

29 September 2023

Submission to Senate inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*

About ACOSS

The Australian Council of Social Service (ACOSS) is a national voice in support of people affected by poverty, disadvantage and inequality and the peak body for the community services and civil society sector.

ACOSS consists of a network of approximately 4000 organisations and individuals across Australia in metropolitan, regional and remote areas.

Our vision is an end to poverty in all its forms; economies that are fair, sustainable and resilient; and communities that are just, peaceful and inclusive.

Summary

ACOSS supports key elements of the Bill

ACOSS supports the changes to workplace relations law in the *Closing the Loopholes* Bill relating to casual employment, underpayment of wages and employee-like arrangements and sham contracting as these will improve rights and protections for people disadvantaged in the labour market.

Those most affected by casual or insecure employment and wage theft are already economically vulnerable.

People on the lowest incomes, including those cycling between income support and employment throughout the year, are severely and disproportionately impacted by insecure employment and underpayment of wages.

As our own research on the labour market circumstances and opportunities of people relying on unemployment payments tells us, low-paid entry-level employment is heavily casualised and chronic underemployment is common, especially among women in those jobs. This makes it harder for people excluded from well paid, secure employment to break out of cycles of unemployment and poverty:

- Most of the jobs obtained by people using publicly-funded employment services are casual positions;
- The incidence of casual employment is highest in low paid occupations such as hospitality workers (79%), personal service workers (56%), labourers (58%) and agricultural workers (55%) compared with an overall incidence of 25%;
- While not everyone seeks full time employment, households headed by a worker employed part time face a much higher risk of poverty (19%) than those with a fulltime employee (5%). Many part-time entry level jobs are also casual jobs.

Temporary migrant workers, especially students and working holiday-makers, are especially vulnerable to exploitation in casualised entry level jobs in industries such as agriculture, retail and hospitality.

Women and young people are disproportionately represented in casual and 'short hours' (less than two days a week) part-time employment which offers insufficient income to cover basic living expenses.

Young people stuck in insecure low-paid employment are often excluded from home ownership, forced to live with their parents well into adulthood, and have to delay establishing a family.

Poor quality jobs in care services contribute to financial hardship, labour shortages and poor quality care

In the provision of essential care services, paid work is all too often precarious and low paid, reflecting a combination of under-valuation of paid work traditionally undertaken by women, casual and 'gig economy' employment arrangements and uncertain public funding. This contributes to the chronic labour shortages in those services and undermines the quality of care provided.

ACOSS believes that stable, ongoing employment in community and care work is better for workers and service users. We recognise that for employers to make the shift from casual, insecure employment towards more stable employment arrangements they need secure ongoing funding from governments. Therefore, along with the passage of this Bill we call for:

- **Government to guarantee necessary funding for pay decisions made by the Fair Work Commission affecting the community sector.** As the main purchaser of services, the Federal Government must guarantee it will fund any relevant pay rises and improved workplace conditions for the community sector workforce arising from decisions made by the Fair Work Commission.
- **Government to commit to better contracting practices,** including:
 - Ensuring funding levels are adequate to deliver security of employment, and adequate, decent pay;
 - Lengthening the time of a funding contract to five years or more;
 - Providing notification procedures of at least six months when a funding contract is to come to an end;
 - Providing adequate transition packages to ensure smooth transitions, including for paid workers, when funding contracts are to come to an end.

1. Casual Workers

Provisions of the Bill

Changes to the Definition of Casuals

The proposed changes will return the legislative definition of a casual employee to one that is more consistent with the position prior to the High Court's decision in *Rossato*. Just prior to that decision the then Coalition Government legislated a definition of casual employment which confined the assessment of casual employment status to the time when an employment contract is formed.

The new provision defines a casual employee as someone for whom there is no firm advance commitment to continuing and indefinite work with an agreed pattern. This is to be assessed with regard to a range of factors, such as: the real substance, practical

reality and true nature of the employment; any mutual understandings or expectations; whether parties have the option to offer, accept and reject work; whether the pattern of work is irregular; and the nature of the employer's enterprise.

Applications can be made to ensure that an award or enterprise agreement is consistent with the new definition of casual employment. The existing right to challenge a person's original classification as casual employee, in a court, remains.

The Casuals Framework

The Bill maintains existing employer-initiated pathways to permanent work for casuals and also allows workers who are classified as casual but do not believe that they meet the definition to notify their employer of this.

Employers will be required to respond to such a notice, consult with the worker and advise if they accept the notification or not. If the notice is accepted, the worker will become a permanent employee.

