

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Education and Employment Legislation Committee

Submission of the United Workers' Union

3 October 2023

ACKNOWLEDGEMENT TO COUNTRY

The United Workers' Union is a national trade union. We acknowledge and respect the continuing spirit, culture and contribution of Traditional Custodians on the lands where we work, and pay respects to Elders – past and present. We extend our respects to Traditional Custodians of all the places that United Workers' Union members live and work around the country.

ABOUT THE UNITED WORKERS' UNION

United Workers' Union ('UWU') is a powerful new union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do – our early childhood educators are shaping the future of the nation one child at a time; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; aged care members provide quality care for our elderly and cleaning and security members ensure the spaces you work, travel and educate yourself in are safe and clean.

EXECUTIVE SUMMARY

1. The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**the Closing Loopholes Bill**) contains a series of essential reforms to plug gaps in the Australian industrial relations system that currently result in workplace exploitation, unfair competitive advantage, inefficiency and unworkability.
2. UWU generally supports the submissions made in relation to the Closing Loopholes Bill by the Australian Council of Trade Unions.
3. In this submission, UWU focuses particularly on the following aspects of the Bill:
 - 3.1. UWU supports the standardisation of workplace delegates rights contemplated by Part 7 of the Bill. The workplace delegates rights that will be enshrined and protected by this part of the Bill already exist in many Australian workplaces, where they are recognised by employers who value the role workplace delegates play in the efficient functioning of their businesses.

- 3.2. UWU supports the regulation of platform based gig work to create minimum standards – where in areas of UWU membership like disability support and aged care, platform based gig work is growing.
- 3.3. UWU supports the protection of the principle that a labour hire worker should be paid an equivalent rate of pay when performing the same work that would otherwise be covered by a collectively bargained rate of pay. When the use of labour hire is about paying a cheaper price for work than would otherwise be covered by a bargained wage rate, it is not about flexibility – it is about cost reduction based on wage cuts. The Bill attempts to address this loophole.
- 3.4. UWU submits that the scheme for the regulation of labour hire arrangements could be made more efficient and sensible. In particular, the scheme should:
 - (a) Allow for a single application for a regulated labour hire arrangement order to be made in respect of multiple labour hire providers who supply labour to the same host, in respect of the same enterprise agreement;
 - (b) Allow for the transmission of a regulated labour hire arrangement order from a former labour hire provider to a new labour hire provider in respect of the same host and enterprise agreement;
 - (c) Reduce the multiplicity of factors the Fair Work Commission may have regard to in considering whether a regulated labour hire arrangement order is “fair and reasonable”, in preference for a simplified test (and resultant simplified and speedier process); and
 - (d) Remove the loopholes, which have been created in an effort to fix a loophole – the exemption from the scheme of work subject to a training arrangement, and short-term labour hire engagements.
- 3.5. UWU supports the measures in the Bill which provide for the criminalisation of wage theft and the increases to civil penalties associated with wage theft. Wage theft continues to be a chronic problem in within many Australian industries and effective deterrence at the Federal level through strong criminal and civil sanctions is long overdue.

WORKPLACE DELEGATES RIGHTS

4. Workplace delegates are a crucial feature of many Australian workplaces. They possess invaluable operational knowledge, they have the respect and confidence of their fellow workers, and thus play an essential role in the way many workplaces function – assisting to avoid and resolve disputes, acting as a localised and accessible source of information and education, identifying and avoiding risk, including health and safety risk and assisting with continuous improvement.
5. UWU has over 5000 workplace delegates across its diverse membership. They range in age and cultural background. About 53% are women, around 180 are under the age of 30, a total of 98 identify as Aboriginal or Torres Strait Islander and nearly 10% were born outside Australia. They routinely donate their own time on a voluntary basis to assist other workers and their employers.

Workplace delegates help ensure that Australian workplaces are productive by assisting to resolve disputes and represent workers.

Leeanne is a workplace delegate at a large hospitality venue Melbourne. Leeanne has worked in the industry for many years. Leeanne is trusted by both employees and management, including senior management. When recently a new owner took over, Leeanne's leadership has afforded the new owner, a smooth transition into the business. Leeanne has represented workers in collective bargaining negotiations multiple times. Leeanne is adept at fixing problems in the workplace before they escalate.

Workplace delegates support employers to keep local jobs.

Adrian is a workplace delegate at food and beverage manufacturing site in Launceston. When Adrian's employer announced the closure of the visitor centre attached to the site, a popular Launceston tourist destination which employed 13 staff, Adrian got to work behind the scenes, organising discussions with local politicians and representing the workers in the media. Adrian's advocacy contributed to a Tasmanian Government decision to provide a \$1 million dollar grant to keep the visitor centre open and keep local staff employed.

