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Senate Select Committee on Job Security

The impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions

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Authorisation

This submission has been authorised by the NFAW Board

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Submission to the Senate Select Committee on Job Security's Inquiry into the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions

This submission is being made by the National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

Insecure employment affects women and men in different ways; it is not gender neutral. This submission responds to the Inquiry's terms of reference through a gender lens.

The displacement of secure by insecure work is not due to a single factor such as growth in casual work. It is a constructive impermanency based on multiple strategies driving and enabling employers to maximise numerical flexibility, maintain a constant downward pressure on wages and side-step the responsibilities of the National Employment Standards.

Historically, it has relied on leveraging women's characteristic employment patterns, calling them 'non-standard' and treating them as atypical. They are typical for women. Nevertheless, the greater deviation from the male-dominated 'standard employment relationship' the less protection there is for workers (Vosko 2007; Vosko and MacDonald 2009).

It is critical not to allow the word 'flexibility' to be used to confuse employer-defined flexibility with flexibility for workers with family responsibilities. They are very different things.

The impact of insecure employment shows itself in the employment data, in COVID-linked risks, and in reduced income and housing security, and in each context women are most likely to suffer from ongoing structural defects in the current policy settings, and an unwillingness to rise to new ones.

Following our initial overview, we have **focused on how these issues are worked out in the feminised and less well researched care sectors—aged, disability and child care.**

Recommendations

Recommendation 1: Data collection and analysis

The Government should

- ensure better data collection to capture alternative and insecure forms of work, including labour hire, sham contracting and gig work.

- better monitor and report on risks of insecure work and exploitation among particular groups in Australia's workforce, including disaggregating data by disability, indigeneity, ethnicity and visa status with a view to better protecting those segments of the workforce that are particularly vulnerable to insecure work; and

- direct the Office for Women, the Australian Bureau of Statistics and other relevant government agencies to prepare a Women's Recovery Plan – a coordinated program of work to identify differential impacts on women and men, track emerging gender inequalities and pursue new opportunities through this crisis to address existing inequalities. All relevant data and research should be made publicly available in real time so that civil society and women's organisations are able to contribute to the public discussion.

Recommendation 2: systemic measures
The federal Government must take a lead in supporting the more equal division of paid work and unpaid care between women and men by:

- legislating for stronger protections from sexual violence in work and strengthening the response by government in relation to its own parliamentary and public service workforces
- legislating, as recommended in this submission, to reduce the incidence of insecure work and better protect workers
- developing campaigns to support families more equally share unpaid work
- providing leadership to create stronger norms and culture of gender equality.

The federal Government should better focus federal budgets towards ameliorating women's greater workforce disadvantages.

Specific measures

Recommendation 3

The Federal Government take a strong and decisive lead in national system reforms to achieve fair conduct and certainty for gig workers, including:

- clarifying and codifying work status to reduce uncertainty about status and the application of entitlements, protections and obligations for workers and businesses;
- aligning work status across workplace laws (including employment, superannuation and workplace health and safety laws);
- establishing a Streamlined Support Agency to provide advice and support to self-employed platform workers;
- establishing a specialised body to assist in resolving disputes about work status;
- promoting fair conduct for platform workers by establishing Fair Conduct and Accountability Standards;
- improving existing unfair contracts remedies for platform workers; and

- introducing enhanced enforcement to ensure compliance with laws.

Recommendation 4

That the express needs and circumstances of female gig workers – particularly in relation to unequal pay and the unequal burden of caring responsibilities – be taken into account when developing national approaches to achieve fair conduct and certainty for gig workers.

Recommendation 5
The $450 monthly earnings threshold for the superannuation guarantee should be repealed.

Recommendation 6
The 30-hour exemption in s.11 (2) of the Superannuation Guarantee Administration Act for work that is wholly or principally of a domestic or private nature should be reduced to 10 hours per week.

Recommendation 7

NFAW welcomes the requirement that the recently passed casualisation provisions be reviewed, and recommends that the review consider instead:

- the insertion in the Fair Work Act (FWA) of a new objective definition of casual *employment in* which employment status is determined by post-contractual employment history as well as the nominal employment contract itself;
- *an amendment* to the FWA requiring that casual workers who have been with the same employer for a year and in regular shifts for six months must be offered permanent employment;
- the development of portable leave schemes for casual employees with an offsetting mechanism for casual loadings.

Recommendation 8
Funding should be made available for an urgently needed report on the operation of 'flexibility' provisions in awards and agreements before further flexibilities are introduced through 'modernisation' and enterprise bargaining.

Recommendation 9
The 'flexibility' provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 addressing part-time and casual work should not be reintroduced.

Recommendation 10
'Job security' and 'gender equality' should be inserted into the objectives and tests of the award review process in the Fair Work Act.

Recommendation 11
NFAW strongly supports recommendation 84 of the Aged Care Royal Commission calling for a conjoined tripartite application for equal remuneration in the Aged Care Award 2010, the

Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010.

Recommendation 12
NFAW strongly supports Recommendation 85 of the Aged Care Royal Commission that 'In setting prices for aged care, the Pricing Authority should take into account the need to deliver high quality and safe care, and the need to attract sufficient staff with the appropriate skills to the sector, noting that relative remuneration levels are an important driver of employment choice.'

Recommendation 13
In order to balance employer-oriented and employee-oriented flexibilities in award-setting, we recommend:

- amending the Fair Work Act to insert 'job security' as a principal object of the Act as a whole and the wage-setting, award review and contractor testing processes, and
- inserting 'gender equality' into the objectives and tests of the award review process.

Recommendation 14

Recommendation 19 below--calling for labour-hire providers to be required to guarantee the same pay and conditions to the workers it supplies as are being provided to employees of the contracting firm doing the same work – should explicitly be taken to apply to migrant workers.

Recommendation 15
NFAW recommends that government replace its current blunt cap on APS staffing with a cap on back-to-back short-term contracts for the same role.

Recommendation 16
NFAW endorses recommendation 85 of the Aged Care Royal Commission which calls on providers to preference direct employment of personal care and nursing service workers, as well as quality reviews of compliance with this arrangement. Corresponding measures be taken to address the growth of contracting and gig economy employment in the disability sector.

Recommendation 17
The Fair Work Act should be amended to lower the intent threshold in relation to misrepresenting employment as an independent contracting arrangement.

Recommendation 18
Victims of sham contracting should have access to the same court and tribunal proceedings as those proposed for victims of wage theft more generally, simplified along the lines recommended by NFAW in its submission to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (submission 82, recommendation 14).

Recommendation 19
Labour-hire providers should be required to guarantee the same pay and conditions to the workers it supplies as are being provided to employees of the contracting firm doing the same work.

Recommendation 20
The labour-hire firm licensing scheme to be implemented at the Commonwealth level should at a minimum identify home-based care in both the disability and aged care sectors among the high-risk sectors to be covered by the scheme.

Recommendation 21
NFAW recommends that, in addition to the broader set of recommendations made in relation to procurement under Term of Reference (g) (Recommendation 22 below), government should recognise its responsibilities as the top of the supply chain body in publicly funded social care systems by:

- making changes to regulatory oversight of government-funded caring activities in the aged care and disability care sectors to address intersecting interests of quality of care and quality of employment laid out in Vol 3A of the report of the Aged Care Royal Commission, and
- increasing funding in the caring sector as proposed in Recommendation 84 of the Aged Care Royal Commission and more broadly in the NFAW 2021 Pre-budget submission.

Recommendation 22
NFAW recommends that:

- the Department of Finance develop a consistent definition of employee;
- discussions be held with existing Free Trade Agreement partners to include a broader employment equity exemption and ensure that future agreements include broader employment equity exemptions;
- government require that a detailed analysis of employment in contracts with a high labour content be published annually; and
- the Department of Finance develop clear compliance requirements relating to social procurement and an evaluation framework.

Discussion

a) The extent and nature of insecure or precarious employment in Australia

The Australian workforce has clearly changed over the last two decades, with a movement away from employment in traditional industries such as manufacturing based on full time, unionised work, and towards more part time, casual, contract or gig work in service industries.

This has happened at the same time as there has been a concerted reform of industrial relations systems that has tipped the power balance towards employers for a significant proportion of Australian workers and, over the last decade, an almost flatlining of wages in real terms.

These trends have given rise to concern about increases in precarious employment. The levels of precarity in the Australian workforce are still at times a matter for debate, though, largely because of lack of agreement about the definition of precarious work.

Precarious work can be described as "…uncertain, unstable, and insecure and in which employees bear the risks of work (as opposed to businesses and government) and received limited benefits and statutory protections" (Kalleberg and Vallas 2017, p. 11). Yet what this entails and where its limits lie can be difficult to ascertain and agree.

One way of defining precarious work would be to consider a few factors as a proxy for precarity, such as the rates of casual employment, some forms of self-employment and multiple job holders. Others note that the concept should be considered as multidimensional, including subjective assessments, seeking "… to encapsulate not only the inadequacy of working hours and employment benefits, but other dimensions such as insecurity of the job itself or a lack of employment rights and entitlements." (Cassells et al, 2018a, p. 10 and Cassells et al, 2018b).

It is also important to unpack the demographics of the phenomenon of precarious work since workforce level trends can often obscure inequalities and gaps.

Whether precarious work is increasing in Australia depends on which of these characteristics are assessed. NFAW considers it is important not to underestimate the complexity of the notion of precarious work but to make a multi-dimensional and segmented assessment of its incidence and trends. While this makes it more difficult to assess, it is important to recognise the nuances of the phenomenon and the lived reality for workers.

However it is defined, it is important to note that in 2018 – for the first time ever – "…less than half of employed Australians work in a permanent full-time paid job with leave entitlements" (Carney and Stanford, 2018, p 1).

This section will consider some of the key elements of precarious work, with a gender lens wherever possible, before reaching some conclusions about the trends and issues.

- **The gendered workforce**

Australia's workforce remains highly gendered. Prior to the COVID pandemic upending the Australian labour market, in January 2020 the trend workforce participation rate was a steady 66 % of the Australian population. The female participation rate was 61.4 %, while the male participation rate was 70.9 % (ABS, 2020a).

The trend participation rate for workforce age Australians (15–64-year-olds) was 78.8%. The Australian Bureau of Statistics noted "…the long term convergence of male and female participation" with male participation rates in this age group at 83% and women's at 74.5 %.

The participation rate was lower for women in all age groups compared to men in those age groups, except for those aged 15- 19 years.

The OECD and ILO have suggested that, in G20 nations, "[t]he gender gap in earnings and in the incidence of low pay are partly explained by gender segregation by occupation, with women more crowded into lower paying occupations than men" (OECD and ILO 2019, p. 11). The authors also note that:

> [p]art-time and temporary work can be an important means for women to integrate into the labour force. However, especially when involuntary, these forms of work may be associated with lower hourly wages than full-time work, lower social security benefits and fewer training opportunities, which jeopardises women's chances to obtain better-quality jobs. (p 12)

Overall, in Australia, the gender pay gap in 2020 still stands at 13.4% when calculated based on full time, ordinary time earnings for women and men. Clearly, the gap for overfall earnings for women and men, taking account of women's greater part time work and lower discretionary and overtime pay, is greater than this.

The Workplace Gender Equality Agency notes that Australia's workforce remains highly sex segregated, and that "[a]verage remuneration in female-dominated organisations is lower than in male-dominated organisations."

Female dominated occupations have grown generally at a greater rate than male dominated industries, with Health Care and Social Assistance growing at almost three time the pace of employment growth across all sectors (Cassells, 2018a).

There are links between segregation by sex and access to part time work, with part time work less likely to be available in male dominated than female dominated or mixed occupations, but it remains unclear how the causation runs – whether "women avoid occupations where part-time work is less likely to be available, or that part-time work is more likely to be supported by employers in female-dominated occupations".

The Australian workforce has seen a steady increase in part time work. Those who work for less than 38 hours per week accounted for nearly a third of all employees, at 32% in 2018, up from a little over 10% in 1996 (Alexander, 2019, p 3).

The proportion of men working full time decreased from 95% to 81% between 1978 and 2018. “In this same period, the share of women working full-time fell from around two-thirds to half” (Cassels et al 2018a, p viii). While part time work has increased more rapidly among men over the last five years, it is clearly coming from a much lower base (Carney and Stanford 2018, p 7).

Part time work is, of course, often associated with higher levels of unpaid caring work and is highly gendered. For parents whose youngest dependent child was under six, three in five employed mothers worked part time compared to less than one in ten employed fathers (ABS 2020b).

Part time work, in itself, is not considered to be a measure of precarity. It has enabled women’s rapid entrance into the workforce over the last several decades, while they continue to be responsible for the bulk of unpaid care and domestic work. However, rapid increases in part time work can point to underemployment and underutilisation if the hours are not the preference of the worker.

In fact, in 2017, 27% of part time workers would have preferred to work more hours, with more men than women preferring more hours. This high proportion points to a lack of full-time opportunities, “…rather than to a preference by workers for part time schedules” (Carney and Stanford 2018, p 8). In 2020, the labour force underutilisation rate in Australia in 2019–20 for those aged 20–74 years old was higher for women, at 15.1% than it was for men, at 12.1% (ABS 2020b).

- **Casual work**

Alongside the increase in part time work, casual work has burgeoned in Australia. In August 2020, there were 2.3 million casual employees in the Australian workforce, representing 22% of employees, down from 2.6 million, or 24% in February 2020 (ABS 2020c).

