

**economic Security4Women (eS4W)** is a national women's alliance, funded by the Australian Government through the Office for Women in the Commonwealth Department of Prime Minister and Cabinet.

It is an alliance of 20 women's organisations united in the belief that economic wellbeing and financial security are essential for women and will enable women of all ages to have an equal place in society.

The role of eS4W is to:

- bring together women's organisations and individuals from across Australia to share information, identify barriers to women's economic security and to identify solutions by prioritising the key issues for action to bring about change
- engage actively with the Australian Government on policy issues as part of a better more informed and representative dialogue between women and government.

One of our members, the National Foundation of Australian Women (NFAW) has made a number of **Recommendations** to the Productivity Commissions Inquiry into Workplace Relations, in the course of addressing the questions raised in the Issues Papers circulated by the Commission.

eS4W endorses the following recommendations listed below in the order in which they appear in the body of the submission by NFAW.

#### **Objects of the FW Act (Section 4)**

1. The current principal object of the Act should be amended to include a gender equality object. We know that gender has a significant impact on workplace relations and this must be reflected in the Act.
2. The objects of the FW Act should not be undermined by limiting or reducing the current range of existing minimum standards and protections embedded in the FW Act, including those affecting the operation of the safety net and bargaining.

#### **Employee protections (Section 5)**

3. While there is already provision for an employee experiencing violence from a member of the employee's family in relation to requests for flexible working arrangements under s.65(1A)(e) of the FW Act, specific corresponding and complementary amendments are required to provisions establishing awards, agreements, IFAs and general protections. In the latter case, Sections 351(1) and

772 (1)(f) of the FW Act should be amended so that discrimination on the ground of domestic violence is a ground for an adverse action and unlawful termination application to Fair Work Australia.

4. The definition of a 'workplace right' in Chapter 3 should be amended to include the right to refuse directions that mean a worker will commit an unlawful act.

#### **Safety net – earnings (Section 6)**

5. The Commission should conduct a thorough gender impact analysis of any evidence it receives on the national minimum wage, minimum award rates and penalty rates from other stakeholders.

#### **Safety net – conditions (Section 7)**

6. The Commission should embrace the recommendations of the Australian Human Rights Commission (AHRC) in its report on pregnancy and return to work to improve the information about employer obligations and employees rights in this area (recommendation 1, AHRC submission) and to clarify the provisions under the NES that allow employees to use existing personal/carers' leave entitlements under s97 of the FW Act to attend prenatal appointments (including IVF) and allow employee breaks from work for the purposes of breastfeeding or expressing (recommendation 3, AHRC submission).

7. NFAW recommend that the right to return to work part-time from parental leave should be included in the NES.

8. The NES should be made more inclusive by extending the opportunity of paid annual leave to casual employees on a pro-rata basis and providing a separate allocation of carers' leave to all employees.

9. The right to be offered the opportunity to convert from casual to permanent employment after six months' regular and systematic casual employment should be included in the FW Act to bring consistency between male and female dominated sectors in the economy.

10. Firm working time minima should be required to be included in all modern awards including a minimum engagement of three hours for casual workers; and written agreement required to a regular pattern of hours. Adequate notice of changes to hours should be required to be provided to part-time workers.

11. The 'better off overall test' (BOOT) should apply to individual flexibility agreements (IFAs) in the same way it does to enterprise agreements. We also recommend that the FWC be required to test a representative sample of IFAs to determine whether employees are better off overall.

#### **Flexibility (Section 8)**

12. An extensive and well-resourced education campaign should be directed at employees and employers to extend community awareness of the FW Act provisions

and, more generally, the importance of flexible working arrangements for employees and employers.

11. The definition of carers should be expanded to cover all carers.

12. The Fair Work Commission should be empowered to deal with any appeals where requests for flexible working arrangements are refused or due process is not followed.

13. More research should be undertaken to determine whether employees are being exploited in the process of seeking or implementing informal requests for flexibility.

economic Security4Women also endorse the Summary versions of NFAWs responses to the Commission's particular questions below in their section 3. Responses to particular questions put by the commission

The responses below summarise NFAWs key responses to particular questions put by the Commission in its set of issues papers. The evidence underpinning these responses, along with references to relevant pages, are provided in the body of the NFAW submission.

