

Ai GROUP REPLY SUBMISSION

**Victorian Inquiry into the Labour
Hire Industry and Insecure Work**

22 March 2016



About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Australian Industry Group contact for this submission

Stephen Smith, Head of National Workplace Relations Policy

Telephone: 0418 461183 or 02 9466 5521

Email: stephen.smith@aigroup.com.au

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1. Introduction

The Australian Industry Group (**Ai Group**) makes this reply submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (**Inquiry**). This submission should be read in conjunction with our submission of 27 November 2015 (**November 2015 Submission**).

We have considered the submissions of other parties and none of them have led to us reconsidering the views that we expressed in our November 2015 Submission.

This reply submission only deals with a limited number of issues. Ai Group's position in response to most of the submissions of other parties should be evident from the views expressed in our November 2015 Submission.

The ACTU and its union affiliates are seeking the imposition of a further regulatory burden on businesses, including a licensing scheme which would not solve the issues of alleged non-compliance by some businesses in the labour hire sector. We reiterate the importance of maintaining a flexible labour market. Labour hire, casual employment and independent contracting arrangements are critical in facilitating this flexibility.

2. Constitutional and statutory issues relating to union calls for a licensing system for labour hire operators

As set out in our November 2015 Submission, Ai Group is not convinced of the need for a licensing system in the labour hire industry.

The Inquiry has expressed interest in the extent to which any licensing system which deals with workplace relations matters could operate, given the Victorian Government's referral of workplace relations powers to the Commonwealth through the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (**Victorian Commonwealth Powers Act**).

The Victorian Commonwealth Powers Act repealed the *Victorian Workers' Wages Protection Act 2007* and amended various other Acts, including the *Long Service Leave Act 1992* (Vic), to accommodate the referral of powers. The matters excluded from the referral of powers are covered in section 5 of the Victorian Commonwealth Powers Act and are limited to public administration, public sector employment and other related issues.

Once a State Parliament has referred its power to the Commonwealth Parliament in relation to a subject matter, the Commonwealth Parliament holds responsibility in relation to that subject matter.

This matter is further dealt with in ss.26, 27 and 28 of the *Fair Work Act 2009* (**FW Act**). The ACTU in its submission has argued that ss.26 and 27 are not as narrow as they appear. However, in Ai Group's view, the scope of ss.26 and 27 of the FW Act are clear. Section 26 of the FW Act seeks to exclude all State and Territory industrial laws insofar as they would otherwise apply in relation to a

national system employee or employer. Section 27 sets out the exclusions to this general proposition, listing various State and Territory laws which are not excluded and specifying various “non-excluded matters” such as workers’ compensation, child labour and long service leave.

Any State or Territory law imposing a licensing system that seeks to regulate or enforce employment terms and conditions would be excluded under s.26 of the FW Act.

Further, Ai Group contends that the creation of a licensing system, particularly of the description advanced by the ACTU and AMWU, could offend the *Competition and Consumer Act 2010*.

3. Casual employment statistics

In Ai Group’s November 2015 Submission, statistics are set out to highlight that the level of casual employment is around 20 per cent of the workforce and that this level is about the same as it was in 1998 – 18 years ago.

Professor Mark Wooden of the Melbourne Institute of Applied Economic and Social Research of the University of Melbourne recently wrote an article for *The Conversation* which assessed the accuracy of Ai Group’s assertions in this regard. The article is reproduced below with the Permission of Professor Wooden.

Fact Check: Is the Level of Casual Employment No Higher Today than in 1998

The AiG claim that statistics from the Australian Bureau of Statistics (ABS) show that casual employees currently represent about 20% of the total workforce; a level that is no different than in 1998. Is this claim correct?

The ABS statistics the AiG are referring to come from the *Forms of Employment Survey* (ABS cat. no. 6359.0) which was conducted at roughly three-year intervals between 1998 and 2013. Further, casual employment status is inferred from the receipt of paid annual leave and sick leave entitlements. The lack of such entitlements has long been regarded as a reasonable proxy for casual employment given that most industry awards include provisions that explicitly exclude casual employees from having access to them.

On my reading of this data source, employees without leave entitlements represented 21.3% of all employed persons in August 1998, almost two percentage points higher than the 19.4% share recorded in November 2013. So on this source the AiG’s claim is not quite right; the casual employment share was noticeably lower in 2013 than in 1998.

An alternative, and arguably preferred, ABS data source is the annual August supplements to the monthly Labour Force Survey. The most recent data come from numbers from its newly badged *Characteristics of Employment Survey* (ABS cat. no. 6333.0). According to this source, in August 2014 there were 2,305,600 employees in Australia without paid leave entitlements. This group represents 19.9% of all employed persons, so entirely consistent with the AiG’s claim that casual employees represent around 20% of the workforce.

Numbers from August 1998 appear in the publication, *Employee Earnings, Benefits and Trade Union Membership* (ABS cat. no. 6310.0). There is, however, a problem with this source (and most likely the reason the AiG did not rely on it). Unlike the most recent data, owner managers of incorporated enterprises were treated as employees (even though they are clearly self-employed),

and hence many would have been classified as casual employees given they would report not receiving paid leave. We thus need to remove these “employees” from the numerator to ensure comparability. Information provided by the ABS as a supplement to the October 2004 issue of *Labour Force Market Statistics* (cat. no. 6105.0) does exactly that, reporting that employees without paid leave entitlements represented 19.8% of all employed persons in 1998. This level is almost identical to the level recorded 16 years later.