Part time work is strongly associated with casual employment, with most part time jobs being casual. One in eight full time positions were also casual in 2017, however. Carney and Stanford note that “[a]s with part-time employment, the incidence of casual work is higher among women (27 per cent in 2017), but it is growing twice as fast among men” (Carney and Stanford 2018, p. 10).

In 2019, for all employees aged 15 years and over, the gender gap in casual work was continuing to close, with 26.4% of women in casual employment compared to 22.5% of men (ABS 2020b, based on access to paid leave entitlements). Women in their reproductive years were the most likely to be employed casually, at 36.3% for women aged 15-34, compared to men, where those aged 65 years or older were most likely to be employed casually, at 38.1%.

The original intention of casual employment was to provide a pool of short-term appointments, yet over half of casual employees are engaged for over a year, and 15% for more than five years (Rawling, 2015, p 252).

Many workers benefit from the flexibility of casual work, but for many others, this flexibility is illusionary, as the ability to refuse work is tied strongly to its ready availability and the goodwill of the employer. Casualisation arguably exerts downwards pressure on the wages,

conditions and job quality of all employees, not just casuals, and there is "…a clear association between precarious work and a deterioration in wages and working conditions" (Rawling, 2015, p 253).

It is worth noting that casual work is not the domain only of low skilled, low paid occupations. The education sector in Australia relies heavily on casual or fixed term employment. In Victoria, for example, a record 68.7% of staff were employed as casuals or on short-term contracts in 2020. Education and Training is an industry with one of the highest proportions of women aged 20-74, with a 71.4 % female workforce (ABS 2020b).

- **Fixed term contracts**

In addition to casual work, other forms of insecure work have become another increasingly prominent feature of the workforce, with a 2015 estimate suggesting that at least 20 % of all workers comprise independent contractors, labour hire workers and fixed-term contractors (Rawling, 2015, p 252).

Fixed term contracts include leave provisions, but those employees may have fewer rights to secure employment. While the courts have interpreted these contracts so as not unreasonably to exclude unfair dismissal claims,[1] employees on fixed term contracts may feel themselves to be more insecure in their employment, and in many cases they are.

Once again, women are over-represented amongst workers on fixed term contracts. "This is primarily due to the fact that women dominate industries in which fixed-term contracts are concentrated" (Alexander 2018, p 6). In organisations and industries where there is a high proportion of employees on fixed term contracts, women are more likely to predominate amongst those on contract Alexander 2018, p 6). This exacerbates inequities for women workers in terms of career development and security.

- **Independent contractors and sham contracting**

There has been a significant increase in independent contractors within the Australian workforce over the last two decades, and a rhetorical focus by successive governments on encouraging entrepreneurialism. In August 2020, there were one million independent contractors in the Australian workforce, representing 8.2% of the workforce (ABS 2020c).

Clearly the opportunity to own and run one's own business is welcomed by many Australians, and many value the autonomy and flexibility that working on one's own account confers. This is particularly important for many women who are seeking to balance paid work and family responsibilities.

However, there is evidence that for many workers, independent contractor status is a form of insecure employment. The Centre for Future Work has estimated that "…almost two-thirds of self-employed workers are not incorporated, and almost 60 per cent have no employees (meaning their access to time off work or continuing income in case of illness is minimal)" (Carney and Stanford 2018, p 11). The Centre for Future Work has also estimated that "…median earnings for part-time self-employed individuals with no employees were 60 per cent lower than for full-time paid employees".

[1] See for example *Khayam v Navitas English Pty Ltd [2017] FWCFB 1524.*

Many unions and academics are concerned that a significant proportion of the independent contractors in the workforce are operating as sham contractors, when they are really dependent on one head contractor and in effect are employees working in insecure arrangements.

As we shall argue later (Term of Reference (e)) Sham contracting is an unlawful method of disguising an employment relationship as an independent contracting arrangement (s. 357 *Fair Work Act 2009* (Cth)). This works to the competitive advantage of employers who reduce their labour costs at the expense of their workers' legitimate entitlements and rights to security.

- **multiple job holders and the gig economy**

The prevalence of workers with more than one job has remained stable over the last ten years at around eight %. According to Cassells et al (2008a, p ix) "[w]omen and younger workers are more likely to hold multiple jobs. Around 17% of women aged 18 to 24 and a tenth of women aged between 25 and 34 have two or more jobs."

However, it appears the traditional data collections are missing gig economy data. A recent paper by the Actuaries Institute suggests that the gig economy may have grown nine-fold between 2015-2019 to $6.3 billion and may engage up to 250,000 workers. The Institute notes that the magnitude is difficult to measure because of the limitations of traditional and ABS data collections (Actuaries Institute 2020, p 4).

Gig workers do not receive salaries but are paid for the services or 'gigs' they perform (Parliament of Victoria 2018).

The gig economy encompasses a range of skill sets from highly skilled consultants and artists to home food delivery or personal transport drivers who are in very low paid, low skilled work. All share income insecurity, but some might well be winners, even with higher anxiety about their economic futures. For example, the *Harvard Business Review* (Petriglieri et al 2018) published qualitative research about gig workers in the US, who were artists or knowledge workers.

> All those we studied acknowledged that they felt a host of personal, social, and economic anxieties without the cover and support of a traditional employer — but they also claimed that their independence was a choice and that they would not give up the benefits that came with it. Although they worried about unpredictable schedules and finances, they also felt they had mustered more courage and were leading richer lives than their corporate counterparts.

Other gig economy workers, however, are at the bottom of the heap, and suffer insecure work without the same benefits. Many earn less than the minimum wage and lack guaranteed work or pay (Parliament of Victoria 2018, p 3). The Actuaries Institute research paper finds "…workers who spend five to 10 years of their productive labour years participating in the gig economy may be between $48,000 or $92,000 worse-off in superannuation savings at retirement" relative to a minimum wage employee (Actuaries Institute 2020, p 30).

It is important to tease out the bifurcated nature and the different experiences within this term. And we need to better tailor our regular data collections to capture this form of work

and its trends. For example, the ABS captures the numbers of independent contractors, who comprise around a stable 8% of total employed people. And it captures those with multiple jobs. But together, these fail to capture the emergence of the gig economy.

As a result, there is little information about the demographics of this form of work. It does affect younger workers more than older workers and it is highly gender segregated. Recent research concludes that "[m]en dominate platforms which specialise in what might be considered traditionally male tasks like transport and women dominate platforms which specialise in more traditional female tasks like caring" (Churchill and Craig 2019). This research suggests women engage in the gig economy more for its support for their management of family responsibilities, whereas men seem to use gig work to supplement their incomes (Churchill and Craig 2019). Around one in five women described the money earned from gig work as a source of income while they looked for more permanent work, pointing to financial precarity from gig work (Churchill, Ravn and Craig 2019).

Likewise, the law has failed to keep up with the emergence of this phenomenon. Jurisprudence is beginning to emerge that reclassifies workers as employees who were originally classified as contractors.[2] It is clear there is a role for the legislature to address this issue further. The President of the Fair Work Commission has noted "[p]erhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy" (Parliament of Victoria 2018, p 7). Both are needed.

- **Labour hire and supply chain issues**

Labour hire companies have been part of the Australian labour landscape for decades. Currently around 3% of employees are registered with a labour hire firm or employment agency (ABS 2020c). Labour hire arrangements can be a valuable source of flexible, short term employment and help employees to gain a foothold in an industry or position. Again, it is very diverse, covering highly skilled professional and knowledge workers as well as entry-level, unskilled workers (Black Economy Task force 2017, p 204).

There is little information about the demographic characteristics of labour hire employment, although it is clear there are some industries and sectors where it is more prevalent, or represents a significant proportion of the permanent workforce, such as in horticulture, agriculture, mining, construction and cleaning (Hepworth 2020).

Parts of the labour hire industry operate unscrupulously or unlawfully to exploit vulnerable workers, up to and including forms of modern slavery, but also including higher injury rates and lower levels of investment in training and development for labour hire workers than permanent employees (Hepworth 2020).

Hepworth notes that

> [w]hile casual work and labour hire are distinct categories of precarious work, there is significant overlap between these categories. In the commercial cleaning sector, most - if not all - contract cleaners are also casual. (p 15)

[2] See for example, in the UK context, *Aslam & Ors v Uber BV & Ors* UKET 2202551/2015; upheld in *Uber v Aslam & Ors* UKEAT/0056/17/DA, 20 November 2017.

Longer and more complex supply chains contribute to this unlawful or unscrupulous behaviour, where multiple intermediary parties to insulate themselves from liabilities towards workers. "The obligations of the lead firm are passed down the chain and each commercial entity takes its cut of profit. Inevitably the parties near the base of the chain often have low profit margins and experience intense competition, necessitating the engagement of cheaper, precarious labour" (Rawling 2015, p 253). In this vacuum, exploitative and even illegal supplier practices can thrive.

With more complex supply chains, it can be difficult for even well-intentioned contractors to identify poor practices.

- **Perceptions of precarity**

It is important to consider workers' own assessments of the insecurity of their employment in identifying precarious work in Australia. As Jeff Borland notes, "…workers' beliefs about their job security are not misguided. They are reflecting the reality of the labour market in Australia."

The Household, Income and Labour Dynamics Survey Australia (HILDA) tracks a number of criteria that are useful for assessing workers' feelings about the security of their employment: self-reported probability of losing one's job in the next 12 months and self-reported dissatisfaction with job security. Cassells et al (2018a, p 29) note that "[t]he proportion of workers that are dissatisfied with their job security has been rising in recent years, but remains at below that of 2003 levels, for both men and women". They also note that:

> [w]orkers in low-skilled occupations report low levels of satisfaction with their job security compared to those in high-skilled occupations. Employees of their own business are significantly happier than other workers. Casual workers are much less satisfied with their jobs than those with permanent and fixed term contracts.

The Australian Bureau of Statistics tracks numbers of workers who do not expect to be working for their current employer in 12 months, and in August 2020, 9.2 % did not expect to be working for current employer in 12 months (ABS 2020c).

Many in the Australian labour force may also reflect on the uncertainty about their economic future that Australia's stagnating wages suggests. Even prior to COVID-19, and from 2012 onwards, "…annual wage increases have decelerated to the slowest pace in decades" (Carney and Stanford 2018, p 3). Among women working casually, for example, wages increased by only 1.7 % between 2010 and 2016 (Cassells et al 2018a). In short, "[f]or years, relatively positive unemployment statistics have masked the nature of insecure work in Australia. Today, more Australians feel uncomfortable in their position at work, in their ability to make ends meet than at many times in Australia's past" (Alexander 2018, p 15).

- **Discussion**

While there is some disagreement about the degree and nature of precarious employment in Australia, most commentators and academics agree that job insecurity has risen in recent years. It is clear that, while the rate of precarity is increasing for both women and men, it is

increasing more quickly among men. However, women still work in more precarious employment overall (see for example Cassells et al 2018).

It may also seem that rates of precarious work have not increased as much as the perception of precarious work, yet it is also the case that aggregated data for the whole workforce have been obscuring an increasingly bifurcated workforce, with clear winners and losers. It seems that regular data collections are failing to elucidate the current situation for some groups of insecure workers.

Many of the industrial and workplace relations changes that have been introduced since the 1990s have led to new forms of work. While they have been useful for some, there are pockets and segments of significantly insecure work. It is the role of government to ensure that we are not seeing growing inequality and pockets of significant disadvantage, particularly on gender lines.

This bifurcated workforce is having, and will continue to have, effects on superannuation outcomes and retirement incomes for many Australian workers. Part time workers with broken working patterns will continue to fail to accrue sufficient superannuation to retire comfortably. Independent contractors and gig workers may fail to accrue any superannuation guarantee payments, leading to inadequate retirement incomes. Our highly gendered superannuation system, based on a traditional standard male working life, is becoming even less fit for purpose, and it should be reconsidered, so that all Australians, particularly those who spent significant portions of their lives caring for others, do not retire into poverty.

There are significant divisions across age groups, with increased precarity a reality for younger workers. While younger workers are experiencing the greatest degree of precarity, it is unclear whether these workers will 'graduate' to more secure work as they gain experience in the workforce. We do not have adequate information about whether this group of workers will remain entrenched in less secure employment throughout their careers. Even if it is a 'rite of passage' for younger workers, this does not justify the increase in precarious employment that these younger workers face. It appears the "…uncertainty of the education to-work nexus and precarious work in general is having a significant impact upon how young people construct their identity and imagine their futures, which is heavily classed and gendered" (Churchill, Rayn and Craig 2019).

Meanwhile, the gender gap in precarious work may be decreasing, as men's work becomes increasingly precarious. The gender gap remains, however, with women much more likely to be employed in precarious work. Research suggests that:

> …young women …are hopeful about the opportunities in the gig economy era and into the future, but find that the gains in education do not necessarily advantage them in the current labour market, forcing them not only into gig or gig-like work but also highly gendered roles at home. (Churchill, Rayn and Craig 2019)

It is vital that government take steps to get in front of this issue to deliver continued progress towards gender equality, rather than seeing some groups of workers locked out of

secure work and falling back into traditional gender norms that will continue to hold back the economy and gender equality.

A useful approach would be for labour market reform to encourage flexibility that works for both worker and employer, and promotes innovative working practices, but which protects workers most at risk of exploitation and marginalisation "…through a 'regulated flexibility' which provides flexibility for employers and security and dignity for workers" (Rawling, 2018, p 255).

