ASU Submission

Senate Education and Employment Legislation Committee

Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

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Introduction

The Australian Services Union ('ASU') is one of Australia's largest unions, representing approximately 135,000 members. ASU members work in a wide variety of industries and occupations in the public private and community sector, including local government, energy, airlines, social and community services, disability, and NDIS, clerical and administrative, information technology, and the Queensland Public Service.

In all industries, work has become less secure and more precarious. For far too long, businesses have used loopholes and sharp legal strategies to undercut the pay and conditions of Australian workers. Our industrial relations system must be rebalanced to provide fairness to work people. Every worker deserves the same protections, whether they are contractors, labour hire, on demand and or casual workers casual workers. The Closing Loopholes Bill will ensure that every Australian worker can enjoy the same protections and minimum standards. It is time for Parliament to close the loopholes and pass the bill.

This submission supplements the submission of the Australian Council of Trade Unions with the experiences of the ASU's members. It addresses the definition of employee, the definition of casual employment, the importance of regulating platform employment in the NDIS, and the exploitation of labour hire loopholes by major Australian employers.

We support the ACTU's submissions and urge the Parliament to adopt their recommendations.

Recommendation 1 **The Closing the Loopholes Bill should be passed in full subject to the amendments proposed by the ACTU and the ASU.**

Recommendations

Recommendation 1	**The Closing the Loopholes Bill should be passed in full subject to the amendments proposed by the ACTU and the ASU.**
Recommendation 2	**The Fair Work Commission should be required to consider funding and regulatory arrangements for government-funded sectors (such as the NDIS) when making Minimum Standards Orders and Minimum Standards Guidelines.**
Recommendation 3	**The Fair Work Act should be amended regulate the provision of labour hire services by national system employers to state system local governments.**
Recommendation 4	**The Commonwealth Government should collaborate with State Governments to close jurisdictional loopholes and ensure all Australian workers are protected from unfair labour hire practices.**
Recommendation 4	**Fix the loophole in s 351 by applying an objective test to the employer's behaviour in general protections cases.**
Recommendation 5	**The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 is passed with amendments to carve out and protect Victorian wage theft laws.**

Platform Workers

The on-demand workforce has grown rapidly in Australia in the last decade. Previous Federal Governments have failed to regulate employment in the sector, turning a blind eye to exploitative working arrangements. Platform workers are often paid well below legal minimum rates, work with no safety net. Platform work also poses intolerably high safety risks for workers and consumers. This problem is particularly pronounced in the NDIS and disability sector, where the rise of platform work poses a significant risk to quality the of service delivery and the sustainability of the NDIS. The Government's proposals to regulate platform employment would support choice and control by ensuring the sustainability of the NDIS and the quality of NDIS services.

How does the NDIS work?

The National Disability Insurance Scheme ('**NDIS**') is the national insurance system for people with permanent disabilities under the age of 65. NDIS services are funded through a unique mechanism – direct funding to individuals. Individual people with a disability are given funding directly to purchase services at a fair price to meet their assessed needs. Following assessment, NDIS participants receive funding for a range of services. NDIS Participants are then free to buy services to meet their needs.

Depending on which supports are funded, the client receives a funding package based on the 'Disability Support Work Cost Model'[1] produced by the National Disability Insurance Agency.

The Support Worker Cost Model provides for minimum wages and conditions to be properly funded. This includes an hourly rate of pay based on:

- The type of support being provided, and
- level of intensity[2] which is linked to the relevant Classification in the SCHADS Award.

Support Worker Costs Model also includes provisions for other minimum Award entitlements such as Superannuation, Annual Leave, Annual Leave Loading, Personal Leave, Public Holidays, workers compensation, supervision, and training. On top of employee entitlements there are additional loadings to cover efficient business and operational costs.

The NDIS Price Guide records the maximum prices for each type of support provided through the NDIS.[3]

Contemporary expectations for disability services and disability support workers are very high. The NDIS requires workers to autonomously implement NDIS plans, to support and develop the independence of people with a disability, and to use modern practices that respect the human rights of people with disability. However, the quality of services and the sustainability of the NDIS are threatened by lack of suitably qualified and motivated staff to deliver those services.