In summary, the AiG’s claim that the casual employment is currently about 20% of all workers, which is much the same as it was in 1998, is entirely consistent with the data source most often used.

This finding that the casual employment share has not exhibited any trend increase over the last decade or so is also found in other data sets employing different definitions. The HILDA Survey, for example, which commenced in 2001, asks respondents not only about whether they receive paid sick leave and paid annual leave, but also whether they would describe their employment arrangements in their main job as casual (as distinct from either permanent / ongoing or fixed-term). On both measures the share of casual employment in total employment, despite rising in the most recent years (2010 to 2014), is no higher in 2014 than it was in 2001. Indeed, the casual employment shares are both about half a percentage point lower than in 2001.

But surely casual employment is much more pervasive than in the past? This is true, but all of the growth occurred prior to the late 1990s. Unfortunately, the earliest data we have only goes back to 1984. But the data we do have show that between 1984 and 1998 the casual employment share grew by a whopping 70%; since that time it has fluctuated at around the 20% mark.

Mark Wooden is Professorial Research Fellow, Melbourne Institute of Applied Economic and Social Research, Faculty of Business and Economics at the University of Melbourne, and Director of the HILDA Survey.

4. The importance of casual employment to increased workforce participation and gender equality

The unions argue that so called “insecure work” leads to various adverse outcomes, including gender inequality (ACTU submission page 21). Contrary to the unions argument, casual employment is vital to increased participation and gender equality.

It is very widely recognised that Australia’s participation rate must increase if Australia is to avoid falling living standards as the population ages over the years ahead.

It is important that casual employment remains accessible to persons seeking to enter into, or remain within, the labour market. Parents (in particular women), older workers, carers, workers with a disability, students and others often view casual work as desirable or essential as this form of employment enables a level of flexibility not available to full-time workers.

In the 21st century, casual employment should not be seen as a secondary or less desirable form of employment. Restricting access to casual employment would have a substantial adverse impact on

workforce participation. Clearly many employees prefer casual work and have no desire to work full-time. Also, many employers need the flexibility that casual employment arrangements offer.

Intergenerational Report

The 2015 Intergenerational Report released by the Australian Treasury reveals that the proportion of the population participating in the workforce is expected to decline over the next 40 years.¹ Increasing workforce participation is critical to Australia's productivity performance and to address skills and labour shortages.

The Government emphasises, within the 2015 Intergenerational Report, that the:

“declining participation rate is projected to detract slightly from real GDP growth per person over this period. Encouraging and valuing greater workforce participation, in particular amongst older age groups, presents an opportunity to further lift GDP growth per person.”²

The report goes on to say that ‘continued efforts to encourage higher participation across the community would have widespread benefits for Australia's economy and society’.³

Increasing the workforce participation of, firstly, the older population group, secondly, prospective parents and parents (particularly women), and, thirdly, workers with a disability, will become essential to maintain and lift the Australian economy as the Australian population continues to age.

The report states that:

- The number of Australians aged 65 and over is projected to more than double by 2054-55, with 1 in 1,000 people projected to be aged over 100. In 1975, this was 1 in 10,000.⁴
- ‘Australians will live longer and continue to have one of the longest life expectancies in the world. In 2054-55, life expectancy at birth is projected to be 95.1 years for men and 96.6 years for women, compared with 91.5 and 93.6 years today.’⁵
- ‘The average annual rate of growth in the population is projected to be 1.3 per cent, compared with 1.4 per cent over the past 40 years.’⁶
- ‘By 2054-55, the participation rate for people aged over 15 years is projected to fall to 62.4

¹ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, page ix.

² The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.2.

³ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 3.2.3.

⁴ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

⁵ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

⁶ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

per cent, compared to 64.6 per cent in 2014-15.⁷

- ‘The number of people aged 15 to 64 for every person aged 65 and over has fallen from 7.3 people in 1975 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.’⁸
- ‘The average number of hours worked is projected to fall slightly over the next 40 years. Population ageing is expected to be the main driver of the decline in average hours worked. Historically, those in older age groups have worked for fewer hours per week, on average, than those in younger age groups. This is expected to continue.’⁹

In respect of female participation, the report states:

- ‘Female employment is projected to continue to increase, following on from strong growth over the past 40 years. In 1974-75, only 46 per cent of women aged 15 to 64 had a job. Today around 66 per cent of women aged 15 to 64 are employed. By 2054-55, this is projected to increase to around 70 per cent.’¹⁰
- ‘Australia’s female participation rate is around 4 percentage points lower than that in New Zealand and Canada. If Australia’s female participation rate reached that of Canada, the Grattan Institute estimate that Australia’s GDP would be a permanent \$25 billion higher.’¹¹
- ‘Over the past three decades, the average number of hours worked per week has decreased, due partly to an increase in the number of people working part-time, reflecting the increase in female and older workers, who particularly benefit from a flexible workplace environment.’¹²

The Intergenerational Report notes that:

“Policy settings that seek to remove barriers to participation of females and older age groups in Australia and encourage them to work, if they wish to do so, can drive gains in GDP and income growth. These policy settings include availability of childcare, flexible working arrangements, and removal of discrimination. Policies seeking to remove barriers or support participation for other groups where this has been challenging, for example, young unemployed people and people with disability, would also be expected to generate gains in GDP and income growth.”¹³

⁷ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

⁸ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

⁹ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4

¹⁰ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts

¹¹ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3

¹² The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4

¹³ The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3

The unions' views and assertions on casual employment run counter to the policy settings that are so necessary given the demographic challenges facing the community.