If the notice is not accepted, a dispute may be referred to the Fair Work Commission (FWC). The FWC may make orders to the effect that the worker should be treated as a part-time or full-time employee or should instead continue to be treated as a casual employee.

ACOSS view

The proposed reforms would help prevent people from being mis-classified as casual employees and improve the prospects for people continuously employed on a casual basis to progress to more secure employment. This would improve economic security for people in financially vulnerable circumstances.

Casual employees are more likely to come from disadvantaged groups who are marginally attached to the labour force. They are also likely to earn less than other employees, suffer financial hardship and lose their jobs in the event of an economic downturn:

- Almost one in four employees in Australia is casually employed.
- Women comprise 55% of all casual employees and 40% of casual employees are between the aged between 15 and 24 years.
- People employed on a part-time casual basis comprise 70% of all underemployed workers (ABS, [Labour Force Australia, detailed](#) and [Characteristics of employment](#)).
- On average, people employed as casuals are paid at least \$11 less per hour less than those with leave entitlements (Per Capita [Reforming casual employment in Australia](#))
- Most of the jobs (54%) obtained by people using publicly-funded employment services prior to the pandemic recession in 2019 were casual positions;
- Prior to the pandemic recession (in 2017) the incidence of casual employment was highest in low paid occupations such as hospitality workers (79%), personal service workers (56%), labourers (58%) and agricultural workers (55%) compared with an overall incidence of 25% (ACOSS and Jobs Australia 2020, [Faces of Unemployment](#)).
- While not everyone seeks fulltime employment, households headed by a worker employed part-time face a much higher risk of poverty (19%) than those with a

fulltime employee (5%) (Davidson P et al 2023, [Poverty in Australia, who is affected?](#) ACOSS and UNSW Sydney).

In a crisis, casuals are the first to lose their jobs. People employed on a casual basis comprised around two-thirds of all people who lost jobs in the early 2020 COVID lockdowns. ([Australian Bureau of Statistics, 'Casuals Hardest Hit by Job Losses in 2020' \(Media Release, 11 December 2020\).](#))

People employed on a casual basis face significant difficulty when applying for loans, or rental properties due to the fluctuating nature of their income and their lack of job security – this exacerbates the housing crisis that most low-paid workers are already experiencing for casual workers.

2. Stopping Underpayments

Provisions of the Bill

Wage Theft - Civil Penalties

The Bill increases penalties for certain matters (mostly wage theft related); and change the definition of serious contravention.

Under the new provisions, maximum penalties for certain matters will be set at:

- 300 (from 60) penalty units (or \$93,900) for contraventions other than serious contraventions (five times this amount for corporations);
- 3,000 (from 600) penalty units (or \$939,000) for serious contraventions (five times this amount for corporations);
- Additionally, courts can award penalties of up to three times the value of a contravention (even if this is greater than the amounts set out above).

The definition of “serious contravention” will be changed from a “knowing” contravention and part of a systematic pattern of conduct to “a knowing contravention” or “part of a systematic pattern of conduct” or “a reckless contravention”.

Wage Theft – Criminalisation

The Bill criminalises wage theft. The new offence will be established when an employer is required to pay an amount for or on behalf of an employee and engages in conduct that intentionally “results in a failure to pay” the required amount when it is due.

The following exclusions apply:

- Superannuation, Long Service Leave, Paid leave for victims of crime, and Jury leave payments;
- Employees covered by the Fair Work Act’s “National System” due to a referral of state legislative powers over industrial laws.

Prosecutions can be initiated by the Director of Public Prosecutions (DPP) or the Australian Federal Police (AFP), and the Fair Work Ombudsman (FWO) may refer matters for prosecution.

Offenders will be liable for up to:

- 25,000 penalty units, or three times the value of the underpayment in fines for corporations;
- 5,000 penalty units or three times the value of the underpayment, and/or imprisonment of up to 10 years for individuals.

The Minister will have the power to draft a “Small Business Wage Compliance Code.” If the FWO is satisfied that a small business complied with the code, it will not refer a matter for prosecution. FWO will also put in place a compliance policy covering the new offences, in consultation with the National Workplace Relations Council.

FWO may enter into a “Co-operation Agreement” with an employer if non-compliance or possible non-compliance with the new wage theft criminalisation laws is reported to it. When a co-operation agreement is in place, FWO will not refer matters for prosecution.

ACOSS view

Stronger penalties for wage theft as proposed in the Bill are overdue.

