C/- Centre for Work + Life, University of South Australia, GPO 2471, ADELAIDE, SA 5001

17th February 2012

The Fair Work Act Review Panel
C/- Department of Education, Employment and Workplace Relations
Fairworkreview@deewr.gov.au

Dear Dr Edwards, Professor Emeritus Ron McCallum and the Hon Michael Moore,

Re: The Fair Work Act Review

The Work + Family Policy Roundtable (W+FPR) brings together feminist and pro feminist researchers with national expertise in gender, work and family policy. Its purpose is to propose and comment on research and public policy within its area of expertise. Accordingly, the W+FPR welcomes an opportunity to contribute to the Post Implementation Review (PIR) of the Fair Work Act (FW Act).

The focus of the W+FPR to date has been on the importance of establishing an equitable work and care regime in Australia – one that is fair to all women, provides genuine equality of opportunity between men and women, and a system that will underpin productive workplaces and well-being for all citizens. A central foundation of such a work and care regime is a comprehensive and inclusive set of labour standards that protect workers no matter what industry they work in, nor the contract basis of their employment.

While the terms of reference for the Review are wide-ranging, we have focused mainly on the safety net provided under the FW Act, made up of the National Employment Standards and the Modern Awards. We also provide brief comment on the FW Act's provisions in relation to pay equity and adverse action given that they are highly relevant to workers with family responsibilities.

Our brief submission draws on our collective research expertise and is in keeping with the Roundtable's goals of contributing to the development of good policy, producing clear policy guidelines and evaluating policy proposals. We would be happy to discuss our submission further or provide copies of the research to which we refer.

Yours sincerely,

Professor Barbara Pocock, Dr Elizabeth Hill, A/Professor Sara Charlesworth,
(Co-convenors W+FPR)

What is the Australian Work + Family Policy Roundtable?

The Roundtable is made up of researchers with expertise on work and family policy. Its goal is to propose, comment upon, collect and disseminate research to inform good evidence-based public policy in Australia.

The W+FPR held its first meeting in 2004. Since then the W+FPR has actively participated in public debate about work and family policy in Australia providing research-based submissions to relevant public inquiries, disseminating current research through publications for public commentary and through the media.

The W+FPR is now made up of 26 academics from 12 universities:

- **Prof Marian Baird**, University of Sydney
- **Prof Rowena Barrett**, Edith Cowan University
- **Dr Wendy Boyd**, Southern Cross University
- **Prof Deborah Brennan**, University of NSW
- **Prof John Buchanan**, University of Sydney
- **Prof Bettina Cass**, University of NSW
- **A/Prof Sara Charlesworth,** University of South Australia (co-Convenor)
- **Eva Cox**, University of Technology (UTS)
- **A/Prof Lyn Craig**, University of New South Wales
- **Dr Michele Ford**, University of Sydney
- **Prof Suzanne Franzway**, University of South Australia
- **Alex Heron**, University of Sydney
- **Dr Elizabeth Hill**, University of Sydney (co-Convenor)
- **Dr Jacquie Hutchison**, University of Western Australia
- **A/Prof Therese Jefferson**, Curtin University
- **Dr Deborah King,** Flinders University
- **A/Prof Sarah Maddison**, University of NSW
- **Dr Virginia Mapedzahama**, University of Sydney
- **A/Prof Jill Murray**, La Trobe University
- **Prof Barbara Pocock**, University of South Australia (co-Convenor)
- **Prof Alison Preston**, Curtin University
- **Dr Belinda Smith**, University of Sydney
- **A/Prof Lyndall Strazdins**, Australian National University
- **Prof Trish Todd**, University of Western Australia
- **Prof Gillian Whitehouse**, University of Queensland
- **Dr Brigid Van Wanrooy**, (formerly University of Sydney, now the Department for Business, Innovation and Skills, UK)

Guiding Principles:

The W+FPR has 12 key guiding principles to inform its work and comment. We believe that in principle, work and family policy proposals should:

1. Recognise that good management of the work-life interface is a key characteristic of good labour law and social policy.

