



**Foundation for Young Australians + Tomorrow Movement +
Young Workers Centre**

Secure, safe and meaningful work for young people

February 2021

Executive Summary

The Foundation for Young Australians (FYA), the Tomorrow Movement and the Young Workers Centre (YWC) welcome the opportunity to contribute to the Education and Employment Legislation Committee inquiry (Inquiry) into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions] (Bill).

FYA, the Tomorrow Movement and YWC commend the Committee for seeking input from the community on what the Bill would mean for workers across Australia.

Young workers were already entering a weak labour market pre-COVID-19

Young people's career trajectories and working futures were shifting from previous generations even prior to COVID-19. A weak labour market, prevalent since the Global Financial Crisis¹ has led to a number of worrying trends for young people entering the workforce:

- **High youth underutilisation:** Almost one in three young people were unemployed or underemployed prior to COVID-19.²
- **Increase in casual full-time work:** Since 1992 the number of young people (15-24) in casual full-time employment has more than doubled.³
- **Growth of the gig economy workforce:** Since 2016 the gig economy workforce is estimated to have grown by 340% with young people (under 35) making up over 50% of this workforce.⁴
- **Experiences of wage theft:** Young people are disproportionately exposed to issues of wage theft as demonstrated by several major cases during 2019.⁵
- **Low or zero wage growth for young workers:** Young workers aged 20-34 experienced nearly zero growth in real wage rates from 2008 to 2018.⁶

COVID-19 exacerbated inequalities in the labour market

COVID-19 has impacted every element of young people's working lives. In 2020, young people were disproportionately exposed to the risks of job losses and are likely to feel the impact of the pandemic for the next decade in their careers.

- **Disproportionate job losses:** Young people were overrepresented in some of the industries hardest hit by COVID-19. For 15-19 year-olds, the accommodation and food services sector provides employment for more than 35% of young working people. For 20-24 year-olds retail trade, at 18%, and accommodation and food services, at 15%, are the two biggest industry employers.
- **Job losses concentrated on casual work:** Analysis during COVID-19 highlighted that the number of casual jobs in small business had fallen 25% between the first week of March and the last week of April, compared to 2% for full time and 5% for part time jobs.
- **Scarring effects may linger for a decade:** Insights from previous recessions show that young people may experience scarring effects in the labour market for up to a decade resulting in lower wages, higher likelihood of overqualification for jobs and higher rates of unemployment and underemployment.⁷

¹ Productivity Commission (2020), "Climbing the jobs ladder". Available at: <https://www.pc.gov.au/research/supporting/jobs-ladder>

² Foundation for Young Australians (2018), "The New Work Reality". Available at: <https://www.fya.org.au/report/the-new-work-reality/>

³ *ibid.*

⁴ Foundation for Young Australians (2020), "The New Work Standard". Available at: <https://www.fya.org.au/report/the-new-work-standard/>

⁵ See Young Workers Centre (2019) for more information: <https://youngworkerscbr.org.au/2020/01/2019-a-crisis-year-for-wage-theft/>

⁶ Productivity Commission (2020), "Climbing the jobs ladder".

⁷ Productivity Commission (2020), "Climbing the jobs ladder".

Impact of COVID-19 on young people's working lives

"A lot more people are going to be forced to shelve their dreams moving forward, especially young people, who might have just been getting on track or just about to start life and now have been put behind. If there aren't appropriate steps taken, that might result in really long term effects on a lot of people." - Young Focus Group Participant, June 2020

As Australia recovers from COVID-19, we need industrial relations reform that ensures young people have safe, secure and meaningful work. The proposed amendments to the Fair Work Act in the Bill do not increase this access, instead it will weaken the security of jobs for young people and increase the incidence of casualisation in our workforce.

Summary of recommendations

FYA, the Tomorrow Movement and YWC recommend the following actions for Education and Employment Legislation Committee:

1. Recommend that the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 not be passed.
2. Hold private hearings to hear direct witness testimony from young casual and part-time workers.

