Response to the Department of Employment and Workplace Relations:

Consultations on the measures being considered for introduction in the second half of 2023

percapita
FIGHTING INEQUALITY IN AUSTRALIA

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RESPONSE TO THE DEPARTMENT OF EMPLOYMENT AND WORKPLACE REALTIONS –CONSULTATIONS ON THE MEASURES BEING CONSIDERED FOR INTRODUCTION IN THE SECOND HALF OF 2023

Per Capita
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Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia, based on fairness, shared prosperity, and social justice.

We welcome the opportunity to provide feedback to the Department of Employment and Workplace Relations ('DEWR') on the industrial relations reform measures being considered for introduction in the second half of 2023. This document captures our responses to:

- selected questions in the four consultation papers;
- other measures where the department is seeking feedback; and
- measures that are not contemplated by the DEWR in their discussion questions, but in our opinion should be included in the next reforms.

We have not provided responses to all 11 measures, but look forward to providing further comment and suggestions when draft provisions are available.

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Employee-like reforms

Introduction

The object of the *Fair Work Act 2009* (Cth) ('*FW Act*') is to 'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.[1] It took the very Australian notion of the *fair go,* and built 'around it a new workplace relations system ready to meet the needs of this nation in the 21st century'.[2] Key to this was the inclusion of 'a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away,'[3] achieved through the National Employment Standards ('NES') and Modern Awards ('Awards').

Today, there is a growing cohort of workers who are excluded from the provisions of the *FW Act*; unprotected by the *safety net of minimum employment conditions.* This raises serious questions as to whether our workplace laws, have kept pace with changing forms of work as we progress through the 21st century.

Excluded workers

Workers in the gig-economy[4] are among those most in need of the protections provided by the *FW Act*, yet they are frequently misclassified and denied access to the rights and entitlements that the *safety net* offers.

The term 'employee-like' obfuscates the diversity in this group of workers. Per Capita is supportive of extending the powers of the Fair Work Commission ('FWC') to ensure genuine independent contractors are provided with a basic set of rights and entitlements. However, we are concerned that lumping genuine independent contractors with platform-workers, may cause uncertainty and negative repercussions for existing employees who have their work mediated by platforms or experience high levels of flexibility, but otherwise resemble traditional employees. We note that the nature of work is changing for employees across Australia. The COVID-19 Pandemic created widespread support for flexible working arrangements which benefit workers, and workplace rostering apps like Deputy, Tanda and Ento are being utilised by employers to organise workforces across the private and public sector. We do not want these workers to lose their entitlements under the *FW Act* by falling into a new *employee-like* category.

[1] *Fair Work Act 2009* (Cth) s 3 ('*FW Act*').
[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Minister for Employment and Workplace Relations).
[3] Ibid.
[4] This paper will use the terms 'gig-work', platform-work, and 'on-demand' work, interchangeably unless the context specifies otherwise.

Our workplace relations system focuses on the rights of employees, and obligations of employers. Some workers who should be employees have been classes as independent contractors. We reject the proposition that this is a choice made my workers who want more flexibility, rather it is a choice made by some businesses who have exploited loop-holes in our industrial relations framework for their own corporate interests. Proceeding with changes on the assumption that some workers are *employee-like* rewards these companies. Instead, the government should aim to capture many of these *employee-like* workers under the definition of employee, where they belong, and ensure that genuine independent contractors are able to benefit from dispute resolution in the FWC.

Gig workers don't have to be engaged as independent contractors

On-demand work resembles casual work in many ways. Workers often have the option to decline shifts, work specific hours and work for multiple businesses. Platform mediated businesses, such as Sidekicker in the hospitality sector; Hireup in the care sector, and Weploy in the clerical and administrative sector, all hire workers as casual employees, providing them with the guarantees of pay and conditions set by Awards, and minimum conditions under the NES.[5] These examples demonstrate that platform-workers can be considered employees, but some platform companies are taking advantage of the absence of a statutory definition of employee in order to minimise their risk, and maximize their profits.

Time to redefine

On several occasions Parliamentary committees have recommended that the statutory definition of employee be expanded to workers who fall through the cracks.[6] Recent changes in the common law definition of employee, make taking this action even more pressing. Per Capita strongly believes that making legislative amendments to the definition of employee, as well as providing the FWC with extended powers to set minimum standards, are the two crucial ingredients for effectively closing this loophole.

Our response to the employee-like consultation paper will consist of two sections. Firstly, we will explain why it is crucial to modify the current definition of employee in the *FW Act* to effectively safeguard platform-workers. Secondly, we will examine how additional powers for the FWC can operate together with a broader statutory definition to protect workers who are genuinely engaged on *contracts for service*, and thus, would more appropriately fall outside of an extended definition.

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[5] Victorian Government, *The Report of the Victorian Inquiry into the Victorian On-Demand Workforce*, (Report, June 2020) 142-3.

[6] See, Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (First Interim Report, June 2021) 165, rec 7; Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope is Not a Strategy- Our Shared Responsibility for the Future of Work and Workers* (Report, 2018) 92, rec 10; House of Representatives Standing Committee on Employment, Workplace relations and Workforce Participation, Parliament of Australia, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* (Report, August 2005) 161-2.

A better definition of 'employee' under the Fair Work Act

When contract is king - vulnerable workers lose

In the *FW Act, employee,* is given its ordinary meaning, determined by Australian common law.[7]

Until recently, determining whether a worker was engaged under a *contract of service* (employee), or a *contract for services* (independent contractor), was done according to a multi-factor test.[8] Under this test, the written terms of the contract were not decisive, but rather, constituted just one of the considerable *factors*.

The High Court's 2022 decisions in *ZG Operations Australia Pty Ltd v Jamsek*[9] and *CFMMEU v Personal Contracting*[10] has altered this precedent. The court has provided that:

> where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged … the legal rights and obligations so established should not be decisive of the character of the relationship'.[11]

This means that where a valid written contract exists, any examination of the parties' subsequent conduct or how the contract is implemented in practice, is no longer a relevant consideration.[12] Furthermore, the courts will now treat employment contracts on equal footing with other contracts, irrespective of the power imbalances that exist between the parties.[13] With respect, this seems absurd. Especially when considering the inherent power imbalance that exists between an Australian Uber driver, whose wage is below the national average, and Uber Technologies, whose market value is $75.5 billion.[14]

There are exceptions to this rule, in situations where the written contract is shown to be a sham or where the terms have been varied.[15] But these offer negligible safeguards, given how easily a putative employer can create written contracts that evade the common law definition of employment. This significant deviation from previous legal precedent makes it exceedingly difficult for gig economy workers to argue that they should be classified as employees.[16]

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[7] *FW Act* (n 1) s 11-2.
[8] *Hollis v Vabu* (2001) 207 CLR 21.
[9] [2022] HCA 2 ('*Jamsek*')
[10] [2022] HCA 1 ('*Personal Contracting*').
[11] ibid [43] (Kiefel CJ, Keane and Edelman JJ).
[12] Ibid.
[13] Ibid [59]; *Jamsek* (n 9) [6], [62].
[14] Trevor Moore, 'Uber Statistics' *Money Australia* (Web Page, 15 March 2023) <https://www.moneyaustralia.net/uber-statistics/>.
[15] *Personal Contracting* (n 10) [43] (Kiefel CJ, Keane and Edelman JJ).
[16] See, eg, *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156; *Nawaz v Rasier Pacific Pty Ltd (t/a Uber BV)* [2022] FWC 1189.

