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Joint Submission in response to the Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework

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Workplace Relations Inquiry

Productivity Commission

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The Work and Family Policy Roundtable (W+FPR) and Women and Work Research Group made a joint submission to the current Inquiry into the Workplace Relations Framework. In light of that submission and in response to the Productivity Commission's Draft Inquiry Report we wish to make a further brief submission.

Notwithstanding the narrow Terms of Reference of the Inquiry, in our view the Commission has not adequately discharged its responsibility to consider the Inquiry's second term of reference in its Draft Report: *the impact of the workplace relations framework on fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net*. In particular we are concerned that the Draft Report failed to give adequate consideration to several key issues we and others raised in submissions in response to the Commission's Issues Papers, including fair and equitable pay and conditions for worker-carers.¹

While the Commission has acknowledged the increased participation of women in the labour force, and that 'women who work are now the norm' (p. 91), its Draft Report arguments and recommendations are based on an ideal of an apparently gender-neutral care-free worker. As a consequence, the Commission's analysis fails to recognise the continuing difficulties faced by worker-carers in a workplace relations framework built around an 'ideal' unencumbered worker. Further, several of the Commission's recommendations, including those on penalty rates and on reconfiguring the BOOT test will potentially have significantly negative implications for women and worker-carers if adopted.

We remain profoundly unconvinced by the argument mounted in in the Draft Report that any change that might support worker-carers (most of whom are women) would encourage employment discrimination against this group

¹ A worker-carer is a worker who combines paid work with an unpaid care role.

(p.171). The Draft Report notes that ‘discrimination against any party based on factors unrelated to their work performance is both inefficient and contrary to well-established social norms’ (p. 254). Such discrimination is also explicitly prohibited not only under the Fair Work Act 2009 (FWA) but also in all state, territory and federal anti-discrimination jurisdictions. A more appropriate response by the Commission would be to recommend more effective ways of ensuring discrimination against worker-carers did not take place. This should include strengthening the anti-discrimination provisions in the FWA, improving the capacity of employers to meet their legal obligations, and enhancing the resources of the Fair Work Ombudsman to effectively and proactively enforce these and other employer obligations (as is recommended in relation to employers suspected of underpaying migrant and undocumented workers - p. 749). This is particularly crucial in the light of submissions from bodies such as the Australian Human Rights Commission, which has highlighted the significant extent of discrimination against women workers whilst pregnant and on their return to work after parental leave (Submission 110).

Our key, but not only, concerns about the analysis and recommendations in the Draft Report are discussed below. **We also attach our original submission** and ask that the Commission’s Final Report address the issues we raised in that submission. We also endorse the submission made by the National Foundation for Australian Women. An analysis of the gendered impact of the current workplace relations (WR) framework is missing from the Draft Report (evidenced for example by referring to the NES as ‘gender neutral’ on p. 126 - see further below). This is a very significant concern given the importance of women’s workforce participation to the economic prosperity of Australia. It also fails to seriously address the increasing need for women and men to combine work with care for children, people with disability and frail older people, a goal that underpins much of the Federal government’s social policy.

Yours sincerely,

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1. National Employment Standards

We and others had recommended that the National Employment Standards (NES) be made more inclusive and, in particular, offer more support to worker-carers. As a basis for not extending the NES, the Commission argues both that 'social changes that involve a greater role by men in caring for children also seem highly probable' and that the NES are 'gender-neutral and so are already well geared to any such social trends' (p126).

While the terms of the NES do not refer to the gender of the workers who access them, their construction around a full-time, non-casual contract norm serves to exclude many casual workers and part-time workers from their reach, both groups of whom are more likely to be women than men, and many of whom are worker-carers. In this context, it is also noteworthy that the only two unenforceable provisions of the NES are those principally used by female worker-carers.² This characterisation of the NES is disappointing as it suggests a lack of capacity or willingness to engage with gender issues relevant to making the WR framework fairer and more relevant.

