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**The Australian Consortium for Research on
Employment and Work
Centre for Global Business**

**Submission to the Productivity Commission Inquiry
into the
Workplace Relations Framework**

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1 About ACREW

- 1.1 Until 2015, ACREW operated as the Australian Centre for Research in Employment and Work. It is now located within the Centre for Global Business of the Monash Business School and operates as the Australian Consortium for Research on Employment and Work. ACREW was established to promote research and scholarship in the broad area of work and employment. A key aim for ACREW is the promotion of cross-disciplinary and collaborative research in a range of fields including human resource management, industrial and workplace relations and organisational behaviour.
- 1.2 ACREW encourages projects spanning private, not-for-profit and government sectors with a view to producing high quality publications which also have impact in the sense of contributing to enhanced organisational performance, improved social well-being and the development of public policy.
- 1.3 The specific aims of ACREW are to:
- Collaborate with private, not for profit and public organisations in addressing challenges and opportunities that arise in the field of work and employment.
 - Facilitate the attainment of high quality research and publications in the field of work and employment.
 - Contribute to public policy debates in work and employment
 - Facilitate links between the Monash Business School and other universities both locally and internationally.

2 Introductory Remarks

- 2.1 This submission focuses on the issue of workplace relations at the level of the firm in the context of the framework set by the Australian Government Productivity Commission (AGPC). The terms of reference in Issues paper 1 seek input on a range of topics including: influence on internal culture, business effectiveness, employee representation, innovation, skill formation and trust. The Productivity Commission also asks submissions to examine and go beyond the current workplace relations system to

identify key factors that can increase competitiveness in an increasingly dynamic work environment. At the same time the Productivity Commission notes the diverse and potentially competing objectives of the workplace relations system and asks “whether any system can hope to achieve coherence across this diversity of objectives” (AGPC, 2015: 7).

- 2.2 In Issues Paper 1, the terms of reference outline the scope of the inquiry and include: the development of fair productive, effective workplaces and patterns of engagement in the labour market. Tied up in these concerns are issues associated with employee representation, particularly in the light of the long term decline in trade union density in Australia, the best way to represent employee interests in the workplace, and trust and cooperation in the workplace. Our submission is based upon detailed academic research undertaken by members of ACREW insofar as they relate to the terms of reference. The contributors are listed at the end of this submission.

3 Terms of Reference and Implications for the Productivity Commission’s Task

- 3.1 The terms of reference for this review are ambitious and extensive. This part of our submission outlines the implications that flow from the terms of reference for the process the Productivity Commission adopts throughout the review. The process proposed starts with the following provision in the terms of reference:

An overarching principle for any recommendations should be the need to ensure a framework to serve the country in the longer term, given the level of legislative change in this area in recent years (AGPC, 2015: iv).

The context for understanding the implications of this term of reference for the AGPC’s task starts with a brief outline of the drivers of frequent change in workplace relations legislation in Australia and how this compares to selected OECD countries.

3.2 Drivers of frequent legislative change in Australian context

Historically, industrial relations laws in Australia have been a source of controversy and substantial variation has occurred over the political cycle. This process of 'political product differentiation in the labour market' as it has been termed, has been extensively reviewed for the period from 1956 to 1997 (Pittard & Fox 1999). An overview of this work is contained in *Beyond Enterprise Bargaining* (AMMA,. 1999), which examines the period in two parts, first to 1988 and then the period up to 1997. For most of this period, the only area of substantive agreement between the major political parties seemed to be that conciliation and arbitration should be the basis of the regulation of industrial disputes.¹ This period of broad consensus among the parties ended abruptly with the introduction and passage of the *Workplace Relations (WorkChoices) Amendment Act 2005*.

In Nordic and Scandinavian countries, there are longstanding bipartite agreements between national employer and union bodies on the framework for collective bargaining. In Denmark, bipartite agreement goes back as far as 1898 and in Norway to 1935. In Sweden, the Basic Agreement reached in 1938, recognised the role of unions,

¹ The period of the 1980s and up to the introduction of the WorkChoices legislation in 2006 a large measure of agreement existed between the labour market parties on key aspects of our industrial and workplace relations systems. In 1999, AMMA identified the following areas of commonality:

- The industrial relations system should have an award safety net arrangement supervised by the AIRC;
- Enterprise bargaining should be the main form of the regulation of industrial relations;
- The AIRC should protect procedural fairness and minimum standards, but otherwise not interfere in the outcome of bargaining;
- Other constitutional heads of power can be used where appropriate, in framing legislation;
- A right to strike should be recognised in bargaining for new agreements, and there is a limited role for the AIRC during periods of protected action;
- The AIRC's powers to intervene to settle an industrial dispute is a function to be exercised in extraordinary circumstances but not normally otherwise;
- Protection from legal sanction and the common law should be afforded the parties during periods of protected bargaining, but sanctions for breach of agreements and unauthorised industrial action should be available in other circumstances including access to the common law; and
- A system of recognition and registration is required to be maintained as part of the machinery of the industrial relations system.

strike action over new contracts and a limited number of managerial prerogatives within the scope of collective bargaining (Gourevitch, et. al., 1985). The legislated framework for collective bargaining has been stable over the longer term in many other countries including the USA (1935), Germany (1952) and Japan (1948). A common feature of these frameworks has been union recognition, the right to strike and broad rules for collective bargaining and the recognition of managerial prerogatives outside the scope of bargaining or what we would refer to as allowable matters in the Australian context.

- 3.3 In Australia, other areas of agreement were nearly all related to procedural arrangements under the prevailing industrial legislation and the regulation of the internal administrative practices of registered organisations. In some areas of substantive disagreement (conciliation and arbitration vs collective bargaining, the scope for individual negotiations vs collective agreements, and the degree of the Australian Industrial Relations Commission control over agreements), it is interesting to note that over time, the positions of the major parties have changed, sometimes to the extent that they are on different sides of the same argument. The conclusion that the Association of Mines and Metal Australia (AMMA 1999) reached from the analysis of the operation of the 'industrial relations pendulum' between 1956 and 1998 period is worth repeating:

The conclusion to which one is inevitably drawn is an embarrassment to the parliamentary process and the history of public policy making in Australia. At the end of the period (1988), it was plain to see that the economy continued to be plagued by high inflation, high unemployment and low productivity growth. By the early 1990s, the Industrial Relations Act 1988, as a framework for the system had been discarded. A wholesale and major reform had begun with a move to an enterprise bargaining based system, first supported by a Labor Government in policy and law. The trend to greater flexibility and decentralisation was continued by the subsequent Liberal/National Coalition Government. Finally, it should be recalled that all the political rhetoric, countless hours of legislative drafting and

Parliamentary debate involved in the 52 Amending Bills introduced over the period...cost, conservatively estimated, well in excess of one million dollars each days debate. Readers may well question the total cost to tax payers over the period, and for what net benefit?

This phenomenon was again readily apparent during the 2007 federal election in which ` amendments featured so prominently. The process of review now occurring represents an opportunity to prevent a further costly and disruptive swing of the industrial relations pendulum.

