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

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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) welcomes the opportunity to make submissions to the Australian Human Rights Commission's (AHRC) "Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with a Disability" and thanks the Age and Disability Discrimination Commissioner, the Hon. Susan Ryan AO, and her team for enabling Australian Chamber members to share their perspectives regarding the employment of people with a disability and/or mature aged workers.

Increasing the workforce participation of older Australians and Australians with a disability will deliver social and economic benefits and the Australian Chamber has played an active role in promoting the business case for employing people from a broad and diverse pool of Australians including people with a disability, mature aged workers, indigenous Australians, women returning to work, workers with different industry backgrounds, the unemployed and people who might have historically been considered 'outside the box'. This commitment can be seen from the Australian Chamber's 'Employ Outside the Box' resources which promote a number of important messages for employers. In particular, the Australian Chamber continues to heighten awareness of demographic changes and structural changes in our economy which will see skill and labour shortages and intensify the need for employers to draw from a broad and reliable supply of labour, including older Australians and people with a disability. Demographic shifts as our population ages will see a heightened focus on attraction and retention strategies and the market will adjust to draw on a labour supply pool that may not have traditionally been considered as a core source of labour. Sources of labour currently considered to be 'outside the box' will naturally come into play as a means of filling skills and labour needs.

However during this adjustment phase, it should be acknowledged that the regulatory framework surrounding the employment relationship in Australia is complex and daunting for employers, particularly small business. There is no need for further regulation. The creation of further regulation will only entrench the views of some that employing people "outside the box" including older Australians and Australians with a disability is too "risky" and will detract from the efforts of industry in helping to overcome stereotypes, myths or misconceptions. The Australian Chamber is aware that there is untapped potential within the labour market and improving ways to match a person's skills and competencies with role requirements and focusing on what a person is able to do, rather than what they can't do, will enhance the employment prospects of people with a disability and older Australians. There is a role for Government to work in partnership with industry in facilitating the matching of people, including older Australians and people with a disability, with businesses that need and will benefit from their skills and competencies in a supported environment.

Improving the workforce participation rates of people 'outside the box', including people with a disability, has significant potential to fill projected shortfalls in the labour market arising from our ageing population. Access to free, individualised support for recruitment, job analysis, job advice

and training as well as financial assistance for workplace adjustments and equipment play an important role in supporting employment outside the box.

Australian Chamber members already have specific programs in place to provide assistance to employers and are able to link employers to other programs to help facilitate employment of older Australians and people with a disability. Industry bodies and the employment services they deliver play a pivotal role in helping to connect employers with people willing to work. Industry bodies also play an important role in providing information on training options and some of the funding and incentives that are available to support employment outcomes. The Australian Chamber has partnered with Campbell Page to assist members and industry in creating direct links between industry needs and the workforce.

There is also an important role for industry to play in promoting the business case for employing outside the box in order to shape and challenge perceptions and the Australian Chamber is continuing its work in this area.

2 Contextual Considerations

The Australian Bureau of Statistics defines disability as “any limitation, restriction or impairment which restricts everyday activities and has lasted or is likely to last for at least six months.”¹ There is a wide range of type and severity of disability and it is estimated that about one in five people have some type of disability. Importantly, many people with disability are able to work effectively with either minimal or no additional assistance. This means that, in the absence of disclosure, a significant number of employers may be employing people with a disability without even realising it. Notwithstanding this, society is experiencing a shift in attitudes and people with disability are more likely to disclose their disability than might have been the case historically.

The disability may or may not be visible when first meeting a person. It may be temporary or permanent. It might have a small or large impact on what a person is able to do, much of which would not normally be noticed by colleagues and acquaintances. Data indicates that around two-thirds of disability pensioners have mild or moderate disability, yet less than 10% earn any income through work.² Many of these people are capable of working and want to work, but in many cases they lack the experience, opportunity or encouragement and support needed to get them into sustainable employment.

Based on current trends, older persons with disability³ will become a larger proportion of the population placing significant demand on the caring workforce which is already struggling with skills

¹ ABS, 2010, Catalogue 4430.0, Disability, Ageing And Carers, Australia: Summary Of Findings, p 3

² Brown, Jessica; 2010, Defeating Dependency: Moving Disability Support Pensioners Into Jobs, Centre for Independent Studies.

³ ABS, 2011, Catalogue 4446.0 - Disability, Australia, 2009, Source: NDS analysis of ABS SDAC 2009 CURF Persons 15-64 employed with disability and not a carer living in households

and labour shortages. These changes present challenges and opportunities for employers and the broader community.