Every iteration of Australian industrial relations legislation has sought to ensure that workers in the weakest bargaining position are protected at work.[17] Findings from the *National Platform Work Survey* found workers engaged through a digital platform like Uber, are more likely to be young, identify as living with a disability, in Australia on temporary visas, or from culturally or linguistically diverse backgrounds.[18]

Many of the survey respondents were not aware of their workplace rights, or their employment status. One third of platform workers did not know if the platform they worked for had a dispute resolution procedure, and a quarter of respondents said that they feel like the company they work for treats them as employees.[19] These are exactly the workers that our system should strive to protect.

Although the judiciary may not have the role of mitigating unfairness caused by power imbalances in contract negotiations,[20] it is essential for any government striving to create a more equitable and stable industrial relations system to address these issues through legislative intervention.

Recent case law, both from courts and the FWC have highlighted the need for legislative intervention to address the issues arising from this approach.[21] At present, a court or tribunal is compelled to find that a relationship between parties is whatever a valid contract holds it out to be, even if such a finding would be unfair when looking at the actual conduct of the parties.

In *Deliveroo Australia Pty Ltd v Franco*,[22] the Full Bench observed there was clearly unfair treatment of Mr Franco by Deliveroo,[23] but was compelled to find that he was a contractor, and not an employee, because there were 'realities [the court was] obliged to ignore'.[24]

The Full Bench's reluctance to uphold this appeal and quash the decision of Commissioner Cambridge in *Franco v Deliveroo,*[25] is demonstrated in obiter:

> Had we been permitted to take the above matters into account, as the Commissioner did, we would have reached a different conclusion in this appeal. As a matter of reality, Deliveroo exercised a degree of control over Mr Franco's performance of the work, Mr Franco presented himself to the world with Deliveroo's encouragement as part of Deliveroo's business, his provision of the means of delivery involved no substantial capital outlay, and the relationship was one of personal service. These matters, taken together, would tip the balance in favour of a conclusion that Mr Franco was an employee of Deliveroo. However, as a result of Personnel Contracting, we must close our eyes to these matters.[26]

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[17] See Richard Naughton, *The Shaping of Labour Law Legislation- Underlying Elements of Australia's Workplace Relations System* (LexisNexis Butterworths Australia, 2017).
[18] Paula McDonald et al, *Digital Platform Work In Australia: Prevalence, Nature and Impact* (Report, November 2019) 5-10.
[19] Ibid.
[20] *Workpac Pty Ltd v Rossato* (2021) 392 ALR 39 [63] ('*Rossato*'), citing *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388.
[21] *Nawaz v Rasier Pacific Pty Ltd (t/a Uber BV)* [2022] FWC 1189 [346], *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156 [54].
[22] [2022] FWCFB 156 ('*Deliveroo*').
[23] Ibid [57].
[24] Ibid [52]-[54].
[25] [2021] FWC 2818.
[26] *Deliveroo* (n 22) [54].

Law makers should adopt a wide approach to the definition of employee

Two approaches can be considered to broaden the definition of an employee: a narrow approach, and a wide approach.

Narrow approach

One way to address the issues stemming from the decisions of *Jamsek* and *Personal Contracting*, is to introduce a statutory definition that allows for the actual work performed by the worker to be taken into account when determining their employment status, rather than relying solely on the written contract. Such a definition would maintain the common law definition while giving the FWC and courts the ability to consider the full scope of the work relationship. This approach would have led to a different outcome in *Deliveroo v Franco*, as suggested by the Full Bench's comments.[27]

The downside of this approach is that it may enable businesses to continue to impose requirements, such as demanding that workers supply their own equipment, obtain their own insurance, hold an ABN, or pay their own taxes, that could make it seem as though the worker is an independent contractor, even if the reality is that the worker is still economically dependent on the business.

Our opinion is that this approach is not adequate because it would be easy for businesses to avoid.

Wide approach

The DEWR will be familiar with the wider approach, suggested by Professor Andrew Stewart in his article 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' in 2002.[28] This approach, which presumes that a worker is an employee, was subsequently endorsed by members of the Australian Labor Party in the House of Representatives Standing Committee on Employment, Workplace Relations, and Workforce Participation in their *Inquiry into Independent Contracting and Labour Hire Arrangements* in 2005.[29]

In a 2022 Policy Brief for the Centre for Employment and Labour Relations Law at Melbourne Law School, Professor Joellen Riley Munton considered this definition. She considered some changes to better ensure it can capture certain types of platform enabled work.[30]

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[27] Ibid 54.
[28] Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.
[29] House of Representatives Standing Committee on Employment, Workplace relations and Workforce Participation, Parliament of Australia, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* (Report, August 2005).
[30] Joellen Riley Munton, 'Defining Employment and Work Relationships under the Fair Work Act' (Policy Breif No, Centre for Employment and Labour Relations Law, Melbourne Law School, 19 August 2022)

Drawing heavily on Stewart's 2002 definition and Munton's 2022 amendments, Per Capita suggests the definition set out in the box below is adopted.

The main objective of this updated definition is to shift the burden of proof to the party claiming that the work arrangement does not constitute an employment relationship. It also outlines the relevant factors that should, and should not, be considered in assessing such a claim.

Proposed definition for employee

1) A worker who provides services to a hirer, or on behalf of a hirer to the hirer's clients or customers, shall be presumed to be an employee of the hirer, unless it can be shown that the worker is genuinely operating their own independent business and has entered into a direct contractual relationship with the client or customer.

2) A contract is not to be regarded as one other than a contract of service merely because:
    a. the contract permits the work in question to be delegated or subcontracted to others;
    b. the contract is also for the supply of the use of an asset or for the production of goods for sale;
    c. the contract requires the person supplying labour to provide an ABN, or to contract through an incorporated entity;
    d. the worker is paid piece rates.

3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:
    a. the extent of the control exercised over the worker by the other party;
    b. the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;
    c. the degree to which the worker is or is not economically dependent on the other party;
    d. whether the worker actually engages others to assist in providing the relevant labour;
    e. whether the worker has business premises; and
    f. whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.

