

**Submission to the Senate Education and Employment Legislation
Committee inquiry into the Fair Work Legislation Amendment
(Closing Loopholes) Bill 2023 (Cth).**

Dr Michael Rawling

**Senior Lecturer, Faculty of Law, University of Technology Sydney
(UTS)**

29 September 2023

1. Thank you for the opportunity to make a submission to this Senate Committee Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Bill).
2. I am a Senior Lecturer at the Faculty of Law, University of Technology Sydney (UTS). Prior to that I was a lecturer at the College of Law, Australian National University (ANU). I have more than 15 years' experience researching and teaching labour law. I have published widely within the field of labour law. Most of my publications are on the scope of labour law and/or labour law enforcement issues. A key focus of my research has been how to regulate business models (such as supply chains and gig economy arrangements) based on precarious work and deployed to evade employment law. My doctoral thesis (completed at the University of Sydney in 2010) examined the regulation supply chains to protect workers. I am a leading expert on the regulation of pay and safety in the road transport industry. I have been a Chief Investigator on two grants funded by the Australian Research Council which have examined innovative regulatory models designed to improve working conditions within supply chains in the textile clothing and footwear (TCF), road transport and commercial cleaning industries. I have appeared in the Road Safety Remuneration Tribunal as an expert witness, and have been a consultant to the Sectoral Policies Department, International Labour Office, International Labour Organization (ILO) regarding best practices in road transport industry safety regulation.
3. This Bill is an extremely important and long anticipated governmental initiative. I strongly encourage the Senate Committee to recommend to the Senate the passing of the Bill in its entirety. The Minister for

Employment and Workplace Relations states in his Parliamentary Second Reading Speech that a number of loopholes currently exist which allow businesses to undercut the pay and conditions offered by “Australia’s best employers in a race to the bottom”. I agree. For too long the loopholes that the Bill would address (if it is passed) have stood in the way of many ordinary and frequently, vulnerable Australian workers achieving fair pay and conditions at work.

4. Aside from Paragraph 3 of this submission immediately above, I confine the comments in this submission to Part 16 of the Bill ‘Provisions Relating to Regulated Workers’ which would, amongst other things, if passed, insert a new Part 3A into the *Fair Work Act 2009 (Cth)* (Fair Work Act). If this Part 16 of the Bill is enacted, amongst other things, Part 3A would make provision allowing the Fair Work Commission (FWC) to set minimum standards including payment terms for regulated ‘employee-like’ workers engaged by digital labour platform operators and regulated road transport contractor workers. It would also provide for collective bargaining rights and rights to challenge unfair ‘deactivations’ and dismissals.

Parliament should give the FWC the ability to set minimum standards for regulated workers

5. It is extremely important that the FWC gains this anticipated ability to set minimum standards including payment terms for these employee-like, ‘gig’ workers and road transport contractor workers.

Low pay, incentive payment methods and poor safety in the road transport industry

6. The key reason that the Parliament should enact legislation allowing the FWC to set minimum standards for road transport contractor drivers is extensive evidence of low pay, incentive-based payment methods and (related) poor safety in the road transport industry.
7. In addition to a large workforce of employee drivers, there is also a considerable work-force of owner drivers who are engaged as contractors and thus currently largely fall outside the employment protections in the Fair Work Act. In particular, many of these contractors work in conditions not regulated by any enforceable minimum pay rates or other industrial conditions of work (such as

maximum hours of work or time taken to provide payment). These owner drivers have low-bargaining power vis-à-vis their more powerful clients who frequently dictate to them the terms and conditions of freight haulage work on a take it or leave it basis. A typical pay arrangement for these road transport workers is for a per kilometre or per load piece rate.¹ Many of these contractors are unable to earn enough to recover costs² and insolvency is more frequent in the road transport industry than other industries. Indeed, the transport postal and warehousing industry was one of the industries with the highest number of business insolvencies.³

8. As a result of low rates of pay and/or performance-based payment methods, many road transport workers especially those labouring as contractors have the incentive to drive faster and longer to earn enough to make a living. This is the nub of understanding the studies compiling extensive evidence of the link between commercial pressures, low pay and poor safety in the road transport industry. These studies have found:
 - a. “over the period 2016-2020 the road transport industry had the highest fatality rate per 100,000 workers of any Australian industry – even higher than agriculture, construction or mining;”⁴
 - b. Australian truck drivers are 13 times more likely to die at work than the average worker;⁵
 - c. there is a connection between the pay rates of owner drivers and working safely;⁶

¹ Thornthwaite, L and O’Neill S *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry: Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* January 2017 p11.

