

**WESTERN SYDNEY
UNIVERSITY**



Business

LITERATURE REVIEW

FOR THE MODERN AWARDS REVIEW
2023-24 RELATING TO THE
WORKPLACE RELATIONS SETTINGS
WITHIN MODERN AWARDS THAT
IMPACT PEOPLE WHEN BALANCING
WORK AND CARE

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With respect for Aboriginal cultural protocol and out of recognition that its campuses occupy their traditional lands, Western Sydney University acknowledges the Darug, Eora, Dharawal (also referred to as Tharawal) and Wiradjuri peoples and thanks them for their support of its work in their lands (Greater Western Sydney and beyond).

Table of Contents

1 Introduction	1
1.1 Aims	1
1.2 Approach	1
1.3 Methods.....	2
2 Background	5
2.1 Workplace Relations Settings	5
2.2 Conceptual context for work and care	6
3 Gendered patterns of working time and ‘employment choice’	13
3.1 The Australian labour market context.....	13
3.2 The regulation of working time	17
3.3 Relationship between types of employment and work and care	21
4 Explicit rights to flexibility and their use.....	24
4.1 Introduction	24
4.2 Awareness and Use of Flexibility Arrangements	25
4.3 Right to request flexible working arrangements under section 65 of the FW Act.....	26
4.4 Individual Flexibility Agreements	32
4.5 Working from home	33
5 Regulating and organising hours of work	37
5.1 Introduction	37
5.2 Maximum working hours.....	37
5.3 Minimum working hours	38
5.3.1 Minimum engagement periods and low minimum hour periods	39
5.4.Span and spread of ordinary hours of work.....	41
5.5 Pattern of work, rosters, rostering.....	42
5.6 Overtime (paid and unpaid)	43
5.7 Working hours regulation.....	44

6 Leave availability and accessibility.....	45
6.1 Introduction.....	45
6.2 Leave Provisions in NES	47
6.3 Leave provisions in modern awards	49
6.4 Who is a carer, what is care?	49
6.5 Extending the access and quantum of leave entitlements	50
6.6 Unpaid parental leave	55
7 Conclusion.....	57
Appendix 1 Proposals for changes to workplace relations settings in the NES and Modern Awards..	63

1 Introduction

This literature review forms part of the Fair Work Commission's targeted review of modern awards and the consultation process in that review considering the impact of workplace relations setting on work and care.¹ The Commission's targeted review in respect of work and care takes place within the context of the findings and recommendations of the Senate Select Committee on Work and Care Final Report.²

1.1 Aims

The Fair Work Commission (FWC) commissioned researchers led by Western Sydney University to:

- Analyse existing literature on modern awards and National Employment Standards (NES) framework in the Fair Work Act 2009 (Cth) (FW Act) and their impact on employees' work and care responsibilities;
- Identify and synthesise the key findings, trends, and emerging themes in the field; and
- Analyse existing literature to highlight various factors influencing the relationships between these workplace relations settings and employees' ability to balance their work and care responsibilities.

1.2 Approach

This work and care literature review focuses on existing literature in the following areas:

- Workplace relations settings: terms and conditions in modern awards and the National Employment Standards (NES);
- Work-related factors in modern awards such as workload, flexibility (including working from home), rostering, hours of work, types of employment (i.e. part-time, full-time and casual) and other relevant employee entitlements;³ and
- Assessments made of the impact of these settings on work and care.

It is important to note the limited scope of the literature review. Conducting primary research was not within the scope of this review, although in various sections, relevant contextual data and framing is briefly set out as context for the publications reviewed.

¹ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024) 10, 8. ([Hyperlink](#)).

² Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023). ([Hyperlink](#)).

³ The literature review does not cover discussion of modern award terms in the form that existed prior to the 4 yearly Modern Awards Review that commenced in January 2014.

Nor is this literature review focused on broader institutional and policy settings, such as paid parental leave (PPL), early childhood education and care (ECEC) and the tax transfer system, or the work organisation and policy settings at the workplace level that also impact on work and care, all addressed by the Select Senate Committee on Work and Care. However, as noted below, in much of the literature reviewed, the adequacy of work and care infrastructure, such as PPL and ECEC, as well as workplace policy and practice are discussed in tandem with the FW Act provisions.

1.3 Methods

The methodology employed in this review sought to address the primary aims of the Work and Care Literature Review as set out above.

Selection of sources

Relevant scholarly and grey literature were selected for review as well as findings and recommendations of, and select submissions to, relevant Senate Committee and Productivity Commission Inquiries from 2014-2023. In considering submissions, we were asked to focus, in the main, on submissions from academics, advocacy and other organisations. This is because the literature review forms just one element of the priority work and care stream in the Fair Work Commission's Modern Awards Review 2023-2024.⁴ It is anticipated that peak employer groups and unions will be involved in consultations and in making submissions and proposals in the Modern Awards Review's work and care stream.

Publications identified for detailed review included those in which work and care in the Australian context is the main topic or one of the main topics. That is, those that, at least in part, deal explicitly or implicitly with the impacts of terms and conditions in the NES and modern award system on employees' work and care responsibilities as well as the enforcement of these terms and conditions.

The range of literature and reports selected include those that deal broadly with the impact of Australian workplace relations system settings on work and care as well as those examining the work and care impact of particular NES or particular award terms and conditions. In many of the publications canvassed in this review, the impact of employment regulation on work and care is the primary focus. Other publications that are concerned with work and care more generally are also included as well as those concerned broadly with employment regulation, where there are comments

⁴ These elements include the Fair Work Commission's Discussion Paper on Work and Care; this literature review; a survey of employers; and consultations with interested parties. Interested parties will also be invited to respond to the work and care discussion paper. See Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024), 9, 11. ([Hyperlink](#)).

on, or implications for, work and care. Our focus in this review is on most Australian employees who are covered by the FW Act.⁵

Search Strategies

The search strategies employed to identify relevant scholarly literature used a variety of databases including: Google Scholar; Lexis Advance; Informit; SAGE Journals; Wiley Online Library; Proquest Central; JSTOR; and EBSCO.