In 2019, the OECD and ILO made a number of recommendations aimed at increasing women's workforce participation in G20 nations generally. These recommendations include that governments should:

- increase access to leave provisions for all workers
- change the stereotypes and norms around unpaid work and care, so that women and men can better share this work and remove one of the major impediments to women's participation in quality paid work
- reduce gender segregation in the workforce, and
- improve the evidence base on the gender gaps in employment.

Importantly, they also recommend that governments ensure "…non-standard forms of employment do not weaken employment rights" generally (OECD and ILO 2019, p 4).

It is important for government to support and protect vulnerable workers and promote gender equality in the workforce, including to enable women and men to better share the unpaid workload. Otherwise, we will merely exacerbate the gendered workforce and unpaid work at home and further entrench harmful gender norms. This will interfere with women's engagement in paid work, their productivity at work and their security in retirement.

b) the risk of insecure or precarious work exposed or exacerbated by the COVID-19 crisis

- **Australia has generally done well**

Australia has fared better than most other nations through the COVID-19 pandemic. Yet some worrying trends are emerging. Women have suffered particularly, and their workforce engagement has been particularly affected. As usual with shocks, the pandemic revealed but also exacerbated inequalities that already existed. Far from securing a stable economy and community, these increasing inequalities threaten Australia's social cohesion and co-operation at a time when they are most needed.

The OECD notes that Australia's unemployment rate, recorded at 6.6% in February 2021, is better than the OECD average at 6.9%. The ABS notes that, by its calculations, in January 2021, the unemployment rate decreased 0.2 percentage points to 6.4 %. It states that, by January 2021, employment was only 59, 000 people lower than March 2020 nationally. Importantly, the underutilisation rate fell 0.6 percentage points to 14.5 %. This is now only

half a per centage point higher than its March 2020 level. Participation rates are also remaining strong, suggesting that there has not been a significant rise in people severing their ties with the labour market entirely.

These are all very positive signs. In no small part, these results are due to the introduction of the JobKeeper supplement.

- **But not all is well - insecurity appears to be increasing**

However, Australia has seen significant shifts in the composition of the workforce through the pandemic, and there are some groups who have borne the brunt of the pain. According to the ABS, Casuals have suffered the most, with a drop of 3% in the proportion of casuals in the workforce. Casual workers were eight times more likely to lose their jobs than workers in permanent positions in the early months of the pandemic (Nahum and Stanford 2020). Workers who already suffered job insecurity and low incomes have been hardest hit (Nahum and Stanford 2020). The result, argue Nahum and Stanford (2020):

> will be a step increase in the broad incidence of insecure work, setting the stage for further dislocation of labour in the future. Both on the way down, and on the way back up, therefore, this pandemic has highlighted the vulnerability faced by workers in non-standard jobs, and accelerated the trend toward insecure work. (p 3)

In part, casual work exists to provide employers with the flexibility to up- or down-scale their workforces, so arguably, the arrangements operated as intended. However, this was potentially accelerated, particularly in the early stages of recovery, in response to the JobKeeper exclusions relating to shorter term casuals.[3]

It also appears that insecure work is increasing again, as "[f]rom May through November, over 60 percent of all new waged jobs were casual positions…", representing the fastest ever expansion in casual employment (Nahum and Stanford 2020, p 12).

It is positive that self-employment is also surging as the economy opens again, but Nahum and Stanford argue that the proportion of "…owner-managers in relatively insecure situations: without incorporation, without any employees, or both" is now greater than pre-pandemic (Nahum and Stanford 2020, p 15).

- **Not all sectors are affected equally - and that's gendered**

The pandemic economic downturn is obviously very different to other recessions, given the extent of the shutdown and the specific, targeted effects, with "…a radical short-term shift in the mix of economic activities – of which an unknown, but possibly significant, amount will be persistent" (Costa Dias et al 2020, p 371).

[3] Casuals who have worked for a business for fewer than 12 months (other than some New Zealanders), local council workers, workers in certain foreign-controlled businesses, employees at most universities and temporary visa holders were also excluded from the scheme. Women were disproportionately represented in the short-term casual roles that were currently ineligible for the JobKeeper support, especially those in the hospitality, health care and retail sectors.

The health sector has been the most affected by the pandemic, both in terms of increased workload and health risks.

A 2019 World Health Organization study of 104 countries that found women still dominate nursing and social care staff (70%), earn about 30% less than their male counterparts, and are more likely to be employed on a part-time or irregular basis (Boniol et al 2019, p 4). In Victoria, doctors comprised five % of health care worker COVID-19 cases between July and August 2020, with 63 doctors thought to have been infected during this period. Nurses comprised 40 %, and aged care workers comprised another 40 % (Smith 2020).

Workers in other sectors are also highly exposed to infection by reason of their work. Workers in retail, health or in caring roles, travel and transportation, entertainment and personal services, and other sensitive retail and manufacturing are exposed through workforce requirements and inadequate welfare structures (Zarkov 2020).

These roles are often undervalued and very low paid and during the pandemic workers faced increased stress, overwork and client or customer violence. This increased stress and risk is layered on top of concerns for job security, which evidence shows "…leads to workers coming to work sick and refusing to take time off', that casual working arrangements "…represent a threat, not just to individual workers…but to the health of all Australians" (McGann et al 2012).

The Australasian Centre for Corporate Responsibility (ACCR) reported on labour hire and contracting in Australia in post-Covid-19 in May 2020. It found similar risks, such as precarious workers feeling fearful of losing their jobs, poor training generally and in the use of personal protective equipment, and low levels of reporting of safety and workplace breaches (Hepworth 2020). Workers in many forms of precarious or insecure work lack access to paid leave.

As we move through the pandemic, some sectors will see a permanent, or at least persistent, change.

> Some fraction of those now turning to online deliveries may discover they like them and will continue using them, while the rapid development and adoption of virtual technologies may inflict a sustained drop in demand for air travel and a growth in jobs that utilise, or depend on, remote working or e-commerce. (Costa Dias et al 2020, p. 373)

This again may create winners and losers. Some sectors, and some workers, may benefit from these changes; others will find their work even more stressful and precarious, or find themselves without work in their sectors. It is important that government monitor these changes closely and protect the most vulnerable workers.

- **An intersectional approach is crucial**

The risks and impacts of any shock, including the COVID-9 pandemic, are not equally felt across any population, but are shaped by "…a web of intersecting factors including age, sex, gender, heath status, geographic location, disability, migration status, race/ethnicity and

socio-economic status…[P]rocesses and structures of power…create an interplay of advantages and vulnerabilities" (Hankivsky and Kapilashrami 2020).

Data are limited in Australia, but in the UK and the USA, there are alarming outcomes for Black and minority ethnic communities, both in terms of health and employment outcomes (Heilman, Castro Bernardini and Pfeifer 2020; see also Hankivsky and Kapilashrami 2020). Young people have been particularly harshly affected in Australia. Through the pandemic, over the 12 months to October 2020, youth unemployment increased by 3.1 %, nearly twice the increase in the overall rate (Maury et al 2020, p 5).

While Australia's unemployment rate is comparatively low, "[i]t is likely that individuals are moving in to lower-paid, precarious employment, and thus are still dependent on income support" as well as being in some paid employment (Maury et al 2020, p 5). They estimate that about 1.5 million Australians, or about 10% of people of working age, received JobSeeker and the unemployed Youth Allowance in September 2020 (p 5).

Australia must do better in monitoring and responding to shocks, including the shock presented by the pandemic, on particular groups of workers in Australia, so that those facing particular vulnerabilities are protected. In the context of the COVID-19 pandemic, these vulnerabilities have affected not only those populations, but have had an impact on the broader community and Australia's ability to contain the pandemic.

We are not "all in this together" because of the different levels of susceptibility to the pandemic that different characteristics present, but nevertheless, ultimately, the whole society is harmed by insecurity and vulnerability of any of its members.

Australia has failed to effectively address the particular vulnerabilities of some populations, and where we have acted, for example by providing paid covid leave, these have been insufficient.

- **Women have been hit hard**

Women were disproportionately employed in the sectors hit hardest by initial COVID-19 shutdowns in Australia, including retail, hospitality, and personal services. As noted, women are heavily concentrated in casual and part time roles, and these positions were eliminated first.

COVID-19 shutdowns significantly increased the amount of unpaid work, while paid work time was slightly lower. Early research has shown that the increased time burdens imposed by the COVID-19 shutdowns were greater for women, but "…gender gaps somewhat narrowed because the relative increase in childcare was higher for fathers". Overall, however, women found it much harder to balance their paid work and family obligations through the shutdowns (Craig and Churchill 2020, p 66).

Many workers could relocate their work to the home, but many women found it too difficult to "…continue their paid jobs while caring for children at the same time, in the same place. This forced many women to reduce their hours of work, or to give up paid work altogether" (Nahum and Stanford 2020, p 18).

For all these reasons, women's employment suffered most through the early stages of the pandemic. Employment for women declined almost 8% between February and May:

> …more than 2 percentage points worse than the corresponding drop for men. And the rebound in employment since May has not closed this gender gap. As of November, women's employment was still about 1.7% lower than in February. That cumulative decline in women's employment was about 3 times larger than for men. (Nahum and Stanford 2020, p 18).

Analysis by Good Shepherd Australia and New Zealand points out that the gender gap in underemployment through the pandemic exploded, with women more likely to be underemployed than men before the pandemic, but at the peak of the lockdown in April 2020, "…the number of women in this situation more than quadrupled, to a full 66 per cent higher than the rate for men" (Maury et al 2020, p 9). By September 2020, Good Shepherd noted, the levels had reverted more closely to pre-pandemic levels, but a greater gender gap than previously remains (p 9).

In July 2020, the McKinsey Global Institute estimated that if we fail to respond to these gendered effects on employment through the pandemic, *"…*global GDP growth could be $1 trillion lower in 2030 than it would be if women's unemployment simply tracked that of men in each sector". On the other hand, it noted, "…taking action now to advance gender equality could be valuable, adding $13 trillion to global GDP in 2030 compared with the gender-regressive scenario" (Madgavkar, A et al 2020).

- **Risks of even more inequality in sharing unpaid care and domestic work – a slow burn issue**

McKinsey Global Institute notes that COVID-19 has increased women's unpaid family workload globally, "…by an estimated 30 per cent in India and by 1.5 to 2 hours in the United States" (Madgavkar, A et al 2020). As noted above (Craig and Churchill 2020), it certainly seems to be the case in Australia. The McKinsey Global Institute concludes "…it is not surprising that women have dropped out of the workforce at a higher rate than explained by labor-market dynamics alone" (Madgavkar, A et al 2020).

Researchers in the UK have noted that:

> [t]he way that couples divide paid work and household responsibilities during this crisis could have an effect that lasts long after the lockdown is lifted. If, on average, mothers are more likely to step back from paid work during this crisis (either voluntarily or through temporary or permanent job loss) and are more likely to pick up more of the domestic responsibilities, they could face a long-run hit to their earnings prospects. This risks reversing some of the progress that has been made on closing the gender wage gap. (Andrew et al 2020)

On the other hand, it is possible that the shock could result in a more equal division of labour between women and men, as many men are "…now at home all day with more exposure to the scale and scope of housework and childcare" (Andrew et al 2020).

In Australia, the combination of massive increases to unpaid caring and domestic work, predominantly shouldered by women, the greater harm to women's workforce engagement due to their forms of work and sectors in which women work, as well as government policies that have hit women hardest, such as excluding shorter term casuals and early childhood education and care workers from access to JobKeeper and eliminating access to free early childhood education and care (ACTU 2020), when aggregated, raise a very serious risk that women will reduce their paid work or leave the paid workforce entirely, and that this will have permanent or at least persistent effects.

This is a very serious risk for Australia's progress towards gender equality and for our economic recovery.

- **Discussion**

It is essential that the federal Government monitors and reports effectively on the trends and issues around insecure work -- particularly as we emerge from the COVID pandemic -- and intervenes to ensure the nation shows real progress towards gender equality and decent, secure work for all. Together, these outcomes will support Australia's long term economic health.

Unfortunately, as the National Foundation for Australian Women's Gender Lens on the Budget Report demonstrates year after year, the Australian Government is paying insufficient attention to gender issues in policy and the Budget.

This inquiry offers an important opportunity to ensure that post-pandemic Australia is better served by its policy settings than pre-pandemic Australia. There remains much to be done to ensure Australia is able to advance towards real equality between women and men.

The National Foundation for Australian Women reiterates the recommendation we have made in other contexts – that the Office for Women, the Australian Bureau of Statistics and other relevant government agencies should publish a Women's Recovery Plan – a coordinated program of work to identify differential impacts on women and men, track emerging gender inequalities and pursue new opportunities through this crisis to address existing inequalities. All relevant data and research should be made publicly available in real time so that civil society and women's organisations are able to contribute to the public discussion.

Recommendation 1: Data collection and analysis

The Government should

- ensure better data collection to capture alternative and insecure forms of work, including labour hire, sham contracting and gig work;

- better monitor and report on risks of insecure work and exploitation among particular groups in Australia's workforce, including disaggregating data by disability, indigeneity, ethnicity and visa status with a view to better protecting those segments of the workforce that are particularly vulnerable to insecure work; and

- direct the Office for Women, the Australian Bureau of Statistics and other relevant government agencies to prepare a Women's Recovery Plan – a coordinated program of work to identify differential impacts on women and men, track emerging gender inequalities and pursue new opportunities through this crisis to address existing inequalities. All relevant data and research should be made publicly available in real time so that civil society and women's organisations are able to contribute to the public discussion.