1. A fair go for young workers in the labour market

The proposed amendments to the Fair Work Act in the Bill would weaken an already weak labour market and create a number of new barriers for young workers accessing secure, safe and meaningful work.

Given the short submission timeframe for this Inquiry, we have briefly summarised our key concerns with the Bill which will have a significant impact on the lives of over 3 million young people across the country.

1. Young workers can be worse off overall for 2 years

The proposed changes to the Better Off Overall Test (**BOOT**) found in the *Part 5 - Better Off Overall* section of the Bill,⁸ means the Fair Work Commission can approve new enterprise agreements even if they fail the BOOT or fall short of the minimum standards in the National Employment Standards for the next 2 years. Young people's workplace conditions could be worse off overall for many years to come, as the agreements made during this period can remain valid for years until a new one is negotiated or a worker applies to have it terminated.

Low Bargaining Power at Work

"Your capacity to negotiate at the moment is very much dependent on your personal financial position outside of your workplace. If you're doing it tough you're not really in the position to say well I don't accept these extra roles you're putting on me or I don't accept these hour cutbacks or whatever, you sort of just have to roll with the punches." - Focus Group Participant, June 2020

2. Extra shifts without overtime for part-time young workers

Part-time workers can work extra hours without the employer paying overtime pay in retail and hospitality,⁹ which will create further hardship for the high numbers of young people affected by COVID-19 lockdown shutdowns in these sectors. This change would likely see part-time young workers who take on extra shifts getting less take-home pay. Young people aged 15 to 29 were the most likely to lose work due to COVID-19 related shutdowns, with almost 50% of young workers working in retail and hospitality. Considering the precarious nature of their employment, and low bargaining power at work - young people are generally not in a position to negotiate these changes.

3. Casual young workers can ask to be made permanent after 12 months¹⁰

Clause 15-A Meaning of a Casual Employee in the Bill¹¹ provides for casual young workers employed for at least 12 month and working regular hours for the past six months to request to be made permanent. We support the Fair Work Act implementing mechanisms to ensure young workers have access to the benefits of permanent work, including levers for young workers to be given access to permanent work benefits and entitlements to reflect the hours and regularity of their work. However, we are nervous that this allows employers to label workers as casuals for 12 months when they should have access to permanent work rights.

This change will not necessarily lead to more young people securing permanent work. This 'right' to casual conversion is not enforceable and there is no arbitration available for disputes. In addition, an employer is

⁸ Parliament of Australia (2020), "Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020". Part 5, pg. 43-45. Available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?page=0;query=BillId:r6653%20Reconstruct:billhome>

⁹ *ibid*, see 168Q Effect of simplified additional hours agreement pg. 26.

¹⁰ *ibid*, pg.5.

¹¹ *ibid*.

not required to offer a permanent position if it's not 'reasonable' for them to do so. This provision also creates a disincentive for employers to retain workers for longer than 12 months in case of the expectation of casual conversion. In practice, few young workers will request a casual conversion or challenge their employer's refusal due to low bargaining power and fears of losing hours or their job.

4. Casual young workers less likely to get backpay

Recent court cases have ordered billions of dollars in backpay to workers who were misclassified as casuals, but were actually part-time employees because they had regular, permanent work.¹² Clause 15-A Meaning of a Casual Employee in the Bill¹³ would amend the Fair Work Act in a way which would prevent future wage theft cases from succeeding. Under the Bill, a person is classified as a casual worker if they accept an employer's offer of employment on the basis that there is no firm commitment to continuing and indefinite work.

This change will make it harder for casual young workers working regular part-time or full-time hours to dispute their employment status and therefore access backpay for unpaid annual and sick leave if wrongly classified as a casual worker.

5. Consistent wage theft laws for all workers across National, State and Territory Governments

All workers in Australia should have the same treatment under the law when it comes to being paid fairly, and not being exposed to wage theft. Lucinda and Mina's experiences of wage theft (below) highlight the urgent need for reform to protect young workers' rights.