- 3.4 While controversy in this area is to be expected, given the economic and industrial interests at stake, the magnitude and frequency of changes in legislative arrangements in Australia is striking compared to most other OECD economies. In a survey of this phenomenon prior to the *WorkChoices* amendments in Australia, Traxler, Blaschke, and Kittel (2001) observed that among OECD countries, European members prioritised social stabilisation when faced with a policy choice between the social and economic objectives which involved overriding the role of the collective processes of the industrial relation system. In the United Kingdom under prime minister Margaret Thatcher (*Trade Union Act 1984* and the *Employment Act 1980* and subsequent amendments in 1988, 1989, 1990), and in New Zealand under prime minister Robert Muldoon (*Employment Contracts Act 1991*, significant legislative interventions were made for the purposes of economic stabilisation and reform with little regard for long established labour market institutions and relationships.
- 3.5 However, successive governments in the UK and NZ have not sought to turn back these fundamental reforms. In Australia by contrast, the unprecedented change reflected in the *Workplace Relations Amendment (Work Choices) Act 2005* was a major factor leading to a change of federal government and to the prime minister of the day losing his seat. Consequently, there is now a systemic risk that rhetoric rather than logic will dominate debate about how our workplace relations system adapts to the economic and social changes that will inevitably flow from a further period of major structural

change. Could the public policy process once again fail at a time when the need for our workplace relations system to support productivity performance is imperative?

3.6 A different approach to this review is required to point the way to lasting change

We contend that the Productivity Commission's review of the workplace relations framework and the terms of reference present an opportunity to begin a more innovative and constructive public policy process. Realisation of this opportunity will however also turn on behaviour and events which are outside the scope and the timing of the review, including the period following early after the next federal election. Part of the behavioural change required, is for those making submissions and other stakeholders, to reconsider longstanding and entrenched positions and to recognise that sustainable and productive improvements in our workplace relations framework do not come only from legislation but from the direct participants who make the system work on a daily basis, regardless of which government is in office. The process of review developed by the Commission can help to start this shift in mindset.

3.7 Three key aspects of the terms of reference point to the opportunity for a better way forward:

- The overarching principle to develop recommendations to serve the country in the longer term carries the clear implication that those recommendations, if acted upon, can serve over successive political and economic cycles.
- The requirement for the Productivity Commission to "identify future options".
- The requirement to seek evidence and, as far as possible, to assess the costs and benefits of recommendations.

3.8 The issues papers released by the Productivity Commission put those making submissions on notice of the need for proposals and recommendations that are advanced to be supported by evidence and argument. However, at this stage little emphasis has been given by the Productivity Commission to the need for submissions to address how legislative proposals advanced could serve the country over the longer term and the question that inevitably flows from this term of reference: how broad based support for reform might be established in order to avoid major modification or

reversal with changes of federal government? This is of the utmost importance in view of the high transaction costs of major legislative change for participants in the system as they adapt to the changes. For example, transaction costs are incurred in making strategic decisions based on the changed business environment, seeking detailed legal advice, revising policies and procedures, training staff at all levels in the requirements of the new system, developing new documentation, and implementing communication strategies and public education campaigns.

3.9 In this context the following process, if not already planned, should now be publicly articulated by the Productivity Commission to help reframe the policy debate:

3.9.1 The public release of a draft report prior to the final report in November 2015, outlining the options that have emerged from the inquiry, tested against the Productivity Commission's terms of reference, including the longer term sustainability of proposed reforms. The draft report should also explore the extent to which key aspects of the workplace relations framework and the ethics and principles on which it is founded are broadly agreed. In this context, we submit that the level of fundamental agreement about the shift to an enterprise based bargaining system in the 1990s and the need for a fair and effective safety net remains strong and can be a starting point for a broader community-wide dialogue and discussion about the principles on which a more stable and sustainable workplace relations framework can be based.

3.9.2 Encouragement of a community-wide debate about options which extends beyond any processes facilitated by the Productivity Commission and which can be expected to continue up to and beyond the next federal election. Part of the context for such a debate is the need to recognise that legislation alone is not the way to productive and sustainable change and that there is a need for the major stakeholders and institutions to become engaged in this debate.

3.9.3 In the evaluation of submissions and in the development of options, there is a need to focus on issues that truly relate to the workplace relations framework, which would involve legislative change and are not

operational aspects of the systems and processes contained within the workplace relations framework which, by their nature, are likely to exhibit variation over time, including in response to changing economic and labour market conditions.

- 3.10 The workplace relations framework sits within a wider economic context which influences the outcomes of, and the processes within the framework according to changing economic circumstances. The framework needs to be durable and effective through these changing circumstances. For example, the framework articulates the boundaries with other regulatory systems such as competition and trade practices law, occupational health and safety regulations; the scope of authorities exercised by institutions operating within the framework; the people and organisations that have access to and can participate; and the matters that can be determined within the systems operating within the framework.
- 3.11 By contrast, the outcomes of bargaining, associated industrial disputation and the setting of standards and conditions of work are readily influenced by changing economic circumstances. These are operational issues and outcomes that are readily distinguishable from the framework issues described above. Legislation shapes the dimensions of the framework and operations therein but legislation can directly impact operational outcomes, including operational processes and business outcomes within corporations, especially now that the Corporations Power is the major underpinning of WR regulation. The significance of this shift cannot be underestimated, as McCallum (2005) has noted:

Labour laws will become little more than a sub-set of corporations law because inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalized economy.

- 3.12 The corporations power in section 51(xx) of the Constitution gives the national government power to intrude directly into the operation of Commonwealth

corporations and to set wages and conditions and to increase or decrease standards such as the federal minimum wage. Currently, as the Productivity Commission notes in Issues paper 1, the scope of the minimum wage has been widened to encompass employees of all businesses (except those employed by unincorporated enterprises in Western Australia), and the creation of specific legislative criteria for setting the minimum. Likewise National Employment Standards (NES) rests on section 51(xx) of the Constitution. Rather than an outcome of dispute settling processes presided over by an independent tribunal, as has historically been the case under the conciliation and arbitration power, in section 51(xxxv) of the Constitution, these standards are the outcome of the political processes of the Commonwealth Parliament. It is not germane that currently the federal minimum wage is set by the Minimum Wage Panel established under the *Fair Work Act 2009*.² It is now within the power of the Commonwealth to legislate directly on this and the NES and consequently these matters are subject to the vagaries of the industrial relations pendulum. The search for some broad based consensus on the political limits on the use of the corporations power for the regulation of workplace relations is, therefore, part of the challenge in establishing a workplace relations framework to serve the country in the longer term.

- 3.13 Below our submission will review some of the major issues identified in the issues papers using the framework-operations distinction in order to identify the critical issues to be resolved in order for the Inquiry's overarching principle to be satisfied. The distinction proposed will better enable the Productivity Commission to distinguish between common causes of variation within the operation of the systems comprising the overall workplace relations framework and issues relating to the design of the overall system or framework. In this regard it is useful to recall the general principle that intervention in a system in response to normal variation (common cause) is likely to actually increase variation (Deming 2000). An overview of the recommended public policy process is set out in Appendix 1.

² It is noteworthy that the Commission of Audit initiated by the current government, suggested the minimum wage be set by the federal government using the corporations power; see *Australian Financial Review*, 2 May, 2014.