Search terms used included general terms used in various combinations, such as work and care, work-life, family-friendly, family responsibilities, flexibility, flexible work arrangements, working time, together with relevant terms and conditions in the NES framework and in modern awards. These terms included those related to flexibility (such as individual flexibility agreements, the right to request flexible work arrangements, working from home), those related to leave provisions as well as provisions on rostering, hours of work, types of employment (i.e. part-time, full-time and casual), and other relevant employee entitlements.

Other relevant literature was sourced from relevant Senate Committee and Productivity Commission Inquiries and in relevant submissions to those inquiries, as well as that cited in the Fair Work Commission's Discussion Papers on Job Security⁶ and on Work and Care.⁷ Relevant literature was also sourced from *Australia Policy On-Line*, now *Analysis & Policy Observatory*, and from *Workplace Express*.

Synthesis and analysis of themes

In the selection of the literature set out in this review we have focused in the main on Australian publications from 2014 onwards, including select submissions to relevant Senate and Productivity Commission Inquiries from key stakeholders. However, some framing literature on work and care, such as what has been called the Australian 'work-care regime',⁸ and on the main architecture and content of workplace relations settings in the FW Act that impact on work and care was published before this date.

⁵ It was estimated in 2015 that the national workplace relations system in the FW Act covers around 85% of all employees in Australia (and over 70% of all employed persons) — Productivity Commission, *Workplace Relations Framework* (Inquiry Report No 76, Vol 1, 2015) 78. ([Hyperlink](#)).⁶ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024). ([Hyperlink](#)).

⁶ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024). ([Hyperlink](#)).

⁷ Fair Work Commission, 'Discussion Paper: Job Security' (Discussion Paper, 18 December 2023). ([Hyperlink](#)).

⁸ Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work, and Organization* 32. ([Hyperlink](#)).

The relevant data, findings and recommendations from the selected collection of scholarly and grey literature and reports is summarised in this review and using a synthesis approach:

- Key and recurring themes are identified including those that go to specific impacts of workplace regulatory settings on work and care, including in particular industries and/or occupations;
- Key aspects or factors identified as influencing the relationship between the workplace relations settings in the NES and modern awards and employees' capacity to undertake both work and care are also discussed.

2 Background

2.1 Workplace Relations Settings

2.1.1 Industrial recognition of work and care

In 1981, the tripartite International Labour Conference (ILO) adopted the Workers with Family Responsibilities Convention (No 156) and its accompanying Recommendation No. 165. Convention No 156 (ILO 156) was ratified by Australia in 1990. The ratification of ILO 156 and increasing awareness of discrimination against workers with family responsibilities led in 1993 to an amendment of the *Industrial Relations Act 1991 (Cth)* to prevent and eliminate discrimination including on the basis of sex, family responsibilities and pregnancy, and a requirement for the Australian Industrial Relations Commission (AIRC) to take account of Convention 156 in its deliberations.⁹

The immediate implementation of ILO 156 also included active Commonwealth support for the 1990 Australian Council of Trade Unions (ACTU) Parental Leave ‘test case’,¹⁰ then before the AIRC. The AIRC 1990 Parental Leave Decision¹¹ led to the introduction of a right to unpaid parental leave, extending the reach of 1979 Maternity Leave Decision,¹² to include fathers as well as mothers who were primary carers.¹³ ILO 156 was invoked in subsequent test cases brought by the ACTU and decided by the AIRC, which were the genesis for many of the current National Employment Standards relevant to worker carers.¹⁴

Today, s 3(a) of the FW Act requires that Australia’s international labour obligations are considered in providing ‘a balanced framework for cooperative and productive workplace relations that promotes

⁹ Sara Charlesworth and Alison Elder ‘Convention No. 156 and Recommendation No. 165: Australia’ (2012) in Adrienne Cruz (ed), ‘Good Practices and Challenges on the Maternity Protection Convention, 2000 (No. 183) and the Workers with Family Responsibilities Convention, 1981 (No. 156): A Comparative Study’ (Report, International Labour Organisation, 2012) 79, 89. ([Hyperlink](#)).

¹⁰ The use of such test cases in relation to work and care are discussed in Jill Murray, ‘Work and Care: New Legal Mechanisms for Adaptation’ (2005) 15 *Labour and Industry* 67, 74. ([Hyperlink](#)); and their demise in Jill Murray, ‘The AIRC’s Test Case on Work and Family Provisions: the End of Dynamic Regulatory Change at the Federal Level?’ (2005) 18 *Australian Journal of Labour Law* 325. ([Hyperlink](#)).

¹¹ *Parental Leave Case* (1990) 36 IR 1.

¹² *Maternity Leave Test Case* (1979) 218 CAR 120.

¹³ Marian Baird, ‘Parental Leave in Australia: The Role of the Industrial Relations System’ in Jill Murray (ed), *Work Family and the Law* (Federation Press, 2005) 43, 49. ([Hyperlink](#)). See also Sara Charlesworth, ‘Law’s Response to the Reconciliation of Work and Care: The Australian Case’ in C G James and N Busby (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) 86–103. ([Hyperlink](#)).

¹⁴ See Sara Charlesworth, ‘Law’s Response to the Reconciliation of Work and Care: The Australian Case’, in James Grace and Nicole Busby (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) 86. ([Hyperlink](#)).

national economic prosperity and social inclusion for all Australians'. While relevant ILO Conventions are not defined in the Act, several of the ILO Conventions Australia has ratified, including ILO 156, were referred to in the Explanatory Memorandum to the Fair Work Bill 2008 (Cth).¹⁵ This reference to ILO 156 is reflected in the s 3(d) objective of 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements'.

In late 2022, amendments to the FW Act in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SIBP Act) introduced additional considerations into the object of the FW Act in s 3(a) which included the aim to 'promote job security and gender equality'. Of relevance also are the SIBP Act amendments to the Modern Award Objective in s 134, which set out the considerations the FWC must take into account in reviewing modern awards. These considerations now include, s 134(1)(aa) 'the need to improve access to secure work across the economy' and s 134(1)(ab) 'the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation'. The impact of these recent amendments on work and care has not yet been subject of direct consideration by the FWC, nor in available publications.¹⁶

2.2 Conceptual context for work and care

In the last two decades there has been a growing Australian literature on, and policy awareness of, the challenges faced by workers who have caring responsibilities. Currently, various terms, such as the more aspirational 'work-family balance' and 'work-care reconciliation' or more negative terms including 'work-family conflict' and 'work-life interference' are used to describe the dilemmas faced and outcomes experienced by worker-carers.