[1] NDIS, *Disability Support Worker Costs Model 2022-2023*, Australian Government, Canberra, 1 July 2022. https://www.ndis.gov.au/media/4566/download?attachment

[2] 'Intensity' describes the complexity of the supports being provided to a person with a disability and the level of specialised skills required to provide those supports by the support worker. More complex supports or more specialised skills attract a higher classification and rate of pay.

[3] NDIS, *Pricing Arrangements and Price Limits 2022-2023,* Australian Government, Canberra, 5 May 2023. https://www.ndis.gov.au/media/5911/download?attachment

The NDIS is facing a workforce crisis driven by low pay and poor working conditions

Nearly a decade of neglect by the Coalition Government and loopholes in Australian industrial relations system are threatening the sustainability of the NDIS.

However, the NDIS loses between 17.5% and 25% of its workforce each year because the work is demanding, the working conditions are poor, and rates of pay are low. A stable workforce is crucial for attracting and retaining skilled professionals, providing ongoing professional development and training, and ensuring the availability of experienced workers to meet the long-term needs of people with disability. Motivated, professional, and continuously improving disability support workers will not do work for poverty wages and should not have their work so deeply undervalued. If the NDIS becomes an employer of last resort (a real risk) then it cannot fulfil its objectives.

A small but growing minority of NDIS participants currently access services through platform providers.[4] The growing prevalence of platform/gig work within the NDIS workforce is a leading contributor to workforce churn by undercutting stable employment arrangements at traditional employers.

NDIS platforms have an unfair advantage of other NDIS providers

Under current regulatory settings, NDIS platform services have an unfair competitive advantage over traditional employers who must comply with the modern award safety net for employees. Disability services are labour intensive (around 80% of organisational budgets is spent on labour costs). Any difference in the cost of labour can significantly affect the competitiveness of a NDIS provider.

The same pricing arrangements apply to all NDIS providers. The Disability Support Worker Costs Model uses the minimum safety-net pay and conditions that apply to employees under the *Social, Community, Home Care and Disability Services Industry Award 2010* ('**SCHDS Award**') and the *Social and Community Services Equal Remuneration Order 2012*[5] ('**SACS ERO**') to determine pricing for work delivered by disability support workers.

A platform provider has no obligation to comply with any of these instruments because its workers are not employees. A platform has no obligations to set consistent rosters, apply minimum payment periods or pay minimum SACS ERO wages. Platforms can deliver services more profitably than traditional services because they can charge higher fees and undercut other providers on pricing. This is competition through a race to the bottom – not competition on service quality and innovation.

Case Study: Mabel – A loophole Company

Mable is a digital labour platform providing services in the NDIS and aged care sectors. It enrols Independent Support Workers and customers (NDIS participants) and joins them up using the online platform.

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[4] NDIS Review, *Building a More Responsive Workforce*

[5] In 2012, the Fair Work Commission made an Equal Remuneration Order covering Social and Community Services Employees in recognition of the gender-based undervaluation of their work. This order applies to every worker in the social and community sector, including NDIS workers such as disability support workers, support coordinators, local area coordinators, and back-of-house/administrative staff. The Equal Remuneration Order applies a loading to the SCHDS Award Pay rates for SACS Employees. A summary of the ERO rates of pay can be found at Note 2 to Clause 15 of the SCHDS Award.

Mable advised the Victorian Inquiry that it has coded a safety net hourly rate into its platform. Workers purportedly use the Mable platform to negotiate both scheduling and remuneration. However, a review of Mable's own website makes it clear that its sample rates that it encourages contractors to charge are dramatically below the accepted industry minimum wage for disability support workers under the SCHADS Award.

As of 27 September 2023, Mable advertises on its website[6] that the average rates on its platform for social support was $50 per hour on weekdays and $65 per hour on weekends. These prices include the 10% fee that Mable charges support workers to use the platform and the 7.95% fee Mable charges NDIS participants.

The average platform worker's take-home hourly rate would $41 per hour. NDIS prices assume that employee entitlements (including award wages, leave entitlements, superannuation) for basic support work would amount to $46.64 per hour. It then adds additional loadings for overheads and costs, bringing maximum prices for basic support work to $65.47 for daytime weekday work.

The $41 per hour is not enough to replace basic employee entitlements, let alone other essential spending such as professional training and development or the use of private motor vehicles.

This practice compounds gender-based undervaluation of disability support work and gives Mable an unfair advantage over their competitors.