Productivity Commission Report on Australia's Workplace Relations Framework

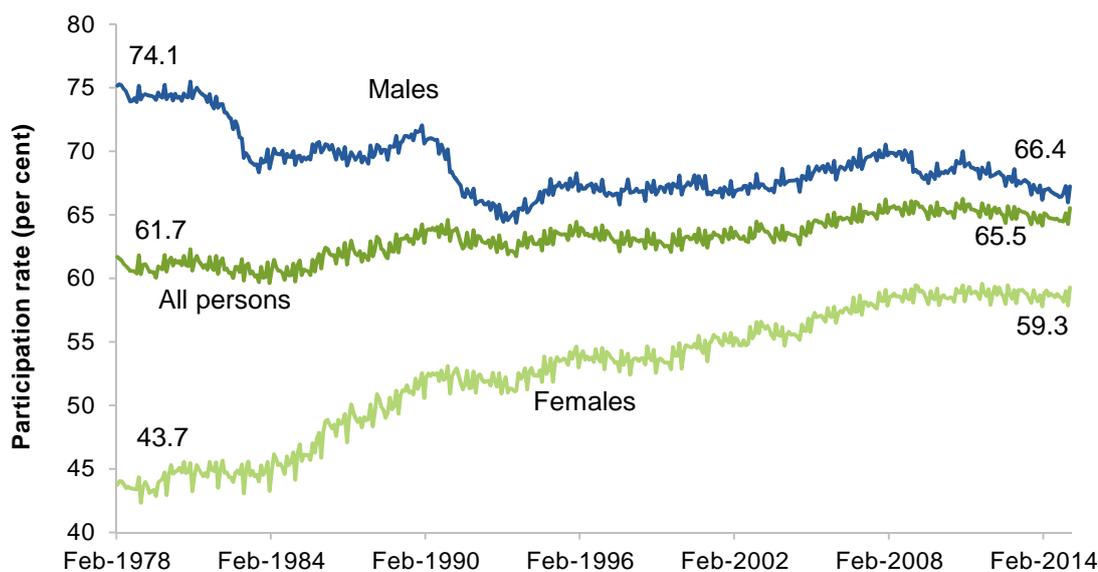
The final report of the PC Review into Australia's Workplace Relations Framework identifies some of the positive trends that have contributed to Australia's increased workforce participation rate over time (emphasis added):

"2.2 Who works? Participation and the composition of the labour force

The composition of Australia's labour force has changed substantially over the past 40 years. Women who work are now the norm, rather than the exception (figure 2.1), more mature age Australians are participating in the labour force, and skilled migrants are forming an increasing share of Australia's migrant intake. These shifts have all contributed to an increased participation rate over time.

Figure 2.1 Female participation rates up, male rates down

February 1978 to February 2015



Source: ABS 2015, *Labour Force, Australia*, Cat. No. 6202.0, released 12 March.

More women are in the workforce

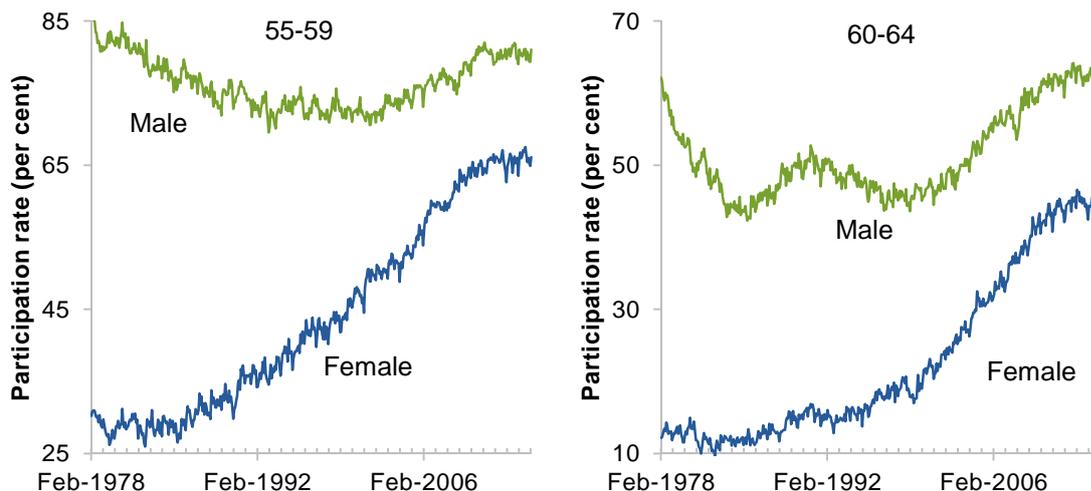
Female participation rates have increased over the last 40 years, both in Australia and other advanced economies. In Australia, they have risen from just under 45 per cent to almost 60 per cent. A number of factors have contributed to this increase, including several social and economic developments. Educational attainment has increased substantially among females since 1960, while fertility rates have declined over the same period. Moreover, increasing access to childcare has facilitated entry into the workforce. Such changes have been partly reflected in regulatory developments. For example, the equal pay cases in the late 1960s and 1970s established the principle of equal pay for work of equal value, overturning the 'Harvester Man' view of the minimum wage.

