



National  
Foundation for  
**Australian  
Women**

REAL WOMEN. VISIONARY LEADERSHIP

WORKPLACE RELATIONS  
FRAMEWORK –  
SUBMISSION TO  
THE PRODUCTIVITY  
COMMISSION

By

**The National Foundation for Australian Women Ltd**

PO Box 405 Dickson ACT 2602

**Tel** 1300 733 221

**Email** [nfaw@nfaw.org](mailto:nfaw@nfaw.org) **Web** [www.nfaw.org](http://www.nfaw.org)

**ABN** 32 008 659 630

## CONTENTS

1. Background to the submission .....	2
2. Recommendations .....	3
3. Responses to particular questions put by the Commission .....	5

## MAIN SUBMISSION

4. Objects of the Fair Work Act .....	13
5. Employee protections.....	24
6. Safety net - earnings .....	33
7. Safety net – conditions.....	42
8. Flexibility .....	50
9. Reference list .....	58
Appendix A – case studies .....	65

# 1. BACKGROUND TO THE SUBMISSION

The National Foundation for Australian Women (NFAW), a non-politically aligned feminist organisation, in conjunction with experts from a range of women's organisations, has prepared this submission to the Productivity Commission's (the Commission) inquiry into the workplace relations framework. NFAW, with other women's organisations, is committed to examining the impact of matters raised in the discussion paper on women, and in particular whether the consequences of policies, intended or unintended, may adversely impact on women. Our submission also makes recommendations about positive policy options for improving gender equity.

There is evidence of a rise in women's participation in formal economic activity over time, although the data shows there is still a long way to go.<sup>1</sup> There is also a substantial body of evidence of a growing gap in economic inequality, most recently examined in the work of Piketty (2014).

The NFAW submission emphasises the economic case for gender equality in the workplace. It focuses on women's experience of social and economic inequality through the prism of the workplace relations system, and the need for ongoing strong safeguards in the system to protect women workers; to protect the gains made in gender equality; and to ensure further equality, fairness, increased workforce participation and productivity in Australia.

NFAW notes that there are likely to be significant differences between the views of various stakeholders in the workplace relations framework and that Productivity Commission consultation to date appears to have been largely dominated by employer associations.

To ensure fairness and balance it will be crucial that the views of employees and other stakeholders, including women, are fully sought and taken into account in the further development of the Commission's report. This may require special effort, given that such groups often lack the financial and organisational support that is available to employers.

We welcome the Commission's emphasis on hard evidence, and recommend that a gender lens be used on any data that is examined, and that employers be requested to provide a gender breakdown on any data they supply. No substantive case has been made for weakening existing protections in the Fair Work Act where generalised assertions by employer associations are not reflected in surveys of actual employers, as the Commission has noted in the case of individual flexibility agreements (Issues Paper 3, p.9); where employee protections as in the case of unfair dismissal are labeled as 'costs' or 'red tape' without reliable data and without corresponding analysis of costs to employees of their removal; and where 'flexibility' is confused with managerial prerogative and sloganeered as 'family friendly'.

<sup>1</sup> "During the last two decades the overall labour force participation rate has increased slowly, rising from 62.6% in 1988-89 to 65.4% in 2008-09. This long-term rise in the labour force participation rate has been driven by an increase in the female participation rate. The female participation rate increased from 50.4% in 1988-89 to 58.7% in 2008-09. In contrast, the male participation rate decreased from 75.2% to 72.3% over the same period" Australian Bureau of Statistics. (2010). *Year Book Australia, 2009-10*. Cat. No. 1301.0. Canberra: Australian Bureau of Statistics. Retrieved from <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/376122D4FE856D5FCA25773700169C69?opendocument>>.

## 2. RECOMMENDATIONS

NFAW has made a number of **recommendations** to address the questions raised in the issues papers circulated by the Commission. These recommendations are listed below in the order in which they appear in the body of the submission, together with references to the relevant pages. Summary versions of all of our responses to the Commission's particular questions are in **Section 3**.

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

1. The current principal object of the Act should be amended to include a gender equality object.
2. The objects of the FW Act should not be undermined by limiting or reducing the current range of existing minimum standards and protections embedded in the FW Act, including those affecting the operation of the safety net and bargaining.

### Employee protections (Section 5)

3. While there is already provision for an employee experiencing violence from a member of the employee's family in relation to requests for flexible working arrangements under s.65(1A)(e) of the FW Act, specific corresponding and complementary amendments are required to provisions establishing awards, agreements, IFAs and general protections. In the latter case, Sections 351(1) and 772 (1)(f) of the FW Act should be amended so that discrimination on the ground of domestic violence is a ground for an adverse action and unlawful termination application to Fair Work Australia.
4. The definition of a 'workplace right' in Chapter 3 should be amended to include the right to refuse directions that mean a worker will commit an unlawful act.

### Safety net – earnings (Section 6)

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

### Safety net – conditions (Section 7)

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

8. The NES should be made more inclusive by extending the opportunity of paid annual leave to casual employees on a pro-rata basis and providing a separate allocation of carers' leave to all employees.
9. The right to be offered the opportunity to convert from casual to permanent employment after six months' regular and systematic casual employment should be included in the FW Act to bring consistency between male and female dominated sectors in the economy.
10. Firm working time minima should be required to be included in all modern awards including a minimum engagement of three hours for casual workers; and written agreement required to a regular pattern of hours. Adequate notice of changes to hours should be required to be provided to part-time workers.
11. The 'better off overall test' (BOOT) should apply to individual flexibility agreements (IFAs) in the same way it does to enterprise agreements.
12. We also recommend that the FWC be required to test a representative sample of IFAs to determine whether employees are better off overall.

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

13. An extensive and well-resourced education campaign should be directed at employees and employers to extend community awareness of the FW Act provisions and, more generally, the importance of flexible working arrangements for employees and employers.
14. The definition of carers should be expanded to cover all carers.
15. The Fair Work Commission should be empowered to deal with any appeals where requests for flexible working arrangements are refused or due process is not followed.
16. More research should be undertaken to determine whether employees are being exploited in the process of seeking or implementing informal requests for flexibility.

### 3. RESPONSES TO PARTICULAR QUESTIONS PUT BY THE COMMISSION

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

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

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

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

- The principal object of the FW Act—to promote social inclusion and national economic prosperity—appropriately recognises that Australian workplace relations are conducted within an economic, social and political system whose causes and effects have complex interactions. Achieving this object will depend on ensuring a mutually re-enforcing relation between social and economic goals and on the existence of effective minimum standards and employee protections.
- The principal object of increased social inclusion and national economic prosperity in section 3 of the FW Act, the equity provisions of section 3, and the equity provisions of the FW Act more generally, are part of a common schema that determines decision-making under the legislation. They are intrinsic to the effective operation of the system overall and are add-ons or red tape, as is sometimes suggested in the issues papers.

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

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

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

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

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

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

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

- The provisions of Chapter 3 are coherent and deal with denial of rights. In some cases they address the right to be free from discrimination; in some cases they address other workplace rights; and in some cases they address a denial of workplace rights which may or may not also be discriminatory (the example at s.154(1) is the denial of rights associated with making or dissolving individual flexibility agreements (IFAs), which are often strongly associated with issues affecting workers with family responsibilities). The drafters of the legislation could not be expected to divide rights into different types. In a workplace relations framework, employee protections may or may not have the effect of preventing indirect and systemic discrimination, depending on different circumstances. For example, the low paid bargaining provisions in Division 9 of Part 2-4 of the Act may or may not help to rectify equal remuneration issues associated with the occupational and industrial segregation of women.

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

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

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

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

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

- It is not in our view possible to quarantine the effects of the protections in Chapter 3 from the protections embedded elsewhere in the FW Act. In terms of the general protections, we have argued in section 6 that without these protections women’s earnings would fall significantly and the macroeconomic women’s workforce participation goals of the G20 (25 per cent by 2025) would not be reached.

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

- Our **recommendations** are detailed in Section 3. Relevant case studies have been included in subsection 5.2 and at Appendix A.

In Issues Paper 4 (p. 6) the Commission asked whether **the general protections within the FW Act, and particularly the ‘adverse action’ provisions, provide certainty and clarity to all parties**. We argue in subsection 5.2 that:

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



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

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

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

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

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

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

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

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

- NFAW does not agree with any change to the FW Act that would allow for minimum wages and penalty rates to vary by state or territory, or indeed by any other variable including business size. This would serve to undermine the principle of a universal safety net. The Workplace Gender Equality Agency (WGEA) has noted the variations in the gender pay gap between states and territories and Daly (2014) has noted that employees in rural or regional locations were generally more likely to receive and rely on penalty rates.

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

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

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

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

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

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

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

- We did not find any evidence to suggest that the NES impose a cost on employers that might exceed the marginal benefits of hiring employees, with adverse implications for employment. If employers believe that is the case they should produce the evidence, with specific reference to any disproportionate and negative impact for women.

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

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

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

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

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

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

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

- If more is not done to support flexible working arrangements for workers and women in particular, and at key stages in their working lives, then there is little hope that the Government's 25 by 25 target on women's workforce participation will be met. We have made a number of specific recommendations that identify features of the NES that should be improved. With respect to the right to request flexibility, in particular, the data indicates a level of ignorance about entitlements and anxiety amongst employees about even asking for flexible working arrangements which surely was not the intent of the legislation, given the principal object s.3 (d) of the FW Act.

## MAIN SUBMISSION

## 4. OBJECTS OF THE FAIR WORK ACT

The principal object of the FW Act – to promote social inclusion and national economic prosperity – appropriately recognises that Australian workplace relations are conducted within an economic, social and political system whose causes and effects have complex interactions. Achieving this object will depend on ensuring a mutually re-enforcing relationship between social and economic goals, and on the existence of effective minimum standards and employee protections.

### 4.1

#### The principal object

---

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

At the highest level, the workplace relations system currently has a single objective, which is set out in the principal object of the FW Act in s.3, namely "... to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" by taking into account a range of specified considerations. The idea that the aim of the industrial relations framework is to provide a framework for balancing employer and employee interests is, and has always been, at the heart of the system. As Higgins pointed out during proceedings in the 1907 Harvester case, if the only object of the industrial relations system was to replicate wages set at market clearing rates, there would be no need for a system at all:

"...the whole idea of the Act is interference with what is called free contract between an individual employer and employee. The whole thing is upon that basis. Of course, if the legislature had meant to leave it to the individual employee to make the best bargain he could with the employer, they would not have needed to have this provision about fair and reasonable wages" (Ex parte H.V. McKay (1907) p.258).

According to Higgins, the goal of the system was not workforce participation alone, but participation on the basis of meaningful minimum standards. 'Fair and reasonable' wages meant wages that met "the normal needs of an average employee, regarded as a human being in a civilised community" (p.1).

What is new to the FW Act is not the concept of fairness but the expression ‘social inclusion’. This has been defined in research conducted for Fair Work Australia “as the process or means by which individuals and groups are provided with the resources, rights, goods and services, capabilities and opportunities to engage in cultural, economic, political and social aspects of life” (Nelms and Tsingas, 2010, p. 4). While the expression is relatively new, the concept underpinning ‘social inclusion’ retains Higgins’ notion that workforce participation is not of itself a good unless it is underpinned by the minimum standards that characterise a ‘civilised community’.

However, ‘social inclusion’ also extends Higgins notion of minima to take in the added concept of access to opportunities to participate fully in society. Nelms and Tsingas (2010, p. 4) found that:

“Paid work is considered to promote social inclusion by increasing people’s resources (such as income, access to goods and services and human capital), developing their social networks and support, and improving their mental and/or physical health. *On the other hand, some aspects of some work (e.g. underemployment, low pay, and long working hours, lack of access to training and career paths) may hamper a person’s opportunities to fully participate in society, as they may provide a worker with an inadequate income, interfere with their capacity to build and maintain human capital and social connections, or affect their health*”[our emphasis].

Social inclusion, then, means workforce participation, but it also builds in the concept of minimum standards—of pay and conditions, and of opportunities.

In the same way, the expression ‘national economic prosperity’ takes in both workforce participation and minimum standards of pay, conditions, and access to opportunities. This is because without an effective safety net, increased labour market participation would not of itself translate into increased national economic prosperity. The Commission will be aware of the considerable and growing body of international literature addressing rising income inequality, the principal cause of which is earnings inequality. It will therefore also be aware of the ways in which inadequate minimum standards undermine ‘national economic prosperity’, including its impact on effective labour allocation, intellectual capital formation, trust-linked innovation and trust-based political and social stability.

In *Divided We Stand*, the OECD (2011, p. 40) argues that:

“...rising income inequality creates economic, social and political challenges. It can stifle upward social mobility, making it harder for talented and hard-working people to get the rewards they deserve. Intergenerational earnings mobility is low in countries with high inequality such as Italy, the United Kingdom, and the United States, and much higher in the Nordic countries, where income is distributed more evenly (OECD, 2008). The resulting inequality of opportunity will inevitably impact economic performance as a whole, even if the relationship is not straightforward. Inequality also raises political challenges because it breeds social resentment and generates political instability. It can also fuel populist, protectionist, and anti-globalisation sentiments”.

In *Inequality Matters*, the Department of Economic and Social Affairs of the United Nations Secretariat (2013, p. 64) reported that:

“High levels of inequality can be a serious impediment to future economic growth and a potential cause of underdevelopment (Berg, Ostry, and Zettelmeyer, 2012; Easterly 2002; Bruno, Ravallion and Squire, 1996; Alesina and Rodrik, 1994). Berg and Ostry (2011) examined the relationship between income inequality and economic growth across 174 countries, to reveal that income inequality was a strong determinant of the quality of growth, even when market structure and other institutional factors were taken into account. Countries with low levels of inequality tend to sustain high rates of growth for longer durations, while growth spurts tend to fade more quickly in more unequal countries. Similarly, growth in more unequal countries can be much slower than that in countries with low initial levels of inequality (Bénabou, 1996).

“In addition to inhibiting economic growth over time, inequality can also generate greater market volatility and instability. . . . While the relationship is not clear-cut, there are persuasive arguments that it was the combination of growing inequality, wage stagnation and financial deregulation that fuelled the global financial crisis of 2008-2009 (Foster and Magdoff, 2009; Galbraith, 2012; Stiglitz, 2012; Stockhammer, 2012; Rohit, 2013)”.

