

**ACTU Submission to  
Australian Human Rights Commission  
Willing to work**

18 December 2015

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australian council of trade unions

## INTRODUCTION

1. The ACTU is the peak body representing 47 unions and almost two million working Australians.
2. Australian unions have a proud history of achieving improved conditions for workers, including general working arrangements, equal pay, maternity leave, superannuation and accident compensation. Despite significant gains, a wide range of issues still remain, in particular for older workers and workers with disability.
3. Both these groups suffer a range of workplace discriminations, up to total and permanent exclusion. They are also over-represented in unemployment queues and experience particular barriers to obtaining and maintaining work.
4. For older Australians, such barriers include age-based discrimination, health related limitations and lack of flexible work arrangements. Similarly, workers with disabilities face discrimination and lack of flexible working conditions, as well as addressing community attitudes to disability and accessing quality education and training.
5. Participation in the labour force through meaningful, paid employment can enhance the lives of mature aged workers and workers with disability; it promotes social inclusion through financial independence, community engagement and positive mental and physical health.
6. Increasing participation of older workers and workers with disability can also have a positive effect on the community and the economy through improved productivity growth.
7. We therefore welcome this opportunity to make a submission on behalf of Australian unions in response to the Australian Human Rights Commission's (AHRC) Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability.

## OLDER WORKERS

8. Between 2000 and 2010, labour force participation of Australians over 55 grew from around one quarter (24%) to one third (34%) and the trend is predicted to continue.<sup>1</sup>
9. Recent analysis conducted by the Melbourne Institute of Applied Social and Economic Research has found that labour force participation for women aged 60-64 years has increased from 15.2% in 1993 to 45% in 2013.<sup>2</sup> Similarly, men aged 60-64 years participation rate has also increased from 48.3% in 1993 to 62.5% in 2013.<sup>3</sup>
10. The 2015 Intergenerational Report projects that the number of Australians aged 65 years and over will more than double by 2054-55.<sup>4</sup>
11. As the Australian population ages, it is expected that Australians will live longer and retire later. By 2054-55, life expectancy for men will be 95.1 years and for women 96.6 years (compared with 91.5 and 93.6 years today).<sup>5</sup>

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<sup>1</sup> Australian Bureau of Statistics, Australian Social Trends, Sep 2010, cat. 4102.0, at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30Sep+2010>

<sup>2</sup> Shane Rodgers, 'Older Women in Work', The Australian, 15 June 2015.

<sup>3</sup> Ibid.

<sup>4</sup> Treasury, *2015 Intergenerational Report*, p.1 at

[http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/2015%20Intergenerational%20Report/Downloads/PDF/2015\\_IGR.ashx](http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/2015%20Intergenerational%20Report/Downloads/PDF/2015_IGR.ashx)

<sup>5</sup> Ibid.

12. In this context, paid employment can be an important source of social inclusion for older workers. Obtaining decent work with decent wages is a key way for people to lift themselves and their families out of social exclusion.
13. Facilitating workforce participation of mature age workers brings significant benefits to the economy by opening up the availability of skilled and experienced older workers. This is important, given increasing fiscal pressures on health and aged care services associated with an ageing population.
14. Ensuring older workers have genuine choice as to whether they wish to retire or remain in the paid workforce and facilitating options which support dignified and decent retirement incomes and meaningful and satisfying employment options which take into account health, lifestyle and caring commitments is key.
15. The ACTU believes that the most effective measures to improve workplace participation for older Australians should focus on:
  - providing additional incentives for employers and employees to encourage mature aged workers to stay in the workforce, particularly those from low-income households;
  - removing restrictions that prevent older Australians from being treated equally in the workforce; and
  - addressing discriminatory attitudes and practices by employers that force older Australians out of work before they might otherwise wish to retire.
16. Achieving these goals requires policy reform across a range of areas including the tax and transfer system, superannuation, workers compensation, employment law, education and training and adequate provision of social support and infrastructure.

## **OBSTACLES FACED BY OLDER PERSONS IN PARTICIPATING IN THE WORKFORCE**

17. Older workers can face a range of barriers to the workforce at different stages of the employment process including recruitment, retention and re-entry.
18. Age discrimination and access to flexible work practices can influence workforce participation during all three stages. Out of date training / skills and outdated job search skills can also be a barrier to employment at both the recruitment and re-entry stages.
19. In determining when to leave the workforce, key reasons include health concerns, caring/family responsibilities and financial reasons.
20. To address these obstacles, a range of policy reforms are required across different policy areas including taxation, the age pension, superannuation, social security, training and skill development, occupational health and safety, workers compensation, workplace rights and regulations, and anti-discrimination legislation.

## IMPROVING WORKFORCE PARTICIPIATION THROUGH THE TAXATION SYSTEM

21. Tax revenue funds the provision of services and infrastructure that are important to the community, and the tax transfer system can lead to a fairer and more prosperous society, taking into account the needs of the community. Personal income tax is the primary means of achieving this goal.
22. The ACTU notes that Australia's personal income tax system has become less progressive in recent decades.
23. The ACTU supports a progressive tax system, where higher income earners pay a larger proportion of their income in taxes than lower and middle income earners. Creating more equity in the income tax system and ensuring that all Australians pay their fair share, with income redistributed towards those who need it most, is key.
24. Any tax reforms considered by the AHRC should strengthen, not weaken, the government's ability to provide public services and social security. The tax system should ensure a fairer redistribution of wealth and income to achieve equal opportunity and to alleviate the disadvantage faced by particular social groups, including older workers.
25. As individuals are more likely to work, or to seek additional work, if they keep a larger proportion of any extra dollar they earn, tax reform should be aimed at low and middle income earners. Evidence suggests that it is these workers who are more responsive to changes in their after-tax incomes (than high income earners or primary earners in a household).<sup>6</sup>
26. To improve workforce participation and support older part-time workers, consideration could be given to increasing the progressivity of tax brackets, including automatic indexation to average wage increases.
27. By increasing their after-tax income, this may encourage older workers to continue working.
28. Further reductions in the effective marginal tax rate (EMTR) for low and middle income earners should also be considered. Higher EMTR may discourage workforce participation, including among mature age cohorts.

## AGE PENSION

29. Making it more difficult for workers to retire will not necessarily lead to those workers finding or retaining paid employment. The ACTU does not support measures that restrict choices by making it more difficult for workers to access their entitlements to the aged pension or superannuation.
30. Australian unions have played an important role in increasing the adequacy of retirement incomes through campaigning for the introduction of the superannuation scheme.
31. However, we recognise that for many workers, the age pension will continue to provide much of their post-retirement income. It is therefore important that, while promoting compulsory and voluntary retirement savings, we do not distract from the need to maintain and enhance the value of the age pension.

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<sup>6</sup> Miranda Stewart, André Moore, Peter Whiteford and R. Quentin Grafton, A Stocktake of the Tax System and Directions for Reform: Five Years After the Henry Review, ANU Crawford School of Public Policy, February 2015, p.44 at [https://taxpolicy.crawford.anu.edu.au/files/uploads/taxstudies\\_crawford\\_anu\\_edu\\_au/2015-03/stocktake\\_report\\_27\\_feb\\_2015\\_final\\_web\\_version.pdf](https://taxpolicy.crawford.anu.edu.au/files/uploads/taxstudies_crawford_anu_edu_au/2015-03/stocktake_report_27_feb_2015_final_web_version.pdf)

32. The ACTU supports raising the age pension to 35% of the full time adult average weekly wage. We do not believe that placing additional restrictions around access to the age pension would be effective in pushing people back into the workforce, as these restrictions would not address the underlying causes that make it difficult for mature age people to find and keep work.
33. We did not support increasing the retirement age to 67, and we would not support any further mandated increases to the retirement age. Many workers are physically unable to continue to work as they mature and should not be punished as a result. Positive measures that encourage people to continue working and increased options for viable work for mature aged workers, rather than withholding the age pension from those who need it are needed.
34. The ACTU notes that steep withdrawal rates on income support payments, combined with low earnings thresholds, can discourage payment recipients (including age pensioners) from participating in the labour force. Tight income tests on income support payments raise both the EMTR and the effective average tax rate faced by low-income workers. There is a case for making these tests less stringent, such as by raising the earnings threshold or reducing the withdrawal rate of payments. The ACTU would support such changes.
35. Proposed changes to the 'taper rate' signalled in the 2015 Budget (and due to commence from 1 January 2017) are also likely to affect older workers on low and middle incomes, especially those transitioning to retirement. Under the new system, \$3.00 of a fortnightly pension will be lost (up from \$1.50) for each additional \$1,000 of assets above the lower threshold. This threshold (the maximum assets allowed to receive a full pension) will be increased from \$286,500 to \$375,000 for a home-owning couple.
36. As a result of these changes, older workers may be required to stay in the workforce longer or be forced to re-enter the workforce due to a reduction in their pension.

## SUPERANNUATION

37. After a lifetime of work, all Australians deserve a comfortable retirement. For most people their superannuation will play an important part in helping them secure a modest lifestyle.
38. Australian unions were central to the creation of the superannuation system in Australia in 1992, and we continue to support compulsory superannuation as one of the pillars of the Australian retirement incomes system.

