Submission to the Productivity Commission Draft Report on Workplace Relations Framework Inquiry

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Introduction

The National Working Women's Centres (NWWCs) in South Australia, the Northern Territory and Queensland are community-based not-for-profit organisations that support women employees whatever their age, ethnicity or work status by providing a free and confidential service on work related issues. All three Centres are small agencies that rely on funding from the Commonwealth Fair Work Ombudsman, State (SA) and Territory governments (NT) through the CBEAS (Community Based Employment Advisory Services) program that when it was initiated recognised the high unmet need in the areas of employment advice for vulnerable workers particularly women.

The Working Women's Centres opened in 1979 in South Australia and in 1994 in the Northern Territory and Queensland. Since their beginnings, the Centres have worked primarily with women who are not represented by a union, their own lawyer or other advocate. We provide advice, information and support in lodging complaints and claims. As we are not legal services and can not provide legal advice, we refer women with legal needs to appropriate legal services. Many women who contact our Centres are economically disadvantaged and work in very precarious areas of employment.

NWWCs also conduct research and project work on a range of issues that women experience in relation to work. These have included access to child care, Repetitive Strain Injury, outwork, family friendly practices, WHS, workplace bullying, the needs of Aboriginal and Torres Strait Island women, pregnancy and parental status discrimination, Community Development Employment Project (CDEP), work/life balance, pay equity and the impact of domestic violence on women workers and their workplaces. Although some of the issues have changed for women since the Centres began operation, the work that we do remains consistent with the philosophy that all women are entitled to respect, to information about their rights and equal opportunity in the workplace.

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- NWWCs on the whole represent the concerns of low paid, non unionised women workers. As such it was disappointing not to see the concerns of this vulnerable group of workers adequately considered in the Productivity Commission Draft Report on the Workplace Relations Framework.

- NWWCs client group are not women well resourced nor necessarily articulate in workplace law to argue their case about the impacts of intended 'reform' on their everyday working lives. We see that as part of our role, based on the experiences that our client group report to us and our observations of their experiences and outcomes in a range of workplace relations jurisdictions. Indeed their need to access their fair entitlements and a fair process through a complaint mechanism when things go wrong for them at work is evidence of the need for adequate protections - as the Report points out 'A workplace relations framework must recognise two features of labour markets. Labour is not just an ordinary input. There are ethical and community norms about the way a country treats it employees. Without regulation, employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions.' We accept that whilst we work hard for our client group, there are many more women who feel they lack adequate protections especially at pressured times in their working life, like when they are trying to negotiate a flexible return to work after parental leave and there is scarce quality and affordable child care available. These women may also lack the means or resources to pursue a remedy at law if one exists.

- However we also see it as the role of the Productivity Commission through an enquiry into the Workplace Relations Framework to fully research and analyse the current place of women in the labour market and look to ways that structural barriers to women's full participation can be removed from an otherwise pretty well functioning system. With significant evidence to indicate that the gender pay gap remains intransigent in 2015 at 18.8% and there remains a gap of 46.6% between men and women in superannuation at retirement, NWWCs are disappointed that the current Draft Report fails to take much account of this disparity. We draw the Productivity Commission's attention to further considering NWWC Recommendations in its March 2015 submission. We have consistently raised the issue highlighted in our Recommendations 3 and 4 in relation to the right to request a flexible return to work after parental leave but don't see this issue reflected in the Productivity Commission's draft report. Our Recommendation 10 bluntly states 'That there be no reduction in penalty rates' and this remains the view of NWWCs, particularly given the flagging of removing Sunday penalties from a range of industries and occupations where women predominate.

- NWWCs take very seriously the concerns and realities of low paid non unionised women workers and hence it was difficult at times to read what appeared to be

deliberately contentious comments in the Draft Report that appeared to take no account of the lives of our client group. Comments such as that on page 3 in relation to 'minimum wages' which many of our clients rely on - 'Minimum wages are also often paid to higher income households.' on face value, with no analysis, no justification or further comment or supporting material feel to us to be totally denigrating of the group of women workers who live a tightly negotiated existence between welfare and work, often juggling 2 or 3 jobs on the minimum wage to meet their financial commitments. Comments such as this are seen as not helpful in a document otherwise void of a demonstrated true grasp of the effect of workplace laws on the lives of working women.