2. Adopt a life-cycle approach to facilitating good work-family interaction.

3. Support women and men to be workers as well as mothers, fathers and carers, and actively encourage fathers as carers.

4. Facilitate employee voice and influence over work arrangements.

5. Ensure sustainable workplaces and workers (e.g. through 'do-able', quality jobs and appropriate staffing levels).

6. Ensure gender equality, including pay equity.

7. Protect the well-being of children and other dependants.

8. Ensure predictable hours, earnings and job security.

9. Promote social justice and the fair distribution of social risk.

10. Treat individuals fairly, regardless of their household circumstances.

11. Ensure flexible working rights are practically available to all workers through effective regulation, education and enforcement.

12. Adopt policy and action based on rigorous, independent evidence.

See http://www.familypolicyroundtable.com.au/ for details of the W+FPR and its activities.

SUBMISSION

1. National Employment Standards

The aim of the Fair Work Act (FW Act) is to guarantee a 'safety net of fair, relevant and enforceable minimum terms and conditions for Australian workers' (Gillard 2008). However, it is our view that the current safety net provided for under the FW Act, made up of the 10 National Employment Standards and Modern Awards, does not provide a comprehensive and inclusive set of minimum standards that is the necessary basis to allow workers, particularly women workers, to manage their work and caring responsibilities.

In the context of the current review, we have a number of concerns about the current set of National Employment Standards (NES) both in terms of their scope and coverage. In particular, the exclusion of casual workers, the maximum (and minimum) hours of work, requests for flexible working arrangements, parental leave and related entitlements and the provision of a Fair Work Information Statement.

a) Exclusion of casual workers

The NES provides some limited recognition of the caring responsibilities of casual workers in the provision of two days *unpaid* carers leave for each occasion when a member of the employee's immediate family or household requires care or support because of a personal illness, injury, or an unexpected emergency. However as Charlesworth and Heron (2012) point out, workers who are employed on a casual basis, especially those who have less than 12 months service — workers who are more likely to be women — are effectively excluded from a number of working time NES (Charlesworth and Heron 2012). Casual workers are not covered by the NES on annual leave, paid carers and compassionate leave. While the very definition of a casual is an employee without access to paid sick or annual leave, for which the casual loading is supposed to compensate, it is noteworthy that in New Zealand, under the *Holidays Act 2003*, casual workers are entitled to paid annual leave either as paid time off or as a proportion of their hourly rate.

Casuals are also excluded from the NES on notice of termination or redundancy pay, and paid community service and jury service leave. Further, while all workers have to have 12 months service with their employers to be protected by the NES, in respect of unpaid parental leave and the right to request flexible work, casual workers also have to be in 'regular and systematic' employment for this period with a reasonable expectation of continuing employment after that time. This effectively excludes a large proportion of women working on a casual basis, as almost half (46 percent) are in their jobs for less than one year (ABS, 2007).

Under the NES, all employees other than casuals are entitled to paid annual leave. However, the growth in casual employment in Australia has seen an increase in the proportion of workers who do not have paid leave entitlements. This not only constrains the capacity of workers to manage the multifaceted demands of work and family life, but not taking a holiday is also associated with worse work-life interaction and mothers are particularly negatively affected (Pocock et al 2010).

Given so many entitlements under the NES are linked with both tenure and a permanent or fixed term contact of employment, the W+FPR believes that the NES, which provide the *floor* of the FW Act safety net, should be updated to both extend paid annual leave to casual workers and provide a mechanism to minimise the use of casual employment. Currently such mechanisms are limited to a handful of Modern Awards in male dominated industries. Casual and part-time work is increasingly associated with unpredictable and unsociable hours. This is not desirable for workers with family responsibilities. While many women might opt to reduce their hours of work, particularly after the birth of a child, the price paid is often moving to a casual contract of employment or poor quality part-time work. There is overwhelming evidence that workers with family responsibilities prefer stable regular hours and conditions rather than irregular and flexible hours that may be offered at short notice. In contrast, stable work patterns allow workers to make appropriate care arrangements and provide a predictable income.