Ostry, Berg, and Tsangarides, in a review of the relevant data and literature for the IMF (2014, p. 4), have found a “tentative consensus in the literature that inequality can undermine progress in health and education, cause investment-reducing political and economic instability, and undercut the social consensus required to adjust in the face of shocks, and thus that it tends to reduce the pace and durability of growth”. Although the staff study does not reflect the IMF's official position, it is another sign of a shift in its thinking about income disparity.

### **The costs of discrimination**

The Commission will also be aware of Australian research into the macroeconomic inefficiencies arising from sex discrimination, including gender pay differentials, bargaining inequality and unilateral flexibility. Work undertaken for the Productivity Commission by Cai (2010) showed that women’s participation in the labour force is relatively elastic and sensitive to all of these interacting factors. A 2009 study conducted by Cassells, Vidyattama, Miranti, and McNamara for NATSEM (2009, p. 25) found that the effect of being female (including both direct discrimination and unobserved characteristics) was then costing the economy over \$55 billion per year in GDP. Cassells et al also found (p. 27-8) that “much of this effect on economic growth is brought about through the channel of hours of work, with a narrowing of the gender wage gap leading to significantly more hours of work, and thus to greater economic growth”. They estimated that the then 17 per cent pay gap between men and women workers alone cost the Australian economy \$93 billion each year, or 8.5 per cent of GDP. Since that time, the gap has increased to 18.8 per cent.

The costs identified by Cassells et al would rise if minimum standards and employee protections, including anti-discrimination provisions, were weakened or removed. Studies of the operation of WorkChoices offer a good operational example of how this can occur.



## The costs of weakening minimum standards and employee protections: the example of WorkChoices

Responding to employer association claims about compliance costs associated with unfair dismissal provisions, and without considering employee costs associated with losing unfair dismissal protection, WorkChoices weakened a range of unfair dismissal provisions, removing coverage altogether for employees in workplaces with less than 100 employees. In 2007, state governments and women's organisations including NFAW commissioned academic research into the overall effect of the removal of unfair dismissal protection on employment outcomes for women in low paid jobs in terms of their economic and financial security, working time, voice at work and employment security. Following 121 in-depth interviews, Elton et al. (2007, pp. 9-10) found that the loss of unfair dismissal protections:

“...[the loss] casts a long shadow across the parts of the labour market in which minimum wage workers are concentrated. This is having significant effects on [women's] pay, their voice at work, their willingness to speak up for themselves or colleagues, their capacity to act collectively or to involve unions, and their access to timely and clear information about rights and obligations.

“One of the most consistent findings in these interviews revolves around the issue of insecurity at work. Many interviewees had effectively lost their job, with direct connections to WorkChoices. In other cases, changes in the form of employment or changes in hours have been imposed (e.g. involuntary conversion to ‘independent contractor’ status, or to casual status or unilateral shifts to ‘permanent part-time’ on terms that were effectively casual but without a casual loading).

“Greater insecurity at work, flowing from changes in the operation of unfair dismissal is having a significant impact on women in many workplaces, based on these accounts. The sacking or unilateral imposition of a change in the form or hours of employment affects more than the individual and their family. They set out a lesson to those who remain.... Women describe being more fearful, less able to speak up and with a weaker capacity to contest illegal or unfair conditions or practices”.

The loss of protections associated with unfair dismissal was also directly and indirectly associated with a loss of earnings in female dominated industries and occupations, since Australian workplace agreements (AWAs) could be offered as a condition of employment or, in the absence of unfair dismissal protections, on a ‘take it or leave’ basis. A 2007 study (Peetz & Price, 2007, pp. 57-8) found that in the hospitality and retail sectors between 80 and 90 per cent of AWAs reduced or removed penalty rates, overtime rates, shift allowances and other protected award conditions.

A second academic study (Evesson, Buchanan, Bamberly, Frino & Oliver, 2007) of the same industries looked at how earnings had changed for those in female-dominated occupations of sales assistants and food and beverage attendants as a result of WorkChoices collective agreements. The study found, firstly, that despite employer concerns about pattern bargaining and despite the call for flexible, tailored agreements, six templates had been used to make nearly half (49 per cent) of all the agreements in the study. The study found that while 90 per cent of union agreements preserved nearly all protected award matters, 50 per cent of non-union agreements abolished five or more.

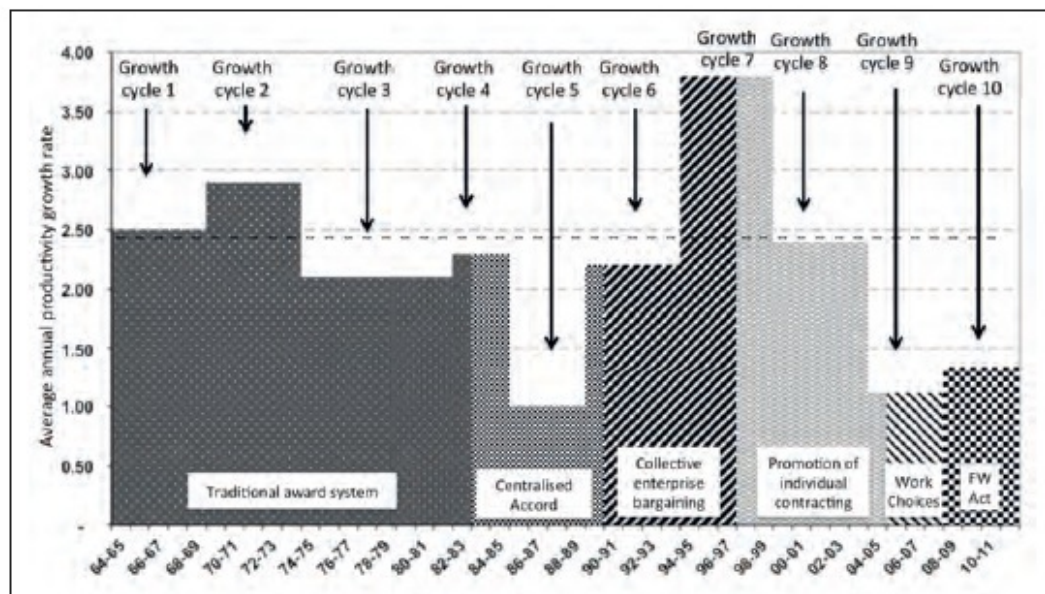
The potential range of earnings losses resulting from all of these agreements was estimated by modelling the impact of 10 rosters commonly used in each industry. This analysis revealed:

- a) Retail: on average the losses were between 2 and 18 per cent. The potential average gains were never more than 0.5 per cent.
  - Casual part time sales assistants working a 12 hour week in retail lost on average 12 per cent of their earnings.
  - Permanent part time workers on the same hours lost 18 per cent.
- b) Hospitality: the losses were between 6 and 12 per cent. The only gains were in union agreements and at most these were just over 3 per cent.
  - Permanent part time waiting and bar staff in the hospitality industry working a 21 hour week of split shifts lost 12 per cent on average.

The most affected employees were those working part time, on a casual basis, on weekends and after usual standard hours.

WorkChoices was amended in 2007 and its replacement was foreshadowed by the incoming Government in 2007, so it is difficult to isolate its impact on women's workforce participation and hours of work, especially as the lowered minima were accompanied by increased penalties in the welfare system for leaving work or refusing to accept a job offer contingent on signing an AWA. However, we do know that labour productivity fell, as the graph below from Peetz (2012, p. 276) indicates; the gender pay gap widened; and average working hours fell for both men and women in both full-time and part-time work in the financial year following the introduction of WorkChoices (Australian Bureau of Statistics, 2012).

**Figure 1: Labour Productivity Growth over Productivity Cycles, 12 Market-sector Industries, 1964–65 to 2010–11**



Source: ABS cat. 5204.0; 5206.0, various years

## The benefits of effective minimum standards and employee protections

There is considerable evidence that the presence of fair and effective minimum standards and access to opportunity in the workplace would significantly increase both social inclusion and national economic prosperity.

We know that, in Australia, the impact of the growing dispersion of hourly wages on the distribution of labour income has only been offset by increased paid employment undertaken by household members and relatively strong growth in part-time employment. Women, that is, are operating as family safety nets as employers retain an increasing proportion of productivity as profits.

We also know that increasing women's workforce participation would have a substantial positive impact on the Australian economy. The Commission is aware of the relevant studies and has cited them (Productivity Commission, 2014, vol. 1, p. 184):

“Some studies have estimated the gross value to the economy from improving the workforce participation of women — that is, not including factors such as the value of unpaid activities (such as childcare) undertaken by women prior to entering the workforce. PriceWaterhouseCoopers (sub. DR648, 2014, pp. 4, 19, 29) estimated that the employment of an extra 0.3 per cent of the female partnered working age population would increase gross domestic product (GDP) in net present value terms by \$3.7 billion. The Grattan Institute (sub. 445, p. 4) estimated that GDP would be \$25 billion higher in a decade if Australian women did as much paid work as women in Canada — implying an extra 6 per cent of women in the workforce. The Organisation of Economic Co-operation and Development (OECD 2012a) estimated that increasing the workforce participation of women (so as to reduce the gap with men by 75 per cent) could increase Australia's projected average annual growth in GDP per capita between 2011 and 2030 from 2.0 per cent to 2.4 per cent”.

G20 Labour and Employment Ministers accordingly committed to take the steps needed to close gender gaps in opportunities and labour market outcomes, adopting the goal of reducing the gap in participation rates between men and women in G20 countries by 25 per cent by 2025. For Australia this means lifting women's participation rate (including numbers of hours worked overall) by at least three percentage points.

This submission focuses on the safety net of wages and conditions and other protections for women under the FW Act. It should also be noted that the *Workplace Gender Equality Act 2012*, administered by the Workplace Gender Equality Agency, has a very considerable role in that aspect of social inclusion which bears on access to opportunities to participate fully in the workplace.

The principal object of increased social inclusion and national economic prosperity in section 3 of the FW Act, the equity provisions of section 3, the equity provisions of the other objects and the remaining equity provisions of the FW Act including those referring to the prevention of discrimination are part of a common schema that determines decision-making under the legislation.

## 4.2

### The other objects

---

As the Commission has noted, there exist a range of structural and cultural barriers in the workplace that affect the G20 target. These limit women's abilities to stay in paid employment and progress at the same rate as men. The Commission has identified the barriers to women's workforce participation as including limitations in workplace flexibility, the persistent gender gap (now risen to 18.8 per cent nationally), cultural norms that prescribe 'suitable occupations' for women and men, and constraints on the support available for pregnant women and new parents (Productivity Commission, 2014, vol. 1, p. 201). The barriers to women's workforce participation are also barriers to increased social inclusion and national economic prosperity. The FW Act cannot eliminate these barriers; but both the broad schema of the FW Act and the decision-making functions of the FWC have been devised to ensure that the workplace relations system does not exacerbate them.

Minimum standards and employee protections spelled out in s.3(a)-(f) of the FW Act are reiterated throughout the legislation in objects provisions dealing with:

- modern awards (s.134)
- variation of modern awards (s.157)
- enterprise agreements (s.171)
- low paid bargaining (s.241)
- minimum wage-setting (s.284)
- transfer of business (s.309)
- workplace rights and responsibilities (s.336)
- unfair dismissal (s.381)
- protected action (s.436)
- right of entry (s.480)
- national employment standards (unpaid parental leave) (s.743), and
- outworkers (s.789AC).

It would, further, be a mistake to consider employee protections as simply confined to these objects provisions or to iterations of the word 'fairness' or the articulation of the need for a balance to be struck between competing employer and employee interests in each of these areas.

Almost everywhere the FWC is required to reach a view, there is a specification of minimum standards and/or employee protections that must be taken into account together with employer interests in maximising profits. For example, the use of the word ‘relevant’ in defining the safety net is intended to call for a balance between keeping minima low enough to encourage bargaining, on one hand, and on the other ensuring that employees are not forced to bargain away basic conditions as wages fall further and further behind inflation.

As s.578 of the Act confirms, the equity provisions of the Act are intended to guide the decision-making of the FWC in tandem with anti-discrimination principles:

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The principal object of increased social inclusion and national economic prosperity in section 3 of the FW Act, the equity provisions of section 3, the equity provisions of the other objects and the remaining equity provisions of the FW Act including those referring to the prevention of discrimination are part of a common schema that determines decision-making under the legislation.

It is important to be clear that the within this schema, decision-making with regard to minimum standards and employee protections includes anti-discriminatory intent. Because of systemic factors such as the occupational and industrial segregation of women, including their predominance in part-time and casual work, avoidance of sex-based discrimination cannot be effective if the relevant protections are assumed to be outside the workplace relations system itself.

The Commission has referred in Issues Paper 4 (p. 1) to “the avoidance of racial and sexual discrimination” as “key protections for people in workplaces, though these are often outside the workplace relations system itself”. To the extent that such protections are outside the system, they are not key but peripheral. They rely on individual complaints and produce remedies that are individual. The likely outcome is conciliation and conciliated outcomes are often confidential between the employer and the individual involved. Conciliated outcomes are not easily enforceable. For example, if the conciliated agreement includes training or other work-based changes affecting the individual such as reinstatement or promotion and the employer does not comply, then the complainant has to go to court. Access to courts is costly, and while courts can order payment of damages to individual complainants, they cannot cause awards or agreements to be amended.

As Charlesworth (2010) has argued, where the cause lies in the workplace relations system, an effective remedy cannot lie outside it:

“...a major constraint on the influence of the *Sex Discrimination Act 1984* on the conditions of women’s employment has been its effective separation from industrial relations law. This has made it difficult to conceive of sex discrimination as a mainstream employment issue and means that the gender equality impact of industrial relations regulation—reflected in classification structures, bargaining provisions and working-time arrangements—remains invisible. In Australia, there is some overlap between anti-discrimination and industrial relations provisions, and the (largely unsuccessful) pursuit of equal remuneration has occurred within the industrial relations jurisdiction. A practical and symbolic divide between two very different regulatory domains remains”.

Minimum standards and employee protections underpin the broad schema of the FW Act and the decision-making functions of the FWC. Once it is clearly understood that their operation is often anti-discriminatory, it will become possible to ‘conceive of discrimination as a mainstream issue’ so that the gender equality impact of industrial relations regulation— reflected in classification structures, bargaining provisions and working-time arrangements—becomes visible.