### *Increase Superannuation Guarantee to 15% by 2025*

39. Australian unions have also consistently advocated for an increase in superannuation contributions to 15% by 2025. This would lead to an increase in retirement income for future generations of older workers and would act as a further incentive for workers to remain in employment for longer.
40. As a result of campaigning by unions and their members, the Labor government introduced new laws that will increase the minimum superannuation from 9% to 12%. As a result on 1 July 2014 the Superannuation Guarantee increased from 9.25% to 9.5%.
41. For many workers these changes will deliver a big increase in their superannuation when they retire.
42. However, under the 2014 Budget, the Superannuation Guarantee has been frozen at 9.5% until 2018. It had been due to rise to 12% by 2019. This is an extremely disappointing missed opportunity to ensure workers retirement savings are sustainable in the future.

### *Abolition of the minimum earnings threshold*

43. The ACTU supports the abolition of the minimum earnings threshold, which is currently at \$450 per month per employer.
44. This threshold is inadequate in the context of the increase in casual or part-time employment, whereby a worker may be employed by two or three different employers to make ends meet.
45. In this scenario, an employee may earn over the \$450 threshold but still would not be entitled to their superannuation because they work for more than one employer. This can be a common issue among older workers, many of whom transition to retirement by taking on part-time or ad hoc employment.

### *Superannuation Guarantee for contractors and self employed*

46. We note that contractors and the self-employed are not always eligible to receive super contributions and we support extending the Superannuation Guarantee framework to these workers. This would encourage more self-employed workers to remain in the workforce for longer.

### *Age settings for access to superannuation benefits*

47. The ACTU notes the current age settings for access to superannuation benefits, being 55 years increasing to 60 years (depending on when you were born) for 'preservation age' (when you may access superannuation if retired) and 65 years for unrestricted access to superannuation (even if you haven't retired).
48. The Australia's Future Tax System Review (the Henry Review) recommended that the preservation age be raised to 67 years.<sup>7</sup>
49. The ACTU rejects the notion that existing age settings encourage workers in meaningful paid employment to retire before they are ready to, and we therefore do not support raising the superannuation preservation age.
50. We also oppose the Australia's Future Tax System Review recommendation to align the age pension eligibility age and the superannuation preservation age.<sup>8</sup> This would be counterproductive to the needs of Australian workers, and will unfairly limit choice for older workers in relation to when they can retire.
51. Instead, the government should introduce more flexible arrangements to accommodate the needs of employees who are transitioning to retirement. This approach strikes a more appropriate balance between encouraging those who wish to work for longer to do so, while providing older Australians with dignity and respecting the legitimacy of their choice to retire when it suits them.

### *Superannuation tax concessions*

52. Superannuation tax concessions were designed to encourage and reward those who saved for their retirement.
53. However, increasingly they are used by high income earners to minimise tax and are heavily skewed to the benefit of the wealthiest in the community.

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<sup>7</sup> Australia's future tax system, The retirement income system: Report on strategic issues, May 2009, p.16 at [http://taxreview.treasury.gov.au/content/downloads/retirement\\_income\\_report\\_strategic\\_issues/retirement\\_income\\_report\\_200905\\_15.pdf](http://taxreview.treasury.gov.au/content/downloads/retirement_income_report_strategic_issues/retirement_income_report_200905_15.pdf)

<sup>8</sup> Ibid.

54. Of the \$30 billion per year foregone by the government in superannuation tax concession, 40 per cent go to the wealthiest 10 per cent. It is important that these costly measures are targeted to those Australians who are in the greatest need of assistance in saving for retirement.
55. One major change to superannuation laws would be to make the system fairer, in order to encourage more low income workers to participate in employment.
56. This can be achieved by requiring the taxation of super to be progressive, based on marginal rates minus a rebate.
57. The present system for taxing contributions is a 15% “flat tax” that provides a greater tax concession to high income earners than to low and middle income earners. Whereas high-income earners receive a 31.5% concession on superannuation contributions, low income earners receive no concession – they pay the same rate on super contributions as they do on their ordinary wage income.
58. Recognising the lower superannuation balances achieved by many women, we also endorse the implementation of further measures to improve the retirement income adequacy of older women, such as top-up and co-contribution schemes.
59. Measures such as the Low Income Superannuation Contribution (LISC) and the superannuation co-contribution should be maintained until a progressive system has been implemented.
60. Consideration should also be given to increasing the superannuation co-contribution amount above the current maximum amount of \$500.

## SOCIAL SECURITY

### *Carer Payment*

61. The ACTU acknowledges the contribution to society that carers make, and notes that carers often face significant financial and social costs in juggling their work and caring responsibilities.
62. Older workers are more likely to have additional caring responsibilities, including for an older spouse, an older dependent with a disability or illness or for children or grandchildren. Those employees who have juggled work and caring commitments for long periods of time are likely to have severely reduced incomes, financial security and retirement savings.
63. The ACTU has long advocated for changes to government payments to include superannuation contributions on behalf of carers in receipt of Carer Payments or Allowances.
64. In addition, the current 25 hour work, volunteering, study and training limitation for the Carer Payment presents a barrier to mature age participation in the workforce or other productive work, and should be lifted to provide carers with more flexibility to take on more work when it is available and convenient to them.

### *Effective Marginal Tax Rates (EMTRs)*

65. The most effective change to social security entails lowering and reducing the EMTR to enable Australians on social security payments to keep more of the money they earn while remaining on their social security payments. We note that this would be of particular benefit to those Australians on the age pension.

66. EMTRs are the sum of the tax paid and social security withdrawn as a result of earning an additional dollar of private income. An EMTR of 60%, for example, means that a low-income person will retain only 40c out of an additional dollar that he or she earns by working.
67. Social security payments (such as Newstart and Youth Allowance) are typically withdrawn at 60c in the dollar: for each additional dollar that a payment recipient earns from work, they lose 60c of their payment. It is this steep 'taper rate' that is the main source of the participation disincentives that are faced by low-income earners. In some ways, high EMTRs are an inevitable by-product of Australia's highly targeted system of social assistance, in which payments are tightly means tested.
68. The problem of high EMTRs has got worse, not better. Researchers from NATSEM estimate that the proportion of working-age Australians who face EMTRs of more than 50 per cent increased from 4.8% in 1996-97 to 7.1% in 2006-07.<sup>9</sup> Low income people can face EMTRs well in excess of the 46.5% marginal rate paid by high-income earners.
69. A reduction in the EMTR and a more gradual taper rate on income support payments would be the most effective changes to social security laws to encourage further workforce participation, especially among mature aged workers.

## TRAINING AND SKILLS DEVELOPMENT

70. To promote and support ongoing employment participation of mature age workers, training and skills development is crucial.
71. Investment in TAFE, VET and the higher education sector is critical to the economy and to society.
72. Despite the critical role it plays, the VET sector has experienced an overall decline in funding from 1999 to 2011.<sup>10</sup>
73. Confidence in the sector and the value of a VET qualification has also deteriorated as successive governments have pursued a market-driven approach, which has seen the publicly funded training system opened up to thousands of poorly regulated private training providers.
74. Supporting a strong training system will help provide older workers with the confidence to retrain and upskill.
75. This requires the Federal Government to work with States and Territories to improve the educational quality of VET. Recognising TAFE as the public provider of quality VET, a commitment by all governments to maintain its funding in real terms is required.
76. An ongoing commitment by employers to firm-specific training will also help equip older workers with the skills they need to participate. PwC notes that businesses that better use their older worker's skills and experience can gain a competitive advantage, particularly where their customer bases are also ageing.<sup>11</sup>
77. Lifelong learning accounts, which provide funding for retraining and upskilling of jobseekers and employees should be considered.
78. Access to improved skills recognition services in order to first capture the existing skills profile of older workers and identify any skill gaps is also required. This helps ensure better targeted training and upskilling for displaced workers to make the transition to new jobs.

<sup>9</sup> NATSEM. Trends in effective marginal tax rates 1996-97 to 2006-07 AMP/NATSEM Income and Wealth Report, Issue 14, September 2006.

<sup>10</sup> ACTU, Building a Better Future: A strong economy for all, ACTU response to the National Reform Summit 2015, p.9.

<sup>11</sup> PwC Golden Age Index, How well are OECD economies adapting to an older workforce? June 2015, p.16 at <http://www.pwc.co.uk/assets/pdf/pwcgoldenageindex-june2015.pdf>

79. The adjustment process that was put in place for workers affected by the closure of the Bridgestone plant in Salisbury, South Australia provides a good example of this. This involved cooperation between governments, the employer, unions, employment and training providers, and the local community.

## OCCUPATIONAL HEALTH AND SAFETY

80. The Australian Work Health & Safety Strategy 2012 – 2022 (the Strategy) has been developed for the purpose of improving health and safety outcomes for all Australian workers and does not differentiate between labour force participants on the basis of their age. This is summed up in the vision of the Strategy which calls for “healthy, safe and productive working lives.”
81. The ACTU submits that the Strategy endorses a whole-of-working-life approach and that all workers regardless of their occupation or how they are engaged, have the fundamental right to be free from the risk of work-related death, injury and illness and the belief that healthy and safe work will allow Australians to have more productive working lives.
82. Mature age workers, through their experience of workplace hazards and industry knowledge, can be an integral component in the delivery of strategic outcomes set out in the Strategy. The ACTU does not support the development of strategic plans which propose differing treatment based on the age of workers.