The crucial role played by workplace delegates at many Australian workplaces

6. Many Australian employers recognise the key role workplace delegates play in their workplaces and recognise delegates' role in their workplace policies and agreements. For example:
- 6.1. In the aged care sector, large employers like Anglicare provide workplace delegates with access to facilities (such as telephones, photocopiers, internet and email), access to have discussions with employees on the worksite, and paid leave to undertake training each year¹;
 - 6.2. Similar rights exist in the pharmaceutical production sector, with large employers like Aspen Pharma providing paid leave to undertake training and on-site communication opportunities and facilities²;
 - 6.3. The right to take paid leave to undertake training is common amongst some of the largest employers in the early education and care sector such as Goodstart³;
 - 6.4. On-site communication facilitation and paid training leave is common amongst large employers in warehousing and distribution, such as Coles and Woolworths⁴;
 - 6.5. In the dairy industry, large employers like Saputo provide workplace delegates with paid leave to undertake annual training, and on-site and off-site time to represent the industrial interests of members⁵;
 - 6.6. Provision for rights connected to the role of workplace delegates is common in various public sector agencies such as in public health and education, where delegates play crucial roles in facilitating communication among workers and avoiding or resolving disputes. For example, the Queensland Department of Education provides employees with full access to workplace delegates during working hours to discuss any employment matter or seek advice, provided that service delivery is not disrupted and work requirements are not unduly affected,

¹ [AnglicareSA Limited Aged Care Agreement 2015](#) – Part 5.

² [Aspen PharmaUWU \(Dandenong Victoria\) Enterprise Agreement 2023](#) – Part 9.

³ [Goodstart Early Learning Enterprise Agreement 2021](#) – cls 55 to 59, [Professional Community Standard 2021](#) – cls 27 and 35, [Victorian Early Childhood Agreement 2021](#) – cl 42.

⁴ [Coles Laverton CDC and NUW Enterprise Agreement 2019](#) – cl 37, [Melbourne Liquor Distribution Centre Enterprise Agreement 2021-2024](#) – cl 3.5.

⁵ [Saputo Dairy Australia and United Workers Union Dairy Beverage Centre Agreement 2021](#) – cl 12.

and all delegates can access paid leave to attend training each year⁶;

6.7. At one of Australia's largest single workplaces – Crown Casino in Melbourne – workplace delegates can access a pool of up to 400 days per year for training and meetings. Workplace delegates are facilitated to assist other workers during working hours with disciplinary or dispute resolution matters. Additionally, a facilitated meeting for workplace delegates to address workers occurs once per year⁷;

6.8. In the property services sector, workplace delegates commonly have access to paid leave to attend training, communication facilities and facilitated access to workers for assistance with the resolution of workplace disputes⁸. The *Cleaning Services Award 2020* provides workplace delegates with access to up to 5 days' paid leave per year to undertake dispute resolution procedure training leave.⁹

7. In areas of the economy which are particularly vulnerable to workplace exploitation and non-compliance, workplace delegates play a crucial role in educating workers about their rights and assisting with the enforcement of those rights. In the hospitality industry, workplace delegates have been vital in increasing worker awareness of their entitlements to minimum rates of pay and penalty rates for after-hours work – many workers being young or migrants.

Workplace delegates help workers to understand their entitlements and enforce their rights.

Rosemarie is a workplace delegate at a laundry business in Perth. In 2022, Rosemarie discovered that she and her co-workers had been underpaid their entitlements to overtime. This was caused by Rosemarie's employer implementing "part-time overtime agreements" where workers would agree to work overtime at ordinary time rates of pay. Rosemarie organised her co-workers to provide her with payslips and provided these to her employer and argued the case with her employer on behalf of her co-workers. Her co-workers were afraid to raise it with their employer without Rosemarie's support. Rosemarie and her co-workers were each paid back their entitlements.

⁶ [Department of Education Teacher Aides' Certified Agreement 2022 \(Qld\)](#) – Part 3.

⁷ [Crown Melbourne Limited Enterprise Agreement 2022](#) – Attachment B.

⁸ [MSS Security Enterprise Agreement \(QLD\) 2020 - 2024](#) – cls 5.11 and 6.17.

⁹ [Cleaning Services Award 2020](#) – cl 31.