1.1 Extending NES rights to casual workers

In our submission we had proposed making the NES more inclusive by extending paid annual leave to casual employees on a pro-rata basis and providing a separate allocation of carers leave to all employees. The Commission rejects proposals that casuals should be afforded annual and sick leave on the basis they have a casual loading that recognises this. In making this argument the Commission incorrectly states that 'casual workers already possess a right (after a specified period of time with the employer) to ask for their casual position to be converted to a permanent one, but in practice there are few examples of this occurring (Stewart 2013)' (p.196). This right is in fact *not included* in most of the Modern Awards in feminized industries including the Aged Care Award, the General Retail Award or the Social Community Home Care and Disability Services Award. Indeed, extending that right to employees covered by a large number of awards where there is no such right is the subject of a claim by the ACTU in the current four yearly Modern Award Review.³

The Commission also appears to dismiss additional rights for casual workers on the basis that casual female workers 'derive as much job satisfaction as female permanent employees, though this is not true for males' citing Buddelmeyer (2014) (p 196-197). This argument ignores a substantial literature critiquing simplistic assertions that because women workers tend to have higher rates of job satisfaction that the quality of their working conditions are not of concern.⁴ Further, the fact

² The right to request flexible working (s.65 FWA) and the right to request a second 12 months unpaid parental leave (s 76 FWA).

³ See <<https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review/common-issues/am2014197-casual-employment>>.

⁴ See for example Watson, I. (2005). Contented workers in inferior jobs? Re-assessing casual employment in Australia. *Journal of Industrial Relations*, 47(4), 371-392; Brown, A., Charlwood, A., & Spencer, D. A. (2012). Not all that it might seem: why job satisfaction is worth studying despite it

that casual female workers may have higher job satisfaction than other workers does not mean they are satisfied with the fact that their jobs are casual.⁵ Indeed, the 'gender paradox' whereby women are consistently more satisfied with their jobs despite objectively worse work conditions than men⁶ may occur because women make comparisons with other women, rather than with men, who on average occupy superior jobs,⁷ or because satisfaction levels are shaped by the gender norms and expectations in particular national contexts at a particular period in time.⁸

The Commission suggests instead that consideration be given to whether casual workers be offered 'an expanded set of choices' to trade off 'their loading for additional entitlements' (p197). Relying on negotiations between individual casual workers and their employers is simply inadequate and does not recognize the unequal bargaining position of individual employees, particularly where they have care responsibilities. As the Commission itself noted in respect of the casual conversion rights available in some awards '... it may be that people do not make such requests because they expect them to be refused' (p.196). Our proposal to introduce collective measures to support casual workers moving to an ongoing contract after a certain period of employment would be far more effective than individual negotiations in providing hitherto casual workers not only with paid leave entitlements, including carers leave, but also with some measure of job security and more predictable hours and schedules. Part of the ACTU claim was for a deeming clause in awards where casual conversion clauses currently apply to the effect that where a regular casual has been engaged by their employer for 6 months, they are deemed to be employed on a permanent full-time or part-time basis unless the employee elects to remain employed as a casual employee. In our view, such a deeming measure does not go far enough and should cover *all* casual workers whether or not their award currently has such a clause.

1.2 Right to request flexible work arrangements

In our joint submission we advocated enhancing the operation and uptake of the NES right to request flexible work arrangements (RTR) by:

- Widening coverage to all employees regardless of caring responsibilities
- Removing the 12 month service requirement for eligibility
- Ensuring that employers are obligated to reasonably accommodate requests for flexible work by providing a right to appeal refusals as applies to other NES

being a poor summary measure of job quality. *Work, Employment & Society*, 26(6), 1007-1018; Hebson, G., Rubery, J., & Grimshaw, D. (2015). Rethinking job satisfaction in care work: looking beyond the care debates. *Work, Employment & Society*, 0950017014556412.

⁵ Watson (2005), p. 373.

⁶ Clark, A. E. (1997). Job satisfaction and gender: why are women so happy at work? *Labour economics*, 4(4), 341-372

⁷ Aletraris, L. (2010). How satisfied are they and why? A study of job satisfaction, job rewards, gender and temporary agency workers in Australia. *Human Relations*, 63(8), 1129-1155.

⁸ Smith, M., Burchell, B., Fagan, C., & O'Brien, C. (2008). Job quality in Europe. *Industrial Relations Journal*, 39(6), 586-603.

- Developing and disseminating detailed guidance material on the RTR and initiating a Fair Work Ombudsman campaign to raise awareness of this right; and
- Protecting workers against discrimination on the basis of their part-time status in line with Australia's international obligations under ILO Convention 175.

The Commission does not believe that any action needs to be taken, stating (pp.171-2):

'A particular concern is that any obligations perceived to be costly by employers and that predominantly affect only one group of employees, may unwittingly lead to employment discrimination. In the particular proposals for improved leave access discussed in box 4.4, the Australian Council of Trade Unions (ACTU) noted that '... [d]espite the issue being significant to all working parents, it is mostly women who are affected by the need to balance work and family' (sub. 167, p. 170). There is therefore a risk that women may find their career and hiring prospects reduced by some employers without any real capacity to detect this. Moreover, to the extent that the provisions are seen as largely oriented to women, men may be reticent about even requesting to use such provisions.

