

PER CAPITA SUBMISSION

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE: FAIR WORK LEGISLATION AMENDMENT (PROTECTING WORKER ENTITLEMENTS) BILL 2022

Per Capita

April 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 (Protecting Worker Entitlements) Bill 2023 (Cth).

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.

Per Capita has considered the Bill and is supportive of its aims. We acknowledge that it is the next step in building a fairer more securing workplace relations system, after years of neglect, and look forward to making further submissions relating to governments agenda of closing the loopholes some businesses use to undercut worker security.

This submission will focus primarily on the unpaid parental leave provisions in this Bill, which we view as an important accessory to the governments paid parental leave policy.

Unpaid parental leave

Per Capita has written extensively about the impact of parental leave policy on gender equity in the workplace, and we welcome these changes.¹

The Bill provides greater flexibility for working families by changing how unpaid parental leave ('UPL') can be taken. By increasing the provision for flexible unpaid parental leave, allowing UPL to be taken in the weeks preceding birth, and removing 'employee couple' and 'concurrent leave' provisions, the Bill promotes shared caring responsibilities and gender equality.

International comparison of parental leave policies, conducted by the Workplace Gender Equality Agency ('WEGA'), shows that the use of parental leave by fathers increases when entitlements are

¹ See, eg, Emma Dawson and Simon Casey, 'The "Herstory" of Superannuation' (Discussion Paper for Women in Super, Per Capita, August 2020) < <https://percapita.org.au/wp-content/uploads/2020/08/The-Herstory-of-Superannuation-FINAL-1.pdf>>; Emma Dawson, Tanja Kovac and Abigail Lewis, *Measure for Measure: Gender Equality in Australia* (Report, March 2020) < https://percapita.org.au/wp-content/uploads/2020/03/MFM_report_FINAL.pdf>.

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generous, and when policies offer flexibility about when leave can be used.² When parental leave is provided equally to men and women, and is not transferable between partners, men's take-up of parental leave is significantly higher, women are more likely to return to the workforce at the same level, and working the same hours, as before becoming a parent, and the economic penalty on mothers is vastly reduced.³

The Motherhood Penalty

Caring responsibilities have a disproportionate financial impact on women. The need to spend more time out of work, change jobs, or work part-time following the birth of a child also negatively affects future career opportunities, rendering motherhood a barrier to career advancement among professional women.⁴ This is often described as the motherhood penalty.⁵

Economists have estimated that 39% of the gender pay gap is attributable to the years women spend out of the workforce to care for children,⁶ and that raising children accounts for a 17% loss in lifetime earnings for Australian women.⁷

Findings from the Australian Bureau of Statistics, *Pregnancy and Employment Transitions Survey*, estimated that 40% of mothers did not start or return to work (and were not on leave) in the first two years after the birth of their child.⁸ The main reason for not being in employment was to care for their child.⁹ 26% of mothers, compared to 8% of partners, who returned to work in this period did not return to their previous employer and were more likely to change roles and responsibilities, or work part time than their partners.¹⁰

The disparity in working hours between mothers and partners is staggering: 80% of mothers with a child under two worked part time, compared to only 10% of partners.¹¹

² Workplace Gender Equality Agency, *Towards a Gender Balanced Paid Parental Leave: Australian and International Trends* (Insight Paper, October 2017)

<<https://www.wgea.gov.au/sites/default/files/documents/gender%20balanced%20parental%20leave.pdf>>.

³ Ibid.

⁴ Nina Drange and Mari Rege, 'Trapped at Home: The Effect of Mothers' Temporary Labor Market Exits on Their Subsequent Work Career' (2013) 24 *Labour Economics* 125.

⁵ Shelly Correll, 'Getting a Job: Is There a Motherhood Penalty?' (2007) 112(5) *American Journal of Sociology* 1297.

⁶ KPMG, *She's Price(d)less: The economics of the Gender Pay Gap* (Report, 22 August 2019) <

<https://assets.kpmg.com/content/dam/kpmg/au/pdf/2019/gender-pay-gap-economics-full-report-2019.pdf>>.

⁷ WEGA (n 2); Jerome Adda, Christian Dustmann and Katrien Stevens, 'The Career Costs of Children' (2016) 125(2) *Journal of Political Economy* 1.

⁸ Australian Bureau of statistics, *Pregnancy and Employment Transitions, Australia, Nov 2017* (Catalogue no 4913.0., 29 July 2018) table 13.

⁹ Ibid table 13.

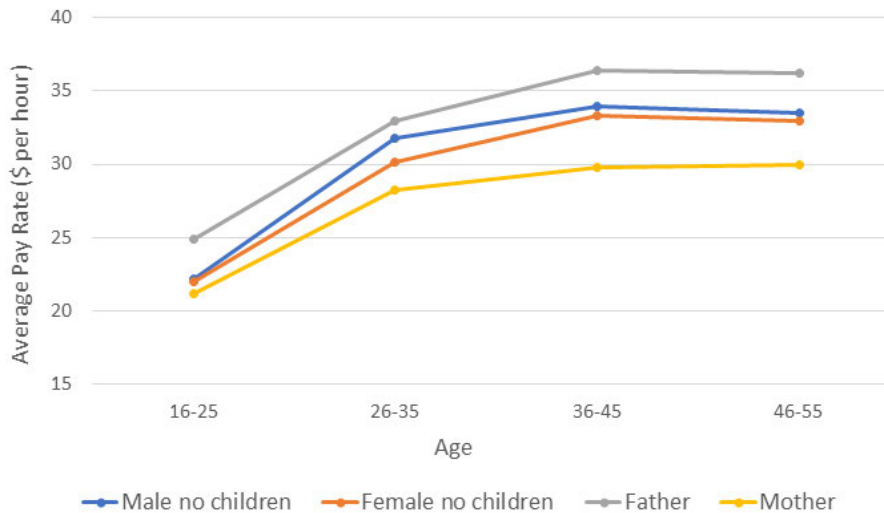
¹⁰ Ibid table 16, 23.

