



## SENATE INQUIRY

# Closing Loopholes Bill

Date Submitted: 28 September 2023

Submitted by: Gerard Dwyer  
National Secretary-Treasurer



## About the SDA

The Shop, Distributive and Allied Employees' Association (the SDA) is one of Australia's largest trade unions with over 210,000 members. Our members work in retail, warehousing, fast food, hairdressing, beauty, pharmacy, online retailing, and modelling.

The majority of SDA members are women (60%, approximately 131,000), under 35 years (57%, approximately 120,000 workers), and low-income. Retail and food services are two of the three lowest industries for median weekly earnings.

The SDA has a long history of advocating on behalf of members. We do this through enterprise bargaining; making submissions regarding Awards and the NES to provide a relevant safety net; and through numerous submissions made to parliamentary and government inquiries and other important reviews.

The SDA has 10 policy principles that guide our engagement in these reviews. For a list of these, see Appendix A.



# Introduction

The SDA welcomes the proposed legislation that has been introduced in the 'Closing Loopholes' Bill which aims to further strengthen and improve the provisions in the Fair Work Act.

Such strengthening is of great benefit to members of the SDA. It will provide real improvements that will make a concrete difference to their work life.

The legislation will close gaps in areas such as wage theft, re-establishing a proper legal definition of casual work, providing protections to the 'gig' workers and labour hire workers, and acknowledging and providing protections for workplace delegates and victims of family violence.

The proposals are steps to redress the balance of power in workplaces and society so that a fairer and stronger safety net can be accessed.

The SDA supports the ACTU submission that has been filed in this Senate Inquiry and the recommendations for further improvements. The SDA will not address all elements of the Bill but has provided some further commentary below on some key areas of the legislation, including wage theft, franchisee access to the single enterprise bargaining stream, delegates rights and improved protection against discrimination for employees who experience family and domestic violence.

## Wage Theft

The SDA has over many years dealt with issues of wage theft from members.

This has been a difficult and time-consuming recovery process that involves the members being brave enough to take on their employer. With the various processes, the party who often avoids prosecution or doesn't believe they can be caught out and punished significantly is the unscrupulous employer who has made a deliberate decision to defraud their workers.

The proposed Bill will introduce a system that addresses this issue.

A key case the SDA was involved in was underpayments in 7 Eleven. Over a broad range of Franchisees, systems were in place to deprive workers of their legal entitlements. Falsifying records was a key issue that 'hid' the underpayments'

Courts awarded more than \$1.8 million in penalties in the 7 Eleven matter, for having unlawful cash-back schemes, paying flat rates, and falsifying records after the Fair Work Ombudsman (FWO) prosecuted. A Compliance Deed with FWO was entered into in December 2016 to improve compliance across the 7 Eleven franchise network.

Unfortunately, with limited resources to check, follow-up and then prosecute, there are employers who elect to set systems to steal from workers and hope to get away with it.

A missing piece in the various jurisdictions is clear and significant penalty for an employer who deliberately sets about to defraud and steal from their workforce. The proposed legislation now has a very clear penalty for actions of employers that deliberate in 'stealing' from workers.

Such an addition is welcomed and should be supported.

# Franchisee access to single enterprise stream

Under the proposed legislation there are various changes which will provide additional access to negotiated agreements for workers employed by franchisees.

The SDA supports the proposed amendment to *Schedule 1 Part 3 – Enabling multiple franchisees to access the single-enterprise stream* which corrects an existing anomalous unintended consequence of the Act. Currently s172(3) of the Act appears to preclude any possibility that a multi-enterprise agreement could be negotiated with employers who are all related employers. This was clearly not the intention. This anomaly arises because the prefatory words to s172(3) of the FW Act states:

“(3) Two or more employers that are not all related employers may make an enterprise agreement (a multi-enterprise agreement):...”

The implication arising from this wording is that where all employers are related employers, a multi-enterprise agreement is not possible (only a single-enterprise agreement bargaining stream can be utilised).