More mature age people are working

Mature age workers (those aged 55–64 years) have been growing as a share of both the population and labour force. While female mature age workers have traditionally had lower rates of workforce participation, this has increased markedly over the last three decades. Moreover, the decline in male participation rates among mature age workers has reversed in the last 15 years (figure 2.2).

Figure 2.2 Mature age workforce participation has been increasing

February 1978 to February 2015, 55-64 year olds



Source: ABS 2015, *Labour Force, Australia, Detailed*, Cat. No. 6291.0.55.001, released 12 March.

As identified by the PC, casual work is particularly important for mature aged workers. The increased flexibility in these areas over time has had a major positive impact on the increased participation of mature aged workers and on Australia’s overall participation rate.

In its final report the PC identified the risks and adverse consequences associated with imposing more restrictions on the engagement of casuals (emphasis added):

“Moreover, enhancing the conditions of certain forms of work (relative to others) may lead employers to choose to use one form over another, with consequences for certain types of workers. For example, moving to give casual workers a legal right to become permanent employees may be attractive to casuals looking for permanency and prepared to give up the loading, but where it dampens the employer’s motivation to hiring casuals and instead leads to an increased use of labour hire staff, it will likely disadvantage the workers with few skills and experience that welcome casual work and the associated loading (particularly when the alternative is unemployment).”¹⁴

It is vital that existing flexibility is maintained.

¹⁴ Productivity Commission Inquiry Report, *Workplace Relations Framework*, 30 November 2015, p.806.

Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation

In August 2012, the Consultative Forum on Mature Age Participation released its final report.

The Forum was chaired by Mr Everaldo Compton AM. The Members of the Forum included the Age Discrimination Commissioner, the Chief Executives of Ai Group and the BCA, a representative of ACCI, the Secretary of the ACTU, the Chief Executives of National Seniors Australia and the Council of the Ageing, and Government representatives.

The forum identified 14 key barriers facing mature age Australians in the workplace or looking for a job. One of the key barriers was: 'Flexibility of Employment Arrangements', with 'increasing access to part-time working arrangements' identified as a key way to overcome this barrier. Another of the 14 barriers was: 'Care-giving Responsibilities' which of course can be assisted through flexible work arrangements.

The final report relevantly states (emphasis added):

"Care-giving responsibilities are a significant barrier to mature age employment, with 28% of respondents being carers for an average 33.5 hours per week, and 14% caring for someone with a long-term illness or disability. These responsibilities prevent over one-third of care-givers from working and just under one-third from working more hours; caring disproportionately affects the workforce participation of females, people aged 45-54, and carers of the long-term ill and people with a disability. An enabler to increase employment participation and hours worked is suitable external care, which help almost half of respondents whose caring responsibilities affect workforce participation to find work or work more hours.

Another means of improving the workforce participation of carers is more **flexible employment arrangements**. Flexible work patterns would help 61% of non-employed carers and half of employed carers, whose caring prevents their workforce participation, from working or working more. Flexible work arrangements are also a significant enabler of workforce participation of the ill and injured. Flexible work patterns have been used by one-quarter of those who have been ill, and would help 59% of non-employed currently ill people to be able to work. Flexible work would most likely help younger workers re-enter the workforce. A reduction in hours as they approach retirement would also help current workers work more years, although for an average of less than one more year."¹⁵

The final report includes the following projection on the cost of failing to increase the flexibility of workplace arrangements:

¹⁵ Consultative Forum on Mature Age Participation, Final Report, August 2012, pp.17-18.

“The flexibility of workplace arrangements for care-givers and the ill barrier results in a loss of almost 450 000 potential employees by 2031, translating to just under 12.5 million hours foregone.”

The impacts of any increased restrictions on casual employment would become progressively worse over the years ahead as the population ages.

Willing to Work Inquiry - National Inquiry into Employment Discrimination against Older Australians and Australians with Disability

The ‘Willing to Work Inquiry’ is underway. The inquiry is looking at employment discrimination against older Australians and Australians with a disability.

Both the discussion paper dealing with employment discrimination against older Australians and the discussion paper dealing with employment discrimination of workers with a disability identify the lack of access to flexible working arrangements as a barrier to employment for older workers and workers with a disability.¹⁶

Ai Group is a member of the Employer Reference Panel for the inquiry, which is expected to conclude by mid-2016.

Productivity Commission Report on Childcare

The availability of part-time and casual work is a major contributor to the participation of maternal participation in the workforce.