4 ToR 3: Small Businesses

- 4.1 This section focuses on term of reference three, and in particular, the impact of the workplace relations framework on the following aspects of employment in small businesses:
- Fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net; i.e. fair, productive and effective workplaces in small firms, including representation and voice issues in small business.
 - The ability for small business employers to flexibly manage and engage with their employees.
 - Red tape and the compliance burden for employers—a particular issue for small business.
- 4.2 This submission argues that the *Fair Work Act 2009* and the Fair Work Commission have an important and ongoing role in setting the regulatory context for small business growth and development. This will ensure that small businesses produce social and economic benefits by providing entrepreneurial and commercial opportunities for business owners and good quality employment opportunities for employees.
- 4.3 Small businesses, defined as actively trading businesses with 0-19 employees, are an important source of employment (although not necessarily employment growth) and add value to the Australian economy. In Australia, approximately 96% of all businesses are small, and of these 34.7% employ staff and 61.2% are sole traders. Small business accounts for 45.7% of private sector employment and this employment is overwhelmingly concentrated in the services sector (84.4%). Small businesses employ 4.818 million employees (see Department of Industry, 2012) and are a source of value added and innovation for the Australian economy. For example, small businesses accounted for 33.7% of private sector industry value added, and for the period 2010-2011, almost 50% of businesses with 5-19 employees reported some kind of innovative activity (Barrett & Mayson, 2005). These statistics point to the social value and economic potential of small business and to the need for effective regulation that enables small

businesses be productive, flexible and engaging workplaces (as well as providing fair and equitable employment conditions).

- 4.4 To this end, the *Fair Work Act 2009* requires that small businesses comply with the National Employment Standards, modern awards, unfair and unlawful dismissal laws, agreement making obligations, transfer of business rules and specified workplace rights.³ Arguably this regulation is crucial for small business operations as it provides a framework of minimum standards with regard to wages and conditions of employment, in this way ensuring that competition is based on competitive advantage rather than the ability to cut costs.
- 4.5 However, small business workplace regulation and indeed regulation more generally remain contentious issues. Those organisations that represent small business⁴ as well as government⁵ and to some extent regulators, such as the Fair Work Commission, recognise that regulation is a burden on small firms because they lack the resources and economies of scale to respond to regulatory requirements. For this reason the Fair Work Ombudsman has developed information resources, including guidelines, check lists and procedures to guide small business compliance, and the Fair Work Commission continues to develop resources to simplify access to and participation in its processes.⁶
- 4.6 The regulation-as-burden argument, while having empirical support, frequently finds its way into policy discussion and ministerial pronouncements as an unchallenged truth (Barrett, Mayson & Bahn, 2014). However, it has been shown that, while small businesses perceive regulation as burdensome, this may also create opportunities and outcomes that are beneficial for small business and its stakeholders, particularly employees (see Barrett, Bahn & Mayson, 2014). For example, in their study on small firm responses to the harmonisation of the occupational health and safety regulations

³ Fair Work Ombudsman, <http://www.fairwork.gov.au/about-us/policies-and-guides/>. Also see Small-business-and-the-Fair-Work-Act-best-practice-guide.pdf and <https://www.fwc.gov.au/>.

⁴ See for example <http://www.cosboa.org.au>

⁵ See <https://www.cuttingredtape.gov.au/>

⁶ Fair Work Commission/Sweeney Research (2014) A Qualitative Research Report on Citizen Co-Design with Small Business Owners. Ref. No. 24210, 13th August, V1. Prepared for the Fair Work Commission, Commonwealth of Australia; and <https://www.fwc.gov.au/audience/small-business-employers>

Barrett, Bahn & Mayson (2014) found, that respondents reported increased business opportunities and found it easier to recruit good quality staff by positively responding to harmonisation. The key issue is recognising that regulatory compliance may set the conditions for small business owners to build robust businesses capable of growing and innovating by managing and developing their workforces in a safe, fair and equitable way. By providing a workplace relations framework which is clearly communicated and user friendly government can lower the transactions costs associated with small business compliance. Specifically, owners and operators need to invest less time and energy in the minutiae of employment regulation and need to have less recourse to legal and other specialist advisors.

- 4.7 Relevant to regulation as burden arguments is research that shows that small firms lack resources, have informal structures and limited managerial capacity and that the personal attitudes and values of the owner/manager shape the development of employment practices (Barrett & Mayson, 2005, 2008; Mayson & Barrett, 2008). These challenges arise from 'smallness' of small firms and the attendant attitudes and responses of small business owners/managers to government regulation, ideological views about the autonomy of small business owners and the degree to which employment management practices are formalised to ensure effective and equitable employment relations (Barrett & Mayson, 2005).
- 4.8 In this regard we also note the findings of Barrett and Mayson (2005) that formalisation of employment practices can contribute to improved outcomes in terms of growth, flexibility and equity in smaller firms. For example analysis of survey data from 600 Australian small firms conducted by CPA Australia found that informality pervaded the employment practices of firms and in the absence of internal formalisation, some firms relied on external guidance such as awards to set wages and conditions. Where firms had developed some level of formalisation of employment practices, there was a link between growth and the use of practices such as formal recruitment processes, selection criteria and, reward practices that engendered employee commitment such as time off, incentives and bonuses (Barrett & Mayson, 2007). In another study of the management of maternity leave in small accounting/financial services firms, Barrett and

Mayson (2008) found that a lack of formality resulted in ad hoc arrangements and that decisions to grant leave were often made at the whim of the owner/manager based on their perceptions of the value or expendability of the employee.

- 4.9 These findings support the arguments in this submission that, despite the regulation as burden arguments, small business stands to benefit from employment regulation (and indeed other regulation such as occupational health and safety) because of the challenges created by their 'smallness'. It follows that the regulatory framework, including that which already exists under the *Fair Work Act 2009*, should be retained but support resources should continue to be developed in consultation with small business. This approach will ensure that regulatory requirements are both effective and that the associated transaction costs are minimised.
- 4.10 Following the reasoning above, we also submit that operational issues such as the application of penalty rates in the sector, which are currently under review by the Fair Work Commission, should not be determined by legislation. Legislation of an operational type would inevitably be controversial and would be unlikely to survive over the longer term, thus making the regulatory framework less stable and predictable for small business.

5 ToR 4: Productivity, Competitiveness and Business Investment

In this part of our submission we draw on the following assumptions and principles relating to the links between workplace relations and productivity growth:

- It is the substance of the employment relationship and not its legal form which determines whether employees are engaged and productive.
- Productivity at the workplace is an outcome of the quality of both leadership and organisational culture and the impact these have on employee engagement and commitment.
- The quality of workplace relations should be a source of competitive advantage flowing to the enterprise and should be encouraged not impeded by legislation.

- 5.1 The first two points can be illustrated by reference to the following evidence and argument. It has often been asserted that direct employment relations between employees and the employer are more productive than an employment relationship mediated by a third party (typically a union) and as a consequence individual contracts of employment will be more productive than collective agreements. However, we have not been able to find any Australian evidence that supports this assertion. Studies of the effects of Australian Workplace Agreements (AWAs) do not establish any link between legislative innovation and productivity (e.g. Peetz 2006; Peetz & Preston, 2009).
- 5.2 In this regard the experience of substantial workplace productivity gains realised in aluminium mining and smelting in the Comalco Group in Australia and New Zealand in the 1990s is highly cogent.⁷ Rapid gains in current efficiency (a key measure of operational efficiency in aluminium smelting), metal purity, the elimination of overtime and substantial reductions in absenteeism have been documented (Macdonald, Burke & Stewart, 2006: 247-258). Productivity gains of up to 25% were achieved shortly after the introduction of individual contracts on a voluntary basis. However, the move to individual contracts by award employees was due to a cultural change strategy that built leadership capability at these operating sites over time. In each case collective processes involving secret ballots of employees were used to authorise the new staff employment arrangements and in each ballot around 90% of employees voted in favour of the company's offer despite strong opposition from the unions covering those sites. Finally, the gains were made in employee engagement and workplace productivity despite the industrial relations legislation in place at the time.
- 5.3 The conclusion is clear; it is the work of management to create the conditions for cultural transformation at the workplace and that at best legislation can facilitate organisations embarking on this path. What then are the key elements of such an approach?