## WORKERS COMPENSATION

83. The ACTU believes that every Australian worker has a right to a fair and safe workplace, regardless of their age. We welcomed the creation of the Model Health and Safety Act 2010, which provides a consistent national approach to health and safety issues for workers across Australia. Australian law should ensure that no worker is disadvantaged if they are injured at work, due to their age or any other factor. We note that the provision of secure, ongoing work is a key factor in improving health and safety outcomes for all workers.
84. The ACTU supports the development of nationally consistent workers compensation standards which are available to all members of the workforce regardless of the retirement age (including the self-employed).
85. The ACTU considers age-based restrictions to be exclusionary and discriminatory, and we would therefore support the removal of all age-based restrictions. Mature age workers should have access to compensation for all injuries that arise out of, or in the course of work, including during their breaks. If a workplace injury results in their death, this compensation should be made available to their dependents.

## DISCRIMINATION AGAINST OLDER WORKERS IN EMPLOYMENT

86. Discrimination has been cited as a key barrier to mature aged workers maintaining paid employment and consequently is an important part of the matrix of legislative support required to ensure older workers are able to participate in the labour market.
87. The AHRC reported that the greatest number of age-based discrimination complaints received in 2014-2015 were employment related (63%).<sup>12</sup> The report also notes that the majority of complaints made under the Age Discrimination Act 2004 (Cth) (57%) involved mature aged workers.<sup>13</sup>
88. As the AHRC notes, age discrimination is a common occurrence in the Australian workforce with older workers looking for employment more likely to experience discrimination.<sup>14</sup>
89. This report also notes that low income earners or single parent households are typically the most vulnerable to experiencing discrimination.<sup>15</sup>
90. Given these findings, addressing discriminatory attitudes and practices by employers both during the recruitment process and ensuring that older workers are not forced out of work before they wish to retire, is important.<sup>16</sup>
91. Cultural change is also required, as the report notes that one in seven Australians aged 50 years or older were discouraged from entering the workforce due to the anticipation of discrimination.<sup>17</sup> Further, the Department of Employment reported that ABS data as at February 2014 suggests that 52.7% of discouraged job seekers were aged 55 years or over.<sup>18</sup>
92. Experience shows that effective cultural change occurs in an organisation when awareness raising and education initiatives are implemented across the whole organisation, not just senior management.
93. Often rank and file employees and their union representatives are the driving force for change in organisations and they must be provided with information about their rights and support in implementing those rights.
94. Unions play a significant role in providing this education and support. Ensuring all employees in an organisation have both access to information, training and support should be part of both individual manager's key performance criteria as well as the organisational performance and accountability framework.

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<sup>12</sup> Australian Human Rights Commission, Annual Report 2014-2015, p. 153 at [https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_Annual%20Report%202014%E2%80%9315\\_Web%20version.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Annual%20Report%202014%E2%80%9315_Web%20version.pdf)

<sup>13</sup> Ibid, p. 152.

<sup>14</sup> Australian Human Rights Commission, National prevalence survey of age discrimination in the workplace, 2015, p. 9 at <https://www.humanrights.gov.au/sites/default/files/document/publication/AgePrevalenceReport2015.pdf>

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ms Renee Leon, Secretary, Department of Employment, speech to the COTA 2015 National Policy Form Council on the Ageing "Workforce participation for our ageing population", p .8.

## FLEXIBLE WORKING ARRANGEMENTS

95. No amount of financial incentives to postpone retirement, or education and awareness-raising of the benefits of employing older workers, will have effect without the ability of older workers to change their working arrangements in a manner which enables them to continue to participate in the paid workforce. A right to flexible work arrangements for those older workers who wish to maintain their connection to the paid workforce but on reduced or changed working arrangements, is critical to removing barriers to employment participation of mature workers. Without a positive, enforceable right to change working arrangements, many older workers will be unable or unwilling to maintain paid employment.
96. Flexible work arrangements enable workers to 'scale down' their work commitments for health and personal reasons or, for a significant portion of employees in this age group, to balance work and caring commitments.
97. The ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age.<sup>19</sup>
98. A right to flexible working arrangements is notably absent from Australia's federal workplace relations framework. The right to request such arrangements is a step in the right direction, but is presently too limited to properly advance the participation and non-discrimination policy objectives which underlie it.
99. Thankfully, policy makers have shown at least some willingness to revisit the issue. The right to request flexible work arrangements under s.65 of the Fair Work Act 2009 (Cth) (FW Act) has, since its inception, only pertained to a limited group of employees (initially only to those with caring responsibilities for children under school age and children with a disability up to the age of 18).
100. The ACTU advocated for the right to request flexible working arrangements to be extended to employees with caring responsibilities for any dependent who reasonably relies on them for care (as is the case in a number of European nations, New Zealand and the UK ). We supported the extension of the right to older workers, and note that most advocates and representative organisations for seniors and older workers, including the Advisory Panel on the Economic Potential of Senior Australians, recommended the right be extended to mature age workers.
101. Amendments to the FW Act 2009 in 2013 broadened the group entitled to benefit from section 65 to relevantly include an employee aged 55 or over or who is a carer as defined in the Carer Recognition Act 2010. This extension to the breadth of eligible workers is welcome, but does not address the other major weakness in the section 65 framework. Consequently, it does not provide older workers with a meaningful option to maintain their connection to paid employment.
102. Anecdotal evidence collated by the ACTU, backed up by the available research material, is that the right to request flexible work arrangements under s.65 has not operated effectively. The overwhelming evidence provided by union members highlights the irregularity, unpredictability and variance of employees' experiences using the right to request provisions.
103. This is because:
  - Section 65 of the FW Act places no obligation on employers to give proper consideration to a request or to reasonably accommodate a request;

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<sup>19</sup> National Seniors Productive Aging Centre, Aging and the barriers to labour Force Participation in Australia (2011), prepared for Consultative Forum on Mature Age Participation, p.23.

- Employers are only required to give an employee the reason for the refusal on 'reasonable business grounds' which are not defined and are used vaguely by employers (for example 'cost reasons' ) without further meaningful explanation; and
  - Employees are specifically denied a right to appeal an employer's unreasonable refusal of a request, unless they have the bargaining strength to reach agreement with their employer to do so in an enterprise agreement.<sup>20</sup>
104. Because of the lack of real, enforceable procedural rights, the right to request provisions have, in practice, remained nothing more than a right for employees to ask for something
  105. The lack of obligation on employers to demonstrate they have given proper consideration to a request has hampered the effectiveness of the provision.
  106. Because employers are aware that they are not obliged to demonstrate they have seriously considered a request and are unlikely to have their refusal appealed, the success or otherwise of an employee's request is by and large subject to the vagaries of the attitudes of their line manager.
  107. Discrimination case law demonstrates that biased attitudes towards older workers exists and this must be acknowledged as evidence of resistance by a significant number of employers to genuinely exploring options for flexible work arrangements in order to assist older workers maintain employment.<sup>21</sup>
  108. The ACTU advocates the adoption of a provision along the lines of that contained in section 14A of the Victorian Equal Opportunity Act (1995) which outlines the obligations of employers in considering a request, including weighing up the importance of the request on the employee's capacity to balance work with family and caring responsibilities against any potential effects the granting of such a request would have on the organisation.<sup>22</sup>
  109. Amending the FW Act right to request provisions to include an obligation on employers to demonstrate serious consideration of a request would give clear guidance to both employees and employers, minimising the need for refusals to go to formal dispute resolution.
  110. Requiring employers to at least properly consider a request will assist in the cultural shift which needs to occur in those workplaces where management is resistant to 'thinking outside the square' and encourage management practices which acknowledge the benefits of including a diverse workforce to their organisation. It is worth noting the UK Coalition Government's conclusion where they noted that the most effective way to achieve cultural change in organisations to embrace the right to request flexible work arrangements provision was to introduce statutory obligations, stating that "even a sustained and extensive campaign is unlikely to have the significant effect on employment culture sought by this policy, and a major challenge would be reaching and convincing those who are resistant to change- which promotion campaigns will always struggle to achieve without the pressure of change in the operating environment of businesses."<sup>23</sup>
  111. The FW Act stipulates that employees have no right to appeal an employer's unreasonable refusal of a request, unless the parties have agreed to allow such appeals in their enterprise agreement.
  112. This is highly ironic, as it is vulnerable workers such as older workers, who already face discrimination and attitudinal barriers to decent employment opportunities who are likely to need the right to request flexible working arrangements. Yet, because of their weak

<sup>20</sup> Ss 739(2), s 740 (2) Fair Work Act 2009 (Cth).

<sup>21</sup> It is worth noting that these cases represent merely the tip of the iceberg as by far the majority of cases are not acted on by victims or remain unreported. For the period of 2014-2015 45% of complaints brought under the Sex Discrimination Act were conciliated, most with confidentiality agreements.