In the final report of the PC inquiry into Childcare and Early Childhood Education,¹⁷ the PC identified the importance of flexible work arrangements, particularly the importance of being able to work fewer hours than full-time employees.

The report relevantly states (emphasis added):

“6.1 Why are we interested in the workforce participation of parents?”

There are a range of benefits from increasing the workforce participation of mothers — whether in terms of their joining the workforce or increasing the hours of work of those already in the workforce. Many participants and others have commented on these benefits (box 6.1).

Private benefits (benefits to the mother and her family) include or arise from:

- the mother’s receipt of wages, on-the-job training, opportunities for career progression, superannuation and other work-related benefits

¹⁶ <https://www.humanrights.gov.au/sites/default/files/document/publication/discussion-paper-age.pdf> and <https://www.humanrights.gov.au/sites/default/files/document/publication/discussion-paper-disability.pdf>.

¹⁷ Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014.

- increased satisfaction for the mother in engaging with others in the community beyond the family.

Community-wide benefits from increased maternal workforce participation, which incorporate the private benefits above, may include or arise from:

- a boost in measured economic output
- increased productivity of the workforce by ensuring the continued workforce attachment of educated and skilled working parents
- reduced risk of long-term unemployment and reliance on the welfare system
- increased return on public expenditure on higher education of women (including the repayment of HECS-HELP loans)
- increased tax revenues and reduced government expenditures (such as on the Newstart Allowance, Parenting Payment and Age Pension)
- improved level of social engagement.

Some studies have estimated the gross value to the economy from improving the workforce participation of women — that is, not including factors such as the value of unpaid activities (such as childcare) undertaken by women prior to entering the workforce. PriceWaterhouseCoopers (sub. DR648, 2014, pp. 4, 19, 29) estimated that the employment of an extra 0.3 per cent of the female partnered working age population would increase gross domestic product (GDP) in net present value terms by \$3.7 billion. The Grattan Institute (sub. 445, p. 4) estimated that GDP would be \$25 billion higher in a decade if Australian women did as much paid work as women in Canada — implying an extra 6 per cent of women in the workforce. The Organisation of Economic Co-operation and Development (OECD 2012a) estimated that increasing the workforce participation of women (so as to reduce the gap with men by 75 per cent) could increase Australia’s projected average annual growth in GDP per capita between 2011 and 2030 from 2.0 per cent to 2.4 per cent. The Commission considers that the workforce impacts from changing Early Childhood Education and Care (ECEC) funding are likely to have complex effects on GDP. These effects are discussed in chapter 16.”¹⁸

The report goes on to state (emphasis added):¹⁹

“Flexible work and other family-friendly arrangements

In contrast to the negative drivers of maternal workforce participation discussed above, is the availability of flexible work and other family-friendly arrangements, which is a key positive workforce participation driver (as noted, for example, by the ACTU, trans., pp. 109, 113–14, Melbourne, 18 August 2014). It can be viewed as a complement to accessible and affordable childcare:

Flexible and caring friendly working arrangements are not a substitute of accessible and affordable good quality childcare, rather they work together to enhance the abilities of mothers and fathers to undertake paid employment whilst having children. (Women and Work Research Group, sub. DR800, p. 7)

These arrangements cover:

- changing the hours of work (for example, working part time or changing start or finish times)

¹⁸ Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.184

¹⁹ Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.223-225

- changing patterns of work (for example, working split shifts, or job sharing)
- changing the place of work (for example, working from home)
- using leave arrangements including paid parental leave
- adopting specific occupational health and safety measures (for example, for pregnant employees)
- applying specific employer supports such as for ECEC (for example, employers providing onsite childcare or reserving places in a childcare centre).

For women who are not in the workforce or who work part time, the ability to ‘work part time hours’, ‘vary start finish/times’ and ‘work school hours’ are ‘very important’ or ‘somewhat important’ incentives to join or increase participation in the workforce, particularly when compared with men (figure 6.8). Indeed, some of these incentives rate above childcare-related incentives.

Most mothers used some type of flexible work or other family-friendly arrangements to assist with childcare (table 6.6). Around 74 per cent of mothers with a child aged under 13 years (around 1.3 million) and around 86 per cent of mothers with a child aged under 2 years who started or returned to work after the birth of their child (205 500) used some sort of work arrangement to assist with the care of their child. The most common working arrangements used were part-time work, flexible work hours and working from home. However, 7 per cent (over 14 000) of these mothers reported that flexible working arrangements were not available to use.

The findings of other surveys — for example, the Australian Institute of Management Survey 2008 of executives; Baseline Australian Mothers Survey 2010; CareforKids.com.au Survey 2014 of parents; and the Finance Sector Union survey of its members (sub. 174, p. 4) — also reinforce the importance to parents of the availability of flexible work and other family-friendly arrangements. For example, the Baseline Australian Mothers Survey (Martin et al. 2012, pp. 50–51) of some 2600 mothers found that in 2010, many mothers who returned to work after the birth of their child made use of flexible work and other arrangements — 57 per cent used flexible hours, 54 per cent went permanent part time, 39 per cent used shorter hours and 33 per cent worked from home. Also, 70 per cent of mothers who changed jobs on or following return to work did so because they wanted shorter or more flexible hours. A reason for 18 per cent of mothers not returning to work before 13 months was ‘couldn’t negotiate suitable work conditions’.