Wage theft is most common where workers have the least power – those in insecure work, temporary migrant workers, women, young people, and First Nations people in lower-skilled jobs are the most vulnerable:

- A national Temporary Migrant Work Survey found that before the pandemic recession in 2017, almost a third of international students and backpackers earned \$12 per hour or less – about half the minimum wage for a casual employee in many of the jobs in which temporary migrants work;
- Young workers are overrepresented in workplace disputes and litigation, comprising 15% of the workforce but 44% of all FWO litigation;
- The evidence indicates that wage theft occurs on a large scale, especially in entry level jobs. Although the FWO can only respond to reported incidents of wage theft and has failed to meaningfully curtail it, the agency recovered more than \$530 million in unpaid wages and entitlements in 2021-22. (Senate Standing Committee on Economics 2022, [*Systemic, Sustained and Shameful. Unlawful underpayment of employees’ remuneration*](#)).

Wage theft pushes people into poverty and undermines the integrity of minimum wage laws. In low paid sectors where wage theft is common, employers who do the right thing and pay their workers properly and on time are under a competitive disadvantage.

3. Employee-like arrangements and sham contracting

Provisions of the Bill

Employee-like arrangements

The Fair Work Act mainly regulates the employment relationship. A growing number of workers – such as those in the “gig economy” – are excluded from the protections available to employees. This is unfair, and to the extent that the more workers are engaged to work outside formal employment relationships it undermines the integrity of our workplace relations system.

Under the new provisions, the Fair Work Commission can make “Minimum Standards Orders” on application by a union or a regulated business. Those orders would cover digital platform workers. Workers who are not engaged through a digital platform are not

included, along with those employed by platforms which are not labour based (for example, Airbnb).

Minimum Standards Orders would include the following terms:

- Payment terms;
- Deductions;
- Working time;
- Record-keeping;
- Insurance;
- Consultation; representation; delegates' rights; and
- Cost recovery.

However, they would not include terms relating to:

- Overtime rates;
- Rostering arrangements;
- Commercial matters that do not affect the terms and conditions of engagement;
- Any term that would change the nature of the engagement (for example, to one of employment)
- Matters comprehensively set out in Workplace Health and Safety law;
- Any matters prescribed by the associated Regulations.

The Commission can also make non-binding "Minimum Standards Guidelines" the terms of which would follow the same rules as for Minimum Standards Orders. Standards should be clear, simple and easily applied, provide a relevant safety net, have regard to comparable employees, and take into account the needs and preferences of workers for flexibility and labour market access as well as the impacts on business and the economy.

Consent agreements can be reached between the relevant union and regulated businesses, which may then be certified by the Commission.

The new provisions will also allow platform workers to challenge "unfair deactivations." This will mean that employee-like workers who work for platforms, who are "deactivated" (removed from the platform involuntarily, so that they can no longer perform work on it) can challenge this in the Fair Work Commission if it is satisfied that:

- The person has been deactivated from the platform;
- the deactivation was unfair; and
- it was not consistent with the Digital Platform Deactivation Code (made by the Minister)

Unfairness will be determined according to:

- whether there was a valid reason relating to the workers' capacity or conduct;
- whether any relevant processes in the Code were followed; and
- any other matters the Commission considers relevant.

The main remedy for an unfair deactivation will be "reactivation" on the platform. If the Commission orders that a worker be reactivated, it may also make an order to restore lost pay.

Sham Contracting

The Fair Work Act prohibits an employer from misrepresenting an employment relationship as contract for services (independent contracting). Employers currently have a defence to the effect that they did not know whether the contract was in fact an

employment contract. This defence means that very few “sham contracting” arrangements are successfully prosecuted.

The proposed legislation will remove this defence and insert a different one, that the employer had a reasonable belief (even if incorrect) that a contract was a contract for services. Reasonableness will be assessed with regard to the size and nature of the business and any other factors considered to be relevant.

ACOSS view

We support these provisions of the Bill, which afford better protections to workers employed on digital platforms (who count among the most disadvantaged and economically vulnerable members of the workforce) and employees who are misclassified as contractors.

A national survey of ‘gig workers’ found that:

- young people, aged 18–34, were more likely to work through digital platforms;
- gig workers were more likely to identify as 'living with a disability';
- gig workers were 1.5 times more likely to indicate that they 'spoke a language other than English at home';
- temporary residents were three times more likely than Australian citizens to be a current platform worker;
- those gig workers who were more dependent on gig work identified as having disability or being unemployed (McDonald P et al 2019, [Digital Platform Work in Australia: Prevalence, Nature and Impact](#)).

Another survey of gig workers found that:

- At least 45% of gig workers reported earned less than minimum wage;
- 81% depended on the money they earn from rideshare, food delivery, or parcel delivery to pay bills and survive.
- 45% struggled to afford everyday items like groceries and household bills (McKell Institute 2023, [Tough gig, worker perspectives on the gig economy.](#))