The W+FPR recommends that:

- The NES on paid annual leave should be extended to casual workers (on top of the casual loading) as is currently the case under the NZ *Holidays Act 2003* where casual workers are entitled to paid annual leave either as paid time off, or as a proportion of their hourly rate.
- The NES need to confine casual employment to work of a limited and genuinely short-term, seasonal or unpredictable nature.
- The NES should provide casual workers with the right to request conversion to permanent status where their work is ongoing, with employers required to reasonably consider such requests and show good reason for refusal.

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b) Maximum hours of work

The NES on maximum hours of work provides that the number of hours worked must not exceed 38 hours. However there are exceptions; one of which is that an employee may be required to work overtime if the request to work is deemed to be 'reasonable', a judgement which is, in practice, at the employer's discretion. While the NES provides an employee may refuse to work unreasonable additional hours in certain specified circumstances, including on the basis of family responsibilities, the high proportion of workers currently working overtime for no overtime payment suggest that in practice, many employees and their employers are unaware they have any right to refuse additional hours.

The existing maximum hours provision in the NES needs to better address the working of extended and persistent long working hours. Recent research suggests that nearly 30 per cent of Australians are working long hours (45+). Long hours are common for Australian men with 40 per cent working longer than 45 hours per week. Fifteen per cent of Australian women also work long hours (Pocock et al 2010; Pocock et al 2012). The Australian and international evidence about the pernicious social and health effects of long hours is extensive (Green, 2008).

Working hours also have a direct impact on the time available for caring and domestic responsibilities. The long hours worked by fathers are 'accommodated' within households with young children by mothers working short part-time hours, often in jobs without access to family friendly arrangements (Charlesworth and Strazdins et al 2011). Good working time arrangements are a crucial way in which policy can improve the work-life interface and the W+FPR supports a more effective approach to the regulation of working time in Australia. We also suggest consideration of the European Working Time Directive, with its limitations on extended and persistent long hours, and its application to millions of European workplaces.

c) Minimum hours of work

There is also a need to consider the outcomes for part-time workers in relation to *minimum* hours. What is absent from the NES is any provision for minimum weekly hours or minimum periods of engagement on a daily basis for those who do not work full-time. The basis for fundamental working time minima for non-standard workers is currently regulated by individual Modern Awards. However, many of the Modern Awards are silent on the minimum weekly hours for part-time workers. This is an issue because of rising *under*employment and, in some cases, consequent multiple job holding, particularly for women working part-time in the Australian retail, hospitality and health and social assistance industries. Underemployment is an issue for workers with family responsibilities in terms of income security and attachment to the labour market and is also an issue for the economy and the broader society in terms of the underutilisation of productive labour.

The current set of Modern Awards provide very different minimum engagements for casual workers ranging from one hour for home care workers in the *Social Home Care and Disability Services Modern Award* 2010 to four hours for casual workers in the *Manufacturing Modern Award* (Charlesworth and Heron 2012). Firm standards on minimum weekly hours and minimum engagements need to be in the NES if they are truly to provide a safety net for *all* workers, particularly those with caring responsibilities.

The W+FPR recommends that:

- Tighter conditions on the imposition of overtime, with a concerted employer and community education campaign run by the Fair Work Ombudsman around the right to refuse additional hours.
- Minimum weekly hours for employees working less than full-time to ensure that part-time workers have access to predictable and sufficient hours.
- A minimum period of engagement for all casual workers of not less than 3 hours per engagement.

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d) Right to Request Flexible Work Arrangements

The W+FPR welcomes the right to request flexible working arrangements as part of the NES. The FW Act provision for specific rights to request flexible work arrangements for parents of pre-school children, or of children with a disability, has shown to be beneficial for working families. Research at the Centre for Work + Life has shown that many workers already make use of flexible working arrangements and are associated with positive work-life benefits (Pocock et al 2009). In workplaces where employee requests for flexibility are accommodated, workers are asking for, and getting some flexibility.

However, some significant gaps remain in this NES as it currently stands and some new problems have emerged. The new 'right to request' is far more limited than similar provisions in the UK and New Zealand. There is no meaningful review of employer refusals to grant requests and eligibility is limited to parents of pre-school children who have 12 months service with their employers.

