Submission to the Senate Education and Employment Legislation Committee: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)

percapita
FIGHTING INEQUALITY IN AUSTRALIA

September 2023

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE: FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023 (CTH)

Per Capita

September 2023

Per Capita welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee's inquiry into the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) (the **Bill**).

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

In Australia, the concept of the fair go remains one of our most enduring principles, saturating our cultural and political discourse. It is a concept so emblematic of our nation, where fairness, egalitarianism, and mateship shape our national character. It has permeated Australian industrial relations, from the 1907 *Harvester Decision*[1] to the 2022 *Aged Care Work Value Case*.[2]

The *Fair Work Act 2009* (Cth) (the ***FW Act***) took this notion and built around it 'a new workplace relations system ready to meet the needs of this nation in the 21st century'.[3] Key to this was the inclusion of a fair and comprehensive safety net: a set of minimum employment conditions, which cannot be stripped away.[4]

Today, too many workers find themselves excluded from this safety net, falling through loopholes in our workplace laws. This Bill is not radical. This Bill is not about pay back. This Bill is only concerned with fairness.

Our submission focuses on amendments proposed in the Bill which ensure that working people have access to the benefits of our workplace laws. These are the proposed reforms relating to casual employment, and defining employment relationships. Getting these definitions right is

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[1] *Ex Parte H V McKay* (1907) 2 CAR 1.
[2] *Aged Care Work Value* Case [2022] FWCFB 200.
[3] National Employment Standards. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Minister for Employment and Workplace Relations).
[4] Ibid; *Fair Work Act 2009* (Cth) s 61(1) ('*FW Act*').

vitally important. Without a strong foundation where workers are classified by the work they do, and not by the label they are given, working people will continue to fall through the gaps.

Per Capita is fully supportive of the reforms relating to casual employees and is broadly supportive of the reforms relating to defining the employment relationship. This submission raises some concerns with the latter and suggests some adjustments to the Bill.

Casual employment

The prevalence of casual employment and other forms of non-standard work have exacerbated a growing crisis of insecure work in our country.

Per Capita welcomes the return of an objective definition for *casual employees*, characterised by an absence of a firm advance commitment to continuing and indefinite work. Together with the proposed amendments which will enhance employee choice, the new definition expands access to permanent employment for those who seek it.

The casual conversion provisions implemented under the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act* 2021 (Cth) (***2021 Amendment***) are woefully deficient in providing a pathway to permanency, even when casuals are ostensibly working in a permanent capacity. The current consent requirements to access arbitration means that casual employees who are refused conversion do not have a real opportunity to challenge that refusal. Proposed reforms in this Bill which allow the Fair Work Commission (the **FWC**) to deal with casual conversion disputes by arbitration will only be available after other appropriate alternative dispute options have been exhausted. This pathway will provide finality and certainty for both employees and employers and be determined by a fair and independent third party. We support these proposed reforms.

Per Capita supports the change to the statutory definition of *casual employee* to replace the statutory definition inserted by the *2021 Amendment*. The clear problem with the existing definition is that classification occurs upon the offer of employment, not by reference to the subsequent conduct of the parties. Indeed, in determining whether an employee is casual or permanent, assessing the subsequent conduct of either party is not currently permitted.[5] Under this definition, employers are given the full prerogative to label their workers as they wish. It ignores the inherent power imbalance which exists between workers and employees, particularly at the point of engagement. By simply applying the casual label to their employees, employers can

[5] Ibid s 15A(4).

shift their risk, engaging workers on an insecure basis and potentially locking them into the label of casual employment indefinitely.

The casual catastrophe in Australia's workforce- why are these amendments needed?

The explosion in the rates of casualisation and other forms of insecure work coincided with the deregulation of our labour market.[6] This has left today's workforce propped up by non-standard forms of work. In August 2023, 22.4% of employees in Australia were employed on a casual basis, for women its 24.1%.[7] While the incidence of casual employment has been relatively stable since the 1990s, it is still exceedingly high by global standards.[8]

At common law, the *absence of a firm advance commitment*, in relation to casual employment, generally involves the notion of informality, irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability.[9] For many of the 2.7 million casual employees working in Australia today, their jobs are not flexible, irregular, or absent of a firm advanced commitment of continued work. Rather, the true characteristics of casual employment are low pay, low power, low safety, and low flexibility. This is not fair, and the amendments to the casual definition proposed in this Bill take a big step towards addressing some of these issues facing millions of workers.

Low pay

Casuals are generally not entitled to paid annual leave, sick leave, carer's leave, or compassionate leave.[10] Instead they are meant to receive an hourly loading in lieu of these absent entitlements, normally set at 25%. It's supposed to be a pay boost, but what they really get is a pay cut. When comparing median hourly pay, casual employees are paid less than their permanent counterparts. Across the entire workforce, they receive $11.40 less each hour, representing a pay gap of 28% (**Figure 1**).