There are differences between mothers and fathers in their use of flexible work and other family-friendly arrangements. For example, ABS data indicate that mothers are more likely than fathers to use paid and unpaid leave to provide care, whereas fathers are more likely to use flexible working hours or rostered days off, or work from home to provide care (table 6.7). The subsequent introduction of the Australian Government’s Paid Parental Leave scheme is likely to have had an impact on the uptake of parental leave since the survey was undertaken.”

Table 6.6 Use of work arrangements by mothers to assist with the care of children 2011

	<i>Mothers with a child aged under 2 years</i>		<i>Mothers with a child aged under 13 years</i>	
	'000	%	'000	%
Part-time work	134.1	76	532.6	57
Flexible working hours	71.3	40	533.1	57
Work from home	53.3	30	226.1	24
Shift work	18.9	11	86.8	9
Job sharing	13.1	7	27.6	3
Any other work arrangements ^a	10.5	6	21.9	2
All work arrangements used to assist with care of child^b	176.5		942.5	

^a Includes women who used leave arrangements. ^b Individual components do not sum to all work arrangements as more than one working arrangement might be used.

Source: ABS (2012a, 2012b, p. 28).

The Australian Workplace Relations Study

In the First Findings report of the Australian Workplace Relations Study (**AWRS**) it was revealed that:

- ‘Flexibility to balance work and non-work commitments was considered to be the most important aspect of employment for almost one-third (32%) of employees when considering their overall satisfaction with their current job.’²⁰
- ‘A higher proportion of female employees (37%) considered the flexibility to balance work and non-work commitments to be the most important aspect of employment, compared to males (26%).’²¹
- ‘Employees were most satisfied with having flexibility to balance work and non-work commitments (5.67) and the freedom to decide how to do their work (5.66).’²²
- ‘Female employees were most satisfied with the flexibility to balance work and non-work commitments (5.78).’²³

The results highlight the importance of flexible forms of employment to all workers, particularly women.

²⁰ Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

²¹ Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

²² Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

²³ Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

Gender Equality

As is evident from the above discussion on workforce participation, the availability, and accessibility, of casual and part-time employment is important in furthering gender equality in Australia.

Despite many decades of increasing female workforce participation, women generally continue to assume the primary caring responsibilities for children and unpaid domestic work. This cultural reality drives the necessity for flexible forms of work, such as casual and part-time employment.

It naturally follows that reducing access to flexible forms of work like casual employment, would have a greater adverse impact on women than men.

As noted above, cultural factors are currently a barrier to gender equality in the workplace. Projects like *The Equilibrium Man Challenge* undertaken by the Workplace Gender Equality Agency attempt to introduce (and normalise) flexible working practices for all workers (not just women).²⁴

Imposing barriers to men working flexibly would have an adverse impact on women. If a greater number of men worked to facilitate parental responsibilities flexibly (including through the use of casual employment), a greater number of women would be able to participate in the workforce.

In addition, access to casual work can assist in rectifying gender inequality between men and women in retirement. For example, providing opportunities to increase female participation in the workforce enables women to increase their retirement saving via contributions to superannuation.

5. ACTU's 'Lives on Hold' Report

The ACTU and its affiliates' submissions heavily rely on '*Lives on Hold: The Report of the Independent Inquiry into Insecure Work in Australia*' (**Lives on Hold Report**).

The Lives on Hold Report was published in 2012 after an inquiry into 'insecure work', which was commissioned by the ACTU. The Inquiry was conducted by a panel of four and it received written submissions and conducted hearings.

The Inquiry preceding the publication of the Lives on Hold Report has repeatedly been referred to by the ACTU and union movement as an "independent inquiry"²⁵. With respect to those who conducted the inquiry, on no reasonable assessment could the inquiry be considered "independent". The inquiry was commissioned by the ACTU, the panel was selected by the ACTU, the panel members were paid by the ACTU, the terms of reference were drafted and provided to the panel by the ACTU, the ACTU made submissions to the inquiry, the ACTU urged its affiliated unions and union members to make submissions to the inquiry, ACTU staff assisted with the

²⁴ See <http://equilibriumchallenge.com.au/>.

²⁵ See for example cover page to Lives on Hold Report.

conduct of the inquiry and the preparation of the Lives on Hold Report, the ACTU conducted the inquiry at a time when it was pursuing a campaign against insecure work.