### **The objects of the FW Act (Issues Paper 1)**

In Issues Paper 1 (pp. 7-8) the Commission has sought stakeholders' views on the **appropriate objectives of the workplace relations system, how these can be balanced, and their capacity to adapt to future structural change and global economic trends.**

With regard to **appropriate objectives** for the Fair Work Act (FW Act) we agree with NFAW in subsections 4.1 and 4.2 that:

- The principal object of the FW Act—to promote social inclusion and national economic prosperity—appropriately recognises that Australian workplace relations are conducted within an economic, social and political system whose causes and effects have complex interactions. Achieving this object will depend on ensuring a mutually re-enforcing relation between social and economic goals and on the existence of effective minimum standards and employee protections.
- The principal object of increased social inclusion and national economic prosperity in section 3 of the FW Act, the equity provisions of section 3, and the equity provisions of the FW Act more generally, are part of a common schema that determines decision-making under the legislation. They are intrinsic to the effective operation of the system overall and are not add-ons or red tape, as is sometimes suggested in the issues papers.

With regard to the **balance between the objectives of the FW Act**, we agree with NFAW in subsection 4.3 that:

- As s.578 of the FW Act makes clear, it is the function of the Fair Work Commission (FWC), and not the objects, to find a balance that will serve the interests of employers and employees in increasing social inclusion and national economic prosperity. The objects provide guidance to the FWC by setting out considerations that it must take into account. To eliminate the FWC's ability to take certain matters into account may speed up decision-making, as the Issues Paper suggests, but it will not necessarily improve the decisions that are made.
- The current objects of the FW Act should not be undermined by limiting or reducing the current range of existing minimum standards and protections embedded in the FW Act, including those affecting the operation of the safety net and bargaining.

With regard to **future structural change and global economic trends**, in subsection 4.1:

- We support the citation of the extensive evidence presented by governments, analysts, the Organisation for Economic Coordination and Development (OECD), the International Monetary Fund (IMF) and others concerning the critical role of women's increased workforce participation in generating strong, sustainable and balanced economic growth.
- We cite further evidence linking women's workforce participation with adequate minimum standards and employee protections, including anti-discrimination measures.

### Employee protections (Issues Papers 4 and 5)

In Issues Paper 4 (p. 6) the Commission sought stakeholders' views concerning **the coherence of the general protections, both as a discrete segment of the FW Act and in relation to other key segments and protections within and additional to the Act.**

With regard to **the coherence of the general protections as a discrete segment of the FW Act**, we argue in subsection 5.1 that:

- The provisions of Chapter 3 are coherent and deal with denial of rights. In some cases they address the right to be free from discrimination; in some cases they address other workplace rights; and in some cases they address a denial of workplace rights which may or may not also be discriminatory (the example at s.154(1) is the denial of rights associated with making or dissolving individual flexibility agreements (IFAs), which are often strongly associated with issues affecting workers with family responsibilities). The drafters of the legislation could be expected to divide rights violations into different types. In a workplace relations framework, employee protections should have the effect of preventing indirect and systemic discrimination, depending on different circumstances.

With regard to **the coherence of the general protections in relation to other key segments**, we agree with NFAW in subsection 5.2 that:

- There are employee protections in the bargaining provisions of the FW Act, in the modern award objective and the provisions for setting and adjusting the safety net of wages and conditions. The protections in Chapter 3 are coherent with these in their operation and intent, and indeed protect rights which are specified elsewhere in the FW Act, as in the example of IFAs specified in s.154(1).
- The employee protections of the FW Act are integral to its operation; they are not quarantined to particular sections of the FW Act; and they are not some sort of anomalous add-on that can be removed, for example, to some other piece of legislation outside the workplace relations system.

With regard to **the coherence of the general protections in relation to protections within and additional to the Act**, we agree with NFAW in subsection 5.3 that:

- Where discrimination lies in the workplace relations system, an effective remedy cannot lie outside it. With the exception of the *Workplace Gender Equality Act 2012*, which is pro-active and systemic, it is fair to say that existing human rights and anti-discrimination legislation is complaints-based, individualised, and retrospective. Only the FWC can reopen and vary an award, regardless of how discriminatory its operation has been found to be. Only the FWC can refuse to make an award or approve an agreement that is perceived to be discriminatory. Only the FWC can make an equal remuneration order that is prospective and applies to a class of people.
- We do not believe any tensions exist between Chapter 3 protections and other anti-discrimination frameworks. On the contrary, in our view every effort is made to refer a complaint to the jurisdiction that is capable of addressing it most effectively whether or not the adverse action is finally found to represent direct, indirect or systemic discrimination.