A level playing field for all NDIS providers and workers

We know from practical experience that NDIS employers are very concerned that any improvement in employment conditions will mean that they lose participants to platform providers and fly-by-night operators. They will even acknowledge that this will drive employee turnover and complain they cannot attract or keep skilled staff. This is not a problem that can be addressed employer-by-employer advocacy. We need sector-level industrial regulation to maintain a level playing field.

All workers in the disability sector – no matter how they are employed, deployed, or engaged – should be entitled to the same basic safety net of SCHDS Award conditions as all other disability support workers. The Government's proposal to regulate platform employment would ensure that all NDIS providers and all NDIS workers will operate on a sustainable and level playing field. This would set a minimum industrial safety net and standard for all workers in the sector and give NDIS participants the assurance that they were paying their support workers properly and not inadvertently engaging in wage theft. It would also level the playing field so that all providers can compete on quality – not exploitation of people – when providing services to participants.

Recommendation 2 **The Fair Work Commission should be required to consider funding and regulatory arrangements for government-funded sectors (such as the NDIS) when making Minimum Standards Orders and Minimum Standards Guidelines.**

[6] Mable, https://mable.com.au/pricing/, Accessed 27 September 2023.

Closing Labour Hire Loopholes

The ASU supports the Commonwealth Government's proposed reforms to close labour hire loopholes. It is unacceptable that some businesses use labour hire to undercut pay and conditions of directly employed workers. Many large employers deliberately threaten that they will replace directly employed staff with labour hire during bargaining and consultation processes. Or they will slowly replace higher waged directly employed staff with lower paid labour hire casuals over a longer period. Removing the labour cost incentive to outsource work to labour hire would rebalance the relationship between employees and employers. We acknowledge that not all decisions to engage external labour are made because of a desire to undercut or undermine prevailing rates of pay. However, there should be a mechanism to address unfair pay rates, even if that was not the intent of the business.

Case Study: dnata/ Airport Handling Services Australia

In 2017 the ASU exposed international airline service company dnata's creation of Airport Handling Services Australia (AHSA), in a bid to undercut its existing employees. Dnata is a labour hire company that provides labour to international airlines operating in Australia. Dnata workers work in the host employer's business, use the host employer's system, and often wear the host's uniforms.

AHSA was established to provide workers at lower pay and conditions than dnata's existing employees. AHSA employees were only guaranteed the legal minimum wage and did not enjoy the better pay and conditions negotiated by ASU members in their enterprise agreement.

Dnata used AHSA to compete directly with its own workforce for labour hire contracts, eroding job security.

Following a protracted campaign to defend the rights of the permanent workforce, dnata dropped their plan to put AHSA staff on a separate Agreement. The ASU successfully negotiated a comprehensive agreement which covered all dnata and AHSA employees.

The new agreement enhanced job security and included provision to transition labour hire and casual staff into permanent position.

We need to close the loopholes that allow labour hire companies to compete against themselves to drive down wages and conditions.

Closing the Local Government labour hire loophole

Every Australian worker deserves same protections from unfair labour hire arrangements. But not all workers will have the same protections if the legislation is passed in its current form.

The ASU represents more than 60,000 workers in Australian local government. Our members deliver essential infrastructure and community services such as roads, water garbage disposal, children' services, libraries, parks, pools, sport facilities, planning and local law enforcement. In many areas, the local council is the largest employer. Our members are dedicated to their work and to their communities.

Sadly, not every local government employer puts the same value on our members' work. Too many employers take a short-sighted approach to service and infrastructure delivery and attempt to outsource services to low wage labour hire providers. Labour hire is a significant problem in local government, affecting the quality and sustainability of service delivery.

Our members are largely employed under state industrial relations legislation or under referred state-powers in the federal system. This creates loopholes that mean our members may not be protected by either federal or state legislation when their jobs are outsourced to National System Employers.

Further, state-system local government employees are not protected by the Fair Work Act transfer of business rules. Unlike national system employees or transferring state government employees, local government employees do not keep their enterprise agreements when their work is outsourced. These provisions should be reviewed in the future.

Libraries

Council libraries provide a wide range of services including book-borrowing, book clubs, reading programs, computer training, events, and workshops. Councils are increasingly using labour hire to replace directly engaged permanent and casual staff in council libraries. This is disrupting professional pathways for librarians and information professionals.