² See Thornthwaite, L and O’Neill S *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry: Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* January 2017, p16

³ Australian Securities and Investment Commission (ASIC) (2019 Insolvency statistics: External administrators’ reports (July 2018 to June 2019), Report 645, December 2019, ASIC.

⁴ Peetz D, ‘Road Transport Regulation, Safety and the Prospects for the ‘Gig Economy’’ (2022) 35 *Australian Journal of Labour Law* 165, 166 citing Safe Work Australia *Work-Related Traumatic Injury Fatalities* Australia 2020, Safe Work Australia, Canberra, 2021.

⁵ Xia, T., Iles, R., Newnam, S., Lubman, D., & Collie, A. Driving Health Report No 2: Work-related injury and disease in Australian truck drivers. Insurance Work and Health Group, Faculty of Medicine Nursing and Health Sciences, Monash University (2018)

⁶ Industrial Relations Commission of New South Wales in Court Session (Beattie P, Sheehy and Sheldon JJ)(1970) Report to the Honourable E.A Willis, Minister for Labour and Industry, on Section 88E of the Industrial

- d. commercial pressures cause hazardous practices; there is an association between driver pay and safety;⁷
- e. the road transport industry has the longest working hours of any industry;⁸
- f. driver fatigue is a major contributor to poor safety outcomes;⁹
- g. the link between poor safety outcomes and economic pressures is a three stage process: 1. economic pressures 2. hazardous on-road behaviour 3. poor safety outcomes;¹⁰
- h. work organization, economic pressure, and compensation factors directly affecting drivers contribute significantly to truck crashes;¹¹
- i. higher pay was strongly associated with reduced crashes;¹²
- j. an increase in driver rates leads to fewer driver safety violations and better safety performance;¹³
- k. A 1% higher hourly driver pay corresponds to 3.16% fewer crashes (3:1 ratio).¹⁴
- l. there is a relationship between pay rates and working hours; drivers will reduce hours with higher pay; drivers who drive less kilometres and work fewer hours are less likely to have a crash;¹⁵

Relations Act, 1940-1968 in so far as it concerns drivers of taxi cabs, private hire cars, motor omnibuses, public vehicles and lorry owner drivers, 23 February 1970, Australia at [30.24])

⁷ M Quinlan and L Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (2008), Australia at p 49

⁸ Peetz D, 'Road Transport Regulation, Safety and the Prospects for the "Gig Economy"' (2022) 35 *Australian Journal of Labour Law* 165, 165.

⁹ A Williamson et al, *Driver Fatigue: A Survey of Long Distance Heavy Vehicle Drivers in Australia*, National Road Transport Commission, Information Paper/ CR 198, September 2001, Australia.

¹⁰ Department of Education Employment and Workplace Relations, *Safe Rates, Safe Roads Directions Paper*, Commonwealth of Australia, Canberra, 2010, at pp15–16

¹¹ M Belzer (2018) 'Work-stress factors associated with truck crashes: An exploratory analysis' *Economic and Labour Relations Review* 29(3) pp289–307

¹² D Rodriguez, F Targa and M Belzer (2006), 'Pay incentives and truck driver safety', *Industrial and Labor Relations Review*, 59(2) pp205-225

¹³ T Kudo and M Belzer (2019) 'The association between truck driver compensation and safety performance' *Safety Science* 120 pp447–455

¹⁴ Evidence of M Belzer, 'Economic Incentives and Market Pressure: Why Markets Require "Safe Rates" Regulation' Senate Rural and Regional Affairs and Transport References Committee Senate Standing Committee on Rural and Regional Affairs and Transport Parliament of Australia, April 28, 2021

¹⁵ M Belzer and S Sedo, (2018) 'Why do Long Distance Truck Drivers Work Extremely Long Hours' *Economic and Labour Relations Review* 29(1) pp59–79

- m. Paying drivers for all their work time - including non-driving time - means drivers will work fewer hours, mitigating accidents resulting from fatigue;¹⁶
- n. Any cost not captured in price is external to the market; external costs are not paid for by buyers or sellers; in trucking, society subsidizes these external costs in the form of death, injury, and property damage on the roads; external costs are not an efficient use of resources.¹⁷

9. These are only some of the research findings. There is also considerable further research on commercial pressures and safety in the road transport industry.¹⁸