The Intergenerational Report highlighted our shifting demographics and ageing population stating that:

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.

In 2054-55, there are projected to be around 40,000 people aged over 100. This is a dramatic increase, well over three hundred times the 122 Australian centenarians in 1974-75.⁴

The Intergenerational Report also observed that:

Life expectancies at birth in Australia for both males and females remain among the highest in the world. According to UN data for the period 2010-15, Australia ranks equal first with Iceland in male life expectancy. For females, Australia ranks only behind Japan, Spain, France and Italy.⁵

We can expect life expectancy to increase as time progresses with the Intergenerational Report suggesting:

Medical research underway today in areas such as stem cell therapy, new medicines and other biotechnology has the potential to provide further dramatic improvements in life expectancy. It is for this reason that some experts have suggested that life expectancy may reach in excess of 140 years. The projections assume that the improvements from medical research continue at the same rate as the past.⁶

It is necessary to consider the impact of our ageing population in the context of the workforce with Australian statistics having predicted that by 2056 there will be about two to three people of working age for person aged 65 years and over. In this regard, the Intergenerational Report notes:

There will be fewer people of traditional working age compared with the very young and the elderly. This trend is already visible, with the number of people aged between 15 and 64 for every person aged 65 and over having fallen from 7.3 people in 1974-75 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.⁷

While the number of people of 'traditional working age' may be falling, the cohort of people who may have once been considered to have been outside of 'traditional working age' is growing in scale. The Intergenerational Report stated:

⁴ Intergenerational Report, pp. vii-viii.

⁵ Intergenerational Report, p. 6.

⁶ Intergenerational Report, p. 7.

⁷ Intergenerational Report, p. viii.

By 2054-55, the number of people aged 65 to 84 will have increased substantially. By 2054-55 there are projected to be 7.0 million Australians aged 65 to 84, compared with around 3.1 million in 2015. This would represent just under 18 per cent of the total population, compared with 13 per cent in 2014-15. In 1974-75, around 1.2 million persons were aged over 65, or around 9 per cent of the population.⁸

However as we age, it is likely that Australians will be able to work in a productive capacity for longer. In this regard the Intergenerational Report noted that “[r]ecent improvements in life expectancy have been met or exceeded by improvements in these health expectancies. That is, not only are Australians’ lives getting longer, they are enjoying good health for an increasing number of those extra years”.⁹ The Intergenerational Report stated:

Not only will Australians live longer, but improvements in health mean they are more likely to remain active for longer. ‘Active ageing’ presents great opportunities for older Australians to keep participating in the workforce and community for longer, and to look forward to more active and engaged retirement years.¹⁰

The Intergenerational Report also made reference to the Australian Institute of Health and Welfare’s (AIHW) estimated ‘health expectancies’ for Australians which suggested that:

A male born in 2012 could expect to live 79.9 years (period method) and an average of 62.4 of those years without disability. A female could expect to live 84.3 years, and an average of 64.5 of those years without disability. Of the years spent living with disability, an estimated 11.8 were without severe or profound core activity limitation for men, and 12.0 for women; that is not needing help with activities of self-care, mobility or communication.¹¹

The Intergenerational Report also referenced the World Health Organisation’s estimates of healthy life expectancy which measure the average number of years that a person can expect to live in ‘full health’ by taking into account years lived in less than full health due to disease and/or injury. The measure suggested that in 2012 Australians had the equal fourth highest healthy life expectancy at birth in the world being 73 years for both sexes combined.¹²

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 10,000.¹³

While not sitting squarely within the scope of this inquiry the issue of retirement incomes policy (including compulsory and voluntary superannuation and the age pension) is relevant in the context of participation decisions. It was acknowledged in the Intergenerational Report that:

⁸ Intergenerational Report, p. 13.

⁹ Intergenerational Report, p. 8.

¹⁰ Intergenerational Report, p. viii.

¹¹ Intergenerational Report, p. 8, sourced from Australian Institute of Health and Welfare Bulletin 126, Healthy Life Expectancy in Australia: Patterns and Trends 1998 to 2012.

¹² Intergenerational Report, p. 8, sourced from World Health Organisation, Healthy Life Expectancy at Birth.

¹³ Intergenerational Report, p. 1.