A range of reasons including workplace cultures and local supervision constrain the full use of the right to request flexible work arrangements. Recently published research also points to issues affecting men, who are less likely to ask, and less likely to receive flexibility, despite the fact that many would like more flexibility in their jobs (see Skinner et al 2011). Increasing flexibility in the next cohort of workplaces will require a firm legislative right and a genuine perception of potential penalty if that right is not provided. The W+FPR believes that there is a good case for stronger rights to dispute rejection (whether partial or total), and an effective mechanism of redress.

Analysis of ABS data about work-life outcomes for carers of frail, aged and other non-child dependents suggests that they suffer more work-life strain than carers of young children (see Pocock et al 2012). The W+FPR believes there is a good case to extend the right to request flexible working arrangements under the NES to accommodate other family and caring responsibilities including caring for older people and people with disabilities.

International evidence suggests that the right can be extended to a broader population of workers without creating difficulties for business. A similar right is available to all employees in the Netherlands and Germany. Extending the right to all employees makes it simpler for employers to manage, can encourage innovation in work organisation, and increase workplace acceptance that men as well as women need to be supported to be working carers. However, flexible work arrangements need to be monitored to ensure flexibility that supports carers is available to workers across the labour market, and that flexibility is not traded off against other employment conditions that support good work-life outcomes (Pocock et al 2009).

Good quality work and employee-friendly flexibility will also enhance the health outcomes for workers and promote social inclusion. It is therefore important to raise awareness about the availability of a right to request flexible work so both workers and their employers are aware of this workplace right and that it does not become a grace and favour arrangement. The Fair Work Ombudsman has proved very effective in industry- and Australia-wide campaigns around the underpayment of wages. Extending such campaigns to the right to

request flexible work would enhance both worker and employer awareness of this right and, over time, 'normalise' its availability and uptake within workplaces as has occurred in the UK.

Many Australian women undertake part-time or casual work as a strategy to reconcile their work and care commitments. In many cases this work is of a poorer quality than full-time work, leaving workers disenfranchised from policy initiatives such as flexible work. Flexible working policies that promote good work-care outcomes should be available to all workers and a strengthened and extended right to request flexible work is a crucial underpinning of such policies.

The W+FPR recommend that:

- The current right to request flexible working arrangements be extended to all carers of children and adults (as is the case in NZ).
- Based on a review of the operation of the right to request, policies be developed to extend the right to all employees (as in the Netherlands and Germany).
- A request may only be refused where reasonable, based on balancing employee as well as employer needs and be subject to the normal workplace grievance mechanisms in place where disputes arise about other National Employment Standards.
- The Fair Work Ombudsman mount an education and community awareness campaign, providing detailed guidance about the right to request and examples of changes that can be requested, including increasing and decreasing hours of work.

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e) Parental leave

The unpaid parental leave standard in the NES is in essence a workplace right most eligible workers have had since the first maternity leave test case in 1979. Yet research, human rights inquiries and complaints to community advocacy/legal/equal opportunity bodies suggest that this standard is frequently breached.

The current NES is an improvement on earlier maternal /parental leave award and statutory standards in a number of respects, including unpaid pre-adoption leave and consultation about workplace change. There are, however, a number of areas where the current standard is inadequate as a statutory minimum entitlement. These include:

- *Eligibility:* Restricting eligibility to those with 12 months service or more means more than a quarter of all female employees are excluded from this minimum standard. This requirement for 12 months service is also inconsistent with the criteria for eligibility for Paid Parental Leave.
- *Return to work guarantee:* The NES requires only that the employee is entitled to return to her pre-parental leave position or if that position no longer exists to 'an

available position for which the employee is qualified and suited nearest in status and pay to the pre-leave position'. In effect this leaves the determination of whether both the pre-leave position and any alternative position are 'available', up to the employer. Returning to work after parental leave to the same employer, and to the same job (including on reduced hours), is critically important to women's labour force attachment. Too often women have to trade off a return to work on part-time or flexible schedules for a downgrade in status, job security or job progression opportunities. Greater efforts are needed to make the job guarantee in the NES a reality for the primary carers of infants and auditing its success needs to be undertaken on a regular basis.