¹¹ Ibid.

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International research has demonstrated that becoming a parent has a diametrically opposed impact on the careers of men and women, with fathers enjoying an *income bonus*, earning more than men and women without children, and mothers suffering a penalty, earning less than all other workers.¹²

An analysis of HILDA data demonstrates that the same effect is true in Australia.¹³



There is a significant body of literature that highlights the importance and benefits of non-birthing parents being involved in early childcare, including benefits for the development of children, and later equality in other household responsibilities.¹⁴ Inequitable parental leave for fathers and partners means that, when mothers return to work, they are more likely to have informal care provided for by other family members, decreasing benefits which stem from early partner childcare.¹⁵

By making it easier for parents (primarily women) to stay in full time work while utilising flexible UPL, other leave entitlements like annual leave and long service leave will remain unaffected, as

¹² Michelle Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay* (Report, Online, 2 September 2014) < <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay>.

¹³ Average pay rates for full-time employees, Adapted from Waves 1-17 of HILDA data: Wilkins et al, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 17* (Melbourne Institute: Applied Economic & Social Research, University of Melbourne, 2019).

¹⁴ Michael Bunning, 'What Happens After the "daddy months"? Fathers' involvement in paid work, childcare, and housework after taking parental leave in Germany' (2015) 31(6) *European Sociological Review* 738; Ásdís Arnalds et al, 'Equal Rights to Paid Parental Leave and Caring Fathers- The Case of Iceland' (2013) 9(2) *Icelandic Review of Politics and Administration* 323; Jennifer Baxter and Diana Smart, 'Fathering in Australia Among Couple Families with Young Children' (Occasional Paper No 37, Australian Institute of Family Studies, 2013); Christopher Knoester, Richard Petts, and Brianne Pragg, 'Paternity Leave-taking and Father Involvement Among Socioeconomically Disadvantaged US fathers' (2019) 81 *Journal of Sex Roles* 257.

¹⁵ Australian Bureau of statistics, *Pregnancy and Employment Transitions, Australia, Nov 2017* (Catalogue no 4913.0., 29 July 2018) table 14.

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workers are not required to change their contract of employment. Additionally, less annual leave will be used for unpaid caring work, instead it will better serve its proper function of providing employees with time for rest and recreation.

For these reasons, Per Capita is supportive of proposed changes to the UPL provisions in the *Fair Work Act 2009* (Cth) ('*FW Act*') and welcome them as part of a larger policy package targeting gender equality in Australia.

Additional comments

Per Capita understands that further legislative amendments will be introduced as part of the government's plan to *close the loopholes* in the *FW Act*. However, we submit that some issues workers face accessing benefits under the *FW Act* are not only the fault of employers exploiting loopholes, but also a consequence of the changing nature of work.

The introduction of the *FW Act*, like other industrial relations legislation before it, evoked the concept of the *fair go*. It was introduced as an enactment which 'takes the Australian value of the fair go and builds around it a new workplace relations system ready to meet the needs of this nation in the 21st century'.¹⁶

Key to this was the inclusion of 'a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away',¹⁷ achieved through the National Employment Standards and Modern Awards. But there are now serious questions as to whether our workplace laws, and indeed the object of the *FW Act* have kept pace with the rise in non-standard forms of work as we progress through the 21st century.

Gig economy, or platform, workers are exactly the workers who most require the *FW Act's safety net*, but often these workers are classified in such a way as to deny them access to the basic rights and conditions that the *safety net* provides. This is not a new strategy to reduce workers' rights, and recommendations of measures to protect these workers have been made to the Australian Government in a number of reports and inquiries dating back to the 1985 *Hancock Report*.¹⁸ Today the problem persists and has been exacerbated by developments in technology.

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Minister for Employment and Workplace Relations).

¹⁷ *Ibid.*

¹⁸ Keith Hancock, *Committee of Review into Australian Industrial Relations Law and Systems* (Report, 1985, vol. 2, AGPS, Canberra). See also, Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235; 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).

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Today, there is a growing cohort of 'employee like' workers who are excluded from protections under our national Fair Work system. Recent High Court decisions¹⁹ that have narrowed the common law definition of employee,²⁰ and the massive power and resources of gig platform companies, have made proving an employment relationship almost impossible for these workers.

Platform workers are particularly vulnerable: they are likely to be young, temporary residents, or come from culturally and linguistically diverse households.²¹ Additionally, many on these workers are not aware of their workplace rights or their employment status.²²

Our strong opinion is that legislative amendments should be made to broaden the definition of employee under the *FW Act*, to capture platform workers and ensure that they have full access to protection under Australia's industrial relations system.

This includes protection under the NES (which, considering many would be deemed casual, would not apply in its entirety), modern awards to provide a base minimum rate of pay, and protections against unfair employer actions, such as unfair dismissal.

We look forward to making a further submission on this matter as further legislative amendments are proposed to make work in Australia safer, fairer, and more secure.

Conclusion

Per Capita supports this Bill. Whilst most employees do the right thing, we know that where there are loopholes, they will be exploited by some.

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

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

¹⁹ *Workpac Pty Ltd v Rossato* (2021) 392 ALR 39; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; *CFMMEU v Personal Contracting Pty Ltd* [2022] HCA 1.

²⁰ See, *Fair Work Act 2009* (Cth) s 12-13.

²¹ Paula McDonald et al, *Digital Platform Work In Australia: Prevalence, Nature and Impact* (Report, November 2019) 5-10. 5-10.

²² *Ibid.*