This gap has steadily climbed, getting bigger every year. It is now the biggest pay gap on record. No matter which way you slice it - whether by industry, occupation, age, or skill - casual employees are paid less per hour than permanent employees (**Figures 2-5**).

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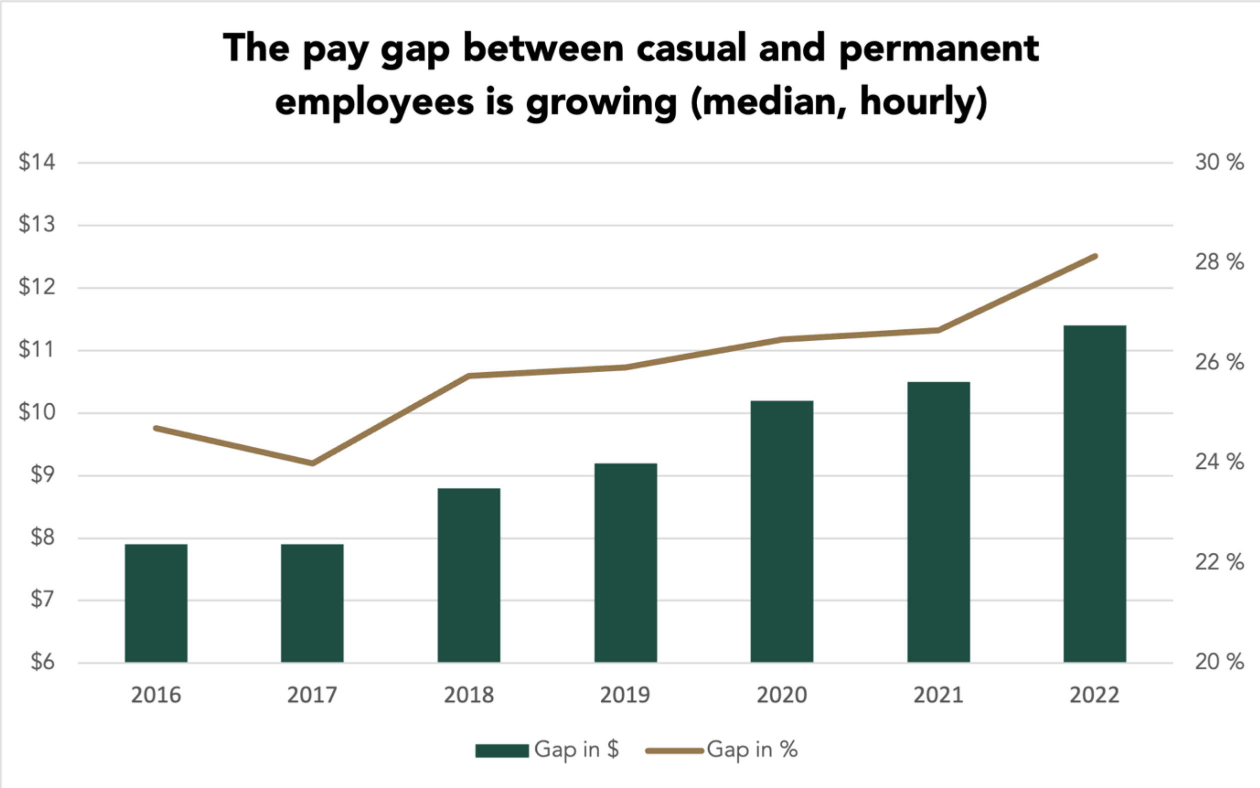
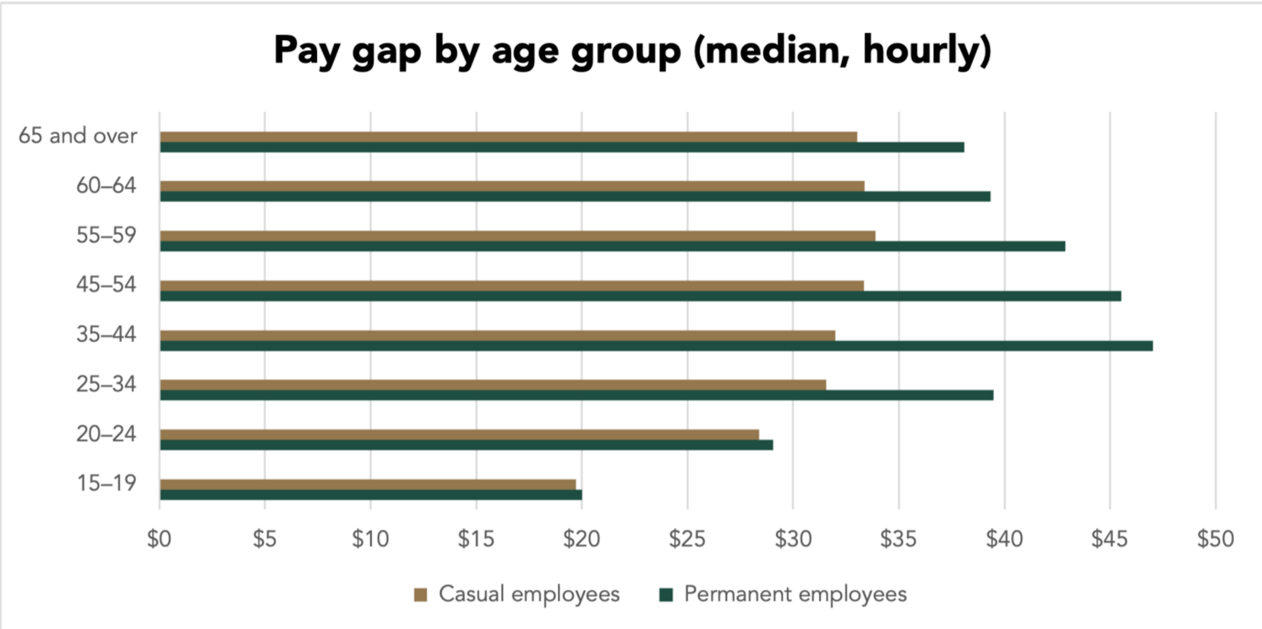
[6] Geoff Gilfillan, 'Characteristics and Use of Casual Employees in Australia' (Research Paper, Parliamentary Library, Parliament of Australia, 19 January 2018).
[7] Australian Bureau of Statistics, *Labour Force, Australia, Detailed, August 2023* (Catalogue No 6291.0.55.001, 21 August 2023).
[8] Organisation for Economic Co-Operation and Development, *The Future of Work: OECD Employment Outlook 2019* (Report, 25 April 2019) ch 2.
[9] *Workpac Pty Ltd v Skene* (2018) 326 ALR 31 [173].
[10] FW Act (n 4) ss 86, 95, 106.

