



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

PROOF

BILLS

**Fair Work Legislation Amendment
(Closing Loopholes) Bill 2023**

Second Reading

SPEECH

Monday, 4 September 2023

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date Monday, 4 September 2023	Source House
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Questioner	Responder
Speaker Burke, Tony MP	Question No.

Mr BURKE (Watson—Minister for Employment and Workplace Relations, Minister for the Arts and Leader of the House) (15:19): I move:

That this bill be now read a second time.

Last year, with the Secure Jobs Better Pay Bill, the parliament passed legislation to improve job security, increase wages and close the gender pay gap. It worked.

We have had the strongest jobs growth for the first year of any Australian government. Half a million jobs have now been created, and 85 per cent of those jobs have been full time. Wages are growing at their fastest rate for a decade. The gender pay gap has fallen to its lowest level ever, and the number of days lost to industrial action has fallen sharply.

But many Australians are not receiving the full benefit of these changes, because of loopholes that allow pay and conditions to be undercut. For these workers the minimum standards in awards and enterprise agreements are words on a page, with little relevance to their daily lives.

The businesses which use these loopholes are able to undercut Australia's best employers in a race to the bottom.

If we want workers to be paid properly we need to close the loopholes.

If we want casuals to have a pathway to secure work we need to close the loopholes.

If we want enterprise agreements to determine minimum rates of pay at a workplace, we need to close the loopholes.

If we want gig workers and those in road transport to have minimum standards, we need to close the loopholes.

Those workers have waited long enough, so today I ask the parliament to come together and close the loopholes that undercut pay and conditions this year.

In relation to wage theft, it is already a crime for a worker to steal from an employer, as it should be. But it's not a crime for an employer to steal from a worker. We will close this loophole.

An employer convicted of intentional wage theft could face up to 10 years imprisonment. Significantly, courts will be able to impose fines of up to three times the amount of the wage underpayment in both civil and criminal contexts, allowing penalties to be proportionate to the scale of the misconduct.

Employers who take reasonable steps to pay the correct amounts, or who make honest mistakes, will not be criminally prosecuted.

The Fair Work Ombudsman will be able to enter cooperation agreements with employers who come forward, and, as was requested by COSBOA, a new Voluntary Small Business Wage Compliance Code will provide assurance to small-business employers that they can't be pursued criminally if they take appropriate steps to comply with the law.

Maximum civil penalties for wage underpayment, including reckless wage underpayment, will be increased, implementing recommendation 5 of the Migrant Workers' Taskforce.

There are two key challenges in stamping out wage underpayments: one is how you detect the problem early, and a second is how you help workers—often very vulnerable workers—to speak up in the workplace. We are making two changes to address these issues.

The first is an amendment to the current process allowing worker representatives to access workplaces to support workers.

Currently, the Fair Work Commission can decide to allow a representative to enter a workplace without 24 hours notice if there is a reasonable prospect of the destruction or concealment of evidence. We will give the commission the capacity to also grant right of entry where it is satisfied there is a reasonable suspicion of wage underpayment.

There can be cases where the paperwork is impeccable but wage theft is occurring. For example, if a worker is being directed to clock off but is still required to work after that, you will only uncover this by attending without notice.

Existing safeguards applying to right of entry will continue. This bill makes no changes to section 483AA for access to non-member records and keeps the prohibition on accessing residential premises.

Secondly, a common feature of many high-profile wage underpayment cases is that, when they are discovered, we find the problem has been going on for years and years. People are too afraid to speak up, and there are no processes in place to help them do so. We need to make sure that, if someone is not being treated fairly at work, it's discovered early. That's why this bill contains important new protections and rights for workplace delegates, including paid access to relevant training—with small businesses exempt from this requirement.

These changes make it more likely that there is a fellow employee at the workplace who is trained and knows the rules. This means more underpayment issues will be resolved early and quickly without involving anyone from outside the workplace.

The next loophole involves casual employment.

Casual employment suits many Australians and plays an important role in our workplaces.

But when someone is called 'casual' on their pay slip or their contract yet is rostered like a permanent worker, expected to accept shifts like a permanent worker, and has a job likely to continue into the future indefinitely, then there's a clear loophole. A worker like this should be able to choose secure employment if they want it.

The ability to treat someone as a casual against their wishes, even if they are working like a permanent worker, is an unfair loophole. And we will close it.

A casual will still be defined as someone who does not have a firm advance commitment to continuing and indefinite work, but the bill will enable employees and their employers to look at what's really happening, not just what their contract says. Employees will be able to notify their employer that they wish to be permanent if they believe they no longer meet the casual definition.

Providing certainty to business, casual employees will remain casual unless they actively choose otherwise; and where an employee chooses to become permanent, no back pay will accrue.

Most casuals who are eligible won't want to convert. Most will prefer to keep their loading. But those casuals who maybe are supporting a household with that job are more likely to want security. Their rent isn't casual; their bills aren't casual. They need a better option for security.

The Fair Work Commission will have the ability to resolve any disputes, including through arbitration as a last resort or in exceptional circumstances.