4) Courts are to have regard for this purpose to:
    a. the practical reality of each relationship, and not merely the formally agreed written terms; and
    b. the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

5) Courts and tribunals are not to have regard to any arrangements the parties have made between themselves in respect of the payment of workers' compensation insurance, 'Pay As You Earn' income tax, superannuation contributions, or payroll taxes.

6) An employment agency which contracts to supply the service of a worker to another party (client or customer) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

7) Where:
    a. an arrangement is made to supply the service of a worker to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary); and
    b. it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above,

the worker is to be deemed to be the employee of the ultimate employer.

How this definition works

The inclusion of the phrase 'or on behalf of a hirer to the hirer's clients or customers' in sub-s 1 covers platform-based work arrangements typically mediated through rideshare of food delivery apps. This definition would capture workers engaged with platforms that operate under a *vertical on-demand model* (e.g. Uber, Deliveroo).

Under this model:

1. The client enters a contract for services with the platform.
2. The platform provides a worker to perform this service.
3. The platform receives payment directly from the client.
4. The platform then passes part of the payment onto the worker.

It would exclude workers who are genuinely self-employed or who obtain work under a *horizontal model* (e.g. Airtasker), where the platform exerts minimal control over the worker and acts mainly as a matchmaker between the worker and the individual consumer. Although the resulting work may be considered employment, that employment relationship would exist between the client and the worker seeking work.

Subsection 2 enables a court or tribunal to disregard contractual provisions allowing for the delegation of work, where such provisions cannot be practically exercised, such as when the worker can only delegate work to someone already engaged by the hirer. In these circumstances the *delegation* could more accurately be deemed as *shift-swapping*, which is common among casual employees in other workplaces. Subsection 2 also provides that a contract that places the responsibility of owning and maintaining a vehicle on the worker should not, solely for that reason, be considered a *contract for services*. The fact that the worker is expected to cover business expenses should not preclude them from being classified as an employee if all other factors indicate employment status. Nor should the fact that they are paid in piece rates, which is already provided for in the *FW Act*.[31]

Subsection 3 includes the list of the factors that make up the multifactorial test, except for those like taxation and insurance provisions which should be seen as consequences of being classified as an employee rather than factors that contribute to that classification. This is further clarified in subsection 5.

Subsection 4 requires the court to have regard to the totality of the relationship (discussed above in minimal approach).

[31] *FW Act* (n 1) s 21.

Subsection 6 captures labour hire agreements and sub-s 7 captures the use of separate legal entities (service companies) controlled by the business operator. If separate legal entities fail to satisfy the criteria of an independent business, the burden of employment would fall back on the true business operator.

Examples from other jurisdictions

An example of similar *presumed employee* provisions can we found in Spain's *Workers' Statute* (*Estatuto de los Trabajadores*).[32] This statue regulates the rights and duties of workers and employees in Spain. It was amended in 2021 so that a worker engaged by a digital delivery platform is presumed to be an employee engaged under an employment contract pursuant to art 8.1.

Additional provision 23 states that:

> By application of what is established in article 8.1, the activity of persons providing paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise entrepreneurial powers of organization, direction and control directly, indirectly or implicitly, through algorithmic management of the service or work conditions, through a digital platform, is presumed to be included in the scope of this law.

Article 8.1 states:

> The employment contract may be concluded in writing or verbally. It shall be presumed to exist between anyone who provides a service on behalf of and under the organization and direction of another person, and the person receiving it in exchange for remuneration.

The definition provided in this response (above) would go further as it would capture workers who are not providing services consisting only of delivery or distribution of consumer goods, but rather a larger scope of workers (care workers, teachers) who are engaged in on-demand work mediated through digital platforms.

Would a third category be a better solution?

Creating a new category of independent workers to capture *employee-like* workers has been contemplated as a possible solution to closing this loophole.[33] It has been implemented with varied success in other jurisdictions. These are discussed in detail in Andrew Stewart and Jim Stanford's 2017 article 'Regulating Work in the Gig Economy: What Are the Options?'.[34]

[32] Available at: https://www.boe.es/biblioteca_juridica/abrir_pdf.php?id=PUB-DT-2023-139
[33] Andrew Stewart and Jim Stanford, '*Regulating Work in the Gig Economy: What are the Options?*' (2017) 28(3) The Economic and Labour Relations Review 420, 423
[34] Ibid.

After considering the intermediate category models implemented by 2017 in Spain, the United Kingdom, Italy and Canada, Stewart and Stanford conclude that:

> creating a 'new' category of worker is not the best way forward, particularly in jurisdictions with a strong existing floor of minimum labour standards.
>
> A better approach would be to enact a more comprehensive definition of employee which moved the boundary of employment to encompass intermediate workers, with appropriate legislation to give separate access to a workable system of collective bargaining for the self-employed. Simply adopting the employee model of collective bargaining for the genuinely self-employed would not be appropriate here as the two groups (employees, including all those in the 'intermediate category'; and the genuinely self-employed) have divergent needs. [35]

Thus, creating a new category to protect workers on the assumption that platform workers are not genuine workers does not fix the problem, in fact it may instead have the opposite effect. It might expose genuine employees to disputes about their employment. However, if the wide definition was adopted and the FWC was empowered to set minimum rates and conditions for workers engaged as genuine independent contractors, it would create a more watertight system where no Australian worker is left behind.

This mirrors recommendations made in 2021 by the Senate Select Committee on Job Security (recommendation 7), although we note that the wide definition would capture some highly dependent, low-leverage workers also. Recommendation 7 reads:

> The committee recommends that the Australian Government expands the definitions of 'employment' and 'employee' in the Fair Work Act 2009 to capture new and evolving forms of work. In addition to an expanded definition of 'employment' and 'employee' under the Fair Work Act, there should be a mechanism by which the Fair Work Commission can extend coverage of those rights when necessary to workers falling outside the expanded definition of employment, including low-leveraged and highly dependent workers so they can be provided with standards and protections under the Act. [36]

Empowering the Fair Work Commission to set minimum standards for workers who fall through the gaps

As outlined in the first part of this response, Per Capita firmly believes that legislative action is necessary to broaden the scope of workers classified as employees under the *FW Act*. However, we understand that this proposal may face resistance from certain platforms, and there are some independent contractors who genuinely wish to remain so. This does not mean that they should be left without some protections under the *FW Act*. Protections should include minimum rates and conditions, an ability to collectively bargain,

[35] ibid
[36] Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (First Interim Report, June 2021) 165, rec 7;

and protection from unfair termination where workers are dependent on a business for ongoing work and income.