Case Study: City of Port Adelaide Enfield & Randstad

City of Port Adelaide Enfield is a South Australian state-system employer. The ASU has negotiated an state-system enterprise agreement covering indoor white-collar staff.

Sally has a Certificate III in Library and Information studies. Sally was employed directly Port Adelaide Enfield as a Casual Library Officer in early 2021. She gradually increased the number of hours she worked with Port Adelaide Enfield, until she was working approximately 25 hours each week and had constructive conversations with her team leader about a permanent position. In 2022, the council stopped offering her shifts. She was never given any notice that her employment would be terminated.

In early 2023, about 9 months after leaving Port Adelaide Enfield, Sally accepted a library job at a 'Metro Council' through the labour hire firm Randstad. She later discovered that she was returning work at Port Adelaide Enfield. If she worked as a permanent employee for the Council, she would be paid $41.00 per hour. As a labour hire employee, Sally is earning $15.00 less per hour than when she did the same job for council. She won't be protected by the Bill in its current form.

Yasmin has been employed at Port Adelaide Enfield through Randstad for about 5 months. Her working hours are very inconsistent. Most of her hours are last minute shift fill-ins and there is little continuity in her schedule. Yasmin is often asked to come into work during hours the Team Leader knows they're not available. Yasmin says that she can be terminated at any time and so she won't refuse unfair hours. If Yasmin was a casual for the council, she would be paid $51.00 per hour.

Case Study: City of Tea Tree Gully & Randstad

Tea Trea Gully Council is a South Australian state system employer with an ASU-negotiated enterprise agreement for indoor white-collar staff.

Tea Trea Gully engages 6 casual library staff through labour hire firm Randstad. This is approximately 20% of their library workforce. The Council has been using Randstad labour hire staff in their library for many years. Randstad staff perform 'front of house duties', including customer service, returning books to shelves, and picking items for holds. According to one team leader, these labour hire staff are responsible for around 60 hours of work performed each week at the library.

Randstad staff in the library are lower paid than their directly employed colleagues and miss out on many employment benefits. For example, the City of Tea Tree Gully provides free flu shots to their staff, but labour hire employees are not eligible. Randstad employees are also restricted from applying for internally advertised jobs at the council. This makes it harder for the team leaders to keep staff at Tea Tree Gully, because quality workers quickly leave for permanent roles elsewhere.

Customer Services

Councils rely on customer service staff to engage with their communities. Customer service staff support the community online, by telephone and face to face. Increasingly, Councils are reducing the number of directly employed customer service staff and replacing them with labour hire. Labour hire staff are usually directly managed by the council and usually deliver core council customer service functions.

Case Study: City of Marion

Jane started working in the City of Marion customer service team as a 'Customer Service Consultant' at start of March 2023. Jane is employed by Randstad, a labour hire provider.

Jane is not backfilling a vacant role or working temporarily during a busy period. The customer service team is understaffed, so Jane is expected to work full-time hours to maintain coverage. However, Jane does not receive the paid leave, rostered days off, work from home days and the other conditions enjoyed by directly engaged permanent staff.

Management pushed back when Jane took unpaid sick days earlier this year. Jane does not think she would be allowed to take a holiday. She is worried about job security because she works on 6-month contracts.

Jane is paid $35.87 per hour. If she was working as a casual for the council, she would be paid $48.85 per hour.

Waste Management

Waste management is a core function of any council. Sadly, too many councils outsource this work to labour hire firms who undercut council wages and provide a poorer service.

Case Study: Merri Bek Council & Citywide

Merri Bek Council is a Victorian local government and a national system employer. Merri Bek partially contracted-out waste management to Citywide several years ago, and in 2020 decided to continue that arrangement. Some areas receive waste management services from an in-house Merri Bek team. Other areas receive services from an outsourced Citywide team.

In the Citywide service area, community members report that service is inferior compared to the service provided by the in-house team. In Citywide services areas, bins are often A Merri Bek Garbage Truck driver earns **$83,000** under the enterprise agreement. A Citywide employee earns between **$63,000 and $72,000** depending on their experience and the equipment they use.

Citywide is local government industry labour hire firm wholly owned by Melbourne City Council. Citywide tenders for work at Victorian local councils. When Citywide takes a contract, it replaces directly engaged council employees with lower paid labour hire employees. Citywide has an enterprise agreement, but not all Citywide staff are covered by the enterprise agreement.