Case Study – Meena was referred to our Centre by the Fair Work Commission. She works 2 different jobs for the same employer, a cleaning company. Meena refers to these jobs as her 'night time job' and her 'day time job'. Meena is just months away from qualifying to become an Australian citizen. She is very excited about this. Meena had to go to Canberra to attend to her passport with her Embassy. She got 15 days notice of this so she put in a request to her employer immediately. Her 2 days of leave was approved as annual leave but when Meena returned to work she was told she would not be paid for those 2 days as the company has a policy of having to give a month's notice for paid annual leave. Meena also had an underpayment issue in her 'day time job'. She had been asked by her supervisor to do an extra hour a week which she had agreed to. Meena checked her payslips for the first 2 fortnights and she was paid for the extra hours she had worked. Meena didn't check her payslips again for several months but kept working the extra hour a week. She presumed that she was being paid. As it was a small amount she didn't notice the discrepancy but when she did, she questioned her employer. She was told that they had no record of her ever working extra hours. Meena was told that the supervisor who asked her to do the extra hours was no longer working there and they would not honour the arrangement, even though Meena had the evidence of the 2 payslips where she had been paid for the extra hours. Meena is working hard to earn a living wage juggling her 2 jobs. She wants to do well in Australia and contribute to life here.

- Nor did we find the key point again on page 3 in relation to the 'The Fair Work Act 2009 (Cth) 'and sometimes the FWC can give too much weight to procedure and too little to substance, leading to compliance costs and, in some cases, poor outcomes – an employee may engage in serious misconduct but may receive considerable compensation under unfair dismissal provisions due to procedural lapses by an employer' at all elucidating or helpful. Too often employers who have not followed accepted principles at law, such as affording natural justice or procedural fairness cry 'foul' when they have been found to have terminated employees unfairly, harshly or unjustly. Rather than take issue with the laws or the conduct of the Commission (both of which can be appealed or argued under current processes) why not make a recommendation that employers access the wealth of material available to raise their knowledge and skill base in relation to following the laws? NWWCs are not convinced that in the majority of unfair dismissal applications, employees have engaged in serious misconduct. Staff of NWWCs do

not assist clients with claims of unfair dismissal that they feel may be lacking merit or are vexatious. Better resourcing our community based services to do some checking or vetting of complaints would be a cheaper way of addressing this perceived problem than tying up FWC staff and slowing down the unfair dismissal process. Community Based Employment Services have demonstrated experience and skills in handling complainants who may not have a good understanding or acceptance of what the workplace relations systems can deliver, hence saving the FWC time and costly resources.

- On the whole NWWCs agree that the current WR system is not dysfunctional, however many of the suggested 'repairs' do not meet with our expectations of what a modern and fair WR system should deliver to women employees.

- For a group of workers particularly under the media spotlight at the moment, namely workers on various visa sub class arrangements, NWWCs agree with the key point on page 4 of the Draft Report that 'Migrant workers are more vulnerable to exploitation than are other employees'. There is always a danger of referring to the position of 'women' as if they are 1 homogenous group without going deeper in an analysis of different groups of women. Similarly we found the draft report's reference to 'migrant workers' is a little superficial. At the moment we are assisting women on 457 visas who are herb pickers, hairdressers and mortgage brokers. We are assisting women backpackers who have been grossly underpaid working in the citrus and poultry industries. We have a client on a skilled visa who came to this country in a high level position and whose circumstances changed for her and her family whilst she was here. She is now on a humanitarian visa. We are assisting students on student visas who are frequently asked to breach the conditions of their visas by working more hours a week than they should. Often they are not paid for the extra hours. In many cases these clients are working for members of their own families and feel unable to refuse their requests to work as they feel beholden to their family for support. The circumstances of each of these women are very different. They all have different industrial issues and the systems for delivering remedies need to be carefully examined and crafted so as not to create unintended negaitive consequences. What this collective group of women workers possibly do share is the fear of breaching immigration laws because of what has happened to them at work, which in turn can lead to exploitation.