It will be critical to continue to support workforce participation, and there are many opportunities to do so. A number of existing policy measures are designed to assist the unemployed into work. Encouraging higher participation requires constant and ongoing reform commitment from the Government and all Australians.¹⁴

The Intergenerational Report notes:

Participation is made up of three elements: how many people choose to seek work (the workforce participation rate), how many of them can get jobs when they do seek work (the unemployment rate) and the average number of hours worked by individuals who have jobs. Improvements in participation happen as more people choose to look for work, and more of them are able to find work.¹⁵

There is little doubt that Australian governments are facing increasing fiscal pressures as the population grows and ages with programs most affected by demographic factors being health and expenditure, age and service pensions and aged care funding.¹⁶ However with the right policy settings in place, these pressures may be partially offset by increases in participation by employing outside the box and challenging social norms and perceptions regarding 'retirement age', work ability and by promoting the notion of career longevity. Indeed the Intergenerational Report states:

Increasing participation rates contributed 0.2 percentage points to average growth over the past 40 years. Over the next 40 years declining participation is projected to detract 0.1 percentage points from average growth.

...over the next 40 years, ongoing improvements in Australian living standards will remain primarily contingent upon continually improving our productivity, and require us to take every opportunity to increase participation rates.¹⁷

3 The Business Case for Employing People with a Disability

The Australian Chamber is active in promoting the business case for employing people with a disability, highlighting the multiple benefits to individual businesses in its 'Employ Outside the Box' resources. Not only do people with disability provide a partial solution to Australia's long term labour force needs, but as employees they can provide benefits to individual businesses. In particular:

- Independent studies provide evidence that people with disability have a very positive work attitude and work ethos. Employers see employees who have a positive attitude in the workplace as being valuable to their business.¹⁸

¹⁴ Intergenerational Report, p. xxi.

¹⁵ Intergenerational Report, p. 2.

¹⁶ Intergenerational Report, p. xvi.

¹⁷ Intergenerational Report, p. xii.

- An employee with disability can lead to increased productivity, reduced absenteeism, reduced turnover, increased morale, more positive organisational culture and reduced workers' compensation.¹⁹
- The costs of hiring staff, advertising, on-costs, induction and training can be reduced as generally there is less turnover for employees with disability.
- Ongoing costs for employees with disability are generally lower.²⁰ The number of work health and safety incidents for an employee with disability is six times lower than that of an average employee and the number of workers compensation incidents is four times lower than that of an average employee.
- Employees with disability have lower days of sickness absence compared to an average employee. The accrued cost of sickness absence in employees with disability was less than half of the cost for an average employee (\$408 vs. \$881).²¹
- Candidates with disability generally have very good problem-solving skills, as they have been challenged to find creative ways to perform tasks others may take for granted.
- There will be a potential boost to the morale and productivity within workplaces as they become more inclusive.
- Hiring people with disability contributes to the organisation's overall diversity. It enhances the company's image among its employees, community and customers with positive benefits to the employer brand.
- An employee with a disability can help a business to develop marketing strategies to reach this growth sector of the market. One in five people have some type of disability and the rate of disability is increasing as the population ages. That is also one in five potential customers.

One of the most common issues raised by employers is what risks will they be taking if they employ a person with disability. This fear can be heightened in physically demanding jobs. Further regulation will not help in addressing this. Rather, policy must assist businesses in seeking support from experts who are readily available and in many cases paid for by government. Industry bodies can play a pivotal role in connecting employers to the support and advice they need to overcome their concerns and better manage and accommodate employees, and prospective employees, with a disability.

¹⁸ Department of Education, Employment and Workplace Relations, 2011, Employer perspectives on recruiting people with disability and the role of Disability Employment Services, <http://www.deewr.gov.au/Employment/ResearchStatistics/ProgEval/Documents/EmployerServicing2011.pdf>, p9.

¹⁹ Disability Investment Group, 2009, The Way Forward, A New Disability Policy Framework for Australia, http://www.fahcsia.gov.au/sa/disability/pubs/policy/way_forward/Pages/default.aspx, p 55.