We make two responses to this puzzling reasoning. Firstly, the Commission has ignored the considerable evidence referred to in our submission and in many other submissions that without some way of making this right effective, through a right of appeal as exists with other NES and in other countries with a RTR mechanism, this right is a hollow and ineffective one. Indeed recent research on this very issue indicates many worker-carers want more flexibility and do not ask.⁹ They are 'discontented non-requesters' who report that they don't ask for flexibility because they feel insecure at work, or they know they will be knocked back and may well suffer for having made a request. A 2014 study of the use of the RTR over five years found that:¹⁰

the existing RTR is not enlarging the proportion of workers who request flexibility beyond those who felt comfortable 'just asking' before the legal RTR was introduced. Ensuring that less confident, less powerful workers, and more fathers and men, can also make effective use of this right will require wider knowledge about the RTR and firmer legal protection around it – such as the right to contest a refusal that seems unreasonable and confidence that requesters will not negative outcomes in the workplace)

It is for precisely for these reasons that the RTR needs to be made more robust and inclusive as per our proposals in our joint submission.

Secondly, the Commission's argument that labour standards should not be modified to accommodate specific 'groups' of workers such as women because this may lead to discrimination against this group of workers, not only highlights the Commission's

⁹ Skinner and Pocock (2014) *The Persistent Challenge: Living, Working and Caring in Australia in 2014*, The Australian Work and Life Index, Centre for Work+Life, University of South Australia.

¹⁰ Skinner and Pocock (2014), p. 5.

conception of the normative worker as unencumbered by care responsibilities, but also reflects an apparent acceptance of the inevitability of employment discrimination as noted above. In Australia, state, federal and territory laws proscribe discrimination on the grounds of sex, and family responsibilities/ parental and/or carer status. Given that the vast majority of women and men will have care responsibilities at some point over their working lives, we would have expected the Commission to suggest ways of ensuring that employers *do not* discriminate against worker-carers. Indeed this is the basis for our proposal that the RTR be extended to all workers so that worker-carers (including men) are not penalised for requesting flexibility.

1.3 Maximum weekly hours

The NES provides for a maximum of 38 weekly hours of work with additional 'reasonable' overtime. In determining what constitutes reasonable overtime the NES requires that the employee's personal circumstances, including family responsibilities, should be taken into account. In practice this standard is neither observed nor enforced. While policies are being put in place to encourage women to increase their participation in paid work, there is an absence of policy attention to reducing overwork and very long hours, despite evidence that countries that lack clear maximum working week regulation also show the widest gender gap in work time.¹¹ It is important that the Commission give serious consideration to the establishment of a clear, regulated and enforced maximum work week standard.

Currently, at least one quarter of all employed Australians work past the NES 38 hour weekly standard. One in eight employed Australians work longer than 50 hours per week, and of these the vast majority are men.¹² This gender gap in working time has widened over the past decades, even as women's labour force participation has risen.¹³ There is now consistent evidence that gender gaps in pay and seniority areas are linked to long work hours,¹⁴ which are widespread in Australia. One problem with unregulated maximum work hours and long work hour expectations is that career advancement shifts from promoting merit to promoting time on the job.¹⁵ As well as undermining innovation and the effective use of human resources, rewarding longer hours rather than talent and ability discriminates against individuals with a time constraint (from caregiving, health or community commitments) and this is most usually a problem faced by women.

¹¹ Landivar, L. (2015) The gender gap in employment hours: do work-hour regulations matter? *Work, Employment and Society*, 29(4): 550-570.

¹² Australian Bureau of Statistics (2010) *Australian labour market statistics trends in hours worked 6105.0*. ABS: Canberra.

¹³ Australian Bureau of Statistics (2011) *Australian social trends overemployment 4102.0*. ABS: Canberra

¹⁴ Cha, Y. and Weeden, K. (2014) Overwork and the slow convergence in the gender gap in wages *American Sociological Review*, 79(3): 457-484.

¹⁵ O'Neill, O. and O'Reilly, C. (2010) Careers as tournaments: The impact of sex and gendered organizational culture preferences in MBA's income attainment *Journal of Organizational Behaviour*, 31: 856-876.