⁷ A description of the journey to all staff employment is provided by Ludeke (1996) but an explanation of the detailed work that was done over several years at Comalco's operating sites to change the culture of the workplace to engage the discretionary effort of employees can be found in Macdonald, Burke & Stewart, 2006).

- The cultural transformation to substantially lift productivity performance will only be achieved if a very substantial proportion of the employees at the workplace support the changes in the employment relationship.
- A collective process to transition to individual employment arrangements (secret ballots) for eligible employees is a disciplined way to demonstrate the necessary level of support for a shift in culture and workplace behaviour.

5.4 Applied to the current regulatory framework this model would have the following characteristics:

- A 66% majority of all employees at a workplace voting in a secret ballot would opt to enter into direct employment arrangements with their employer which would displace the operation of modern awards and any collective agreement which might otherwise apply.
- At all times the NES would apply as safety nets along with applicable occupational health and safety legislation and other anti-discrimination and human rights legislation.
- Employees would be able to give reasonable notice to initiate a secret ballot to exit the self-regulatory model with a simple majority (50% plus 1) of employees casting a vote being determinative.

5.5 In summary, recognising that legislation should play a framework role, legislative change to enable some form of individual contracting can facilitate productivity improvement, but there needs to be appropriate minimum standards and procedural safeguards provided. If this does not occur, legislative innovation will be both controversial and fail to endure.

6 ToR 6: Patterns of Engagement in the Labour Market

6.1 This section focuses on term of reference six, and in particular, demographic changes and workplace flexibility as they relate to patterns of engagement in the labour market.

This is an important policy issue and one where the framework-operations distinction needs to be carefully considered.

- 6.2 Changes in workforce demographics are putting pressure on employers to flexibly manage and engage with their employees. There is increasing recognition that if employers are to 'flexibly engage', they also need help to better understand and manage the changing family responsibilities of Australian workers. This is particularly important in relation to the increasing number of Australians who will provide care for their family and loved ones. The 2012 Survey of Disability, Ageing and Carers, defined a carer as a person who provides informal assistance to an older person or someone who has a disability or a long-term health condition. The survey identified 2.7 million Australians carers (12% of the population), with 770,000 (3.4%) identified as primary carers, although care for children was not included (ABS, 2012).
- 6.3 Like many other western developed nations, Australia has an ageing population (ABS, 2013) in tandem with delayed childbearing (ABS, 2008) and a long-term increase in women's labour force participation (ABS, 2006), as well as continuing gender inequality in the allocation of unpaid care work (Hoeing & Page, 2012). These changing demographics have put pressure on the number of Australians who are likely to take on the role of a carer at some point in their life while at the same time engaging in meaningful employment. Australian Bureau of Statistics figures identify over 1.5 million carers are of working age (18-64) but the labour force participation rate for primary carers (42%) and other carers (63%) was lower than that for non-carers aged 15 years or more (69%) (ABS, 2012). Combining paid work and primary care is often not possible or very difficult and this is likely to have major implications for organisational performance.
- 6.4 Policy-makers in developed nations such as Australia are facing considerable pressure to respond to the needs of an ageing population. An understanding of the full range of caregiving commitments can have implications for the development of labour market policies. Recent research by ACREW members (Bardoel & Drago, 2014) has found that it is important to expand the traditional definition of carers to include the 'sandwich generation' (care for child and parent) and also to include multi-generation carers (with

care for a child and any adult). For example, if labour market circumstances are similar for members of the sandwich generation and those with multi-generational caregiving status, then the effectiveness of those policies could be enhanced by supporting employment among individuals with a broader range of caregiving commitments.

6.5 To the extent that care is provided by individuals other than children, multi-generational caregiving status may be expanding as well, along with grandparent multi-generational caregiving. However, until recently no estimates of sandwich generation or multi-generational carer status existed for Australia. Based on eight waves of the Household, Income, and Labour Dynamics in Australia (HILDA) Survey with approximately 6,000 respondents, Bardoel and Drago (2014) calculated the probability of entering multi-generational carer status between the ages of 22 and 60 years. The initial results have revealed that there is a 37% probability of any adult entering multi-generational caregiving status at some point in their life and this is gendered; women have a 0.23 probability and men have only a 0.025 probability. The survey also indicated that partnered women receive little help from their partner when they enter multi-generational caregiving status, according to partner reports. However interestingly the duration one spends as a carer is not predicted by gender or other demographics, suggesting it is largely beyond the control of caregivers. The figures reveal that duration as a caregiver is typically short (70% exit after 1 year), but a small group have a long duration as caregivers (10% for at least 6 years). Also while duration is not predictable, at a practical level, it is often difficult to undo commitments.

6.6 For policy-makers, financial, mental health, and other policy supports such as innovations around long-term job leaves and flexible work arrangements for multi-generation caregivers may be worthy of consideration. This gives rise to an issue of whether the existing 'right to request' provisions in the *Fair Work Act 2009* (section.65) and National Employment Standard 2 are sufficient or whether legislative amendments would intrude into operational issues. We are however mindful of the compliance issue facing small business as discussed in section 4 above and of the need to balance this against the issue of increasing labour force participation.

6.7 At the same time it should be noted that National Employment Standard 2 provides:

2. Requests for flexible working arrangements — an employee who has responsibility for a child under school age may request a change in working arrangements to assist the employee to care for the child. This entitlement only applies to an employee with at least 12 months continuous service with the employer or, in the case of casual employees, to long term casual employees who have a reasonable expectation of continued employment with the employer. An employer is entitled to refuse an employee's request for flexible working arrangements on reasonable business grounds but must provide written reasons for such a refusal.

6.8 This standard is by design limited to parents of children and operates within the right to request framework. However, in view of the issue of caregiving and labour market participation, it may be timely to re-visit this standard. Further, it is evident from the experience of the Retail and Hospitality industries that the existence of the national standard has led to a measure of innovation in the development of enterprise agreements (Lafferty, 2013).

7 ToR 7: The Ability for Employers to Flexibly Manage and Engage with their Employees

This section focuses on term of reference seven, and in particular, how employee voice, representation and participation relate to, shape and impact upon employers' abilities to flexibly manage and engage with their employees.

7.1 Employee voice can be defined as how employees have a say and participate in decisions that affect them at work. Our research on employee voice, drawn from national surveys, the Australian Workplace Representation and Participation Survey (AWRPS) conducted in 2004, 2007 and 2010, distinguishes three types of voice: union voice, non-union (direct) voice and hybrid voice.

7.2 Union voice

In Issues Paper 1, the Productivity Commission notes the decline in union membership and adverts to the possibilities of alternative forms of representation. While we acknowledge this phenomenon of declining union membership, a trend common across Anglo-American countries, we emphasise the continuing importance of trade unions both in the workplace and the wider society. With approximately 1.7 million members, the Australian trade union movement still directly represents a significant proportion of the Australian workforce as well as providing a representative voice for a large number of otherwise disenfranchised employees, particularly women and younger workers, employed in low income and often insecure jobs. We also find evidence of unmet demand for trade unions in our AWRPS surveys: that is, non-union employees who would join a union if one is formed at their workplace. The 2010 AWRPS data indicates unmet demand of 34% in non-union workplaces (Pyman, Teicher, Cooper, & Holland, 2015).

7.2 The union movement in Australia and in most parts of the world exists as an institution providing employee voice in the workplace but playing a variety of roles as part of the Australian community. Trade unions not only offer protection for Australian workers through representing workers at the workplace in relation to both individual and collective issues, they also seek to influence government policy beyond the workplace for the benefit of members, former members and potential members. Some campaigns run by the union movement have reflected the gap between community expectations and concerns and government policy.