Figure 1



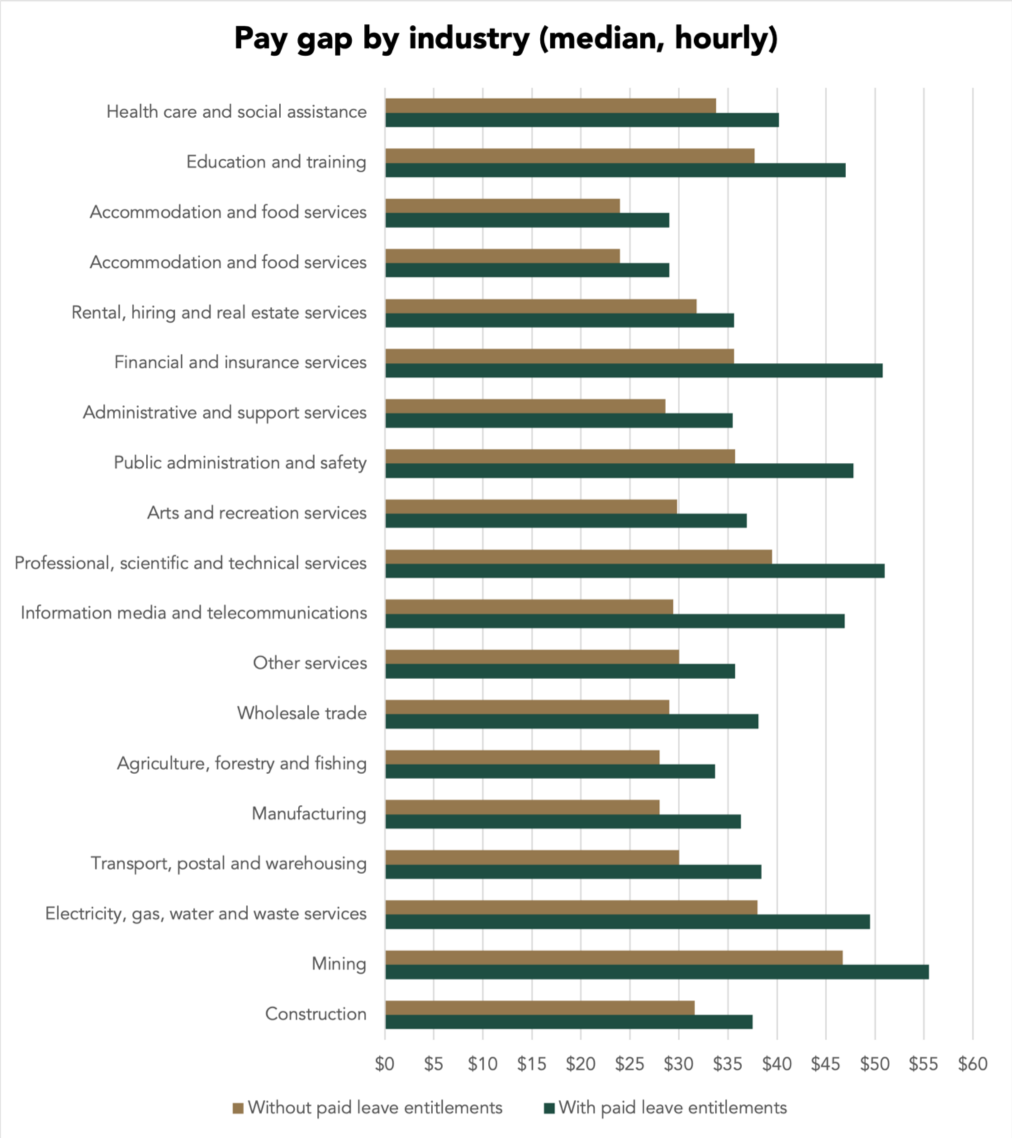
Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 2