1.4 Improved paid leave rights for carers & those experiencing domestic violence

We endorse the submission by the Kingsford Legal Centre¹⁶ proposing that employees experiencing domestic/family violence or supporting a person experiencing such violence be given the right to paid leave to deal with the circumstances arising from the violence. We also support their proposal that such workers be protected from victimisation for exercising these rights.

Most unpaid care falls to women, making rights to paid carer's leave essential for worker-carers and to gender equality. We proposed in our joint submission that the Commission recommend a separate period of additional personal leave to be used as carer's leave if a carer's paid personal leave entitlement is exhausted, and that this be available to all employees including casuals.¹⁷ We also recommended that a new paid leave provision for employees who provide palliative care for a family member or other dependent be included in the NES. Such provisions are increasingly common in Europe.¹⁸

2. Improving working time minima in awards

Having read a number of submissions to the Workplace Relations Inquiry and followed submissions as part of the Fair Work Commission's Modern Award Review, we propose establishing firm working time minima in all modern awards. These minima would include a minimum engagement of 4 hours for casual and part-time workers and require written agreement to a regular pattern of hours and adequate and genuine consultation about and notice of changes to hours for part-time and casual workers. These minima would build on the current provisions that awards and enterprise agreements include a requirement that an employer follow a consultative procedure with an employee about any proposed changes to their regular hours, with particular reference to the effect this may have on the employee's caring responsibilities.¹⁹ All are important in providing the working time and income predictability that is required by most workers and particularly by low paid worker-carers.²⁰

3. Penalty Rates

In our submission we raised the issue of penalty rates given our concern about employer proposals to reduce penalty rates for working unsocial hours, particularly because of the extremely gendered negative outcomes it would produce. This erosion of current minima would particularly affect low-paid workers in services industries such as retail and hospitality, many of whom are

¹⁷ See also the recommendations in AHRC (2013) *Investing in Care, Recognising and valuing those who care*, AHRC, Sydney, p. 43.

¹⁷ See also the recommendations in AHRC (2013) *Investing in Care, Recognising and valuing those who care*, AHRC, Sydney, p. 43.

¹⁸ AHRC (2013), p. 72.

¹⁹ FWA 2009, s. 145A and s. 205.

²⁰ Elton et al (2007).

women and most of whom have low workplace power, reflected in low rates of unionisation.

The Commission has recommended reducing penalty rates for Sunday work to bring them in line with Saturday penalty rates for a specific group of workers – those are in ‘relevant consumer oriented industries’, that is the hospitality, entertainment, retailing, restaurants and cafes industries. The Commission’s rationale for such a reduction is ‘the evidence suggests that the penalty rates for a Sunday are out of step with the social costs borne by people working on that day’ (p. 526). Yet it quarantines other groups of workers in essential services from a reduction in Sunday premia, because these premia for this group ‘align with long-held community expectations, the typical working arrangements and the job skills required in these industries’ (p. 483). While we continue to support the maintenance of existing Sunday premia for *all* workers who work that day of the week, we are baffled by the Commission’s reliance on ‘typical working arrangements’ to distinguish between premia for employees in ‘relevant consumer oriented industries’ and those in essential services. The ‘typical’ working arrangements for many employees in retail and hospitality also include working on the weekends and on Sundays.

We are particularly concerned with the Commission’s very partial use of Australian Work and Life Index (AWALI) data to support its rationale for reducing Sunday premia for some workers. Notwithstanding the fact, as the Commission concedes, that 2014 AWALI survey data shows that work-life interference is ‘significantly’ worse for people who work on weekends, and especially on Sundays relative to Saturdays (p. 500), the Commission gives no weight to this finding. Instead the Commission undertakes, without explanation, a very selective analysis of four of the five individual AWALI components.²¹ They exclude the AWALI question that asks ‘how often does work affect your ability to develop or maintain connection and friendships in your local community?’ The exclusion of this AWALI index component is puzzling given the impact of weekend working on such connections and friendships may have for workers.

In its following analysis of four of the five AWALI components, the Commission controls for the effects on work-life interference that relate to gender, age or the presence of young children. The Commission then argues that once what it terms ‘personal traits’ are controlled for, employees working on Sundays have no worse life balance and do not feel any more rushed than those who work on Saturdays (p 513).