7.3 These community based activities cannot be readily disentangled from the day-to-day workplace based interventions by unions. A recent example of this role relates to public concern at the cruelty associated with live meat exports; however, the union movement has been concerned with aspects of this industry since the mid-1970s. Led by the Australasian Meat Industry Employees' Union (AMIEU), alliances between the union movement, animal rights groups, other community groups, and even meat processing industry employers, have been formed to raise awareness of the issues surrounding live export. These activities have included cruelty to animals and the competition between

the established meat processing and export companies and the new live export industry, which has led to job losses in abattoirs across Australia (Jerrard, 2007; Jerrard & Le Queux, 2013). This case illustrates the tight nexus between industrial and what might be called non-industrial issues.

7.4 There are other powerful examples of the continuing efficacy and importance of trade unions in the face of declining membership. The outcome of the James Hardie Company campaign which was both an industrial one on behalf of present and former trade union members is illustrative of the role of unions beyond formal workplace voice mechanisms or where that form of voice fails. The campaign reflected the social justice objective of providing financial compensation for the sufferers of asbestos-related mesothelioma contracted during their working lives, as well as compensation for their families. The campaign was run by the ACTU, Unions NSW and the Australian Manufacturing Workers' Union (AMWU) in conjunction with anti-asbestos groups and the New South Wales Government (Holland & Pyman, 2011; Jerrard & Le Queux, 2013).

7.5 Other brief examples of this kind include:

- A union-community alliance aimed at improving occupational health and safety was formed by the Australian Workers' Union (AWU) with the Country Women's Association (CWA), and supported by WorkSafe Victoria (Jerrard, 2008).
- The ACTU, Victorian Trades Hall Council, Queensland Council of Unions and a group of unions⁸ assisted Australians for Native Title and Reconciliation (ANTaR) and the Stolen Wages Campaign Working Group (SWCWG) with a publicity campaign to raise awareness about payments that had been held in trust funds for indigenous workers but never paid to those entitled to them (Jerrard & Heap, 2010).
- The Maritime Union of Australia has formed a community alliance that benefits seafarers when on shore with the establishment of and fundraising for the Stella Maris Seafarers' Centre in Melbourne (Jerrard, Cockfield, & Buttigieg, 2009).

⁸ Australian Services Union (ASU), the AMIEU, the CFMEU (Construction and Mining and Energy Divisions), United Voice, the Maritime Union of Australia (MUA), and the National Tertiary Education Union (NTEU).

7.6 **Direct voice**

The AWRPS surveys show that direct voice, that is, two-way communication between management and individual employees without the intermediation of a third party is increasingly common in Australian workplaces. Using ordered probit regression analyses, we found that direct voice underpins employees' global job satisfaction in the workplace (Holland, Cooper, Pyman, & Teicher, 2012). The link between direct employee voice and organisational outcomes is important when considering how employers can best engage employees. There is now a large body of research in the areas of organisational behaviour, human resources management and workplace relations demonstrating that job satisfaction is associated with a range of other desirable individual and organisational outcomes including employee engagement, and commitment (Cox, Zagelmeyer, & Marchington, 2006; Oshagbemi, 1999; Spector, 1997; Wright, 2006). These outcomes, in turn, have been found to be associated with reduced intention to quit and increased performance.

7.7 In another study of employee voice using ordered probit regression analyses (Pyman, Holland, Teicher, & Cooper, 2010), it was found that employees' perceptions of the industrial relations climate are more likely to be favourable if they have access to direct-only voice arrangements. Where management is perceived by employees to oppose unions (in unionised workplaces), the industrial relations climate is more likely to be reported as poorer. Industrial relations climate is a function of work patterns and practices and perceived management attitudes and is linked to organisational performance. Our findings show a positive relationship between direct voice and employees' perceptions of the industrial relations climate; see Tables 1 and 2. Our findings on the relationship between employee voice arrangements and the industrial relations climate are evidence that trust is a critical aspect of developing cooperative workplace relations and therefore engaging employees.

Table 1: Distribution of Voice Arrangements: 2007 Australian Worker Representation and Participation Survey

Voice Arrangements	%
Union only	12.1
Direct only	27.5
Union and direct (dual-channel/hybrid)	23.0
Neither union nor direct voice	23.8
Not known	13.6

Source: Pyman et al. 2010: 468

Table 2: Results of Ordered Probit Regression Analyses Predicting Perceptions of the Industrial Relations Climate

	<i>B</i>	<i>s.e.</i>
Model 1: employee voice arrangements (reference category: no union or direct voice)		
Union only	-0.47*	0.18
Direct only	0.55*	0.13
Union and direct (dual-channel)	0.20	0.15
Model 2: direct voice arrangements		
Regular meetings with all staff	0.41*	0.09
Employee involvement program	0.08	0.14
Semi-autonomous workgroups	0.24*	0.12
Model 3: employees' perceptions of managerial attitudes to unions and employee voice arrangements — unionized workplaces only		
Perceived management opposition to unions	-0.76*	0.14
Presence of any direct voice	0.47*	0.18

Note: Nagelkerke pseudo R^2 for: model 1 = 0.11; model 2 = 0.08; model 3 = 0.28. Controls include: gender, age, gross weekly income, occupation, hours worked, organisational tenure, organisational size, sector, union membership.

$p < 0.05$. B =probit regression coefficient; $s.e.$, standard error.

7.8 The analyses based on the three AWRPS surveys have consistently shown that regular meetings between senior management and staff are the most effective employee voice channel, followed by semi-autonomous work groups and team briefings. Little evidence has been found for efficacy of formal employee involvement programs such as quality circles, but the incidence of such programs is relatively small in Australia. In the light of the discussion below, it is important to note that the quality of relationships at work is an important element in organisational performance and employee well-being.

7.9 **Voice complementarity**

The AWRPS studies demonstrate the benefits of voice complementarity – that is, the co-existence and reinforcement of both union and non-union (direct) voice (Pyman, Cooper, Teicher, & Holland, 2006). Our research found a positive impact of complementary or hybrid voice channels on employee job satisfaction, but interestingly not for trust in management (Holland et al., 2012). Our research also shows a positive impact of voice complementarity on the perceived industrial relations climate, job control, influence over job rewards, and the responsiveness of managers to employee needs (Pyman et al., 2010). In terms of the Productivity Commission's focus on co-operative relations at work, we submit that it is important for organisations to develop complementary or hybrid voice systems (union and non-union/direct) which are linked to employee commitment and organisational performance. However, our research suggests that most participants in the Australian workplace relations system may not be ready to develop and manage sophisticated human resources policies and practices where voice systems complement rather compete with each other. Consistent with the evidence and argument presented above, we do not argue that this is a cause for legislative intervention other than to encourage employers to have recourse to innovative workplace agreements.

7.10 ***The Role of Joint Consultative Committees***

Joint Consultation Committees (JCCs) were a significant component of the industrial landscape of Australia, particularly from the 1970s onwards. JCCs are considered as a form of indirect employee voice which could be further categorised as union or non-

union indirect voice. Traditionally, they have been union dominated but apart from that relatively little is known about their operation and contribution.

- 7.11 Research conducted by ACREW members found that 80% of employees surveyed considered JCCs to be effective (Holland, Pyman, Cooper, & Teicher, 2009). Another significant issue was that JCCs were seen to be more effective in smaller organisations (typically having low union membership) and where management had a variety of communication strategies (Holland et al., 2009). These findings support the argument that management needs to develop a variety of mechanisms and communication channels to effectively enhance workplace co-operation, employee engagement and commitment.