The bill also prohibits 'sham' casual arrangements, which will stop employers deliberately and unreasonably misrepresenting to an employee that their employment is casual when it is not.

The next problem is the labour hire loophole.

There's a legitimate role for labour hire in Australia—for surge work, for specialist work, or to provide temporary replacement workers.

Because of the inherent insecurity, labour hire workers are usually paid higher rates of pay, and those cases are completely unaffected by this legislation.

But 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.

On application, the Fair Work Commission will be able to make an order requiring labour hire workers to be paid at least the minimum rates in a host business's enterprise agreement. The Fair Work Commission must not make the order unless it is fair and reasonable to do so, for example where it finds an arrangement is for the provision of services rather than labour. Orders can only apply to pay rates; not to non-monetary conditions.

To be very clear—this reform does not prevent employers paying their employees more in recognition of their skills, qualifications and experience.

It does not apply to hosts who are small businesses; or to independent contractors; or to training arrangements.

The bill contains broad anti-avoidance protections that will stop businesses deliberately changing and manipulating their operations to try to get around these new obligations.

The Fair Work Commission will help businesses to implement these obligations, including through developing guidelines.

In relation to employee-like workers, the road transport industry, and unfair contracts: a definition of employment is needed.

Avoiding paying worker entitlements by calling a relationship 'independent contracting' when it is in reality an employment relationship is not appropriate and must end.

Courts will now be required to look at the totality of the relationship, not only what's on paper, to work out what is really going on.

And we need fair minimum standards for employee-like workers and the road transport industry. Currently gig workers have no minimum standards at all.

This is a loophole causing serious harm to workers and it must be closed.

At the moment if you're a worker wanting assistance, you turn up to the Fair Work Commission or the Fair Work Ombudsman and question 1 is: are you an employee? If the answer is yes, the Commission or Ombudsman works out where you fit into the system and a whole host of entitlements and rights follow. If the answer is no, all of those rights fall off a cliff.

The amendments in this bill will close the loophole and turn that cliff into a ramp, allowing the Fair Work Commission to make minimum standards orders for workers on digital platforms who do not meet the definition of employee, but nonetheless have low bargaining power, or low authority over their work or comparatively low pay—for example, people doing work via digital platforms in the NDIS, working in aged care, delivering food to people's homes, or transporting us around.

In many countries, the answer for these types of workers has been 'just make them an employee'. We are not doing that. We are going to accept the form of engagement.

But what we're asking is, within that form of engagement, surely there are some minimum standards that are appropriate.

For example, the Fair Work Commission might come up with a minimum rate of pay. In relation to rideshare, it might go for a 5-minute or per-minute rate rather than an hourly rate. Why? Because it would need to be a rate appropriate for the form of engagement.

Things like insurance, working time standards—these are possible without changing the form of engagement.

Things like rostering and overtime, though—these would change the form of engagement and are not permitted under the bill. Similarly you couldn't logically pay somebody for all the time that they're just on the app, because that would wreck the form of engagement.

Gig workers will have new rights to seek reinstatement if they've been unfairly deactivated from the platform. Gig workers have the same financial obligations as other workers and should not have their platform access and livelihood unfairly cut off without any chance of redress.

The road transport industry is currently operating in a way that is putting businesses, workers and their families under immense financial pressure and undermining the safety, sustainability and viability of the industry.

The problems are starkly illustrated in the *Without trucks Australia stops* inquiry by the Senate Standing Committee on Rural and Regional Affairs and Transport chaired by Senator Glenn Sterle, who joins us in the chamber now.

Acting on calls from the industry to make an urgent change, the bill will allow the Fair Work Commission to set minimum standards for the road transport industry and to hear disputes about unfair contract terminations.

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.

We know that the challenges that drivers face are made worse with complex contractual chains in the trucking industry. To address this, the bill will provide for regulations to empower the Fair Work Commission to make minimum standards for participants in road transport contractual chains. The government will continue to work with industry and union representatives to craft these regulations to ensure they are appropriate and effective in addressing pressing challenges, such as fair payment times.

And we need better protections against unfair contract terms for independent contractors.

Existing protections against unfair contract terms under the Independent Contractors Act have not worked.

This bill creates a new, low-cost and efficient jurisdiction at the Fair Work Commission for resolving disputes about unfair contract terms in services contracts, for independent contractors below a high-income threshold.

The next problem we are dealing with is fundamental.

Every worker has the right to go to work and come home safely.

Currently, manslaughter is a crime; but the same kind of culpable conduct is not prosecuted as manslaughter if it happens at work.

We will close this loophole.

This bill makes industrial manslaughter an offence—a long overdue recommendation of Marie Boland's 2018 review of the model work health and safety laws.

The offence includes penalties of \$18 million for bodies corporate and 25 years imprisonment for officers. The most serious penalties should apply to recklessly or criminally negligently causing the death of a worker.

This part of the bill became essential because of the advocacy of the families of workers who never came home; some of whom are in the gallery right now.