There are existing legislative provisions in Australian jurisdictions that demonstrate the ability to extend the rights and protections expected by employees to other types of workers. For example, Chapter 6 of the *Industrial Relations Act 1996* (NSW) ('*IR Act*'), grants the NSW Industrial Relations Commission ('IRC') the power to issue *contract determinations*[37] that establish minimum standards, similar to the way *Awards* function under the *FW Act*. The NSW IRC can also approve contract agreements[38] which operate similar to collective agreements. Research by David Peetz, published in the *Australian Journal of Labour Law* in 2022, indicates that these provisions have improved road safety for truck drivers in New South Wales, and has saved lives.[39] These provisions focus on road workers, but could be expanded to capture other industries where there are large cohorts of independent contractors.

We do not believe a new independent tribunal or a third worker category to capture 'employee-like' workers would be appropriate. When considering the creation of a new independent tribunal to deal with these issues, it's worth noting the fate of the Federal Road Safety Remuneration Tribunal ('RSRT'). The RSRT, which was established in 2012 with similar powers to those provided to the NSW IRC under Chapter 6, was short-lived and was shut down by a LNP government in 2014. This example illustrates how incoming governments can easily remove newly established tribunals before proper analysis on their efficacy can be undertaken. It suggests to us that amending the *FW Act* to give the FWC more powers may be a more secure and reliable option.

To extend the FWC's current powers, the *FW Act* could be amended to give contractors the right to challenge unfair termination, especially when they are economically dependent on a single business but would still be more appropriately classified as independent contractors under an expanded definition.

This could be achieved by extending the unfair dismissal provisions in the *FW Act* to include a new provision that covers economically dependent contractors who have:

- worked for a company for a minimum of six months;
- derive more than 50% of their income from that company; and
- do not earn above the high-income threshold.[40]

It is entirely appropriate that more dependent contractors, who get majority of their income from one source, should be able to seek remedies of reinstatement, or compensation in lieu of reinstatement, in these circumstances.

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[37] *Industrial Relations Act 1996* (NSW) s 316.
[38] ibid s 325.
[39] David Peetz, 'Road Transport Regulation, Safety and Prospects for the "Gig Economy"' (2022) 36 *Australian Journal of Labour Law* 165.
[40] A similar proposal was put forward in: Joellen Riley Munton, 'Defining Employment and Work Relationships under the Fair Work Act' (Policy Breif No, Centre for Employment and Labour Relations Law, Melbourne Law School, 19 August 2022) 9. Munton proposed 80% as it is in line with other contexts, however we believe that more than 50% indicates that a business is the workers 'main hirer' and similar to their main employer.

The federal government may also task the FWC with setting minimum rates of remuneration for some on-demand workers (who are genuine independent contractors) and other small business contractors, much like Awards. The approach could be modelled after Chapter 6 of the *IR Act*. This would ensure that contractors can earn a decent income whilst taking into account the unique nature of their work patterns.

If the minimum rates established through contract determinations were comparable to, and increased in line with, Awards, it is possible that this could reduce the financial incentive for businesses to engage workers as contractors in the first place.[41] This would help to promote fair remuneration practices and prevent exploitation of workers in the gig economy.

Contract determinations may provide a floor from which consenting parties (worker representatives and large employers) could negotiate tailored agreements. These might be provided for by amending existing multi-employer bargaining provisions in the *FW Act*.

Concluding comments

Expanding the definition of employee to be inclusive of platform workers isn't a magic bullet, but recent High Court decisions make it ever more pressing. If it were done in tandem with extending the powers of the FWC, Australian workers with diverse work patterns and relationships, can be appropriately protected at work under our industrial relations framework.

[41] Joellen Riley Munton, 'Defining Employment and Work Relationships under the Fair Work Act' (Policy Breif No, Centre for Employment and Labour Relations Law, Melbourne Law School, 19 August 2022) 10.

Standing up for casual workers

Introduction

There are considerable issues with how work status is defined. In line with our position on a statutory definition of employee, Per Capita supports an amendment to the definition of casual employee, [42] which implements an objective test to determine casual employment. This would require consideration of the terms of the contract, but also, the post-contractual conduct (i.e. the actual relationship).

Background to issue

The common law test for determining whether a worker is a casual employee was provided in *WorkPac* Pty Ltd v *Skene*,[43] and was altered by *WorkPac Pty Ltd v Rossato.*[44]

In *Skene*, the Full Court of the Federal Court held that a casual is a worker that has 'no advance commitment from the employer to continuing and indefinite work'.[45] Importantly, the court held that this should be determined by looking at the nature of the relationship and the actual way in which the work was carried out.[46] But this was later altered by the statutory definition, and confirmed in *Rossato*, where the HCA held that post contractual conduct is not relevant if the legal rights and obligations are made out in a written contract.[47]

Statutory definition

The statutory definition of casual employment, as amended by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)[48] implements the no advance commitment test[49] but requires the relationship to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.[50]

Per Capita believes that this should be changed.

In KPMG's 2022 *Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*[51] several submissions were made in favour of an objective test:

[42] *Fair Work Act 2009* (Cth) s 15A.
[43] [2018] FCAFC 131 ('*Skene*').
[44] [2021] HCA 23.
[45] *Skene* [172] (Tracey, Bromberg and Rangiah JJ).
[46] See, ibid [180].
[47] *Rossato* [56].
[48] *Fair Work Act 2009* (Cth) s 15A.
[49] Ibid s 15A(1)(a).
[50] Ibid s 15A(4).
[51] KPMG, *Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*, (Report, 11October 2022).

- The ETU recommended a return to the test from *Skene*, which reflected the 'practical reality and true nature of the [casual] employment relationship'.[52]
- The Victorian Government recommended a change to reduce the reliance on the formal offer of employment made at the time employment started as it may result in an employee being formally treated as a casual, even though this practice does not reflect the actual experience.[53]
- The WA Government recommended that the statutory definition be amended to 'allow the subsequent conduct and substance of the employment relationship to override the offer and acceptance of casual employment from the relationship's outset'.[54]

Redefining the definition of casual employee, to 'stand up for casual workers'

Work status should be determined by reference to the actual work, not what the contract holds it out to be

In line with our position on determining the definition of *employee*, work status needs to be determined by reference to the actual relationship, not purely the written contract created by employers (who are generally in a stronger bargaining position than workers).

Below we propose amendments to allow determination of work status to be made by looking at the actual relationship in dispute (more felicitous drafting may be required).

Proposed amendments

- Section 15A (4) amended to read: In determining whether a person is a casual employee, regard to the practical reality of the relationship between the employer and that person should be considered in preference to the formal terms of any contract or documentation created by the parties.
- Section 15A (3) amended to read: When looking to the actual conduct between the parties, irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability are indicia of an absence of a firm advance commitment to ongoing work.
- Section 15A (5)(c) added to read: it is determined by reference to the subsequent conduct of either party that a person is a casual employee.