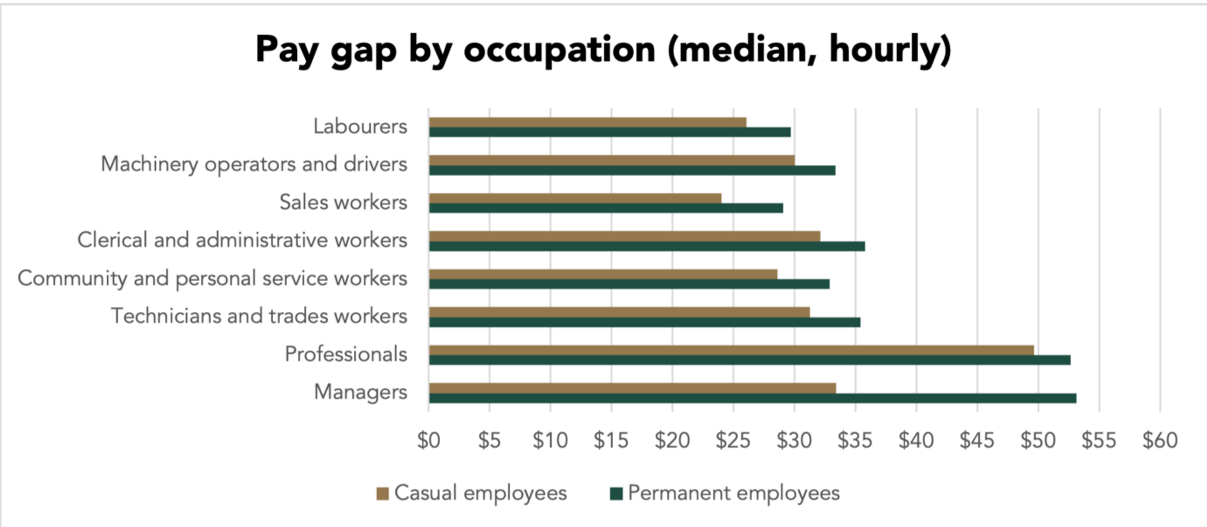
Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 3



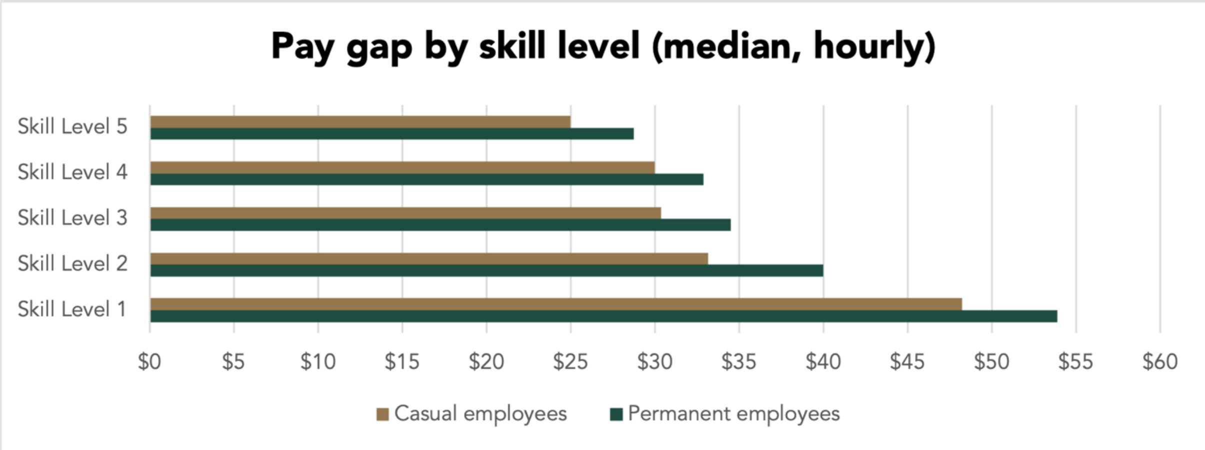
Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 4