In the literature and in government inquiries, the work and care challenges faced by many employees are generally seen as linked to gender inequality; firstly in the distribution of unpaid care labour and paid work, and secondly, because many employment protections for worker-carers¹⁷ remain

¹⁵ Explanatory Memorandum, Fair Work Bill 2008 (Cth) 342 [2251].

¹⁶ These amendments to the Modern Award Objective were considered generally by the FWC in the *Annual Wage Review Decision 2022-2023* [2023] FWCFB 3500, [41], where the FWC stated that the s 134(1)(ab) reference to 'providing working conditions that facilitate women's full economic participation' is 'likely to relate to conditions such as flexible working hours, access to stable parttime employment and special types of leave such as family and domestic violence leave'. The s 134(1)(ab) consideration was also discussed by the FWC in the *Aged Care Work Value Case* [2023] FWCFB 93, [173]–[174], but not in relation to work and care.

¹⁷ We use the term 'worker-carers' throughout this review to give equal weight to both paid work and unpaid care responsibilities.

dependent on the standard employment relationship, that is full-time ongoing employment.¹⁸ The obligation in the Modern Award Objective to consider the need to achieve gender equality in the workplace, including by providing workplace conditions that facilitate women's full economic participation, suggests that in the future the link between work and care and gender equality will become a key consideration in workplace relations settings set out in modern awards that impact on work and care.

2.2.1 Work-care regimes

In conceptualising the challenge of work and care and locating our synthesis of literature that deals with relevant workplace relations settings in the Fair Work Act 2009 (Cth), it is useful to consider the broader context within which workers manage care responsibilities. One approach to better understanding work care outcomes for employees is through what Barbara Pocock describes as a 'work-care regime'. Drawing on the work of Raewyn Connell and Birgit Pfau-Effinger, Pocock argues that the work-care regime operates within a broader 'gender order', which reflects common assumptions about the division of paid and unpaid work between men and women, both generally and within households. These gendered assumptions shape and are shaped by the balance of forces between employers and employees and the role and nature of the state.¹⁹

The components of a national work-care regime include firstly, the broader work-care culture - the values and norms that set the standard for how we think about work and care and how it is interpreted in the broader social context - for example, gendered social norms about the roles of the 'proper mother', the 'proper father' and the 'proper worker'.²⁰ The second component of a work-care regime includes work-care institutions such as industrial law, the labour market, workplaces and family structures. The third component includes action, behaviours, preferences, such as around participation in paid work, how unpaid work is allocated and how dependants are cared for.²¹ All three

¹⁸ See International Labor Organization, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Report, 2016). ([Hyperlink](#)). It has been argued that the use of a standard/nonstandard employment terminology is still warranted in the Australian context, as permanent full-time employment 'remains the reference point when it comes to employment protection, benefits and career development.': Inga Laß and Mark Wooden, 'Trends in the Prevalence of Non-standard Employment in Australia' (2020) 62(1) *Journal of Industrial Relations* 3, 6. ([Hyperlink](#)).

¹⁹ Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work & Organization* 32, 38. ([Hyperlink](#)).

²⁰ Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work & Organization* 32, 40. ([Hyperlink](#)).

²¹ Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work & Organization* 32, 40. ([Hyperlink](#)). As noted further in this Report there remains some debate about the extent to which behaviour, such as in working in part-time or casual work, reflects worker preferences or a constrained choice.

components are crucial to the ways that workers manage care and how industrial regulation, such as the FW Act, operates in practice to protect or create protective gaps for worker-carers.

In Australia, while there has been considerable policy action to assist women with work and care such as in childcare provisions and paid parental leave, the consistent findings of a range of studies suggest that the sharing of work and care remains underpinned by strong social attitudes that care, especially for young children, is primarily the responsibility of women for whom paid work should be adjusted to fit around their care responsibilities.²² While recent HILDA data highlights that there has been change over time in both men's and women's attitudes to women balancing parenting and work, men consistently hold more traditional and gendered attitudes than women. For example, men are still more likely than women to agree with the proposition that 'a pre-school child is likely to suffer if their mother works full-time'.²³ Women's attitudes may also depend on the extent of their workforce participation, with women working part-time being more likely to support a 'male breadwinner' model of sharing work and care than women working full-time.²⁴ A number of studies outlined below suggest that some work and care policy and regulatory settings reflect such attitudes.

2.2.2 Australian work-care regulatory institutions

Our synthesis of the literature is located in the context of the work-care regulatory institutions in the Australian work-care regime. These institutions can be conceptualised as operating at three levels. The macro-social and economic level,²⁵ which includes policy and regulatory infrastructure and institutions such as paid parental leave, early childhood education and care (ECEC), recognition and

²² See, eg, Alexandra Heron, Rae Cooper and Gabrielle Meagher, 'Australia: The Care Challenge' in Marian Baird, Michelle Ford and Elizabeth Hill (eds) *Women, Work and Care in the Asia Pacific* (Routledge, 2017) 167. ([Hyperlink](#)); Jennifer Baxter, 'Gender Role Attitudes within Couples, and Parents' Time in Paid Work, Child Care and Housework' in Australian Institute of Family Studies, 'The Longitudinal Study of Australian Children: Annual Statistical Report 2014' (Report, 2014) 39. ([Hyperlink](#)); Sara Charlesworth and Fiona Macdonald, 'Employment Regulation and Worker-Carers: Reproducing Gender Inequality in the Domestic and Market Spheres?' in David Peetz and Georgina Murray (eds), *Women, Labor Segmentation and Regulation: Varieties of Gender Gaps* (Palgrave Macmillan New York, 2017) 79–96. ([Hyperlink](#)).

²³ Roger Wilkins et al., 'The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 19' (Report, Melbourne Institute: Applied Economic & Social Research, 2021) 145. ([Hyperlink](#)).