- The Fair Work Ombudsman may well benefit from more resources to detect and deter exploitation of 'migrant' workers but so would community based employee agencies (CBEAs) funded by FWO. Our organisations are often at the frontline of intelligence about exploitative and illegal practices. There are broader reforms needed to deal with this issue that relate to the way bodies like FWO and DIBC work together and there is a need for more access to workplace remedies that truly take account of a person's visa status if they make a complaint. Some form of amnesty from deportation for breaching visa workplace conditions may be well considered for workers lodging complaints in the FWC. We have had a number of

matters where settlements have not been reached before the worker has had to leave the country.

- Worryingly for our particular client group, many of the information requests in the draft report flag a desire to return to a system where individual contracts in the past have proven to drive down the wages and conditions of low paid non unionised women workers and created a two tier system for those workers with bargaining power and those without. NWWCs reject moves to return to a non specified, no evidence based 'No Disadvantage Test'. NWWCs assert that the spirit of Enterprise Agreements are to enhance employee's award conditions and entitlements in consideration of the unequal bargaining position of employers and employees. A 'better off overall test' takes into account this spirit or principle. NWWCs believe that a NDT is just not good enough for low paid, non unionised already vulnerable employees.

- NWWCs take exception to a comment on page 8 of the Draft Report – 'The legislation is complex and there are meaty pickings for lawyers and workplace practitioners on all sides.' This seems a strange and unnecessarily provocative representation of the need for complex laws to cover complex arrangements (which most workplace arrangements are) and the many practitioners who seek to provide assistance to people needing to access their legal workplace entitlements. NWWCs do not condone any practices that seek to draw a larger than necessary cost from clients (our services are free). NWWCs feel that this comment does not acknowledge the very worthwhile work of the FWC under the guidance of His Honour President Justice Iain Ross to provide clear guidance material in plain language to assist people and their advocates to navigate various processes of the workplace relations system. Simplifying laws and in the process, perhaps removing entitlements that once assisted employers and employees is no substitute for education that assists people to better understand the laws and how to access their entitlements in low cost arenas.

- NWWCs encourage a deeper gendered analysis of labour market performance. The experiences of our client group do not resonate with the overview of labour market performance outlined in the Report Overview.

- The OECD explains economic empowerment as the capacity of women to participate in, contribute to and benefit from growth processes in ways that recognise the value of their contributions, respect their dignity and make it possible to negotiate a fairer distribution of the benefits of growth. Economic empowerment increases women’s access to economic resources and opportunities including jobs, financial services, property and other productive assets, skills development and market information. (OECD Women’s Economic Empowerment Issues Paper 2011)

- While it is reported that Australian women are among the most educated in the world (more than half of university graduates are women), gaps remain when it

comes to workforce participation. The broader reality for Australian women relative to similar countries was not as optimistic as reports suggest, (Booz & Co). Australia has a relatively low female workforce participation rate (ranked 14th of 34 OECD nations in 2010), and a continuing significant and unmoving gender pay gap. Many barriers remain to women's participation across a great many areas in the life of the nation.

- The World Economic Forum (WEF) has released the ninth edition of the Global Gender Gap Report, measuring the relative gaps between women and men across four key areas: health, education, economy and politics. The Report provides each country with an overall ranking on gender equality. While Australia ranked equal first in terms of educational attainment, it ranked 51st for labour force participation and 63rd on wage equality for similar work.

- NWWCs support the concerns about the rise in youth unemployment and point to our Recommendations 8, 9 and 10 as being of particular relevance in addressing this trend. We point also to research undertaken for the Fair Work Ombudsman by Professor Andrew Stewart and Rosemary Owen 'The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia' January 2013. The recommendations from this research should be considered. We would like to see again a much more nuanced analysis of 'youth' reflected in the considerations of the Productivity Commission.

- NWWCs take issue with the section on page 11 of the Report titled 'The heavy weight of history'. The Draft Report seems to be arguing against relying on historical precedents. History and precedent are used as arguments against the need for social change but NWWCs note that in other policy areas history and precedent is just as equally used as an argument against social change eg not paying proper entitlements to Aboriginal and Indigenous workers who had their wages stolen. NWWCs have no objection to the FWC initiating research to better inform decisions and sees no impediment to this. We do note that the comment 'The FWC should not just impartially hear evidence from parties, but also engage with parties that do not usually make submissions, such as those representing consumers and the jobless' presupposes that those parties are resourced to provide evidence when most likely they are not. NWWCs have sought to be heard in the past in Minimum Wages matters to represent the concerns of low paid non unionised women workers but this is a very resource intensive exercise for a small community based organisation. NWWCs do however hold rich data about the lives of working women and have access to clients who can attest to the impact of low wages on their lives.