Recommendation 2: systemic measures

- The federal Government must take a lead in supporting the more equal division of paid work and unpaid care between women and men by:
    - legislating for stronger protections from sexual violence in work and strengthening the response by government in relation to its own parliamentary and public service workforces
    - legislating, as recommended in this submission, to reduce the incidence of insecure work and better protect workers
    - developing campaigns to support families more equally share unpaid work
    - providing leadership to create stronger norms and culture of gender equality.

- The federal Government should better focus federal budgets towards ameliorating women's greater workforce disadvantages.

c) workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy

The prevailing employment framework, along with demand created by consumer trends, are conspiring to create a rapid expansion in the 'gig economy'. The gig economy is defined largely through the use of digital platforms as intermediaries, connecting workers (or suppliers) with consumers, for time- and scope-limited tasks. More traditional piecemeal work, organised through 'bricks and mortar' supply agencies, can however also be considered part of the 'gig economy' where work is allocated on a task-basis, with no guarantees of an ongoing employment relationship.

It is agreed largely that the major defining characteristic of gig work is that it is 'redefin[ing] workers as independent contracts that can be made to assume risks previously handled by the firm' (Kalleberg, 2018, p 241).

The growing prevalence of the gig economy is covered elsewhere in this submission (see Term of Reference (a)) noting, for example Actuaries Institute (2020, p 4) research suggesting that the gig economy may have grown nine-fold between 2015 and 2019 and may engage up to 250,000 workers.

Gig work reflects the broader workforce and economy by being highly gendered: women dominate in caring and clerical roles, whereas men tend to take gigs in the technology,

transport and delivery sectors. According to research by Lyn Craig and Brendan Churchill (2019, p 741) women are more likely than men to choose gig work due to the flexibility it confers, whereas men are more likely than women to find this type of work financially rewarding.

Although there is a lack of data in Australia concerning the gig economy (see Recommendation 1) Craig and Churchill present evidence that warns against assuming that women's (or young people's or the otherwise underemployed) work in the sector comprises 'pin money' and find far more overwhelming evidence that income from gig work is a significant component in sustaining livelihoods.

As an important – and in many cases only (even if multiple jobs are held, they may all be in the gig economy) – source of income, gig work tends to pay poorly. Codagnon et al (2016, p 6), in looking at gig work in the European Union, found that most gig workers are underemployed or self-employed and earn very low to modest wages. Roles dominated by women within the gig economy are likely to pay less than those filled by men, and 'men's earnings, on average, are higher than women's in platform-based work, with differentials comparable to that in the labour market as a whole' (Milkman 2020, p 6). In food delivery services (such as for supermarkets), Milkman et al (2020, p 2) found that the vast majority of 'pickers' were women, and the vast majority of drivers were men, with drivers earning more than pickers. Even within discrete fields, gender pay gaps are evident. Cook et al (2018, p 2), for example, report that within the rideshare sector female drivers earned seven per cent less per hour than male drivers.

On top of poor pay, gig workers tend to take on a range of risks that have historically been borne by the traditional employer or the government. Notwithstanding some degree of tax deductibility, gig workers assume costs associated with purchasing and maintaining infrastructure such as cars, technology and other equipment; as well as insurances to cover material assets and income lost through sickness or injury. Other risks achieve less deductibility such as losses associated with cancellations or payment refusals by clients, along with significant administrative imposts associated with scheduling and the self-management of superannuation, insurances and taxation.

While not all gigs are equal – and some, particularly those in the creative and technological industries can be rewarding and remunerative – the majority of gigs, and particularly those undertaken by women, tend to be low paid, low quality and poorly protected. Evidence suggests that women are driven to gig work as a means of supplementing other poorly paid employment (possibly also in the gig economy), and to balance the competing demands of work and caring responsibilities.

On 22 September 2018, the Victorian Government announced the establishment of an independent Inquiry into the Victorian On-Demand Workforce, with terms of reference including to consider and report on the extent and nature of the on-demand economy, for the purposes of considering its impact on both the labour market and economy more broadly. The inquiry reported in July 2020, finding that there was a compelling case for change, and making twenty recommendations to help 'provide genuine choice, fair conduct and certainty for on-demand workers. The recommendations included:

The Inquiry recognised the efficiencies of the Federal Government taking a strong and decisive lead in this area.

Recommendation 3

The Federal Government take a strong and decisive lead in national system reforms to achieve fair conduct and certainty for gig workers, including:

- clarifying and codifying work status to reduce uncertainty about status and the application of entitlements, protections and obligations for workers and businesses;
- aligning work status across workplace laws (including employment, superannuation and workplace health and safety laws);
- establishing a Streamlined Support Agency to provide advice and support to self-employed platform workers;
- establishing a specialised body to assist in resolving disputes about work status;
- promoting fair conduct for platform workers by establishing Fair Conduct and Accountability Standards;
- improving existing unfair contracts remedies for platform workers; and
- introducing enhanced enforcement to ensure compliance with laws.

Recommendation 4

That the express needs and circumstances of female gig workers – particularly in relation to unequal pay and the unequal burden of caring responsibilities – be taken into account when developing national approaches to achieve fair conduct and certainty for gig workers.

d) the aspirations of Australians including income and housing security, and dignity in retirement

The extent of insecure work in the Australian economy has been identified above. To the extent that a worker is under-employed this creates income insecurity, with the worker at risk of being unable to meet their living costs. This is particularly problematic where work patterns are erratic so that workers are not sure what their income will be week by week. Where the worker is the second income earner in the household, as is the case for many women, the household will need to budget on the basis that the second income is not predictable.

Jobseeker and Youth Allowance are available to eligible recipients who report earnings over $300 pw (from September 2020). Data from January 2021 (Data.gov.au) indicate that women were more likely than men to have some earnings, but still required income support: 26.5% of female Youth Allowance (YA) recipients compared to 17% of male YA recipients; and 25.3% of female Jobseeker recipients compared to 14.7% of male Jobseeker recipients. Although the numbers are reducing as the economy recovers from the COVID shock, in January 2021 there were 274,172 recipients of income support who had work but were not earning enough to support themselves without Jobseeker.

The consequences of precarious work and precarious income are that workers cannot commit to long term expenditure, including housing; and their contributions to superannuation are lower, which contributes to a lack of security in retirement. It is worth noting that although the overall number of women on Jobseeker is lower than that for men, the age profile is different: the number of women on income support increases in the over 45 age brackets, while for males the highest numbers of Jobseeker recipients are under the age of 34 (Data.gov.au, Table 3). The data does not cross-reference age against income earned.

A matter of particular concern for women in this situation is that it may be difficult to secure childcare. Childcare places are generally allocated based on a regular pattern of use, leaving women in precarious employment either paying for care on days when they are not required as they are not working; or unable to accept work as they cannot arrange childcare. For many young women in precarious work, decisions relating to childbearing are driven by their work situation (Chan and Tweedie, 2015).

Housing is a matter of particular concern, as it generally requires a long-term commitment either through a lease or through home ownership. There is longstanding research showing that precarious housing has adverse effects on wellbeing, including economic participation (Hulse and Saugeres, 2008). Baker et al (2020) examined the housing consequences for renters during the COVID pandemic, and found that during COVID the buffers of the Jobseeker supplement and Jobseeker provided some relief for renters, but that the removal of these supports would result in hardship and evictions. Workers who are in less secure employment were more adversely affected during the pandemic (Leishman et al, 2020). It is usual for rental property managers to require proof that an applicant can pay the rent as it comes due, and it can be expected that as the rental market tightens and rent moratoriums are lifted it will become more difficult for people in insecure employment to be able to compete.

For aspiring homeowners, there have been a number of issues that have limited their ability to enter the housing market over the last decade. While interest rates have been reduced to record low rates, the property market has surged in most capital cities in Australia. In order to apply for a loan, first home buyers must save a deposit and then obtain a loan – neither of which is easy when in insecure work.

In particular, APRA is required to establish prudential standards to regulate lending institutions. APG 223 sets out prudential requirements for mortgage lending. Under changes to this guidance in 2017, banks adopted a more rigorous approach to assessing income and expenses of applicants when assessing whether they could service a loan. This creates a particular hurdle for applicants in insecure work, as it is more difficult to show the ability to service debt in the future.

Although in 2019 there was some easing of the requirements in relation to the interest rate to be applied in determining serviceability, the assessment of income, living expenses and other debts (APG 223 paras 38 – 46) were not reviewed at that time. Home ownership is still out of reach for many workers in insecure employment.

Current homeowners who fall into precarious employment may also face mortgage stress as a result. Ong et al (2019) examined the levels of mortgage stress among homeowners over the age of 55, and found that more than 20% of homeowners in mortgage stress were underemployed (p 27). This poses additional economic risk in retirement, with superannuation applied to repay the debt, and the homeowner becoming more likely to rely on the age pension.

Ong et al also noted that there is a gender dimension to mortgage stress among older homeowners: older women in mortgage stress were more likely to experience lower mental health and higher psychological distress scores than their male counterparts. They are also affected by career interruptions, which is another manifestation of insecure work; and are more likely to be single following marriage breakdown (Ong et al 2019, pp 4; 105).

The structure of our superannuation system is another cause for concern for workers in insecure work. The system was designed for a labour market where most workers were connected to a particular employer or industry, with the superannuation guarantee managed and enforced through that employment arrangement.

The Retirement Income Review (Treasury 2020, p 235) notes that:

> As superannuation is an employment-based scheme, full-time and continuously employed people and those at the higher end of the income distribution make more superannuation contributions and receive more superannuation tax concessions. People with the lowest lifetime incomes generally receive most of the Age Pension payments.

The Retirement Income Review also notes that the two categories of retirees who are most likely to experience income insecurity in retirement are those who do not own a home, and those who leave the workforce early (Treasury 2020, p 137). Both of these risk factors are overrepresented among women in insecure work. The data show a high proportion of women over 45 among the long term unemployed/underemployed; and women tend to leave the paid workforce earlier than men (Treasury 2020, p 257). As already noted, workers in insecure work are more likely to be in housing stress, and this will be reflected in retirement outcomes (Ong et al, 2019; Treasury 2020).

A matter of particular concern for workers in insecure work is the $450 per month threshold for superannuation guarantee payments. Employers are not required to pay superannuation guarantee payments in respect of these workers, 63% of whom are women (Treasury 2020, p 7). This exemption is anachronistic and should be removed. The exemption affects primarily low paid and casual employees, and it encourages employers to limit the hours offered to those employees to ensure that they remain below that threshold. This exemption has been in place since the introduction of the superannuation guarantee, and it predates the ability for current payroll technology to process small amounts cost effectively.

This anachronism must be removed in the interests of fairness.

Recommendation 5

The $450 monthly earnings threshold for the superannuation guarantee should be repealed.

There is also an exemption in s.11 (2) of the Superannuation Guarantee Administration Act for work that is wholly or principally of a domestic or private nature, for less than 30 hours per week. The Explanatory Memorandum uses the example of a part time Nanny or a housekeeper and appears to be intended to remove a business obligation from a householder.

In the context of the care industry, workers may be engaged under the NDIS or Home Aged Care to provide services that are essentially of a private or domestic nature, and these may be engaged directly by the user, without an intermediate agency. NDIS clients have been actively advised to use this exemption when structuring their care requirements, drawing on multiple part time workers instead of one full time worker in order to remove the obligation to pay superannuation guarantee (Macdonald and Charlesworth, p. 16). Although this does make administration easier for the client, and it makes the funding stretch further, this is at the expense of the long-term economic security of the worker.

Whether funded by NDIS or Aged Care packages or engaged as nannies and housekeepers, most of these domestic workers are women, who retire with lower levels of superannuation. Systems are in place to facilitate the payment of small amounts of superannuation by small employers. The exemption is overly generous and open to abuse.

Recommendation 6

The 30-hour exemption in s.11 (2) of the Superannuation Guarantee Administration Act for work that is wholly or principally of a domestic or private nature should be reduced to 10 hours per week.

e) the effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies;

For the first time since records have been kept (Carney and Stanford 2018, p 1), fewer than half of employed Australians are counted as working in a permanent full-time paid job with leave entitlements. As noted in our response to Term of Reference (a), the displacement of secure by insecure work has not been due to a single factor such as growth in casual work. It is a constructive impermanency based on multiple strategies for enabling employers to maximise numerical flexibility, maintain a constant downward pressure on wages and side-step the responsibilities of the National Employment Standards.

Strategies that operate to displace secure work within the industrial relations system include unnecessary casualisation of ongoing and systematic work; use of flexible provisions to drive irregular hours work without casual loadings and overtime rates; and underemployment often resulting in multiple job-holding.

Strategies that operate to side-step the industrial relations system altogether involve deliberate "fissuring" of parts of the workforce – shedding direct employees and creating intermediaries between workers and the corporation profiting from the work performed. These strategies include:

- outsourcing through labour hire (arm's length through a second employer)
- short-term contracting
- sham contracting
- gig economy work or work for platforms, and
- supply chain procurement.

All of these measures drive down the income of those who work in a business and drive that business's competitors into taking similar measures. Given the current high levels of tolerance for structures to circumvent safety net obligations, it is not surprising that insecure employment is at an all-time high and wage growth is at an all-time low.

Insecure work within the industrial relations framework

- **Casual employment**

Industrial awards and agreements commonly define a 'casual employee' as 'one who is engaged and paid as such as such'. The extent of casual employment is measured by the absence of any paid leave entitlement.