²⁴ Jennifer Baxter, 'Gender Role Attitudes within Couples, and Parents' Time in Paid Work, Child Care and Housework' in Australian Institute of Family Studies, 'The Longitudinal Study of Australian Children: Annual Statistical Report 2014' (Report, 2014) 60. ([Hyperlink](#)). See also the analysis of HILDA data in Alison Preston, 'Changing Gender Role Attitudes and the Changing Gender Gap in Labour Force Participation' (2023) 65(5) *Journal of Industrial Relations* 562, which suggests women's hours preferences are highly correlated with their attitudes to gender roles. ([Hyperlink](#)).

²⁵ See Barbara Pocock and Sara Charlesworth, 'Multilevel Work-Family Interventions: Creating Good-Quality Employment over the Life Course' (2017) 44(1) *Work and Occupations* 23, 26. ([Hyperlink](#)).

support for carers, the tax-transfer system, the superannuation system²⁶ as well as the interaction of such institutions as labour market conditions, household configuration and socio-economic and geographical location.²⁷ The second level of Australian work-care regulatory institutions is where this literature review is located. This level concerns both the pay and conditions of work set out for most Australian casual, full-time and part-time worker-carers in modern awards and the NES in the FW Act, as well as the regulatory ‘adaptions’ or measures set out in these provisions to accommodate them.

The third level of work-care regulatory institutions is the workplace, where labour law regulation takes effect and ‘where local enterprise, worksite, and immediate supervisory factors are the filter through which regulation’s reach is either observed or obstructed, and where the mismatch between workplace structures and expectations and the needs of working carers is most evident’.²⁸ The workplace level, strongly influenced by industry norms,²⁹ is also where the organisation of work, employer policy and practice and organisational ‘work-life culture’,³⁰ shape workers’ access to work-care ‘adaptions’ and also influence longer-term consequences across the life course for worker-carers, both those who can access such adaptions and those who cannot.³¹

2.2.3 Flexibility

In many of the publications reviewed, access to ‘flexibility’ is seen as the key mechanism to assist workers manage their care responsibilities. Yet what flexibility means and indeed ‘whose’ flexibility is being discussed is not always clear.³² For example, non-standard employment, such as casual and part-time work, is argued by some stakeholders to play an important role in ensuring those with caring

²⁶ Rae Cooper, Frances Flanagan and Meraiah Foley, ‘Flexible Work Policy: Building “Good Flex” across the Life Course’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) 119. ([Hyperlink](#)).

²⁷ Barbara Pocock and Sara Charlesworth, ‘Multilevel Work-Family Interventions: Creating Good-Quality Employment over the Life Course’ (2017) 44(1) *Work and Occupations* 23, 30–32. ([Hyperlink](#)).

²⁸ Barbara Pocock and Sara Charlesworth, ‘Multilevel Work-Family Interventions: Creating Good-Quality Employment over the Life Course’ (2017) 44(1) *Work and Occupations* 23, 34. ([Hyperlink](#)).

²⁹ See, eg, Helen Lingard, Valerie Francis and Michelle Turner ‘Work–Life Strategies in the Australian Construction Industry: Implementation Issues in a Dynamic Project-Based Work Environment’ (2012) 30(3) *International Journal of Project Management* 282. ([Hyperlink](#)); Robin Price, ‘Controlling Routine Front Line Service Workers: An Australian Retail Supermarket Case’ (2016) 30(6) *Work, Employment and Society* 915. ([Hyperlink](#)).

³⁰ See, eg, Paula McDonald, Barbara Pini and Lisa Bradley ‘Freedom or Fallout in Local Government? How Work–Life Culture Impacts Employees Using Flexible Work Practices’ (2007) 18(4) *The International Journal of Human Resource Management* 602. ([Hyperlink](#)).

³¹ See, eg, Jennifer Tomlinson, Marian Baird, Peter Berg and Rae Cooper, ‘Flexible Careers Across the Life Course: Advancing Theory, Research and Practice’ (2018) 71(1) *Human Relations* 4. ([Hyperlink](#)); Natalie Skinner, Jude Elton, Jocelyn Auer and Barbara Pocock, ‘Understanding and Managing Work-life Interaction Across the Life Course: A Qualitative Study’ (2014) 52(1) *Asia Pacific Journal of Human Resources* 93. ([Hyperlink](#)).

³² See Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life, University of South Australia, September 2014). ([Hyperlink](#)).

responsibilities have access to paid work.³³ Further, non-standard work, such as casual work is seen to be inherently flexible for worker-carers as it enables them to choose their preferred level of engagement in paid work, including on weekends if they so choose.³⁴ Casual work may also suit mature age worker-carers who may not prefer to work full time or who wish to ‘exercise a greater level of choice as to when and how they work, and a desire to engage in other non-work related or unplanned activities’.³⁵ Other stakeholders have argued, however, that ‘employer-defined flexibility’, and ‘flexibility for workers’, especially women, are two different concepts that ought not be confused.³⁶

A recent publication makes a useful distinction between what is described as ‘good flex’ and ‘bad flex’.³⁷ Good flex is described as where ‘workers have a degree of control and choice over the types of flexibility they access, coupled with the capacity to exercise voice, or “have a say”, to signal needs and preferences. This form of flexibility allows workers to construct and progress within careers, underpinned by secure employment and a living wage’.³⁸ On the other hand, bad flex is described as ‘precarious and poorly rewarded work where the flexibility overwhelmingly benefits employers and

³³ See, discussion of employer evidence on the benefits of casual employment for employees wishing to balance competing life priorities: Senate Select Committee on Job Security, *The Job Insecurity Report* (Fourth Interim Report, February 2022) [7.5]–[7.14]. ([Hyperlink](#)).

³⁴ National Retail Association, Submission No 29 to Senate Select Committee on Job Security Inquiry (31 March 2021) 6. ([Hyperlink](#)).

³⁵ Australian Industry Group, Submission No 41 to Senate Select Committee Inquiry on Work and Care (19 September 2022) 5. ([Hyperlink](#)).