²⁰ Australian Safety and Compensation Council, 2007, Are People with Disability at Risk at Work? www.safeworkaustralia.gov.au/.../359/ArePeopleWithDisabilityRiskAtWork_Review_2007_RTF.doc • DOC file

²¹ Australian Safety and Compensation Council, 2007, Are People with Disability at Risk at Work? www.safeworkaustralia.gov.au/.../359/ArePeopleWithDisabilityRiskAtWork_Review_2007_RTF.doc • DOC file

4 The Business Case for Recruiting and Retaining Mature Aged Workers

To the extent that society has formed stereotypes and incorrect perceptions on mature aged workers 'suitability for the job' the community as a whole has a responsibility to address this. The Australian Chamber has taken the approach of examining the myths and barriers that may challenge some employers when considering mature aged workers. The Australian Chamber has also developed guidance suggesting steps an employer can take to resolve skills and labour shortages by taking advantage of the existing talent in the mature aged workforce. The Intergenerational Report suggests that:

Participation rates among those aged 65 and over are projected to increase strongly, from 12.9 per cent in 2014-15 to 17.3 per cent in 2054-55. This represents a significant opportunity for Australia to benefit more from the wisdom and experience of people aged over 65.²²

The benefits of a diverse workforce including mature aged workers include:

- better returns on investment in human capital by retaining or recruiting the 'advantages' of significant length of service, investment in training and wealth of accumulated experience;
- the ability to tap into a source of skill and labour when current sources of labour supply become scarce;
- maximising the chances of businesses employing the best people for the job by considering mature aged job seekers;
- leveraging the networks, external interests and experiences that mature aged workers have and which can add value to the business.;
- a strong commitment to the business by mature aged workers who are often more loyal and stay with the business longer;
- increased ability to respond to the changing age profile of customers and the need to reflect this in the workforce;
- making the corporate memory with lessons of experience, often not recorded, available to be imparted to younger workers;
- enabling an employer to market their business as a good employer by promoting diversity in the workforce and being seen to respond to emerging pressures to address organisational culture through making changes to traditional human resource practices;
- taking advantage of government-funded financial incentives, provision of special training grants and support for job creation;
- enhancing capacity to respond to changes to the operating environment, competitive pressures and economic circumstances affecting the business;

²² Intergenerational Report, p. ix.

- enhancing capacity to identify and understanding any looming problems in your workforce and opportunities that could be developed and future workforce requirements.

Committed business leaders are essential to ensure that age-friendly practices are adopted in order to eliminate stereotypical attitudes and prejudices affecting the employment of mature aged workers. It is also important to be aware that many mature aged workers themselves are heavily influenced by entrenched attitudes towards retirement (social or peer views about an accepted age for retirement). Increasing the participation rates of older Australians is a community wide issue suite of complimentary policies will be required to challenge perceptions around traditional working age and patterns or employment.

5 Work health and safety considerations

Care needs to be taken to avoid forming stereotypes or misconceptions regarding groups of people and their capacity to work. Rather, it is appropriate to consider and understand the strengths, weaknesses, needs and wants of each worker for their work health and safety and those around them regardless as to what group of people they may be considered to fit within. Under the model work health and safety legislation, independent of a person's age or of a disability, reasonable care must be taken at work to avoid foreseeable risk, as far as is reasonably practicable. In addition there should be reasonable accommodation. What is considered reasonable can depend on the individual case, on the tasks and the risks. This might mean special attention to any pre-existing conditions, to inexperience, to supervision and to education and training. It is a case-by-case assessment.

Seeking to regulate work health and safety practices for older Australians or people with a disability as broad groups would not be an appropriate policy response. Rather, policy should be concerned with shaping community expectations to reflect that work is a part of all our lives and that many factors including environmental factors, personal circumstances, mental and physical health and functional capacity will impact a person's ability to work and that every individual is different.

Industry bodies can play a role in helping to overcome myths and misconceptions regarding the work capacity of older people and people with a disability. For example, some surveys have indicated a disconnection between the employer and the employee based on community misunderstandings such as, for example, a person over the age of 45 being perceived as presenting an increased work health and safety risk. Safe Work Australia statistics contradict such assumptions and actually indicate that younger workers accounted for more injuries than older workers. Safe Work Australia's 2012 publication "The Australian Workplace Barometer: Report on psychosocial safety climate and worker health in Australia" suggested that workers aged between 25 – 34 years show the poorest psychological health, possibly due to factors such as competing work and family demands as well as entering the workforce following study, working hard and using long hours to advance in their careers, as well as experiencing low levels of skill discretion. Findings of another Safe Work Australia report published in 2013 entitled "Work-Related injuries

experienced by young workers in Australia 2009-10” suggested young workers have a heightened risk of work-related injury in Australian workplaces relative to their older counterparts.

A survey undertaken by Chandler Macleod in July 2013 entitled “Coming of Age - The Impacts of an ageing workforce on Australian Businesses”, involving 480 employers and 640 employees, considered a Finnish Institute of Occupational Health Work Ability model. This model was also considered by Safe Work Australia. The model suggests that the term ‘age management’ distinguishes between calendar age, functional age, organisational age, psychological age and life span age or stage. The survey respondents claimed high levels of shortages in highly experienced workers and rated productivity of older workers quite highly.