It is often argued that the lack of leave entitlements is compensated by the payment of a casual loading. In practice, ABS data indicates that fewer than half of casuals receive a casual loading (Peetz, 9). Nor is the loading adequate compensation, as the Fair Work Commission (FWC) has pointed out:

> Although the casual loading for which modern awards provide notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits, particularly for adult long-term casuals who are financially dependent on their casual employment. These include attending work while sick, not taking recreational leave because of concerns about whether any absence from work will endanger future employment, the incapacity to properly balance work and attending to personal and caring responsibilities and commitments, changes in working hours without notice, and potential for the sudden loss of what had been regular work without any proper notice or adjustment payment. Additionally there are other detriments associated with casual employment of this nature, including the lack of a career path, diminished access to training and workplace participation, poorer health and safety outcomes and the inability to obtain loans from financial institutions. ([2017] FWCFB 3541, para 366)

The conventional rationale for casual employment – as the government reiterated in the Explanatory Memorandum of its Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) bill (p ii) – has always been its flexibility, the scope it offers employers to change hours and numbers of employees at short notice as required by the needs of the business. This flexibility is provided by the fact that within the industrial relations framework

of awards, agreements and National Employment Standards, most casuals can have their hours changed or be terminated without notice for any reason at the end of a shift.

However, in practice casual employment is not necessarily an employment option chosen by employers for its flexibility. Research conducted at Griffith University has shown that only about 6% of leave deprived workers are being used flexibly, as a 'narrowly-defined casual' (Peetz 2020, p 1).[4] The most recent available ABS data shows that the majority of leave-deprived workers have been with their employer for over a year and expect to be with the same employer a year into the future, and around half of them have stable hours from one week to the next and are not on standby (Peetz 2020, p 1). Fewer than half of all casual employees receive 'casual loadings' to compensate for loss of leave entitlements (Peetz 2020, p 7); the rest do not. What is more, low-wage casuals have been found to receive a wage 'penalty', given their skills, experience and the like, even though the casual loading should have had the opposite effect for those who received it (Laß and Wooden 2019).

All that remains common to casual employment within the industrial framework is exposure to termination without notice at the end of a shift. The capacity to change hours and shifts without notice and to terminate employment without notice is the ultimate employer-defined flexibility – an omnibus power overlaid on an existing capacity to make employees redundant when the business introduces new technology, slows down due to lower sales or production, closes down, relocates interstate or overseas or restructures or reorganises because a merger or takeover happens.

However, the Full Federal Court recently found that casual employees had some rights outside the industrial relations system under common law, because under common law the terms of the contract set by employers are not wholly determinative, that is, the casualness or otherwise of an employee is determined not only by the terms of an engagement, *but also by post-contractual conduct*.

To some extent the industrial relations system recognised the situation in common law through a model award clause enabling casuals with a post-contractual history of regular and ongoing employment[5] to apply to their employers to be formally converted to regular and ongoing employment (*4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541).

Under the model clause, reasonable grounds for an employer to refuse casual conversion to an employee include:

> (i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in

[4] 'A 'narrowly-defined casual' is a worker who: has been with the employer for less than twelve months, and who do not expect to be with same employer in twelve months time (that is, engaged in short-term work); and did not have the same hours and pay from week to week (that is, engaged in intermittent or variable work), or is on standby; and did not have leave entitlements' (Peetz, 2020, p.6).

[5] Defined as 'an employee who has in the preceding period of twelve (12) months worked a pattern of hours on an ongoing basis that reflects that of employee engaged on a full-time or part-time basis (and can continue to work such a pattern without significant adjustment

> accordance with the provisions of this award – that is, the casual employee is not truly a regular casual…;
>
> (ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
>
> (iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or
>
> (iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work. (para 381, (g))

The FWC reached these grounds for refusing conversion in its model clause after considerable consultation. In effect, the grounds recognise that employers will always retain the right to refuse casual employees access to permanent employment it suits their interests to keep them classified as casual.

The model clause included a process for reviewing employer refusals. It is unlikely to get much use in non-unionised, female dominated workplaces. Applicants for conversion are by definition casual and by definition subject to termination at the end of any shift. The likelihood of any casual's applying, or having applied for conversion, and having been refused, then pursuing the unreasonableness of a refusal through the workplace dispute resolution process and on to the FWC is vanishingly small if what they are seeking is increased employment security.

Nor does the model clause-based mechanism compensate an employee for misuse of casual employment; it merely enables employees to ask that the misuse cease.

The issue of compensation was, however, addressed through the courts in the strongly unionised mining sector. In *Skene* and *Rossato* (WorkPac Pty Ltd v Skene [2018] FCAFC 131; WorkPac Pty Ltd v Rossato [2020] FCAFC 84) people employed as casual but used on an ongoing and regular basis were found to have a claim to the entitlements of equivalent regular and ongoing employees under the NES. By government calculations, existing potential back pay liabilities for employees flowing from *Skene* and *Rossato* could amount to between $18 and $39 billion. Employers who could be found to have been mis-classifying casual workers became concerned at this potential liability.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 included a set of intersecting provisions which would address employer concerns by clawing common law cases back into the industrial system where they are then defined out of existence (submission 82). These provisions involve:

- A 'definition' of casual employment which is effectively a deeming mechanism. Casual employment is to be defined by the absence of a firm commitment to

ongoing work in the employment offer of the employer. Any subsequent misuse of casual employment or common law case is thus displaced by the legislation and defined out of existence;
- A compensation mechanism that offsets casual loadings and ignores other detriments and in any event will not be of any use because the deeming definition is retrospective; and
- A conversion mechanism, including a right to request conversion, that effectively confirms the deeming definition.

NFAW agrees that there has been a need for a definition of casual work, for a mechanism facilitating conversion from casual to permanent employment, and --in lieu of a court-based process for recovery of lost entitlements wholly reliant on usually vulnerable applicants--the development of a development of portable leave schemes for casual employees for those who remain in insecure work, offset by casual loadings. This would only mean increased employer costs to cover long service leave (in some states) for those who are actually meeting their existing obligations to pay casual loadings. We have argued at length (submission 82) that the amendments finally passed are less than inadequate – they are, like JobMaker, a mechanism for actively supporting and extending casualisation and underemployment to keep wages and award protections minimal.

The introduction of a small claims process to enforce conversion rights is unlikely to offset the impact of employer deeming provisions on vulnerable employees, especially given the exclusion of small business from the conversion (but not the deeming) provisions. We welcome the introduction of a legislated review of the impact of this recently passed provision and the opportunity to amend what has been done.

Recommendation 7

NFAW welcomes the requirement that the recently passed casualisation provisions be reviewed, and recommends that the review consider instead:

- the insertion in the Fair Work Act (FWA) of a new objective definition of casual *employment in* which employment status is determined by post-contractual employment history as well as the nominal employment contract itself;
- *an amendment* to the FWA requiring that casual workers who have been with the same employer for a year and in regular shifts for six months must be offered permanent employment;
- the development of portable leave schemes for casual employees with an offsetting mechanism for casual loadings.

- **irregular hours**

Much has been made by government of the fact casual employment as a percentage of the workforce has not grown significantly since the burst in casualisation from 19.4% to 24.3% of the employee workforce between 1990 and 2010 (Charlesworth and Heron 2012, p 1). However, at the same time that massive increases in casualisation began to taper off, the industrial relations system had widened the scope for using permanent part-time

employment as casual work without the necessity of a casual loading, and often without overtime.

The Fair Work Act 2009 introduced a framework of common National Employment Standards and tailored modern awards. The NES provides a maximum hours standards for full time work, but minimum hours -- critical to part-time and casual employees -- were left to be settled on an industry-by-industry basis through modern awards. Each modern award was limited to 10 allowable matters, and on the ground 'there were trade-offs between the parties around the content in each' (Charlesworth and Heron, 2012, pp 13-14).

Modern awards in feminised industries were negotiated against the background of 15 years of enterprise bargaining that had focussed on the award stripping exercise that was AWAs, and enterprise agreements based on trading employer-oriented flexibilities for minimal wage increases. The legacy of bargaining 'meant that those in female-dominated industries came to award modernisation negotiations with far poorer working time arrangements in place and a greater reliance on their award safety net to set the terms and conditions of their employment' (Charlesworth and Heron 2012, 4). The 'modernised' awards that emerged feature 'significant and gendered differences in working time minima for workers in feminised industries.'

Working time minima and predictable working patterns are crucial for women, who form the great majority of casual and part-time workers. Women's work may be 'non-standard' when measured against a traditional male norm, but it is standard for women: women constitute 37.9% of all full-time employees and 67.2% of all part-time employees.

However, it is deliberate myth-making to imply that the numerical flexibilities that benefit employers are the same flexibilities that benefit for women – though the two are often conveniently conflated by employer associations. Steady and substantive minimum hours of work and a reliable working pattern represent basic income security to women and set a floor to the transaction costs of working, such as the expense and time in travelling to work. Most importantly, they assist in the planning of caring arrangements – which is the reason why most women are working 'non-standard' hours to begin with (Charlesworth and Heron 2012, 14-15).

There is little data to be had on the operation of flexible hours provisions following cuts to the ABS and the Australian Workplace Industrial Relations Survey; and the government's triennial report on agreement-making has shrunk from 435 pages in the 1994 Annual Report on Enterprise Bargaining to 55 pages in a triennial report now. However, there is a very useful comparative study of awards framework for flexible hours in the Aged Care and the Social, Community, Home Care and Disability sectors, and manufacturing sector (Charlesworth and Heron, 2012).

The 2012 study goes systematically through the key male and female-dominated awards in 2012, as they emerged from the 'modernisation' process, covering minimum engagements, contracted hours and notice of change, span of hours and shift penalties, overtime penalties and access to casual conversion. We will not take the committee through the details of the respective awards, except to say that women were systematically considered to require less protection and less compensation for irregular working hours than men (pp 16ff).

While there is no systemic data on how awards are operating in practice, there are anecdotal reports from unions about the practice in female-dominated sectors:

> Working time insecurity in the form of irregular or fragmented hours is common in industries and sectors such as retail, hospitality, and health services. In these sectors employers have sought to enhance flexibility and reduce costs by: reducing or removing restrictions on working time arrangements; widening the span of ordinary hours; removing or reducing penalty rates for extended or unsociable hours; and reducing minimum periods of engagement. Lack of predictability of scheduling (on a daily and weekly basis) has further eroded job quality. For example both casual and 'permanent' part-time home care workers have highly fragmented working hours. Many of these workers experience multiple short shifts, with long periods of non-pay and no paid breaks. (ACTU 2018, p 2)

It is critical not to allow the word 'flexibility' to confuse employer-defined flexibility with flexibility for workers with family responsibilities. They are very different things.

Women actually need to know when they will be working. They are the family carers. They need to know the minimum they will earn to ensure that the effective marginal tax rate they pay makes financial sense. They are not generally benefitted by 'flexibilities' that average their working hours over weeks or months with unpredictable rosters on a daily or weekly basis. They are not generally benefitted by 'flexibilities' that allow split shifts over a wide span of daily hours or make weekends and weekdays interchangeable. All these costs are borne by casuals; using awards to extend them to part-time workers is just making part-time work casual through the back door.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 serviced employer-defined flexibility in part-time as well as casual work. It sought to remove yet more protections from feminised industries and non-standard hours workers, initially in the hospitality and retail sectors. It proposed a mechanism for direct and informal agreements between an employer and a part-time employee which would displace award entitlements and protections and FWC approval mechanisms. Overtime pay was to be removed for these workers in exchange for access to additional hours. The underemployed were to be compensated by being underpaid. The government foreshadowed extending this 'flexibility' to additional awards by regulation.

We note that Parliament has rejected these provisions and that the Government has not ruled out reintroducing them.

NFAW accepts that the lack of minimum hours protections means that many women---10.7% in January 2020, before COVID impacts-- are underemployed, and that a subset of these women might be in a position to arrange short term care at little or no notice. But the award system has a mechanism – individual flexibility agreements (IFAs)—whereby these women can make themselves available for added hours. The difference between the government's proposals and the IFA is that the current mechanism specifies that an IFA cannot be imposed on an employee, must be in writing, and cannot be used to reduce or remove an employee's entitlements. The government's proposal would have the same changes unwritten, directly with employees, and by definition used to reduce entitlements.

Those overtime arrangements that do not reduce entitlements can be put in place without legislative amendment.

Recommendation 8

Funding should be made available for an urgently needed report on the operation of 'flexibility' provisions in awards and agreements before further flexibilities are introduced through 'modernisation' and enterprise bargaining.

Recommendation 9

The 'flexibility' provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 addressing part-time and casual work should not be reintroduced.

Recommendation 10

'Job security' and 'gender equality' should be inserted into the objectives and tests of the award review process in the Fair Work Act.

- **multiple job holding**

The skewing of industrial relations arrangements in the service of employer-defined flexibilities is closely tied to the problem of underemployment. Some research suggests that prior to COVID, up to 94% of all underemployment was experienced by part time workers (Kifle et al., 2019), up from 88% in 1985 (Matthew Lloyd-Cape 2020, p 16). Pre-COVID, hours worked per employed Australian fell by more than one hour per month over the past five years, to 139.7 hours per month in 2017 (Carney and Stanford 2018, Table 2).