[52] Ibid 43.
[53] Ibid 44.
[54] Ibid.

Concluding comments

Per Capita supports a post-contractual conduct determination of casual employee. Determinations of work status should be based on what a person's work status actually is rather than what their status is held out to be at commencement. As this is not the case, statutory intervention is required to address the courts orthodox position in *Rossarto*, *Jamsek* and *Personal Contracting*.

Compliance and enforcement: criminalising wage theft

Wage theft is a problem that cannot be solved through market mechanisms, as it has become baked into the business practices of unscrupulous employers in a range of industries, most notably in hospitality.[55] As a result, this issue requires a strong regulatory framework that contains enforcement measures and carries significant penalties for non- compliance. We argue that the government must take wage theft seriously, and that a strong interventionist approach must be taken to ensure the security of work for an entire generation of Australians.

Industrial Hydra: the many forms of wage theft

Wage theft has become so prolific partly as a result of the many forms that it can take. We identify five forms of wage theft that are most common in the Australian economy: unpaid trials, cash-in-hand, unpaid overtime, misclassification, and super theft.

Unpaid trials

Unpaid trials occur when a business requires prospective employees to do unpaid trial shifts within the business as a precondition for securing paid employment. It is worth noting that there are certain circumstances when unpaid trials are lawful: when it involves nothing more than a demonstration of the person's skills; when it is only for as long as needed to demonstrate the skills required for the job; and when the worker is under direct supervision of the potential employer (or other appropriate individual) for the entire trial.[56]

However, the practice of asking prospective employees to do unpaid trials that cover entire shifts or multiple shifts, involve productive work that creates profit for the business owner, and that involve working independently, have a long history, and are increasingly common.[57]

While this form of unpaid trial is prevalent throughout the hospitality industry in particular, another related practice is common amongst high end restaurants. *Culinary tourism* occurs when up and coming chefs will seek out experiences in famous restaurants, in order to build their résumé and obtain new skills.[58] Both practices are predatory behaviours that take advantage of the desire for experience among young and inexperienced workers.

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[55] Ben Schneiders, *Hard Labour Wage Theft In The Age Of Inequality* (Scribe Publications, 2022).
[56] 'Unpaid Trial', Fair Work Ombudsman (Web page, 2023) <https://www.fairwork.gov.au/starting-employment/unpaid-work/unpaid-trials>.
[57] Richard Robinson and Matthew Brenner, 'Wage theft in professional kitchens: Conned or Complicit?' (2021) 11(1) *Hospitality & Society* 87.
[58] Watson Baldwin, 'Chef's Sabbatical: An Analysis of Chef's Gastronomic Research Through Culinary Tourism' (2018)13 *International Journal of Gastronomy and Food Science* 67.

Cash-in-hand

Cash-in-hand is a familiar phrase in our economy. Like most shady dealings, it goes by many names: unreported employment, the informal economy, or the grey labour market. Whatever we call it, it is used to circumvent Australian workplace and taxation laws.

This should not be confused with being paid in cash.[59] For example, an employer who wanted to reduce their expenditure on transaction fees could add up an employee's hours, calculate wages for the week minus tax, superannuation and other deductions. The adjusted wages could then be paid straight from the till, accompanied by a payslip.

The tell-tale signs of a *cash-in-hand* job are a lack of formal employment paperwork, such as signed contracts, weekly payslips or a group certificate at tax time. There are obvious downsides: these jobs are unlikely to pay the correct minimum wage, penalty rates,[60] or super contributions.[61] A greater concern is these jobs aren't covered by workers' compensation. The most concerning aspect is that so little data is being collected about such jobs. The most recent estimate comes from a 2012 survey, and found that one in four young workers had recently done cash-in-hand work.[62]

The risks of this informal economy extend well beyond young workers. Professor Christopher Bajada previously estimated that cash-in-hand jobs make up an informal economy equivalent to 15% of Australia's GDP.[63] Similarly, in 2004 the government estimated the informal economy between 3-15%.[64]

Even if we take the lowest estimate of 3% of GDP, that's approximately AUD$48.6 billion which is circulating, untaxed, outside our economy. A 2012 report on the cash in hand economy estimates a staggering $3.3 billion of public revenue is being lost to cash-in-hand working arrangements each year.[65] This is a significant amount of forgone revenue to the federal budget.

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[59] 'Receiving Cash for Work You Do', *Australian Taxation Office* (Web Page, 24 February 2022) <https://www.ato.gov.au/Individuals/jobs-and-employment-types/Working-as-an-employee/Receiving-cash-for-work-you-do/>.
[60] Sharif As-Saber, 'Penalty Rates and Their Role In Australia's Cash Economy', *The Conversation* (Online, 7 January 2015) <https://theconversation.com/penalty-rates-and-their-role-in-australias-cash-economy-30420>.
[61] 'Receiving Cash for Work You Do', *Australian Taxation Office* (Web Page, 24 February 2022).
[62] Loretta Florance and Michael Atkin, 'Young People Ripped Off By Cash-In-Hand Work', *ABC News* (Online, 26 September 2012) <https://www.abc.net.au/news/2012-09-26/one-in-four-young-people-working-illegally/4282040>.
[63] Christopher Bajada, 'Estimates of the Underground Economy in Australia' (1999) 75(4) *Economic Review* 369.
[64] Senate Economics Reference Committee, Parlimaent of Australia, The Structure and Distributive Effects of the Asutralian Taxation System (Report, June 2004) 63)
[65] David Richardson and Richard Denniss, *Cash-In-Hand means Less Cash for States* (Report, 21 October 2021) <https://australiainstitute.org.au/report/cash-in-hand-means-less-cash-for-states/>.

Unpaid overtime

Unpaid overtime occurs when working outside of normal rostered hours becomes an expected part of working life. This practice ranges from minor time theft (for example, where workers are expected to be at work 15 mins before a shift to count the till before their shift starts) through to major time theft, like the practices uncovered within the Rockpool dining empire that paid workers for a 38 hour week and demanded an additional 20-30 hours be worked.[66] This form of wage theft is prevalent throughout the hospitality, retail and fast food industries and represents a significant approach to work within the industry.

Misclassification

Classification underpayments are often overlooked within the wage theft debate. This form of wage theft occurs when workers are employed on a wage rate that corresponds to one level within the relevant Award, yet are expected to perform duties that are covered by a different level of the Award that would be attract a higher rate of pay.