¹⁶ T Kudo and M Belzer, (2019) 'Safe Rates and Unpaid Labour: Non-Driving Pay and Truck Driver Work Hours' *Economic and Labour Relations Review*, 30(4) pp532–548

¹⁷ Evidence of M Belzer, 'Economic Incentives and Market Pressure: Why Markets Require "Safe Rates" Regulation' Senate Rural and Regional Affairs and Transport References Committee Senate Standing Committee on Rural and Regional Affairs and Transport Parliament of Australia, April 28, 2021

¹⁸ • W L Soro et al (2023) 'An examination of the relationship between financial performance and safety factors in the heavy trucking industry' 164 *Safety Science* 106156

- Ryley, W and Belzer, MH. 2023. "Compensation and Crash Incidence: Evidence from the National Survey of Driver Wages." *The Economic and Labour Relations Review*, 34(1).
- W L Soro et al (2020) 'Associations of heavy vehicle driver employment type and payment methods with crash involvement in Australia' 127, *Safety Science* 104718
- M Faulkner and M Belzer (2019) 'Returns to Compensation in Trucking: Does Safety Pay?' *Economic and Labor Relations Review* 30(2) pp262-284
- R Friswell, A Williamson, (2019) 'Management of heavy truck driver queuing and waiting for loading and unloading at road transport customers' depots' 120 *Safety Science*, pp194-205.
- G Chen et al (2021) 'Truck driver reported unrealistically tight delivery schedules linked to their opinions of maximum speed limits and hours-of-service rules and their compliance with these safety laws and regulations' *Safety Science* 133
- M Belzer and A Thörnquist (2020) 'Economic Liberalisation of Road Freight Transport in the EU and the USA' in P. Sheldon, S. Gregson, R. Lansbury and K. Sanders (eds) *The Regulation and Management of Workplace Health and Safety: Historical and Emerging Trends*. New York: Routledge, pp52-79
- Panel on Research Methodologies and Statistical Approaches to Understanding Driver Fatigue Factors in Motor Carrier Safety and Driver Health. 2016. *Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs*. Washington: National Academies Press. <http://www.nap.edu/24818>
- M Belzer (2011) *The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety*, prepared for the Safe Rates Summit, Canberra, November
- A Williamson et al (2009) Short trips – long days: health and safety in short-haul trucking *Industrial and Labour Relations Review* 62(3) pp415-429.
- Saltzman GM and Belzer MH. (2007) *Truck Driver Occupational Safety and Health: 2003 Conference Report and Selective Literature Review*. Washington, DC: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health. <http://www.cdc.gov/niosh/docs/2007-120/>.
- C Mayhew and M Quinlan (2006) 'Supply chains/subcontracting, the labour process and occupational health and safety in the Australian long haul trucking industry' *Employee Relations* 28(3) pp212-229
- Quinlan, M. Johnstone, R. & Mayhew, C. (2006) *Trucking Tragedies: The Hidden Disaster of Mass Death in the Long Haul Road Transport Industry* in Eric Tucker ed. *Working Disasters*, Baywood, New York, pp19-64.
- D Rodriguez et al, (2003) 'The Effects of Truck Driver Wages and Working Conditions on Highway Safety: A Case Study', (2003) 1883 *Transport Research Record* 95

10. The vast bulk of this evidence highlights the necessity of regulating the road transport industry in the manner in which Part 3A of the Fair Work Act would do if the federal parliament passes Part 16 of the Bill.
11. In addition to the above evidence in paragraph 8 of this submission linking pay to safety, there are significant flow on effects of the low pay and poor safety currently experienced by road transport contractor drivers. Low rates for contractor drivers have placed downward pressure on the pay of employee drivers.¹⁹ Moreover, there is undoubtedly currently major safety risks not only for those working in the industry but as well for everyday road users (after all the workplace for road transport workers consists mainly of public roads which are also used by the general public). There are scores if not hundreds of deaths each year in heavy vehicle crashes with many of the dead being members of the general public driving on the roads.²⁰ This is an additional reason to allow the FWC to set minimum standards for the road transport industry by passing Part 16 of the Bill. That is, there is evidence to suggest that implementing mandatory standards such as those relating to payment terms could reduce such fatalities. A cost benefit analysis found that previous standards set by the (now abolished) Road Safety Remuneration Tribunal would have reduced heavy vehicle crashes.²¹ Also I discuss below findings by Professor David Peetz on how the regulation of the NSW local road transport industry by Chapter 6 of the NSW Industrial Relations Act has reduced the number of fatalities in heavy vehicle crashes.

