



Catholic Religious Australia Submission to the Inquiry into Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

28 September 2023

Submission to the Senate Standing Committee on Education and Employment inquiry into the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Catholic Religious Australia (CRA) welcomes the opportunity to make a submission to the Senate Standing Committee on Education and Employment (the Committee) inquiry into the *Fair Work Legislation (Closing Loopholes) Bill 2023* (the Bill).

CRA is the peak body representing the Leaders of 150 Catholic Religious Institutes and Societies of Apostolic Life which operate in Australia. Our religious institutes comprise about 4,800 Catholic religious women and men. Our members are employers with many staff members working in education, health care and social welfare, including aged care and disability support.

We believe that safe, secure and fulfilling work is a right to which each person is entitled, allowing them to earn a reasonable living, support family, contribute to and participate in Australian society, forge relationships, express their skills and talents and securely enjoy leisure time. Legislation should therefore never reduce the function of work to a simple economic contract between employer and employee or to having the sole purpose of increasing capital.¹

The proposed Bill intends to provide better protections for workers in several precarious employment arrangements, by closing legislative loopholes that could allow for their exploitation by employees. CRA supports these aims and will explore the Bill's proposals in greater detail below, while making recommendations for areas of further action.

Definition of Casual Work

The Bill seeks to change the definition of "casual" in the *Fair Work Act*², from a previous definition set by the Morrison government whereby the contractual "casual" title when employed remains in place for the duration of employment, regardless of any subsequent changes to the nature of the role. In a submission³ to the Senate Inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* in early 2021, CRA had highlighted concerns that such a definition changed to the right to request casual conversion, thereby increasing the casualisation of the Australian workforce. Indeed, Australian Bureau of Statistics (ABS) data shows that casualisation is climbing, with 2.7 million casual employees (23% of employees) recorded in August 2022, up from 2.4 million in August 2021.⁴ The increasing casualisation of the workforce is leaving many Australians in an unstable and precarious financial position, without access to the benefits of permanent employment. Further, having the employment relationship permanently stipulated at

¹ J. Zabar and A. Treloar, *Strong Economy, Stronger Australia: Building Our Prosperity to Serve the Common Good* (Catholic Social Services Australia (CSSA): Canberra, 2020).

² Fair Work Ombudsman, "Legislation," <https://www.fairwork.gov.au/about-us/legislation>

³ Catholic Religious Australia, "CRA Submission to the Inquiry into Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill," https://static1.squarespace.com/static/5acea6725417fc059ddcc33f/t/60f7d79e86bb0f67147b32a4/1626855327752/20210205_CRA+Submission+Fair+Work+Amendment_Bill.pdf

⁴ Australian Bureau of Statistics, "Characteristics of Employment, Australia," <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/characteristics-employment-australia/aug-2022>

the start of the contractual arrangement denies the dynamics of employment relationships, especially in relation to casuals. The pattern of work of a casual employee may change over time, and employees should therefore rightfully be shifted from casual to permanent part time employment. Being left as a “permanent casual” denies these employees rights such as sick leave or annual leave and keeps them in an insecure employment situation. Research shows that, on average, low-paid “casuals” are paid less than equivalent permanent workers, despite the casual loading, but that barely half of casual employees even get the casual loading.⁵ This leaves many Australians in an unstable and precarious financial position, not to mention the impact it has on family relationships and mental health and wellbeing.

CRA therefore supports the Bill’s changed definition of ‘casual,’ which places primacy on the reality of employment over time, allowing a worker to apply to their employer to become permanent after six months, if work arrangements have changed. We also applaud the Bill’s proviso that an employee can engage Fair Work if such a request results in dispute (rather than going to courts as previously), and provisions that prohibit dismissal to engage a person as a casual.

CRA believes that the Bill is a step in the right direction, but that more needs to be done to support those casual workers who rely on their casual loading and are not in a position to be able to trade this money for holidays and other entitlements of permanent employment. In the majority of other higher SES countries, all workers are entitled to annual leave, regardless of their type of employment.⁶ CRA calls for further efforts to provide all workers the protections of annual and sick leave, and minimum award wages to be raised so that low-wage workers aren’t reliant on the casual loading for survival. This will ensure that our most vulnerable can engage in more dignified working arrangements.