Source: ABS, 6336.0 Working Arrangements, August 2022

Figure 5

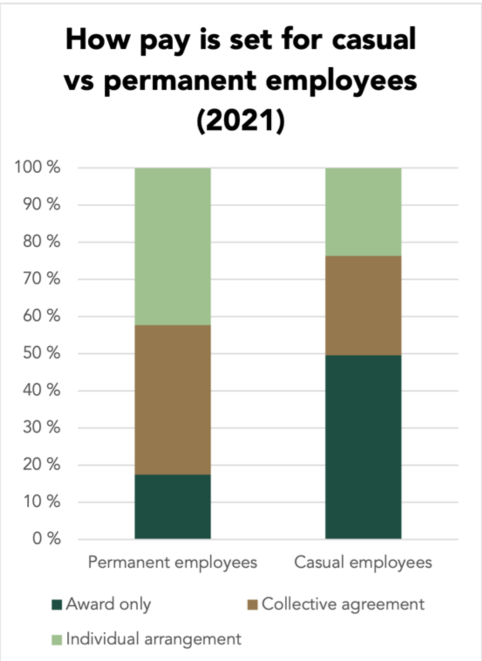


Source: ABS, 6336.0 Working Arrangements, August 2022

Low power and safety

Casual employees have less power in their workplaces. They are more likely to have their wages and conditions set by an industry award, and thus, paid less than those on collective agreements (**Figure 6**). On average, award dependent casual employees earn $9.30 less than casuals on collective agreements.[11]

Figure 6

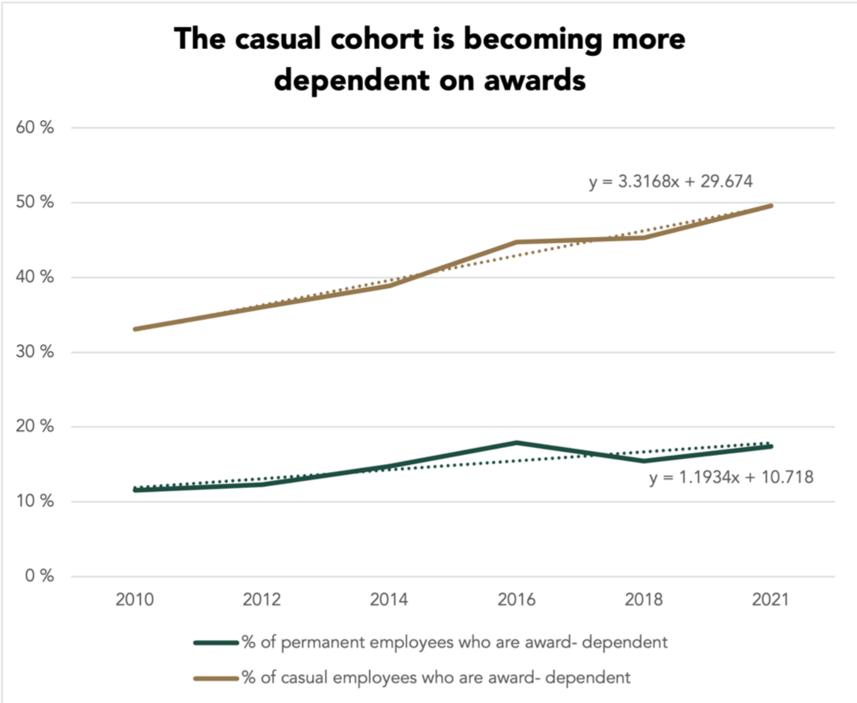


Source: ABS, 6306.0 Employee Earnings and Hours, Australia, 2021, non-managerial employees

[11] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, 2021* (Catalogue no 6306.0, 19 January 2022).

Whilst one in five employees in Australia is casually employed, they make up almost half of all award-dependent employees (45.5%).[12] Since 2010 the share of all employees who are award-dependent has increased, but for casuals, it is increasing almost three times faster than their permanent counterparts (**Figure 7**).