Exploitation of gig workers has led to low pay and poor safety

12. The key reason that the Parliament should enact legislation allowing the FWC to set minimum standards for employee-like 'gig' workers is

• M Belzer, R Rodriguez and S Sedo (2002) 'Paying for Safety: An Economic Analysis of the Effect of Compensation on Truck Driver Safety', Washington, United States Department of Transportation, Federal Motor Carrier Safety Administration.

http://ai.fmcsa.dot.gov/CarrierResearchResults/WordFiles/PayAndSafety_Report.doc

¹⁹ Michael Rawling, Richard Johnstone and Igor Nossar 'Compromising Road Transport Supply chain Regulation: The Abolition of the Road Safety Remuneration Tribunal' (2017) 39(3) Sydney Law Review 303, 308-309

²⁰ Department of Infrastructure, Transport, Regional Development, Communication and the Arts *Road Deaths In Crashes involving heavy Vehicles Fatal - quarterly Bulletins* available at:

https://www.bitre.gov.au/publications/ongoing/fatal_heavy_vehicle_crashes_quarterly

²¹ Price Waterhouse Coopers 'Review of the Road Safety remuneration system: Final Report' (Departmental document No EM16, Department of Employment (Cth) January 2016, p83, p86.

considerable evidence of the exploitation²² of these workers which has led to them experiencing low pay and poor safety.

13. There is an urgent need for minimum standards including minimum payment terms for gig workers because, by and large, these workers are currently engaged as contractors and consequently may not be entitled to such protections under the Fair Work Act.
14. Regarding the low rates experienced by gig workers, the following passage from an article published in the University of New South Wales Law Journal in 2022 highlights the low rates experienced by gig workers in the road transport industry and substantiates the necessity for setting minimum rates for road transport gig workers:

“Presently, rates of pay for riders are dictated by the platforms. Riders are not genuine entrepreneurs with the power to negotiate their own rates. As one commentator noted, these workers are in the ‘economically irrational’ position of being ‘free’ to negotiate with customers, but only for a lower rate than stipulated by the platform.¹¹⁰ Nor are they industrially organised, and able to collectively bargain agreed rates. It is difficult to determine with any certainty whether the rates presently set by the platforms are capable of generating a minimum wage for riders. According to a report prepared for the Transport Education Audit Compliance Health Organisation (*TEACHO Report*), a range of surveys of drivers themselves conducted by the Transport Workers’ Union in conjunction with the RideShare Drivers Cooperative suggest that rates paid to drivers are significantly below award rates. These surveys, conducted in 2018 and 2020, found that rates paid to Uber drivers were well below \$16 per hour, and possibly as little as \$12 per hour, even before taking their costs into account. The same surveys suggest that 60% of rideshare drivers cannot save enough to fund annual leave breaks, or any superannuation savings. Even these low rates may be overstated in some cases. A study conducted by Bright and Fitzgerald for On Demand Workers Australia and the Transport Workers’ Union in 2018 suggested that pay for some drivers is as low as \$6.67 to \$10.50 per hour. More worrying still is the fact that most drivers surveyed claim to have experienced a decrease in their incomes over time.

On the other hand, senior leaders of the food delivery platforms have asserted (in evidence given to the Senate Select Committee on Job Security) that average rates are much higher than this, although still below the \$24.80 hourly rate for casual employees earning minimum wages in Australia. Matthew Denman, General Manager of Uber Eats Australia, told the Senate public hearings that Uber Eats had commissioned research by Accenture, which found that ‘at meal times drivers are earning, on average, over \$21 an hour after all costs, including their wait time’. Ed McManus, Chief Executive Officer of Deliveroo in Australia said that the hourly rates paid to riders in March 2021 averaged at \$23.40 per hour,

²² M Marmo, E A Sinopoli and S Guo ‘Worker exploitation in the Australian gig economy’ (2022) 31 *Griffith Law Review* 171-192

although this was a ‘pre cost’ rate, not accounting for the riders’ expenses. So where does the truth lie? While rates remain unregulated, it will be a matter of conjecture whether riders are earning a decent level of remuneration from their work. Regulation of rates, however, would ensure that all riders (and not merely the ‘median’ rider) are adequately remunerated. If rates are already at an appropriate level, it is difficult to see why the platforms would need, or wish, to resist the imposition of a safety net of rates for their riders.