Same Job, Same Pay

CRA supports the Bill’s provisions to prevent the utilisation of labour-hire contracts to avoid giving contractors the same pay and conditions as direct employees working the exact same job. ABS data shows that 84% of workers on labour-hire contracts don’t have access to paid leave entitlements, and that their work is insecure and poorly compensated for being insecure. They are also more likely to sustain workplace injuries due to inadequate training and management practices.⁷ This can be remedied through the Bill’s requirements that labour-hire businesses and their users to cooperate to ensure engaged workers’ pay and conditions are on par with those paid to direct employees. This will not impact the ordinary and fair use of labour hire, particularly as a means to manage surge periods and employee absences, but is vital step in ensuring greater security for labour workers. The Bill will also give employee the right to go to fair work for a review of any disingenuous contract arrangements.

⁵ David Peetz, “We need more than a definition change to fix Australia’s culture of permanent ‘casual’ work,” *The Conversation*, <https://theconversation.com/we-need-more-than-a-definition-change-to-fix-australias-culture-of-permanent-casual-work-210456>

⁶ Arvo Kuddo, “Labor Regulations throughout the World: An Overview,” *World Bank Group*, <https://openknowledge.worldbank.org/server/api/core/bitstreams/4f45d37a-ae74-5c30-8313-aa7783191d1a/content>

⁷ Gemma Beale, “Business is trying to scare us about ‘same job, same pay’. But the proposal isn’t scary,” *The Conversation*, <https://theconversation.com/business-is-trying-to-scary-us-about-same-job-same-pay-but-the-proposal-isnt-scary-207113>

Gig Workers and Digital Platforms

By engaging workers via digital platforms, such as in the food delivery sector and a growing number in disability and aged care, workers are not treated as employees, but rather contractors. As above, this means that the contracting companies escape paying their contractors the legal minimums employees would be entitled to. CRA supports the Bill's provision to provide the Fair Work Commission the power to set Minimum Standards Orders for gig workers employed via digital platforms, on matters such as payment terms, deductions and working time. It is also positive that the Bill will allow workers to dispute their 'deactivation' from a digital platform in a way akin to unfair dismissal claim, particularly when this is often ordered by an algorithm.⁸ While there may be some discontent amongst the general public as there will likely be a moderate price increase for these services frequently engaged, such as food delivery, this is a small price to pay for a luxury expense, to ensure better rights for our fellow Australia workers. We also see these changes as especially beneficial to those who work in the social and community services (SACS) sector, a sector which is increasingly interacting with digital platforms to secure workers, a significant number of whom therefore fall outside current labour laws.⁹ Many CRA members are employers with staff members working in the SACS sector, and they would support the Bill's provisions to enable minimum standards to be set in place for their workers.

Although this is a positive step, CRA notes that the Bill does not give the Fair Work Commission the power to implement a full suite of minimum standards, with overtime rates, rostering arrangements, and the ability to turn a platform worker into an employee, outside their remit.¹⁰ The latter is particularly concerning, as the Bill supports the creation of a new category of the "employee-like" worker, which may encourage some businesses to substitute employees for workers with less favourable conditions. As Dr Alex Veen cautions, "some employers will opportunistically turn their employees into "employee-like" workers to save on labour costs, while others will be forced in this direction because of competitive pressures, resulting in a regulatory-enabled race to downgrade conditions."¹¹ The 32 member countries of the European Union have recently sought to avoid this by agreeing that all platform workers are to be treated as employees.¹² Alternatively, Dr Alex Veen suggests create unique regulation that helps protect workers in this form of work.¹³ So while CRA supports the Bill's provisions to prevent some level of exploitation of digital platform engaged workers, it

⁸ Alex Veen, et. al., "Australian consumers support better protections for gig workers," *Sydney Business Insights*, <https://sbi.sydney.edu.au/australian-consumers-support-better-protections-for-gig-workers/>

⁹ F. Macdonald & S. Charlesworth, "Regulating for gender-equitable decent work in social and community services: Bringing the state back in," *Journal of Industrial Relations*, 63, 4 (2021): 477–500.

<https://doi.org/10.1177/0022185621996782>. One digital platform claims to have 10,000 care and support workers on their platform and to list 220 new independent care contractors each week.