The terms of reference for the inquiry can be found at page 1 of the Lives on Hold Report. The panel was asked to consider:

- The extent of insecure work in Australia;
- The causes of insecure work and its prevalence in modern Australia;
- The workers that are most at risk of insecure work and why;
- The level of compliance with applicable labour laws and any barriers to their effective enforcement;
- The effect of insecure work on:
 - Financial security;
 - Occupational health and safety of workers and workplaces,
 - Wellbeing and health of workers outside the workplace, including impact on family and other relationships,
 - Training and skills development,
 - Career progression and opportunities;
 - Regional communities;
 - Social inclusion;
 - Community organisations;
- The social and economic cost of insecure work to employees, employers, government, and the Australian community;
- The rights and entitlements/working conditions that can best assist to provide security for workers;
- Relevant international human rights and labour standards.²⁶

For the purposes of the inquiry, ‘insecure work’ was defined by the ACTU as ‘that which provides

²⁶ ACTU Lives on Hold Report at p.1.

workers with little social and economic security, and little control over their working lives’.²⁷

The terms of reference are not balanced. For example, they do not refer to assessing the benefits of casual employment to employers, employees and the community. The terms of reference proceed on the basis that “insecure work”, as defined by the ACTU, is a prevalent and negative feature of the labour market in Australia. The Inquiry received written submissions between November 2011 and January 2012. It is important to note that those submissions were primarily provided by unions and workers. Not one of the submissions was filed by an organisation that represents employer interests. At the time that the inquiry was conducted, associations like Ai Group decided against making submissions as we took the view that the inquiry was not in fact “independent” and was part of a union campaign.

The inquiry featured hearings, where evidence was heard primarily from union officials and workers.²⁸ No employer groups participated in the hearings. Transcript of these proceedings is not publically available and the evidence taken was not tested by way of cross examination, nor was it subject to the rules of admissibility. The ‘case studies’ found in the Lives on Hold Report are based on the evidence provided by workers and ‘further interviews’.²⁹ The Report does not specify by whom those interviews were conducted, nor does transcript appear to be available. These ‘case studies’ are effectively only hearsay.

The panel also allegedly ‘met with and heard from academics, civil society groups, local indigenous leaders, national union leaders, representatives of The Productivity Commission and members of the roundtable for the Committee for Economic Development of Australia’.³⁰ The details of whom the panel met with and the details of those discussions are unknown.

At its highest, the Lives on Hold Report represents the views of a panel that was constituted by the ACTU for the purposes of examining what the ACTU describes as ‘insecure work’, based on anecdotal, untested evidence and submissions that were filed predominantly by the ACTU, affiliate unions and their constituents.

The Lives on Hold Report does not offer a fair, balanced or thorough examination of any of the issues that are subject to this Inquiry.

The panel assessed the extent of insecure work in Australia by reference to ABS data that goes to the proportion of employees who are engaged in casual employment, fixed-term employment, the number of independent contractors, the proportion of workers that are employed by labour hire agencies, and so on.³¹ However, the methodology for arriving at their figure of 40% of the workforce being in “insecure work”³² is grossly flawed and overstated. The report cites that

²⁷ ACTU Lives on Hold Report at p.1.

²⁸ ACTU Lives on Hold Report at pp.78–81.

²⁹ ACTU Lives on Hold Report on the sixth page (no page number appears).

³⁰ ACTU Lives on Hold Report at p.78.

³¹ ACTU Lives on Hold Report at pp.14-17.

³² ACTU Lives on Hold Report at p.5.

Australia's workforce is made up of the following types of workers:

- 62.4% - full-time and part-time;
- 19.3% - casual;
- 9% - independent contractors; and
- 9.3% - business operators.

To derive the figure of 40% of the workforce being in 'insecure work', every casual, every business operator and every independent contractor in Australia, as well as some full-time and/or part-time employees would need to be included. This is clearly spurious.

Most independent contractors are happy with their arrangements and have no desire to be employees. Also, business operators cannot be regarded as being in insecure work – they run their own businesses, and commonly employ other people.

The report states that about 1.25% of workers are employed by labour hire firms, but these employees are included in the above figures, mostly as casuals, and should not be double-counted.

The report also states that 4% of workers are engaged on fixed term contracts but these are also included in the above figures for full-time and part-time employees and should not be double-counted.

Whichever way the statistics are cut or added, the alleged figure of 40% of the workforce being in insecure work does not withstand the most cursory scrutiny.

It may be that the 40% figure has been derived by adding employees who work particular patterns of hours. The report states that '*(w)orking time insecurity is also experienced in the form of excessive hours*'.³³ No doubt many managerial and professional employees in secure jobs would be amazed to hear that they have been deemed to be in 'insecure work' in the ACTU's report, simply because they work long hours.

The Lives on Hold Report simplistically seeks to demonise all casual employment and non-standard working arrangements, irrespective of the circumstances surrounding the employee's engagement, and characterises it as "insecure work". It reaches this conclusion absent any rigorous consideration of or evidentiary case regarding the circumstances in which casual employees are engaged, why they are so engaged or their working conditions.

For the reasons we have here provided, the Inquiry should not give any weight to the Lives on Hold Report. Its observations, characterisation of casual employment, conclusions and

³³ ACTU Lives on Hold Report at p.17.

recommendations must be seen in light of the nature of the inquiry and the terms of reference pursuant to which it was conducted. The unions' assertions that it provides a valid and robust consideration of the impact of casual employment or its characteristics should be wholly disregarded.

6. Compliance with ILO Conventions – labour hire licensing schemes

The ACTU, in its submission at page 29, seeks to rely on International Labour Office (ILO) Convention 181 as a basis on which a labour hire licensing system should be implemented in Australia.

The current forms of regulation, including those in current workplace laws, are sufficient to regulate the labour hire industry.