Like any other group, older Australians want to feel valued for their contribution, connect with the organisation and find challenge and reward. They can provide substantial expertise and enhance productivity by remaining in the workforce later in life. These workers bring valuable experience and knowledge, and will be likely assets to their organisation. Retaining such workers in a positive working environment should be of utmost importance to employers, and the working population.

Recruitment policies should be clearly based on merit with an emphasis on the positives – on a person’s expertise, knowledge, experience, skills and capacity to undertake required tasks safely.

Flexible approaches to work are also important for all sectors of the workforce, but are highly valued by many people with disabilities or who are older Australians, a concept which is discussed further. Policies on return to work and workers compensation and other insurance should also recognise appropriate demographics and products for these cohorts. This would assist engage and retain not only mature age workers and workers with disabilities, but all workers.

The requirements under work health and safety legislation should also recognise the diversity of, size, nature and operations of any business. As noted above, the management of risks to work health and safety are qualified by reasonably practicable. In a small business there is a need to balance the substantial opportunities, in productivity and experience or expertise, decision making capabilities and motivation with reasonable accommodation and duty of care. This balance needs to be done on a case by case basis.

It is a shared community responsibility to ensure that the participation of older Australians and Australians with a disability within the workforce and broader community is maximised. However this does not warrant more employment regulation. There are already existing legislative requirements and multiple layers of legislation. Rather than more legislation, support (including financial support) and education programmes are required. Support through peers such as employer associations has been shown to be the most trusted form of communication. All parties have a role in communicating and raising awareness. Career longevity and increased participation can also be enhanced through the development pathways for redeployment of people who have been displaced (whether on the basis of skills relevancy or capacity) in a way that complements structural changes in the labour market.

6 Impediments within the Workplace Relations Framework

Section 3 of the *Fair Work Act 2009* (Cth) (FW Act) provides that its object is to “provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for Australians”. Similar sentiments are echoed in the modern awards objective within section 134 of the FW Act which is concerned with providing “a fair and relevant minimum safety net of terms and conditions, taking into account” (among other things) “the need to promote social inclusion through increased workforce participation” and “the need to promote flexible modern work practices and the efficient and productive performance of work”.

Despite these objectives the Australian Chamber holds the view that the framework still contains barriers to workplace flexibility that continue to hamper social inclusion through workplace participation and prevent the modern awards and minimum standards operating as a fair and relevant safety net. Notably, section 138 of the FW Act is concerned with the means of ‘achieving the modern awards objective’ and the Explanatory Memorandum to the FW Act stated in relation to this provision that “a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations”. The Australian Chamber maintains the view that community standards and expectations should include consideration of matters such as:

- The provision of an appropriate safety net for employees that does not exist at the expense of other important objectives such as employment;
- The encouragement of job creation and the promotion of opportunities for particular groups of Australians and for all Australians;
- The importance of a framework that does not threaten the employment prospects of those most vulnerable in the labour market and the capacity for young people, persons undergoing training, older Australians, the unemployed and people with a disability to obtain and remain in employment;
- Enabling persons to gain a foothold into the labour market;
- Enabling the negotiating of arrangements in the workplace that reflect the needs of both the business and the individuals within the business.

The Australian Chamber considers that sections 134 and 3 of the FW Act were intended to be concerned with enhancing job growth opportunities and reducing unemployment. The FW Act’s qualification of the promotion of social inclusion “through increased workforce participation” reinforces this view. The commonly understood notion of workforce participation refers to the share of the working age population, i.e. persons aged 15 and above, who are either in a job or actively looking for one - those who are “willing to work”. Workforce participation, population and productivity are commonly referred to as the “three Ps” that impact on economic growth and higher levels of workforce participation also have the effect of reducing pressure on the social welfare system as well as promoting social inclusion and equity objectives.

Much has been said about the challenges our ageing population presents for our social welfare system and economy. Participation rates are influenced by a wide variety of factors including individual work preferences, cultural and social attitudes, government policies such as retirement incomes policy and the tax transfer system as well as labour market regulation. It is critical that government and policy makers ensure that policies and regulations do not have the effect of discouraging workforce participation and in this regard, aspects of our workplace relations framework are in need of reform.