Case study 1: Lucinda on her experience with wage theft

"My experience of wage theft is really subtle – I have worked in jobs which did not pay me for overtime, or have any wage increase incentives, yet still put the pressure on for me to deliver high quality work. I have worked jobs which were cash in hand, jobs that I was asked to invoice for the \$20 p/hr wage, without understanding that meant I had to manage my own tax and superannuation.

All these situations, though, I thought were normal – I thought that these situations were what were expected, to "prove" myself before being worthy of a new role. In growing up working in hospitality, and saying "yes" to every shift, in fear of future shifts being cut, I learnt that you have to prove yourself to be an exemplary worker – and for me, that meant being happy, and accepting of their conditions. It felt like the cards were always in their hands, and I was scared to even speak up, or have the conversation, in fear of retribution."

Case study 2: Mina's experience with wage theft

Mina is an international student and had worked at a café for over a year she was 23 years old. Like too many international students, she was paid a flat rate below the minimum wage, with no penalty rates for working weekends or public holidays. Her employer also failed to pay the right amount of superannuation. By the time the café shut down in 2017, she was owed \$23,000 in stolen wages. Even after navigating the complex wage recovery processes through the Fair Work Ombudsman, Mina wasn't able to get her employer to repay her stolen wages until the Young Workers Centre legal centre restarted negotiations. She didn't get her money back until 2019 when the matter was resolved.

¹² See the Federal Court judgement on *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84. Media coverage: <https://www.hcamag.com/au/specialisation/employment-law/federal-court-doubles-down-on-casuals-double-dipping/223247>

¹³ Parliament of Australia (2020), "Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020". Pg.5.

National laws that address wage theft should not be inconsistent with state laws and their right to legislate within their respective criminal codes. In particular, Victorian laws in regards to wage theft¹⁴ should not be weakened.

The below table summarises the key additions regarding wage theft proposed in section 12 and the differences to the Victorian Wage Theft Bill.¹⁵

Table: Comparison of proposed National and Victorian wage theft provisions

| Element | Fair Work Amendment Bill 2020 Proposed Amendments | Victorian Wage Theft Bill (comes into effect 1 July 2021) |
|--------------------------|--|---|
| Definition of wage theft | The proposed additions to Section 12 ¹⁶ - 'Remuneration-related contravention' that contravenes civil remedy provision, or relates to the underpayment of wages or other monetary entitlements, unreasonable deductions or requirements to spend or pay, and the method or frequency of amounts payable to employees in relation to the performance of work. | 'Dishonest withholding of employee entitlements' including an amount payable, a benefit attribute, wages (including casual loading, penalty rates), superannuation, allowances, gratuities, leave entitlements, and breaks. |
| Breaches | <p>The Bill has a higher bar for dishonesty. It defines 'dishonest' to mean 'dishonest according to the standards of ordinary people' where the defendant must know it is dishonest according to the standards of ordinary people.</p> <p>'Serious' and 'non-serious breaches' are distinguished, where a 'serious contravention' applies when a person:</p> <ol style="list-style-type: none"> 1. knowingly contravened a provision, and 2. the person's conduct was part of a systematic pattern of conduct. <p>With regards to a 'systematic conduct': the court is able to consider the number of contraventions, the period in which the contraventions took place, the response when the contraventions are brought to their attention, and whether the employer kept records.</p> | <p>The Wage Theft Bill defines 'dishonest' to mean 'dishonest according to the standards of a reasonable person'. Dishonesty also captures recklessness, which is defined as failing to do 'what a reasonable person should have done in the circumstances'.</p> <p>In defence, someone accused of dishonestly withholding entitlements must demonstrate 'due diligence' where there is a reverse onus on the employer to prove they did due diligence.</p> |
| Responsibility | The Bill attributes responsibility for individuals but it is not clear who the individual refers to. | The Victorian Wage Theft Bill attributes the act of 'dishonestly withholding employee entitlements' to 'an officer of an employer' such as Directors or CEO (e.g. a book-keeper is not held responsible). |

¹⁴Victorian Government (2020), "Wage Theft Bill 2020". Available at: <https://www.legislation.vic.gov.au/bills/wage-theft-bill-2020>

¹⁵ Parliament of Australia (2020), "Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020". Pg.69-71. Victorian Government (2020), "Wage Theft Bill 2020". Available at: <https://www.legislation.vic.gov.au/bills/wage-theft-bill-2020>. The Bill comes into effect on 1 July 2021.