The standardisation of workplace delegates rights that already apply across the economy

8. The Closing Loopholes Bill establishes a scheme to make the recognition of the role of workplace delegates that already occurs in many thousands of Australian workplaces standardised, in a manner that strikes an appropriate balance between the desirability of an economy-wide standard with an ability to tailor the application of these standards to the needs of particular sectors or employers (including the needs of small business).
- 8.1. Firstly, the Closing Loopholes Bill would establish broad recognition of workplace delegates rights similar to those already recognised by many employers, such as the right to reasonable communication for the representation of workers' industrial interests and the avoidance of disputes and reasonable access to paid time to undertake training related to that purpose;
- 8.2. Secondly, the Closing Loopholes Bill would provide a way for those rights to operate within particular industries, by the process of creation of award provisions to give them effect at the industry/sectoral level (noting that some awards already provide for some of these rights)¹⁰;
- 8.3. Thirdly, the Closing Loopholes Bill would make the recognition of those rights a mandatory part of a collective bargaining agreement (a matter which is already commonly dealt with in enterprise bargaining agreements), and the precise application of these rights can be tailored to particular employers or workplaces.

Workplace delegates help Australian employers and workers access the collective bargaining system.

Shae is a workplace delegate at the tourist attraction in Melbourne. In 2022, Shae helped her fellow workers engage with her employer to make a collective bargaining agreement covering the mostly young workforce at the venue, eventually resulting in pay increases of about \$2.00 per hour for many workers, and the introduction of penalty rates for Saturday shifts. Shae attended a delegates training course at UWU on her own time to acquire the skills she needed to negotiate the new agreement.

¹⁰ [Cleaning Services Award 2020](#) – cl 31, [Manufacturing and Associated Industries and Occupations Award 2020](#) – cl 44 and [Road Transport and Distribution Award 2020](#) – cl 33.

Types of delegates rights

9. The Closing Loopholes Bill would create new section 350C, which would provide that workplace delegates are entitled to the following rights:
 - 9.1. to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer;
 - 9.2. reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests;
 - 9.3. reasonable access to the workplace and workplace facilities where the enterprise is being carried on for the purposes of representing the industrial interests of members and persons eligible to become members; and
 - 9.4. except in relation to small business, reasonable access to paid time, during normal working hours, for the purposes of related training taking into account the size and nature of the enterprise, the resources of the employer of the workplace delegate and the facilities available at the enterprise.
10. The workplace delegate rights contemplated by new s 350C of the Closing Loopholes Bill are appropriate, because they reflect the fundamental and common role played by workplace delegates in many Australian workplaces, and are rights which are already recognised by many Australian employers. For example:
 - 10.1. Each year, between 1000 and 1500 UWU delegates undertake training of various forms – particularly the core delegate skills course. The course is delivered by experts in communication and dispute resolution and covers:
 - (a) how to build and execute democratic Union structures within a worksite or industry group;
 - (b) how to navigate and interpret awards and enterprise agreements; and
 - (c) how to bridge gaps in communication between members and managers for effective dispute resolution.
 - 10.2. Many employers of UWU members have enshrined, as part of their own procedures for dealing with performance and conduct issues, a right for workers to be represented in any meeting about such issues by a representative of their choice – often a workplace delegate. This delegate may provide support to the

worker during the meeting, acts as a witness to the discussion and helps to ensure the process is procedurally fair. In order to properly fulfill this function, the workplace delegate must have appropriate access to the worker they are representing, time to communicate properly with that worker and access to appropriate facilities.

10.3. Having reasonable access to their fellow employees, to their worksite and to appropriate communication facilities is crucial for many delegates to fulfill a commonly held dual role of workplace health and safety representative, taking on functions including:

- (a) attending health and safety committee meetings;
- (b) identifying hazards and risks in the workplace;
- (c) receiving and investigating health and safety complaints from employees;
- (d) assisting with the investigation of accidents that occur in the workplace;
and
- (e) making safety improvement suggestions to management.

Protections for delegates

11. In the main, Australian employers respect and value the role of the workplace delegate. But in some cases, workers who voluntarily take on this role are subjected to recrimination and retribution. Such conduct is inconsistent with Australia's obligations under international law which plainly recognises the right of workers to organise and unionise, and explicitly, the role of workplace delegates in the exercise of that right.¹¹ It is also, to some extent, inconsistent with protections in the *Fair Work Act 2009* against adverse action being taken against workers who exercise their workplace rights or engage in lawful industrial activity. However adverse action taken against a workplace delegate who is exercising their right to perform their role should be made explicit.

¹¹ See, e.g., ILO Convention 135, ratified by Australia on 26 February 1993.