Some commentary has downplayed the importance of rates and conditions in the gig economy on the basis that the majority of the Australian workforce continues to be made up of employees who are covered by the mandatory pay and conditions standards in modern awards and the *Fair Work Act*. The assertion/implication has been that there is only a small, marginal, sub-set of workers engaged in the gig economy. However, the Australian gig economy workforce is sizeable and growing. The Actuaries Institute has stated that the gig economy workforce ‘may be as large as 250,000 workers’. Many of these workers . . . are engaged in the road transport industry. Thus, the issue of rates of pay is important for a significant number of gig economy workers labouring in that industry.”²³

15. There is also evidence of low rates of pay for gig workers in other sectors such as the aged and disability care sector.²⁴

16. Additionally, it is clear that gig workers in the road transport industry face particularly unsafe working conditions.²⁵ There has been a shocking number of fatalities of food delivery riders in recent years. The ABC reports that at least 13 gig workers have died on the road in recent years.²⁶ A survey of 160 riders undertaken by the Transport Workers Union in 2019 indicated that 46.5% of riders had been injured at work, or knew someone who had been injured.

17. For these gig workers, low pay rates and performance-based payment methods can contribute to unsafe conditions at work because they

²³ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 24-26. (footnotes omitted)

²⁴ ‘Gig platforms capitalising on NDIS structure: Expert’ Workplace Express 3 April 2023 citing *The organisation of care work via digital platforms*, presentation to AIRAANZ 2023 conference, Magnetic Island, February 8, by QUT’s Professor Paula McDonald; Fiona Macdonald *Unacceptable Risks: The Dangers of Gig Models of Care and Support Work*, The Centre for Future Work at the Australia Institute May 2023.

²⁵ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 23.

²⁶ ‘Government to create pay floor for gig workers, saying small increases to food delivery costs a ‘small price’ for safety’ ABC News Online 31 August 2023 available at <https://www.abc.net.au/news/2023-08-31/minimum-pay-rates-for-gig-workers-more-safety/102798638>

suffer from similar pressures as are experienced by truck owner drivers. As was stated last year in a peer reviewed article:

“Like road transport sector work generally, for these riders and rideshare drivers, low rates of pay and per-delivery pay methods are key factors contributing to the lack of safety at work.”²⁷

18. The extreme exploitation of gig workers leading to low pay and poor safety places downward competitive pressures on other businesses in the same industry. This downward pressure includes the undercutting of wages and conditions of workers at those other businesses. This pressure emanating from gig arrangements makes it much more difficult for those other businesses to maintain or implement fair and compliant wages and conditions.
19. Given this, one improvement that I suggest making to this part of the Bill is for road transport digital labour platform work to be automatically included within the purview of the proposed Expert Panel for the road transport industry (rather than only included if the President intervenes).²⁸ This is because the work performed by digital labour platform workers such as ride-share drivers and delivery riders is plainly *road transport work*. The road transport Expert Panel needs this jurisdiction over road transport platform work to ensure any road transport industry standards are not circumvented by shifting road transport work to an alternative digital labour platform business model.

Importance of including unfair dismissal and collective bargaining rights

20. It is also important to include procedural protections for regulated workers. As I suggested earlier in this submission, I urge the committee to recommend that the Senate pass the proposed part 16 of the Bill (pertaining to regulated workers) in its entirety. This includes the proposed Part 3A-3 which pertains to the right of regulated workers to challenge an unfair deactivation or dismissal and Part 3A-4 which pertains to collective bargaining rights for regulated workers.
21. As confirmed by a large volume of case law, gig workers and owner drivers engaged as contractors usually do not have access to the unfair

²⁷ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 23..

²⁸ See proposed section 617(10A)-617(10D) of the Fair Work Act.

dismissal rights under the Fair Work Act. Yet the protection against unfair deactivation or dismissal is important for road transport owner-drivers and gig workers because “job insecurity clearly contributes to unsafe work”²⁹. The threat of termination for working more safely but too slowly is very real for these workers. For example, “Diego Franco was terminated by Deliveroo because his delivery times fell below those deemed acceptable by Deliveroo’s algorithm for calculating median delivery times.”³⁰ Due to their low incomes, these workers need access to an extended Fair Work Commission unfair dismissal jurisdiction, with low filing fees and prompt conciliation and arbitration of unfair termination complaints.³¹