In Issues Paper 4 (p. 6) the Commission asked about the **economic impacts of the general protections within the FW Act, and particularly the ‘adverse action’ provisions**. We agree with NFAW in section subsection 5.2 that:

- It is not in our view possible to quarantine the effects of the protections in Chapter 3 from the protections embedded elsewhere in the FW Act. In terms of the general protections, we have argued in section 6 that without these protections women’s earnings would fall significantly and the macroeconomic workforce participation goals of the G20 would not be reached.

In Issues Paper 4 (p. 6) the Commission asked whether **the general protections within the FW Act, and particularly the ‘adverse action’ provisions, afford adequate protections**.

NFAWs **Recommendations** are detailed in Section 3 of their submission. Relevant case studies have been included in subsection 5.2 and at Appendix A of their submission.

In Issues Paper 4 (p. 6) the Commission asked whether **the general protections within the Fair Work Act 2009, and particularly the ‘adverse action’ provisions,**

**provide certainty and clarity to all parties.** We agree with NFAW in subsection 5.2 that:

- It is in the highest degree unlikely that any legislative specification of the protections of employees and employers embedded in the FW Act would provide clarity and hence certainty to all parties prior to being tested in practice. We are satisfied that both the FWC and the Fair Work Ombudsman are progressively making available clear information on precedents around the conduct of the provisions, but note elsewhere the need for an information campaign addressing the making and operation of IFAs.

In Issues Paper 5 (p. 16) the Commission sought stakeholders' views **on the implications of international labour standards for Australia's workplace relations system.** We agree with NFAW in subsection 5.4 that:

- Setting aside the economic and political implications of Australia's compliance with the ILO Conventions it has ratified, the direct implications of international labour standards for the FW Act are that they extend the coverage provisions of the FW Act relating to unpaid parental leave, notice of termination by the employer, and unlawful termination to all employees in Australia, including employees of unincorporated employers in Western Australia.

### **The safety net – earnings (Issues Papers 2 and 3)**

In Issues Paper 2 (p. 6) the Commission asked **what are the impacts of minimum wages on employment as a whole, and on particular groups of people (by age, skill, education, gender, and location, among other things)?** We agree with NFAW in section 6 that:

- Low pay generally and gender based inequality in earnings are recognised as being bad for a productive economy and discourage labour market participation. Low pay and gender based inequality in earnings impact on individuals and their families and flow-on to government benefits and services and the tax transfer system. Women in particular are impacted in a number of ways, not least as their ability to accumulate wealth and saving for retirement is much reduced compared to men.
- While minimum wages contribute some way to addressing the persistent gender pay gap, there are important protections in the workplace relations framework which must be preserved, if not enhanced. These include provisions for the federal minimum wage (FMW) and minimum award wages, the better off overall test (BOOT) that underpins bargaining and equal remuneration for work of equal or comparable value provisions.

In Issues Paper 2 (p. 6) the Commission asked **what would be the best process for setting the minimum wage, and how (and why) does this vary from the decision making processes used by the minimum wage Expert Panel of the Fair Work Commission?** We agree with NFAW in section 6 that:

- We regard the provisions in the FW Act requiring the FWC to annually review and set the FMW and minimum award wages for employees in the national workplace relations system and to review all modern awards every 4 years, as a fair and equitable process to determine award issues.
- The existing process involves detailed consideration by the independent umpire on the basis of submissions from the parties and robust evidence from others. Such reviews can of course result in awards being varied or revoked, or for new modern awards to be made, so there already exists flexibility within the framework to address the issues by the FWC.

In Issues Paper 2 (p. 6) the Commission asked **whether there should be a process to allow the minimum wage to vary by state and territory or region?** We agree with NFAW in section 6 that:

- NFAW nor eS4W does not agree with any change to the FW Act that would allow for minimum wages and penalty rates to vary by state or territory, or indeed by any other variable including business size. This would serve to undermine the principle of a universal safety net. The Workplace Gender Equality Agency (WGEA) has noted the variations in the gender pay gap between states and territories and Daly (2014) has noted that employees in rural or regional locations were generally more likely to receive and rely on penalty rates.

In Issues Paper 2 (p. 6) the Commission asked **to what extent should an earned income tax credit (EITC) or some other in-work payment serve as a complement or substitute for minimum wages?** We agree with NFAW in section 6 that:

- NFAW does not support the introduction of an EITC for the following reasons:
  - It is a costly option. If the minimum wage falls in real terms, it amounts to a wage subsidy for employers and draws a larger percentage of the population into the welfare system.
  - EITCs could reduce work incentives in income ranges where the payment is phased out
  - EITCs don't address negative impacts on secondary earners because they are based on family income rather than personal income.
  - EITCs can discourage upward mobility.
- NFAW supports meaningful reforms building on the existing benefits and tax systems and supports the conclusion of the ACOSS 2014 submission to the annual wage review: "Adequate minimum wage can make a significant contribution to economic growth and efficiency through the mobilisation of additional labour, including from income support recipients, second earners in middle income households and mature age people seeking a part time job" (p. 52).