³⁶ Senate Select Committee on Job Security, *The Job Insecurity Report* (Fourth Interim Report, February 2022) ([Hyperlink](#)). The Committee cites the National Foundation for Australian Women (NFAW)’s evidence at [7.18] noting that ‘The NFAW stressed that flexibility, not insecurity, is vital for women: Working time minima and predictable working patterns are crucial for women ... However, it is deliberate myth-making to imply that the numerical flexibilities that benefit employers are the same flexibilities that benefit for women—though the two are often conveniently conflated by employer associations. Steady and substantive minimum hours of work and a reliable working pattern represent basic income security to women and set a floor to the transaction costs of working, such as the expense and time in travelling to work. Most importantly, they assist in the planning of caring arrangements—which is the reason why most women are working ‘non-standard’ hours to begin with’ See also discussion on the ways in which insecure work negatively impacts family life, with low pay and unpredictable hours compromising workers’ ability to meet family commitments: Fair Work Commission, ‘Discussion Paper: Job Security’ (18 December 2023), 34–36. ([Hyperlink](#)).

³⁷ Rae Cooper, Frances Flanagan and Meraiah Foley, ‘Flexible Work Policy: Building “Good Flex” across the Life Course’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) 103–124. ([Hyperlink](#)).

³⁸ Rae Cooper, Frances Flanagan and Meraiah Foley, ‘Flexible Work Policy: Building “Good Flex” across the Life Course’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) 105. ([Hyperlink](#)). Such flexibility has also been described as worker or employee-orientated flexibility: see, eg, Raymond Markey and Joseph McIvor, ‘Regulating Casual Employment in Australia (2018) 60 *Journal of Industrial Relations* 593. ([Hyperlink](#)); Iain Campbell, ‘Working-Time Flexibility: Diversification and the Rise of Fragmented Time Systems’ in Damian Grimshaw et al., (eds) *Making Work More Equal* (Manchester University Press, 2017) 108–126. ([Hyperlink](#)).

workers have low levels of control over these arrangements'.³⁹ Such flexibility is seen as coming at the expense of job security,⁴⁰ and gender equality over the life course.⁴¹

In many publications, flexible work is defined in a way that makes clear that what constitutes flexible work is by its nature intended to allow employees to change working arrangements to better accommodate their commitments outside of work.⁴² In other publications, the lack of access to workplace flexibility to accommodate caring responsibilities is seen as problematic for gender equality and/ or the gender pay gap, but the nature of that flexibility is undefined.⁴³

However, in much of the work and care literature there are different forms of flexibility discussed, ranging from changes in the quantum of hours of work, changes to the scheduling of those hours across the day or week, and changes in the location of all or part of paid work at home. Worker-carer needs for different forms of flexibility may also depend on the nature and intensity of their care responsibilities. For example, workers may require flexible work on an ongoing basis or a temporary or episodic basis, such as to care for older family members whose needs for care may be less predictable than those for a young child.⁴⁴ The intensity of care needs may be smaller, such the need

³⁹ Rae Cooper, Frances Flanagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) 103. ([Hyperlink](#)). Such employer-orientated flexibility is well documented in studies in industries such as retail: see, eg, Natasha Cortis, Megan Blaxland and Sara Charlesworth, 'Care Theft: Family Impacts of Employer Control in Australia's Retail Industry' (2023) 44(1) *Critical Social Policy* 106. ([Hyperlink](#)); Robin Price, 'Controlling Routine Front Line Service Workers: An Australian Retail Supermarket Case' (2016) 30 *Work, Employment & Society* 915. ([Hyperlink](#)).

⁴⁰ See, eg, Rick Sullivan, Caleb Goods, and Brett Smith, 'Young Australians are Out for Control: Reconciling Flexibility, Security, and the Next Generation of Labour' (2022) 32 *Labour and Industry* 116. ([Hyperlink](#)). See also Senate Select Committee on Work and Care, *Final Report* (Report, March 2023) [6.54]–[6.58] and further at [6.59]. ([Hyperlink](#)): 'Workplace flexibility and job security are closely related. It was put to the committee that for many working carers, the two are mutually reinforcing: a lack of flexibility drives them into insecure forms of work, while job insecurity limits their ability to access flexible arrangements'.

⁴¹ The Workplace Gender Equality Agency describes having access to flexibility and to leave that allows employees to better accommodate their commitments outside of work, as key enablers of gender equality WGEA *Flexible Work post-COVID* (2021) 1. ([Hyperlink](#)). See also Barbara Pocock and Sara Charlesworth 'Job Quality and Work-life: Unsocial Working Hours, Casual Work and Work–Life Outcomes in Australia' in Chris Warhurst and Angela Knox (eds), *Job Quality in Australia* (Federation Press, 2017) 103. ([Hyperlink](#)).

⁴² See, eg, Leah Ruppner, Rennie Lee and Matt Huffman 'Do Mothers Benefit from Flexible Work? Cross-national Evidence for Work Time, Job Quality, and Satisfaction' (2018) 48(2) *International Journal of Sociology* 170. ([Hyperlink](#)). In this cross-national study 'expansive flexible work offerings' were found in countries where workers are more likely to have their work hours match their preferences.

⁴³ KPMG, *She's Price(d)less: The Economics of the Gender Pay Gap* (Report, 2022) 14. ([Hyperlink](#)).

⁴⁴ See eg Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care, (8 September 2022). ([Hyperlink](#)); Carers NSW Submission No 94 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Recognition of Unpaid Carers* (15 August 2023). ([Hyperlink](#)).

care for a sick dependant for a day or so, or more substantial care needs such as providing end of life support to a family member.⁴⁵

There is some complexity in the ways flexibility for worker-carers is researched and considered.⁴⁶ It may be researched through the analysis of data from workers who are participants in representative surveys, such as the Australian Work Life Index (AWALI) surveys⁴⁷ and Housing, Income and Labour Dynamics (HILDA) surveys⁴⁸; in quantitative or qualitative studies, mainly based at the industry or workplace levels where data may be collected from employers, managers and/or workers;⁴⁹ including in cross-national comparison;⁵⁰ and via feedback, typically in submissions to government inquiries, from key stakeholders such as carer advocacy groups, unions and employers as well as academic researchers from a variety of disciplines. This complexity means that there are often different perspectives on what constitutes positive or beneficial flexibility for worker-carers that supports rather than hinders their engagement in both paid work and unpaid care. These different perspectives are most evident in assessments of the impact of current provisions in modern awards and the NES and in proposals for changes to them discussed in Sections 4-6 and summarised in Section 7.