Figure 7



Source: ABS, 6306.0 Employee Earnings and Hours, Australia, 2010-2021 (non-managerial employees)

The cost of casual employment hits more than just the wallet. Casual employees experience higher workplace injury frequency rates (**Table 1**), and because they have relatively less power than permanent employees, they are less likely to raise health and safety concerns or make complaints about working conditions or workplace harassment.[13]

Examples of how lack of power coincides with lack of safety for casual employees were exposed in the 2020 *Respect@Work Report*. The report documents numerous accounts from workers, unions, academics, and advocates about the extent to which casual employment affects the likelihood of workers making a sexual harassment complaint.[14] What the report exposed was how the precarious nature of casual employment compounds the already relatively low levels of power casual employees have in the workplace, making speaking up about workplace harassment a

[12] Ibid.

[13] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, January 2020); see also, 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].

[14] Ibid 197-8; Paula McDonald and Professor Sara Charlesworth, Submission No 708 to Australian Human Rights Commission, *Sexual Harassment Inquiry* (January 2019) 15.

bigger risk. This doesn't only affect the individual; it has consequences for the safety of entire workplaces. [15]

Safety or work

The Covid pandemic shone a light on how disastrous the insecurity of casual employment can be. Causal workers accounted for around two-thirds of all people who lost jobs in the early 2020 lockdowns. In that year, just between February and May, their numbers fell from 2.6 million to 2.1 million.[16] Later research suggests that during the 2021 lockdown waves, casual workers were eight times more likely to experience job loss compared to permanent staff.[17]

Of the 2.6 million casuals employed in Australia in August 2019, less than half had been with their employer for at least 12 months.[18] Although 80% expected to be with their current employer for the next 12 months it left many without access to the full JobKeeper payments.[19] Young people were hit the hardest; more likely to be casually employed and more likely to be with their current employer for a shorter period. When the JobKeeper payments ceased, casual workers (who generally do not have sick pay) were forced to choose between going to work and getting paid, or staying home and getting healthy; between putting food on the table or keeping the community safe.[20]

Safety at work

When assessed on a per hour basis (hours actually worked in all jobs), casual employees get injured more often at work than permanent employees. During the 2021-2022 financial year, 436,497 employees experienced a work-related injury or illness: 78% were permanent employees and 22% were casuals.[21] Although this is consistent with the percentage of casuals and permanent employees across the workforce, casual employees experienced a 49% higher frequency rate of injury on a per hour basis, compared to their permanent counterparts. The disparity was even more

[15] See eg, individual, Submission No 93 to Australian Human Rights Commission, *Sexual Harassment Inquiry;* Our Watch, Submission No 281 to Australian Human Rights Commission, *Sexual Harassment Inquiry* (January 2019) 12; AHRC, *Respect@Work* (n 13) 194: from a union roundtable held in Melbourne.

[16] Australian Bureau of Statistics, 'Casuals Hardest Hit by Job Losses in 2020' (Media Release, 11 December 2020).

[17] Jim Stanford, 'Shock Troops of the Pandemic: Casual and Insecure Work in COVID and Beyond' (Briefing Paper, Australia Institute, Centre for Future Work, October 2021)>

[18] Geoff Gilfillan, 'COVID-19: Impacts on Casual Workers in Australia - A Statistical Snapshot (Research Paper, Parliamentary Library, Parliament of Australia, 8 May 2020).

[19] Ibid.

[20] Emilia Terzon, Most Casual Workers Will Have to Choose between No Pay or Going to Work with COVID-19, *Australian Broadcasting Corporation* (Online, 13 October 2022) <https://www.abc.net.au/news/2022-10-13/casual-workers-covid-payments-sick-leave-isolation/101528640>.

[21] Australian Bureau of Statistics, *Work-Related Injuries, 2021-22 Financial Year* (Catalogue no 6324.0, 15 February 2023).

pronounced for female casual employees. In 2021-2022, female casuals had an injury frequency rate nearly double that of their permanent female counterparts (93% higher).

Several factors may contribute to this alarming trend, including: inadequate training for casuals in comparison to permanent employees, a higher likelihood of casual workers attending work despite being fatigued or unwell due to the lack of access to paid sick leave, and the possibility that lower job security makes casual employees less willing to voice safety concerns, fearing the potential of losing their job or of other negative repercussions.