### **Recommendation 1**

There is a need for the inclusion of new provisions in the FW Act to ensure that the critical role of equity in the operation of the Act is better recognised and respected in practice. For this reason NFAW recommends that s.3 of the FW Act be amended to include a gender equality object.

The minimum standards and employee protections embedded in the FW Act are intrinsic to the effective operation of the system overall, and are not add-ons or red tape as is sometimes suggested in the issues papers.

### 4.3

#### Equity is not red tape

---

The principal object of increased social inclusion and national economic prosperity in section 3 of the FW Act, the equity provisions of section 3, the equity provisions of the other objects and the remaining equity provisions of the FW Act including those referring to the prevention of discrimination are part of a common schema that determines decision-making under the legislation. The minimum standards and employee protections embedded in the FW Act are intrinsic to the effective operation of the system overall and not add-ons or red tape as is sometimes suggested in the issues papers.

In Issues Paper 1 (p. 7), the Commission notes that the FW Act “cites objectives that are diverse and — as is often the case with such diversity — potentially in conflict” as if the conflict were being introduced to the system by the legislation and not by the range of factors that influence way the labour market works.

Conflicting forces would not leave the system just because they were ignored by workplace relations legislation. On 16 October 2005, for example, the then Government advertised in the *Daily Mail* the view (still being brought to the Commission by employer associations) that red tape was responsible for interfering in the relationship between employers and employees:

“There are too many rules and regulations making it hard for many employees and employers to get together and reach agreement in their workplaces. We also have too much red tape, too much complexity and too much confusion in some parts of the current system. It’s bad for business. It costs jobs and it’s holding Australia back” (Luck, Bailey & Townsend, 2009, Figure 1, p.15).

WorkChoices was intended to address this complexity and simplify employer–employee interactions. In practice, however, enabling employers and employees to get together and reach agreement meant not only removing the old regulatory system but creating a new one.

Unleashing the power of individuals meant leashing collective power. So it became necessary for WorkChoices to limit the scope for collective industrial action. As a consequence it became necessary for WorkChoices to limit unions’ capacity to enter workplaces and organise. As a consequence of that it became necessary to amend occupational health and safety regulations to close the back door to union right of entry. As a consequence of all of this it became necessary for WorkChoices to specify in detail what employers and employees were or were not allowed to ‘get together and reach agreement in their workplaces’ about.



When the music stopped, WorkChoices was over 2600 pages long and there was still complexity and confusion in some parts of the system, only now they were different parts. According to one analyst at the time, the changes, “paradoxically made in the name of deregulation of the labour market, have significantly increased both the quantity and complexity of the federal legislation that governs employment conditions and industrial relations” (Stewart, 2005).

As s.578 makes clear, the objects provisions guide the FWC ‘in performing or exercising powers, in relation to a matter, under a part of this Act’. It is, then, the function of the FWC, and not the objects, to find a balance that will serve the interests of employers and employees in increasing social inclusion and national economic prosperity. The objects provide guidance to the FWC by setting out considerations that it must take into account. To eliminate the FWC’s ability to take certain matters into account may speed up decision-making, as the Issues Paper suggests, but it will not improve the decisions that are made.

## **Recommendation 2**

We believe that, generally speaking, the objects of the FW Act should not be undermined by limiting or reducing the current range of existing minimum standards and protections embedded in the FW Act, including those affecting the operation of the safety net and bargaining. We will, however, be recommending the inclusion of a limited number of additional protections in sections 5, 6, and 7.



## 5. EMPLOYEE PROTECTIONS

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

### 5.1

#### Coherence of the Chapter 3 employee protection provisions

---

Chapter 3 (sections 334-536) of the FW Act deals with general protections for employers and employees in relation to discriminatory or wrongful treatment, unfair dismissals, the regulation of industrial action and right of entry to an employer's work premises. The logic or coherence of the Chapter 3 provisions as they apply to employees is as follows:

All employees have protected rights at work. These protected rights include:

- workplace rights
- taking or not taking part in industrial activities or belonging or not belonging to an industrial association, and
- being free from discrimination.

Employees cannot be treated differently or worse because they have exercised a right. Employees are protected from:

- adverse action
- coercion
- undue influence or pressure, and
- misrepresentation.

In our view the provisions of Chapter 3 are coherent and deal with denial of rights. In some cases they address the right to be free from discrimination; in some cases they address other workplace rights; and in some cases they address a denial of workplace rights which may or may not also be discriminatory (the example at s.154(1) is the denial of rights associated with making or dissolving IFAs, which are often strongly associated with issues affecting workers with family responsibilities). The drafters of the legislation could not be expected to divide rights into different types. In a workplace relations framework, employee protections may or may not have the effect of preventing indirect and systemic discrimination, depending on different circumstances. For example, the low paid bargaining provisions in Division 9 of Part 2-4 of the Act may or may not help to rectify equal remuneration issues associated with the occupational and industrial segregation of women.

## 5.2

### **Coherence of the Chapter 3 employee protection provisions in relation to other key segments and protections within the FW Act**

---

In 5.1 above, we argued that employee protections including minimum standards were part of the broad schema of the FW Act. This is because in the workplace relations system the loss of protections at one point can produce wages or conditions outcomes at another that affect a whole class of employees. We cited above the example under WorkChoices where unfair dismissal changes were associated with adverse wages outcomes in female-dominated industries characterised by low levels of unionisation. Another example is the link between provisions for multi-employer agreements in industries with historically low levels of bargaining and the equal remuneration provisions of the FW Act.

There are employee protections in the bargaining provisions of the FW Act, in the modern award objective and the provisions for setting and adjusting the safety net of wages and conditions. The protections in Chapter 3 are coherent with these in their operation and intent, and indeed protect rights which are specified elsewhere in the FW Act, as in the example of IFAs specified in s.154(1).

The employee protections of the FW Act are integral to its operation; they are not quarantined to particular sections of the FW Act; and they are not some sort of anomalous add-on that can be removed, for example, to some other piece of legislation outside the workplace relations system.

The Commission has asked about the economic impacts of the general protections within the FW Act, and particularly the ‘adverse action’ provisions. For the reasons given above, it is not in our view possible to quarantine the effects of the protections in Chapter 3 from the protections embedded elsewhere in the FW Act. In terms of the general protections, we have argued in section 6 that without these protections women’s earnings would fall significantly; the macroeconomic workforce participation goals of the G20 would not be reached; and it would be reasonable to expect the falls in productivity that characterised WorkChoices.

The Commission has also asked whether the general protections within the FW Act, and particularly the ‘adverse action’ provisions, afford adequate protections. We refer to the submission to the Fair Work Act Review Panel from the Australian Law Reform Commission (ALRC) (which draws heavily on the experience and findings in ALRC’s Inquiry into Commonwealth laws and family violence) and the submission from the National Working Women’s Centres.

These organisations have expertise and experience in the practical impacts of domestic violence on workplace relations. The ALRC (2012) submitted that:

“Employees experiencing family violence may be ‘subject to direct and indirect adverse treatment in the workplace, as a result of their experience’ of family violence. Stakeholders, such as the [Australian Human Rights Commission] submitted that ‘most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated’”.

However, employees experiencing family violence may face difficulties in relying on the protected attributes articulated in s.351(1) of the FW Act, which prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons.

These difficulties have been illustrated in case studies submitted by the National Network of Working Women’s Centres (NWCC) (2012, pp. 26-30), which are set out below and at Appendix A.

#### **Case study – Lucille**

WWC SA was contacted by Lucille's father who was referred by a SafeWork SA Inspector. He encouraged Lucille to phone us. Lucille's husband had found a text message from a co-worker, which said 'I'm sitting at your desk.' This co-worker was from interstate and had been flown in for the day. He sent the text to Lucille as a courtesy. She worked part time and wasn't at work that day. The husband flipped when he saw the text message, rang the workplace and told them, 'The last person who had a crush on my wife spent 6 months in hospital.' Lucille then fled, taking the children with her. Her husband and 2 of his mates then spent the day outside the workplace in the city and watched everyone who left to see if they could identify the person who may have sent the text. The interstate worker had already been flown back to his home due to the threat. This all happened on a day when Lucille did not work anyway. When she got back to work the employer summoned Lucille to his office. Lucille let him know that she had left her husband. The employer said, 'I can't believe you have the audacity to think you can have your job back.' The husband had told her to 'pack her shit and get out' which she had done. Lucille felt she was not at risk but would be once her husband learnt that this was final. She made it quite clear to the employer that she had no intention of resigning, that she was the victim and not responsible for her husband's behaviour, that she loved her job, that she'd left him, that she had 2 children to support and now had no home and that there had never been any performance issues in the past.

#### **Case study – Mary**

Mary had worked for 2 months and in that time had been promoted to manager. Her husband had come in to the workplace one day and caused problems. After another incident at home she rang her boss to say she would be in a bit late as she was at the police station reporting a domestic violence incident and had been delayed. He sacked her as he said she was just too difficult.

NFAW recognises that there is already provision for an employee experiencing violence from a member of the employee's family in relation to requests for flexible working arrangements under s.65(1A)(e) of the FW Act; however, specific corresponding and complementary amendments are required to provisions establishing awards, agreements, IFAs and general protections. In the latter case, sections 351(1) and 772 (1)(f) of the FW Act should be amended so that discrimination on the ground of domestic violence is a ground for an adverse action and unlawful termination application to Fair Work Australia.

The NWCC also raised the needs for clarifying the definition of a 'workplace right' to include the right to refuse directions that mean a worker will commit an unlawful act. Relevant case studies submitted by the NWCC (2012, pp. 13-14) are set out below.

### **Case studies**

Marlene worked as a carer in a residential care facility. There had been a leak in one of the resident's rooms causing a fair bit of water damage. Some of the resident's belongings had been water damaged and were starting to smell and go mouldy. The Director of the facility told Marlene to throw out anything that was soiled and mouldy.

It was near the end of Marlene's shift. She didn't feel ok about just throwing out the resident's belongings without checking with her first. She bagged up the soiled belongings and went to speak to the resident who was very upset about her things being thrown away. Marlene left the bag of soiled items and went to speak to the Director, who was at a meeting and not due back at the facility for another hour. Marlene let the Director's secretary know (also the Director's daughter) what she had done and that the resident didn't want her things thrown out. Two days later Marlene received a dismissal notice saying that she had refused to follow directions. This will be lodged as an adverse action complaint as Marlene had only been working there for 3 months.

In a similar case some time ago an office worker, Claire, had been directed to change records of services and incorrectly invoice clients for more than they owed as the business was experiencing a cash-flow problem. She refused as she felt it was unethical and her employment was terminated. When the matter went to conciliation it was deemed that the employer was justified in terminating the worker, as she had not followed directions, albeit that the directions meant that the worker was being asked to do something that she felt was illegal.

In another matter just conciliated, Liz, a worker in a small deli had been ordered by her employer to serve food that was 'old'. Our client, the worker, felt that this would contravene health standards for food handling and raised this with her boss. He however insisted that she serve the food to customers. That night she could not sleep as she was worried that customers may get ill from eating the food. Our client had only worked casually for 5 days. Her employment was terminated for not following the employer's direction. At conciliation there was a debate about whether our client had asserted a 'workplace right' as it is defined in the Act. It does not seem clear anywhere in the Act that being directed to do something illegal or unethical is covered or clearly explained.

### **Recommendation 3**

While there is already provision for an employee experiencing violence from a member of the employee's family in relation to requests for flexible working arrangements under s.65(1A)(e) of the FW Act, specific corresponding and complementary amendments are required to provisions establishing awards, agreements, IFAs and general protections. In the latter case, sections 351(1) and 772 (1)(f) of the FW Act should be amended so that discrimination on the ground of domestic violence is a ground for an adverse action and unlawful termination application to Fair Work Australia.

### **Recommendation 4**

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

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

### 5.3

#### **The consistency of the Chapter 3 employee protection provisions with other anti-discrimination regulations that currently apply in Australia**

---

In Issues Paper 4 (p. 7) the Commission pointed to federal human rights and anti-discrimination laws, as well as to various equal opportunity and anti-discrimination acts at the state and territory level, as venues where people in workplaces can also seek protection. It has raised the question of whether there are any tensions between Chapter 3 protections and these other anti-discrimination frameworks.

We have argued in section 4.2 above, that where discrimination lies in the workplace relations system, an effective remedy cannot lie outside it. With the exception of the Workplace Gender Equality Act, which is pro-active and systemic, it is fair to say that existing human rights and anti-discrimination legislation is complaints-based, individualised<sup>2</sup>, and retrospective. Only the FWC can reopen and vary an award, regardless of how discriminatory its operation has been found to be. Only the FWC can refuse to make an award or approve an agreement that is perceived to be discriminatory. Only the FWC make an equal remuneration order that is prospective and applies to a class of people. The Sex Discrimination Commissioner (SDC) can bring issues to the attention of the FWC and can appear before that body, but cannot provide an effective remedy in cases of indirect and systemic discrimination in the workplace relations system.

Like the SDC the Fair Work Ombudsman (FWO) receives complaints, but recognising the distinction between individualised and systemic matters, refers appropriate individual complaints to the relevant anti-discrimination body, and in its own words “places particular emphasis on addressing indirect, systemic and more insidious forms of unlawful discrimination” (2012, p. 14) in the workplace relations system, defining systemic discrimination as:

“...patterns or practices of discrimination that are the result of interrelated policies, practices and attitudes that are entrenched in organisations or in broader society. These patterns and practices create or perpetuate disadvantage for certain groups” (2012, pp. 14-15).

---

<sup>2</sup> “HREOC acknowledges that there are already provisions to enable the lodging and commencing of representative complaints and court proceedings. However, the rules are technical and complex, compounded by the fact that the requirements at the HREOC and Federal Court stages are not consistent.[466] The provisions also require that court proceedings be commenced by one or more persons aggrieved by the relevant conduct, which raises the same difficulties encountered in Access for All.[467] Furthermore, the Federal Magistrates Court does not permit representative proceedings, which limits such proceedings to the more expensive Federal Court jurisdiction. Indeed, to date very few representative proceedings have been commenced under any of the Federal discrimination Acts.[468]

“Further, The courts lack power to order systemic corrective orders—such as a change in policy, the introduction of a compliance program that might prevent further discrimination, or an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant—or to set reform standards. In this way, the laws are more focussed on redressing, not preventing harm or promoting equality. Having settled a complaint of discrimination, an employer may not even see a connection between the individual complaint and other equality issues in the workplace” (HREOC, 2008).