Parks and Gardens

Council parks and gardens are essential community infrastructure, they include from small local reserves, sporting grounds, and major landmarks. Sadly, our outdoor green spaces and recreational facilities fall into disrepair when dedicated council workers are replaced with transient, low-paid labour hire workers.

Case Study: Sutherland Shire Council

Sutherland Shire Council is the local government for a diverse and growing suburban region in southern Sydney. It is an NSW state system employer and is covered by an ASU-negotiated enterprise agreement.

It is the largest employer in the local government area and is responsible for the delivery of essential services and infrastructure. Council staff do maintain roads and footpaths including filling potholes, drainage-issues, footpath construction, and short distance road surfacing. Parks and Gardens staff maintain garden beds, sports fields, parks, the botanic gardens, and the foreshore areas. Waste Services, where our members carry out cleaning duties in all council buildings, clean and maintain Malls throughout the Shire, and clean the foreshore areas.

These departments represent a significant investment in skilled workers and equipment. The community can be assured that the work is carried out by skilled and qualified employees and knowing that their local infrastructure and facilities are well maintained, safe and clean.

This skilled workforce and high-quality equipment can also be called upon in the event of natural disasters such as flood and fire. Many Sutherland Shire Council employees were sent to the far south coast during the 2019-2020 bush fires. They supported emergency services and local authorities during the fires and then helped communities rebuild. Our members were working on 24/7 rosters and 10-to-12-hour shifts.

Short Term Labour Hire

The Sutherland Shire Council uses labour hire to cover work during employee absences when the Council should be engaging sufficient staff to allow for internal coverage for short term absences. The additional costs of labour hire for leave coverage are on average 30% more than the cost of additional staff. Further, most labour hire workers have little experience of council services and requires additional support and training on the Job. Because they lack job security and a firm connection with the workplace, they also lack the same level of commitment as direct council workers. The union has proposed a traineeship program as an alternative to labour hire. This would ensure sufficient staff are available to always maintain service delivery while also developing the future council workforce.

Contracting Out Council Work

A significant amount of Council work is being contracted out. Parks and Gardens, Foreshore, Construction, Maintenance, Waste and Cleaning are all areas that have contractors doing council work. The types of work being contracted out as an example are mowing, garden bed maintenance, traffic control, and the cleaning of Council assets.

Impact on services and infrastructure

Over the time that labour hire and contractors have been engaged in carrying out Council Employees work, the quality of the work carried out by Contractors and labour hire is by for inferior to the work carried out by Council employees.

Our members regularly report that they are called out to repair or fix the work of a contractor or Labour hire.

It is not uncommon that employees of Council will complain to their management on Contractors and Labour hire not ensuring that all aspects of safety are applied at a worksite, leaving workers and the public at risk.

Pools and Leisure Centres

Council provides communities with accessible, well-maintained pools, leisure centres, sporting facilities. Directly employed workers at these facilities are usually covered industrial instruments by negotiated the ASU. Labour hire providers pay significantly lower wages.

Case Study: City of Sydney Council & Belgravia Leisure

City of Sydney Council has recently resolved to continue the contracting out of its pools and leisure centres to Belgravia Leisure. City of Sydney Council staff are covered by a USU-negotiated NSW state system award.

Belgravia Leisure is a major contractor in local government pools and leisure providing services to councils across Australia. This includes state system and national system employers. For nearly 20 years, Belgravia Leisure undercut council workers with a zombie agreement[7] with a 40-hour working week, no weekend, shift or public holiday penalty rates and a 20% casual loading.

Thankfully, Belgravia Leisure's zombie agreement will terminate on 6 December 2023 thanks to the Government's Secure Jobs, Better Pay reforms to the Fair Work Act. However, this will only move Belgravia's employees onto the federal Fitness Industry Award 2020. This award offers significantly lower rates of pay for employees ($832 to $859 per week) than provided by our state system enterprise agreements ($950 to $1120 per week).

Recommendation 3 **The Fair Work Act should be amended regulate the provision of labour hire services by national system employers to state system local governments.**

Recommendation 4 **The Commonwealth Government should collaborate with State Governments to close jurisdictional loopholes and ensure all Australian workers are protected from unfair labour hire practices.**

[7] *Belgravia Leisure Certified Agreement* made under the Howard-era *Workplace Relations Act 1996*.