Often within retail, hospitality and fast food, casual workers will be asked to manage a shift or supervise a section of the business (the counter, the kitchen, etc), yet will receive the same rate of pay as others on shift. Similarly, someone who is employed as a barista might be asked to work in the kitchen on different shifts, but their rate of pay will remain the same regardless of the change in their duties.

Super theft

This form of wage theft occurs when employers avoid their legal obligations and refuse to pay mandatory superannuation. Recent research conducted by Industry Super Australia ('ISA') has shown the breadth and depth of this problem. Through an analysis of Australian Tax Office ('ATO') data, ISA estimates that 2.85m workers are having their super stolen by employers, with a staggering $5.94bn being taken from workers' wages.[67] Young workers are most likely to experience this form of wage theft, with almost half of all workers aged 20 to 29 earning less than $30,000 not receiving their mandated superannuation payments from their employers.

The theft of super represents a large threat to the eventual retirement of young workers, as the compound interest that is generated over time is crucial to ensuring an adequate super balance at the time of retirement. Super theft is particularly dangerous for young women, as research shows that

[66] Ben Schneiders and Royce Millar, 'Rockpool Staff Records Doctored as Part of 'Most Egregious' Wage Theft', *The Sydney Morning Herald* (Online, 24 October 2019) <https://www.smh.com.au/business/workplace/rockpool-records-doctored-as-part-of-worst-ever-wage-theft-20191018-p531wa.html>.

[67] Industry Super Australia, Super Scandalous: How to Fix the $5 Billion Scourge of Unpaid Super (Report, 28 October 2021).

women are more likely to earn less, work shorter hours and spend longer periods of time outside the paid labour market.[68] By engaging in super theft, employers are actively contributing to the future likelihood of poverty, insecurity, and homelessness among older women.

The cost of wage and superannuation theft to the national economy

The cost to the economy of wage and super theft is substantial. As indicated above, an estimated $5.94bn is being taken from workers superannuation balances annually. As superfunds achieved an average return of 7.9% per year between 1993 and 2022,[69] over 40 years that $5.94bn in stolen super would accumulate to $115.7bn less in overall super balances.

The cost of wage theft is more difficult to estimate. Recent estimates conducted by the McKell Institute show that for every 1% of wages that are stolen, the government loses $46.4m in income tax revenue in Queensland alone.[70]

Conservative calculations using the ATO's tax gap data reveal that approximately 20% of all Queensland's wages are being stolen through the various forms of wage theft practices, resulting in $928m in foregone revenue every year.

Given that Queensland employs approximately 20.19% of Australia's workforce, it is reasonable to estimate that the national revenue loss due to forgone income tax on stolen wages is approximately $4.6bn a year.

Identifying and uncovering wage and superannuation theft

Given the epidemic of wage theft being engaged in by Australia's employers, it is clear that current arrangements to regulate wage payments are not working. While the current push for the criminalisation of wage theft is an admirable one, restrictions on the ability of unions to access workplaces, represent workers, monitor wage payments and engage in legal industrial action not only diminish the power of ordinary workers, but reduce the likelihood of wage theft cases being made public.

Internationally, evidence has been mounting to show the integral role that trade unions play in ensuring stronger wage growth, greater social cohesion and reduced inequality. Notably, a

[68] David Hetherington and Warwick Smith , *Not So Super, For Women : Superannuation and Women's Retirement Outcomes* (Report, July 2017)
[69] Barbara Drury, 'Super Fund Performance over 30 Calendar Years (to December 2022)', *Super Guide* (Post, 19 January 2023).
[70] Lachlan Blain and Edward Cavanough, *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace*, (Report, March 2019).

comprehensive paper by the International Monetary Fund ('IMF') reported that high union density strongly predicts low income inequality.[71] They found that a reduction in union density weakens earnings for middle- and low-income workers and increases the income share of corporate managers and shareholders.

Similarly, recent research from Princeton found that union density had a strong equalizing effect on income distribution, ensuring that low skilled workers wages at the low end of income distribution were lifted at times of high union density.[72]

Trade unions and industrial lawyers have been integral to uncovering cases of wage theft. The best way to ensure that incidences of wage theft are identified, prosecuted and brought to justice is to increase the rights of working people and extend the industrial powers of the trade union movement, including by reinstating the right of unions to enter the workplace and inspect the accounts of employers to check that wages and superannuation are being paid at award rates.

Concluding comments

Wage theft is an epidemic.

Throughout our economy, employers are engaging in unscrupulous practices that are taking money from the pockets of workers and reducing the revenue of governments. Overwhelmingly, it is younger workers who are bearing the greatest costs of wage theft, particularly those employed within the hospitality industry. This contributes to entrenched inequalities within our society, most notably generational and gendered inequality.

By allowing these practices to continue and providing amnesty to the guilty parties who have engaged in these criminal acts, the government is sending a message that it is soft on crime – provided you run a business. These actions are teaching an entire generation of workers that their government does not value their work, their safety or their security. Young workers deserve so much better.

We have argued that not only has wage theft become a crisis in Australia, but that it is a crisis we can avoid. Therefore, we support the *tiered approach* to the criminalization of wage theft within the act.

[71] Florence Jaumotte and Carolina Osorio Buitron, 'Inequality and Labor Market Institutions' (Discussion note SDN 15/14, International Monetary Fund, July 2015)
[72] Henry S. Farber, Daniel Herbst, Ilyana Kuziemko and Suresh Naidu, 'Unions and Inequality over the Twentieth Century: New Evidence from Survey Data' (2021) 136(3) *Quarterly Journal of Economics* 1325.

Stronger protections for workers against discrimination, adverse action, and harassment

Introduction

As an outcome of the 2022 Jobs and Skills Summit, the Government committed to update the *FW Act* to provide stronger protections for workers against discrimination, adverse action, and harassment.

It is our strong opinion that necessary steps should be taken to ensure all workers are protected at work. It is a fact that courts have interpreted the *FW Act*'s anti-discrimination provisions in such a way that has limited the protection afforded to workers. In some cases, employers have successfully defended themselves against claims by relying on technical and narrow readings of the legislation. This, in our opinion, undermines the modest objectives of Australia's anti-discrimination statutory schemes.

General comments on questions in the consultation paper

Our view is that the *FW Act* should be as clear as possible. It should act not only as a piece of legislation but also as a *user-friendly* guide for workers and businesses. An employee or employer should be able to look at the *FW Act* and clearly understand their rights and obligations. In that regard, some of these questions are relatively straight forward. For example, question one, which asks if the *FW Act* should expressly prohibit indirect discrimination. It is settled law that discrimination for the purpose of s 351 contains both direct and indirect discrimination.[73] For the sake of clarity, a provision could be inserted in s 351 to clarify that: *discrimination on the basis of an attribute provided in s 351(1) includes both direct and indirect discrimination*. To achieve further clarity, and to make the *FW Act* as *user-friendly* as possible, our preference would be for the full definitions of each type of discrimination (direct and indirect), with relevant examples, to be inserted into the *FW Act*.[74] This would not have an effect on how the section is interpreted, but may reduce the amount of litigation arising from disagreements about the scope of discrimination in s 351.