22. Unfair dismissal protections are also important for enforcement of standards. These protections will go some of the way to ensuring that regulated workers are not scared of assisting regulators to ensure compliance with minimum standards. If these regulated workers do not have any protections against unfair dismissal then work providers might easily dismiss regulated workers for raising issues about underpayment or other non-compliance with standards.
23. As Stewart et al³² highlight it does not appear that the Bill includes provision for compensation as a remedy for digital platform workers who are unfairly deactivated. In its report the Senate Committee might explain why this is the case (if there is a rational basis for this omission). Alternatively, if the Committee forms the view that there is not a rational justification for this omission, the Committee might recommend the Bill be amended to include such a compensation remedy.
24. Currently road transport contractors and gig worker contractors do not usually enjoy access to collective bargaining under the Fair Work Act. However, Australia has ratified ILO Conventions 87 and 98 (which guarantee both the right to collective bargaining and to freedom of

²⁹ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 23.

³⁰ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 23..

³¹ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 23

³² Andrew Stewart et al ‘the closing Loopholes Bill brings more challenges for employers’ Piper Alderman 2023, pp1-12, 6.

association).³³ Furthermore, these Conventions extend the right to form unions and engage in collective bargaining to all *workers* irrespective of their formal status as an employee or otherwise.³⁴ Passing the proposed Part 3A-4 would fulfil Australia's international obligations to provide these workers with the right to collective bargaining.

Parliament should enact the proposed s15AA but it is alone insufficient – Part 3A rights and entitlements for contractors are also needed

25. It is to be applauded that the Closing Loopholes Bill, if enacted, would provide clear guidance to the courts and the FWC on the meaning of employee and employer by way of the proposed s15AA of the Fair Work Act. This proposed s15AA is in response to recent High Court decisions on the distinction between employee and independent contractor.³⁵

26. However, it should be emphasized that this proposed new definition of employee and employer is alone not sufficient to ensure that gig workers receive the benefit of minimum standards. Setting standards for the benefit of employee-like, 'gig' workers who continue to be engaged as contractors - as in the proposed Part 3A of the Fair Work Act - is also crucial. This is because, even prior to those 2022 High Court decisions when the common law was similar to the proposed s15AA, case law regularly found that certain vulnerable gig workers were *not* employees for the purpose of the Fair Work Act.³⁶ In fact, for a period of around 10 years prior to the 2022 High Court decisions, most vulnerable gig workers laboured as contractors despite a similar common law test to the proposed s15AA being in place. Furthermore, although the proposed s15AA would return the common law to a more appropriate, broader, legal basis for finding vulnerable workers to be employees, it is likely that digital labour platform operators will continue to strongly resist the extension of the full range of employment protections under the Fair Work Act to their workforce of gig workers. As a recent report explained:

"[I]t is clear that businesses engaging workers through digital platforms do not want their workers being designated as employees. Work providers such as Uber have made it part of their business model to avoid being covered by employment protection

³³ *ILO C87 Freedom of Association and the Protection of the Right to Organise Convention* 1948, and *ILO C98 Right to Organise and Collective Bargaining Convention* 1949.

³⁴ Johnstone R, McCrystal S, Nossar I, Quinlan M, Rawling M and Riley J (2012), *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press) 131–132.

³⁵ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

³⁶ See for example, *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698

regimes such as the Fair Work system. Given this commitment to evading employment protection regimes, it is possible that work providers would find more ingenious means to avoid the application of any statutory presumption of employment or expanded definition of worker inserted into the Fair Work Act.

This is why effective government action to protect gig economy workers cannot solely rely on changing the legal definition of employee in the Fair Work Act. This just sets up another artificial boundary that could be circumvented. By tweaking their arrangements with their workforce, gig companies could find new grounds to argue their workers are contractors, not employees."³⁷

27. Even more evidently, it has long been the situation that the law views truck owner-drivers as contractors.³⁸ So the proposed s15AA alone may not assist those workers to access minimum pay or other protections under the Fair Work Act *unless* Part 3-A is enacted in full to extend minimum standards to road transport *contractors*.