In effect the FWO will triage complaints, and will either “assign a Fair Work Inspector to investigate the complaint or, where appropriate, refer the complaint to the relevant agency (i.e. the Fair Work Commission, the Australian Human Rights Commission or a State anti-discrimination body)” (FWO, 2012, p. 10).

Of course the issues raised by a complainant are bound to vary according to the circumstances which gave rise to them, and it will always be necessary to exercise judgement concerning the appropriate jurisdiction to hear, investigate, resolve, and if necessary provide a remedy for the complaint. Each jurisdiction operates under provisions intended to prevent duplication; each is deeply familiar with its own and the others’ roles; they are working comfortably together in the interests of both employers and employees. The FWO’s advice is characteristic:

“The FWO is concerned to ensure that employers are not put to the cost and inconvenience of having to defend matters in multiple fora. If a complaint has been made to another anti-discrimination body, the FWO will cease to deal with it while it is being addressed by the other body. If the matter is resolved within that alternative forum the FWO will not further consider the matter. However, the FWO may further consider a matter if it has not been resolved by an alternate body once that body’s processes are completed” (2012, p. 10).

NFAW does not believe any tensions exist between Chapter 3 protections and other anti-discrimination frameworks. On the contrary, in our view every effort is made to refer a complaint to the jurisdiction that is capable of addressing it most effectively whether or not the adverse action is finally found to represent direct, indirect or systemic discrimination.

## 5.4

### The implications of international labour standards for Australia's workplace relations system

---

The Commission has sought stakeholders' views on the implications of international labour standards for Australia's workplace relations system. Australia is a signatory to various international agreements relating to labour standards. Some of these deal with minimum entitlements such as International Labour Organisation (ILO) Convention No.175 on Part-time Work, and some deal with employee protections including both anti-discrimination matters and workplace rights.

A number of these conventions have been ratified by Australia on the basis of an assessment by the Commonwealth that existing Commonwealth or state/territory legislation was sufficient to implement the provisions of the convention (in other words, Australia was already meeting domestically the terms of the convention through existing legislation and no further action was necessary). That existing legislation has included, inter alia, previous iterations of the FW Act—a fact which is acknowledged in s.3(a) of the principal object, which refers to “providing workplace relations laws that . . . take into account Australia's international labour obligations”.

In the case of three ILO conventions, however, the FW Act itself is the explicit instrument of implementation. Reference is made to the relevant Conventions in sections 743, 758, 771 and 784:

- S. 743 specifies that it is the object of Division 2 of Part 6-3 of Chapter 6 (Extension of entitlement to unpaid parental leave and related provisions) to give effect to ILO Convention (No.156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers With Family Responsibilities; and the Workers with Family Responsibilities Recommendation 1981 (Recommendation No.R165);
- S. 758 specifies that it is the object of Division 3 of Part 6-3 of Chapter 6 (Extension of entitlement to notice of termination or payment in lieu of notice) to give effect to ILO Convention (No.158) concerning Termination of Employment at the Initiative of the Employer; and the Termination of Employment Recommendation 1982 (Recommendation No.R166) (notice of termination of employment by the employer);
- S.771 specifies that it is the object of Division 2 of Part 6-4 of Chapter 6 (Termination of employment) to give effect or further effect to ILO Convention (No.111) concerning Discrimination in respect of Employment and Occupation (Unlawful termination), as well as Conventions No 156 and No 158; and
- S. 784 specifies that it is the object of Division 3 of Part 6-4 of Chapter 6 (Notification and consultation requirements relating to certain terminations of employment) to give effect to both Convention No.158 and Recommendation No.R166.

In these cases, where the FW Act is the explicit instrument of implementation, the law has a broader application than would otherwise be the case.



The ‘external affairs power’ is the power provided in s.51(xxxix) of the *Commonwealth of Australia Constitution Act 1901* which enables the federal parliament to enact laws which are a faithful implementation of some international treaty or convention to which Australia is a party. Laws enacted using the external affairs power apply to every employee in Australia. This means—as the explanatory memorandum for the Fair Work Bill pointed out at paragraphs 2747 and 2770—that the provisions of the FW Act that relate to unpaid parental leave, notice of termination by the employer, and unlawful termination, apply to all employees in Australia, including employees of unincorporated employers in Western Australia.

Setting aside the body of Australian legislation which takes into account Australia’s international labour obligations, and also setting aside the economic and political implications of Australia’s compliance with the ILO Conventions it has ratified (Romeyn, 2007), the direct implications of international labour standards for the FW Act are that they extend the coverage provisions of the FW Act relating to unpaid parental leave, notice of termination by the employer, and unlawful termination to all employees in Australia, including employees of unincorporated employers in Western Australia.

## 6. SAFETY NET - EARNINGS

In Issues Paper 2 the Commission asks stakeholders to consider the role of the federal minimum wage (FMW) but does so within a limited context focussed on ‘hard’ macro-economic indicators including effects on employment, consumer prices and returns to skill acquisition. While these are indeed important, scant attention is paid to possible employment impacts on particular groups of people (Issues Paper 2, p.6), including women, or for that matter to issues of fairness and equity for low paid workers whose earnings are reliant on the FMW and minimum award wages.

Low pay generally and gender based inequality in earnings are recognised as being bad for a productive economy and discourage labour market participation. NFAW argue that such inequality runs counter to the overlapping principal objects of the FW Act of social inclusion and economic prosperity. Low pay and gender based inequality in earnings impact on individuals and their families with flow-ons to government benefits and services and the tax transfer system. Women in particular are impacted in a number of ways, not least as their ability to accumulate wealth and saving for retirement is much reduced compared to men.

This has been clearly acknowledged by the key international economic and financial organisations including the OECD, the IMF (2013), the ILO (2013a) the World Bank (Morton et al 2014) and by the G20 member countries.

“Compared to men, women are less likely to work full-time, more likely to be employed in lower-paid occupations, and less likely to progress in their careers. As a result gender pay gaps persist and women are more likely to end their lives in poverty” (OECD 2012a).

“G20 countries have much to gain from increased female labour force participation in terms of economic growth and increased welfare. But merely increasing labour force participation among women will not be enough to ensure that gender gaps in economic empowerment are eliminated. To optimize the labour productivity potential of increased female employment, women should be fully integrated in the labour force, not subjected to discriminatory gender wage gaps and not involuntarily confined to part-time employment and to the most low-paid, low productivity and vulnerable jobs” (OECD 2014).

The Australian Government, along with the other G20 economies, has committed to reducing the gap in participation rates between men and women by 25 per cent by 2025 (25 by 25 target). If this target is met, it is predicted that up to 200,000 additional women will be participating in the labour force above current employment projections.<sup>3</sup> The Prime Minister has stated that “.....if female participation in Australia were six per cent higher, at Canada’s level, GDP would be higher by \$25 billion a year”.<sup>4</sup>

---

<sup>3</sup> Senator Michaelia Cash, Senate Hansard Monday, 17 November 2014.

<sup>4</sup> Prime Minister’s National Press Club Address, February 2 2015.

More recently, the 2015 Intergenerational Report has pointed to the importance of, amongst other things, policy settings that seek to remove barriers to participation of women in Australia and encourage them to work which can drive gains in GDP and income growth (Commonwealth of Australia 2015).

“Participation rates in other countries reflect their specific circumstances, for example, the interaction of the tax and transfer systems, availability of childcare, and policies on parental leave. Nonetheless, policy settings that seek to remove barriers to participation of females and older age groups in Australia and encourage them to work, if they wish to do so, can drive gains in GDP and income growth.

These policy settings include availability of childcare, flexible working arrangements, and removal of discrimination. Policies seeking to remove barriers or support participation for other groups where this has been challenging, for example, young unemployed people and people with disability, would also be expected to generate gains in GDP and income growth” (p.21).

NFAW would argue the policy settings need to extend beyond childcare and flexible working arrangements to equitable conditions, workplace opportunities, and standards of pay. As it is, if current occupational and industrial segregation trends continue, it is likely that many of these women will continue to be reliant on the FMW, minimum award wages and penalty rates.

In 2014, women comprised over 60 per cent of the workforce in three occupations: clerical and administrative workers; community and personal service workers; and sales workers. The highest representation of women working in any industry was in health care and social assistance, at 77.6 per cent and the second highest was education and training, where women comprised 69.4 per cent of workers. Men comprised more than 60 per cent of workers in four occupations: machinery operators and drivers; technicians and trades workers; labourers; and managers (ABS 2014c).

At the enterprise level, gender pay equity makes very good business sense. Employees are more likely to stay with an employer where they consider that remuneration is fair thus reducing turnover costs. Businesses that pay employees fairly, regardless of gender, will have access to a broader talent pool. It will also reduce the risk of legal claims (see for example, WGEA 2013).

## Wealth and pay inequality

There is convincing evidence of growing wealth inequality – not only between rich and poor but between men and women. This is in spite of women outnumbering men in higher education and longer-term increases in women’s workforce participation (Austen et al 2014).

There is also evidence of a growing number of low paid workers in Australia. According to the OECD (Jericho 2015), while 13.8 per cent of Australian workers in 2002 were low paid (compared to OECD average of 17.2 per cent, by 2012 the percentage of low paid Australian workers had risen to 18.9 per cent (while the OECD average had fallen to 16.3 per cent).<sup>5</sup>

---

<sup>5</sup> The OECD defines low pay as workers earning less than two-thirds of median earnings  
<http://www.oecd.org/employment/emp/onlineoecdemploymentdatabase.htm#earndisp>

In addition, the value of Australia's minimum wage has fallen over the last 10 years with the ratio of minimum to median wage falling from 58.3 per cent in 2003 to 54 per cent in 2013. In the 1980s the ratio was about 65 per cent.

Gender pay gap statistics both produced and reproduced by the Workplace Gender Equality Agency (WGEA) show the gender pay gap is persistent. In November 2014, the gender pay gap stood at 18.8 per cent. The average weekly ordinary time earnings of women working full-time were \$1,289.30 per week, compared to men who earned an average weekly wage of \$1,587.40 per week, making women's average earnings \$298.10 per week less than men. There has been an increase of over a percentage point (+1.4 pp) in the gender pay gap since November 2013. Since May 1995, the gender pay gap (then 16.5 per cent) has increased by over two percentage points (+2.3 pp). Over this 19 year period the gender pay gap was lowest in November 2004, at 14.9 per cent.

Recent evidence from over 4,000 of WGEA's reporting organisations have cast further light on the extent of the gender pay gap problem, with the biggest gaps being reported in managerial positions across industry sectors, and in particular in female-dominated industries (WGEA, 2015). This has been well documented elsewhere, including by Romeyn et al (2011).

At the macro level, Piketty (2014) argues that in the absence of any major government intervention, economic inequality will continue to rise (as it has over the 20<sup>th</sup> century) essentially because the return on capital is likely to outpace the rate of economic growth. Wealth, already concentrated in the pockets of a few, will remain increasingly so concentrated and will be largely based on inheritance rather than merit. On the face of it, this does not bode well for gender equality.

While Piketty does not engage in a gender analysis of this inequality (and largely focuses on the role of the tax system to redress this imbalance), we are urged by other economists not to ignore institutional arrangements that have benefited women or at least in are in place to try and benefit women (Perrons, 2014 and Geier et al, 2014). In the workplace relations framework these include centralised wage fixing, a safety net of minimum wages and conditions (including flexible working practices, parental and carers leave) and provisions for pay equity.

The workplace relations framework extends beyond the FW Act and the work of WGEA should not be underestimated in this context. WGEA takes a practical approach to issues at the core of the framework as they relate to women including pay equity and flexible working. WGEA not only collects relevant data on workplace gender equality from its reporting organisations, it makes freely available a range of advice and tools to employers which, indirectly, assist employers to fulfil certain obligations under the FW Act. WGEA actively encourages businesses to become leading edge 'Employers of Choice'.

While minimum wages contribute some way to addressing the persistent gender pay gap, NFAW argue there are important protections in the broader workplace relations framework which must be preserved, if not enhanced. These include provisions for the FMW and minimum award wages, the better off overall test (BOOT) which underpins bargaining and equal remuneration for work of equal or comparable value provisions. These are considered below and in the following section.

## The federal minimum wage and women

The FMW sets wages for employees not covered by an enterprise agreement or a modern award and there is compelling evidence showing that – when compared to all adult employees – women, part-time employees (predominantly women) and casual employees are over-represented among those earning below (or just above) the FMW (Nelms et al 2011).

Further, employees earning below or just above the FMW are over-represented in certain female-dominated industries (for example, retail trade, accommodation and food services, administrative and support services, and other services) and occupations (sales workers, or community and personal service workers).

“Compared to all adult employees, the datasets generally show that women are over-represented among those employees who earned below and just above the FMW. In particular, in HILDA, while women comprise 47 per cent of all adult employees, they comprise more than half (between 50 and 57 per cent) of those who earned in the below FMW groups (the well below FMW and just below FMW groups) and the just above FMW group. In two of the three datasets (SIH being the exception), a slightly lower percentage of women earned well below the FMW compared with the proportion earning just below the FMW and just above the FMW)” (Nelms et al, p. 13).

While there continues to be some academic debate on the effects of minimum wages on employment, we believe the weight of evidence demonstrates that it is unlikely that modest increases in the minimum wage will have a negative impact on employment. As Issues Paper 2 notes, the Expert Panel of Fair Work Australia which undertakes the Annual Wage Review has so concluded:

“The Panel’s view continues to be that modest minimum wage adjustments lead to a small, or zero, effect on employment” (Fair Work Commission, 2014).

According to the ILO (2014), fixing of minimum wages by a public authority, government or otherwise, after consultation with the social partners, is the method most frequently chosen by member States. This is the approach taken in Australia and appears to be working well and, under the FW Act, is more grounded in rigorous evidence than in previous more adversarial National Wage Cases. As the Fair Work Commission (2104 at para 9) stated, it “calls for the exercise of broad judgment rather than a mechanistic approach to minimum wage fixation”.

NFAW supports the provisions in the FW Act requiring the FWC to annually review and set the FMW and minimum award wages for employees in the national workplace relations system and to review all modern awards every 4 years (Modern Award Review) and notes that the first 4 yearly review is currently underway and includes the issue of penalty rates (AM2014/305). NFAW regard this as a fair and equitable process to determine award issues.