¹⁶ Parliament of Australia (2020), "Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020". Pg.69.

The differences between the proposed Bill and the Victorian Wage Theft Bill create a number of inconsistencies for workers' protections. Any national wage theft protections should be consistent with the Victorian Wage Theft Bill - for example:

- **Definition of wage theft:** The definition of wage theft should include breaks and other non-monetary entitlements. The theft of gratuities should be included as a form of wage theft.
- **Breaches & burden of proof:** The non-serious penalty lacks a reverse onus on the employer, so the worker still holds the burden of proving that wage theft occurred and that it was the fault of the employer. The proposed Bill is unlikely to change wage theft behaviour effectively as a result. Under the Victorian Wage Theft Bill, almost all wage theft is dishonest, unless due diligence can be established. This creates a positive onus on employers to comply with the law.
- **Responsibility:** There should be a clear understanding of who is responsible for wage theft in companies. Responsibility should lie with the person who made the decision that led to wage theft, such as a Director or CEO.

We recommend that the Australian Government adopt the Victorian model for wage theft as current best practice that should be modelled in any amendments to the Fair Work Act.

RECOMMENDATION 1

The Education and Employment Legislation Committee should recommend that the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 not be passed.

2. Hearing from young workers

Young workers will be disproportionately affected by the amendments to workplace rights and conditions in the Bill. Young people are overrepresented in insecure work, which the Bill will further entrench. It is therefore crucial that young workers' voices and experiences are heard by Committee members in making your recommendations to the Australian Parliament.

However, methods for parliamentary hearings and engagement are often inaccessible for young people to participate and have their views taken into account in determining critical policy decisions. We recommend that the Committee ensure that hearings are scheduled to hear directly from young workers about their experiences of precarious work during COVID-19 and their concerns around the changes proposed in the Bill, with the option to give evidence privately to avoid potential repercussions from current employers.

FYA, the Tomorrow Movement and YWC can assist the Committee to connect directly with young workers willing to give evidence about their personal experiences and to outline the impact of the Bill's proposed changes to their work, income and lives.

RECOMMENDATION 2

The Education and Employment Legislation Committee should hold private hearings to hear direct witness testimony from young casual and part-time workers.

About FYA

Today's generation of young people in Australia are facing unprecedented and intersecting crises. They also have the skills, insight and ambition to address them.

FYA's vision is that young people have the power to beat injustice and transform the future. In pursuit of this vision, our purpose is to back young people with the trust, resources, skills, and connections to make change.

Contact:

Lee Carnie (they/them)
Executive Director - Advocacy
lee.carnie@fya.org.au
0402 088 060

About YWC

YWC's is a one-stop-shop for young workers who want to learn more about their rights at work or who need assistance in resolving workplace issues. Our team of lawyers, organisers, educators and researchers seek to empower young people working in Victoria with the knowledge and skills needed to end workplace exploitation and insecurity.

YWC's vision is a state in which young people are safe at work, do not suffer harassment or bullying, and are provided their legal entitlements. For this vision to be realised, we must encourage young people to speak up without fear and join with other young workers to make change and improve their workplaces and communities.

Contact:

Felicity Sowerbutts (she/her)
Director
FSowerbutts@vthc.org.au
0421 856 786

About the Tomorrow Movement

We are an unstoppable movement of young people fighting for a society with good jobs, great public services and a safe climate for all.

We are organising young people all over the country to fight for a tomorrow that works for everyone, not just big business.

Contact:

Cat Nadel (she/her)
Director
cat@youngcampaign.org
0418 375 905

Attachments

Foundation for Young Australians (2020), "The New Work Standard". Available at:
<https://www.fya.org.au/report/the-new-work-standard/>