The bill rightly preserves Chapter 6 of the NSW Industrial Relations Act

28. Chapter 6 of the NSW Industrial Relations Act provides for certain rights and entitlements of short-haul owner-drivers in NSW. The current drafting of the bill preserves Chapter 6. The proposal in the Bill to insert section 536JP(3)(b)(i) into the Fair Work Act would preserve Chapter 6 by stating that the general exclusion of certain State or Territory laws (earlier in that section) does not apply to Chapter 6. I urge the Committee to recommend that this provision in the Bill be retained so that Chapter 6 is preserved for the following reasons: Chapter 6 is a very stable system of regulation which has received bipartisan support in NSW for decades. It ought not be disturbed or abolished. Evidence shows that direct hirers of road transport contractor drivers have "relatively good compliance rates with Chapter 6 instruments."³⁹ And many long-term Chapter 6 contract agreements have been negotiated between the Transport Workers Union and large transport companies.⁴⁰ Therefore, Chapter 6 provides

³⁷ Michael Rawling and Joellen Munton, *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry*, a report for the Transport Education Audit Compliance Health Organisation (University of Technology Sydney Faculty of Law, January 2021)

³⁸ See for example *Humberstone v Northern Timber Mills* (1949) 207 CLR 21

³⁹ Michael Rawling and Joellen Riley Munton 'Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work' (2022) 45(1) *University of New South Wales Law Journal* 7, 29; citing M Quinlan and L Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (2008), Australia at p 29.

⁴⁰ Michael Rawling and Joellen Munton, *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry*, a report for the Transport Education Audit Compliance Health Organisation (University of Technology Sydney Faculty of Law, January 2021) 19; Michael Rawling and Joellen Riley Munton 'Constraining

both owner-drivers and the road transport businesses who engage them with considerable certainty.⁴¹ Moreover, a recent empirical study by Peetz found that:

- a. “. . . occupational safety in heavy vehicle road transport improved with the entrenchment of Chapter 6 regulation in New South Wales. Since 1989, the average annual decline in fatal accidents involving articulated trucks in New South Wales was around double the declines in other fatal road accidents in the state or in fatal road accidents in the rest of Australia. Heavy vehicle accidents accounted for a declining share of road deaths in New South Wales but not in the rest of Australia. . . .The long-term decline in articulated truck accidents in the state cannot be explained by any factors that influence general road safety in New South Wales or across Australia. It is likely that over 205 lives have been saved as a result of Chapter 6.”⁴²

29. There should not be any significant additional complexity arising from the concurrent operation of Part 3A protections for road transport workers in the Fair Work Act and the protections in Chapter 6 of the NSW Industrial Relations Act. The FWC and the NSW Industrial Relations Commission are well-equipped to deal with matters of concurrent operation. In addition, previously Chapter 6 operated concurrently with the Commonwealth Road Safety Remuneration Act and tribunal with no significant problems.

Extensive, extra procedural and substantive safeguards are included as a result of prior experience to ensure the efficacy of road transport industry regulation

30. The Minister notes in his Second Reading Speech that the Bill contains a “number of guardrails” as a result of the experience with the abolition of the Road Safety Remuneration Tribunal (RSRT) by the Turnbull Coalition government in April 2016.⁴³

31. It should be acknowledged that prior peer-reviewed research found that the RSRT was abolished for reasons of political expediency. As Peetz states “well-resourced employer groups, national level corporations and the Liberal-National Coalition all saw an advantage

the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 29

⁴¹ Michael Rawling and Joellen Riley Munton ‘Constraining the Uber Powerful Digital Platforms: A Proposal for a New form of Regulation of On-Demand Road Transport Work’ (2022) 45(1) *University of New South Wales Law Journal* 7, 29.

⁴² Peetz D, ‘Road Transport Regulation, Safety and the Prospects for the ‘Gig Economy’ (2022) 35 *Australian Journal of Labour Law* 165, 181-182.

⁴³ Tony Burke, Minister for Workplace Relations, Commonwealth of Australia, Parliamentary Debates, House of Representatives, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Second Reading Speech, Monday 4 September 2023, p66

in destroying [the RSRT].”⁴⁴ But there was “no lack of evidence for the need for the tribunal or any lack of evidence that it could be effective.”⁴⁵

32. Having said that, Part 16 of the Bill contains important safeguards to minimize the risks of not securing the necessary industry support for implementing new, federal road transport industry regulation. Those safeguards will ensure stakeholder views and the viability of road transport businesses are taken into account when the FWC makes minimum standards orders for regulated road transport contractors. These safeguards are both procedural and substantive. The Minister outlined these safeguards and their purpose in his Second Reading Speech as follows:

“The bill contains a number of guardrails to ensure that the mistakes of the Road Safety Remuneration Tribunal are not repeated. A 'notice of intention' process gives parties an extended period to consider draft minimum standards orders before they become binding. Particular issues that are already comprehensively covered by other laws cannot be regulated. The Fair Work Commission must be satisfied that any order will not have an unreasonable adverse impact on the viability or competitiveness of drivers. Parties affected by a potential order will have the right to be heard before the order is made; and a fail-safe process will allow an employee or employer organisation or the minister to apply to suspend the operation of an order in order to enable a full merits review to take place.