There are two main issues with this highly selective analysis. The first is that apart from excluding one of the AWALI components, the Commission ignores its own analysis of two of the four remaining AWALI components; that is the extent to which work interferes with outside activities, and to which work interferes with activities with family and friends. Table 14.10 of....clearly indicates that those who work on Sundays are *much more likely* than those

²¹ See Skinner and Pocock (2014) p. 8 for a discussion of the composition and rationale of the AWALI Index.

who work on Saturdays to report both that work interferes with outside activities, and with activities with family and friends. However, in the Commission's overview report this analysis is summed up as: 'Survey evidence shows that the overall social costs of daytime work on Sundays are similar to Saturdays' (p. 24). Even based on the Commission's own partial analysis this assertion is misleading to say the least.

The second and perhaps more fundamental criticism we have of the Commission's use of AWALI data lies in its decision to control for gender and the presence of young children. This type of analysis essentially asks the 'what if' question of how work-life interference would differ between groups if the effect of gender and having young children are removed. That is, how work life interference differs between workers who work Sundays and those who do not without considering how this is affected by gender and the presence of young children. Given that both gender and the presence of young children are key determinants of work-life conflict, to control for such characteristics in an analysis of work-life interference is particularly perplexing. It is a way of discounting and making invisible the very factors, gender and care responsibilities, that are likely to make work-life balance an issue for employees working on Sundays rather than Saturdays. The Commission's approach to evidence reflected in its selective and misleading analysis of AWALI data underlines the Commission's profound failure to recognise the realities for many worker-carers in the 21st century workplace.

The proposal to reduce Sunday penalty rates would impact disproportionately on women²² as this change is proposed for the accommodation and food services industry. In the latter industry women comprise 55% of the workforce and in the retail sector women comprise 54.5% whilst overall, women make up only 45.6% of the labour market.²³ Approximately a quarter of all non-managerial employees in 2014 worked in one of these industries. Their average hourly cash pay is \$10 an hour less than in other industries (\$24 compared to \$35) (PC, 2015: p 509).

4. Gender Pay Gap

In our submission we made the following recommendations in respect of addressing the worsening gender pay gap in Australia:

- Support for a wage system that fairly rewards work while removing tax and benefit arrangements that penalise second income earners (usually women).
- [that] the Inquiry directly address and make specific recommendations to address the wide gender pay gap in Australia including ensuring the effective application of the equal remuneration principles in the *Fair Work Act 2009* to address systemic inequalities in modern awards and to reduce differences

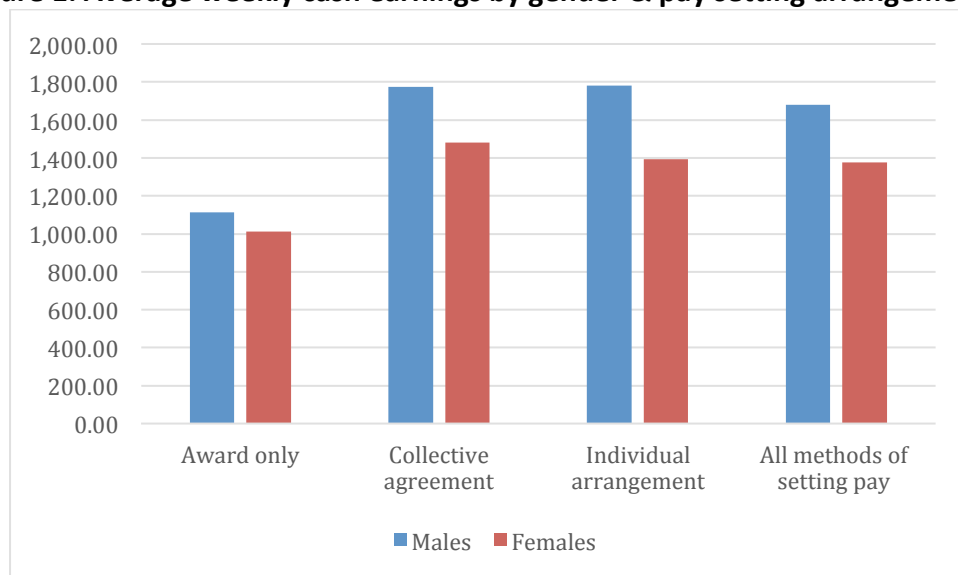
²² Pocock (2015), 'Holding up half the sky? Women at work in the 21st century' *Fay Gale Lecture* 2015, 20 August, University of Adelaide.

²³ WGEA (2015) 'Gender composition of the workforce: by industry', available: <https://www.wgea.gov.au/sites/default/files/Gender-composition-of-the-workforce-by-industry.pdf> viewed 9 Sept 2015.

between male-dominated and female-dominated awards in such areas as the definition of ordinary hours and the payment of penalty rates.