The process involves detailed consideration by the independent umpire on the basis of submissions from the parties and robust evidence from others. Such reviews can of course result in awards being varied, revoked or for new modern awards to be made so there is already existing flexibility within the framework to address the issues by the FWC.

NFAW does not agree with any change to the FW Act that would allow for minimum wages and penalty rates to vary by state or territory, or indeed by any other variable including business size. This would serve to undermine the principle of a universal safety net. WGEA has noted the variations in the gender pay gap between states and territories and Daly (2014) has noted that employees in rural or regional locations were generally more likely to receive and rely on penalty rates.

## Minimum award wages and women

Awards are enforceable instruments containing minimum terms and conditions of employment in addition to any legislated minimum terms. They provide an important safety net of minimum pay rates, allowances, penalty rates and employment conditions and are used as the benchmark for assessing enterprise agreements before approval. This safety net is of particular significance for women. The minimum wages received by employees in the national workplace relations system are reviewed by the FWC annually, with any adjustments taking effect on 1 July each year.

Regardless of data sources used, it is clear from the evidence that award reliant workers are more likely to be female.

Data from the ABS Employee Earnings and Hours (EEH) survey 2014 shows award reliance increased to 19 per cent in May 2014 from 16 per cent in 2012. For women, the percentage increase was from 18.5 to 21.4 and for men, from 13.6 to 16.1. This means one in five women is reliant on minimum award wages (ABS, 2015).

Research from the Minimum Wages and Research Branch in Fair Work Australia (Farmakis-Gamboni et al 2012) shows that:

- almost 60 per cent of award-reliant workers in both small and larger firms were female compared with around 50 per cent for non-award-reliant workers in both small and larger firms.
- 60 per cent of award-reliant employees in both small and larger firms were part-time, compared with less than 40 per cent for non-award-reliant employees in both small and larger firms, and
- most female employees worked part-time, particularly award-reliant employees (over 70 per cent for both small and larger firms).

Pointon et al (2012) confirm that females are more likely than males to be award-reliant, finding that women make up 58.5 per cent of all award-reliant employees and 58.3 per cent of all non-casual award-reliant employees. Wright and Buchanan (2013) report that adult award-reliant employees are more likely to be female, employed on a casual basis and working part-time hours.

## Women: the minimum wage and the tax transfer system

Issues Paper 2 (pages 6-8) invites stakeholders to comment on how the tax and transfer system interacts with the minimum wage and to consider the role of in-work benefits.

Most in-work supplements in Australia take place through the social security and family assistance payments. Means tests applied to pensions and allowance entitlements allow for individuals to receive a part payment when in part time work and in some cases, full time work. Partners of low income employed people can receive assistance in their own right (subject to the income of their partner). Assistance for the cost of children for both beneficiaries and low income families is through the Family Tax Benefit. Families also receive assistance for the cost of child care through the Child Care Rebate (CCR) and the Child Care Benefit (CCB).

Australia has one of the most targeted transfer systems in the OECD. The interface of the income tax and social security systems and the overlapping of different income tests can result in very high effective marginal rates of tax. This can create strong disincentives to move off welfare into work.

Labour supply decisions for sole parents and for partners in low income households, usually the woman, are especially highly sensitive to changes in the tax and welfare system.

The Government's current welfare reform exercise is attempting to address some of these issues. The final report of the Review of Australia's Welfare System, February 2015, proposes a range of measures to improve work take-up, including a 'Passport to Work' to ensure the rewards for work are clear and addressing the negative effects of means testing such as income test 'stacking' and 'sudden death' asset thresholds.

Payment adequacy as well as work incentives are also critical for reform. Unemployment benefits are very low relative to pensions and the minimum wage, and are losing value over time because they are indexed at a lower rate than pensions. This forces people into low paid jobs and makes them susceptible to accepting terms and conditions below award of agreement minima through IFAs (with no rigorous BOOT).

The Government's welfare reform should also address these issues. The value of both the unemployment benefit and the minimum wage is falling in Australia.

Welfare proposals in the 2014-15 budget include harsh changes that would adversely affect unemployed people. NFAW strongly believes that these proposals are simply welfare cuts rather than welfare reform.

The Productivity Commission Report on Childcare and Early Childhood Education also acknowledges that the interaction of taxation and welfare policies act as powerful disincentives for many secondary income earners to work more than part-time. The Report recommends combining CCR and CCB into one payment with increased assistance to low and middle income earners. CCB is currently targeted at low income families ensuring children from disadvantage families have the opportunity to access quality child care. The Report attempts to also address the issue that the current maximum benefit under CCB does not reflect the actual cost of child care.



The government is expected to respond to these reports in the next budget. ‘In-work benefits’ are thus partially addressed in these reforms. However moving to some form of earned income tax credit (EITC) or negative tax or new in-work benefits has not been addressed. The earlier McClure 2000 report on welfare reform examined the issue of EITC’s but decided against because it wasn’t sure it could be well integrated into the current system.

NFAW does not support the introduction of an EITC for the following reasons:

- It is a costly option. If the minimum wage falls in real terms, it amounts to a wage subsidy for employers and draws a larger percentage of the population into the welfare system.
- EITCs could reduce work incentives in income ranges where the payment is phased out
- EITCs don’t address negative impacts on secondary earners because they are based on family income rather than personal income
- EITCs can discourage upward mobility.

Ryan Batchelor’s article in the 25 February 2015 edition of *The Guardian* also points out the huge implementation difficulties a move to universal credits would present for Australia as well as the unsuccessful roll out of the UK system which has been plagued by IT issues.

NFAW believes the combined effects of the minimum wage, family payments and child care relief on the extent of poverty should be taken into account in setting the minimum wage.

NFAW supports meaningful reforms building on the existing benefits and tax systems and supports the ACOSS 2014 submission, in conclusion, to the annual wage review:

“Adequate minimum wage can make a significant contribution to economic growth and efficiency through the mobilisation of additional labour, including from income support recipients, second earners in middle income households and mature age people seeking a part time job” (p52).

## Penalty Rates

In Issues Paper 2 the Commission poses a number of questions in relation to penalty rates and NFAW has focused its submission on the impact of penalty rates on Australian women.

Essentially stakeholders are asked to consider the continuation and/or reduction, of penalty rates for working unsocial hours involving work at night, at weekends and for working on public holidays. This has obvious implications for female dominated sectors including retail and hospitality.

The importance of weekends for families is demonstrated by time use surveys and impacts on Australian society, family and community life cannot be underestimated. Needless to say, provision of childcare is not readily available for families who need to work on weekends and on public holidays.



Evidence from AWALI (Daly 2014) shows a complex picture around the issue of penalty rates with a significant proportion of employees working unsocial hours relying on penalty rates. Many workers would not work these hours without a pay premium. The report also shows that certain employees may be at more financial risk than others if changes are made to penalty rates.

Given women disproportionately rely more on the FMW and minimum award wages, it follows that they are likely to be more reliant on penalty rates. This is borne out by research from the Centre for Work + Life at the University of South Australia (Daly 2014). Women workers with lower household incomes, and employees in rural or regional locations, may be at greater financial risk if policy changes are made to the payment of penalty rates for working unsocial hours.

While evidence demonstrates there are no differences between men and women in the receipt of penalty rates, a greater proportion of women report relying on those payments for household expenses. Consequently, any reduction in penalty rates will increase financial pressures on women and in particular those with caring responsibilities.

## Conclusion

It is clear from a straightforward gendered analysis of the evidence that the FMW, minimum award wages and penalty rates are essential economic protections for women, particularly those in low paid jobs and where the ability to bargain is weak. While the FW Act actively promotes enterprise bargaining, sectors remain where bargaining is unlikely or very hard to take hold, including female dominated low paid sectors such as childcare, cleaning and the community sector. This can be for a number of reasons, including low union membership, or the fact that employers and employees lack skills, resources and prior experience in negotiating agreements. While a particular stream of multi-employer agreement making is now available under the FW Act to deal with this issue, award minima remain important protections for these employees. In addition, for those covered by enterprise agreements, award minima must be regularly maintained at relevant and effective levels otherwise the BOOT would become impotent.

NFAW draws the Commission's attention to the importance of taking into account in its inquiry the current minimum wages objective in the FW Act (at s.284) which are of particular importance to working women, including

- promoting social inclusion through increased workforce participation;
- relative living standards and the needs of the low paid;
- the principle of equal remuneration for work of equal or comparable value; and
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

These must also be viewed in the context of s.3(b) which ensures a guaranteed safety net of **fair, relevant and enforceable** minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders (emphasis added). NFAW advocates strongly for the retention of the minimum wages objective within the context of the principal object of the FW Act to promote social inclusion and economic prosperity.

In terms of the general protections, we have argued in section 5 that without these protections women's earnings would fall significantly; the macroeconomic workforce participation goals of the G20 would not be reached; and it would be reasonable to expect the falls in productivity that characterised WorkChoices.

### Recommendation 5

The Commission should conduct a thorough gender impact analysis of any evidence it receives on the national minimum wage, minimum award rates and penalty rates from other stakeholders. This is in keeping with the Commission's stated desire for an "evidence-based understanding of the impacts of current and any amended penalty rate regulations" (at Issues Paper 2, p.15).

## 7. SAFETY NET – CONDITIONS

The Commission states in Issues Paper 2 (at page 9) that unless it receives submissions which present solid grounds to the contrary, it will not undertake a holistic review of the National Employment Standards (NES).

NFAW agrees with this general approach. The NES were introduced following significant consultation and, in replacing the Australian Fair Pay and Conditions Standard, many of the entitlements arise from a long history of test cases (ALRC, 2011, p. 411). However, the Commission then goes on to target a key component of the NES which impacts on women – the right to request flexible working arrangements – and raises issues (from employers but not employees) on workplace flexibility and compliance costs (at page 10).

Before going on to examine the specific issue of flexibility in some detail in Section 7, we will look first at the safety net for women reliant on awards and its role in underpinning the better-off overall test (the BOOT) for collective and individual agreements.

NFAW did not find any evidence to suggest that the NES impose a cost on employers that might exceed the marginal benefits of hiring employees, with adverse implications for employment. If employers believe that is the case they should produce the evidence, with specific reference to any disproportionate and negative impact for women.

Our justification for recommendations around the NES and the BOOT are based on the following facts indicating that women are particularly dependent on safety net protections for both their wages and conditions.

- Women are more reliant on the collective protection of the NES and award minima. Award reliance overall has increased to 19 per cent in May 2014 from 16 per cent in 2012. For women, the percentage increase was from 18.5 to 21.4 and for men, from 13.6 to 16.1 (ABS EEH Surveys).
- It is more common for women than men to provide care between the ages of 18-74 years. In 2011, one in three women (31.8 per cent) compared to one in four men (23.6 per cent) were caring for children, with only 18 per cent of mothers with children under the age of 5 years in full-time employment (Australian Bureau of Statistics, *2011 Census of Population and Housing, Basic Community Profiles* Catalogue no. 2001.0, (2012)).
- The gender gap in labour force participation rates is most evident when children are under the age of six years, with the labour force participation rates of female parents being some 37 percentage points lower than male parents who had a youngest child under six years (Australian Bureau of Statistics, *Gender Indicators, Australia*, (2014) Catalogue, no. 4125.0).

- More mothers who have young children are now in the labour force compared to five years ago. The participation rate for mothers who have children aged 0-5 years increased 2.5 percentage points from 55 per cent in 2008-09 (ABS Gender Indicators 2014).
- Women constitute 69.5 per cent of all part-time employees, 35.5 per cent of all full-time employees and 54.8 per cent of all casual employees (ABS 2014b).

We find that the BOOT in its current form does not adequately protect women on IFAs (see section 7.2).

## 7.1

### National Employment Standards

---

The NES are an absolute legislative safety net that cannot be excluded or overridden by a less beneficial individual contract, enterprise agreement or modern award, other than as expressly allowed in the FW Act.

Given that women carry the burden of caring responsibilities, the following NES are of particular interest to NFAW and should not be weakened or removed.

- Requests for flexible working arrangements – an entitlement allowing employees in certain circumstances as set out in the FW Act (as amended) to request a change in their working arrangements because of those circumstances (see also Section 7).
- Parental leave and related entitlements – up to 12 months unpaid leave per employee, plus a right to request an additional 12 months unpaid leave, plus other forms of maternity, supporting partner and adoption related leave. Related entitlements include unpaid special leave; keeping in touch while on unpaid leave; transfer to a safe job or ‘no safe job leave’; return to work guarantee; and the right to request flexible working on return to work.
- Personal/carer’s leave and compassionate leave – 10 days paid personal/carer’s leave, two days unpaid carer’s leave as required, and two days compassionate leave (unpaid for casuals) as required.
- Maximum weekly hours of work – 38 hours per week, plus reasonable additional hours.

#### Right to request flexible working arrangements

The provisions of the FW Act providing a right to request flexible working arrangements are currently unenforceable and therefore meaningless. We examine these provisions and the evidence in Section 8.

## Parental leave

The Australian Human Rights Commission (AHRC) in its extensive 2014 report on pregnancy and return to work found that one in two (49 per cent) mothers and more than one quarter (27 per cent) of the fathers and partners surveyed reported experiencing discrimination in the workplace during pregnancy or parental leave, or on return to work. The report chronicled the devastating impacts such discrimination can have on a person's health, on their economic security and on their family (AHRC 2014). This demonstrates that discrimination is widespread and comes at a cost - not just to women, working parents and their families - but also to workplaces and the national economy.

### Recommendation 6

NFAW supports the recommendations of the AHRC to improve the information about employer obligations and employees rights (Recommendation 1, AHRC submission) and to clarify the provisions under the NES that allow employees to use existing personal/carers' leave entitlements under s97 of the FW Act to attend prenatal appointments (including IVF) and allow employee breaks from work for the purposes of breastfeeding or expressing. (Recommendation 3). The complementarity of the FW Act and the Sex Discrimination Act are important protections for women within the workplace relations framework as discussed in Section 5.3 above.

An employee returning from parental leave is legally entitled to return to the same job they held prior to going on leave. If that job no longer exists, they are legally entitled to return to an available position for which they are qualified and suited, which is nearest in status and pay to their pre-parental leave position. An employee may request flexible or shorter hours if these appear necessary but has no right to return on such a basis. NFAW supports the application by the ACTU to the 4 yearly Review of Modern Awards for a right to return to work on a part-time or reduced hours basis following parental leave. However, we recommend that this right is fundamental and should be added to the NES.