Discrimination against workplace delegates for the exercise of their rights.

Bryan is a workplace delegate at Casino Canberra. In 2019, discussions were ongoing for the sale of the Casino to a new owner. In representing his fellow workers' concerns about the impact of the sale on employee entitlements, Bryan sat for an interview with The Canberra Times to discuss the workers' concerns. Two days after the publication of the article, the Casino's in-house legal counsel wrote to Bryan, seeking to discipline him for his comments, an act which would have undermined his employment. Bryan, with the assistance of the UUU, brought a case against the Casino in the ACT Civil and Administrative Tribunal, where it was found that the Casino had discriminated against Bryan because of the exercise of his rights as a workplace delegate involved in industrial activity. Bryan was fortunate in that the discrimination laws in the ACT were able to provide him with protection against discrimination for exercising rights as a workplace delegate¹².

12. The Closing Loopholes Bill would create new s 350A, which has the effect of prohibiting the unreasonable failure or refusal to deal with a workplace delegate; the knowing or reckless making of a false or misleading representation to a workplace delegate; and unreasonable hinderance, obstruction or prevention of the exercise of a workplace right of a delegate.
13. These protections are essential. The *Fair Work Act 2009* currently lacks positive protection for the role a workplace delegate plays. The positive protection created by proposed s 305A fills this gap.

PROTECTIONS FOR REGULATED WORKERS

14. It is well known that platform based gig work is rife with exploitation.¹³ Gig workers, as independent contractors, have few rights and protections, work in isolation without supervision, have typically irregular work schedules and no certainty of ongoing work, no paid leave or minimum standards, and limited access to training and development. They are not covered by workers compensation if they get injured, they often provide some or all of the capital for equipment used directly in their work, and they do not receive superannuation contributions.
15. While platform-based gig work is prominent in the transport sector, platform-based

¹² *Casino Canberra Limited ACN 051 204 114 V Kidman (Appeal)* [2022] ACAT 22

¹³ *Report of the Inquiry into the Victorian On-Demand Workforce*, Victorian Government, June 2020, [337]; *Regulating work in the gig economy: What are the options?*, Stewart, A. & Stanford, J., The Economic and Labour Relations Review 2017, 28(3) 420-437.

gig work is also growing in sectors such as health and aged care, disability support and hospitality. Gig workers in those sectors are commonly female, and many have English as a second language, both of which can be cohorts susceptible to exploitation. This exploitation comes in a range of forms

Low rates of pay

16. When minimum Award-based and statutory standards that ordinary employees can rely on are factored into a platform-based gig worker's 'contractor' rate – for example, paid leave, overtime, workers' compensation insurance and superannuation – not to mention expenses that workers may incur, a gig worker's real hourly rate can easily fall below the minimum rates of pay of employed workers. This has lifelong implications for entitlements like superannuation, particularly for women.
17. Workers must pay to work. The Mable platform deducts 10% of workers' fees, in addition to separate fees that Mable charges clients.¹⁴ Members report the Five Good Friends platform deducts 20% of workers' fees.
18. One UWW member registered with Mable reported:

"I was fairly treated, but felt that the pay structure was not fair for all disability support workers. Mable asks you as the worker to set your hourly rate of pay. Mable do not explain that they receive a minimum of \$59 from the NDIS. Some disability support workers only receive the minimum wage of around \$23 per hour. Mable should not be receiving over half of the payment from the federal government."

Lack of job security

19. Gig workers do not know when their next shift will be, or even if there will be a next shift. There is no guarantee of work at all. This has obvious implications. But when disability support and aged care becomes gig work, work that is not transactional food delivery-type work but is personal, usually ongoing, and relational, the insecurity is problematic for both the worker and the person receiving care and support.
20. Clients may cancel shifts or have periods where they do not require support (for example, going to hospital or on holiday), and gig workers must simply absorb these losses.

¹⁴ <https://mable.com.au/pricing/> (accessed 26 September 2023).

Lack of support and health and safety standards

21. Workers in disability and aged care are vulnerable to occupational violence, and physically and psychologically unsafe workplaces. A 2022 survey of disability support workers conducted by the UWU¹⁵ found that 38% of 1500 respondents faced occupational violence ‘sometimes’ or ‘most of the time’. When that work is performed by a platform-based gig worker, there is no oversight of the relationship between worker and client; workers are solely responsible for workplace safety. If they are injured at work, there is no access to workers’ compensation.

When work is completely unregulated, workers are vulnerable.