A gender pay gap exists under all forms of wage setting as set out in Figure 1.

Figure 1: Average weekly cash earnings by gender & pay setting arrangement



Source: ABS (2014) Employee Earnings and Hours, Cat. No.6306.0

Where bargaining takes place, whether at an individual or a collective level, men and male-dominated occupations win better pay and conditions than women and female-dominated occupations.²⁴ As discussed in our original submission, this issue deserves specific, high-level attention by the Inquiry as the main legal mechanism designed to address it lies within the WR legal framework.

The gender pay gap narrowed slightly in May 2015 to 17.9%.²⁵ However this is not a cause for optimism as in the recent past fractional gender pay gap decreases have been subsequently negated by further rises. The persistent gender pay gap suggests substantial systemic flaws in the existing WR framework and practice, which the Draft Report fails to address.

The Commission's acknowledgement of the widening gender pay gap (p. 815) is welcome. However, reference to the unfairness of discrimination between men and women in a discussion of 'equal pay for work of equal value' ('[a] concept [the draft report states] with many flaws', p. 448), does not do justice to the issue and does not reflect an accurate understanding of the relevant provisions under the FWA, which in fact refers to 'equal remuneration for work of *equal or comparable value*'.²⁶ No reference is made to the implications of the significant and partly successful SACS Equal Remuneration Order application. There is no mention of any need for

²⁴ Cooper, R. (2012) The gender gap in union leadership in Australia: A qualitative study, *The Journal of Industrial Relations*, 54(2): 131-46.

²⁵ WGEA (2015) 'Gender Pay Gap Statistics' (from ABS Average Weekly Earnings May 2015, cat.no. 6302.0) available: https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

²⁶ s 302, FWA.

more effective provisions, or of the institutional and legal barriers to overcoming gender pay inequality identified by many commentators,²⁷ or of the success some state jurisdictions have had in addressing this issue. The Commission's Final Report should draw on this evidence and experience to analyse the failings of the current WR framework in respect of the gender pay gap. This would allow the Commission to bring this persistent inequity to the fore in the discussion of what might constitute a fair and sustainable WR framework.

For example, the gender pay gap needs to be considered in relation to ways of making enterprise bargaining more effective for women. The Commission has previously noted the 'poor bargaining position of a highly feminised, part time workforce' resulting in 'relatively low' pay received by aged care workers, a 'highly feminised, part-time workforce'.²⁸ In relation to childcare workers, the Commission has also found that it was rare for wages in the sector to exceed the award by more than 10 per cent'.²⁹ The low paid bargaining stream has proved singularly ineffective in relation to addressing the issue of low pay in feminised sectors.

We also oppose the proposed enterprise contracts and individual flexibility arrangements, which are likely to have a greater adverse impact on women than men. These would also be likely to increase the gender pay gap to which the Commission needs, as we point out above, to give greater attention in its Final Report.

5. Conclusion

The existing WR framework often impacts on women and, in particular, on worker-carers to their detriment. The W+FPRT and the WWRG are profoundly dismayed by the Draft Report's inattention in its over 1000 pages to an analysis of how this occurs and how it could be improved. Many of its draft recommendations will worsen the situation of women in the labour force. The Draft Report makes a significant contribution to continuing inequity contrary to its second term of reference.

As we noted in our original submission to the Inquiry, Australia needs a workplace relations framework that can:

'ensure a good society that enables workforce participation while supporting social and family relations, where work and care can easily be combined with positive benefits for all. In the long run, productivity is dependent upon social reproduction before all else, making the successful combination of work, care and family an ongoing economic, as well as social, goal.'

²⁷ Layton, R., Smith, M. and Stewart, A. (2013) *Equal Remuneration Under the Fair Work Act 2009*, Fair Work Commission; Smith, M. and Stewart, A. (2014), Equal remuneration and the Social and Community Services case: progress or diversion on the road to pay equity?, *Australian Journal of Labour Law*, 27(1): 31 - 56.; Charlesworth, S. and Macdonald, F. (2014), *Australia's gender pay equity legislation: how new, how different, what prospects?*, *Cambridge Journal of Economics*, vol. online: 1-20.

²⁸ Productivity Commission (2011) *Caring for Older Australians*, p.359.

²⁹ Productivity Commission (2015) p. 350, citing Productivity Commission (2010).