### Recommendation 7

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

## Personal/Carers' Leave

Casual employees are only entitled to unpaid carers' leave and unpaid compassionate leave. As the majority of casual employees are women this has a gendered impact on those employees seeking to manage their caring and work responsibilities. Men working on a casual basis are more likely to convert their status to permanent than women (Richardson, 2013).

### Recommendation 8

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

## Hours of work

Security and predictability of hours are just as important to working women as flexibility in hours. Casual and part-time jobs do not have the same financial security and predictability as full-time permanent employment and employees repeatedly express preferences for more and/or more predictable hours.

The AWRS (2015) shows that compared to full-time employees, a greater proportion of employees working part-time reported a preference to work more hours – 27 per cent and 39 per cent respectively. Almost half (46 per cent) of casual employees indicated they would prefer to work more hours (for more income). In addition, modern awards covering the construction, manufacturing, electrical and plumbing industries contain a requirement to offer permanent employment to regular and systematic casuals after six months' employment. This is concentrated in male-dominated industries but is not replicated in modern awards covering female-dominated industries, such as children's services or hair and beauty further contributing to this gendered impact (Richardson, 2013).

### Recommendation 9

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

The NES (and indeed modern awards) protect the rights of ‘standard’ full-time, permanent workers but not the rights of non-standard workers such as casual workers to minimum hours for an engagement. As Heron and Charlesworth (2102) comment,

“Surprisingly little consideration has been given to the working time standards set out in modern awards. Their value as a firm collective basis from which to request some variation to working time-- and as a way of providing the very predictability and security so many workers managing work and care require--needs to be given greater prominence in these debates”.

### **Recommendation 10**

We recommend establishing firm working time minima in all modern awards

- including a minimum engagement of 3 hours for casual workers; and
- requiring written agreement to a regular pattern of hours and adequate notice of changes to hours for part-time workers.

For award reliant workers, the majority of whom are women, these safety net conditions are essential protections which help facilitate their workforce participation while also supporting their caring and family responsibilities. Importantly, the NES and modern awards also underpin agreement making – both for collective enterprise agreements and for IFAs.

## 7.2

### Testing enterprise agreements and individual flexibility agreements against the safety net

---

As in the previous review, the current Australian Government has proposed changes to the BOOT to make it clear that non-monetary items (such as more flexibility for an employee about when they work) can be considered as part of the BOOT, and that alter the oversight arrangements and burden of proof for the BOOT.

Under existing provisions in the FW Act, the terms of an enterprise agreement must not be less beneficial to an employee than the NES and overall must be better than the relevant modern award.

For an agreement to pass the BOOT, the FWC must be satisfied that each award covered employee and each prospective award covered employee would be better off overall under the agreement than if the relevant modern award applied.

The BOOT is an important mechanism ensuring there is a foundation on which bargaining takes place and for agreement outcomes that help increase gender equality in workplaces. Williamson and Baird (2014) provide a useful overview of gender equality bargaining drawing on Australian and international studies. They show the potential collective bargaining has to increase gender equality and that the scope of gender equality bargaining is expanding to cover, for example, flexible working arrangements, sexual harassment clauses, pay equity and domestic violence leave. However, evidence from the UK and France point to the success of gender equality bargaining being dependent on a range of factors including the economy, the legislative environment, and commitment from trade unions and other stakeholders, and that gender equality bargaining can be particularly vulnerable to austerity measures.

It has long been recognised that decentralised approaches to wage determination are generally less favourable to women than centralised systems (Pointon et al 2012; Romeyn 2011). Women under collective agreements generally do better in terms of pay and conditions than those on awards, although the gender pay gap is smaller for those under awards. As such, we argue that the BOOT remains a test to be met for all employees and not on the collective welfare for a particular group of employees. In male dominated workplaces for example, conditions that may be more attractive to women should not be allowed to be traded off. Not only would this potentially discriminate against women employees, but would only perpetuate gender segregation within the workforce.

Women on individualised arrangements are most at risk.

“The individualisation of employment relations is particularly damaging for women, because it relegates them to a position where their disadvantage in power relations is most acute, where their structural disadvantage is unmitigated and where any disadvantage in confidence can be fully exploited” (Peetz 2007).



There is sufficient evidence on the way the individual agreement stream under WorkChoices was detrimental to employees and women in particular. This includes evidence of undue pressure from employers on a 'take it or leave' basis; increased discretion for employers to set terms and conditions below a safety net and inadequate compensation for the removal of monetary entitlements (see for example Elton et al (2007); ACTU (2012) at page 8-9). See Section 4.1 above on the costs of weakening minimum standards and employee protections and the example of WorkChoices.

While the FW Act has improved protections around IFAs to ensure employees are not disadvantaged, NFAW's main concern remains around the potential vulnerability of women on IFAs. Approximately three per cent of all female employees, compared with around two per cent of male employees, reported having made what has been classified as an IFA. More than two-thirds of IFAs reported were made by female employees.

While the formalised use of IFAs under the FW Act is not extensive, more women than men and more part-time workers than full-time workers are covered by such agreements (Fair Work Australia 2012c).

In its submission to the Fair Work Australia, the ACTU (ACTU, 2012) reported that some employers are using IFAs in similar ways as WorkChoices Australian Workplace Agreements (AWAs) were used and that they remain "concerned about the risk of coercion in non-unionised, award-dependent workplaces particularly with respect to vulnerable workers" (ACTU 2012, p. 11).

The FW Act requires an employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to. However, IFAs are not assessed by, or registered with, the Fair Work Commission so in effect application of the BOOT is 'self-regulated' by employers.

There is evidence that a better off overall assessment is not being undertaken by some employers and that if it is, it may not be applied in a rigorous manner. The FWC reported that just under a fifth of employers with single IFAs and 69 per cent of employers with multiple IFAs did not assess whether the employee was better off overall. Where BOOT assessments were undertaken, a conversation with employees was the most commonly cited approach (FWC 2012c, p.63-5):

- Only around 28 per cent of single-IFA employers in the assessment had compared wages under the IFA to the modern award or enterprise agreement.
- Among multiple-IFA employers only 39 per cent compared wages under the IFA with those under with the award or agreement.
- Six per cent of multiple-IFA employers did not even know how the assessment had been performed.
- Around 14 per cent of female employees with an IFA did not consider themselves better off overall under their IFA than without their IFA.

This does not instill confidence that the BOOT is being rigorously applied in the case of IFAs.

Consequently, NFAW has **serious** concerns about the scope for trading off monetary compensation (such as penalty rates) for non-monetary compensation (such as flexible working arrangements) **without fair and proper** consideration by the industrial umpire. This has the potential to undermine both the role of the safety net of minimum award wages and conditions and the FWC's role in determining monetary compensation.

We note the *Fair Work Amendment Bill 2014* provisions currently before parliament seek to 'clarify' the existing situation where such trade-offs can be made and as such will make no difference to our stated position.

#### **Recommendation 11**

We recommend that the BOOT should apply to IFAs in the same way it does to enterprise agreements.

#### **Recommendation 12**

We also recommend that the FWC be required to test a representative sample of IFAs to determine whether employees are better off overall.

## 8. FLEXIBILITY

The Commission's Issues Paper 1 states that "Some businesses and other commentators have argued that the current system lacks flexibility, and thus interferes with managers' ability to manage".

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

Reed (2010), in an extensive review of the evidence on the relationship between labour market flexibility and economic performance, concludes:

"...generally it is not the case that labour market deregulation gives rise to better performing economies. The 'orthodox' view that deregulation was a prerequisite for economic efficiency has been in something of a retreat since the heyday of the OECD Jobs Study in the mid-1990s (although it remains powerful and influential, particularly on the right of the political spectrum). The evidence presented here shows that this retreat has been for a very good reason – the empirical facts simply don't support the orthodox view" (p.173).

Reed found that the strongest evidence from research at the macro level is that co-ordinated wage bargaining systems are associated with lower unemployment – a finding in direct contradiction to the orthodox view. In addition, he found that other forms of so-called labour market regulation had positive impacts on economic performance:

"Paid maternity leave provisions and childcare subsidies play a vital role in allowing many women to stay in skilled, high-quality jobs in the labour market after having children. Without them, the gender pay gap would most likely be much worse than it is now. The right to request flexible working, derided by many orthodox economists as pointless 'soft' regulation, seems to have had a real impact in freeing up many employees' work hours" (p. 174).

At various points in this submission we too have argued that 'freeing up many employees' work hours would have a positive impact on women's labour force participation and could also benefit employers who understand the difference between flexibility and exercising managerial prerogative. These benefits are set out in the following box.

**WGEA – Benefits for employers of having a workplace flexibility policy:**

- meet legal requirements
- increase staff loyalty, satisfaction and commitment
- improve workplace productivity
- reduce absenteeism and staff turnover, resulting in lower recruitment and training costs
- attract, retain and develop talents
- be recognised as an employer of choice
- provide smoother transitions for employees between work and parental leave
- enable employees to maintain their effectiveness at work by meeting the needs of the work area, while also accommodating other personal responsibilities
- provide both women and men access to equal opportunities and outcomes

With the exception of merely meeting legal requirements, these benefits to employers are clearly dependent on their responsiveness to employee choice. We consider the prevalence of flexible working practices in Australian workplaces, the evidence on formal and informal requests for flexible working arrangements and their significance to employees. We conclude by making recommendations on how this part of the framework could better operate and contribute to the Government goal of increasing women's workforce participation rates.

## 8.1

### The right to request flexible working arrangements

---

The right to request flexible working arrangements and extension of unpaid parental leave are key measures in the FW Act directly impacting women. As we have noted in Section 5, it is more common for women than men to provide care, and this affects their workforce participation rates. Australia is one of the most unequal countries with respect to men's and women's sharing of domestic and care work (Sayer et al., 2009; Craig & Mullan, 2010).

While the focus of this section will be on women's experience of these provisions, we obviously acknowledge and recognise the importance of these provisions for men and for advancing gender equality both in the workplace and in society.

The right to request flexible working arrangements (s.65) and extension of unpaid parental leave (s.76) are direct expressions of the FW Act's principal object (s.3(d)) to assist "employees balance their work and family responsibilities by providing flexible working arrangements". For simplicity, in this section we focus attention on the s.65 right to request flexible working arrangements, noting that the arguments we make are applicable to the right to request an extension of unpaid parental leave and make it of no less importance.

While the legislation recognises the employee's right to request these arrangements it is not an absolute or unfettered right and also allows for employers to refuse such a request "on reasonable business grounds" (which are not defined in the FW Act). Employers' decisions are not subject to review by Fair Work Australia, unless parties have agreed in a contract of employment, enterprise agreement or other agreement that the FWC will deal with such a dispute. The FW Act also prescribes that requests should be in writing and that eligibility depends on several factors including length of continuous service, with long term casual employees with a reasonable expectation of continuing employment being also eligible.

### **Prevalence of various types of formal and informal flexible working arrangements on offer**

In addition to the provisions of the FW Act, the Workplace Gender Equality Act addresses cultural change to further gender equality by providing assistance to employers and by gathering data on set of six standardised gender equality indicators (GEIs). Gender Equality Indicator 4 (GEI 4) relates specifically to flexible working arrangements, including: availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities. The WGE Act requires relevant employers to report if a formal policy or formal strategy is in place.

Table 1 on the following page shows the prevalence of flexible working arrangements amongst WGEA reporting organisations, of which there are 4,354, employing collectively 3,891,900 people. AWRS data also points to widespread availability of flexible working practices with half of enterprises reporting that flexible start and finish times were available to all of their employees.

Flexible leave arrangements were also widely available to employees of enterprises, with over half (55 per cent) of enterprises indicating that these arrangements were available to all employees (AWRS 2015 Figure 4.4).

In spite of the range of flexible options available, WGEA shows a disappointing level of formal employer strategies in place to facilitate flexible working. While nearly half (47.7 per cent) of employers have policies on flexible working, only 13.6 per cent reported having a strategy for flexible working. Similarly, 45.2 per cent of employers have a *policy* for supporting employees with family and caring responsibilities but only 13.2 per cent have a strategy to support their policy (WGEA, 2014).

Table 1: Prevalence of various types of formal and informal flexible working arrangements on offer – WGEA Reporting Organisations 2013-14.

	<i>Formal</i>	<i>Informal</i>	<i>Total</i>
<i>Carer's leave</i>	92.5	4.5	97.1
<i>Flexible hours of work</i>	57.0	37.2	94.2
<i>Part-time work</i>	79.7	14.6	94.3
<i>Telecommuting</i>	27.8	34.5	62.3
<i>Unpaid leave</i>	78.7	18.2	96.9
<i>Compressed working week</i>	25.7	22.8	48.5
<i>Job sharing</i>	39.0	20.5	59.5
<i>Purchased leave</i>	27.6	7.0	34.6
<i>Time-in-lieu</i>	50.7	39.0	89.7

Source: WGEA Reporting data 2013-14.

### Extent of Requests for Flexible Working Arrangements

AWRS (2015 Figure 6.1) reports that flexibility to balance work and non-work commitments was considered to be the most important aspect of employment for almost one-third (32 per cent) of employees when considering their overall satisfaction with their current job. A higher proportion of female employees (37 per cent) considered the flexibility to balance work and non-work commitments to be the most important aspect of employment, compared to males (26 per cent).

A formal request for flexible working arrangements under the FW Act must be made in writing and be given to an employer. Data from the 2012 Fair Work Commission's General Manager's Report notes only 5.3 per cent of employers indicating they received at least one request for flexible working arrangements. After excluding requests that were not deemed to fit the NES definition, this dropped to 4.6 per cent, with over half of those employers receiving more than one request in the survey period. Only around 1.5 per cent of all employees surveyed for the General Manager's report were judged to have made a request for flexible working arrangements under the NES.

The low numbers of requests under the NES are in stark contrasts to the reported number of requests for flexible working arrangements actually being made by employees. AWRS (2015) shows that overall, 41 per cent of enterprises had reportedly received a request for flexible working arrangements since 1 July 2012, with a greater proportion of larger enterprises (72 per cent) reporting that a request had been received than smaller enterprises (38 per cent). AWRS data publicly available does not at this stage distinguish between requests under the NES and requests under provision of an individual or enterprise agreement.