7.12 **Management attitudes**

The body of AWRPS research has consistently shown the importance of management attitudes in influencing employee's perceptions of co-operative workplace relations (Holland et al., 2012; Pyman et al., 2010); an issue of interest to this inquiry (AGPC 2015: 4). We have found that management attitudes are an important indicator of the climate or workplace culture (Pyman et al., 2010). For example, as noted above, where management is perceived to have a negative attitude to trade unions, employees' trust and perceptions of the industrial relations climate are significantly poorer (Pyman et al., 2010). It was also found that management attitudes are linked to the presence of other voice practices. For example, where management had favourable attitudes to unions, 74% of respondents reported the presence of a JCC. However, where management were perceived to oppose unions the presence of JCCs fell to 41% (Holland et al., 2009; Pyman et al., 2010).

- 7.13 In summary, the research on employee voice, representation and participation in Australian workplaces undertaken over a 10-year period shows that co-operative relations between employees and employers are associated with the provision of hybrid voice systems (Pyman et al., 2006). Underpinning such systems is the importance of direct voice. The key for management is to build sophisticated human resources systems that develop and encourage such a framework. For management this requires

significant and ongoing investment in human capital and communication and the development of a dialogue and working relationship with unions in those workplaces where they exist. In some European nations, these systems are mandated through work councils or legislation on information and consultation, and it may well be that the process of standard setting has been a factor in the acceptance and institutionalisation of these provisions. Legislating for mechanisms to institutionalise employee voice is likely to be problematic in Australia and risks falling foul of the industrial relations pendulum due to employers' lack of understanding of the benefits. In this regard the experience with the implementation of the Training Guarantee and strong employer resistance is salutary. In the present circumstances it would be valuable for the Productivity Commission to encourage wide public debate on the benefits and means of fostering hybrid forms of employee voice in Australian workplaces. More generally, management attitudes and leadership are critical variables in productively managing and engaging employees and in creating a workplace culture that fosters not only productivity and competitiveness but equity and employee wellbeing.

8 ToR 10: Industrial Conflict and Days lost due to Industrial Action

- 8.1 This section focuses on term of reference ten, which requires the Productivity Commission to consider the impact of the workplace relations framework on “industrial conflict and days lost due to industrial action”. In this regard it is important to note that, while collective industrial conflict has undergone a long term decline, the issue of industrial conflict remains an important one in considering the future shape of the workplace relations framework in this country. Indeed, we think it is pivotal to the efficiency of organisations and ultimately the performance of the economy and the well-being of the population. The Productivity Commission has made a similar point in Issues Paper 1 (AGPC, 2015: 4):

Long-run shifts in labour markets, institutions, the nature of the economy and social security systems may provide an impetus for further change. For example:

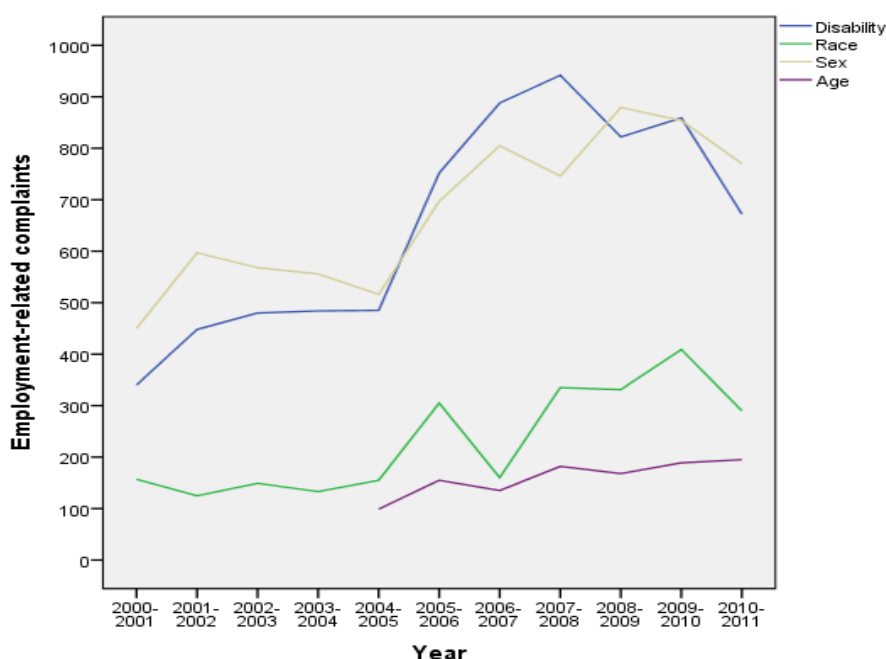
- *cooperative relations between employees and employers may be more important for innovation, technological diffusion and investments in skills — developments that are critical for future productivity, economic growth and adaptability*

In this regard, we note that declining days industrial action is not reflected in the workload of the Fair Work Commission (2014) with a sharp rise in individual disputes including unfair dismissal and adverse action claims as well as disputes arising from failed dispute resolution procedures.

8.2 The existing legislative framework has for the most part proven effective in restraining industrial action notwithstanding the occurrence of a small number of high profile disputes in areas such as building and construction and mining. Levels of industrial conflict as measured by the number of working days lost due to industrial disputes per year has fallen from a peak of about 6 million days in 1974 to a low of 50,000 in 2007. In recent years there has been a small increase in working days lost, for example working days lost reached 241,000 in 2013. We are not suggesting that the decline in organised conflict is entirely due to legislative change however.

8.3 While working days lost are declining, there is abundant evidence that there is still widespread, but less visible conflict in the form of individual and small group disputes. Moreover, there is a high cost associated with individual and small group conflict with the Productivity Commission (2010: 287) suggesting that the annual costs to the economy could be as high as AUD\$36 billion. As shown in Chart 1, since 2000 there has been an increasing number of complaints that involve employment discrimination to the Australian Human Rights Commission (AHRC) and its predecessor, the Human Rights and Equal Opportunity Commission (HREOC). The 84% increase observed in the areas of disability, sex, race and age between 2004–05 and 2010–11 is unlikely to be entirely a result of growing public awareness of these avenues for resolving complaints. Employment-related complaints constituted 86% of all complaints under the *Sex Discrimination Act 1984*, 44% of areas under the *Racial Discrimination Act 1975*, 44% of areas under the *Disability Discrimination Act 1992*, and 62% of areas under the *Age Discrimination Act 2004* (HREOC, 2010).ⁱ

Chart 1: Employment-related complaints from 2000 to 2011



Source: HREOC/AHRC Annual Reports. Note: The Age Discrimination Act has only been in existence from 2004–2005.