- *Protection against sham redundancies*: Research and the experience of Working Women's Centres and JobWatch have all highlighted the problem of the non-genuine redundancies where the pre-parental leave position is the sole position to be made redundant or 'not available' while the employee is on leave as well as forced transfer to casual and inferior positions and different work locations on return to work (Charlesworth and Macdonald 2007; McDonald and Dear 2006). The onus thus needs to be placed on employers to demonstrate that if the pre-leave position is not available it is a genuine redundancy and if this is the case, to locate a position that is comparable in terms of remuneration and status.
- *Antenatal leave:* The NES does not provide for antenatal leave. This is not covered by the current NES on personal/carer's leave and compassionate leave. A normal pregnancy does not involve either personal illness or injury (of the employee or of an immediate family member) or unexpected emergencies. However, regular antenatal checks are crucial to ensuring a healthy pregnancy, birth, mother and child.

The W+FPR recommends that:

- Employees who have worked for 10 of the 13 months prior to the leave (similar to the requirement for Paid Parental Leave) are protected by the Parental Leave and Related Entitlements NES.
- Access to reasonable antenatal leave be included in this NES.
- It be a breach of this NES if a worker is made redundant while pregnant, on parental leave, or on return to work from parental leave, unless the employer can demonstrate that this is a genuine redundancy.
- Action be taken to ensure the job guarantee in this NES is honoured by employers, including through proactive education and enforcement by the Fair Work Ombudsman.

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f) Provision of a Fair Work Information Statement

The NES requires employers to provide employees with a simple statement of their general rights and entitlements under the NES after they commence employment about modern awards in general, and other general conditions. However, for employees to fully understand their rights and entitlements, details of the specific awards or agreements on which employee's rates of pay and conditions are based, need to be included in the Fair Work Information Statement. Currently the standard excludes prospective employees and those already employed.

The W+FPR recommends that:

- As a statutory minimum, the NES should ensure that all employees, including current and new employees are provided by their employer with a document setting out their entitlements, their classification, pay rates, and their conditions of work under the relevant award and/or agreement on an annual basis.
- Prospective employees are advised of their rights and entitlements under the NES, their classification, pay rates and their conditions of work under the relevant Modern Award and/or agreement at the time they are offered a position.

2. Modern Awards

While the current review is not considering the terms of individual Modern Awards, we wish to express our concern about two key issues about the current Modern Award regime. These contain basic minimum working time standards for workers, which affect a greater percentage of women than men, and the role of Fair Work Australia in actively addressing the ways in which Modern Awards might affect the conditions of low paid workers and any discrimination, including against women and workers with family responsibilities.

We note that under the FW Act that (and its predecessor the Australian Industrial Relations Commission) was obliged to have regard to the needs of the low-paid and to eliminate discrimination including in the award modernisation process. These obligations include eliminating discrimination specifically on the grounds of sex, pregnancy and family responsibilities. In our view there is little evidence that these obligations formed any part of the negotiation between the relevant parties nor in the decisions made by the AIRC in the award modernisation process, nor by Fair Work Australia in subsequent amendments to the Modern Awards.

Working time regulation plays a critical role in relation to both wage levels and the creation of good-quality jobs for non-standard workers such as casual and part-time workers (Charlesworth and Heron 2012). Pay is affected by the scheduling of hours and among other things the structure of penalty and overtime rates. The degree of predictability and employee control of working time can be adversely affected by the ease with which employers can effectively impose changes to work hours. Recent evidence from the retail and childcare industries points to substantial working-time insecurity for many permanent part-time employees (see Campbell and Chalmers 2008; Whitehouse et al 2011).

There is also some evidence to suggest that the historically poorer working time protections in female compared to male dominated industries have been reproduced under the Fair Work regime (Charlesworth and Heron 2012). For example, part-time and casual community service workers have fewer protections in their Modern Award both relative to full-time workers covered by that award, and to other casual and part-time workers working under other Modern Awards, particularly those in male-dominated industries. As a result, there remain significant and gendered differences in working time minima for workers in feminized industries.