- NWWCs do not support the proposed changes to address what the Draft Report identifies as a need for reform caused in its view by the appointment of persons with differing perspectives and practice because they have represented employers or employees in the past. NWWCs acknowledge that in unfair dismissal matters there are from time to time inconsistencies in judgements. We have raised this with the

FWC in the past. However we do not contend that drawing members from areas totally outside of workplace relations is the answer to addressing this. The proposed approach has the potential to deny appointments of women (due to their lower representation on Boards and Committees) and in and of itself will not address political or ideological bias. Better training, supervision, accountability practices and evidence based research in our view would do more to rectify any inconsistent practices. NWWCs caution about just relying on a 'merit based' process if that process is gender blind.

- NWWCs have had the benefit of reading the NFAW's response to the Draft Report and support that submission's analysis of the likely deleterious consequences of proposed changes on women workers in Australia. For low paid non unionised women who are already industrially vulnerable, proposals regarding enterprise contracts, penalty rates and a range of practices in regard to workplace bargaining have the potential of further weakening their pay and conditions. NWWC also agrees with NFAW that the proposals to change the governance arrangements for the Commission have the potential to further exclude women from the appointments process if that process does not consider gender fully.

- With specific regard to our Recommendation 6 we note the recent publication on 30 July 2015 of the Toolkit to Combat Pregnancy Discrimination by the Australian Human Rights Commission. The Guide 'Supporting Working Parents summarises what the law including the Fair Work Act 2009 says. We note the inclusion of the 'Quick Employer Guide to Supporting Working Parents' as a valuable resource to employers with employees taking or returning from parental leave.

- We note in relation to Recommendation 14 in our March 2015 submission the adoption of flexibility entitlements for employees who have worked with the same employer for at least 12 months. Under the NES they can now request flexible working arrangements if they are experiencing family or domestic violence, or provide care or support to a member of their household or immediate family who requires care and support because of family or domestic violence. NWWCs are active in delivering training on domestic and family violence as it relates to workplaces under the Safe at Home Safe at Work Project and note that many employers remain unaware of their responsibilities. We note the recent case where Cmr Roe made a finding of unfair dismissal as the applicant (who had experienced domestic violence from her husband who worked in the same workplace) was not afforded any opportunity to discuss how she could continue working with an intervention order in place. It is noted that the organisation chose to terminate the vicitm of the violence, rather than the perpetrator and this accords with the experiences of many of our clients in similar situations. Greater efforts should be made in the Fair Work Act to consider protections for victims of domestic violence, such as adding domestic violence as a ground of discrimination.

- NWWCs made a number of recommendations in its March 2015 submission

(Recommendations 11, 12 and 13) in relation to workplace bullying. We accept that there will be another opportunity to have our views considered with a future review of the Stop Bullying Jurisdiction. We do emphasise however that the industry group with the highest level of complaints of workplace bullying is the Health and Community Sector and that complainants in this sector are often working for non constiitutional corporations and so have no jurisdiction in the Stop Bullying arena. NWWCs believe that all workers should have access to the Stop Bullying jurisdiction.

- **Draft Recommendation 3.5 –** If a likely outcome is to improve consistency NWWCs encourage the publishing of more detailed information about conciliated outcomes and processes and an independent review.

- **Information Request re Draft Recommendation 4.3 -** NWWCs ask whether an entitlement a casual worker has exchanged for part of their loading eg personal or carer's leave would be paid out on termination? If not, clearly the employee risks being worse off and NWWC would not support this. If this can be shown to support flexibility and security of employment for working mothers without the loss of entitlements through exchanging or trading, then NWWCs would support this.

- **Information Request re Draft Recommendation 5 Unfair Dismissal –** NWWC is happy with existing exemptions from lodgement fees for unfair dismissal claims for our clients. If lodgement fees are raised NWWCs would want the capacity for exemptions to continue or for there to be a fair means test applied. NWWCs do not support lodgement costs that will present barriers for low paid workers to access the unfair dismissal process.