⁴⁵ For a detailed discussion on the different types of pressures worker-carers may face in terms of their participation in paid work see the typology set out in Iain Campbell and Sara Charlesworth, 'Background Report: Key Work and Family Trends in Australia' (Report, Centre for Applied Social Research, RMIT University, 2004) 38–39. ([Hyperlink](#)).

⁴⁶ Gabrielle Golding, 'The Right to Disconnect in Australia: Creating Space for a New Term Implied by Law' (2023) 46(2) *University of New South Wales Law Journal* 728, 737. ([Hyperlink](#)).

⁴⁷ The latest set of AWALI survey findings is here: Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014' (Report, Centre for Work + Life: University of South Australia, September 2014). ([Hyperlink](#)).

⁴⁸ See eg, Inga Laß and Mark Wooden, 'Temporary Employment and Work-Life Balance in Australia' (2020) 32(2) *Journal of Family Research* 214. ([Hyperlink](#)); Hong Dinh, Lyndall Strazdins and Jennifer Welsh, 'Hour-glass Ceilings: Work-hour Thresholds, Gendered Health Inequities' (2017) 176 *Journal of Social Science & Medicine* 42. ([Hyperlink](#)).

⁴⁹ See, eg, Natasha Cortis, Megan Blaxland and Sara Charlesworth, 'Challenges of Work, Family and Care for Australia's Retail, Online Retail, Warehousing and Fast Food Workers' (Report, Social Policy Research Centre, 2021) ([Hyperlink](#)). Sara Charlesworth and Linda Isherwood, 'Migrant Aged-care Workers in Australia: Do they Have Poorer-quality Jobs than their Locally Born Counterparts?' (2021) 41(12) *Ageing & Society* 2702, 2708. ([Hyperlink](#)).

⁵⁰ See, eg, Leah Ruppanner, Rennie Lee and Matt Huffman, 'Do Mothers Benefit from Flexible Work? Cross-national Evidence for Work Time, Job Quality, and Satisfaction' (2018) 48(2) *International Journal of Sociology* 170. ([Hyperlink](#)).

3 Gendered patterns of working time and ‘employment choice’

This section sets out the context for the more specific focus in the literature review on the operation of provisions in the FW Act in respect to work and care.

3.1 The Australian labour market context

Over the two decades, there have been profound changes in the labour market context in which many employees both work and care. Firstly, there has been a significant increase in the employment participation of women, rising from 54.1% in 2001 to 62.4% in 2022.⁵¹ However strong gender differences remain in the patterns and forms of employment with women continuing to dominate part time and casual work and women with preschool children more likely to work part time than women without preschool children.⁵²

There also remain differences in the patterns of hours by workers employed in full-time employment in Australia, with most long hours workers (those working over 50 hours a week) are men. Long hours are one of the strongest predictors of work/family conflict. This is because long hours worked by partners make it hard for women in couple households to engage in full time or longer hours part time work which has gendered ramifications over the life course.⁵³

The nature of full-time work has also changed for workers in higher occupational status occupations, with many working longer hours with a shift to ‘time unbounded’, performance-driven modes of working. This time unbounded work not only makes accommodating care responsibilities difficult but where performance expectations do not have time limits, well-being and health can be eroded.⁵⁴

At the same time, there has been glacial change in industry level labour markets within which women and men work. Australia still has a highly gender segregated labour market. In a recent study undertaken for the Commission on occupational segregation, the segregation of women and men into different occupations and industries was identified as a key driver of the gender pay gap. The study found that in many occupations where large numbers of women are disproportionately concentrated are among the lowest paid. This level of occupational segregation underpins earnings and wealth gaps

⁵¹ Alison Preston, ‘Changing Gender Role Attitudes and the Changing Gender Gap in Labour Force Participation’ (2023) 65(5) *Journal of Industrial Relations* 562. ([Hyperlink](#)).

⁵² The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 10. ([Hyperlink](#)).

⁵³ Hong Dinh, Lyndall Strazdins and Jennifer Welsh, ‘Hour-glass Ceilings: Work-hour Thresholds, Gendered Health Inequities’ (2017) 176 *Journal of Social Science & Medicine* 42. ([Hyperlink](#)).

⁵⁴ Jane Dixon et al., ‘Flexible Employment Policies, Temporal Control and Health Promoting Practices: A Qualitative Study in Two Australia Worksites (2019) 14(12) *PloS One* 1. ([Hyperlink](#)).

that accumulate across the life course,⁵⁵ which are exacerbated by care responsibilities, especially by parenthood for women, but not for men.⁵⁶

Where worker-carers engage in casual work to manage work and care there is evidence that the penalties they may face lie not only in job and working time insecurity but also in limited opportunities for career progression, given the career insecurity attached to casual work.⁵⁷ This is reflected in women's lower lifetime earnings which is due to the high rate of part-time employment for women concentrated in feminised industries and in jobs which attract lower pay rates with less career mobility.⁵⁸ Worker-carers who use flexible work arrangements may also face career penalties. As highlighted in a recent study, what is known as 'flexibility stigma' can lead to a deterioration in employment status and career prospects for those who use such arrangements, most typically mothers.⁵⁹ Somewhat unexpectedly, this effect is more pronounced for women using formal rather than informal arrangements. The authors posit that this may be because while formal arrangements may offer a more secure way to access working-time flexibility, their use may also 'produce a level of visibility that risks exacerbating flexibility stigma, potentially leading to reduced pay or lost opportunities for training, and/or taking on an increased workload to compensate for reduced workplace presence'.⁶⁰

On-demand employment and the fragmentation of working time

There is evidence that non-standard work has increased in Australia.⁶¹ In terms of employment covered under the FW Act, this is reflected in the decline of full-time permanent employment over the last twenty years, and the increase in part-time work not only for women but also for men.⁶² As noted below, there is some debate about the extent to which part-time employment reflects shifts in

⁵⁵ Natasha Cortis et al., 'Gender-based Occupational Segregation: A National Data Profile' (Research Report, UNSW Social Policy Research Centre, 2023) 1. ([Hyperlink](#)).