It is important that our safety net of employment conditions does not have the effect of excluding people from obtaining or remaining in employment and the facilitation of job creation where flexibility is required by both the business model and those seeking such flexibility. Older Australians and people with a disability may have particular needs and preferences that attract them to working in industries and roles that can offer flexibility yet constraints on the degree of flexibility that can be incorporated into operating structures remain by virtue of anachronistic award provisions.

The inflexibilities within the award structure such as prescriptive minimum engagement periods, prescriptive part-time hours and excessive penalty rates impose significant limitations on the pattern of hours an employer can offer and are significant barriers to participation for those requiring ultra-flexibility. Union applications are currently before the Fair Work Commission and seek to inject even more inflexibility into the system, including (among other things) clauses that would see the inclusion of longer minimum engagement periods. One size fits all minimum engagement periods of four hours are too inflexible given the very diverse circumstances faced by employers and their employees. Flexibility is required so that employers are not prevented from offering work.

The changes sought will, if awarded, result in additional regulatory and cost imposts for employers in what is already an unduly complex system. The 'common' nature of the claims is akin to an attempt to expand the legislated NES yet such content is not subjected to a regulatory assessment process as would be expected of changes to the NES.

There is no place in the modern economy for award provisions which restrict the kinds of employment that employers and employees may wish to enter into. Regulations that force changes to the nature of an employee's contract of employment (e.g. from a casual contract of employment to a full-time contract of employment) or which place impractical restrictions on engagement patterns inherently discourage hiring. Job opportunities should not be demonised because they are not permanent or offer fewer hours than full-time employment. The 2015 Intergenerational Report has highlighted:

To drive higher levels of prosperity through economic growth, we must increase productivity and participation. If we are to achieve these goals we need to encourage those currently

*not in the workforce, especially older Australians and women, to enter, re-enter and stay in work, where they choose to do so.*²³

The report highlights the importance of opportunities to support increased participation rates and a system centred around the 9-5, Monday to Friday paradigm does not facilitate the creation of employment opportunities to cater for a broad range of personal circumstances, including persons looking to balance work and caring responsibilities or transition to retirement.

If employers and employees are unable to implement mutually beneficial changes to award working arrangements in the absence of a significant cost impost, flexibility will not be extended and the parties will be forced to work within the strictures of the award. This may prevent employees accessing working patterns that suit them and may prevent employers from structuring their working arrangements in an efficient way.

Maximising both participation and productivity will be critical to Australia's future growth, competitiveness and the maintenance of high living standards. Our regulatory environment must enable access to the broadest range of work arrangements possible. Barriers to employment within the industries that can facilitate flexible forms of labour engagement must be removed. With flexible work driven by both supply and demand factors, there is scope to identify more effective ways of better connecting businesses that are reliant upon flexible forms of labour engagement for the efficient and productive operation of their business to those seeking such flexibility. Once that connection is made it is important that the crafting of working arrangements that reflect the mutual needs and interests of the parties is enabled by the system.

During its inquiry into the workplace relations framework the Productivity Commission identified that an overarching concern is "the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them".²⁴ The Australian Chamber maintains the view that the workplace relations framework's focus on complex, collective agreement making together with prohibitions on the making of statutory individual agreements, is not conducive to SMEs and their employees negotiating arrangements of mutual benefit.

In the Australian Chamber's view, the reform task ahead should complete the evolution from the adversarial, conflict based approach from which the system derives its historical origins toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a simple, flexible safety net.

As our population ages and people remain in the workplace for longer we can expect that people will take on more jobs and will consider a range of different forms of work across their working life. The participation rate of older workers is rising as our population ages and access to flexible forms of work has supported this outcome. People are becoming increasingly concerned with career longevity.

²³ 2015 Intergenerational Report Australia in 2055, Commonwealth of Australia, March 2015, p iii.

²⁴ Issues Paper 3: Bargaining, p. 1.

The importance of maintaining the legitimacy of ‘non-standard’ forms of work will become increasingly important in maximising participation outcomes as our population ages. In the context of casual employment the Productivity Commission has found that:

Casual work rates are highest among the very young – people aged 15-19 years – and become progressively lower (for a given gender) until age 60-64 years. Since school retention rates have risen (figure 2.12), the rising casual rates among young people suggests that more are combining employment with education...²⁵

Such data provides some insight into the changing work patterns in response to life stages and reinforces the view that people who are at the latter end of their working life may be more attracted to work options other than permanent employment. Furthermore, if flexibility, efficiency and productivity is not enhanced it will constrict the capacity of the economy to grow at a sustainable rate, and will reduce the nation’s living standards. Accordingly, non-standard labour forms must be promoted as a perfectly legitimate way of performing work in the modern economy and an entirely valid alternative to direct, permanent employment and must be supported because of the many benefits they provide.