<sup>22</sup> UK legislation also places a statutory duty on employers to give serious consideration to a request according to a set procedure.

<sup>23</sup> HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011.

bargaining power, they are most likely to be locked out of workplace bargaining or have inferior workplace agreements with no right to appeal an unreasonable refusal.

113. Evidence suggests a significant number of employers with access to legal and industrial advice specifically draft workplace agreements to deny employees requesting flexible work arrangements access to the general dispute resolution processes outlined in their workplace agreements.<sup>24</sup>
114. Recently published data from Fair Work Commission indicates that the rate of applications for FWC to deal with disputes in relation to a refusal by an employer for flexible work arrangements is very low.<sup>25</sup> This is not surprising given employers are not legally obliged to seriously consider the request and, in any event, most employees do not have the right to take an appeal of an unreasonable refusal to the Fair Work Commission. However, overseas experience indicates that allowing for either an obligation to seriously consider a request, or a right to appeal a refusal, does not result in an increase in disputation.<sup>26</sup>
115. The coverage of the National Employment Standards (NES) should be extended to include casual and contract employees. Currently, almost one quarter of employees in Australia work in insecure employment arrangements such as casual and contract work, many of whom cannot meet the eligibility requirement of 12 months continuous service with an employer to be afforded protection of the NES entitlements. A significant proportion of older workers are engaged in insecure forms of employment in order to access reduced hours of work and are excluded from accessing the NES right to request flexible work arrangements.
116. The right to request flexible work arrangements provisions must be amended not only in the scope of employees able to access the right but also in the process; so that the provision fulfils the policy objective of encouraging employers to explore all options to accommodate a workforce of diverse characteristics and meets basic procedural fairness by providing a genuine enforceable right for all employees to seek independent review of unfair decisions.
117. We note that next round of research reports required under section 653 of the FW Act 2009 concerning the effectiveness of right to request mechanism were due to be provided to the Minister at the end of November 2015, and is yet to be public released. These reports are required to examine, among other things, the effect that section 65 has had on the employment of mature age persons.

*Individual flexibility arrangements made under s 202 of the Fair Work Act 2009 (Cth)*

118. The ACTU does not support individual flexibility arrangements (IFAs) provided under s.202 of the FW Act. We believe there is ample scope under modern awards (and contracts of employment) for employers to roster work in a flexible and efficient manner. For example, the General Retail Industry Award 2010 allows an employer to:
  - Implement long shifts of up to 11 hours on any day of the week;
  - Require employees to work 'reasonable' additional overtime;
  - Trade on weekday evenings and trade on weekends;

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<sup>24</sup> For example, the *Telstra Enterprise Agreement 2010-2012* specifically states that the dispute resolution clause "does not apply in relation to disputes about whether Telstra has reasonable business grounds to refuse a request for flexible work arrangements or a request for extended parental leave under the National Employment Standards": *Telstra Enterprise Agreement 2010-2012* C2011/3478

<sup>25</sup> Fair Work Commission, Quarterly report to the Minister Jul-Sep 2015, indicated there was a total of 9 complaints for the July – September 2015 period, <https://www.fwc.gov.au/documents/documents/quarterlyreports/Minister-1Q-FYR-15-16.pdf>

<sup>26</sup> The UK conducts regular surveys of both employers and employees on the operation of the request provisions since its introduction into law in 2003. Results from the Third Work Life Balance series reveal that 17% of employees requested a change to their working arrangements, approximately 60% of requests were granted, and of the 40% refused, only one quarter were appealed. The Third Work-Life Balance Employees Survey, March 2007, Employment Relations Research Series No.58 and The Third Work-Life Balance Employers Survey, December 2007, Employment Relations Research Series No.86.

- Change rosters; and
  - Provide flexible hours to employees such as starting or leaving work early or late.
119. If the genuine operational requirements of the business truly require even greater 'flexibility' (such as 24 hour rotating shifts), this is something that should be negotiated collectively with the workforce and their union, to ensure that workers' interests are properly accommodated.
120. In theory, there are a number of ways in which employees can access individual flexibility other than IFAs. These include informal over-award arrangements, contracts of employment and the right to request flexibility working arrangements under the NES. Employees that are in a strong position to negotiate with their employer do not need to rely on an IFA in order to access genuine flexibility. Those employees who have little say about their terms and conditions of employment, or who are in a vulnerable employment situation, are unlikely to derive any benefit from an IFA, including mature age employees who are more likely to find themselves in a vulnerable employment situation due to the increased discrimination against older workers.

*The experience of Australian Workplace Agreements (AWAs) shows that, in practice, individual agreements that modify the operation of the safety net do not benefit employees.*

121. This is because:

- It is overwhelmingly employers who initiate the use of such agreements;
- Employers seek agreements that provide them with increased discretion to set the terms and conditions of work;
- Employers commonly provide inadequate compensation for the removal of monetary entitlements;<sup>27</sup>
- Employers will apply pressure to employees to accept their preferred agreement;
- Employees are likely to be unaware of their right to refuse to make an agreement, and are not always well placed to make an assessment of whether the agreement disadvantages them;
- Employees are reluctant or unable to challenge their employer, either by opposing the making of an agreement, or in seeking compensation;<sup>28</sup> and
- Non-compliance with employment obligations and lack of enforcement by employees is particularly prevalent in industries where the employer is under competitive pressure to reduce labour costs such as parts of manufacturing, hospitality and retail and in the case of vulnerable workers including mature aged workers, particularly those working in precarious employment or in workplaces without a union presence.<sup>29</sup>

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<sup>27</sup> See A Roan, T Bramble and G Lafferty, 'Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions' (2001) 43 *Journal of Industrial Relations* 387; R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

<sup>28</sup> See, for example, Queensland Industrial Relations Commission, *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers*, 2007; Standing Committee on Social Issues, Legislative Council, New South Wales, *Inquiry into the Impact of Commonwealth WorkChoices Legislation*, Report, 2006; Jude Elton and Barbara Pocock, 'Not Fair, No Choice: the impact of Work Choices on Twenty South Australian Workers and their Households', July 2007.

<sup>29</sup> Miles Goodwin and Glenda Maconachie, 'Employer Evasion of Worker Entitlements 1986-95: What and Whose?' (2005) Proceedings of the 19<sup>th</sup> AIRAANZ Conference, vol 1, 239-45.

*The safeguards in the FW Act provision for individual flexibility arrangements (including the model award clause) have proven ineffective in protecting employees entering IFAs.*

122. The FW Act does not require IFAs to be approved or registered by an independent authority and the lack of reliable data makes it difficult to assess the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements.
123. Over the last two years, however, it has become apparent that IFAs are being used by employers in a similar fashion to AWAs – that is, to drive down wages and conditions. Moreover there is very little evidence that IFAs provide employees with access to genuine flexibilities that assist them to balance their work and personal needs. To make matters worse, there is currently legislation before the Parliament that proposes to water down the already largely ineffective safeguards that accompany the process of making IFAs.<sup>30</sup>

#### *Lack of genuine employee consent*

124. Unlike collective agreements, there is no process for ensuring that the employee has genuinely agreed to enter into a flexibility arrangement. Consequently, the legislative requirement of consent offers employees very little protection.
125. There have been many reports of employers unlawfully making entry into an IFA a condition of employment. In our experience, it's quite common for an employer to include an IFA in the bundle of documents to be signed at the commencement of employment, without explaining to the employee that they are not obliged to sign the IFA.
126. It also appears that IFAs, like AWAs, are 'template' documents that are developed by workplace relations consultants, law firms or employer organisations<sup>31</sup> raising questions as to whether the IFAs are produced following genuine negotiation.<sup>32</sup>
127. The ACTU remains concerned about the risk of undetected coercion in non-unionised workplaces particularly with respect to vulnerable workers given the process by which agreement is reached is generally not subject to external scrutiny. There has been at least one prosecution under the General Protections provisions of the FW Act that involved an IFA.<sup>33</sup>

#### *The operation of the 'Better Off Overall' test (BOOT)*

128. There are numerous reports of IFAs that clearly do not pass the BOOT, yet employer organisations frequently assert that arrangements that provide 'the opportunity to earn extra income' or that 'meet employee needs' can be used to offset the loss of entitlements. For example, in 2011, Spotless IFAs allowed Spotless to direct employees to work a shift, waiving their rights to the usual seven days' notice and overtime rates of pay. They received no compensation, except 'the opportunity to earn a higher income'.

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<sup>30</sup> See *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*

<sup>31</sup> See the IFA available from the Clubs ACT or Queensland Pharmacy Industry.

<sup>32</sup> Fair Work Ombudsman, QLD- Pharmacy Industry Audit Program, Final Report, February 2012, p 11-12.

<sup>33</sup> In that case, six employees were asked to sign an IFA that removed penalty rates for overtime, weekend and public holiday work. Five of the six employees signed the agreement. One of the employees signed only after the director threatened that there would be no work for him if he did not sign. Another employee had his shifts cut following his refusal to sign.

Similarly, Medibank Private has offered its employees the option of working from home provided the employee agrees to forgo the entitlement to overtime rates under the terms of the relevant collective agreement. *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064.