Linda* is a UWU member registered with two different community support digital labour platform operators. When Linda first registered on each, she was required to demonstrate her competency in various work areas by completing unpaid learning modules. Linda took around 2 weeks to complete these modules; she said it ‘felt like having a full-time job’. When a potential client expresses an interest in engaging Linda’s services, Linda is expected to arrange an unpaid ‘meet and greet’ with the potential client to build an initial connection. Linda usually spends around 1-2 hours at these ‘meet and greets’.

Gig work doesn’t pay a fair wage to Australian workers.

Mary* gets paid \$49 per hour for the community work she gets through her platform. Mary’s jobs usually last between 1 – 3 hours. Sometimes clients want to go out for coffee and cake. Mary pays for her own coffee and cake, sometimes spending \$12-\$15, and her accountant has told her that she cannot claim this back on tax. Sometimes clients want to go to places that have an entry fee. Mary has to pay for her own entry fee when that happens. Sometimes clients engage Mary to clean their house. Mary pays for her own PPE, cleaning equipment and products. Mary does all her own admin – arranging client appointments and records, timesheets, pay records – in her own time.

The table below shows how Mary’s pay rate compares with some of the *Social, Community, Home Care and Disability Services Award 2010* (the Award) entitlements and demonstrates that Mary’s rates can be as much as 46% below the Award.

¹⁵ UWU Survey 2022, unpublished.

For a 2-hour job	Services contract with Mable	Award (Schedule B - level 2, pay point 1).	Award (Casual)	Award (Saturday)	Award (Sunday)
Hourly rate	\$49	\$26.1842	\$32.7302	\$39.2763	\$52.3684
Annual leave (4wk p.a.)	-	\$2.0141	N/A	\$2.0141	\$2.0141
Annual leave loading 17.5%	-	\$0.3525	N/A	\$0.3525	\$0.3525
Superannuation 11%		\$3.1405	\$3.600	\$4.5807	\$6.0209
Sub-total (hourly rate)	\$49	\$31.6913	\$36.3302	\$46.2236	\$60.7559
TOTAL	\$98	\$95.0739	\$108.9906	\$138.6708	\$182.2677

The Closing Loopholes Bill strikes the right balance

22. This Bill strikes the right balance. It protects essential rights while retaining the integrity of the model. The creation of the statutory “employee-like worker” and “digital labour platform operator” expressly acknowledges a narrow class of worker working in a specific business, legal and technological environment, and the attendant vulnerabilities for that class of worker in that environment. The Bill enables the creation of minimum standards and protections for those workers that are consistent with community standards, while not overburdening business and retaining flexibility all round.

Minimum standards

23. The Bill would allow the creation of minimum standards in the form of business-specific orders, guidelines, and collective agreements, underpinned by a minimum standards objective which balances the need for an appropriate safety net for workers, the need to maintain the form of engagement of the workers, and the need to avoid adverse impacts on business, industry, and the economy.
24. The Bill would create new sections 536JB and 536JJ which have the effect of creating enforcement mechanisms for minimum standards orders and collective agreements.

25. Minimum standards are a bulwark against the erosion of the increasingly recognised value of care work¹⁶ in Australian society.

Fairness

26. The Bill would create a new Part 3A-3 which has the effect of prohibiting the unfair ‘deactivation’ of platform workers from their registered digital labour platform operator, and a new Part 3A-5 which has the effect of prohibiting unfair contract terms in services contracts between employee-like workers and digital labour platform operators.
27. The Bill would provide workers with recourse to challenge the conduct of operators, rebalance the bargaining power, rights, and obligations as between worker and operator, and protect minimum standards.
28. These new parts would create protections against unfair treatment, and address job insecurity to the extent that a gig worker cannot be deactivated at the whim of a platform operator; a gig worker may feel safer to raise a safety concern, or refuse a client’s request to work unpaid overtime, or report sexual harassment, without the same fear of platform deactivation.

CLOSING THE LABOUR HIRE LOOPHOLE

29. When the use of labour hire is about paying a cheaper price for work that would otherwise be covered by a bargained wage rate, it is not about flexibility – it is about cost reduction based on wage cuts.
30. For decades, under Governments of various political persuasions, collective bargaining has lay at the heart of Australia’s industrial relations system. A key object of Australia’s industrial relations system remains, as it has for decades, to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining.¹⁷
31. The practice of some Australian employers agreeing to particular rates of pay and conditions for particular types of work by making an enterprise bargaining agreement, and then having that work done at cheaper rates by using labour hire, fundamentally undermines this principle and the system. This “loophole” enshrines within our

¹⁶ *Application to vary the wage rates in the Nurses Award 2010 and the Aged Care Award 2010* [2022] FWCFB 200, [931].