- **Draft Recommendation 5.1 –** NWWCs do not support consideration of unfair dismissal applications 'on the papers' prior to commencement of conciliation. This would hugely disadvantage many of our clients who can not express in writing what has happened to them. To gain fair representation applicants need a good understanding of the laws and the language of the Fair Work Act to properly put forward their claim. There is much to be gained from a poorly handled dismissal process when a worker feels 'heard'. Too often we find ourselves assisting women who have been accused of fraud or stealing money where there is no evidence of this and no police report made. In many cases, to accuse someone of some supposed wrong doing is a quick and easy, but not lawful or fair, way to get rid of a worker

- **Draft Recommendation 5.2 –** NWWCs do not support a change to the penalty regime so that an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct. NWWCS agree that reinstatement is not always an option but this should be assessed on a case by case basis. NWWCs have no problem with an

employer receiving counselling or education but not at the expense of an entitlement to a worker. The experience of our clients is that the provision of a few weeks wages to meet financial commitments until a new job can be found makes the difference between major upheaval for a family or some stability between jobs. NWWCs question who the proposed 'financial penalties' would be paid to. Presumably it does not mean to the worker who has been dismissed. NWWCs question the economic benefit of not paying compensation to a worker who has been dismissed for doing nothing wrong. A costs analysis we believe would find this is not a sensible approach. The ability of people to pay their bills and keep stability in their lives assists everyone in the community.

- **Draft Recommendation 5.3 –** NWWCs agree that the emphasis on reinstatement as the primary goal of the unfair dismissal provisions could be removed but acknowledge that, in our view, the value of this emphasis is aspirational ie that it holds the employment relationship up as worth protecting. In that sense, if that means that all efforts are made by workplaces to encourage the maintenance of the working relationship then there is value in keeping it. In reality, decision makers manage to speak with parties at conciliation about the merits or otherwise of forcing people back into workplaces where the relationship is likely to further break down.

- **Draft Recommendation 6.1 –** NWWCs believe this proposal to be overly legalistic and counter to the spirit of conciliation. Discovery processes in other jurisdictions tend to blow out timelines and costs. In this jurisdiction there is a lot to be gained in having complaints addressed in a timely manner. In our view there is already adequate discretion for members to request proof of claims being made.

- **Draft Recommendation 6.2 –** NWWCs would like to see the term 'workplace right' more clearly defined and especially extended to complaints that assert workplace bullying. We would also like to see the addition of 'refusal to follow an unreasonable direction' added as a workplace right. We have had a number of clients who have been directed to sign documents, authorise payments or follow procedures at the direction of their employer which place them in a position of committing fraud or breaching a law, contractual arrangement or company procedure. When they have refused to do these things the employee has been dismissed. We would assert that this is an unfair consequence of refusing to do something unlawful but it has been found to not constitute a 'workplace right' to follow the directions of a supervisor or manager. In relation to the second part of 6.2 NWWCs assert that better resourcing of Centres such as ours will ensure that complaints are screened by our staff and hence made in good faith.

- **Draft Recommendation 6.3 –** NWWCs believe that complaints that are frivolous and vexatious can be adequately dealt with already.

- **Draft Recommendation 6.5 –** agree. Additionally training about other jurisdictions that deal with discrimination in particular should be provided as at times these

appear to be poorly understood.

- **Draft Recommendation 8.1 –** agree with this but there must be agreement between parties about which research sources are relied upon.

- **Draft Recommendation 9.2 –** agree with this recommendation but such an investigation into traineeships and apprenticeships should also consider the impact of the supply of visa sub class workers on supply and demand.

- **Information Request re Chapter 14 preferred hours clauses –** NWWCs can see that this may have positive outcomes for women with caring responsibilities but would need to be carefully managed and monitored.

- **Draft Recommendation 15.4 and 16.2 –** NWWCs do not support replacing the BOOT with an NDT for reasons already discussed.

- **Draft Recommendation 16.1 -** NWWCs do not support changes to the timeframes to 1 year for termination of a flexibility term. This potentially would lock many workers in to arrangements they can't plan for or meet.