129. Proposed amendments would modify the scheme such that employees would be required to provide a statement setting out why they believe an IFA will meet their needs and how it results in them being better off overall. This works in tandem with a further amendment creating a new statutory defence for employers to enforcement proceedings if the employer “reasonably believes” the safeguards were complied with. This is clearly intended to operate as a scheme whereby the employee signs a statement prepared for them by the employer which serves as the employer’s basis for the “reasonable belief” that constitutes their defence. Under this scheme, ignorance of the law is an excuse, absolving the employer not only of liability for penalties but also depriving the employee of the right to recover any underpayments.

*The absence of genuine employee flexibility and good faith obligations with respect to employee proposals*

130. Employers commonly assert that IFAs are used to tailor unique employment conditions that accommodate the needs and wants of individual employees, or that they are initiated at the request of an employee.

131. However in our experience, most employers are not interested in negotiating individual flexibility arrangements that benefit employees and employee requests for flexible work arrangements made under the NES are often rejected without sufficient genuine consideration of accommodating the employee’s needs. Further information on the operation of IFAs will be contained in the research reports mandated under section 653 of the FW Act, which as we note above were required to be provided to the Minister by the end of November 2015.

132. Employers consistently objected to submissions from employee organisations or community groups to extend the scope of the NES right to request provision to employees with caring responsibilities and mature workers. The same employer organisations complain about the prohibition on making flexibility arrangement a condition of employment, the inability to use IFAs to structure businesses as they see fit, and the prospect of needing to update a plethora of workplace arrangements on a rolling basis as employees opt out of previously agreed arrangements.

133. The legislative changes sought by these organisations are designed to ensure that IFAs can be used to lock employees into identical working arrangements for a lengthy period of time rather than provide employees with individual agreements that suit their particular circumstances.

134. The fact that there is no obligation on employers to consider employee proposals in good faith or take into account the employee’s need for alternative working arrangements makes IFAs an attractive alternative for employers to enterprise bargaining and flexible working arrangements made the NES.

135. The ACTU is aware of a number of cases in which an employee sought flexible working hours in accordance with the right to request flexible working arrangements provision of the NES and was informed by their employer that they could not access the desired flexibility without entering into an IFA that removed penalty rates.

136. The ACTU advocates that, in addition to the NES right to request provisions, workplace agreements are the appropriate vehicle to facilitate employee’s requests for flexible work arrangements. Collectively negotiated workplace agreements provide greater protections for employees and are less likely to result in vulnerable individuals needing flexible work arrangements to suffer diminution of basic rights and entitlements.

## GENERAL PROTECTION PROVISIONS

137. The ACTU supports the reverse onus of proof model adopted by the FW Act general protections provisions. This model assists employees being discriminated against by requiring them to establish “adverse action” was taken against them, after which the employer must establish that the action was not for the discriminatory reasons alleged by the employee. Legislative reforms including replacing the ‘dominant reason’ with a less onerous test in the Age Discrimination Act (2004) has also assisted protection of mature workers.
138. However, the FW Act General Protections against discrimination does not extend to carers who have been indirectly discriminated against and is compromised by the lack of clarity over the operation of s.351(2) which states that the protection may not apply where the action is not unlawful under any discrimination law in force in the place where the action is taken. This section should be amended to clarify that the protection applies irrespective of whether the action is lawful under State or Territory anti-discrimination legislation and ensure employees with family or caring responsibilities are protected from both direct and indirect discrimination and the exemptions available to employers on the grounds that the discrimination is an ‘inherent requirement of the job’ should be restricted.

## OTHER REFORM POSSIBILITIES

### *Modern awards*

139. During the award modernisation process, some significant protections for part-time workers were lost. Access to part-time employment options, greater employee control over rosters and greater certainty over hours of work which assisted many older workers to transition to reduced hours of work should be restored in modern awards. In addition, we support the introduction of casual conversion clauses to those modern awards that do not currently contain them, and we also support including a more comprehensive definition of a casual employee in modern awards.

### *Compulsory retirement ages and licensing or requalification requirements in specific industries and professions*

140. The ACTU notes that there is inconsistency across State and Territory regulation of various aspects of licensing and/or requalification requirements. Consistency of these regulations would assist awareness and compliance. ACTU generally supports an approach to licensing and/or requalification which is based on risk factors rather than age.

## APPROACHES TO REGULATION AND MONITORING

141. The ACTU supports the inclusion of preventative measures aimed at encouraging long term cultural change in the regulation framework. Currently, the framework is biased towards the provision of remedial compensation once discrimination or adverse action has occurred in employment. The framework should provide the 'full triangle of regulation', including:
- meaningful, enforceable legal rights and obligations;
  - preventative measures such as providing recommendations or entering into enforceable undertakings with employers; and
  - Education, awareness raising and reporting activities aimed at encouraging a cultural shift amongst the community, employers and employees which values the contributions of older workers.
142. Amending the NES right to request flexible work arrangements provision to include an obligation on employers to demonstrate proper consideration of the request role and allowing all workers to appeal an unreasonable refusal of a request would go some way to providing a meaningful, enforceable legal framework.
143. The AHRC should be given more power and resources to be more proactive in providing preventative actions, such as making recommendations or entering into enforceable undertakings with employers, as well as initiating inquiries into systemic discrimination and conducting own motion legal proceedings where appropriate.
144. The ACTU supports the use of reporting frameworks such as that administered by the Equal Opportunity for Women in the Workplace (EOWW) Agency. Such frameworks assist employers and employees to self-identify internal practices and procedures which may hinder or assist maintaining a diverse workforce, including mature age workers.

## ECONOMIC AND SOCIAL COSTS, AND THE COSTS TO PRODUCTIVITY

145. Increasing older workers participation in the labour market can have a positive effect on productivity growth.
146. PriceWaterhouseCoopers (PwC) has recently released the Golden Age Index, which is a weighted average of indicators – including employment, earnings and training that reflect the labour market impact of workers aged over 55 in 34 Organisation for Economic Co-operation and Development (OECD) countries.<sup>34</sup>
147. This demonstrates that positive progress has been made, with Australia currently ranked 15th place in 2013 (up from 20 in 2003). Iceland is leading the ranking, followed by New Zealand, Sweden, Israel and Norway.<sup>35</sup>
148. Using Federal Treasury's Intergenerational Report which projects the economy out to 2050, PwC modelling shows that if Australia increased its participation among older workers to New Zealand levels (i.e. from 63.2% to 79.7%), this will at that time:
- increase GDP by 4.7 per cent or \$198 billion at today's value;
  - improve the Commonwealth and state/territory budget by 1.7 per cent of GDP;
  - reduce net debt by 11 per cent GDP in 2050.<sup>36</sup>

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<sup>34</sup> PwC Golden Age Index, How well are OECD economies adapting to an older workforce? June 2015, at <http://www.pwc.co.uk/assets/pdf/pwcgoldenageindex-june2015.pdf>

<sup>35</sup> Ibid.

<sup>36</sup> PriceWaterhouseCoopers, Australia Improving but far behind NSW in leveraging mature age workers, 29 June 2015, at <http://www.pwc.com.au/press-room/2015/leveraging-mature-age-workers-jun15.html>

149. PwC further notes the overall benefits to the economy of employing more older workers, which generates greater demand and therefore more jobs.<sup>37</sup> To achieve this, change is required, particularly around addressing social bias towards older workers.<sup>38</sup>
150. As the AHRC notes, lower levels of participation at individual workplaces can have a variety of impact including lower levels of productivity and job satisfaction, loss of knowledge and highly experienced and skilled staff, and higher recruitment and training costs.<sup>39</sup>
151. The social costs are also high. As the AHRC notes, age discrimination can affect individual's mental and physical health, which can have a flow on effect to their families.<sup>40</sup> Other negative impacts include having to change careers and retrain, or if that is not possible, early retirement and access of superannuation or social security payments.

## HUMAN RIGHTS OF OLDER AUSTRALIANS

152. Older persons are protected by a number of international human rights treaties including the *International Covenant on Civil and Political Rights 1966 (ICCPR)*, articles 2 and 25(c) and *International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)*, articles 2, 6, and 7.<sup>41</sup>
153. ICSECR provides for a number of key rights including the right to work,<sup>42</sup> to just and favourable conditions of work,<sup>43</sup> the right to an adequate standard of living<sup>44</sup> and the right to enjoy these rights without discrimination.<sup>45</sup>
154. The ACTU notes that there is no specific United Nations convention on the rights of older workers, but that the 1991 United Nations Principles for Older Persons sets out a number of important employment rights including the opportunity to work or access income-generating opportunities,<sup>46</sup> and the autonomy to choose when to transition from the labour force.<sup>47</sup>
155. Whilst these conventions and principles help promote cultural change in the workforce by setting out international standards, their value is diminished if they are not enshrined in the domestic legal framework.
156. As previously indicated, individuals must have enforceable rights under domestic legislation. This will help assist workers with their ongoing participation in the labour market.

<sup>37</sup> IPwC Golden Age Index, How well are OECD economies adapting to an older workforce? June 2015 <http://www.pwc.co.uk/assets/pdf/pwcgoldenageindex-june2015.pdf>, page 12.