However, other questions asked in this consultation paper are interconnected and thus more complex. This problem stems from issues related to Australia's anti-discrimination framework as a whole. The legal system in Australia regarding anti-discrimination is fragmented, with various Commonwealth and state/territory laws potentially applicable for addressing discrimination, sexual harassment, bullying, and other related behaviours. There are four substantive anti-discrimination statutes at the Commonwealth level, and they overlap with state and territory laws covering similar concepts and grounds, along with additional attributes not provided at the Commonwealth level. These laws have different requirements,

[73] *Klein V Metropolitan Fire and Emergency Services Board* [2012] FCA1402.
[74] See, *Equal Opportunity Act 2010* (Vic) ss 8-9.

procedures, timeframes for lodging claims or applications, and potential outcomes if a claim is pursued to a hearing and is successful. Additionally, the rules regarding the availability of legal cost orders can greatly impact the practicality of pursuing a claim. The complexity and fragmentation of anti-discrimination laws in Australia can be overwhelming for workers. They may face diverse laws that respond to similar factual circumstances in very different ways.

A harmonising of anti-discrimination laws should be undertaken to ensure that obligations, rights, and avenues to remedies, are clear to all parties. This does not mean that changes to the *FW Act* to align better with other anti-discrimination legislation, as it is currently, should not be undertaken. We support the spirit of the changes contemplated in the consultation paper, but for many of the questions, we will reserve specific comments until provisions have been drafted.

Complaints process

If a new complaints process was established to require all complaints of discrimination under the *FW Act* (i.e. both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation, then the descriptions, and extensions of attributes, in Australia's anti-discrimination legislation would need to be duplicated, or referenced, in the *FW Act*.

For example, if a definition of disability, that extends to manifestations,[75] is not included in the *FW Act*, then a Victorian employee may find themselves unsuccessful in a complaint made to the FWC,[76] when they may otherwise have been successful in a complaint made to VCAT.[77] A similar outcome would occur if s351(2)(b) was not amended to include reasonable adjustments[78] (question 3), or if an attribute extension was not provided for (question 4).[79]

Mandating that all employment related matters must first be dealt with by the FWC would substantially increase the workload of the FWC. It may also disempower complainants by reducing their ability to take the avenue of their choice to resolve a dispute. In the fiscal year 2021-22, the Australian Human Rights Commission ('AHRC') recorded 3,736 complaints, many of which involved multiple respondents, grounds and areas of discrimination.[80] A significant proportion of complaints received were related to employment. Employment related complaints made up 22 % of complaints under the *Disability Discrimination Act 1992*

[75] As it does under the *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'disability'): '[t]o avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability', And under the *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'disability'): 'includes … behaviour that is a symptom or manifestation of a disability'.
[76] See, eg Hodkinson v Commonwealth (2011) 248 FLR 409; Western Union Business Solutions (Australia) Pty Ltd v Robinson [2019] FCAFC 181.
[77] As a contravention of part 4 of the *Equal Opportunity Act 2010* (Vic)
[78] For how *inherent requirements* are understood see *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 294-295. Under the *Equal Opportunity Act 2010* (vic) s 20, employers must make reasonable adjustments for person offered employment and for employees with a disability
[79] For an example of attribute extension in the Victorian Act, '[d]iscrimination on the basis of an attribute includes discrimination on the basis… of a characteristic that a person with that attribute generally has; of a characteristic that is generally imputed to a person with that attribute; [and] that a person is presumed to have that attribute or to have had it at any time': *Equal Opportunity Act* 2010 (Vic) ss 7(2)(b)-(d).
[80] Australian Human Rights Commission, *Complaint Statistics 2021-2022* (Report 2022).

(Cth); 73 % of complaints under the *Sex Discrimination Act 1984* (Cth); 38 % of complaints under the *Racial Discrimination Act 1975* (Cth); and 41 % of complaints under the *Age Discrimination Act 2004* (Cth)[81].

If complaints were required to be handled in the first instance by the FWC, it would be unfair to require a filing fee to be paid. Currently a filing fee applies to complaints made in the FWC but not in the AHRC.

If this change were made, the increase in complaints, and a waiving of the filing fee, would require further resources and funding of the FWC. Further, it may make it unclear what avenue complainants would need to take if their complaint comprised an instance of discrimination related to their employment as well as another aspect of public life.

Repealing section 722

Section 722 provides protection for employees unable to pursue general protections. Its scope is generally limited to non-national system employees by s 723. However, there are instances where s 772 has covered employees unable to pursue a general protections application on other grounds. In *Krcho v University of New South Wales*[82] a national system employee alleged dismissal on grounds of political opinion under s 772(1)(f). He was unable to make a general protections application for contravention of s 351(1) but was able to make one under s 772. This occurred because under the *Anti-Discrimination Act 1992* (NSW), *political opinion* is not a discriminatory attribute, thus s 351(1) does not apply by reason of s 351(2)(a). Removing s 722 without tackling the task of harmonising anti-discrimination laws at the federal and state/territory level, will disadvantage some national system employees.

In principle, Per Capita supports providing clarity to duplicative and potentially confusing aspects of the *FW Act* but will wait to provide further comment once drafting of potential changes has occurred.

Family and domestic violence as a protected attribute

The recognition of family and domestic violence as a protected attribute under anti-discrimination law has been recommended by various bodies, including the AHRC, the Australian Law Reform Commission, and the Senate Legal and Constitutional Affairs Committee.[83] Incorporating it into the Commonwealth's anti-discrimination framework would clarify and strengthen existing discrimination laws, which offer some, but limited protection to victims and survivors of this form of violence. The inclusion of family and domestic

[81] Ibid.
[82] [2021] FWCFB 3908.
[83] Australian Human Rights Commission, submission to the Department of Education, Employment and Workplace Relations, *Post Implementation Review of the Fair Work Act 2009* (12 March 2012) recommendation 14; Australian Law Reform Commission, Family Violence and Commonwealth Laws— Improving Legal Frameworks (Final report No 117, November 2011) recommendation 16-8; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) recommendation 3.

violence as a protected attribute would help raise community and business awareness about its impact, enable the adoption of measures to eliminate and prevent discrimination, facilitate the adoption of workplace policies and procedures to support victims and survivors, and foster an environment where they feel comfortable disclosing their situations. The stigma associated with family and domestic violence extends beyond the workplace, making it important to protect this attribute in the wider anti-discrimination statutory regime.[84]

We support its inclusion in the *FW Act*, but this change should be implemented alongside broader anti-discrimination reform. This would provide people affected by family and domestic violence with more avenues to have their complaints heard. Especially in instances where the discrimination occurs in multiple aspects of public life.