¹⁰ Fiona Macdonald, "New laws for 'employee-like' gig workers are good but far from perfect," *The Australia Institute*, <https://australiainstitute.org.au/post/new-laws-for-employee-like-gig-workers-are-good-but-far-from-perfect/>

¹¹ Alex Veen, "Gig economy needs to see creative reforms from the federal government," *The University of Sydney*, <https://www.sydney.edu.au/news-opinion/news/2023/06/20/the-australian-government-needs-to-be-creative-with-gig-economy-.html>

¹² Fiona Macdonald, "New laws for 'employee-like' gig workers are good but far from perfect," *The Australia Institute*, <https://australiainstitute.org.au/post/new-laws-for-employee-like-gig-workers-are-good-but-far-from-perfect/>

¹³ Alex Veen, "Gig economy needs to see creative reforms from the federal government," *The University of Sydney*, <https://www.sydney.edu.au/news-opinion/news/2023/06/20/the-australian-government-needs-to-be-creative-with-gig-economy-.html>

encourages the government to consider measures to protect the gig economy from becoming an entrenched underclass of “employee-like” workers, with limited security and rights.

Further, the government should consider extending these safeguards to all gig economy workers, not just those engaged via digital platforms. Gig workers are estimated to number in the hundreds of thousands,¹⁴ and safeguards should apply whether they are engaged by a digital platform or not.

Wage Theft

A recent Senate Inquiry into unlawful non-payment or underpayment of employees’ remuneration by employers, otherwise known as wage theft, found it to be a markedly increasing phenomenon in Australia from around 2015, widespread in the hospitality, retail, horticulture, franchise-heavy and higher education sectors.¹⁵ Worryingly, they reported that wage theft was largely deliberate and systematic, and often normalised, with underpayment affecting thousands of workers, robbing them—and the Australian economy—of billions of dollars every year. Vulnerable workers in insecure work arrangements, including women, migrants, youth, First Nations Peoples and regional, rural and remote workers, are particularly impacted.¹⁶ CRA therefore supports the Bill’s provisions to help protect vulnerable workers from wage theft. We applaud the increase in penalties to make it a more serious offence, and the introduction of criminal charges if found to be intentional. Likewise, additional rights for delegates to educate workers as to their rights and raise issues with employers on behalf of workers will greatly assist.

However, other measures are needed to truly protect vulnerable workers, with Associate Professor Giuseppe Carabetta believing that criminalisation does not assist affected employees to easily seek redress.¹⁷ Further recommendations were made in the report of the Senate Inquiry. These included particular measures to protect migrant workers, such as reforming visa rules that make them particularly vulnerable to exploitation and creating clear pathways from temporary to permanent. Also recommended was a mechanism for the Australian Securities and Investments Commission to disqualify directors of companies guilty of systemic non-compliance.¹⁸ Associate Professor Giuseppe Carabetta has also suggested that enhanced enforcement, through expanding the role of and better resourcing the Fair Work Ombudsman and other regulatory agencies, will yield greater compliance and compensation.¹⁹

¹⁴ Michelle Grattan, “Gig economy workers set for new protections in Albanese government’s legislation introduced next week,” *The Conversation*, <https://theconversation.com/gig-economy-workers-set-for-new-protections-in-albanese-governments-legislation-introduced-next-week-212541>

¹⁵ Senate Standing Committees on Economics, “Systemic, sustained and shameful,” https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages/Report/section?id=committees%2freportsen%2f024434%2f76110

¹⁶ *Ibid.*

¹⁷ Giuseppe Carabetta, “Wage theft has reached pandemic proportions, so why hasn’t the Albanese government criminalised it?” *The Conversation*, <https://theconversation.com/wage-theft-has-reached-pandemic-proportions-so-why-hasnt-the-albanese-government-criminalised-it-195804>

¹⁸ Senate Standing Committees on Economics, “Systemic, sustained and shameful,” https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Underpaymentofwages/Report/section?id=committees%2freportsen%2f024434%2f76110

¹⁹ Giuseppe Carabetta, “Wage theft has reached pandemic proportions, so why hasn’t the Albanese government criminalised it?” *The Conversation*, <https://theconversation.com/wage-theft-has-reached-pandemic-proportions-so-why-hasnt-the-albanese-government-criminalised-it-195804>

Conclusion

As outlined above, CRA supports the Bill as it will provide greater protections and minimum standards for vulnerable workers, particularly casuals, those working in the gig economy and those whose characteristics or life circumstances might make them susceptible to exploitation by employees. However, as noted numerous times, the Bill is only step in the right direction, with further legislative changes needed to truly secure the dignity and rights of these workers, allowing for their full participation in our society.