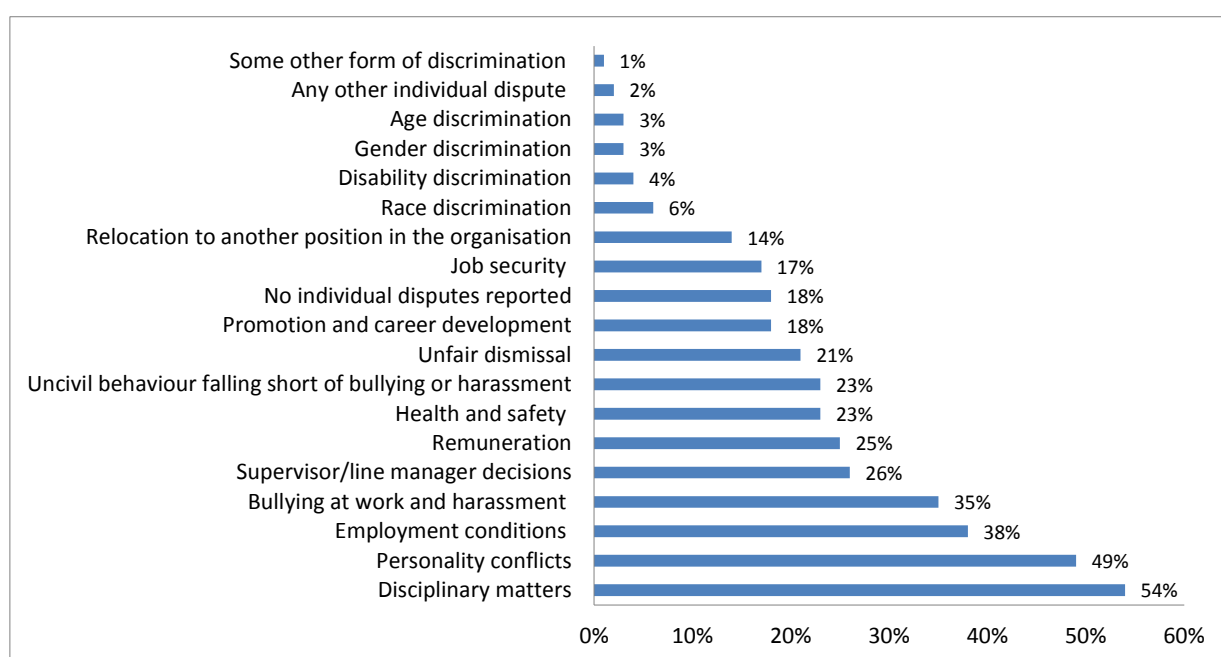
8.4 In considering changing patterns of workplace conflict and their implications for this inquiry, we draw on the findings of two national surveys and in-depth interviews with senior practitioners, which were conducted as part of an Australian Research Council funded project on workplace conflict and its resolution. The findings presented below are preliminary and detailed analysis of the data is in process.⁹ The first survey conducted in 2014 presents the views of 1,412 respondents who were the most senior manager responsible for employee relations in the organisations surveyed. The second survey examined employee perceptions of conflict and dispute resolution in the workplace. This survey was completed by 773 employees working in six case study organisations across Australia.

8.5 The survey of managers revealed the prevalence of disputes in organisations with 82% reporting at least one individual dispute in the past 12 months. The most frequently occurring issues related to disciplinary matters and personality conflicts (see Chart 2) although this varied across organisational size. Significantly, the respondents, the most

⁹ Australian Research Council funded research project DP120103054: 'Efficiency, Justice and Voice: A Study of Effective Ways to Prevent and Settle Workplace Disputes'.

senior manager responsible for human resources, reported that on average they spent 10% of their time per week resolving individual disputes. Indeed, for organisations with more than 500 employees the senior manager spent an average of 14 hours per week on individual conflicts. In summary our evidence suggests that conflict is widespread and costly to resolve and this has clear implications for organisational productivity.

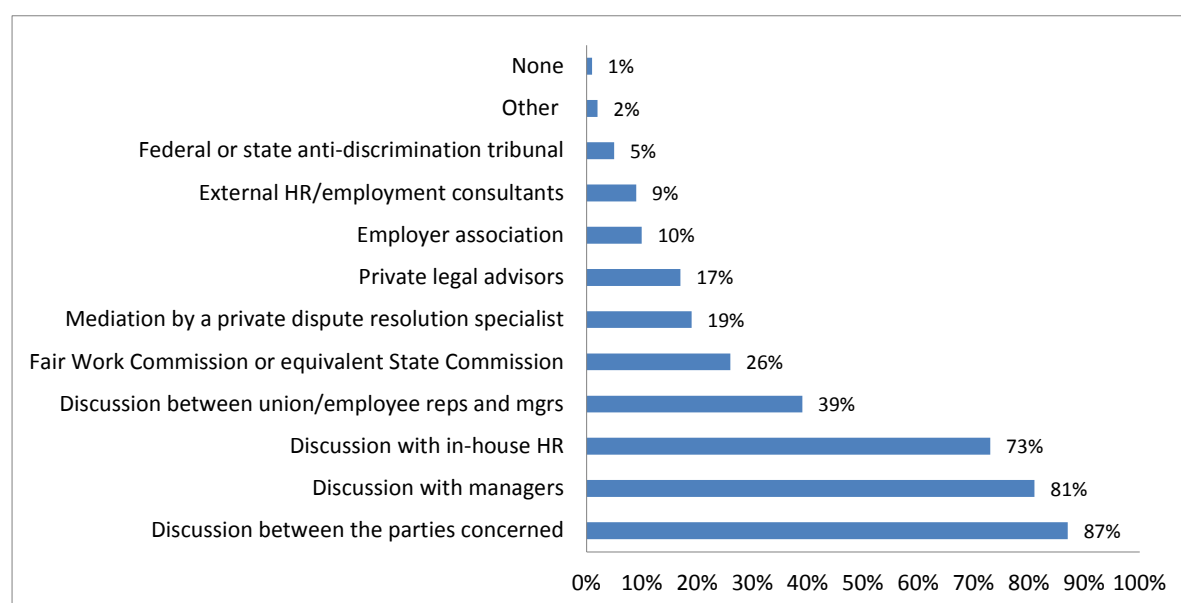
Chart 2: Types of individual disputes occurring in the past 12 months



Note: respondents could select multiple response options

8.6 In view of the interest and importance of building co-operation at workplace level, it is notable that employers found that discussions between internal parties were the most common approach to resolving individual disputes and were considered to be the most effective of the approaches. As would be expected, organisations involve external or third parties in individual dispute resolution to a lesser extent. Industrial tribunals including the Fair Work Commission were used in just over a quarter of cases to resolve individual disputes; see Chart 3. But this does not mean that disputes are always resolved. Turning to the employee survey, of the 40% who reported that they had experienced conflict at work in the last 12 months, only 21% reported that the conflict was fully resolved and almost half reported partial resolution.