AWRS also reports that just over one-quarter (28 per cent) of employees had made a request for a flexible working arrangement over the reference period of the survey and that the incidence is higher among females. Skinner and Pocock (2014) found 21 per cent of employees in the 2014 AWALI survey had made a request to change working arrangements and that this has been reasonably consistent since 2009 (Table 2). They also find that women are more likely than men to make requests.

The 2014 AWALI survey (Skinner and Pocock, 2014) included a question about the mechanism under which employees made their request. The findings confirm that there is a large gap between formal requests for flexible work arrangements made under s.65 and informal requests: only 2.8 per cent of employees utilised the right to request under the NES to make their request. The majority of employees (57.3 per cent) said they ‘just asked’ their supervisor or manager, or applied under their organisation’s policy or enterprise/collective agreement (39.9 per cent).

Table 2: Employees Making a request to change work arrangements, by gender, 2009, 2012 and 2014 (per cent)

	2009	2012	2014
	%	%	%
<i>All</i>	22.4	20.6	20.1
<i>Men</i>	16.3	17.3	15.4
<i>Women</i>	29.1	24.2	25.1

*Source: Skinner and Pocock, 2014 p. 40*

AWRS also sought to find out if requests from employees were formal (in writing) or informal (verbal). Of the 28 per cent of employees who indicated that they had made a request for a flexible working arrangement, almost two-thirds (62 per cent or 17 per cent of the total population) had made the request verbally which was later accepted by their employer. Women again are more likely to make informal requests than men. Of course the nature of this flexibility is not known – it could be one-off, irregular or longer term.

Skinner and Pocock (2014) present some interesting evidence on the number of hours actually worked and survey respondents’ preferences for working more or less hours. AWALI surveys across the years all show a large unmet demand for reduced working hours. A poor fit of working hours and working hour preferences (not just the actual number of hours worked) leads to a higher level of work-life interference. Why are more employees not making requests when there is evidence of unmet demand for more flexibility in working hours?

The evidence shows that employees remain unaware of the right to request flexible working arrangements, show anxiety about negative effects on the employment relationship with their employer and concern about negative effects on employer and or colleagues (Fair Work Australia, 2012, table 5.14).

Skinner and Pocock similarly found that while the level of awareness about the right to request a flexible work arrangements embodied in the NES has increased since 2012, most workers remain unaware of this right, and the incidence of requests has not changed significantly since before the right was enacted.

### **Recommendation 13**

While knowledge about the right to request flexible working arrangements under the NES has improved, it remains a mystery to many employees and employers. NFAW recommends that there be an extensive and well-resourced education campaign directed at employees and employers to extend community awareness of the FW Act provisions and, more generally, the importance of flexible working arrangements for employees and employers. With extra resources, WGEA are well placed to lead on this and offer practical advice to employers on how to manage a flexible workforce.

Other reasons for unmet demand may include the lack of coverage of the current provision. In its submission to the FWA's General Manager's report on the provisions of the National Employment Standards relating to flexible working arrangements and extensions of unpaid parental leave, the NWWC (2012, p. 4) points out that thousands of carers are still being excluded by the terms of the current provision. They include employees caring for others out with formal parenting roles, including siblings, partners, and adults with disabilities. Indigenous women in particular have cultural and extended family obligations which should be recognised.

### **Recommendation 14**

While NFAW welcomes the broadening of the eligibility for the right to request flexible working arrangements in mid-2013, we recommend that the definition of carers be expanded to cover all carers.

## **Outcomes of requests**

The AWALI data shows that the majority of requests for flexible arrangements are granted. In the 2014 AWALI (Figure 18), the majority of requests for flexibility (64.3 per cent) were fully granted, with a further 16.9 per cent of requests partly granted. A relatively small proportion of requests (10.8 per cent) were declined. This pattern is comparable to the previous AWALI surveys in 2009 and 2012.



The AWRS conducted in 2014 reported that of the 28 per cent of employees who indicated that they had made a request for a flexible working arrangement, almost two-thirds (62 per cent) had made the request verbally which was later accepted by their employer. This equates to 17 per cent of the broader employee workforce having made a verbal request for a flexible working arrangement that had been accepted.

While data on reasons why requests for flexible working arrangements were refused is not yet available from AWRS, it is perhaps the most significant part of this issue. The General Manager's 2012 report does not shed much light either and provides only general reasons such as 'business reasons or operational reasons', 'employee deals with customers/clients and could not work from home'. This generality is perhaps not surprising given the FWC has no formal role in reviewing decisions.

The NWWC (2012) found that the 'reasonable business grounds' defence has been used by many employers to refuse requests for flexible working hours, without any elaboration or definition of these specific grounds. In many cases, employers did not put their response in writing and in some cases employers became hostile when a request was made and refused to recognise the entitlement at all.

Further analysis of the 2014 AWRS data is required to enable more nuanced findings on this issue, including the extent to which requests were refused and the employer and employee characteristics where this occurred. NFAW welcomes ongoing research funded by Fair Work Australia and notes that the Centre for Work + Life, University of South Australia is currently undertaking a qualitative study of requests for flexibility to inform the General Manager's 2015 report on developments in enterprise agreement-making in Australia and hope this will shed further light on this aspect of the right to request flexible working arrangements.

### **Recommendation 15**

The right to request flexible working arrangements under s. 65 (and to request the extension of unpaid parental leave) is a toothless tiger which does not give support to the most vulnerable. We recommend empowering the Fair Work Commission to deal with any appeals where requests are refused or due process is not followed.

### **Conclusions**

So what can we conclude from the evidence? Flexible working arrangements appear to be widely available if not necessarily widely utilised by employees. While there are strong business reasons for enabling employees to balance their work and life commitments, employers do not seem to be taking a strategic approach to the issue. Nor are they being overwhelmed with requests – whether formally under the NES or informally – and they certainly show a preference for the latter.

However, as researchers at the Centre for Work + Life demonstrate, there is a large body of evidence regarding the contribution flexibility can make to a positive and healthy work-life interaction and showing that employees, women in particular, place considerable importance on balancing caring and work roles. The ability to work flexibly is an important motivator and sign of workplace satisfaction.

The right to request flexible working arrangements, as currently enacted, does not appear to have substantially impacted on flexibility in Australian workplaces and we conclude that it has not placed an undue regulatory burden on employers

In fact the opposite could be said to be the case, given employers have virtual carte blanche to refuse such requests from employees who do not have any additional protections afforded in enterprise agreements.

The current provisions are in effect no more than a ‘right to discuss’ with no enforcement or appeal mechanism and little support or protection for more vulnerable workers reliant on the NES for their safety net. Even where requests are granted, employers have indicated a preference to use informal or undocumented arrangements instead of formalised IFAs, or indicated award provisions were suitable or there were sufficient flexibility in award provisions (Table 4.13 AWRS 2015).

In short, the provisions do not go far enough, particularly for more vulnerable employees. The data indicates a level of ignorance about entitlements and anxiety amongst employees about even asking for flexible working arrangements which surely was not the intent of the legislation, given the principle object s.3 (d) noted above. If more is not done to support flexible working arrangements for workers and women in particular and at key stages in their working lives, then there is little hope that the Government’s 25 by 25 target on women’s workforce participation will be met.

### **Recommendation 16**

The extent of informal requests is significant yet neither the process nor the outcomes seem to be subject to any scrutiny, including a BOOT, in any meaningful way. In the previous section we recommend that the BOOT be applied to IFAs in the same way it is applied to EAs. Here we recommend that more research is undertaken to determine whether employees are being exploited in the process of seeking or implementing informal requests for flexibility.

## 9. REFERENCE LIST

Austen, S., Ong, R., Bawa, S. & Jefferson, T. (2014). Exploring recent increases in the gender wealth gap among Australia's single households. *The Economic and Labour Relations Review*. Abstract retrieved from: <http://elr.sagepub.com/content/early/2014/08/18/1035304614556040.abstract>

Australian Bureau of Statistics. (2012). *Gender Indicators* (Cat. no. 4125.0). Canberra, Australia. Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/4125.0~Jan+2012~Main+Features~employment+conditions~1120>

Australia Bureau of Statistics (2014). *Gender Indicators* (Cat. no. 4125.0). Canberra, Australia. Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features110August%202014>

Australian Bureau of Statistics (2014b). *Forms of Employment* (Cat. no. 6359.0). Canberra, Australia. Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6359.0>

Australian Bureau of Statistics (2014c). Labour Force, Australia, Detailed, Quarterly, Feb 2014, (Cat. no. 6291.0.55.003), Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6291.0.55.003>

Australian Bureau of Statistics (2014). *Employee Earnings and Hours* (Cat. no. 6306.0). Canberra, Australia.

Australian Bureau of Statistics. (2010). *Year Book Australia, 2009–10*. Cat. No. 1301.0. Canberra: Australian Bureau of Statistics. Retrieved from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/376122D4FE856D5FCA25773700169C69?opendocument>.

Australian Council of Social Services (2014). *Submission to Wage Review 2014*. Retrieved from: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14>

Australian Council of Trade Unions (2012). *Submission to Fair Work Australia: General Manager's Reports: Individual Flexibility Arrangements*. ACTU. Melbourne. Retrieved from: [http://www.actu.org.au/Images/Dynamic/attachments/7657/d\\_16%20ACTU%20Submission%20to%20FWA%20-%20General%20Managers%20Report%20-%20IFA%20%202012%20April%202012.pdf](http://www.actu.org.au/Images/Dynamic/attachments/7657/d_16%20ACTU%20Submission%20to%20FWA%20-%20General%20Managers%20Report%20-%20IFA%20%202012%20April%202012.pdf)

Australian Council of Trade Unions (2014). *Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014*. Retrieved from: <http://www.actu.org.au/Images/Dynamic/attachments/8215/ACTU%20Sub%20to%20Senate%20Cttee%20on%20Ed%20and%20Employment%20re%20Fair%20Work%20Amendment%20Bill%202014.pdf>

Australian Human Rights Commission (2014). *Supporting Working Parents: Pregnancy and Return to Work National Review – Report*. Retrieved from: <http://www.humanrights.gov.au/publications/sex-discrimination>

Australian Law Reform Commission (2012). *Submission to the Fair Work Act Review Panel*. Retrieved from: <http://www.alrc.gov.au/submission-fair-work-act-review-panel>

Australian Law Reform Commission (2011). *Family Violence and Commonwealth Laws— Improving Legal Framework. Final Report*. ALRC Report 117 November 2011 Sydney: Australian Law Reform Commission. Retrieved from <https://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-117-summary>

Batchelor, R (25 February 2015). *The Guardian* Morrison should resist the temptation to make McClure's report his little red book Retrieved from: <http://www.theguardian.com/commentisfree/2015/feb/25/morrison-should-see-the-dangers-as-well-as-the-possibilities-in-the-mcclure-review>

Cai, L. (2010). *Work choices of married women: drivers of change*. (Visiting Researcher Paper). Canberra: Productivity Commission. Retrieved from: [https://www.melbourneinstitute.com/downloads/hilda/Bibliography/Other\\_Publications/pre2010/Cai\\_PC\\_married\\_women.pdf](https://www.melbourneinstitute.com/downloads/hilda/Bibliography/Other_Publications/pre2010/Cai_PC_married_women.pdf)

Cassells, R., Vidyattama, Y., Miranti, R., & McNamara, J. (2009). *The impact of a sustained gender wage gap on the Australian economy* (NATSEM Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs). Canberra: Department of Families, Community Services, Housing and Indigenous Affairs. Retrieved from: [http://www.natsem.canberra.edu.au/storage/gender\\_wage\\_gap.pdf](http://www.natsem.canberra.edu.au/storage/gender_wage_gap.pdf)

Charlesworth, S. (2010). The Sex Discrimination Act: Advancing gender equality and decent work? In Thornton, M. (Ed.), *Sex discrimination in uncertain times* (Chapter 6). Canberra: ANU E Press. Retrieved from: <http://press.anu.edu.au/apps/bookworm/view/Sex+Discrimination+in+Uncertain+Times/5321/ch06.xhtml>

Commonwealth of Australia (2015) 2015 Intergenerational Report Australia in 2055. Circulated by The Honourable J. B. Hockey MP Treasurer of the Commonwealth of Australia, March 2015

Craig, L. & Mullan, K. (2010). Parenthood, gender and work-family time in the United States, Australia, Italy, France, and Denmark. *Journal of Marriage and Family*, 72(5), 1344-1361.

Daly, T. (2014). *Evenings, nights and weekends: Working unsocial hours and penalty rates*, Centre for Work + Life University of South Australia <http://www.unisa.edu.au/Research/Centre-for-Work-Life> at page 11

Department of Economics and Social Affairs (2013). *Inequality matters: Report of the World Social Situation 2013* (United Nations Report ST/ESA/345) New York: United Nations. Retrieved from <http://www.un.org/en/development/desa/publications/world-social-situation-2013.html>

Department of Education, Employment and Workplace Relations (2012). *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*. Canberra. Retrieved from: <http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview>

Elton, J et al. (2007). *Women and WorkChoices: Impacts on the low pay sector*. Adelaide: Bob Hawke Prime Ministerial Centre. Retrieved from: <http://apo.org.au/node/3352>

Elton, J., Bailey, J., Baird, M., Charlesworth, S., Cooper, R., Ellem, B., Jefferson, T., Macdonald, F., Oliver, D., Pocock, B., Preston, A. and Whitehouse, G. (2007). *Women and WorkChoices: Impacts on the Low Pay Sector*. Summary Report . Centre for Work + Life, University of South Australia. Retrieved from: <http://www.unisa.edu.au/hawkeinstitute/cwl/publications.asp>

Evesson, J., Buchanan, J., Bamerry, L., Frino, B. & Oliver, D. (2007). *Lowering the standards: From awards to Work Choices in retail and hospitality collective agreements*.

Ex parte H.V. McKay (Harvester Case) (1907). Transcript of proceedings, 15 October, p. 258. Melbourne: Fair Work Australia. Retrieved from <https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/documents/harvester-case/harvester-case>.