¹⁷ *Fair Work Act 2009*, s 3(f)

system downward pressure on wage rates and a race to the bottom.

32. It is appropriate that Australia's industrial relations system embodies a core principle that a worker should be paid 'a fair day's pay for a fair day's work'. The labour hire loophole undermines this principle.

Gaming the system – make an enterprise agreement, then get the work done cheaper.

In 2021 the a large Australian clothing company who operates a warehouse and distribution facility made a new enterprise agreement with UWU providing for increases to pay rates for workers engaged in warehousing and distribution work. Since this agreement was made, the employer has rarely engaged any workers directly, but instead uses labour hire workers paid about 35% less than the EBA rate. Among a workforce of about 200 workers, the employer directly employed workforce who are covered by the EBA has fallen to about a quarter of that number. Gaming the system in this way is not an uncommon occurrence for UWU members engaged in enterprise bargaining in the logistics supply chain, in food production and in manufacturing.

A mechanism that is efficient and sensible

33. The principle that a labour hire worker should be paid an equivalent rate of pay when performing the same work that would otherwise be covered by a collectively bargained rate of pay lies at the core of the Closing Loophole Bill's regulated labour hire arrangement scheme. In his second reading speech, the Minister said "when a business agrees on rates of pay in an enterprise agreement, and then asks labour hire workers to work for less—this is a labour hire loophole and this bill will close it".¹⁸
34. The protection of this principle could have occurred in a more efficient and sensible manner than is contemplated by the Closing Loopholes Bill. New s 306E would require that, in order to obtain a regulated labour hire arrangement order, an application must be made to the Fair Work Commission and only if such an application is made and granted, will the principle apply.
35. By contrast, the *Fair Work Amendment (Same Job, Same Pay) Bill 2021* introduced to Parliament in November 2021, but which did not proceed, would have created a "same job same pay obligation" that a labour hire business must provide to a worker pay and conditions no less favourable than those which would be required to be paid

¹⁸ Minister's Second Reading Speech, *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*.

to an employee of a “host” employer¹⁹ having application as a general principle (subject to exceptions). Similarly, the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* which also did not proceed (and which was confined in operation to particular industries, including Black Coal and Offshore Oil and Gas), would have required a labour hire employer to pay a labour hire employee a base rate of pay no less than the base rate of pay payable to an employee of a host – again – by application as general principle, subject to exceptions.²⁰

36. The Closing Loopholes Bill takes a different approach – the core principle does not apply as a general principle – rather, it only applies if there are sufficient resources and wherewithal for an application to be made to the Fair Work Commission for a regulated labour hire arrangement order.
37. This is less than optimum. It means that labour hire workers can be paid less than collectively bargained rates of pay applying to their work in circumstances where no application to the Fair Work Commission is made. Undoubtedly, many thousands of Australian workers will continue to be paid less than a bargained rate of pay when doing the same work, simply because no case has been run in the Fair Work Commission on their behalf.
38. The process to make an application to the Fair Work Commission to obtain a “regulated labour hire arrangement order” is complex and will require the investment of significant resources from Unions and employers alike. Three key inefficiencies arise from the mechanism adopted in the Bill to dealing with the labour hire loophole.
 - 38.1. Firstly, several separate applications must be made in respect of labour hire employers concerned with the same host employer. Host employers who use labour hire frequently use more than one provider. Many major employers use two, three or even four different labour hire companies; for example, the major supermarkets (Coles and Woolworths) use third party logistics operators such as Schenker, Linfox and Toll, and major pharmaceutical storage and distribution providers such as Onelink. In order to ensure the relevant collectively bargained enterprise agreement pay rates apply to each labour hire worker concerned with the host, multiple applications must be made in respect of each labour hire provider. It would be preferable that the mechanism allow a single application to be made in respect of all of the labour

¹⁹ *Fair Work Amendment (Same Job Same Pay) Bill 2021*, s 123C(2).

²⁰ *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*, s 333B(a).

hire providers with whom the host has an arrangement, in relation to the enterprise agreement in question.

38.2. Secondly, a fresh application must be made each time a host begins using a new labour hire provider, even where the previous provider was the subject of a regulated labour hire arrangement order. The Bill does not contemplate a circumstance in which a regulated labour hire arrangement order “transmits” to a new labour hire provider operating in similar circumstances to a predecessor. This is a problem – host employers change labour hire companies frequently. To ensure the maintenance of principle that bargained pay rates are not undermined the Closing Loopholes Bill contemplates a fresh application for a regulated labour hire arrangement order made every time a host employer changes its labour supplier.