For example, in the context of casual employment the Productivity Commission has suggested:

Typically, casual work appeals to workers who value flexible hours, with the option of declining work (Shomos, Turner and Will 2013) as well as workers who are either just entering or close to leaving the workforce. Adding to this appeal is the higher hourly rate, or casual loading...²⁶

It should also be recognised that independent contractors are legitimate small businesses, often, for whom independence and freedom to work for themselves can enable them to achieve economic independence in a way that does not compromise their needs and life goals. The Productivity Commission has also acknowledged the importance of non-standard forms of labour engagement, stating for example:

Independent contracting differs from ongoing work in that it offers greater autonomy. Because they contract out their services on a job-by-job basis (most are single person owner-operated businesses), independent contractors can usually choose what jobs to take, the hours they work, and the way in which they complete the job. They can also work for a number of clients simultaneously. Independent contracting arrangements developed unaided as an alternative to the standard employment for and, by 2006, they had become such an intrinsic aspect of the WR system that the Independent Contractors Act 2006 (Cth) was introduced.²⁷

²⁵ Productivity Commission, , *Workplace Relations Framework Draft Report*, p. 102.

²⁶ Productivity Commission, *Draft Report*, p. 715.

²⁷ Productivity Commission, *Draft Report*, p. 715.

While exploitation of vulnerable workers is an appropriate target for enforcement agencies, the existence of non-standard forms of labour engagement does not amount to a 'social ill' that needs to be targeted and treated. Independent contracting, labour hire, casual and fixed term employment are critical pillars of the labour market and deliver benefits for businesses, workers and consumers.

Non-standard forms of work can facilitate:

- higher levels of productivity;
- guaranteed higher quality of work;
- payment by results which leads to predictability of costs;
- capacity to flexibly organise work to meet project schedules;
- innovation and wealth creation;
- freedom of choice and flexibility for the individual.

These forms of work provide the flexibility required to respond to our rapidly changing economy and product and service cycles where work is not always ongoing or guaranteed. Where specialist or additional skills are required for discrete and finite periods, skill and labour gaps are able to be filled through legitimate contractual arrangements and Australians who have accumulated a wealth of experience across their working life will play a critical role in addressing these skill and labour gaps.

Within the traditional construct of direct employment, it should also be recognised that particular cohorts of employees, such as people with a disability are often more vulnerable in the labour market and caution is warranted in ensuring that a safety net of minimum wages and conditions is not set at a level too high so as to make people non-competitive in the labour market. The sensitivity required in the setting of an appropriate safety net for people with a disability has been summarised previously in an Australian Government submission made as a part of the minimum wage review process:

11.45 If full minimum wages are applied to employees with a much reduced productive capacity due to their disability, those employees are likely to be priced out of the labour market. If an employer is faced with the choice of hiring an employee with a disability with reduced productive capacity, or an employee with full productive capacity at the same wage rate, an economically rational employer will select the fully productive employee.

11.46 Therefore, the key determinant of the competitiveness in the labour market of people with a disability is the relative cost of employing such a person as opposed to an employee with full productive capacity. To ensure competitiveness, minimum wages for employees with a disability must have an appropriate relativity to the applicable minimum wage that covers the same type of work. An appropriate minimum wage for an employee with a disability would be one that reflects the lesser capacity of the employee relative to other employees doing the same job.

Such a minimum wage would pro-rate the full minimum wage for the job in proportion to the relative capacity of the employee.

...

11.48 *The importance of minimum wage relativities is illustrated by the employment barriers faced by those categories of employees with a disability whose vulnerability in the labour market is multiplied by other factors, such as the lesser experience and maturity associated with youth, or time spent in training as an apprentice. For example, an employer hiring an apprentice at the apprenticeship rate of pay is unlikely to employ a person with a disability if the employee has a reduced productive capacity due to their disability. In this instance, the employer would be burdened with an extra cost of decreased productivity in addition to the costs of employing an apprentice. Therefore, it is necessary that the employer receive a further incentive to provide employment to this particular employee, by being able to pay a rate that pro-rates the apprenticeship rate of pay in proportion to the relative productivity of the employee. A similar process is also necessary for junior employees with a disability. It will ensure that the employment of people with a disability seeking employment in other sub-minimum wage categories is not further impaired.*²⁸

While wage determination is outside the scope of this Inquiry, the Australian Chamber maintains that it will be important for policy and regulatory settings to operate in a manner that ensures that the wages for those who are vulnerable in the labour market be set at a rate that ensures they are competitive. To maximise the employment prospects of people with a disability, it will be important that any wages assessment tool enables wages to be set at a rate that properly reflects productive capacity. The psychological benefits of employment are also critical. Participating in work and being a part of a workplace can play an important role in contributing to a person's self-worth and self-esteem.