In Issues Paper 2 (p. 16) the Commission asked **what changes, if any, should be made to the modern awards objective in relation to remuneration for non-standard hours of working?** We agree with NFAW in section 6 that:

- While evidence demonstrates there are no differences between men and women in the receipt of penalty rates, a greater proportion of women report relying on those payments for household expenses. Consequently, any reduction in penalty rates will increase financial pressures on women and in particular those with caring responsibilities.
- The Commission should take into account in its inquiry the current minimum wages objectives in the FW Act (at s.284) that are of particular importance to working women, including:
  - promoting social inclusion through increased workforce participation;
  - relative living standards and the needs of the low paid;
  - the principle of equal remuneration for work of equal or comparable value;
  - providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

These must also be viewed in the context of s.3(b) which ensures a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards (NES), modern awards and national minimum wage orders (emphasis added). NFAW advocates strongly for the retention of the minimum wages objective within the context of the principal object of the FW Act to promote social inclusion and economic prosperity. Without these protections women's earnings would fall significantly; the macroeconomic workforce participation goals of the G20 would not be reached; and it would be reasonable to expect the falls in productivity that characterised WorkChoices.

### **The safety net – conditions (Issues Papers 2 and 3)**

In Issues Paper 2 (p. 16) the Commission asked **what, if any, particular features of the NES should be changed?** We agree with NFAW in section 7 that:

- There is no evidence to suggest that the NES impose a cost on employers that might exceed the marginal benefits of hiring employees, with adverse implications for employment. If employers believe that is the case they should produce the evidence, with specific reference to any disproportionate and negative impact for women.

In Issues Paper 3 (p.6) the Commission asks **should the Better off Overall Test (BOOT) be met for all employees subject to an agreement, or should the test focus on collective welfare improvement for employees?** We agree with NFAW in section 7:

- That the BOOT remains a test to be met for all employees and not the collective welfare for a particular group of employees. In male dominated workplaces for example, conditions that may be more attractive to women should not be allowed to be traded off.



In Issues Paper 3 (p. 9) the Commission asked **should there be restrictions on the matters that parties can trade off in forming individually-tailored agreements, and if so, why?** We agree with NFAW in section 7 that:

- While the FW Act has improved protections around IFAs to ensure employees are not disadvantaged, NFAW's main concern remains around the potential vulnerability of women on IFAs. Approximately three per cent of all female employees, compared with around two per cent of male employees, reported having made what has been classified as an IFA. More than two-thirds of IFAs reported were made by female employees.
- We have serious concerns about the scope for trading off monetary compensation (such as penalty rates) for non-monetary compensation (such as flexible working arrangements) without fair and proper consideration by the industrial umpire. This has the potential to undermine both the role of the safety net of minimum award wages and conditions and the FWC's role in determining monetary compensation.

In Issues Paper 3 (p. 9) the Commission asked **how should a workplace relations system address the desire by some employers and employees for flexibility in the workplace?** We agree with NFAW in section 8 that:

- The term flexibility is used throughout the Commission's issues papers in relation to many different policy settings including: labour market flexibility; wage flexibility; award flexibility; workforce or enterprise flexibility; and so on. Flexibility is a value-laden term which presupposes that it is, at all times, a good thing and that there is a positive relationship between the flexibility of a country's or enterprise's labour market and its economic performance. There is increasing recognition that this is not supported by empirical evidence.

Findings from forums held by eS4W in 2012 found that casual work, which is often touted as 'flexible work' was not offering sufficient security to women in the workforce and backed the findings of the independent inquiry into insecure work. Insecure work is a particular concern for women over the age of 45 years, especially those who are looking to return to work and those wanting to boost their retirement savings.

In Issues Paper 2 (p. 10) the Commission asked **what, if any, particular features of the NES should be changed?** We agree with NFAW in section 7 that:

- NFAW have made a number of specific recommendations that identify features of the NES that should be improved. With respect to the right to request flexibility, in particular, the data indicates a level of ignorance about entitlements and anxiety amongst employees about even asking for flexible working arrangements which surely was not the intent of the legislation, given the principal object s.3 (d) of the FW Act. If more is not done to support flexible-working arrangements for workers and women in particular, and at key stages in their working lives, then

there is little hope that the Government's 25 by 25 target on women's workforce participation will be met.