



# National Foundation for Australian Women

REAL WOMEN. VISIONARY LEADERSHIP

## **Submission DR288 - National Foundation for Australian Women - Workplace Relations Framework - Public inquiry**

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# The Submission of the National Foundation for Australian Women in response to the Draft Report on Workplace Relations

## OVERVIEW:

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The Commission's draft report argues that 'a sound workplace relations system must give primacy to the wellbeing of employees (and would-be employees), and take account of community norms about the fair treatment of people'(5).

While the well-being of employees is a reasonable point of departure, the Commission takes as its unit of analysis the male employee, arguing that current labour standards should not be modified to accommodate the needs of feminised 'groups' of workers because this may lead employers to discriminate against women (171). On this ground the Commission rejects measures to prevent discrimination against worker-carers while accepting the need for ongoing measures to address discrimination after it occurs. We refer to the Commission's position on recommendations made by NFAW (submission 154, rec 6-10) and others to

- embrace the recommendations of the Australian Human Rights Commission in its report on pregnancy and return to work;
- include the right to return to work part-time from parental leave in the NES;
- extend the opportunity of paid annual leave to casual employees on a pro-rata basis and provide a separate allocation of carers' leave to all employees;
- offer the opportunity to convert from casual to permanent employment after six months' regular and systematic casual employment;
- require firm working time minima to be included in all modern awards-- including a minimum engagement of three hours for casual workers-- and written agreement to a regular pattern of hours, with adequate notice to part-time workers of changes to hours.

Further, having failed to undertake a substantive analysis of the position of women in the workplace relations system, the Commission floats a number of recommendations and information requests that would, if implemented, radically undermine 'community norms about the fair treatment of people', but most particularly the treatment of women, who are characteristically found in lower paid, precarious occupations with little bargaining power.

We refer to the Commission's proposals regarding enterprise contracts, penalty rates, governance arrangements for the Fair Work Commission, and a range of practices associated with bargaining, including industrial action.

Our recommendations address both the Commission's failure to strengthen the safety net to support worker-carers and its proposals weakening bargaining position of women.

### NFAW

- **recommends** that the Commission undertakes a more substantive analysis of the position of women in the workplace relations system and reviews the recommendations in NFAW's

submission (No 154) for measures to address structural barriers affecting women in the system

- **rejects** the proposals embedded in a number of the draft recommendations and 'information requests' in the draft report, that is, draft recommendations
  - 3.2 and 3.3 on Commission appointment processes;
  - 14.1 on reducing penalty rates;
  - 15.3 on 5-year nominal expiry dates for agreements;
  - 15.4 16.2 on the tests to be applied to agreements;
  - 15.2 and 16.1 extending the scope and duration of IFAs;
  - and the series of draft recommendations affecting industrial action: 19.1 (access to protected action ballots) 19.2 (suspending or terminating industrial action causing, or threatening to cause, significant economic harm to the employer) 19.3 (standing down employees who have withdrawn notice of industrial action) 19.4 (withhold a protected action ballot order from who have withdrawn protected action, without the agreement of the employer);
- **rejects** the proposal to collectivise AWAs embedded in the information request on enterprise contracts (627);
- **recommends** that before calling for a change from the Better Off Overall Test (BOOT) for EAs, the Commission should provide a clear account of the test that is to replace it;
- **endorses** the Commission's views on the grounds for accepting any possible overlap between the anti-discrimination provisions of the Act and of other legislation (254); strongly agrees with its support for the retention of the reverse onus of proof (260); and also strongly endorses the Commission's support for retaining the provision recognising the role of multiple reasons in the adverse action test (259-60)
- **recommends** that, before putting forward changes to the operation of IFAs, the Commission should be able to present:
  - improved data indicating that employers and employees require these changes, and that they will be mutually beneficial;
  - a clear model for its proposed NDT;
  - a mechanism that would ensure transparency in the terms and operation of IFAs;
  - a mechanism to deal effectively with coercion.