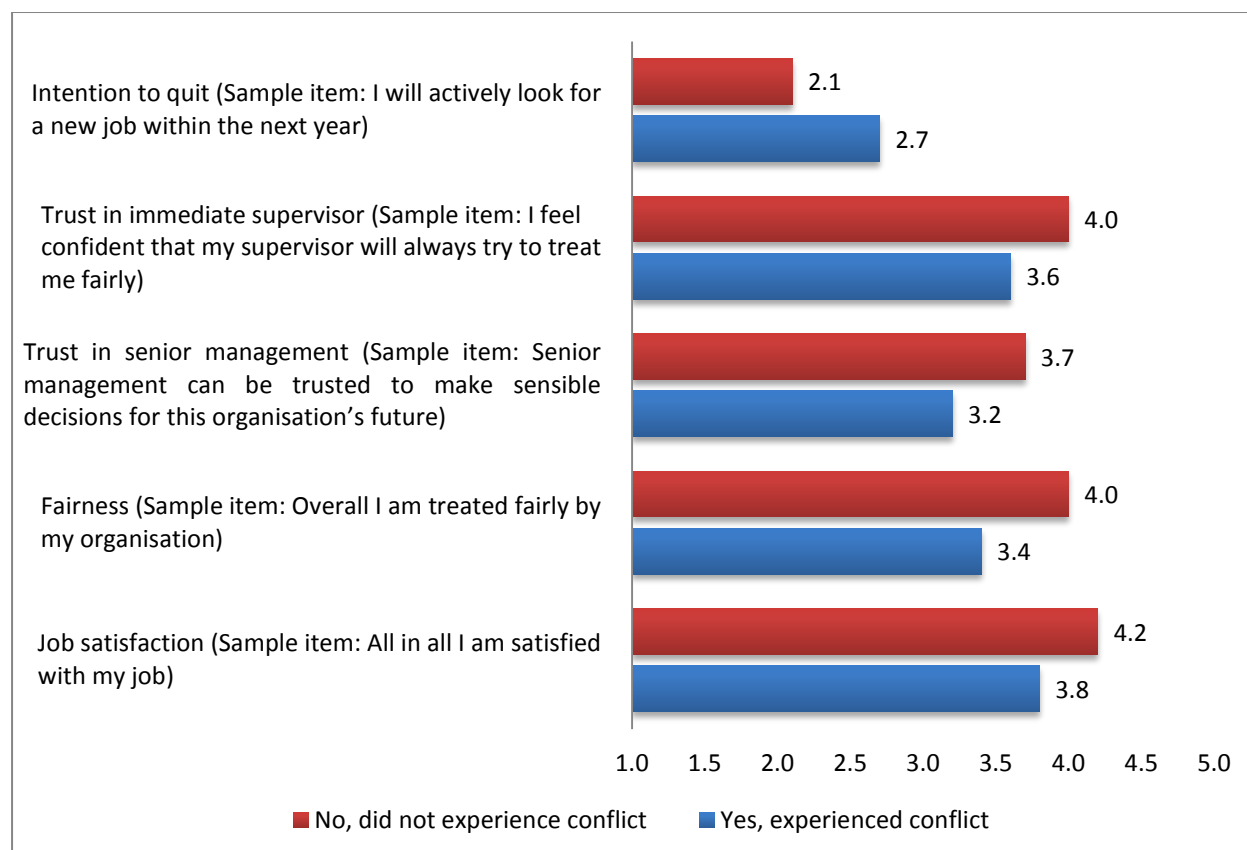
Chart 3: Parties involved in resolving individual disputes in the past 12 months



Note: respondents could select multiple response options

8.7 As shown in Chart 4, employees who experienced conflict at work in the last 12 months reported lower levels of job satisfaction, fairness at work, trust in senior management, and trust in their immediate supervisor compared to those who reported they had not experienced conflict at work. Employees who experienced conflict at work in the last 12 months also reported higher levels intention to quit when compared to those who had not experienced conflict at work. Two immediate conclusions are suggested by these findings: first that organisations in general are not effective in resolving conflicts and that the experience of conflict (even when it is reported as fully resolved) has detrimental consequences for key outcome variables associated with organisational performance; e.g. trust and fairness.

Chart 4: Mean scores on key work attitude, employee well-being and behaviour indicators – respondents experiencing conflict versus not experiencing conflict



Mean scores as reported by respondents (1=Strongly disagree to 5=Strongly agree). All differences are statistically significant at $p < .05$.

8.8 In terms of the framework-operations approach adopted in this submission, the prevalence of workplace conflict is both costly and has significant implications for employee well-being, but it is an issue which ultimately has to be addressed by the workplace participants. The research suggests that much remains to be done at the workplace level, not so much in developing more or better dispute resolution procedures but in creating genuine opportunities for employees to exercise voice. For this to occur, among other things, much greater attention must be directed to training both managers and employees in effective dispute resolution. These are not things that can be readily mandated by legislation, but, as we have suggested in section 7, consideration should be given to whether legislation could foster the development of employee voice mechanisms such as joint consultation or works councils as found in many European countries.

9 Conclusions and Recommendations

- 9.1 The terms of reference and the issues papers that the AGPC has released emphasise the need for evidence and argument to be presented to support proposals and recommendations advanced in submissions to the inquiry. Our submission addresses issues raised by the Productivity Commission to the extent that relevant research has been conducted by members of ACREW or is accessible to us.
- 9.2 The submission first discussed the terms of reference of the inquiry and the implications for how the Productivity Commission could approach its task. We concluded that there is a significant opportunity to advance the quality of the public policy process in the contentious area of industrial relations and workplace relations reform by focussing on the longer term implications and sustainability of options for change developed by the Productivity Commission. We argued that this was not only desirable but in fact required by the terms of reference. We also submitted that the Productivity Commission should position its report so as to encourage a wider public debate about workplace relations reform in the period up to and beyond the next federal election. In the interests of stability in the legislative arrangements in this important area such a debate has the potential to advance public policy formulation and implementation. Finally in this part of our submission we highlighted the need to distinguish between operational issues and those which truly did relate to the framework of the workplace relations system where sustainability and stability is required over the longer term.
- 9.3 The submission then turned to specific issues identified in the inquiry's terms of reference where research and evidence could be advanced based on the work of ACREW members.
- 9.4 In relation to small business, there is an emerging body of research that demonstrates the need to weight the regulation-as-cost arguments against the benefits of regulation in the area of workplace relations. These benefits include gains in operational efficiency and in the capacity to attract and retain staff associated with the formalisation of employment practices leading to improved outcomes in terms of growth, flexibility and

equity. In the circumstances, arguments to lessen the application of workplace relations laws to small business should be resisted, however, consideration could be given to encouraging greater flexibility through refining NES 2 as discussed below above and in section 9.7.

- 9.5 The impact of the workplace relations on “productivity, competitiveness, and business investment” in term of reference 4 is central to the purposes of the inquiry. We drew on several sources of evidence including experiences in the mining industry to develop the argument. We submit that the legislation should play a framework role only and that the link between workplace relations and productivity growth and increased competitiveness lies in the quality of both leadership and organisational culture and the impact these have on employee engagement and commitment. These findings are also borne out by the research reviewed in sections 7 and 8.
- 9.6 In addition, recognising that legislation should play a framework role, legislative change to enable some form of individual contacting can facilitate productivity improvement, but there needs to be appropriate minimum standards and procedural safeguards provided by law. Should this not occur legislative innovation would be fraught with controversy and would not be enduring.
- 9.7 Term of reference 6 deals with patterns of engagement in the labour market, however, our submissions have been limited to the impact of an ageing workforce for labour market participation and its impact on productivity. In view of the large actual and even larger potential impact on the labour force, we submit that NES 2 should be revisited to included caregiving in its various forms. . Further, it is evident from the experience of the Retail and Hospitality industries that the existence of the national standard has led to a measure of innovation in the development of enterprise agreements.
- 9.8 The “ability to flexibly manage and engage with employees” is implicit in each of the issues reviewed above but we contend that our research on employee voice in the Australian workforce over a decade underscores the importance of co-operative relations between employees and employers and in particular the utility of hybrid voice systems For management this requires significant and ongoing investment in human

capital and communication and the development of a dialogue and working relationship with unions where they exist. Legislating for mechanisms to institutionalise employee voice is desirable but this can only follow a community-wide debate such as we have proposed could be initiated by the Productivity Commission in the period following the release of its draft report.

- 9.9 The terms of reference also raise the issue of industrial conflict, however consistent with the approach we have taken in this submission, we have widened the discussion to include all forms of workplace conflict. The prevalence of workplace conflict is both costly and has significant implications for employee well-being. Much remains to be done at the workplace level in creating genuine opportunities for employees to exercise voice and this depends on the quality of management.

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Appendix A

Overview proposed approach : Review of National WR Framework