<sup>38</sup> PriceWaterhouseCoopers, Australia Improving but far behind NSW in leveraging mature age workers, 29 June 2015, <http://www.pwc.com.au/press-room/2015/leveraging-mature-age-workers-jun15.html>

<sup>39</sup> Australian Human Rights Commission, Issues paper: Employment discrimination against older Australians, at <https://www.humanrights.gov.au/publications/issues-paper-employment-discrimination-against-older-australians/7-economic-and-social>

<sup>40</sup> Australian Human Rights Commission, National prevalence survey of age discrimination in the workplace (2015), p .45 at <https://www.humanrights.gov.au/our-work/age-discrimination/publications/national-prevalence-survey-age-discrimination-workplace>

<sup>41</sup> See also, the *Convention on the Elimination of All forms of Discrimination against Women*, 1979 articles 2 and 11; and International Labour Organization, *Discrimination (Employment and Occupation) Convention*, 1958 (ILO 111), article 1. ILO111 does not specifically include age as a ground for discrimination but provides for possible additions to the list of grounds. The International Labour Organization, *Older Workers Recommendation*, 1980 (No.162) directly addresses older workers.

<sup>42</sup> Article 6. ICESCR.

<sup>43</sup> Article 7. ICESCR.

<sup>44</sup> Article 11 and 12. ICESCR.

<sup>45</sup> Article 2, ICCPR and article 2, ICESCR.

<sup>46</sup> United Nations Principles for Older Persons, adopted by the United Nations General Assembly in 1991, A/RES/46/91 (1991), Principle 2.

<sup>47</sup> Ibid, Principle 3.

## RECOMMENDATIONS

- Ease the restrictions on income tests for income support payments such as the age pension, either by raising the earnings threshold, or reducing the withdrawal rate of payments;
- Further reduce the effective marginal tax rate to increase the take-home pay of low-income workers. To be most effective, this change should apply to recipients of all income support payments, not just the age pension;
- Increase the Superannuation Guarantee to 15%;
- Remove the \$450 minimum earnings threshold below which employers are not required to contribute to their employee's voluntary superannuation contribution;
- Extend the Superannuation Guarantee framework to all employees, including casual, contract and self-employed workers;
- Improve the retirement income of women through top-up and co-contribution schemes and payment of super on periods of paid and unpaid parental leave;
- Implement a fairer system of tax concessions on superannuation with a fixed offset deducted from an employee's marginal tax rate;
- Maintain the superannuation preservation age at 65 for those who wish to retire at that age and access their superannuation;
- Lift the 25 hour work limit for workers who are in receipt of the Carers Payment;
- Invest in retraining and recruiting mature age workers for jobs within Australia;
- Remove age based restrictions for access to workers compensation;
- Reform the right to request flexible work arrangements to mandate genuine consideration of requests and to include an effective right of review;
- Acknowledge and address the negative impact of insecure employment on mature age workers;
- Clarify that the FW Act discrimination provisions operate irrespective of whether the action is not unlawful under state or territory discrimination law.
- Ensure the FW Act General Protections for prospective employees against discrimination on the basis of age are enforced with respect to prospective employers and labour hire companies;
- Implement the 'full triangle' of regulation, including enforceable, meaningful legal rights and obligations, preventative measures such as enforceable undertakings and reporting requirements and whole of organisation education and awareness activities.

## PEOPLE WITH DISABILITY

157. The Australian union movement has been a longstanding advocate of disability rights, since the adoption of the Disabled Workers Charter at the ACTU Congress in 1981.
158. All workers, including those with a disability, have the right to meaningful and secure employment. For people with disability, access to paid employment is fundamental to independence, wellbeing and financial security, and for equal participation in the social and economic life of their communities.
159. These benefits can only be fully realised by increasing the employment participation rate of people with disability. Almost one in five working age Australians are reported to have a disability, and of these only around 53% are in paid employment compared to an 83% participation rate for workers without a disability. The unemployment rate is at least twice that of workers without disability.<sup>48</sup>
160. These outcomes have changed very little over the past 20 years, even when workforce participation rates more generally have improved as the economy has strengthened, indicating the many barriers to employment of people with disability are entrenched and require systemic reform.
161. The principle of decent work underpins our approach to improving employment participation of workers with disability. Decent work is work that is inclusive and provides workers with a safe, fair and friendly workplace, fulfilling social interactions, freedom, dignity, opportunity and economic security.
162. The decent work agenda was adopted by the International Labour Organization in 2002, and further endorsed by the ACTU and our affiliates at our 2009 Congress. It recognises the central role of work in people's lives and that the quality of work is crucial to a fair and equal society.
163. We believe that working life should promote social inclusion by engaging people within their communities, cultivating self-esteem and self-efficacy, enabling financial independence, and improving physical and mental health outcomes. These values underpin our approach to improving employment participation of workers with disability and inform our responses to this submission.

## INCLUSIVE EDUCATION

164. Every Australian's employment opportunities are improved by access to quality education.
165. The ABS reported that in 2009 most children with disability who attended school attended regular classes in mainstream schools (65.9%). The remainder attended separate, special classes within mainstream schools (24.3%) or separate, special schools (9.9%).<sup>49</sup>
166. Only half of all students with severe disability progressed past Year 10 at school, and only 38% completed Year 12 or its equivalent.<sup>50</sup> These outcomes are not equipping students with disability to obtain work.
167. There are barriers to employment for qualified and experienced people with disability. The barriers are even greater for students with disability leaving school without skills or qualifications, particularly for students with severe and/or intellectual disability who are disproportionately represented in non-inclusive school settings.<sup>51</sup>

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<sup>48</sup> Issues paper: Employment discrimination against Australians with disability, *Australian Human Rights Commission, 2015*

<sup>49</sup> 4429.0 - Profiles of Disability, *Australian Bureau of Statistics, 2009*

<sup>50</sup> 4430 - Disability, Ageing and Carers, Australia: Summary of Findings, *Australian Bureau of Statistics 2012*.

<sup>51</sup> The Right of Persons with Disabilities to an Inclusive Education without Discrimination, *Inclusion Australia (NCID), 20 September 2013*.

168. Maximising the provision of inclusive, integrated quality education that meets the individual needs of students with disability is one of the most important investments that can be made to break the cycle of social exclusion and financial dependency faced by many people with disability.
169. The ACTU notes that from 2015 all government and non-government schools will participate annually in the Nationally Consistent Collection of Data on School Students with Disability, to identify the number of school students with disability and the level of reasonable educational adjustment provided.<sup>52</sup>
170. The UN Convention on the Rights of Persons with Disabilities, to which Australia is a party, recognises that people with disability have the right to, amongst other things, an inclusive education system at all levels and lifelong learning to ensure their full and equal participation in education and as members of the community.<sup>53</sup>
171. In 2013 the UN Committee on the Rights of Persons with Disabilities recommended that Australia set targets to increase participation and completion rates by students with disabilities in all levels of education and training.<sup>54</sup>
172. Inclusive education is not only the right of people with disability, it is essential to improving community attitudes in future generations of employers and co-workers and thereby increasing opportunities for employment for people with disability.

## ***TRANSITION FROM EDUCATION TO EMPLOYMENT***

173. It is difficult to find consistent national, longitudinal data on the rates of transition from education to employment for young people with disability.
174. The Ticket to Work national initiative, which creates local networks of schools, industries, training providers, employment agencies and disability services to support students with disability to transition to employment, has found that:
175. "Australian young people with disability are currently not successfully transitioning from school into further training or employment; a factor that is an indicator of long term, and often life-long, disadvantage. In Australia, young people with disability are more likely to drop out of school early, be excluded from the labour force, have fewer educational qualifications, experience poverty and be socially isolated..."
176. Participation while at school in career development, work experience, accredited training and completing secondary school are among the most significant indicators of post-school success for young people with disability...
177. Young people with disability who exit school with a job are more likely to maintain a positive career trajectory than those who do not."<sup>55</sup>
178. The Ticket to Work network has identified Australian School-based Apprenticeships and Traineeships (ASbAT) as an ideal approach for enabling transition from school to work for disadvantaged students. ASbATs allow secondary school students to spend one or two days in the workplace, one day undertaking accredited vocational training delivered by a Registered Training Organisation and the remainder of the week at school. The network is currently expanding to NDIS trial sites.