⁵⁶ Siobhan Austen and Astghik Mavisakalyan 'Gender Gaps in Long-term Earnings and Retirement Wealth: The Effects of Education and Parenthood' (2018) 60(4) *Journal of Industrial Relations* 492. ([Hyperlink](#)).

⁵⁷ Inga Laß and Mark Wooden, 'Temporary Employment and Work-Life Balance in Australia' (2020) 32(2) *Journal of Family Research* 214, 231. ([Hyperlink](#)).

⁵⁸ See, eg, Senate Economic References Committee, *Inquiry into Achieving Economic Security for Women in Retirement: A Husband is not a Retirement Plan* (Final Report, 2016, [2.11]. ([Hyperlink](#)).

⁵⁹ Ning Xiang et al. 'The benefits and penalties of formal and informal flexible working-time arrangements: evidence from a cohort study of Australian mothers.' (2022) 33(14) *The International Journal of Human Resource Management* 2939, 2941. ([Hyperlink](#)).

⁶⁰ Ning Xiang et al. 'The benefits and penalties of formal and informal flexible working-time arrangements: evidence from a cohort study of Australian mothers.' (2022) 33(14) *The International Journal of Human Resource Management* 2939, 2954. ([Hyperlink](#)).

⁶¹ See discussion in Senate Select Committee on Job Security, *The Job Insecurity Report* (Fourth Interim Report, February 2022) 16–19 [2.16]–[2.26]. ([Hyperlink](#)).

⁶² Geoff Gilfillan, 'Recent and Long-term Trends in the Use of Casual Employment' (Research Paper, Research Paper Series 2021-22, Department of Parliamentary Services, 24 November 2021) 10. ([Hyperlink](#)).

employer and employee preferences. What is generally agreed, however, is that in some sectors, part-time work has become marked by poorer working time security than in full-time work.⁶³ Poorer working time security may be enabled by working time provisions that provide employers with the capacity to roster not only casual employees but also some part-time employees on an ‘on-demand’ basis. It has been argued that on-demand employment, in the context of the FW Act can be understood as ‘work arrangements in which the worker agrees to be available for work and is called into work as and when she/he is needed by the employer’.⁶⁴ This form of non-standard employment includes both casual employees as well as part-time workers on minimum hours arrangements that can be flexed up and down from that minimum, under working time provisions in certain modern awards.⁶⁵

What is described as the ‘fissuring’ of employment, familiar in many other advanced economies, including leased labour, franchising, supply chains and subcontracting, has become more common in Australia.⁶⁶ It is suggested unlike the United States, the FW Act safety net of modern awards and the NES and strategic enforcement by the Fair Work Ombudsman (FWO) has provided some protection, at least for employees.⁶⁷ However there is some evidence that for many employees in feminised sectors such as care work and retail, working time, including for permanent part-time employees, has become more fragmented.⁶⁸ It has been suggested that such working time insecurity has been

⁶³ See, eg, See Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67–90, 86 ([Hyperlink](#)).

⁶⁴ See Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67–90, 67 ([Hyperlink](#)).

⁶⁵ See, eg, Fair Work Commission, ‘Discussion Paper: Work and Care’ (Discussion Paper, 29 January 2024) on various exceptions to modern award requirements for notice of rosters and changes to rosters for part-time employees in, for example, the Retail Award and the Social Community Home Care and Disability Services (SCHADS) Award: Table 13, 105–109. ([Hyperlink](#)).

⁶⁶ Richard Johnstone and Andrew Stewart, ‘Swimming Against the Tide: Australian Labor Regulation and the Fissured Workplace’ (2015) 37 *Comparative Labor Law & Policy Journal* 55, 86–88. ([Hyperlink](#)).

⁶⁷ Richard Johnstone and Andrew Stewart, ‘Swimming Against the Tide: Australian Labor Regulation and the Fissured Workplace’ (2015) 37 *Comparative Labor Law & Policy Journal* 55, 88. ([Hyperlink](#)). The authors however describe these protections as piecemeal - more akin to a ‘finger in the dyke’.

⁶⁸ See, eg, Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Care Theft: Family Impacts of Employer Control in Australia’s Retail Industry’ (2023) 44(1) *Critical Social Policy* 106. ([Hyperlink](#)); Fiona Macdonald, Eleanor Bentham and Jenny Malone, ‘Wage Theft, Underpayment and Unpaid Work in Marketised Social Care’ (2018) 29(1) *The Economic and Labour Relations Review* 80. ([Hyperlink](#)).

facilitated by inadequate working time protections in modern awards in these sectors,⁶⁹ and in care sectors, which are publicly funded, further exacerbated by individualised funding models.⁷⁰

The fissuring or fragmentation of working time arrangements can be facilitated by the increasing use of technology in rostering staff as well as by management practice. What is known as ‘algorithmic management’ is becoming more common in a range of industries in Europe, such as in retail and hospitality, where workers are algorithmically scheduled based upon forecasting customer demand and matching available labour.⁷¹ In Australia, in industries such as retail, there is some evidence of the use of sophisticated software to minimise labour costs through just in time scheduling.⁷² In industries such as aged care, the fragmentation of employee working time may also be due to management rostering practice in a context of understaffing where employees do not have any input into rostering arrangements and where late-notice rostering changes are frequent.⁷³

The pandemic context

A number of surveys conducted in the wake of the initial phase of the COVID-19 pandemic suggest that while men took on a greater share of care and domestic work, the pandemic may have reinforced and deepened gender inequality in the division of unpaid care and paid work.⁷⁴ One study of parents found, for example, that while more fathers than mothers reported high levels of subjective time stress, unfairness, and dissatisfaction, mothers were more likely to be dissatisfied with the balance of work and care taken by their partners than before the onset of the pandemic.⁷⁵ However, a 2023 study

⁶⁹ See Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Challenges of Work, Family and Care for Australia’s Retail, Online Retail, Warehousing and Fast Food Workers’ (Report, Social Policy Research Centre, October 2021) 10. ([Hyperlink](#)); Sara Charlesworth, ‘Partial Protection? The Regulation of Home Care Workers’ Working Time’ in Colin Fenwick and Valérie Van Goethem (eds), *Regulating for Equitable and Job-Rich Growth* (Edward Elgar, 2017) 125. ([Hyperlink](#)).