### The safety net

- *Commission appointments*

The Commission is recommending a new ‘fit for purpose’ governance model involving all Australian jurisdictions in a panel to nominate a list of candidates for appointment to the FWC to be submitted to the Minister for selection. This recommendation is intended to address ‘evidence ... of a demonstrable link between appointment processes and prior systematic bias in outcomes that could be avoided’ by an improved appointment process (142). The Commission is minded to recommend that appointments to the Fair Work Commission

- be subject to periodic reviews (draft recommendation 3.2), and
- be processed by an ‘expert appointments panel’ making recommendations to the Minister (draft recommendation 3.3).

The idea is that this ‘model would reduce the risks of partisan appointments’. In fact, introducing fixed term appointments and making them subject to performance reviews has been shown to have the reverse effect to that anticipated in the Commission’s recommendations.

In the first place, the use of fixed term appointments means that large numbers of tribunal appointments are put into the political domain in any given year.

The case of recent highly politicised appointments to the Refugee Review Tribunal illustrates the shortcomings of this recommendation. In 2015, following the expiry of their fixed terms, a number of senior and experienced members, many with a record of decisions that did not conform to the Government’s preferred approach to refugees, were not re-appointed. It is reported that, of the 37 new appointments, a significant number had close party political affiliations to the current Government.<sup>1</sup> In the 2014 round of appointments, despite the merit-based recommendations of the independent panel, three appointees were not among those recommended by the independent selection panel, two of whom were reported to have well-documented ties to the party of the Government of the day.<sup>2</sup>

The current arrangement is not ideal, but does have the virtue of exposing a smaller number of positions to the risk of partisan appointments by the Government of the day. Over time, appointments under current arrangements tend to even out.

Further, drawing members of the panel shortlisting candidates for FWC appointments from persons with ‘experience in board or senior executive selection rather than previous direct roles in industrial representation or advocacy’ (154) would have the effect of skewing panel membership and FWC appointments very strongly against women and against employee representatives generally. Neither

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<sup>1</sup> ‘Liberals order purge of refugee review body’, *The Australian*, July 14, 2015  
<http://www.theaustralian.com.au/national-affairs/immigration/liberals-order-purge-of-refugee-review-body/story-fn9hm1gu-1227440521501>

<sup>2</sup> ‘New members of Migration Review Tribunal bypassed selection panel’, *The Guardian*, October 20, 2014  
<http://www.theguardian.com/australia-news/2014/oct/20/new-members-migration-review-tribunal-bypassed-selection-panel>

group is likely to have a high probability of experience senior executive or board selection. The proposal basically gives the power of drawing up candidate lists to employers.

NFAW is opposed to this draft recommendation, which in our view would not address the problem identified by the Commission, and would in fact very likely exacerbate it.

- *Employee rights*

The Commission has found in its draft report that around 80 per cent of general protections applications involve unfair dismissal. It has also found that, while there is little data on the remaining applications, there is a reasonable presumption that many of them have positive impacts, and that especially given recent case law, the grounds for significant change do not seem persuasive.

NFAW has argued in section 5.3 of its submission for the importance of retaining the anti-discrimination provisions of the FWA despite possible duplication of some of those provisions outside the workplace relations jurisdiction. It agrees with the Commission that to the extent that this overlap ensures protection in otherwise exposed areas of human interaction, there are grounds for accepting such duplication (254).

NFAW strongly endorses the Commission's support for the retention of the reverse onus of proof, for the reason identified by the Commission, that the decision-maker, rather than the claimant, is in the best position to provide evidence about the reasons for his or her action (260).

We also strongly endorse the Commission's support for retaining the provision recognising the role of multiple reasons in examining adverse action, noting that recent decisions have clarified the operation of the provision, and that prior to its introduction

the 'sole or dominant reason' test was widely seen as providing too high a hurdle in proving claims of contravention. Reverting to it would shift the balance too much in favour of employers. (259-60)

- *Penalty rates*

The Commission is recommending that Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries (draft recommendation 14.1).