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<sup>52</sup> <https://www.education.gov.au/what-nationally-consistent-collection-data-school-students-disability>

<sup>53</sup> Article 24, *UN Convention on the Rights of Persons with Disabilities*

<sup>54</sup> Concluding Observations on the initial report of Australia, 2-13 September 2013, Committee on the Rights of Persons with Disabilities, CRPD/C/AUS/CO/1

<sup>55</sup> [www.tickettowork.org.au](http://www.tickettowork.org.au)

179. Best practice examples from other countries also demonstrate that people with moderate to severe disabilities can also benefit from this approach.
180. The SPAGAT model applied in Vorarlberg, Austria, offers employment opportunities to school-leavers and people with disabilities who were previously considered unemployable and generally directed towards disability support services.
181. Participants may choose between employment in a sheltered workshop or supported employment in the general labour market, supported by:
  - the development of a circle of support
  - the “creation” of customised jobs
  - the use of mentors in every company.
182. SPAGAT reports that approximately 70% of all special school-leavers with increased educational needs now successfully use the model.<sup>56</sup>
183. The Youth Transition Program in Oregon, USA, prepares people with disabilities for competitive community employment ie. paid work at minimum wage or higher in integrated settings, or for career-related post-secondary education or training.
184. The program also works to increase capacity and create systems change in schools and other agencies to assist students with disabilities transition from education to work. Since 1990 more than 23,000 students have received YTP services. YTP reports that 80% of participants are engaged in employment or post-secondary training at the end of the program and these outcomes are maintained 6 and 12 months after the program.<sup>57</sup>
185. In summary, greater investment is required nationally in education and skills training that have been demonstrated to assist people with disability to transition from school to work.

## DISCRIMINATION IN EMPLOYMENT

### *INCLUSIVE EMPLOYMENT*

186. People with disability in Australia work within a variety of employment settings, ranging from supported employment settings such as Australian Disability Enterprises to the competitive, open labour market.
187. The ACTU supports all workers, including those with a disability, having the right to meaningful and secure employment and at legal wages.<sup>58</sup> As outlined previously, there is growing evidence that people with disability, including severe and/or intellectual disability, can be productive workers within inclusive, mainstream employment settings.
188. It is also worth noting a trend in the USA away from the practice of paying sub-minimum wages to people with disability. In May 2015, New Hampshire became the first state to pass legislation that bans the practice of paying people with disabilities sub-minimum wages. Vermont eliminated the practice altogether in 2002 and now has the highest employment rate of people with disabilities in integrated settings in the USA.

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<sup>56</sup> 10 Best Practices in Employment Support for People with Disabilities, *European Association of Service Providers for persons with Disabilities, 2013.*

<sup>57</sup> 10 Best Practices in Employment Support for People with Disabilities, *European Association of Service Providers for persons with Disabilities, 2013.*

<sup>58</sup> Employees of Australian Disability Enterprises - Final Resolution, *ACTU Congress 2015*

189. The National Federation of the Blind notes that 95% of people employed in sub-minimum wage environments in the USA never left sheltered workshops for competitive employment, despite services receiving decades of funding dedicated to that purpose.<sup>59</sup>
190. The US Federal Congress is also currently considering draft federal legislation to phase out the employment of people with disabilities at sub-minimum wage rates.<sup>60</sup>
191. This change of perspective, towards services and programs that enable people to live and work in the most integrated setting appropriate, is underpinned in the USA by the legacy of the civil rights movement and the strength of the Americans with Disabilities Act.
192. While the historical and statutory framework is somewhat different in Australia, the workforce participation rate of people with disability is likely to be significantly improved by favouring an approach that assumes people with disability are entitled to inclusive, integrated training and employment opportunities and to meaningful, secure work.
193. The UN Convention on the Rights of Persons with Disabilities also recognises the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.<sup>61</sup>

## OBTAINING EMPLOYMENT

194. One of the greatest barriers to people with disability obtaining employment is community attitudes to disability. Entrenched, negative perceptions of disability translate to workplace practices. If employment participation of workers with disability is to be improved, community attitudes and workplace practices need to change significantly.
195. It is well established that increased workforce participation by people with disabilities has wider economic and community benefit. There have been multiple, well-publicised reports in Australia in recent years that quantified the cost of excluding people with disability from the workforce, and the economic and social benefits of employing people with disability.<sup>62</sup>
196. Such reports assisted in building the business case for the National Disability Insurance Scheme, but do not appear to have influenced significant improvements in workforce participation rates. There appears to be little to be gained in investing further public funding in researching and promoting the benefits of employing people with disability.
197. The best way to improve participation of workers with disabilities in all industries and all levels of the workforce is to recruit more people with disability, and to support and progress workers with disability already in employment.
198. To achieve the systemic change required, the ACTU has previously proposed an employment equity scheme, similar to the Workplace Gender Equality Agency, which would require large businesses and public sector agencies, in the first instance, to establish voluntary employment targets and report on the number of self-reported employees with disability in the workplace.<sup>63</sup>

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<sup>59</sup> Frequently Asked Questions on the Transitioning to Integrated and Meaningful Employment Act, National Federation of the Blind USA.

<sup>60</sup> <https://www.congress.gov/bill/114th-congress/house-bill/188/text>

<sup>61</sup> Article 27, *UN Convention on the Rights of Persons with Disabilities*

<sup>62</sup> Australian Chamber of Commerce and Industry, *Employ outside the box: The rewards of a diverse workforce*, 2012; PricewaterhouseCoopers, *Disability expectations: Investing in a better life, a stronger Australia 2011*; Deloitte Access Economics *The economic benefits of increasing employment for people with disability*, 2011; Disability Care and Support, Final Report, Productivity Commission 2011.

<sup>63</sup> Improving the employment of people with disability in Australia, *ACTU Response to Ministerial Inquiry, 22 February 2013*.

199. Voluntary disability employments targets supported by organisational commitment and effective strategies work. A contemporary example is the National Disability Insurance Agency (NDIA), which established a target of 15% of its workforce identifying as having a disability by June 2016.
200. The NDIA has already exceeded its target, through a range of effective recruitment, training and other employee support strategies, including:
- a person with disability being included on selection panels for service delivery roles
  - a 12 month traineeship programme for people with an intellectual disability
  - an intern program to provide up to 10 intern positions for people with disability across National Office and the trial sites.<sup>64</sup>
201. While the NDIA may have been perceived as being inherently more welcoming of applications from people with disability, there is no reason to suppose these outcomes could not be replicated by other employers.
202. The former Disability Discrimination Commissioner, Graeme Innes, also provided practical advice to employers seeking to increasing employment of people with disability, including:
- setting recruitment targets for people with disability
  - making a commitment to give every applicant with a disability an interview
  - reserving a proportion of graduate recruitment places for people with disability
  - creating or reserving a proportion of apprenticeships, traineeship and work experience opportunities for people with disability.<sup>65</sup>
203. However, without a requirement for employers to set recruitment targets, it is unlikely such strategies will be implemented on the scale required.

### ***CUSTOMISING EMPLOYMENT***

204. A further barrier to people with disability obtaining work is the discrimination inherent in the requirements of many jobs, which tend to have been developed for workers without disability.
205. The Disability Discrimination Act 1992 provides that it is unlawful for an employer to discriminate against a person on grounds of disability, including in determining who should be offered employment.<sup>66</sup>
206. However, the Act also provides an exception to this requirement, so that it is not unlawful to discriminate if the discrimination relates to particular work and because of the disability the person would be unable to carry out the inherent requirements of the work.<sup>67</sup>
207. It is not always possible for individual employers to adjust jobs and workplaces to meet the skills and needs of a worker with disability. Systemic change is required to facilitate the development of more tailored jobs that are accessible to people with disability.
208. Innovative employment programs in Australia and overseas seek to address these systemic barriers by customising employment to meet the skills of the person with disability.<sup>68</sup>
- “Reports have shown that even those individuals with quite severe disability can participate in employment, provided the role is customised with the right employer...”*

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<sup>64</sup> NDIA 2014-15 Annual Report

<sup>65</sup> [Graeme's top 10 tips to increasing employment of people with disability](#)

<sup>66</sup> s15, *Disability Discrimination Act 1992* (Cwth)

<sup>67</sup> s21A, *Disability Discrimination Act 1992* (Cwth)

<sup>68</sup> *Submission to the Interim Report of the Reference Group on Welfare Reform – A New System for Better Employment and Social Outcomes, Ticket to Work, August 2014.*

*We have found that many DES providers have little or no knowledge of customised employment and demand-led approaches. Many still use the ‘beg, place and pray’ approach; that is beg the employer to take on a person with disability (usually pitched at the employers charitable side), place a person (even if it not role that the individual is interested in or have an aptitude for) and then pray it lasts long enough to receive the government outcome fee. The government has a role to play in supporting DES providers to gain knowledge and expertise in the demand-led approaches to employment.”<sup>69</sup>*

209. Federal and State Governments do provide guidance and some funding to workers with disabilities and employers to make workplaces more accessible and inclusive. Additional and/or more effective support and funding is necessary to significantly increase workforce participation by people with disability.
210. It is also necessary that any necessary support systems or modifications to the workplace needed are implemented in a timely manner. It is of little use to an employer or employee if modifications required for an employee with disability to work effectively take months to implement.
211. The ACTU notes the Australian Government established in April 2015 a Disability Employment Taskforce to review the current support system, recognising that only one in three jobseekers registered with the Disability Employment Services program secures employment.<sup>70</sup>
212. Greater transparency is required regarding the effectiveness and responsiveness of disability employment assistance programs such as the Employment Assistance Fund and Job Access, so that workers with disability and employers can be confident their needs will be met in a timely manner.