Definition of Employee

The ASU welcomes the inclusion of a statutory definition of employment based on objective criteria. The recent approach of the High Court (in *Personnel* and *Jamsek)* places too much emphasis on the rights in the written contract. This gives too much power to the party with the most bargaining power and access to lawyers at the time of engagement. In almost all circumstances, this will be the employer.

Fairness demands that the definition of employment of employment looks beyond the words of the contract to the true, practical nature of the working relationship. This approach recognises that employers and employees are not equals in the labour market. In most cases, the employee is at a disadvantage and must accept the offer of a job as is.

Even where they have some bargaining power, employees often lack the legal knowledge to properly engage in negotiations over the terms of their contract.

We support the ACTU recommendations to strengthen the Bill. We wish to emphasise the recommendation to grant the Fair Work Commission the jurisdiction to arbitrate on the question of whether a worker is an employee or an independent contractor. This would assist us to resolve disputes about employment status in more informal and efficient way than court action.

Case Study: Jennifer and Maxima

The customer services team at Tea Tree Gully is the face of the council. It usually has 9 or 10 staff, 3 or 4 of which are usually employed through Maxima, a labour hire company.

ASU member **Jennifer** was employed through Maxima to work at the reception desk, answer calls and emails from residents, respond to online questions and comments from residents, handle rates and cashier duties, and support other teams within council during short-term and seasonal bursts in workload. Jennifer also took over the monitoring work orders were for the whole organisation to ensure they were up to date (a task which was previously within the scope of the customer relations team leader).

Jennifer was paid $39.45 (the same hourly rate as a City of Tea Tree Gully employee in the same role) but she did not enjoy paid leave and other entitlements. Maxima informed her that she was an independent contractor and notified her that she needed to report her income as ‘personal services income’.

Jennifer wasn’t running her own business – she was working as an administrative professional in a core function of the Council. Jennifer should have been an employee of Maxima, if not the Council.

Casual Employment

Employers have abuse loopholes in the definition of casual employment to misclassify ongoing workers. It is not acceptable for workers who have set shifts and are long serving at their employer to be treated as disposable temporary workers simply because their contract says 'casual'. The recent approach of the High Court at *Rossato* has radically transformed traditional understandings of casual employment. The *Rossato* approach privileges the bare words of the employment contract over the practical reality of their working arrangements. The Closing the Loopholes Bill's proposed definition of casual employment is an important step to rebalancing our industrial laws. Working people with regular and predictable working hours should be entitled to convert to permanent employment. This right must be backed up by an effective and accessible enforcement mechanism: Fair Work Commission arbitration.

Case Study: Administrative Worker – Corporate Sector

Pablo has been employed as an administrative worker by a large company since March 2022. Pablo was interested in a casual role with the company because it was advertised that there would be a variety of shifts that he would be able to work when it suited him. Instead, when Pablo was offered the role, he was told he would be working at least 4 days a week. Soon after he started working, he was placed on mainly night shifts, which also didn't suit him. In early June 2023, the company offered him conversion to part-time permanent employment. Pablo accepted the offer; however, the company didn't formalise the conversion with a written agreement or letter of offer.

Pablo had to get in touch with the union, who have arranged for the conversion to take place on 2 October. The union negotiated that annual leave would be counted from around the time he was offered and accepted the conversion in June.

Case Study: Administrative Worker – Local Government Labour Hire

Henry works as a Fleet Administrative Support Officer for a South Australian Council. The role is responsible for commissioning and decommissioning of vehicles, maintaining registrations, asset administrative duties for vehicles and procurement team. These are ongoing, core council functions.

Henry was first engaged two years ago through as a casual employee of a labour hire provider. As a labour hire casual, Henry was working 38 hours or more each week in a regular pattern of work. However, he did not receive the paid leave or other conditions of employment enjoyed by directly engaged staff. He went without pay if he was sick and during the annual Christmas shutdown.

Under the Government's proposed amendments, Henry would have been able to give notice to his labour hire employer that he wanted to become a permanent employee. He would have been entitled to paid leave and other benefits of permanent employment.

Henry has recently become a permanent employee. Henry raised with the Council that he wanted to be an ongoing employee several times. Henry is now a council employee and subject to a 6-month probation period despite. Henry was never told why it was a labour hire role, but it was not for backfill or for additional team support. He was delivering ongoing, core administrative functions for the council.