In effect, this introduces a two tier penalty rates system based on some generalised notion of types of job and skills and a particular view of 'community expectations' and penalty rates that 'are proportionate to the impacts on...employees' ( 483).

The supporting evidence for the draft recommendation is less than convincing. While there is much on the history of penalty rates, changing trends in community norms and expectations (around certain service sectors), and generalisations about weekend workers (and their household incomes), there is no evidence on how many workers are actually paid "excessive" penalty rates (and therefore

the cost to the economy) for Sunday work and, more importantly, how many employers are actively avoiding paying weekend penalty rates.

In addition, the data from the Australian Work and Life Index (AWALI) on the impact of Saturday and Sunday working on 'work-life interference' appears to have been misrepresented and used in a very selective manner. This research clearly indicates that working on Sunday has a significantly higher score on work-life interference than working on Saturdays. ( For detailed consideration of this data we refer the Commission to additional submissions from the Work and Family Policy Roundtable and The Women + Work Research Group.)

Indicators of whether penalty rates apply in an enterprise or for award covered employees are not a reflection of the reality of what actually happens. By way of example we refer the Commission to Daly (2014) who found in relation to working across the range of unsocial hours:

Nearly three quarters of AWALI 2014 respondents indicated that they had worked unsocial hours at some time during the preceding 12 months, with over half of these workers reporting that they did not receive extra pay or penalty rates for working outside of standard hours.<sup>3</sup>

Although it is difficult to know for certain whether all these employees were entitled to receive extra pay or penalty rates for working unsocial hours, we can be certain that some employers are failing to comply with their current legal obligations (see for example the Four Corners programme aired on Monday 31 August 2015 on the underpayment of 7 Eleven employees points). The Commission's report does not adequately address compliance issues regarding the correct payment of wages and penalty rates, which gives little confidence that any Sunday penalty rate would be adequately enforced without further resources being made available to the Fair Work Ombudsman.

NFAW recommended that the Commission should conduct a thorough gender impact analysis of any evidence it received on the national minimum wage, minimum award rates and penalty rates from other stakeholders (Recommendation 5). The Draft Report contains no such analysis in relation to the impact of the Commission's proposal to cut Sunday penalty rates in female-dominated 'selected consumer services', so we can only assume this has not been undertaken. This is disappointing to say the least (for example, the proportion of women could easily have been added to Table 14.3 Characteristics of the industries where concerns are greatest) (509).

NFAW argued in its submission that while evidence demonstrates there are no differences between men and women in the *receipt* of penalty rates (across the economy), a greater proportion of women report *rely* 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. If, as the Commission acknowledges (81), small increases in wages can have a significant impact on lifetime earnings, then surely a cut in wages (through reducing penalty rates – cuts of between 17- 37.5 per cent, as estimated by the Commission) would have a significant negative impact on lifetime earnings for workers in already low-paying sectors.

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<sup>3</sup> Daly, T. (2014). *Evenings, nights and weekends: Working unsocial hours and penalty rates*, Centre for Work + Life University of South Australia, p. 18 <http://www.unisa.edu.au/Research/Centre-for-Work-Life>

It is widely accepted, and supported by evidence, that significant socio-economic disparity remains between men and women, evidenced by the pay gap between men and women which sits at 18.8 per cent and the gap in superannuation at retirement, which is 46.6 per cent. A cut in Sunday penalty rates as recommended by the Commission in specified service industries will only assist in widening the gender pay gap given that this is where low paid women, lacking in bargaining power, are more likely to work, and to work only on weekends (Daly, 12).

Because these issues remain unaddressed, the draft solution can propose only a simplistic fix to a complex workplace relations and social issue. A more sensible approach, as we pointed out in our submission, is already underway in the FWC as part of the 4 yearly Modern Award Review and is a fair and equitable process to determine this highly contentious issue.

We also refer the Commission to the submission of the Work and Family Policy Roundtable and The Women + Work Research Group on a range of matters affecting the safety net.

