

28 September 2023



Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

To the Committee,

**RE: FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023
INQUIRY**

Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission to the Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 ("the Bill"). VTHC commends the Albanese Labor Government on introducing this vital legislation that will level the industrial playing field for more Australian workers.

VTHC was founded in 1856 and is the peak body for trade unions in Victoria. VTHC represents 41 unions and more than 500,000 workers in the state. These workers are members of unions that reach into every industry across Victoria. Since winning the Eight Hour Day in 1856, VTHC has had a long history of fighting for and defending the rights of all workers in Victoria.

A fair day's pay for a fair day's work has never been more important and relevant with the current cost of living crisis and stagnant wage growth.

The Closing Loopholes Bill will ensure that every Australian worker is able to experience the benefits of the Secure Jobs Better Pay legislation. For too long, businesses have used loopholes and dodgy tricks to undercut the pay and conditions of Australian workers. For labour hire, on demand and casual workers, businesses have deliberately undercut the minimum standards fought for and won by unions and generations of Australian workers.

It is unacceptable that businesses use labour hire to undercut pay and conditions of directly employed workers. Too often, labour hire providers exploit workers and treat them appallingly. In Victoria, the Labour Hire Licensing Authority has been very effective in stamping down on this practice. VTHC strongly supports further action at a national level to ensure that workers doing the same job are paid the same rate.

As the on-demand workforce has grown in Australia, the lack of regulation has resulted in workers being paid well below minimum rates, working with no safety net and with intolerably high safety risks. In Victoria, the Andrews Labor Government has conducted a landmark Inquiry into the On Demand Workforce. The introduction of Fair Conduct and Accountability Standards and the Gig Worker Support Service are both national firsts. The Federal Bill will finally ensure that on demand workers have minimum standards across Australia.

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Employers have long taken advantage of loopholes regarding casual workers to misclassify ongoing workers as disposable. It is not acceptable for workers who have set shifts and are long serving at their employer to be denied the certainty of permanent work simply because their pay slip says 'casual'. Providing casual workers the option to convert to permanent work is an important step in ending the toxicity of insecure work in Australia.

The Andrews Labor Government's Sick Pay Guarantee provides sick and carer's pay to casual and contract workers who don't have access to paid sick and carer's leave. The pandemic has shown the devastating effects of insecure work. Every worker in Australia deserves sick leave and the National Employment Standards should include an entitlement to paid sick leave for all workers, including casual and contract workers. No worker should have to go to work when sick just to be able to pay the bills.

Victorian unions strongly support the introduction of changes to Comcare in relation to presumptive provisions for first responders.

In Victoria, Workplace Manslaughter legislation was passed in 2019. This momentous change came about due to campaigning by unions and the tireless advocacy of families who lost their loved ones at work and saw companies get away with nothing more than a slap on the wrist. Introducing workplace manslaughter laws at a national level goes one step further in sending a clear message that every worker has the right to a safe workplace.

Closing loopholes regarding casual, labour hire and on demand workers and introducing workplace manslaughter laws are vital reforms that should be passed.

Criminalising Wage theft

It is imperative that there are multiple, well-resourced paths to enable workers to quickly recover wages owed to them by their employer and that employers are held to account for these underpayments. In 2020, Victorian unions won the country's first wage theft criminalisation laws as a result of relentless campaigning and advocacy by workers in Victoria. The Victorian union movement is extremely proud of the Andrews Labor Government criminalising wage theft.

Victorian wage theft laws are the best in the country. The Wage Theft Act 2020 (Vic) ("the Act") creates criminal offences against employers who dishonestly and deliberately withhold wages and entitlements and establishes Wage Inspectorate Victoria as a standalone statutory authority with enforcement powers.

The Act makes stealing workers' wages and entitlements criminal. It includes a broad definition of 'dishonesty'. Dishonesty is assumed as a default where there is wage theft, and employers can only prove their defence when they demonstrate due diligence. The Act is also stand alone, creating its own regulatory framework, given the extent and pervasiveness of the issue of wage theft.

Employers hold significant power over workers' lives. The Victorian Act is drafted to effectively address the power imbalances present in the workplace, and workplace cultures and practices that contribute to wage theft. The Act requires employers to prevent wage theft. It reflects community expectations that employers have a

responsibility to make every possible effort to do the right thing. Employers who are unwilling to pay lawful wages and entitlements to workers should be held to account.

That is why Victoria's strong wage theft laws must be safeguarded by any proposed Commonwealth legislation.

The Victorian wage theft laws must also continue to cover workers employed by the state of Victoria.

The falsification of and failure of an employer to keep employee entitlement records is also a criminal offence under Victoria's wage theft laws. When businesses do not maintain records of what is owed to workers, it is extremely difficult for workers to recover stolen wages and entitlements or confirm their rate of pay is compliant with their industrial instrument. It is no fault of the worker if the employer fails to keep records, yet it is the worker who suffers as they cannot accurately recover the wages they earned. If an employer does not keep entitlement records, they must be held to account.

Importantly, the definition of employee entitlements in Victorian wage theft legislation captures a broad range of entitlements beyond the hourly pay rate, including superannuation, paid leave and tips. This ensures that workers can protect all aspects of their minimum legal entitlements, not just the face-value sum of unpaid wages.

The Act creates penalties of up to \$1,153,860 for companies or up to 10 years jail or \$230,772 for individuals. It further pierces the corporate veil by holding the person responsible for perpetrating the wage theft to account. This creates a deterrent for employers against stealing wages.