7 Concluding comments

During roundtable discussions, the Australian Chamber took the opportunity to advance its primary position that the AHRC should not proceed down the path of recommending more regulation for employers to contend with. As the AHRC has acknowledged, older Australians and Australians with a disability are already protected by federal and state anti-discrimination laws, and the general protections and anti-discrimination provisions in the FW Act. They also have the specific right to request flexible working arrangements (see ss 65 (1A)(c) and 65(1A)(d) of the FW Act).

²⁸ Australian Government Submission, 2006 AFPC Minimum Wage Review, Chapter 11, p.354

<http://www.fwa.gov.au/sites/afpc2006wagereview/submissions/AustralianGovernmentSubmission2006Chapter9Minimumwagesforjunioremployees.pdf>

¹⁹ Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with a Disability – 4 December 2015

The roundtable discussions instead focussed on the need for workplace relations laws to have sufficient flexibility to make it easier for employers to employ older Australians and Australians with a disability. In this regard, conditions regulating part time and casual employment, minimum periods of engagement, ordinary hours of work and rates of pay and penalty rates must not combine to act as a barrier to employment opportunities.

Of course the problems and solutions do not begin and end with the workplace relations framework. As the AHRC has noted, laws regulating superannuation, tax, social security benefits and pensions, work health and safety and workers' compensation can impact on employment opportunities. If policy makers are resolved to increase the employment opportunities for older Australians and Australians with a disability, they must ensure that these laws (and others) operate in ways that encourage employment instead of discouraging it.

Above all, the effectiveness of any approach designed to improve employment opportunities older Australians and Australians with a disability needs to be built on substantial awareness in the community.

If the goal is to increase participation of older Australians and Australians with a disability, the following factors come into play:

- Recruitment policies and procedures should have a merit focus on positives such as a person's applicable expertise, knowledge, experience, and skills.
- From a work health and safety point of view the focus has to be on the capacity to undertake the task safely, no matter what a person's age is or what disability they have.
- Flexible work forms are important for all sectors of the workforce, but are highly valued by older Australians and Australians with a disability.
- Opportunities for training or professional development and sharing of skills and expertise, recognition of prior learning, transferrable skills or demonstrated equivalent experience should be present.
- Policies on return to work and workers compensation and other insurance should recognise the appropriate demographics. This assists in engaging and retaining not only mature age workers and workers with disabilities, but all workers.
- The complexity and wide array of legislation can influence a decision to offer work or continue working. Both employers and employees require reasonable stability to sustain productive employment arrangements. Issues such as more favourable tax or transition to retirement approaches may encourage greater participation and influence work practices. Framed negatively, they can discourage participation.
- Positive community awareness and engagement programmes supported by government resources can play a vital role. Businesses offering employment opportunities to older Australians and Australians with a disability should be promoted and celebrated.

This all relies on the understanding and perceptions of the community. Under a strong community programme employers and employees alike have shared roles to remain in the workforce and to employ these sectors of the workforce. There are already legislative requirements with multiple

layers. Rather than more legislation, support (including financial support) and education have a role to play. Additionally, support through peers has been shown to be the most trusted form of communication but all parties have a role in communicating and raising awareness.

Government also has a role to play. Pleasingly, a new Government taskforce has been established to review the entire disability employment system and develop a National Disability Employment Framework to boost employment rates for people with disability. It can lead by example by employing older Australians and people with a disability, thereby enhancing greater diversity in the workforce. It can tackle red tape requirements. It can raise awareness about the benefits of a diverse workforce by working in partnership with industry, promote industry leaders and link SMEs to mentors.

8 About the Australian Chamber

8.1 Who we are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive. We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

8.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs. We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

ACCI Members

AUSTRALIAN CHAMBER MEMBERS: BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AGED CARE AND COMMUNITY SERVICES AUSTRALIA **ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **AUSTRALIAN STEEL INSTITUTE** AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **COMMERCIAL RADIO** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **NATIONAL ROAD AND MOTORISTS' ASSOCIATION** NSW TAXI COUNCIL **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA

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