Henry is now classified at Level 3 of the council's enterprise agreement. As a labour hire employee, he was told his pay was 'pegged' to Level 3 but did not include the full casual loading for an employee

without leave entitlements or job security. He was paid $41.14 and would have been paid $47.54 if he was a casual council employee.

Henry went without his full rate of pay, paid leave and job security for two years because his labour hire employer and the host council exploited the loopholes in our industrial relations system.

Stronger Protections Against Discrimination for People Experiencing Family and Domestic Violence

As the union of frontline family and domestic violence workers, the ASU has been a leader in the campaign to end the untold damage of family and domestic violence in our community. Our campaign has focussed on the fact that domestic violence is a workplace issue. We led the successful campaign that made ten days of Paid Family and Domestic Violence Leave a universal right for all workers through the National Employment Standards (NES).

Family and domestic violence is a critical workplace issue because it directly impacts employees' safety and well-being. Workers living with family and domestic violence change their job more often, miss out on promotions, are more likely to resign or be terminated and more likely to be bullied at work. The effects of violence can extend beyond the home, infiltrating the workplace through absenteeism, reduced concentration, decreased performance, and increased stress.

All too often, employers fail to recognise the complex needs of individuals who have experienced violence, including the deep and lasting impact of trauma. Trauma affects every aspect of a person's life, including their ability to work and function effectively. Employers should create a space for safety, healing, recovery, and rebuilding. They should give survivors time and space to prioritise their well-being, seek necessary support, and break free from the cycle of violence. This compassionate approach promotes a culture of understanding, validates the experiences of those who have experienced violence, and empowers them to reclaim their lives.

The ASU supports the proposal to include subjection to family and domestic violence as a protected attribute in the Fair Work Act. These changes recognise the impact of family and domestic violence on working people. It is important to protect workers who are experiencing family and domestic from discrimination at work, reprisals for exercising their workplace rights, and to ensure better options for recourse if such discrimination and reprisals do occur.

Further, general protections applications relying upon or including contraventions of section 351 are unduly complex and difficult claims to pursue. This is in no small part due to the decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('Barclay'),[8] in which the High Court decided that an employer's adverse action does not need to be 'entirely dissociated' from a protected attribute, only that the protected attribute was not a 'substantial and operative factor' in their decision. This was based on the Court's interpretation of section 361 of the FWA, in which the employer is presumed to have taken the adverse action for the reasons alleged unless they prove otherwise. The line of authority applying Barclay has led to several cases in which union members engaging in lawful industrial activity have been dismissed because the employer subjectively believed

[8] Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500

that the activities broke laws, damaged their reputation or breached the employer's policies (whether this was actually the case).[9]

Legislative intervention to fix section 361 is imperative. Amending this section to include an objective test, and/or a requirement for the employer to prove that the adverse action was sufficiently dissociated from the reason alleged will go part of the way to fixing general protections.

We also support the ACTU's recommendations to strengthen the Fair Work Act protections against discrimination by removing technical barriers to bringing applications.

Recommendation 5 **Fix the loophole in s 351 by applying an objective test to the employer's behaviour in general protections cases.**

Wage Theft – Protecting the Victorian Jurisdiction

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'.[10] We are concerned that the Closing the Loopholes Bill as introduced would override Victorian laws criminalising wage theft.

The Wage Theft Act 2020 (Vic) ('**Victorian Wage Theft Act**') creates criminal offences against employers who dishonestly and deliberately withhold wages and entitlements and establishes Wage Inspectorate Victoria ('**WIV**') as a standalone statutory authority with enforcement powers. This is a robust and effective scheme. The Closing the Loopholes Bill should be amended to ensure that the Fair Work Act works with *and not against* the Victoria Wage Theft Act and WIV. Further, WIV is an effective, hands-on regulator. It should be allowed to continue its good work. There must be careful coordination between WIV and the Fair Work Ombudsman once the Bill becomes law.

We note the submission of Victorian Trades Hall Council and we support their recommendations.

Recommendation 6 **The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 is passed with amendments to carve out and protect Victorian wage theft laws.**

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[9] Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2014) 253 CLR 243; Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd (2015) 231 FCR 150.

[10] https://anthonyalbanese.com.au/media-centre/labor-will-criminalise-wage-theft-13-may-2021