Victorian unions are also especially proud of the creation of a powerful state-based stand-alone regulatory body to address systemic wage theft. Wage Inspectorate Victoria (WIV), established by Victorian wage theft laws, has also been effective in tackling wage theft in Victoria. Under the Act, WIV is equipped with extensive powers to execute search warrants, issue compulsory notices, enter premises and seize evidence. In its first year of operation, WIV assisted 15,000 workers and took strong action in the courts, including a successful case against Coles that led to more than \$700,000 paid back to workers in stolen long service leave.¹ It is especially well-placed to enforce wage theft laws given its strong experience enforcing child employment, long service leave and owner driver and forestry contractor laws. WIV is also the most appropriate regulatory body to effectively enforce wage theft laws where the state is the employer. Without careful coordination, the Federal Bill is very likely to compromise the operations of an effective WIV.

Concerns regarding criminalising underpayments sections of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

In May of 2021, the Australian Labor Party announced that a future Albanese Government would criminalise wage theft in Australia. This announcement included a commitment that "Labor's laws will not water down any wage theft laws already passed by the states."² The Bill as introduced appears to violate this commitment and

¹ <https://www.vic.gov.au/wage-inspectorate-helps-15000-victorians-first-year> 3 and unlawful

² <https://anthonyalbanese.com.au/media-centre/labor-will-criminalise-wage-theft-13-may-2021>

will likely render Victoria's wage theft laws obsolete. This will be a backwards step for all Victorian workers.

The Bill will criminalise wage underpayments only where an employer had intention. This means that only in very limited circumstances where employers deliberately underpay workers will they be guilty of an offence. Prosecutors will have to prove employers knew the specific, relevant rate of pay under the applicable Award or industrial instrument, and that they deliberately failed to comply with it. It does not capture employers who do not bother to look up the Award rate, or who do not keep up to date with increases to rates of pay from year to year, or who do not understand the importance of classifications, leave, loadings or penalty rates. If an employer cannot pay their workers properly, they do not have a viable business model and shouldn't be running a business.

Wage theft comes in many forms, each of which is serious and diminish a worker's rights, take-home pay and retirement. Being paid the lawful rate can be the difference between being able to afford rent and groceries or not. Wage theft can include being paid the incorrect base rate, not being paid for leave, not being paid superannuation, incorrectly classifying workers or withholding tips.

The Bill is narrower in its definition of employee entitlement than Victoria's Wage Theft Act 2020. As a result, payments for superannuation and gratuities or tips are not captured by the Federal Bill unlike the Victorian legislation.

Further, the Bill fails to introduce a criminal offence in line with Victoria's offence of falsifying or failing to keep employee entitlement records.

The Bill also gives the Minister the power to declare a Voluntary Small Business Wage Compliance Code ("the Code"). This may allow a small business who opts into the Code to deliberately underpay an employee and be exempt from prosecution. The Young Workers Centre (YWC) based at VTHC assists and represents workers under the age of 30 in relation to a wide range of work-related legal matters. Since its inception in 2016, the YWC has assisted more than 2,825 young workers and recovered more than \$2 million in compensation for young workers. Almost 70% of the YWC's ongoing matters are in relation to wage theft and 63% of inquiries are from young workers who are working for or have worked for employers with less than 15 employees. This demonstrates the importance of capturing small businesses in any wage theft legislation.

An effective Regulator

VTHC does not support the Fair Work Ombudsman (FWO) being the regulator responsible for enforcing wage theft laws in Victoria. This view is based on extensive experience of affiliated unions with the FWO. The FWO has a culture of adopting a soft approach to ensuring employer compliance with workplace laws.

For example, the YWC, recently referred 11 matters to the FWO that it assessed involved clear breaches including failure to pay minimum rates of pay, failure to provide pay slips and unlawful deductions from wages. On each occasion, the YWC provided extensive documentation, including calculations of underpayments.

The FWO has investigated only four matters and commenced proceedings in only one matter. The FWO's communication and consultation with the affected workers and the YWC has either been poor or non-existent. The FWO has sometimes issued compliance notices but has never informed the YWC. The worker affected also never receives a copy of the compliance notice. In two matters that the YWC referred, the worker affected has partially recovered what they are owed. In two other matters, the FWO agreed to a payment schedule on behalf of the workers, without consulting the workers. The payment schedule extends over 2 years, and the employer has not yet made a payment on time in accordance with the schedule.

In the only case where the FWO has issued proceedings, the conduct of the regulator has been so poor that that YWC has re-evaluated its practice of sending any matters to the FWO. We have so little confidence in the professionalism and competence of the FWO that WIV must be the statutory authority responsible for enforcing wage theft laws in Victoria. A state-based stand-alone statutory authority has the ability to quickly investigate and respond to intelligence and can work seamlessly with other state-based authorities relating to employment. The Bill is very likely to jeopardise or compromise the operations of WIV and will have a detrimental impact on Victorian workers.

VTHC recommends that the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 is passed with amendments to carve out and protect Victorian wage theft laws.

While VTHC welcomes the vast majority of reforms introduced by the Bill, significant concerns exist regarding the criminalising underpayments section. The Bill requires evidence of subjective intention which will make it very difficult to successfully prosecute. This effectively means investigators will need a smoking gun to be able to proceed with a case against an employer.

Examples of this may include correspondence from the employer indicating that not only are they aware of the correct employee entitlements but they then made a deliberate decision to pay less than that amount. This evidence will be extremely rare to find as most employers who steal workers' wages are sophisticated enough to not put it in writing.

Victorian unions' strong grassroots advocacy means that Victoria's wage theft laws and wage theft regulator are the best in the country and Victorian workers would like to keep them that way.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Luke Hilakari', with a stylized flourish at the end.

Luke Hilakari
Secretary

Ref: LH:TS 92.32