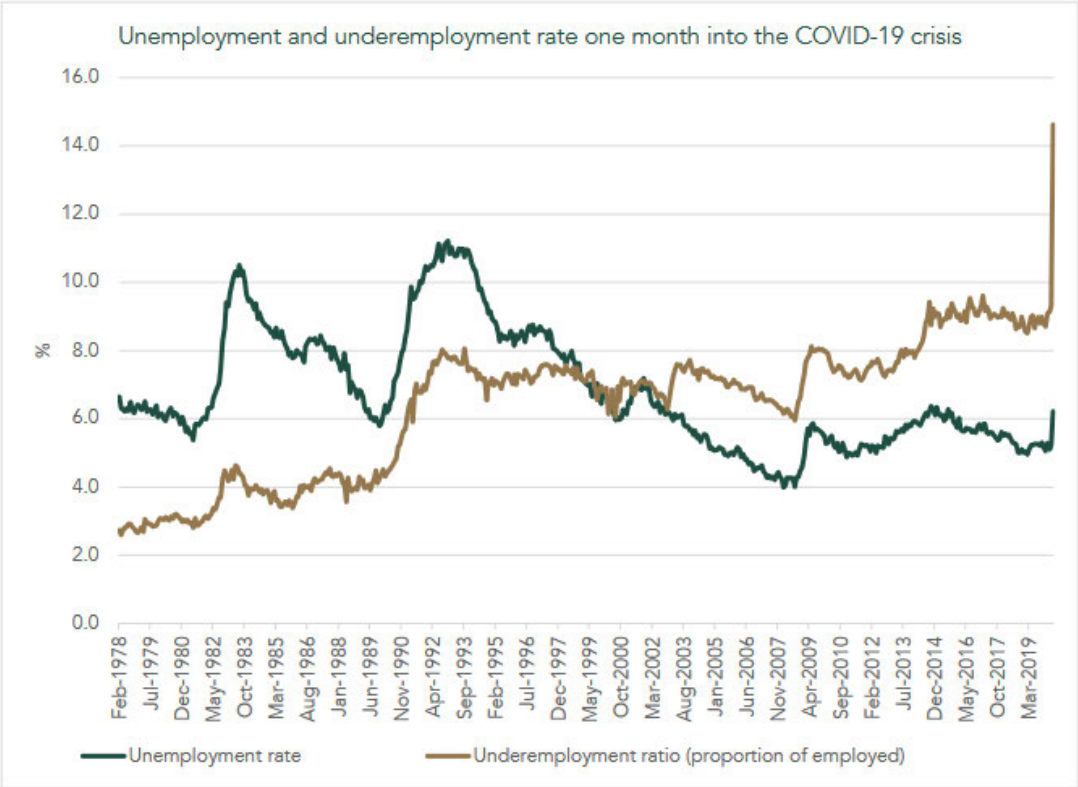
Predictably, industries that have a large proportion of part-time workers also have a higher rate of underemployed workers. These industries also tend to be dominated by women and by younger workers. Underemployment is most commonly experienced in retail, health care and social assistance, accommodation and food services, and education and training (Lloyd-Cape 2020, 15-19). The 2016 The 2016 Aged Care Workforce Survey similarly found that there had been 'an increase in the proportion of workers employed for fewer hours' (Aged Care Royal Commission 2021, Vol 3A, p 427).

Underemployment has no advantages for employees.

It has five advantages for employers. First, it makes rostering easy. Secondly, it allows employers to put in place very low minimum weekly hours for permanent part-time employees, which, thirdly, allows those employers to evade paying superannuation. Fourthly, it increases the working time and earnings insecurity of underemployed workers who are then in a weaker bargaining position for wages and (fifthly) dependant on their managers and employers for additional hours of work.

It is therefore unsurprising to see a correlation between the growth in underemployment and the transfer of power to employers in the industrial relations system following first

WorkChoices (2005) and then award modernisation under the Fair Work Act (2009) in the graph below (Lloyd-Cape 2020, Figure 7).



Source: Australian Bureau of Statistics, 6202.0 multiple releases

The inadequate hours of work received by many Australians have resulted in the growth in the number of multiple job holders. According to the ABS there were over 2.1 million multiple job holders in 2016-17, compared with 1.8 million in 2011-12. Women were more likely to be multiple job holders than males. In 2016-17, 53.7% of multiple job holders were female and 46.3% were male. The multiple job holding rate for women (17.5%) was higher than that for men (13.8%).

Current numbers are COVID-affected, but in the longer term underemployment and multiple job-holding are likely to be encouraged by the Design of JobMaker, which the Government was advised by Treasury could enable employers to replace a full-time employee on $75,000 with three part-time staff on wages between $22,500 and $30,000, while remaining in front financially.

Consistent with the pattern linking part-time/casual work, low wages and underemployment to multiple jobholding, the industries in which secondary jobs are most concentrated are female-dominated: administration and support services, education and training, healthcare and social assistance, accommodation and food services and retail (ABS Cat No 6150.0.55.003 – Labour Account Australia, Quarterly Experimental Estimates, December 2018).

Also consistent with the pattern is the fact that those working multiple jobs are paid less than workers with a single job according to the ABS. This is consistent with qualitative research in the care sector which found that 'most employees linked their unpaid overtime to job insecurity and some reported responding to pressure to complete additional unpaid tasks at clients' request because they feared losing shifts if a client requested a different support worker' (Macdonald et al 2018, p 92).The figures show that the median wage for workers with a single job was $48,028 in 2015-16 compared to $39,813 in the same year for those who had to hold multiple jobs to survive. Many of these are the women whose overtime was to be removed under the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) bill in the name of economic growth.

In addition to being paid less, workers with multiple jobs often must contend with increased exposure to COVID (see Term of Reference (b)) and increased travel costs – reported by Macdonald and Charlesworth in 2016 (p 13) and later by the Aged Care Royal Commission (Vol 3A, p 425) -- and in some cases part or all of the travel itself does not even count as work time (MacDonald et al 2018, p 88).

- **The NDIS: a case study in undermining awards**

There has been an increasing emphasis on individual client agency and home-based care provision in the aged and disability care sectors ensuring that those receiving support have greater choice and control to determine not only what service is provided but how, when and by whom. In practice, this means that the person can choose to have the National Disability Insurance Agency (NDIA) manage their funding while they choose their preferred service providers, they can opt to manage their funding and arrange their own supports, or they can appoint a person or organisation to manage their funding and supports (National Disability Insurance Scheme (Plan Management) Rules, 2013).

NFAW is supportive of the principle of increased choice and control for those receiving care. However, we are greatly concerned about the design of the current arrangements and their impact on those delivering care and, as a consequence, those receiving it. However, funding in the sector has been structured to force their arms-length providers beyond efficiency into cost-cutting:

> Funding for the personal support provided by DSWs [Disability Support Workers] is determined on the basis of an hourly price, varied in some circumstances. Recent study suggests this fee has been set too low to enable the minimum SCHADS Award conditions to be met for DSWs (Cortis et al., 2017). The study also found that the pricing model did not reflect existing employees' classification levels and provided inadequate allowance for training, workers' time not spent providing face-to-face support (3 minutes an hour), travel between clients (providers can include a 20-minute journey but without any adjustment for support to be provided), and supervision (both levels and workloads). These assessments are supported by findings of an employer survey in which two-thirds of respondents disagreed with the statement 'NDIS prices enable us to meet our industrial obligations' (Cortis and Blaxland, 2017: 3). (Macdonald et al 2018, p 85)

The NDIS blueprint came out of the Productivity Commission's (PC) 18-month long inquiry into Disability Care and Support (2011). The Report's strong message was that the model of self-directed care and the award safety net framework were likely to prove incompatible, and that the latter would have to give way in the interests of 'sustainability'. The PC argued, for example, that:

> A casual conversion clause as presently drafted by the FWC could have ramifications for the National Disability Insurance Scheme (NDIS) workforce and scheme sustainability. Much of the scheme's settings rely on a significant increase in casual employees who would work fairly consistent and predictable hours. If these workers took up the option to convert to permanency, then this could reduce the flexibility of employers to respond to demand from scheme participants (and could require adjustment to the assumptions used in the National Disability Insurance Agency's pricing approach). (Productivity Commission 2011, p 327)

The PC noted, however that employers could 'keep the number of hours worked by employees low to avoid the risk of a casual conversion occurring (Productivity Commission 2011, p 327).

NDIS data for 2017 shows that, in percentage terms, the permanent growth rate of the workforce was 1.3% per year; the casual growth rate was 26% per year (National Disability Services 2018, p 14).

At the same time, the pay increases arising from the successful 2012 social and community services equal pay case - which recognised the gendered undervaluation of care work – did not apply to home care workers (Macdonald and Charlesworth, 2016, p 7).

Other strategies used by employers to cut costs involved moving employees to different award classifications. In 2020 the ASU reported a dispute with Community Connections who had classified workers as "home care workers" instead of "community support workers" resulting in an almost $5 an hour difference for workers (ASU submission 2020, p 5.) More generally, the ASU reported that with the transition to NDIS, more and more community sector services were downgrading the classification of roles despite the descriptors contained within the SCHADS Award. The driver, they argued, was the need to:

> … ensure compliance with funding requirements. The NDIS only funds to a level 2.3 of the SCHADS Award whereas previously employees may have been paid at a level 3 or 4 of the Award. There is concern that we will see more downgrading of positions if there is not a review of the funding arrangements.6 …. Sleepover Allowance, Weekend Penalties and Travel Allowances are also under pressure. (ASU submission 2020, p 6).
>
> Recently, Anglicare SA made a number of workers redundant in their exceptional needs unit while offering jobs back at a lower rate of pay. Workers were previously paid at level 4 of the SCHADS award but were offered jobs back at level 2 while working with the same exceptional needs clients. The NDIS pricing model needs to be restructured so that prices reflect the correct wages required to pay highly skilled and qualified workers to work with people with exceptional needs… (ASU submission 2020, p 8)

While re-classification and underemployment could be pursued within the existing award framework in the sector, providers identified a number of new award 'flexibilities' required to meet the demand for tailored care by clients on one hand, and low and inflexible funding from the government's competitive tendering process and funding model on the other. Field research among providers in the NDIS pilot stage found that:

> Two providers named reductions or abolition of penalty rates for work in unsocial hours, the reduction of minimum engagement and notice periods and the ability to average agreed work hours over longer periods as changes needed. One suggested the 'the award safety net is way too high' (Trial site provider 2). These claims are similar to those made by disability services employers in the Modern Award Review process (Jobs Australia, 2015; NDS, 2015). (Macdonald and Charlesworth 2016, p 15)

Alternatively, individual contracting by clients could circumvent these 'inflexibilities' by pushing provision out of the industrial relations framework altogether. According to the PC, direct contracting by people with disability would circumvent some award minima (2011, Appendix F, p 2) and 'involve no superannuation, tax withholding or OH&S obligations' (2011, p 379). Further, the PC noted, individual contracting would enable those requiring care to draw 'the so-called 'grey' market of family, friends and neighbours into the pool of people who can provide support services to people' minima (2011, Appendix E, p 24). This would have the effect of saving money, keeping down wages and reinforcing the gendered undervaluation of this work.

Corresponding guidance was provided to NDIS participants:

> A direct employment guide for people with a disability (My Place, 2013) advised that where a person manages their own funds and directly employs or engages a worker to provide personal or domestic support in their home for 30 or fewer hours a week there is no superannuation guarantee payment made for the worker under an exemption for people employed by a householder 'to do work wholly or principally of a domestic or private nature for not more than 30 hours per week' (ATO Superannuation Guarantee Ruling SGR 2005/1). As suggested in the employment guide, a person with disability can structure their care and support so that it is provided by multiple part-time workers rather than a single worker so that these exemptions apply (My Place, 2013). (Macdonald and Charlesworth 2016, p 16). [See recommendation under Term of Reference (d) above.]

For its part, the Productivity Commission noted that poor wages and fragmented hours associated with cost-cutting measures might mean that labour supply did not match demand in the sector, but hopefully added that for many carers the psychic reward of the work would compensate for poor wages and conditions, and that in any case immigration might be used to increase supply (2011, Vol 2, ch 15). The PC proposal assumed that immigration policy remain unchanged, that is, that Australia retains a system of strict immigration controls and rules which would enable supply and demand to be evaded and costs suppressed with 'a workforce vulnerable to exploitation':

> The majority of this workforce are migrant women who are not protected by employment law due to temporary visa status and who are willing to accept low

> wages and poor working conditions to earn money to support themselves or family overseas, but risk deportation or other legal immigration issues if they are not compliant (Baines, 2016). (Joseph 2019, p 12)

- **Strengthening awards in the caring sector**

The Aged Care Royal Commission found that, in the aged care sector at least, the combination of psychic reward and immigrant exploitation has not been sufficient to meet the demand for carers. In 2016, almost two-thirds of residential facilities (63%) reported a shortage of workers in at least one direct care occupation. Almost half of home care providers reported skills shortages (49%) (Aged Care Royal Commission Vol 3A, p 374). (At the same time, in annual terms, about one quarter of the disability workforce changed jobs every year (Disability Services Australia 2018, p 18).

The Commissioners took the view that something needed to be done to address poor wages and fragmented hours associated with cost-cutting measures if workforce pressures were to be addressed. It proposed two key measures: bringing a work value case and equal remuneration application to the Fair Work Commission and making wage increases an explicit policy objective of the aged care funding system (Aged Care Royal Commission 2021, Vol 3A, p 414).

So far as awards are concerned, the Royal Commission recommended that those carers who had not benefitted from the Equal Remuneration Order made by Fair Work Australia in 2012 should be included in any application, including both residential care workers working under the Aged Care Award 2010 and home care workers covered by Schedule E of that Award year (Aged Care Royal Commission 2021, Vol 3A, p 417).