38.3. Thirdly, an application for a regulated labour hire arrangement order is by no means a simple or efficient process. If submissions are made in response to an application for a regulated labour hire arrangement order, the Fair Work Commission must reach a state of satisfaction that it is fair and reasonable to make the order²¹, having regard to as many as eighteen different factors (as well as “any other matter FWC considers relevant”)²². Legal proceedings around the consideration of these factors (inevitably involving the consideration of evidence) will be lengthy and costly. A more confined set of factors would be preferable and make for a more efficient system.

Creating loopholes in an attempt to close them

39. It also seems odd that an attempt to “close a loophole” has been done in such a way as to potentially create new loopholes. For example:

39.1. The proposed mechanism will not apply to work in respect to which a training arrangement applies. There seems little basis for this exception, and unscrupulous employers might create sub-standard traineeships simply to avoid the application of the scheme²³.

39.2. The proposed mechanism will not ordinarily apply in respect of the first three

²¹ *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, s 306E(2).

²² *Ibid*, s 306E(8).

²³ Complaints from Unions and Business alike about the quality of training through traineeships and apprenticeships are not uncommon. See for example: [“More than a few bad apples: The problems plaguing apprenticeships”](#), *Sydney Morning Herald*, 25 June 2023

months of regulated work. This exemption appears likely to be intended to cater for “surge” labour requirements. It is unclear why it should be permissible for labour hire work, where directed at work otherwise covered by an enterprise agreement, to be paid at rates below the negotiated agreement rate, simply because it is for a short term. If a genuine “surge” exemption is necessary at all, it should be through an application to and the scrutiny of the Fair Work Commission.

WAGE THEFT

Wage theft significantly effects workers in the Australian economy

40. Worker exploitation and wage theft has become a low-risk decision for many Australian businesses and is regarded as a ‘cost of doing business’. Australians expect businesses to pay their workers fairly and justly. Businesses that use wage theft as a core part of their business are stealing and are undermining Australian law and community standards. Many businesses are doing so because of a lack of enforcement, scrutiny and deterrence measures. Current laws are not being adequately enforced and punishment is too light. Business owners do not consider the Fair Work Ombudsman’s (FWO) activities as a deterrent. The FWO has only around 300 inspectors for over 14 million workers in over 2 million workplaces.²⁴ Low union density breeds a culture of low expectations and poor education that make underpayment seem acceptable.

Wage theft hurts Australian workers.

Bishal is a cleaner in Canberra who started a new job in February 2023. He was 19, on probation and keen to do a good job. One day Bishal was pressured by his supervisors to do a double shift to cover someone who was sick. Bishal worked a 9 hour shift, had a 1 hour break, then worked another 6 hours, finishing at 4am on Saturday. Instead of being thanked for his contribution to the business, Bishal’s bosses underpaid him and threatened his visa if he spoke out. Bishal has fought his employer for 4 months to receive his overtime pay, and still remains underpaid to this day.

41. In 2018, in Queensland alone, a parliamentary committee conservatively estimated that 437,000 Queensland workers were affected by wage theft, totalling up to \$2.5

²⁴ [Workplace Relations Framework](#), Productivity Commission Inquiry Report, Volume 1, 2015, p 150 – reports that the FWO had 253 inspectors out of 794 total employees at the end of 2014. As at June 2022, the FWO had a total of 979 employees.

billion per year being stripped from the Queensland economy.²⁵ It is clear that the cost to the Australian economy is significant. Wage theft is now extremely well-documented in a number of academic studies, state and federal parliamentary inquiries, as well as submissions and reports. The extent of the problem does not need to be reiterated. Wage theft mocks the notion of a ‘fair day’s pay for a fair day’s work’, condemns workers to poverty by regressively transferring wealth from workers to employers, undermines workers’ retirement savings plans, destroys workers’ trust in the rule of law, is unfair on law-abiding employers and robs governments of tax revenue.

Migrant workers are particularly vulnerable to wage theft exploitation

In 2021, a Federal Court ruling that seven former Canberra massage employees are owed around \$900,000 brought to an end one of Australia’s worst cases of wage theft and worker abuse.

The judgement found workers were threatened with either being returned to the Philippines or having their families killed if they reported the business – Canberra’s Foot & Thai Massage – to the authorities.