The W+FPR recommends that:

- In the forthcoming review of Modern Awards, Fair Work Australia's obligations in respect to having regard of the needs of the low-paid and to eliminate discrimination, be specifically considered both in the review of individuals awards and across the review process more generally.

3. Gender Pay Inequity

The FW Act has strengthened the safety net of the *Workplace Relations Act 1996*, particularly the porous safety net established through the WorkChoices amendments. It includes some work and family provisions in the NES, prioritises collective over individual bargaining, expands equal remuneration provisions and increases anti-discrimination regulation. Each of these changes has the potential to improve women's pay and conditions directly or indirectly. However, since the introduction of the FW Act in 2009, available data suggest that the gender pay gap is continuing to widen.

The *Making it Fair* report was released in November 2009 and provides a very comprehensive set of pro-active recommendations to improve pay equity which could guide the government in its drive to improve the position of women. Many of those recommendations have still to be taken up. Yet the available statistics continue to remind us that gender inequity is a serious problem in the Australian labour market. The gender pay gap is trending upward; whereas in May 2005 women's average weekly ordinary time earnings (fulltime) were 85% of equivalent men's, by May 2011 they were 82.8% (ABS 2011). The pay gap for *all* employees is considerably wider when part-time employment is taken into account. Today, almost all analysts recognise the multiplicity and inter-connectedness of factors contributing to gender pay equity including industry and occupation segmentation, the undervaluation of women's jobs, the impact of part-time employment, organisational culture and gendered societal norms and expectations. Nevertheless good labour regulation can have a direct and powerful impact on reducing the gender pay gap.

The W+FPR recommends that:

- Gender pay equity be mainstreamed throughout wage determination by being included as an explicit objective of the FW Act as well as in obligations of Fair Work Australia in relation to Modern Awards, the negotiation of any enterprise agreement, and of the minimum wage adjustment process.
- There be systematic research to assess the outcomes of the FW Act and its effects on gender pay equity, including through the modernisation of awards, enterprise bargaining and the implementation of individual flexibility clauses.
- The Australian Government act promptly on the recommendations in the 2009 Making it Fair report, including the establishment of a specialist Pay Equity Unit within Fair Work Australia or the Fair Work Ombudsman to coordinate the development and implementation of strategies to address gender pay inequity.

4. Adverse Action

The W+FPR is concerned with recent employer calls to remove the protections against adverse action in the FW Act. Historically, Australia has had separate anti-discrimination and industrial relations jurisdictions. As a result, unlike in the UK, this has marginalised discrimination against workers on the grounds of sex, pregnancy and family responsibilities as matters somehow 'outside' workplace relations.

The introduction of clearer anti-discrimination provisions in the FW Act has mainstreamed workplace discrimination as an industrial relations issue. One of the significant benefits of taking discrimination action under the FW Act, rather than anti-discrimination law, is that it provides that once an employee establishes in effect a *prima facie* case, it is presumed that the adverse action was taken for the discriminatory reason (eg pregnancy discrimination) unless the employer can prove otherwise. These provisions have the potential to protect both against discriminatory provisions in awards and agreements, and to protect pregnant workers and workers with family responsibilities against adverse action in all stages of employment, not only termination. Together with effective enforcement by the Fair Work Ombudsman, the shifting burden of proof in section 361 has enabled this potential to be realised in two recent pregnancy discrimination cases which have been prosecuted. Such enforcement action provides a powerful deterrent to employers who may engage unintentionally or otherwise in this form of discrimination, and raises awareness more generally in the community about the current rights pregnant women have under the FW Act.

The conciliation process under the *Sex Discrimination Act 19*84, which prohibits discrimination in employment on the ground of sex, pregnancy and family responsibilities, does not offer the same practical assistance to complainants by a body such as the Fair Work Ombudsman, nor the same public deterrent to employers though the mechanisms of enforceable undertakings and prosecution. In our view it would be an extremely backward step to remove or weaken in any way the existing adverse action provisions in the FW Act.

The W+FPR recommends that:

- The current adverse action provisions, including those that protect workers against discrimination on the grounds of sex, pregnancy and family responsibilities be retained in the FW Act.

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