Noting that the only Equal Remuneration claim successfully brought to the FWC under the present legislation was a claim endorsed by the government of the day, the Royal Commission *recommended that the principal funder, the Australian Government join in the application* year (Aged Care Royal Commission 2021, Vol 3A, p 416).

The outcome of these considerations was Recommendation 84:

> **Increases in award wages**
>
> Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:
>
> a) reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or

b) seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).

NFAW strongly endorses this recommendation, together with recommendation 85: 'In setting prices for aged care, the Pricing Authority should take into account the need to deliver high quality and safe care, and the need to attract sufficient staff with the appropriate skills to the sector, noting that relative remuneration levels are an important driver of employment choice.'

NFAW also recommends amending the Fair Work Act to insert 'job security' as a principal object of the Act as a whole and the wage-setting, award review and contractor testing processes, and inserting 'gender equality' into the objectives and tests of the award review process.

Recommendation 11

NFAW strongly supports recommendation 84 of the Aged Care Royal Commission calling for a conjoined tripartite application for equal remuneration in the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010.

Recommendation 12

NFAW strongly supports Recommendation 85 of the Aged Care Royal Commission that 'In setting prices for aged care, the Pricing Authority should take into account the need to deliver high quality and safe care, and the need to attract sufficient staff with the appropriate skills to the sector, noting that relative remuneration levels are an important driver of employment choice.'

Recommendation 13

In order to balance employer-oriented and employee-oriented flexibilities in award-setting, we recommend:

- amending the Fair Work Act to insert 'job security' as a principal object of the Act as a whole and the wage-setting, award review and contractor testing processes, and
- inserting 'gender equality' into the objectives and tests of the award review process.

Recommendation 14

Recommendation 19 below--calling for labour-hire providers to be required to guarantee the same pay and conditions to the workers it supplies as are being provided to employees of the contracting firm doing the same work – should explicitly be taken to apply to migrant workers.

Shifting work outside the industrial relations framework

We have noted that fewer than half of employed Australians work in a permanent full-time paid job with leave entitlements -- yet employer submissions to the Fair Work Amendment bill and the Government's own Explanatory Memorandum indicate that both still feel that the Australian workforce is not sufficiently 'flexible'. There is never any clear endpoint to this drive for flexibility (that is, numerical flexibility of the sort that serves employer interests). Despite the ongoing employer-defined flexibilities introduced through modern awards, despite the flexibilities currently on the government and employer agenda, it will always be cheaper for employers to avoid using an industrial relations system at all, if at all possible.

That is, in fact, is what is occurring. Even with modernised awards and cuts to penalty rates, even with increasingly relaxed enterprise bargaining processes and standards, arms-length employment is blossoming in increasingly inventive forms. As discussed above and in Term of Reference (a), individual contracting has grown; gig economy work has grown; and supply chains are becoming more complex and commonplace. Despite data deficits, there is a consensus in academic, union and government reporting (such as that of the Black Economy Task Force) that sham contracting, labour hire and gig economy work have all grown – the latter "including, in particular, home-based services" (Black Economy Task Force 2017, pp 34, 231, 234). All these measures increase employer-oriented 'flexibility' to terminate workers, and incidentally enable them to:

- avoid paying minimum safety net pay and entitlements such as sick, carer's and annual leave
- avoid employment payroll tax, training costs and meeting regulatory standards such as OH&S
- transfer administrative costs, superannuation, workers' compensation and travel costs elsewhere, usually directly to employee
- transfer risks to employee (eg any downturn in the economy or industry).

Many of the measures being taken to side-step the responsibilities of being an employer have been considered at length by the Senate Education and Employment References Committee's report on Corporate avoidance of the Fair Work Act 2009 (2017), the report of the Black Economy Task Force (2017) and the Migrant Workers Task Force (2019). We do not propose to dwell on these reports at length, except to point out to the Committee that those inquiries were conspicuously light on gender analysis and recommendations. For this reason, we again propose to focus on practices shifting work outside the industrial relations framework in the caring sector.

(a) direct and arms-length contracting

- **Fixed-term contracts**

For some individuals, fixed-term contracting is the employment mode of choice. For others, it is the employment mode of necessity. What is known is that:

> Almost two-thirds of self-employed workers are not incorporated, and almost 60 per cent have no employees (meaning their access to time off work or continuing income in case of illness is minimal). And the proportion of self-employed individuals working part-time has grown markedly in recent years, reaching 35 per cent in 2017. Earnings for many self-employed Australians are low and unstable: for example, median earnings for part-time self-employed individuals with no employees were 60 per cent lower than for full-time paid employees. (Carney and Stanford 2018, p 11)

Government is the biggest employer in the industries where fixed term contracts are most prevalent. The majority of these fixed term contracts are heavily concentrated in a few sectors, the three biggest being: education (38%), health care and social assistance (16%), and public administration and safety (13%) (Alexander 2019, p 5). These are also sectors where women workers predominate.

In some cases individual contractors are simply used to add numerical flexibility, as in the case of the Commonwealth's public service where contractors and consultants are used to circumvent the government's own employment caps. These cases have been recently examined in the course of the Senate Legal and Constitutional Affairs References Committee's Inquiry into the Impact of changes to service delivery models on the administration and running of Government programs, where, for example, the Department of Human Services 'acknowledged that one of three main drivers for utilising casual, non-ongoing and labour hire employees is 'the need to operate within the parameters of our budget and Government policies, including the Average Staffing Level (ASL) cap on APS staff' (para 271). We note that in its report the Committee recommended that the Commonwealth public service Average Staffing Level (ASL) cap be lifted immediately (Recommendation 4).

If departments and agencies find it necessary to use temporary contracts to circumvent permanent employment caps on the APS, then the caps themselves need to be replaced by a mechanism which encourages employers to distinguish between temporary and ongoing staffing requirements. Otherwise, caps are just another mechanism to drive workforce insecurity. If departments and agencies find a cap an essential crutch for decision-making, NFAW recommends that government replace its current blunt cap on APS staffing with a cap on back-to-back short-term contracts for the same role.

Recommendation 15

NFAW recommends that government replace its current blunt cap on APS staffing with a cap on back-to-back short-term contracts for the same role.

In other cases government creates systems which drive individual contracting by intermediaries. Governments have progressively outsourced their health care and social assistance responsibilities through grants-based arrangements which effectively force their arms-length providers into managing fixed-term contracts that may or may not be renewed with service delivery grants. NFAW has outlined the impact of this practice on the female-dominated university sector in its 2020 Gender lens on the Budget.

Where government grants are part of a competitive tender process, they are also used to drive compliance and 'efficiencies' such as contracting which, as is shown below, unashamedly derive from evading safety net standards set by industrial relations, tax and occupational health and safety regulations.

These and similar cases involving the delivery of health care and social assistance are principally of interest to NFAW here, as they have been generally under-regarded by government task forces and are in a female-dominated sector. The Report of the Aged Care Royal Commission, citing the analysis of ABS data for the whole of Australia undertaken for the Inquiry into the Victorian On-Demand Workforce, records that:

> between 2014 and 2018, the number of 'independent contractors' in health care and social assistance increased by 29%, from 70,700 in 2014 to 91,700 in 2018, compared with a 19% increase in the overall health care and social assistance workforce during the corresponding period. (Aged Care Royal Commission 2021, Vol 3A, p 428)

Growth in contracting is simply one term in a process of competitive cost reduction that begins with award circumvention and the call for further flexibilities and progresses past the award system altogether into contracting.

Evidence brought to the Commission that 429 stated that, in the increasingly common case of contractors using platforms to find employers, there are also a 'range of direct and indirect costs of doing business [that] are apportioned to workers. 'The apportioning of these costs of the labour process to the worker, in addition to the lack of paid leave, superannuation contributions and 'other protections in Australian employ 4429

While one Commissioner felt that the negative impacts on the contractor and the contractee could be addressed through vigilance by the Quality Regulator, Commissioner Briggs recommended a proactive as well as a reactive approach which in our view is likely to prove more effective:

> **Recommendation 87: Employment status and related labour standards as enforceable standards**
>
> 1. By 1 January 2022, the Australian Government should require as an ongoing condition of holding an approval to provide aged care services that
>
>   a) approved providers: have policies and procedures that preference the direct employment of workers engaged to provide personal care and nursing services on their behalf
>
>   b) where personal care or nursing work is contracted to another entity, that entity has policies and procedures that preference direct employment of workers for work performed under that contract.

2. From 1 January 2022, quality reviews conducted by the Quality Regulator must include assessing compliance with those policies and procedures and record the extent of use of independent contractors.

Recommendation 16

NFAW endorses recommendation 85 of the Aged Care Royal Commission which calls on providers to preference direct employment of personal care and nursing service workers, as well as quality reviews of compliance with this arrangement. Corresponding measures be taken to address the growth of contracting and gig economy employment in the disability sector.

- **Sham contracting**

There are then obvious advantages to an employer if a contract for service can be represented as a contract of service. The scope for slippage between the contract types from the court perspective has been detailed under Term of Reference (f) below; here we consider the ways in which employees are required to acquiescence in the sham as a condition, not of employment, but of obtaining work.

The Black Economy Task Force was 'told of … blatant examples of ABNs being required by employers for people who are employees, such as sales staff in retail shops in shopping centres, Irish backpackers working for traffic management firms, and cleaners forced to incorporate prior to taking on a role' (Black Economy Task Force 2017, p 233). The report could not provide specific estimates on the size of the sham contracting problem but reported that 'our consultations suggest it may be growing and numerous examples have been brought to our attention in sectors such as IT, labour hire, courier, beauty and hairdressing, and even executive assistants' (Black Economy Task Force 2017, p 231).

Again, NFAW is interested in the caring sector, where even trialling the provision of home-based services led, according to one executive manager, to 'lots of one hour shifts, lots of travel time. We've got staff working 15 hours to get 8 hours' pay, and they're running their own vehicles. (Trial site provider 4) (Macdonald and Charlesworth 2016, p 13).

Caring services are ripe for sham contracting: the nature of the work, the view of the work taken by agencies like the PC, and the focus of the government's funding machinery on cutting industry costs all drive providers along the spectrum from minimising award protections to evading the industrial relations framework through contracting and sham contracting. According to the Black Economy Task Force:

> National Disability Services (NDS), the peak organisation for non-government disability services, has expressed concern about the potential for sham contracting under the NDIS, stating that it: 'could be a new and growing problem in our industry as the NDIS creates a more competitive market for disability services. Our concern is that greater choice and control for people with disability should not entail increased legal risk for them, and/or unfair wages and working conditions for their workers'. (238)

In its 2019 submission to the Inquiry into the Victorian On-demand Workforce, VCOSS members identified similar concerns among its members regarding sham contracting arrangements, and particularly the position in which employees driven into sham contracts find themselves.

While the Fair Work Act 2009 prohibits "sham arrangements" to avoid the responsibilities of employment, workers seeking clarity around whether they are eligible for basic entitlements and protections must challenge their employment arrangements before a court or a tribunal. VCOSS argued that 'placing the onus on vulnerable workers to initiate a claim in the Commission puts a disproportionate burden on employees, particularly when employers have greater resources to defend a claim' and recommended that 'greater legislative clarity around employment status and access to entitlements can reduce this burden.'

The Australian Services Union has argued further that not only are employees put into an invidious position, but that the provisions of the FWA under which their case would be heard are also deficient. The Act provides that:

> **S 357 Misrepresenting employment as independent contracting arrangement**
>
> (1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.
>
> (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
>
> (a) did not know; and
>
> (b) was not reckless as to whether;
>
> the contract was a contract of employment rather than a contract for services.

The Productivity Commission and the Commonwealth Government's Black Economy Taskforce both recommended amendment to the current provision to reduce the degree of intention that must be proven. The Commonwealth Government agreed in principle to increase the penalties for breaches of the sham contracting provisions in the FW Act, but as with the other parts of the wage theft proposals in the 2020 Fair Work package, stopped short of agreeing to lower the intent threshold for establishing the offence.

Recommendation 17

The Fair Work Act should be amended to lower the intent threshold in relation to misrepresenting employment as an independent contracting arrangement.

Recommendation 18

Victims of sham contracting should have access to the same court and tribunal proceedings as those proposed for victims of wage theft more generally, simplified along the lines recommended by NFAW in its submission to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (submission 82, recommendation 14).

- **Labour hire**

The final report of the Black Economy Task Force the labour hire and broader recruitment services industry as a valuable source of flexible, short-term employees for businesses. At the same time it found that

> Parts of the labour hire industry … are infiltrated by unscrupulous firms and individuals that are operating in the black economy. Some sectors are particularly vulnerable to such operators, including horticulture, security and **perhaps even aged care** [our emphasis]. This can range from simple non-compliance with PAYG tax withholding and payment of cash wages well below award rates, to exploitation of vulnerable workers and even labour hire firms with links to crime, money laundering, immigration fraud and other abuses. (247-8)

As employers, labour hire firms can pay less than the employer using their services, and while they cannot pay less than the relevant award or the NES they can reduce costs through underemployment, casualisation and reclassification. They can avoid safety net minima altogether if they use contractors, genuine or sham. The same applies to gig platforms examined under Term of Reference (c) above.

The RC examined this issue at some length (Vol 3A, Ch 12.7) in relation to modes of employment, including contracting both by providers and through gig platforms.