The judgement supported workers’ evidence that both the director, Colin Kenneth Elvin, and a manager of the business, Jun Millard Puerto, threatened to kill workers’ families, with Mr Puerto telling some of the workers:

“If you ever talk about your salary or the work you’re doing in the shop, I will get someone in the Philippines to kill your family. I have so many connections in the Philippines. My friend kills people as his job and it will only cost me 10,000 pesos (\$250) to get him to kill someone for me.”

The court found the business exploited the workers’ vulnerability as temporary visa holders, forcing them to be available at any time across 12 hours on the six days they worked²⁶.

42. Any legislative change that seeks to tackle wage theft must have deterrence at its heart. Prevention of wage theft in the first place will always be better for workers than seeking to recoup payment later.

²⁵ [A fair day’s pay for a fair day’s work? Exposing the true cost of wage theft in Queensland](#), Queensland Parliamentary Committee on Education, Employment and Small Business, November 2018.

²⁶ *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 4)* [2021] FCA 1242

43. The UWU broadly endorses the proposed model adopted in this legislation.

Most employers do the right thing – but some don't.

Bethany worked at a café in Perth. When she asked about why she was paid below the minimum wage on weekends, her boss sent her a text message which said:

Hi Bethany, as we discussed earlier today unfortunately I can't meet your demands ... It absolutely doesn't make any sense for you to continue working with us if you're not happy with your pay & how things are managed. For these reasons it's in the best interests of myself & especially you that unfortunately I'll have to let you go ..."

Bethany worked with UWU to take the Café to Court where she was successful in fixing her employment record through a statement of service, and where she was paid compensation for lost wages.

Criminal liability for wage theft

44. The Bill introduces new s 327A, which will make it a criminal offence for a national system employer to engage in intentional wage theft, by failing to pay a 'required amount' to an employee or on behalf of them or for their benefit. Punishment for wage theft could attract imprisonment for up to 10 years, or a fine, or both for individuals.
45. Notably though, new s 327A does not apply to the non-payment of superannuation contributions. Industry Super Australia estimates that non-payment of superannuation costs Australian workers almost \$5 billion dollars per year.²⁷ UWU welcomes the recent legislative change that requires employers to make "payday" superannuation contributions, but without the inclusion of superannuation within the remit of new s 327A, dodgy employers may simply use superannuation as a lower-risk vehicle for wage theft.
46. The "safe harbour" provisions in the Bill, which allow for "cooperation agreements" between the FWO and anyone who self-reports conduct that may be the commission of a wage theft offence, are appropriate for dealing with cases where honest mistakes have been made and employers willingly repay employees.
47. Similarly, the Bill strikes a balance for small business employers, through the

²⁷ [Super Scandalous: How to fix the \\$5 billion scourge of unpaid super](#), Industry Super Australia, 28 October 2021.

introduction of a small business wage compliance code which will help to ensure that honest mistakes by small business are not caught by the criminal liability provisions.

Employers support strong wage theft laws.

Sean Minter and Kirsten Baker own and manage Finders Keepers café in Hawthorn, Victoria.

They support strong wage theft laws and a “frontline approach” by the Fair Work Ombudsman.

“It’s not up to us as café owners to determine who should and shouldn’t be paid correctly. We aren’t above the law. There is no excuse for wage theft, but it is rife. Some employers use the “we didn’t know what the award rate was” excuse. But that’s ridiculous. It is so easy to find out what award rate you should be paying.”

“The exploitation makes for an unfair playing field. It makes customers think we are charging too much when we are simply charging what we need to ensure that our staff are paid and our kids are fed.”

“If an employee stole daily from their employer, adding up to hundreds or thousands of dollars, they would be arrested and charged. How is wage theft not the same?”²⁸

Increases to civil penalties

48. The Bill increases civil penalties for a range of offences by five times. In respect of wage theft offences, fines could be as high as \$1.5 million for individuals or \$7.8 million for companies, or 3 times the underpayment if that would be greater.
49. The Uwu welcomes these changes. Particularly, the addition of an ability to seek a penalty that is 3 times the amount of the underpayment means that wage theft will not simply be a ‘cost of doing business’.
50. The Bill also amends s 557A to provide that a contravention may be a serious contravention if an employer recklessly underpays an employee. Further, the reform removes the requirement to show that conduct is part of a systematic pattern of conduct in order to establish a serious contravention of a civil remedy provision. These changes will undoubtedly deter underpayment conduct by dodgy employers.

²⁸ <https://www.theguardian.com/commentisfree/2018/may/19/as-cafe-owners-we-know-that-wage-theft-is-rife-but-there-is-no-excuse-for-it>

United Workers' Union

3 October 2023