This has been corrected in the proposed legislation by amending s172(3) to read as follows:

“(3) Two or more employers that are not all related employers or that are all related employers mentioned in subsection (3A) may make an enterprise agreement (a multi-enterprise agreement):...”:

The proposed new subclause 172(3A) of the FW Act, to be read in conjunction with new subclause 172(5A)(c) of the FW Act addresses another issue. It makes it clear that related employers can include co-franchisees. In the absence of this amendment, the capacity of co-franchisees to be parties to either a single-enterprise agreement or a multi-enterprise agreement being a single interest employer agreement was dependent upon the Commission being persuaded that such co-franchisees were engaged in a joint venture or, perhaps more relevantly, a common enterprise. There is at least one decision of the Fair Work Commission which has held on the relevant facts before it that co-franchisees were not engaged in a common enterprise with each other (*Re Bakers Delight Holdings Ltd & Ors, PR923670*) even though they were engaged in a common enterprise with their franchisor. This amendment addresses and resolves the possibility for any dispute on this issue. It should be supported.

## Delegates Rights

The proposed changes will now recognise Union delegates and provide rights and protections for these workers who take on the additional responsibility of assisting and representing workers in the workplace.

The work of delegates is invaluable. They are a valuable conduit in workplaces in assisting workers to understand their entitlements, engage with their managers to constructively work through issues and if necessary, represent members in disputes.

Having the recognition for delegates in the FW Act, Modern Awards and Enterprise Agreements will ensure that delegates wherever they are working will be protected and can carry out their valuable work. This will not only provide benefits for the individual workers who take on the role of union delegate, but will also provide better workplace protection, access to information about, and the enforcement of rights and entitlements for all workers and assist in achieving improved resolution of issues when they arise in the workplace.

“ XX at YYY was targeted by the management team twice, because she was a delegate, and spoke up for members rights. . (large national employer)

‘DDD from ZZZ has experienced not being allowed to represent members in disciplinary proceedings and needing to argue it was part of her delegates duty.’ (supermarket delegate)

The SDA has hundreds of delegates across its Branches and too often they report that their industrial rights and the activities they need to perform in their role as union delegate are stifled, discouraged or blatantly not allowed by managers in their workplace. The improved recognition provided by this Bill will assist them to be able to enforce their right to perform their role in the workplace. The SDA strongly supports these changes.

## Stronger Protections Against Discrimination

Family and Domestic Violence is a workplace issue. For many workers who experience family and domestic violence, the experience impacts them at work. For example, it can impact their ability to attend work, to get to work on time and can impact their performance. It is common for the SDA to represent members in disciplinary meetings relating to absenteeism or performance and find that the reason for it is due to family and domestic violence.

It is widely recognised that the workplace plays a critical role in supporting those experiencing family and domestic violence so that the person impacted can continue their employment and maintain financial security which is vital when making decisions and empowering a person to be able to leave a violent situation.

The SDA commends the Government for the recent changes to the National Employment Standards which now provide universal paid family and domestic violence to all employees.

The proposed changes to the *Fair Work Act 2009* (Cth) to include ‘a person being subjected to Family and Domestic Violence’ as a protected attribute will complement the paid family and domestic leave entitlement and help to ensure that workers who disclose they are experiencing family and domestic violence and seek to access this entitlement and the support of their workplace will not be discriminated against.

The proposed change recognises the discrimination faced by some workers in this circumstance. The changes will give recognition and protection to workers who exercise their workplace rights. It will also give a clearer pathway and mechanism if such discrimination occurs.

In 2019, the SDA participated in a survey conducted by the Domestic Violence Service Management (DVSM) in NSW. The DVSM deals with people (predominately women) who have experienced domestic violence. In most cases by the time the individuals approach the DVSM for help they have already lost employment.