This bill is for Kay Catanzariti and Barney Catanzariti, whose 21 year old son Ben was killed on a construction site at the Kingston foreshore here in Canberra when a concrete boom collapsed on him and two other workers.

This bill is for Shauna Branford and her husband, Peter Branford. Shauna's 39-year-old brother, Glenn Biddle, was killed at work in an explosion in North Ryde, New South Wales.

You have been tireless, resolute and courageous in advocating for reform over many years.

The Albanese government acknowledges you and your work on these important changes to the law; and we pay respects to your loved ones who are not here with us today to see this bill introduced.

The bill will also deal with other loopholes. It will expand the Asbestos Safety and Eradication Agency to eliminate silica related diseases in Australia.

It will simplify workers' compensation for first responders with post-traumatic stress disorder, including firefighters, Australian Federal Police employees and ambulance officers in the Commonwealth jurisdiction.

It will further improve bargaining by giving the Fair Work Commission the power to make enterprise agreement model terms, allowing franchisees to bargain together in the single-enterprise bargaining stream and allowing employers covered by a multi-enterprise agreement to bargain with their employees for a replacement single-enterprise agreement at any time.

It will strengthen protections against discrimination for employees subjected to family and domestic violence.

It will make sham contracting laws fairer.

It will clarify the operation of Fair Work Ombudsman compliance notices.

It will simplify registered organisation demerger provisions.

It will clarify rules for the small business redundancy exemption in insolvency contexts.

The debate about these laws has now been raging for years, ever since we announced these policies from opposition.

Three arguments are always made when people don't want to argue the merits of an issue. They will complain about consultation, they will talk about something that the issue is not or they will ask for a delay.

But my request in the debate we are about to have is simple—anyone who intends to vote against closing the loopholes should defend the loopholes. Defend them.

If someone thinks it's reasonable that wage theft not be a crime, defend it.

If someone thinks it's okay that someone who could easily be converted to secure work shouldn't have the option to do so then they should say so.

If someone believes that low-paid workers in the gig economy should have absolutely no minimum standards, they should make that case.

If someone's position is that it's fine for certain companies to agree to minimum rates of pay in an enterprise agreement and then use a loophole to completely undercut them then they should defend the loophole and make that case.

If anyone thinks it is reasonable that recklessly or negligently causing the death of a worker not be a criminal offence, they should explain why.

If these loopholes had been closed years ago our workplaces today would be safer and fairer than they are.

Nothing leaves me more convinced of the need for this legislation than the refusal of its opponents to step up and defend the loopholes that we are closing. They know that their arguments don't stack up.

In presenting this bill to the House, I want to acknowledge the advocacy of workers, of union delegates and organisers, of academics, of community sector organisations and of employers who are frustrated that their competitors use these loopholes—all of whom have said, 'Enough is enough.'

While the opposition to closing loopholes has wandered from the selfish to the absurd, at one level the political debate isn't what any of this is about.

This is about the many responsible employers—small, medium and large—who work hard every day to contribute to this country and are tired of unfair competition from those employers who do the wrong thing.

This bill is about all those members in the road transport industry who want to make a great contribution to a great industry and come home safely at night to their families. This bill is for owner-drivers like Frank Black, Tony Matthews and their trucking colleagues and industry representatives who have joined us today.

This bill is for gig workers from rideshare and food delivery who want fair minimum standards at work—people like Rosalina, Nabin and their colleagues who are with us today. This bill is for Yavuz Cikar, whose 30-year-old nephew, Burak Dogan, was killed in Sydney's inner west while working as a food delivery rider.

We are closing the loopholes for gig workers; and ensuring that the road transport industry is safer, more sustainable, more viable into the future.

This bill is for people like Chris—a cleaner who has worked here in Canberra cleaning government buildings for almost 40 years. Chris, who is here in the gallery today, has worked for six employers, and during that time every single one of them has underpaid Chris in one way or another. She got her money back eventually each time with the help of her union, and a struggle each time.

Chris, we are closing the wage theft loophole for hardworking people like you.

This bill is for people like Sanjeev, a migrant worker with two children in high school. He was planning to be here today. He can't because he's caring for an ill family member. Sanjeev is a pathology courier. For the past five years, he's worked 30 to 40 hours a week and always been employed as a casual.

Despite requests, his employer has refused to convert him to permanent employment, leaving Sanjeev without the job security that he needs for his family.

We are closing the forced permanent casual loophole for people like Sanjeev.

This bill is for Brodie, who is with us in the gallery today. Brodie works for BHP Operations Services in Queensland as an operator in production. Brodie and his directly employed workmates all work full time, all within the same part of the business, performing the same operator role.

Except that Brodie gets paid less.

This bill will close the labour hire loophole for people like Brodie.

This bill will close the loopholes which undermine and weaken our workplace relations system, and it will make Australian workplaces safer and fairer.

The loopholes that have been harming workers, families, employers, and our community can be closed here, this year—with this bill.

Let's get this done.

The DEPUTY SPEAKER (Ms Claydon): The debate must now be adjourned. The question is that the resumption of the debate be made an order of the day for the next sitting.