The former Labor Government provided a number of detailed reports to the ILO setting out reasons why the *Fair Work Act (FW Act)* complies with relevant ILO conventions, including:

- The *Freedom of Association and Protection of the Right to Organise Convention, 1948* (Convention 87)
- The *Right to Organise and Collective Bargaining Convention, 1949* (Convention 98)
- The *Equal Remuneration Convention, 1951* (Convention 100)
- The *Discrimination (Employment and Occupation) Convention, 1958* (Convention 111)
- The *Employment Policy Convention, 1964* (Convention 122), and
- The *Tripartite Consultation (International Labour Standards) Convention, 1976* (Convention 144).

Ai Group, ACCI and the ACTU were consulted in the preparation of those detailed reports. Ai Group agrees with the Australian Government's position that the FW Act complies with Australia's international labour obligations.

In relation to ILO Convention 181, Article 3 states that:

"2. A Member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice" (emphasis added).

In Australia, labour hire firms are regulated by the same federal and state laws as other employers. The implementation of a licensing system in Victoria could breach, Article 3 of the ILO Convention 181.

7. Portability of long service leave

Ai Group strongly opposes the creation of, or extension of any scheme (legislative or otherwise) aimed at portability of long service leave, as advanced by the AMWU.

A Victorian Parliamentary inquiry is underway into the portability of long service leave entitlements. Ai Group has made a number of submissions to the inquiry and appeared at the public hearings.

The detailed analysis in Ai Group’s submissions demonstrates that portable long service leave schemes are around four times as costly as traditional long service leave schemes. The imposition of a levy across the Victorian workforce of the same magnitude as the existing levy in the Victorian construction industry portable long service leave scheme (i.e. 2.7% of ordinary pay) would cost Victorian employers over \$4 billion per annum, compared to the \$900 million per year cost of regular long service leave entitlements.

The cost to the Victorian manufacturing industry would be around \$460 million per year which is about four times the current long service leave cost of around \$115 million per year.

Ai Group’s submissions argue that providing portable long service leave entitlements to Victorian workers would damage Victorian industry. The additional costs would make Victorian firms less competitive against interstate and overseas firms. The adverse impacts of such a massive cost impact would not be limited to employers; the impact would be felt by Victorian workers through lower employment, downsizing and plant closures.

8. ACTU’s “secure work principles”

The ACTU asserts in its submission at page 33 that:

“The most obvious, immediate and direct contribution that the Victorian Government can make to the prevalence and impacts of secure work is in relation to its own workforce”.

The ACTU goes on to propose a set of “mandatory secure work principles binding government and connected agencies”.

Ai Group strongly opposes the proposal to consider or implement a set of mandatory secure work principles in the context of government tendering processes.

Procurement practices in the Victorian Government are regulated by the Victorian Government Purchasing Board which sets policies that govern procurement of goods and services across all Victorian Government departments and various public bodies. The Government’s use of goods and services obtained from the private sector is a vital part of the Australian economy with the Victorian Government alone spending several billions on the purchase of goods and services from the private sector. Government tender processes are already highly complex and should not be subject to any additional restrictions.

9. Labor’s Protecting Australian Workers Bill

The Labor Party has introduced the *Fair Work Amendment (Protecting Australian Workers) Bill 2016* into Parliament. The Bill would impose very tough penalties (including up to 2 year jail sentences) upon employers who deliberately or recklessly underpay workers or engage in sham contracting.

The Bill has been referred to a Senate Committee inquiry. Ai Group will make a submission by the 4 April deadline.

Prior to the introduction of the Bill into Parliament, the Labor Party consulted Ai Group on the content of the Bill. Ai Group’s views are set out in the attached correspondence to The Hon Brendan O’Connor MP, Shadow Minister for Employment and Workplace Relations.



AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES

SYDNEY 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059 Tel 02 9466 5566 Fax 02 9466 5599

CANBERRA 44 Sydney Avenue, Forrest ACT 2603, PO Box 4986, Kingston ACT 2604 Tel 02 6233 0700 Fax 02 6233 0799

MELBOURNE Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004 Tel 03 9867 0111 Fax 03 9867 0199

BRISBANE 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004 Tel 07 3244 1777 Fax 07 3244 1799

ADELAIDE 45 Greenhill Road, Wayville SA 5034 Tel 08 08 8394 0000 Fax 08 08 8394 0099

REGIONAL OFFICES

ALBURY/WODONGA 560 David Street Albury NSW 2640 Tel 02 6041 0600 Fax 02 6021 5117

BALLARAT Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350 Tel 03 5331 7688 Fax 03 5332 3858

BENDIGO 87 Wills Street, Bendigo VIC 3550 Tel 03 5440 3900 Fax 03 5444 5940

NEWCASTLE Suite 1 "Nautilus", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300 Tel: 02 4925 8300 Fax: 02 4929 3429

WOLLONGONG Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520 Tel 02 4254 2500 Fax 02 4228 1898

AFFILIATE: PERTH Chamber of Commerce & Industry Western Australia

180 Hay Street, East Perth WA 6004, PO Box 6209, East Perth WA 6892 Tel 08 9365 7555 Fax 08 9365 7550

www.aigroup.com.au