Concluding comments

Updating the *FW Act* to better protect employees from discrimination is necessary. It does not have to wait until harmonisation of anti-discrimination legislation is undertaken, although this should be a priority of the government for better clarity in pursuing discrimination claims in all aspects of public life. We support the spirt of these changes but will wait for further drafting before making additional comments.

[84] See, Australian Human Rights Commission, submission to the Department of Education, Employment and Workplace Relations, *Post Implementation Review of the Fair Work Act 2009* (12 March 2012).

Same Job Same Pay

Introduction

Labour hire arrangements in Australia generally involve a triangular relationship where there is a work contract between the worker and the labour hire agency, and a commercial contract between the agency and the host employer.[85] Agency workers will generally perform work under the direction, and for the benefit, of the host employer. Yet outside few exceptional situations, these workers are not deemed to be employees of the host employer.[86] They are therefore, not protected by the unfair dismissal provisions in the *FW Act*,[87] even in situations where a worker has worked on a full-time basis for a considerable period of time. The concept of *joint employment*, where there could be more than one employer is yet to be accepted by Australian courts,[88] thus, in the absence of a clear intention to create a contract between an agency worker and a host employer, courts will not imply that a contract exists.[89]

Issues labour hire workers face

The ease of dismissal from work performed for a host employer without recourse, has consequences for workplace health and safety. Whilst, host firms are bound by the same obligations to agency workers as to directly employed workers, in regard to their work health and safety obligations,[90] labour hire employees may be more reluctant to raise concerns about breaches of occupational health and safety standards or about being underpaid, out of fear of dismissal without recourse.[91] The legislation should be amended so that agency workers have greater recourse from dismissal from a job they are performing for a host employer.

A major issue facing Australian workers is the increase in workforce flexibility, which we are told benefits workers as much as it benefits employers. But in reality, the majority of these benefits serve corporate interests, while workers experience increased rates of casualisation.

Labour hire workers are most often employed by agencies on a casual basis.[92] Among OECD countries, Australia has one of the highest rates of casual workers,[93] and labour hire is a major contributor to the growth in casualisation in Australia. It is worth noting that today 60% of casual workers, work the same

[85] Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 76 [4.9].
[86] See, eg, *Damevski v Giudice* (2003) 133 FCR 438.
[87] *FW Act* (n 1) pt 3-2.
[88] See, eg, *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) FWCFB 9605.
[89] See, eg, *Mason and Cox Pty Ltd v McCann* (1999) 74 SASR 438,443; *Wilton and Cumberland v Coal and Allied Operations Pty Ltd* [2007] FCA 725.
[90] *Work Health and Safety Act 2011* (Cth) pt 2.
[91] Construction, Forestry, Mining and Energy Union, Submission No 200 to Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (2017) 8 [27].
[92] *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925 [45].
[93] OECD, *OECD Employment Outlook 2019*: The Future of Work (Report, 2019) 59-60.

hours each week.[94] This raises questions as to whether casual employment is preferred by workers seeking flexibility, or if it is enforced by businesses attempting to reduce the obligations they have to full time and part time employees.

Labour hire workers often have inferior rights, entitlements, and job security to their counterparts in ongoing employment. There are legitimate reasons for labour hire use in Australia, however this form of engagement has expanded far beyond its traditional use. That was, providing short term or temporary labour, or workers with specific expertise. It is now a $19 billion a year industry.[95]

This expansion, in concert with the lack of regulation, has opened the door for the triangular relationship to be utilised as a tool for reducing wages and conditions.

Support for 'Same Job Same Pay' obligations

Per Capita supports implementation of a *same job same pay obligation* to curtail businesses using labour hire arrangements in unscrupulous ways.

In general, we support the provisions provided in the Fair Work Amendment (Same job, Same Pay) Bill 2021 (Cth). This bill provided a clear definition of labour hire businesses in line with the definition used in other Australian jurisdictions.[96] It also defines what same job means.

Pay should be calculated in a way that captures the real pay that workers who are working side-by-side with labour hire employees receive. Many enterprise agreements have allowances and loadings that wouldn't be captured by a base rate of pay. Calculating pay by reference of a base rate of pay would not result in the labour hire workers receiving the same real pay received by the employees they work side-by-side with. This loophole would not be closed if work which attracts an allowance, especially those which apply to more dangerous tasks, such as work at height, underground, or overnight work, is not extended to labour hire workers. Additionally, some conditions apply under enterprise agreements which would be appropriate to extend to labour hire workers, like time limits applicable to certain environmental conditions (heat, rain, smoke), as well as superannuation contributions that sit above the minimum. There may be some conditions in enterprise agreements that are provided to employees of the host that may not be appropriate the capture in this obligation, such as study bursaries. But the drafting in s 123C of the bill should capture the conditions and pay that would be paid to an employee working the same hours and doing the same job.

[94] Stewart, *Stewart's Guide to Employment Law* (n 16) 67.
[95] Australian Council of Trade Unions, 'Labour Hire 2021' (policy paper, ACTU congress 2021, 2021).
[96] *Labour Hire Licensing Act 2017* (Qld) s 7(1); *Labour Hire Licensing Act 2017* (SA) s 7; *Labour Hire Licensing Act 2020* (ACT) s 7.

A small business exemption?

We question whether the small business exemption that was provided in s 123E of the bill are appropriate. We are concerned that allowing the obligation to apply to employers who employ less than 15 employees may encourage employers to reduce their own workforce and rely more heavily on labour hire so that they are not bound by the obligation. If there was a small business exemption it should be determined by reference to the meaning of small business entity in the *Income Tax Assessment Act 1997* (Cth),[97] rather than turning on the number of employees engaged by the host.

Concluding thoughts

In general, we support reform to labour hire, like that proposed in the 2021 bill. We look forward to providing further input once drafting of provisions has occurred.

[97] *Income Tax Assessment Act 1997* (Cth) s 328.110.

Conclusion

We thank the DEWR for their consideration of this response. We are available for any further questions from the DEWR regarding our comments above.

We look forward to providing further submissions on proposed changes to Australia's industrial relations statutory regime.

We consider many of these proposed changes, bold, brave and necessary.

We acknowledge the decades of campaigning by Australian working people in their workplaces, communities and unions. They have put these changes on the legislative agenda.

However, we maintain that one of the most important reforms remains the implementation of a statutory definition of employee. This was not contemplated in the DEWR's questions. We support a definition which presumes an employment relationship exists and requires the real relationship between the worker and their putative employer to be the primary determinant.