### **Bargaining**

- *Enterprise contracts*

The Commission is using an information request to “float” the option of a new statutory arrangement in the form of an enterprise contract – described as “a collective individual flexibility agreement, but with more flexibility” (37).

These contracts would be employer initiated, would vary an award (via a template format, though employers could change the pro forma as desired) for an entire class of employee or for a group of employees without employers having to negotiate with employees, and would not even be subjected to a yet-to-be-defined no-disadvantage test unless the FWC received a complaint from an individual. What is more, employees who believe they are disadvantaged relative to an award would nevertheless be locked into an agreement for the full statutory term of the agreement (the Commission nominates 12 months)(623).

Worryingly, these contracts could be offered to prospective employees as a condition of employment – take it or leave it. Coupled with the proposed cuts to weekend penalty rates for certain employees (note that retail is used as an example for both cutting Sunday penalty rates and for enterprise contracts) might we see the penalty rates even further reduced or removed altogether?

For all intents and purposes, the proposed enterprise contracts appear to be a reincarnation of the WorkChoices Australian Workplace Agreements (AWAs) and greenfield agreements, including “take it or leave it” conditionality for new employees and template agreements applied across a class of employees. Both these now abandoned instruments led frequently to cuts in penalty rates and other terms and conditions (see submission 113 by Professor David Peetz to the Productivity Inquiry). The proposal that employers will self-regulate by applying an as yet unspecified no disadvantage test to their own unilateral agreements does not increase confidence in the proposal, particularly in the light of experience with the number of employers who failed to apply any statutory tests in the case of IFAs. And these proposed ‘collective individual flexibility agreements’ would lock employees in for a year rather than the 28 days currently specified for IFAs.

We refer the Productivity Commission back to the evidence presented in the NFAW submission at pages 16-17 which found that in the hospitality and retail (female-dominated) sectors between 80 and 90 per cent of AWAs reduced or removed penalty rates, overtime rates, shift allowances and other protected award conditions. One would expect the same thing to happen with the proposed enterprise contracts, since both models in practice involve template-based unilateral employer-initiated 'agreements'. As David Peetz has commented:

The individualisation of employment relations is particularly damaging for women, because it relegates them to a position where their disadvantage in power relations is most acute, where their structural disadvantage is unmitigated and where any disadvantage in confidence can be fully exploited.

NFAW is strongly opposed to any additional statutory arrangement such as enterprise contracts which would disproportionately disadvantage women.

- *from BOOT to NDT*

The Commission proposes draft recommendations that would see the BOOT replaced by some version of the NDT both for EAs (draft recommendation 15.4) and IFAs (draft recommendation 16.2).

In its discussion, the Commission sets out a range of NDTs, from a test against a very limited subset of minimum standards, to a test against awards, to a test against EAs which the new agreement is seeking to replace. It notes that NDTs can be applied line by line, or can permit trade-offs that are tangible (e.g. penalty rates for ordinary hour increases) or can permit trading off earnings for intangibles such as generalised commitments to "flexibility". They can be assessed employee by employee, classification by classification or overall (whereby a majority of employees can vote to trade off the benefits of a minority for some advantage). They can be applied at the time they are made or can be required to include a capacity for adjustment if wages fall below the award at some point over the life of an agreement.

Each of these designs has significant implications for the earnings and conditions of employees. This is especially likely to be the case for industrially vulnerable employees, who are most likely to be offered employer-generated agreements and IFAs.

NFAW is strongly of the view that before recommending a change from the current test, the Commission should provide a clear account of the test that is to replace it.

- *5 year nominal expiry dates (NEDs)*

The Commission is minded to recommend (draft recommendation 15.3) that the Australian Government should amend the Fair Work Act to allow an enterprise agreement to specify a nominal expiry date that can be up to five years after the day on which the Fair Work Commission approves the agreement. The Commission is proposing this change despite recognising that 'for some EAs that have conditions close to the award level, there is a risk that longer agreement lives could lead to a gulf between award and EA conditions, as the BOOT is only applied at the time the agreement is



approved, even if the conditions in the award were subsequently improved to be better than those in the agreement'(568). The same point would apply to IFAs tested against such a long-term agreement.