The DVSM’s survey looked at how employers are responding to employees when they disclose they are experiencing domestic violence. The DVSM launched its report from the survey in February 2020. SDA members made up almost 50% (547) of the employee survey respondents so the report provides data and insights in relation to SDA members’ experience of FDV and disclosures at work. A copy of the report at this link [Insights Paper: Experiences and perceptions of workplace responses to domestic and family violence](#).

DVSM also provided the SDA with the data from workers in retail and fast food (SDA members). The data from SDA members found that:

75% of members who completed the survey said they experienced FDV

Only 39% of SDA members who experienced FDV decided to disclose to someone in their workplace

78% of those who disclosed did so to a manager/supervisor, 55% disclosed to a co-worker and almost 4% disclosed to the union

Of the employees who disclosed, they were provided the following support:

25% flexibility

19% accessed EAP services

8% were provided paid FDV leave

4% unpaid FDV leave

13% other unpaid leave

5% safety plan

10.5% confidentiality

6% referred to FDV support services

5% change to location

Of those who disclosed that they were experiencing FDV, many were supported but many were not. Many felt judged, were embarrassed, humiliated, and felt it was hard and traumatic.

Of those who chose not to disclose, they did this because they were:

Afraid their perpetrator would find out

Embarrassed

Felt they would be judged

Did not trust their employer to maintain confidentiality

Worried they would not be supported, and it would have a negative impact on their employment

This research demonstrates that protections against discrimination are needed. This will help to assure workers who need to disclose, that it is unlawful for their employer to discriminate against them if they disclose. It will enable them to more safely ask for the workplace support they need and if they are discriminated against, they will have an opportunity to seek recourse.

The SDA strongly supports this amendment.



## Appendix A: Rationale for SDA policy positions

SDA policy is driven by providing value to our members whose work is regulated by a broken industrial framework. We seek an economic system that supports, protects and advances the interests of working people in this country.

Our predecessors built the conciliation and arbitration system which provided the foundations to our nations prosperity over a century ago, it is now our responsibility to build a system for the next generation.

Since the introduction of the Fair Work Act 2009 and subsequent radical changes to the financial and digital context inequality has grown and economic and political power has concentrated in the hands of a few.

We believe that fundamental not incremental change is needed. In contributing to policy, we seek to drive a new system that acknowledges the change that has occurred and will withstand the emerging world of work.

We engage in topics that help us drive this agenda and are guided by ten principles that we believe will create value for our members. Those principles are:

- 1. Address Inequality & Enshrine Fairness**  
Minimum expectations must be set and adhered to.
- 2. Equity & Empowerment**  
All workers must be supported to progress so that no-one is left behind.
- 3. Mobility & Security**  
A socially successful economy must provide opportunity for all, regardless of their background. Systems must be built in a way that support success and adaptation in a rapidly changing world of work.
- 4. Delivering Prosperity & Growth For All**  
A foundation for prosperity and economic growth must be achieved.
- 5. Protection in Work & Beyond**  
Workplaces and the community must be healthy and safe for all workers and their families during and beyond their working lives.
- 6. Workers Capital & Superannuation**  
Workers capital and superannuation must be an industrial right for all workers and treated as deferred earnings designed for dignity and justice in retirement.
- 7. A Strong Independent Umpire**  
A strong, independent, cost effective and accessible industrial umpire and regulator must be central to the future system of work in Australia.
- 8. Protection & Support for Our Future**  
Protecting and supporting our future requires a strong and vibrant retail industry and supply chain providing jobs with fair and just remuneration and contributing to the economy including through skilled workers.
- 9. Work & Community**  
Work is a fundamental human activity that provides for personal, social and economic development. Work as it operates in community must build and protect a balance between life at work and life so that workers can contribute to society through the wider community.
- 10. Institutional Support for Collective Agents**  
Institutional support must provide for collective agents (registered organisations) so that they are recognised, enshrined and explicitly supported as central to the effective functioning of the system.

Details of specific policy positions can be discussed by contacting the SDA National Office.