Following commitments to introduce or the actual introduction of labour-hire firm licensing schemes at state and territory level, the government has announced its intention of introducing its own scheme and, proposed the following list of "guiding principles":

- Mandatory registration of labour hire operators with the Fair Work Ombudsman under annual subscriptions and requiring disclosure of prescribed information about their owners/operators and the business;
- Coverage of high risk sectors at a minimum, including horticulture, cleaning, meat processing and security (subject to stakeholder consultation);
- Compliance to be monitored by the Fair Work Ombudsman;
- Publication of a directory of registered labour hire operators; and
- Imposition of fines for the use of unregistered labour hire operators.

Without knowing what information is to be prescribed for disclosure it is not possible to assess the effectiveness of the proposed Commonwealth regime. The possibility that the scheme will be confined to selected sectors also restricts the scope for assessment, but in

our view it ought at least to take in home-based care in both the disability and aged care sectors.

In any event a licensing regime will only deter conduct that is actually unlawful; it will not of itself deter the use of labour hire as a mechanism to keep costs down through underemployment, casualisation, reclassification or the use of arms-length employment to avoid paying minimum safety net entitlements, superannuation, workers' compensation, travel costs or meeting OH&S responsibilities.

The proposal that firms using labour-hire be required to guarantee the same pay and conditions for the same job will go some way to prevent employers from outsourcing their labour requirements to labour hire companies or contractors in order to cut the wages of employees and side-step the enterprise agreements for the pay and conditions of those employees, and NFAW is supportive of such a measure. But such a measure would not address the case where a firm using labour hire has no equivalent in-house employees; and in any case it would need to be supplemented by the recommendations relating to award and non-award strategies for pushing down wages set out under this Term of Reference.

Recommendation 19

Labour-hire providers should be required to guarantee the same pay and conditions to the workers it supplies as are being provided to employees of the contracting firm doing the same work.

Recommendation 20

The labour-hire firm licensing scheme to be implemented at the Commonwealth level should at a minimum identify home-based care in both the disability and aged care sectors among the high-risk sectors to be covered by the scheme.

- **Concluding remarks on Term of Reference (e)**

Home-based care in Australia has been marketised under the rubric of client choice and control, but marketisation has also meant that both the care and the control have had to be exercised in a competition to reduce wages, entitlement, and employment costs generally. This is the intention of the model, and it relies on ripping off carers, their clients, and many of the provider groups and individual carers who are wedged into progressively cutting their costs and compromising their employment practices on behalf of government.

The recommendations in this section target different points across the broad cost-cutting strategy for care delivery, but as has been pointed out, 'the fact that the government is effectively the top of the supply chain body in publicly funded social care systems such as the NDIS and aged care highlights the need for embedding accountability for labour standards in public policy more generally (Macdonald et al 2018, 94). These measures include:

- making changes to regulatory oversight of government-funded caring activities in the aged care and disability care sectors to address intersecting interests of quality of care and quality of employment, as laid out in Vol 3A of the report of the Aged Care Royal Commission
- increasing funding in the caring sector as proposed in Recommendation 84 of the Aged Care Royal Commission and more broadly in the NFAW 2021 Pre-budget submission
- amendments to the Fair Work Act proposed in Recommendation 13 above to balance employer-oriented and employee-oriented flexibilities in award-setting, and
- inserting 'gender equality' into the objectives and tests of the award review process.

Government procurement guidelines and practices are addressed under Term of Reference (g).

Recommendation 21

NFAW recommends that, in addition to the broader set of recommendations made in relation to procurement under Term of Reference (g) below, government should recognise its responsibilities as the top of the supply chain body in publicly funded social care systems by:

- making changes to regulatory oversight of government-funded caring activities in the aged care and disability care sectors to address intersecting interests of quality of care and quality of employment laid out in Vol 3A of the report of the Aged Care Royal Commission, and
- increasing funding in the caring sector as proposed in Recommendation 84 of the Aged Care Royal Commission and more broadly in the NFAW 2021 Pre-budget submission.

f) accident compensation schemes, payroll, federal and state and territory taxes;

Employers are required to contribute to a range of statutory schemes based on the number of employees that they have. Workers or accident compensation schemes and payroll taxes are payable at the state or territory level, while federal taxes include the liability for Pay As You Go withholding tax, superannuation and Fringe Benefits Tax. There are also protections under the *Fair Work Act* for employees.

Casual and part-time employment is within the terms of the relevant legislative schemes. Where the tax is based on the aggregate wages bill, such as payroll tax, it will include all employees, although in respect of individuals there may be thresholds that are not met, for example the $450 pm threshold for superannuation guarantee contributions.

The challenge in respect of taxation and other regulatory regimes that are based on employment is that coverage is not generally extended to workers who are not classified as employees: contractors and workers in the gig economy. Such arrangements are often referred to as sham contracting.

The engagement of workers under contracts for service, instead of as employees (contracts of service) has the potential to significantly reduce taxes payable by the employer. The employer will save in two ways: they are not liable for those taxes that are borne directly by the employer; and where an amount is withheld on behalf of a worker they gain a cash flow and management advantage as they do not have to comply with withholding arrangements.

One of the problems with categorising a worker as a contractor instead of an employee is that obligations that are imposed on an employer can be circumvented, leaving the employee unprotected: for example they may not be covered by Workers Compensation insurance or the superannuation guarantee. In a perfect market, the rate paid to such workers would be sufficient to ensure that they are able to purchase the appropriate type of cover personally; however in most cases of sham contracting the worker does not receive enough remuneration to reflect the benefits that are lost by not being an employee.

We note that the NSW Parliament is currently undertaking an enquiry into the impact of technological and other change on the future of work and workers in New South Wales, which is due to report in late 2021. Evidence presented to the select committee highlights the concern over working conditions for workers engaged in the gig economy. In particular, the submission from the Australian Women's Working Futures Research Project highlights concerns over the effect on women of the removal of certain working conditions, including parental leave; conditions that apply to sham contractors as well as gig economy workers.

At law there are a series of tests adopted by the Courts to determine whether a person is engaged under a contract of service (employee) or a contract for service (contractor).

The most significant is the control test, which determines whether the worker has control over how they conduct their own business, or whether the payer sets the procedures and protocols that must be followed.

The other questions to be considered include:

- whether the service is integrated in the payer's business model;
- is the contract to achieve a result, without the method being specified;
- can the work be delegated; who bears the risk if the work is not satisfactorily completed; and
- does the worker need to provide all tools necessary to complete the task (ATO TR 2005/16).

In 2011 the Federal Court was required to determine whether workers were employees for superannuation guarantee purposes in *On Call Interpreters And Translators Agency Pty Ltd v FC of* T (No 3) [2011] FCA 366. The Court summarised the question as follows:

> 208 Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:
> Viewed as a "practical matter":
> (i) is the person performing the work as an entrepreneur who owns and operates a business; and,
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee. (at para 208)

The Court then went on to discuss these questions and the consequences at length in paragraphs 209 to 220.

The difficulty for regulators is that each contract or arrangement must be considered on a case-by-case basis. For example, in the Vabu cases the Courts considered whether a bicycle courier was an employee on two separate occasions. In 1996 they were held not to be employees for superannuation guarantee purposes (*Vabu Pty Limited v Federal Commissioner of Taxation* (1996) 95 ATC 4898), but subsequently the High Court held that they could be employees for the purposes of public liability (*Hollis v Vabu* (2001) 207 CLR 21); although this finding may not have extended to contractors using other delivery modes such as delivery vans.

Notably, following the public debate and the recent series of fatalities to home delivery drivers Uber Eats has reportedly changed its contract terms to state that riders are not employees, including adopting some of the criteria used in determining whether a worker is an employee (The Guardian, 29 Jan 2021).

One technique that has been adopted to address this has been to provide that the law also applies to persons engaged under a contract that is primarily for their services: for example, s. 12(3) of the Superannuation Guarantee (Administration) Act provides that:

> If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract; and the definition of salary or wages in s.11 includes payments under a contract referred to in subsection 12(3) that are made in respect of the labour of the person working under the contract…

However a contract can be written using terms that are not caught by this extension, for example by requiring that the worker provides their own means of transport: arguably the contract then also covers provision of the vehicle.

There is a common perception that requiring a person to obtain an ABN is sufficient to confer them the status of an independent contractor. This is not the case, as the ABN

application asks a series of questions to determine whether the applicant is in fact operating a business and entitled to an ABN.

In 2016 the Inspector General of Taxation published a report on the administration of Employer obligations by the ATO (Inspector General of Taxation, 2016: Ch 2). The key tool used by the ATO is the Employer/Contractor Decision Tool (ATO QC19387) that works through the various factual and legal points that need to be considered when making a decision.

An area of particular concern for NFAW is the increasing use of contracts for service among care providers, who are disproportionately women. This form of contract leaves these women without the protection of workers compensation and the *Fair Work Act* and could have further legal consequences in the event of a client taking legal action in respect of their care, depending on the basis of the claim and the terms of the contracts between all three parties.

The Federal Government had the opportunity to address these issues in 2006 when the *Independent Contractor Act* 2006 was passed. The focus of that Act, which predates the rise of the gig economy, was to protect genuine contractors by removing them from the scope of state workplace relations laws and setting up a contract review mechanism. The consequence has been to make it more difficult for regulators to protect the rights of workers where the services being provided are to all intents and purposes the same as those provided by employees, but the contract is drafted using terms that classify them as contractors.

g) the interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy

Governments spend billions on goods and services including from external suppliers. In 2018-19, the Australian government spent $64.5billion procuring goods and services across almost 80,000 contracts (Department of Finance 2020, "Statistics of Australian Government Procurement Contracts" derived from AUSTRAC Tender, 12 August 2020). This does not include funding between the Commonwealth and State/Territory governments, local governments and other organisations in receipt of Commonwealth funds.

Currently Commonwealth Procurement Rules (CPRs) mandate purchasing requirements. The principal requirement is value for money but also includes the following social procurement principles:

- the Workplace Gender Equity Payment Principles
- the Australian Industry Participation Plan for Government Procurement to support local industry, and
- the Indigenous Procurement Policy to support Indigenous businesses.

Procurement used to address employment equity issues has a long history. The UN, ILO, EU and the OECD all recognise the importance of strategic public procurement. In addition, the Australian government is party to a number of such international agreements, for example,

the Australian, New Zealand Government Procurement Agreement, the objective of which is to create and maintain a single ANZ government procurement market in order to maximise opportunities for competitive ANZ suppliers and reduce costs of doing business for both government and industry.

As this submission has demonstrated, women are over-represented in casual, part-time and insecure "on demand" employment. As the submission also demonstrates, these categories present major challenges for the way work is regulated.

NFAW strongly supports the requirement that organisations need to demonstrate compliance with the Workplace Gender Equity Act 2012. However, we suggest the CPR's need to go further in order to maximise employment opportunities in jobs that are sustainable. While suppliers have to comply with the Fair Work Act, existing regulations do not directly address employment conditions facing many women and many workers are not covered by the Fair Work Act.

Currently there is no single consistent definition of the term 'employee' used across the public sector in workplace relations and procurement. Contracts of employment or independent contractors are generally not explicitly covered. There also appears to be no requirement for public sector agencies to report all details of contracts with a high labour content, including for the purposes of identifying and remedying sham contracting arrangements (particularly where 'employees' have unknowingly entered into independent contracting arrangements).

In addition, Australia has to comply with obligations under Free Trade Agreements (FTAs). FTAs can result in barriers to implementing social procurement principles. Generally, FTAs do not address employment equity issues. This leaves potential Australian suppliers in competition with foreign suppliers with relatively poor employment practices.

Addressing these issues presents a complex set of challenges. As our submission has highlighted, the COVID-19 pandemic resulted in further deterioration of employment outcomes for women. Now is the time to implement structural change to procurement and related policies to help rebuild the economy.

The ACT government has developed a set of arrangements that appear to address some of these issues. The ACT government now requires contractors to meet workplace standards contained in the Secure Local Jobs (SLJ) code and have a SLJ plan and certificate. The plan includes information on employment security health and well-being, diversity and career development for workers.

Suppliers are ineligible to tender for Territory-funded works unless they:

- hold a Secure Local Jobs Code Certificate issued by the Registrar, confirming that the contractor complies with the Secure Local Jobs Code; and
- for procurements of $25,000 or more, provide a Labour Relations, Training and Workplace Equity Plan (LRTWE Plan) (principal contractors only).

Upon the award of a tender, contractors are required to contract on the basis of 'model contract terms' which bind the contractor to comply with the Secure Local Jobs Code and any LRTWE Plan (among other matters). More specifically, the LRTWE Plan must detail how the contractor will (among other matters):

- minimise 'insecure work arrangements' (including short-term and casual employment);
- support the physical and mental health of its employees, including with any health and well-being activities;
- promote and support diversity in the contractor's workforce; and
- if there is an existing contractor in relation to a procurement, support the transfer of employees from the existing contractor to the tendering contractor.

Social procurement has strong potential to address insecure and "on-demand" work. alongside other interventions. The ACT code is a good start but could be strengthened by greater emphasis on gender equity by, for example, including family violence leave.

To be most effective suppliers need to provide employment data as well as to provide evidence of compliance. Where breaches occur remedies should be applied such as financial penalties, exclusion from tendering, cancellation or warnings. Mechanisms should be used to regularly monitor effective implementation.

Recommendation 22

NFAW recommends that:

- the Department of Finance develop a consistent definition of employee;
- discussions be held with existing Free Trade Agreement partners to include a broader employment equity exemption and ensure that future agreements include broader employment equity exemptions;
- government require that a detailed analysis of employment in contracts with a high labour content be published annually; and
- the Department of Finance develop clear compliance requirements relating to social procurement and an evaluation framework.

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