We also note that the hurdles in place in relation to making new agreements, especially where employers decline to bargain and in relation to accessing secret ballots, already add significantly to the de facto duration of agreements.

While the Commission addresses concerns that employers might have about 5-year NEDs, it does not address this critical employee concern, most likely to affect lower paid and less industrially strong, that is feminised, workplaces and industries.

NFAW strongly rejects draft recommendation 15.3.

- *IFAs*

The draft report recommends extending the minimum duration of IFAs (draft Recommendation 16.1 raising the termination period from 28 days to 13 weeks) and broadening their scope (draft recommendation 15.2 calling for the model clause to constitute a minimum list of matters subject to variation) . The Commission accepts that there is very little data on which to base these proposals, but trusts that any possible disadvantage to employees would be addressed by a new but as yet undefined NDT (Table 16.1) and yet another information campaign. It also notes that concerns about making IFAs a condition of employment have proved justified despite the explicit prohibition in the Act.

The Commission recognises in its discussion of the issues that in addition to a lack of data, there is a disconnect between the claims of employer associations about the problems posed by existing arrangements and the survey responses of actual employers, who 'overwhelmingly' prefer informal agreements to IFAs (606).

NFAW recognises the importance of flexible working arrangements to employees who have family responsibilities, and that it is women who are currently by far the most likely to shoulder these responsibilities in any given family. However, as the evidence in our submission indicated, women's experience with AWAs has been that their earnings were reduced in exchange for flexibility often intended to suit employers rather than employees. The Commission's proposals to enhance the scope and duration of IFAs would tend to increase their resemblance to AWAs. Non-unionists ( a female-dominated group) would be most affected if the period of notice for cancelling an unsatisfactory "individual flexibility agreement" is, as proposed, multiplied by up to eight times, given the difficulties of enforcement.

It is our view that before locking more people into IFAs covering more matters for longer periods, the Commission ought to have a clearer understanding of real world arrangements that would offset the great inequality of bargaining power between employers and individual employees, and in particular non-unionised employees with pressing family responsibilities.

We recommend a that, before recommending changes to the operation of IFAs, the Commission should be able to present:

- improved data indicating that employers and employees require these changes, and that they will be mutually beneficial
- a clear model for its proposed NDT
- a mechanism that would ensure transparency in the terms and operation of IFAs
- a mechanism to deal effectively with coercion.

- *Industrial action*

The Commission argues that 'Industrial action in Australia is at low levels. Only some minor tweaks are required' (4). Nevertheless, it recommends several changes to procedures and regulations around industrial action intended, in the Commission's words, to:

- reduce the ability and incentive of unions to organise and threaten strike action that is either pre-emptive (that is, before negotiations have begun), unlawful, likely to cause significant harm, or likely to impose high costs on an employer but immaterial costs on employees (chapter 19)
- increase the ability of employers to impose a graduated response to strike activity, and reduce the costs that employers face when dealing with strike activity (chapter 19). (818)

These include 19.1 (access to protected action ballots); 19.2 (suspending or terminating industrial action causing, or threatening to cause, significant economic harm to the employer); 19.3 (standing down employees who have withdrawn notice of industrial action); and 19.4 (withhold a protected action ballot order from who have withdrawn protected action, without the agreement of the employer). It has also asked for further information about a definition of significant harm.

These are very odd recommendations. The Commission recognises that industrial action is at historically low levels. It recognises that there is an imbalance in bargaining power between employers and employees, and that rectifying this imbalance is the underlying purpose of having industrial regulation. It also recognises that meaningful industrial action, or even the capacity to take meaningful industrial action, is the only means of addressing such imbalance, unless Australia is to return to a system of compulsory arbitration.

These draft recommendations are inconsistent with the aims of the system, including fairness, with many of the other fundamental points made by the Commission, and with recent experience of experience industrial action.

NFAW does not support these recommendations.