Ex parte H.V. McKay (Harvester Case) (1907). Decision, p. 1. Melbourne: Fair Work Australia. Retrieved from <https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/documents/harvester-case>

Fair Work Australia (2012). General Manager's report on the operation of the provisions of the National Employment Standards relating to the right to request flexible working arrangements and extension of unpaid parental leave, 2009-2012. Retrieved from: <https://www.fwc.gov.au/about-us/reports-publications/general-managers-reports/reports>

Fair Work Australia (2102a) General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012. Fair Work Australia. Melbourne. Retrieved from: <http://www.fwc.gov.au/documents/documents/NES.pdf>

Fair Work Australia (2102b) General Manager's report into enterprise agreement making in Australia under the Fair Work Act 2009. Fair Work Australia. Melbourne. Retrieved from: <http://www.fwc.gov.au/documents/documents/amr.pdf>

Fair Work Australia (2012c). General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009–2012. Fair Work Australia. Melbourne. Retrieved from: <http://www.fwc.gov.au/documents/documents/IFA.pdf>

Fair Work Commission (2015). Australian Workplace Relations Survey First Findings Report. Pay Equity Unit, Fair Work Commission, Melbourne. Retrieved from: <https://www.fwc.gov.au/creating-fair-workplaces/research/australian-workplace-relations-study>

Fair Work Commission (2014) Annual Wage Review 2013–14 decision (FWCFB 3500) Retrieved from: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14>

Fair Work Ombudsman. (2012). FWO Discrimination Policy. (Guidance Note No. 6). Melbourne: Fair Work Ombudsman. Retrieved from <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.fairwork.gov.au%2FArticleDocuments%2F725%2FGN-6-FWO-Discrimination-Policy.rtf>

Farmakis-Gamboni, S., Rozenbes, D. and Yuen, K (2012) Award-reliant small businesses Report 1/2012 Minimum Wages and Research Branch—Fair Work Australia. Retrieved from: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-wa-8>

Geier, K., Bahn, K., Gamble, J., Eisenstein, Z. and Boushey, H. (2014). How Gender Changes Piketty's 'Capital in the Twenty-First Century'. The Nation, August 6, 2014. Retrieved from: <http://www.thenation.com/blog/180895/how-gender-changes-pikettrys-capital-twenty-first-century>

Heron, Alexandra and Charlesworth, Sara (2012). Working time and managing care under labor: whose flexibility? *Australian Bulletin of Labour*, 38(3) pp. 214-233. Retrieved from: <http://www.freepatentsonline.com/article/Australian-Bulletin-Labour/311291544.html>

Human Rights and Equal Opportunity Commission. (2008). Submission to the Senate Legal And Constitutional Affairs Committee Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality. Sydney: Australian Human Rights Commission. Retrieved from: <https://www.humanrights.gov.au/inquiry-effectiveness-sex-discrimination-act-1984-cth-eliminating-discrimination-and-promoting>

International Labour Organisation (2013a). *Equal pay: an introductory guide*, International Labour Organization, Geneva. Retrieved from: [http://www.ilo.org/global/publications/WCMS\\_216695/lang--en/index.htm](http://www.ilo.org/global/publications/WCMS_216695/lang--en/index.htm)

International Labour Organisation (2014). Minimum Wage Systems, Geneva. Retrieved from [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_235287.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_235287.pdf)

International Monetary Fund (2013), *Women, Work, and the Economy: Macroeconomic Gains from Gender Equity*, Staff Discussion Notes, No. 13/10, International Monetary Fund, Washington DC. Retrieved from: <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf>

Jericho, G. (2015) Inequality should be at the forefront of a debate on the minimum wage. Guardian 28 January 2015. Retrieved from: <http://www.theguardian.com/business/grogonomics/2015/jan/28/inequality-should-be-at-the-forefront-of-a-debate-on-the-minimum-wage>

Luck, E., Bailey, J., & Townsend, K. (2009). WorkChoices, ImageChoices and the marketing of new industrial relations legislation. *Work, Employment and Society*, Vol. 23(2), pp. 285-304.

Morton, M., Klugman, J., Hanmer, L. and Singer, D. (2014). *Gender at work : a companion to the world development report on jobs*. Washington, DC : World Bank Group. Retrieved from: <http://documents.worldbank.org/curated/en/2014/02/19790446/gender-work-companion-world-development-report-jobs>

National Foundation for Australian Women. (2014). *Submission to Productivity Commission Public Inquiry into Childcare & Early Childhood Learning*. Retrieved from <http://www.pc.gov.au/inquiries/completed/childcare/submissions/initial/submission-counter/sub059-childcare.pdf>

National Network of Working Women's Centres (2012). Submission to the FWA's General Manager's report into the provisions of the National Employment Standards relating to flexible working arrangements and extensions of unpaid parental leave. Retrieved from: <http://www.wwc.org.au/index.php?page=publications>

Nelms, L. & Tsingas, C. (2010, February). *Literature review on social inclusion and its relationship to minimum wages and workforce participation* (Research Report 2/2010). Melbourne: Fair Work Australia. Retrieved from <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-w-36>.

Nelms, L., Nicholson, P. and Wheatley, T (2011). *Employees earning below the Federal Minimum Wage: Review of data, characteristics and potential explanatory factors*. Research Report 3/2011. Minimum Wages and Research Branch—Fair Work Australia. Retrieved from: [https://www.melbourneinstitute.com/downloads/hilda/Bibliography/Working\\_Discussion\\_Research\\_Papers/2011/Nelms\\_etal\\_Employees\\_Earning\\_Below\\_the\\_Federal\\_Minimum\\_Wage.pdf](https://www.melbourneinstitute.com/downloads/hilda/Bibliography/Working_Discussion_Research_Papers/2011/Nelms_etal_Employees_Earning_Below_the_Federal_Minimum_Wage.pdf)

OECD (2011), *Divided We Stand: Why Inequality Keeps Rising*. OECD Publishing. Retrieved from: <http://www.oecd.org/els/soc/dividedwestandwhyinequalitykeepsrising.htm>.

OECD (2012a), *Closing the Gender Gap – Act Now*, OECD Publishing, Paris, p.149. Retrieved from: <http://dx.doi.org/10.1787/9789264179370-en>

OECD (2014) *Achieving stronger growth by promoting a more gender-balanced economy* 15 August 2014 Report prepared for the G20 Labour and Employment Ministerial Meeting, Melbourne, Australia, 10-11 September 2014. <http://www.oecd.org/g20/topics/employment-and-social-policy/ILO-IMF-OECD-WBG-Achieving-stronger-growth-by-promoting-a-more-gender-balanced-economy-G20.pdf>

Ostry, J., Berg, A. and Tsangarides, C. (2014). *Redistribution, inequality, and growth*. (International Monetary Fund Staff Discussion Note SDN/14/02). International Monetary Fund. Retrieved from: <http://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf>

Peetz, D. & Price, R. (2007). *Profile of the retail and hospitality industries* (Report prepared for the Office of the Victorian Workplace Rights Advocate). Brisbane: Queensland University of technology. Retrieved from: <http://eprints.qut.edu.au/13574/1/13574.pdf>.



Peetz, David (2007). Collateral Damage: Women and the WorkChoices Battlefield, *Hecate*, Vol. 33, No. 1, pp. 61-80. Retrieved from :

<http://researchhub.griffith.edu.au/display/nd04a77718d787124396ef507856eba6b>

Peetz, D. (2012). Does industrial relations policy affect productivity? *Australian Bulletin of Labour*, Vol. 38(4), 268-292.

Perons, D. (2014). Gendering Inequality: a note of Piketty's Capital in the Twenty-First Century. *British Journal of Sociology*, December 65(4):667-77.

Piketty, T. (2014). *Capital in the twenty-first century*. Cambridge, Massachusetts: Harvard University Press.

Pocock, B. and Elton, J. (2008). *Work, Family and the Proposed National Employment Standards: A Submission to the Australian Government*. Centre for Work + Life, Hawke Research Institute for Sustainable Societies, University of South Australia. Adelaide. Retrieved from:

<http://w3.unisa.edu.au/hawkeinstitute/cwl/documents/submission-national-employment-standards.pdf>

Pointon, M., Wheatley, T., Ellis, G. and MacDermott, K. (2012). Award reliance and differences in earnings by gender; Research Report 3/2012, Minimum Wages and Research Branch—Fair Work Australia. Retrieved from: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-wa-8>

Poynton, A. and Rolland, L (2013) Untapped Opportunity. The role of women in unlocking Australia's productivity potential. Ernst and Young. Retrieved from: <https://www.wgea.gov.au>

Prime Minister's National Press Club Address, February 2 2015.

Productivity Commission (2014). *Childcare and Early Childhood Learning: Overview*, Inquiry Report No. 73, Canberra.

Reed, H. (2010). *Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance*. A Report for the TUC. Landman Economics. Retrieved from:

<https://www.tuc.org.uk/sites/default/files/extras/flexiblewiththetruth.pdf>

Richardson, S. (2013). Do We All Want Permanent Full-Time Jobs? The Standard Offering Of Full-Time Permanent Work Is No Longer The Best Fit For Many People In The Workforce Today. A condensed version of the Foenander Lecture given at the University of Melbourne on 11 September 2013. Retrieved from: [http://insights.unimelb.edu.au/vol15/02\\_richardson.html](http://insights.unimelb.edu.au/vol15/02_richardson.html)

Romeyn, J. Archer, S. and Leung, E. (2011) Review of equal remuneration principles, Minimum Wages and Research Branch—Fair Work Australia Research Report 5/2011. Retrieved from

<https://www.fwc.gov.au/creating-fair-workplaces/research/pay-equity-research>

Romeyn, J. (2007). The International Labour Organisation's core labour standards and the Workplace Relations Act 1996 (Parliamentary Library research paper No. 13, 2007–08). Canberra, Parliamentary Library. Retrieved from: <<http://www.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp13.pdf>>.



Sayer, L.C., England, P., Bittman, M. & Bianchi, S.M. (2009). How long is the second (plus first) shift? Gender differences in paid, unpaid, and total work time in Australia and the United States. *Journal of Comparative Family Studies*, 40(4), 523-545.

Senator Michaelia Cash, Senate Hansard Monday, 17 November 2014.

Skinner, N. and Pocock, B. (2014). The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index. The Centre for Work + Life University of South Australia. Retrieved from: <http://www.unisa.edu.au/Research/Centre-for-Work-Life>

Skinner N, Hutchinson C & Pocock B (2012). The Big Squeeze: Work, home and care in 2012 (Australian Work and Life Index 2012), Centre for Work + Life, University of South Australia.

Stewart, A. (2005). A simple plan for reform? The problem of complexity in workplace regulation. *Australian Bulletin of Labour*, Vol. 31(3) , 210-236.

Williamson, S. and Baird, M. (2014). Gender equality bargaining: Developing theory and practice. *Journal of Industrial Relations*, 56(2) 155-169.

Work + Family Policy Roundtable. (2013). *Work, Care & Family Policies. Election Benchmarks 2013*. Adelaide: Centre for Work + Life, University of South Australia. Retrieved from <http://www.workandfamilypolicyroundtable.org>

Workplace Gender Equality Agency (2014). Data Explorer. Retrieved from: <https://www.wgea.gov.au/lead/new-data-explorer-gender-equality-industry-revealed>

Workplace Gender Equality Agency (2014). Gender Pay Gap Statistics August 2014 at [https://www.wgea.gov.au/sites/default/files/2013-09-02%20WGEA%20GPG%20Taskforce%20Report%20FINAL\\_0.pdf](https://www.wgea.gov.au/sites/default/files/2013-09-02%20WGEA%20GPG%20Taskforce%20Report%20FINAL_0.pdf)

Workplace Gender Equality Agency (2015). Gender pay gap biggest in manager ranks, Media Release 17 February 2015. Retrieved from: [https://www.wgea.gov.au/sites/default/files/20150217\\_MR\\_GenderPayGaps5.pdf](https://www.wgea.gov.au/sites/default/files/20150217_MR_GenderPayGaps5.pdf)

Workplace Gender Equality Agency (2013). The Business Case for Gender Equality. March 2013. Retrieved from: <https://www.wgea.gov.au/learn/about-workplace-gender-equality>

Wright, S. and Buchanan, J. (2013). Award reliance. Research Report 6/2013 Workplace Research Centre, University of Sydney Business School, December 2013 Retrieved from: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14-2>

## APPENDIX A – CASE STUDIES

In addition to those case studies provided at section 5.2, the following are provided in further support of this submission (originally provided by the National Working Women's Centres).

### **Anna**

Anna had worked for her sister-in-law for 15 years. Anna divorced her husband following domestic violence. When she spoke about the DV to her sister-in-law (also the boss) she was sacked.

### **Donna**

Donna disclosed to her boss that she was experiencing domestic violence. Donna had been head-hunted for this position but once she revealed the DV she was systematically bullied out of her position.

### **Kelly**

Kelly worked for a short time in a small boutique in a regional town. Her husband came in to the store and went 'nuts'. The store owner lives in Victoria so didn't know about the incident but other women who worked there rang and told him. Kelly had to go to have a CAT scan because her husband had hit her so hard. She let the owner know about this. He then told her she had to choose between her job and the CAT scan – he said 'you can't have both.' Kelly was then dismissed for very vague reasons – 'it's not working out, etc.'

Kelly rang HR who told her she would be paid a week's notice but the payment never appeared. When she rang to enquire again, HR told her that she wouldn't be getting it as she'd been dismissed for gross and wilful misconduct. When she asked what this meant she was told there was an accusation of stealing but they couldn't give any details of what or when she had allegedly stolen something. Kelly asked if she had stolen something why hadn't she been told and why hadn't it been reported to the police. She was given no reason. Kelly now works in the shop next door.

### **Sylvia**

Sylvia worked as a community support worker. She was experiencing domestic violence from her husband who was also coming in to Sylvia's workplace. She was often late for work and the violence was impacting on her performance generally. Sylvia was terminated for performance issues (lateness). Sylvia then left the relationship. She has a domestic violence order against her husband which covers her in her workplace.

Sylvia applied to work at another organisation. She did very well at the interview and was sure they would offer her work which they did. The new employer then rang the former employer for a reference. He told them that she'd had heaps of personal and family problems, that there'd been issues with attendance and that the abusive husband had been coming on to work premises causing problems. The new workplace has not withdrawn the offer of work but has requested a statutory declaration (they are emailing her what they want her to sign) from her saying that she has nothing to do with her ex---husband. They also want a copy of the order as they say it covers them.

Her question to us was 'Can they do this?' She has no children. There are no issues that indicate this could be a case of disability discrimination. At the time Sylvia was advised that the Australian Human Right Commission was keen to run a test case where domestic violence is seen as the reason for possible discriminatory treatment. Sylvia was not keen to be a test case and did not proceed with an AHRC complaint.