Importantly, the order will be made by an expert panel within the Fair Work Commission, which must take account of advice from a road transport advisory group, with subcommittees able to provide additional expertise – a group formally established under this bill. This is a clear requirement to ensure orders acknowledge the practical realities of the road transport sector.”

33. The consultative mechanisms which the Minister describes that are included in the Bill will ensure that the views of road transport businesses and road transport contractor drivers are taken into account in the process of making road transport minimum standards orders. The proposed legislation will also ensure that the viability and competitiveness of road transport owner drivers will not be unduly affected by road transport minimum standards orders.⁴⁶ In sum,

⁴⁴ Peetz D, ‘Road Transport Regulation, Safety and the Prospects for the ‘Gig Economy’ (2022) 35 *Australian Journal of Labour Law* 165, 182.

⁴⁵ Michael Rawling, Richard Johnstone and Igor Nossar ‘Compromising Road Transport Supply chain Regulation: The Abolition of the Road Safety Remuneration Tribunal’ (2017) 39(3) *Sydney Law Review* 303.

⁴⁶ See proposed s536KA

although probably a little over-cautious, the effect of these safeguards should be to minimise the risk of any future owner-driver backlash to the operation of road transport industry regulation under the proposed Part 3A.

The legislative regulation of road transport supply chains should be enshrined in the Fair Work Act.

34. Part 16 of the Bill includes a proposed Division 4 of Part 1-4. If enacted these provisions would allow the Minister to make regulations “relating to the road transport industry contractual chain.” It is to be commended that the Bill includes proposed regulation of road transport industry supply chains. However, it is extremely important that these provisions be adapted in order to be included in the Fair Work Act itself rather than by way of executive decree. This is because the regulation of road transport supply chains is crucial to the stability of road transport industry workplace regulation. Supply chain pressures are an underlying factor contributing to low pay and poor safety in the industry. Indeed, it is in undermining pay and related conditions of road transport workers that the effects of supply chain pressures are most evident.⁴⁷ Particularly, in some sectors of the road transport industry (such as the supermarket sector) economically powerful clients of the road transport industry have the market dominance enabling them effectively to set the price and delivery times for transport services and delivery of goods by road. Since the 1980s road transport companies (including some large employers) have experienced a significant dilution of their bargaining power vis-à-vis these off-road client companies.⁴⁸ The imposition of excessively harsh profitability and efficiency terms by lead firms flow down the supply chain and most adversely impact drivers and small contractors.⁴⁹

⁴⁷ Australian Trucking Association (2008), Submission to the National Transport Commission, Safe Payments Inquiry, September 2008.

⁴⁸ M Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, Motor Accidents Authority of New South Wales, 2001, Australia, 180

⁴⁹Johnstone, R, Nossar, I and Rawling, M (2015) Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal. Federal Law Review. 43(3): 397-421, 404.

Drivers frequently must accept pay rates and conditions dictated to them or else fail to receive the work.⁵⁰

35. Thus, these supply chain/client pressures set the overall parameters within which road transport work is performed and are an underlying factor contributing to low pay and poor safety in the industry. On this point, a previous report found that client pressures contributed to hazardous practices and compromised safety in the road transport industry.⁵¹ Another study found that the dominant position of clients in road transport supply chains contributed to poor work health and safety outcomes in the road transport industry.⁵²
36. As can be seen from the above analysis, the regulation of road transport industry supply chains is crucial for the effectiveness of the proposed road transport industry regulatory scheme. Accordingly, the importance of the regulation of road transport supply chains/contractual chains should be recognised by the Parliament by inclusion in the Act itself.
37. Thank you for considering these submissions.

Yours sincerely

Dr Michael Rawling

Senior Lecturer

Faculty of Law

University of Technology Sydney

⁵⁰ Michael Rawling, Richard Johnstone and Igor Nossar 'Compromising Road Transport Supply chain Regulation: The Abolition of the Road Safety Remuneration Tribunal' (2017) 39(3) Sydney Law Review 303, 308-309.

⁵¹ M Quinlan, Report of Inquiry into Safety in the Long Haul Trucking Industry, Motor Accidents Authority of New South Wales, 2001, Australia, pp 117, 124, 130, 152–53, 162, 164, 180

⁵² M Quinlan Supply Chains and Networks Report Safe Work Australia, July 2011, Australia at 4