## RETAINING EMPLOYMENT

213. In 2013 the ACTU and unions highlighted to the Australian government examples of employers in the open job market failing to provide reasonable adjustments to employees with disabilities, leading variously to underpayments, loss of wages and qualified workers leaving industries with skills shortages because of employers’ unwillingness to accommodate the reasonable needs of workers with disability.<sup>71</sup>
214. Since then, the *Fair Work Act 2009* has been amended to extend the right to request a change in working arrangements to a broader category of persons, including to employees with a disability.<sup>72</sup> The ACTU welcomes this amendment.
215. Nevertheless, a request for flexible working arrangements may be refused on reasonable business grounds, including on the basis that the new working arrangements would be:
  - too costly for the employer
  - likely to have a significant, negative impact on customer service
  - likely to result in significant loss of efficiency or productivity.
216. Similarly, the *Disability Discrimination Act 1992* requires employers to make reasonable adjustments to the workplace so that employees can meet the inherent requirements of the job, but a request for reasonable accommodation may be refused if it would impose unjustifiable hardship on the employer.

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<sup>69</sup> *Submission to the Interim Report of the Reference Group on Welfare Reform – A New System for Better Employment and Social Outcomes, Ticket to Work, August 2014.*

<sup>70</sup> *National Disability Employment Framework – Issues Paper, May 2015, Department of Social Services, Cwth.*

<sup>71</sup> Improving the employment of people with disability in Australia, *ACTU Response to Ministerial Inquiry*, 22 February 2013.

<sup>72</sup> s65(1A), *Fair Work Act 2009* (Cwth)

217. While the Fair Work Act and the Disability Discrimination Act both provide avenues for refusal of flexible working arrangements or reasonable adjustments to be challenged, it is clear that these exceptions only serve to entrench discrimination.
218. As in every other part of life, jobs and workplaces are structured with the 'norm' in mind, ie. non-disabled workers. Making jobs accessible to people who do not fit the norm is inherently a challenge for employers.
219. Without systemic reform to provision of employment support services, there is little likelihood the current low levels of employment for people with disability will change.
220. Other instruments that provide flexibility to workers with a disability could also be considered. The Trades Union Congress and unions in the UK have developed policy and model agreements that seek to protect workers with disabilities from losing their jobs by:
- separating the counting of disability-related absences from sickness absence, and
  - establishing a Disability Leave provision.<sup>73</sup>
221. Disability Leave is intended to provide paid leave for a reason associated with a workers' disability, for example allied health care appointments that facilitate recovery from injury or maintenance of health.
222. There is little data on the use, benefits and disadvantages of Disability Leave to date, or how it might interact with reasonable adjustments. However, the approach recognises that disability does not always equate to ill-health, and that workers with disability are at a disadvantage compared to workers without disability when forced to use sick leave for routine maintenance of their health and fitness for work.

## AGEING AND EMPLOYMENT WITH A DISABILITY

223. People with disability are living longer and healthier lives and many are able to work through to retirement. People with disability are as vulnerable to the diseases of ageing as any other worker, but are often subject to financial discrimination that prevents them obtaining income protection insurance through their superannuation schemes.
224. This has been highlighted in the media recently in the context of people with a history of mental illness being refused insurance, but is an issue facing many workers with disability who experience the same serious illnesses as the rest of the population but without being able to protect their and their families' income.<sup>74</sup>
225. Most insurance products differentiate between people on the basis of risk which may, rightly or wrongly, include consideration of a person's disability. Unlike the community rating principle applied to health insurance, this approach means workers with disability who may be relatively healthy for their whole working lives are unable to protect their and their families' income in the event of illness or trauma that can happen to any member of the working population.<sup>75</sup>
226. The Disability Discrimination Act contains specific exemptions for the insurance and superannuation industry, recognising that discrimination is inherent to most insurance assessment in Australia and that insurance is generally a for-profit business.

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<sup>73</sup> Sickness Absence and Disability Discrimination, *Trades Union Congress, UK, 2013.*

<sup>74</sup> <http://www.abc.net.au/news/2015-10-09/beyond-blue-calls-on-insurance-industry-to-work-on-insurance/6841092>

<sup>75</sup> *Guidelines for Providers of Insurance and Superannuation, Australian Human Rights Commission, 2005.*

227. The current, risk-based insurance model, predominantly informed by the medical model of disability, does not meet the needs of workers with disabilities. If more workers with disability are to be encouraged to work, more appropriate superannuation and insurance products will be required for workers with disability to maintain financial security throughout their working life.
228. The UN Convention on the Rights of Persons with Disabilities also recognises that people with disability have the right to equal access by persons with disabilities to retirement benefits and programmes.<sup>76</sup>

## OTHER BARRIERS TO EMPLOYMENT

229. Inclusive and adequate provision of community services such as public transport and health services significantly contribute to labour market participation rates, particularly for workers with disability.
230. Employment participation costs for workers with disability are higher than for those without – housing, transport costs, personal care, aids and appliances costs can all act as a barrier to participating in paid employment.
231. Better funding for community programs and services can make a significant contribution to major improvements in the capacity for people with disabilities and other disadvantaged groups to more fully engage in their communities.<sup>77</sup>

## IMPLEMENTATION OF THE NATIONAL DISABILITY INSURANCE SCHEME

232. One of the greatest barriers to participation in the workforce and in every other part of community life for people with disability is the lack of support services that meet their individual needs.
233. The NDIS is intended to facilitate increased participation by people with disability in all facets of community life, including the workforce, and to significantly improve access to individualised and relevant support services. It is estimated that the support workforce will need to at least double in size by 2018.
234. The ACTU notes the need for development and implementation of a disability sector workforce and sector engagement strategy that improves sector capacity and ensures quality standards are maintained and enhanced, including:
- a) enhancement of skill levels and continuing professional development of the workforce by ensuring access to quality and relevant training;
  - b) maximising representation of people with lived experience of disability in the delivery and implementation of the NDIS, by creating opportunities for more workers with disability to be employed in the support workforce through access to quality and relevant training;
  - c) ensuring that NDIS funding reflects and protects the wages and condition of workers in the sector, including the provision of future wage increases from the equal pay case and workforce bargaining outcomes;

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<sup>76</sup> Article 28 *UN Convention on the Rights of Persons with Disabilities*.

<sup>77</sup> COAG Reform Council, 'Chapter 3. Enjoying choice, well-being and independence', *Disability 2010-11: Comparing performance across Australia*, 2011. Accessed at [http://www.coagreformcouncil.gov.au/reports/docs/disability\\_10-11/Disability\\_2010-11-EnjoyingChoiceWell-being.pdf](http://www.coagreformcouncil.gov.au/reports/docs/disability_10-11/Disability_2010-11-EnjoyingChoiceWell-being.pdf)

- d) development of disability sector planning and support aimed at enhanced job security, increased part-time and full-time models of employment, and ensuring the minimisation of casualised and insecure work; and
  - e) development of an agreed regulatory framework for minimum standards for workers and providers to ensure quality, sustainable outcomes for people with disabilities.<sup>78</sup>
235. The employment prospects of people with significant and permanent disability are in many ways reliant upon effective delivery of the NDIS, which must have ongoing and certain funding to provide consistent, high quality support services.
236. It must also be noted that the majority of people with disability will not be entitled to NDIS services, which is being developed to meet the needs of people with a condition that is likely to be permanent and who require support to carry out everyday tasks.
237. When fully operational in 2020 the NDIS is intended to provide services to 460,000 participants, of a total Australian population of approximately 24 million.<sup>79</sup> This will represent approximately 2% of the population. However, it is generally accepted that almost one in five working age Australians have a disability.
238. Without systemic reform to education, training, employment practices and community attitudes people with disability will still face significant barriers to obtaining employment, however successful the implementation of the NDIS.

## RECOMMENDATIONS

239. To improve understanding of workforce participation issues and employment opportunities for people with disability, the ACTU supports the introduction of an employment equity scheme that would require large businesses and public sector agencies, in the first instance, to establish voluntary employment targets and report on the number of self-reported employees with disability in the workplace.<sup>80</sup>
240. To improve understanding of workforce participation issues and employment opportunities for people with disability, the ACTU supports the introduction of employment reporting mechanisms and the establishment of a Workforce Disability Equity Agency,<sup>81</sup> with responsibility for nationally consistent collecting and reporting on:
- the transition of students with disability from school to work, vocational and higher education.
  - the transition of people with disability from supported employment schemes to work in the open labour market at or above minimum wages.
  - the timely provision and effectiveness of Disability Employment Services.
241. To facilitate equity of access to work-based insurance and retirement benefits, governments, representatives of people with disability, representatives of the insurance and superannuation industries and unions should collaborate on the development of more appropriate superannuation and insurance products for workers with disability.

<sup>78</sup> A Fair Go For All - Workers with Disability Final Policy, *ACTU Congress 2015*

<sup>79</sup> 'Australia's National Disability Insurance Scheme: Its Design, Progress, Campaign Lessons, Challenges and Opportunities', Bruce Bonyhady, Chairman, National Disability Insurance Agency, Claiming Full Citizenship 2015 International Conference, 15-17 October 2015

<sup>80</sup> Improving the employment of people with disability in Australia, *ACTU Response to Ministerial Inquiry, 22 February 2013.*

<sup>81</sup> A Fair Go For All - Workers with Disability Final Policy, *ACTU Congress 2015*

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