Table 1

Status in employment	Males	Females	Total
Number of injured workers			
Employees	239,045	197,452	436,497
With paid leave	197,923	140,559	338,482
Without paid leave	41,122	56,893	98,014
Number of hours actually worked			
Employees	2,360,663,975	1,927,854,817	4,288,518,793
With paid leave	1,995,102,088	1,594,121,945	3,589,224,033
Without paid leave	365,561,887	333,732,873	699,294,760
Incidence rate (injuries per 1000 workers)			
Employees	42.02	34.66	38.34
With paid leave	44.24	33.06	38.79
Without paid leave	33.86	39.4	36.87
Frequency rate (injuries per million hours worked)			
Employees	101.26	102.42	101.78
With paid leave	99.20	88.17	94.31
Without paid leave	112.49	170.47	140.16

Source: Calculations based on: ABS, 6291.0.55.001 Labour Force, Australia, Detailed, May 2023; 6336.0 Working Arrangements, August 2022; 6324.0 Work-Related Injuries, 2021-22.

Low security

Many casual employees work regularly, on an ongoing basis, working the same hours week in, week out. Their work is not genuinely irregular, intermittent, or unpredictable. For many, they are only casual in name.

Employing workers on a permanent basis requires employers to manage risks associated with fluctuating workloads. In contrast, by using a casualised workforce, they are relinquished of obligations to pay benefits and entitlements associated with permanent employment and can budget in a way that is purely responsive to demand.

But this risk doesn't disappear. It is simply transferred from the business owner to the worker. When the amount of work required to service the business drops, employers can shed staff quickly and cheaply. Why should workers bear the risk if they don't share in the rewards?

These reforms are about fairness and choice

Per Capita support the proposed changes relating to casual employment in this Bill. If you are expected to work like a permanent employee, and you want to be a permanent employee the label you are given upon employment should not prevent you from seeking that status. That's not a radical idea, its common sense, and it's the position at common law. The amendments to casual employment, definition, choice and conversions, are not about giving workers unequal power. They are not about punishing businesses. They are about fairness and about flexibility, for employees and employers alike.

Defining the employment relationship

The nature of work is changing across Australia. The COVID-19 pandemic created widespread support for flexible working arrangements which benefit workers, and over the last decade, technological advancements have been changing how work is organised.

Our workplace relations system focuses on the rights of employees, and obligations of employers, but today there is a growing cohort of workers who are excluded from the provisions of the *FW Act* because they have not been engaged as employees. Workers who provide on demand work, often mediated through a digital platform, are among those most in need of the protections provided by the *FW Act*. Yet these workers are frequently misclassified and denied access to the rights and entitlements that they would be entitled to if they were engaged as employees. Our workplace laws have not kept pace with the changing forms of work as we progress through the 21st century. This argues strongly for legislative reform to clarify who is and who is not an employee for the purpose of the *FW Act*. We are glad to see the Bill tackle this issue.

Per Capita supports the inclusion of a statutory definition of employee and employer in the *FW Act* proposed in this Bill. We support the proposal to extend the powers of the FWC so they can set fair minimum standards for *employee-like* workers who would still fall outside the statutory definition. However, we have concerns about the narrowness of the definition at s 15AA and the potential for these reforms to create a third category of worker — a category of worker who may otherwise, under a wider definition, sit comfortably as employees.

We are concerned that the term *employee-like* obfuscates the diversity in this group of workers. Gig workers don't have to be *employee-like*. On-demand work can resemble casual work in many ways. Workers often have the option to decline shifts, work specific hours and work for multiple businesses. Many fit easily into the definition of casual employee. 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 applicable to casual employees under the NES.[22]

We are concerned that the narrow definition proposed in this Bill, in concert with the *employee-like* provisions, may cause uncertainty for workers and businesses, and carry negative repercussions for existing employees. Particularly those who have their work mediated by platforms, or experience high levels of flexibility, but otherwise resemble traditional employees.

The argument for change in how we define the employment relationship

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.[23] Under this test, the written terms of the contract were not decisive, but rather, constituted just one of the considerable *factors*. The 2022 decisions in *ZG Operations Australia Pty Ltd v Jamsek*[24] and *CFMMEU v Personnel Contracting*[25] has altered this precedent, emphasising the primacy of contract.

As it stands, 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. [26]

[22] Victorian Government, *The Report of the Victorian Inquiry into the Victorian On-Demand Workforce*, (Report, June 2020) 142-3.
[23] *Hollis v Vabu* (2001) 207 CLR 21.
[24] [2022] HCA 2 ('*Jamsek*').
[25] [2022] HCA 1 ('*Personnel Contracting*').
[26] *Nawaz v Rasier Pacific Pty Ltd (t/a Uber BV)* [2022] FWC 1189 [346], *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156 [54].

In *Deliveroo Australia Pty Ltd v Franco*,[27] the Full Bench observed there was clearly unfair treatment of Mr Franco by Deliveroo,[28] but was compelled to find that he was a contractor, and not an employee, because there were 'realities [the court was] obliged to ignore'.[29]

Even before *Jamsek* and *Personnel Contracting*, parliamentary committees had been making recommendations that the statutory definition of employee be expanded to workers who fall through the cracks.[30] There is clearly a need for legislative intervention to address the issues arising from this approach.

Why should the definition strive to capture gig workers?

Every iteration of Australian industrial relations legislation has sought to ensure that workers in the weakest bargaining position are protected at work.[31] 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.[32]

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.[33] These are exactly the workers that our system should strive to protect.

Per Capita recognises that industrial relations reform has been, for decades, incredibly polarising and politicised. We appreciate that steadily building reforms is sometimes the only way to move forward at all. We acknowledge that even under a wide definition of employee (that we have proposed below) some businesses will still find a way to get around the rules. Allowing the FWC to set minimum standards for on-demand workers that are not captured by the definition is important. However, we believe a wider definition that the Bill's 15AA will allow for better coverage of potential employees as well as provide wider flexibility for the future as new forms of work emerge.

Comments about widening the definition of employee and employer

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[27] [2022] FWCFB 156 ('*Deliveroo*').
[28] Ibid [57].
[29] Ibid [52]-[54].
[30] 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.
[31] See Richard Naughton, *The Shaping of Labour Law Legislation- Underlying Elements of Australia's Workplace Relations System* (LexisNexis Butterworths Australia, 2017).
[32] Paula McDonald et al, *Digital Platform Work In Australia: Prevalence, Nature and Impact* (Report, November 2019) 5-10.
[33] Ibid.

In the *FW Act, employee,* is given its ordinary meaning, determined by Australian common law.[34] The definition proposed in this Bill deals with the issues stemming from the decisions of *Jamsek* and *Personnel Contracting*, by introducing a statutory definition that replicates the common law but which directly counteracts the principle established in *Personnel Contracting* and *Jamsek.* The definition proposed in the Bill allows for the actual work performed by the worker to be considered when determining their employment status, rather than relying solely on the written contract. This definition would maintain the common law position while giving the FWC and courts the ability to consider the full scope of the work relationship. This amendment is an important step, but we are concerned it does not go far enough to close this loophole.

The downside of this approach is that it could enable businesses to continue imposing 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. It also allows for contractual provisions, like allowing for the delegation of work to be considered indicative of a principal/independent contractor relationship, even where such provisions cannot be practically exercised.

Our opinion is that the Bill's narrower approach is less suitable because it would be easy for businesses to avoid. Instead, we support a wider definition that shifts the burden of proof to the party claiming that the work arrangement does not constitute an employment relationship, and which outlines the relevant factors that should, or should not, be considered in assessing such a claim.

Outlining relevant factors is less about providing guidance to the court and more about aiding workers and businesses to understand their rights and obligations under the *FW Act*. This is vital if they are to attempt to resolve disputes in the first instance, in the workplace. The *FW Act* should be as clear as possible — it shouldn't be a document that you need a law degree or a LexisNexis subscription to understand.

Our suggestions incorporate aspects of Andrew Stewart's 2002 definition, with tweaks to better capture the realities of platform mediated work, suggested by Joellen Riley Munton in 2021.[35]

Drawing on this definition and considering the text at s15AA, we suggest that four additional sub-sections should be added into the proposed s15AA. Their purpose is to shift the burden of proof

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[34] *FW Act* (n 4) s 11-2.

[35] Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235; 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)

to the party claiming that the work arrangement does not constitute an employment relationship; and outline the relevant factors that should, and should not, be considered in assessing such a claim.

1) To avoid doubt in determining whether a worker is most appropriately classified as an employee under this section or an employee-like worker under s 15P, 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 and the hirer their employer, 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) 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.

3) 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.

4) A contract is not to be regarded as service contract, within the meaning of s 15H, 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.

We believe these amendments will allow for a wider and more flexible definition under proposed s 15AA. What we don't want to see is genuine employees, like those casual employees working for employers who use digital platforms to mediate work, exposed to disputes about their employment. If a wider definition was adopted, alongside the proposed reforms to empower the FWC to set minimum rates and conditions for workers who still fall outside a wide definition, it would create a more watertight system for now and into the future.

Conclusion

Per Capita broadly supports this Bill. In this submission we have focused on definitions, but there is so much more this Bill does.

This Bill is not a radical proposal. It does seek to implement some substantial changes, but these are about ensuring the *FW Act* so that it can continue to meet its intended objectives. The Bill should be passed as soon as possible.

We would like to acknowledge the decades of campaigning by Australian working people in their workplaces, communities and unions, to put this on the legislative agenda.

We thank the members of the Senate Education and Employment Committee for their consideration of our submission.