⁷⁰ See, eg, Fiona Macdonald, *Individualising Risk: Paid Care Work in the New Gig Economy* (Palgrave Macmillan, 2021) 91, 175. ([Hyperlink](#)); Senate Select Committee on Job Security, ‘Second Interim Report: Insecurity in Publicly Funded Jobs’ (Interim Report, 2021), [5.20]–[5.24]. ([Hyperlink](#)).

⁷¹ Alex Wood *Algorithmic management consequences for work organisation and working conditions* (2021), Working Papers Series on Labour, Education and Technology Joint Research Centre, European Commission, 4. ([Hyperlink](#)).

⁷² See, eg, Robin Price, ‘Controlling Routine Front Line Service Workers: An Australian Retail Supermarket Case’ (2016) 30(6) *Work, Employment and Society* 915. ([Hyperlink](#)).

⁷³ Jane Dixon et al., ‘Flexible Employment Policies, Temporal Control and Health Promoting Practices: A Qualitative Study in Two Australia Worksites (2019) 14(12) *PLoS One* 1, 16. ([Hyperlink](#)).

⁷⁴ Lyn Craig and Brendan Churchill ‘Dual-earner Parent Couples’ Work and Care during COVID-19’ (2021) 28 *Gender, Work & Organization* 66 ([Hyperlink](#)); Lyn Craig and Brendan Churchill, ‘Working and Caring at Home: Gender Differences in the Effects of COVID-19 on Paid and Unpaid Labor in Australia’ (2021) 27(1-2) *Feminist Economics* 310. ([Hyperlink](#)).

⁷⁵ Lyn Craig, ‘Coronavirus, Domestic Labour and Care: Gendered Roles Locked Down’ (2020) 56(4) *Journal of Sociology* 684. ([Hyperlink](#)).

which sought to put the pandemic into a life course perspective found that parenthood had far greater effect on gender inequalities in unpaid care work than COVID-19 lockdowns.⁷⁶

In the wake of the changes to working conditions instigated during the COVID-19 pandemic, there was an increased uptake of working from home by many workers able to perform their job from home,⁷⁷ and some flexibility for employees as to the hours when paid work was performed in order to combine work and care.⁷⁸ The Productivity Commission found that many of those working from home in 2020 considered being able to work a flexible schedule of hours was the greatest benefit of working from home, after saving on commuting time. The Commission also found that the flexibility of working from home may present some risks to workers — for example, in respect of workers’ health and safety and ‘blurring the lines’ between home and work, which can negatively affect wellbeing.⁷⁹ One study suggests that two years into the pandemic, many Australian workers who provided care were exhausted, stressed, and burnt-out. Close to half of worker-carers felt they were working harder than they had been pre-pandemic compared to about just over a third of workers without care responsibilities.⁸⁰

The COVID pandemic also revealed the fault lines in the FW Act safety net for those employees who continued to work in their workplace, overwhelming in the service sector. Casual employees were not entitled to paid leave, while other part-time and full time employees in sectors with high public contact such as in retail, health and care found that the quantum of their paid personal/carers leave was inadequate. It has been suggested that the pandemic is a catalyst for rethinking regulation around flexible work arrangements.⁸¹

3.2 The regulation of working time

It has been suggested that working time ‘rules’ in awards and in entitlements to paid and unpaid leave, mainly in the NES, have historically been built around the ‘unencumbered’ worker, with no care

⁷⁶ Janeen Baxter, Alice Campbell and Rennie Lee, ‘Gender Gaps in Unpaid Domestic and Care Work: Putting The Pandemic in (a Life Course) Perspective’ (2023) 56(4) *Australian Economic Review* 502. ([Hyperlink](#)).

⁷⁷ It has been noted that only approximately 30% of Australian jobs could be performed working from home Alison Pennington and Jim Stanford, ‘Working from Home: Opportunities and Risks’ (Briefing Paper, The Centre for Future Work, April 2020) 2. ([Hyperlink](#)). Those able to work from home typically have jobs with higher education requirements and higher expected incomes: Productivity Commission, ‘Working from Home’ (Research Paper, September 2021) 15. ([Hyperlink](#)).

⁷⁸ Productivity Commission, ‘Working from Home’ (Research Paper, September 2021) 15. ([Hyperlink](#)).

⁷⁹ Productivity Commission, ‘Working from Home’ (Research Paper, September 2021) 15. ([Hyperlink](#)).

⁸⁰ Leah Ruppanner, Brendan Churchill and David Bissell, ‘State of the Future of Work’ (Research Paper, The University of Melbourne, 2023) 10–11. ([Hyperlink](#)).

⁸¹ Dominique Allen and Adriana Orifici, ‘What Did the COVID-19 Pandemic Reveal about Workplace Flexibility for People with Family and Caring Responsibilities?’ (2022) 1 *University of New South Wales Law Journal Forum* 1, 16. ([Hyperlink](#)).

responsibilities.⁸² While there have been significant changes over time in the extent to which the needs of worker-carers for flexibility might be accommodated through working time and leave provisions in modern awards and the NES, such accommodations are still seen to be inadequate.⁸³ Anna Chapman argues, in considering FW Act provisions, that four key reasons for the ineffectiveness of the Australian regulatory framework regarding work and care are interrelated. These reasons include firstly, that various regulatory accommodations favour full-time, longer-term continuous employment, which excludes many women, and especially mothers, who remain more likely to be in part-time and casual employment,⁸⁴ as discussed further below. The second reason Chapman advances is that judicial interpretation of key legislative concepts, such as adverse action protections for employees with care responsibilities,⁸⁵ has further narrowed the application of these accommodations. The third reason is that enforcement procedures are weak or non-existent such as the right to request flexible work arrangements and an extension to unpaid parental leave,⁸⁶ with the final reason being that some FW Act provisions, emphasise a primary carer model - for example in the NES on unpaid parental leave - that fails to recognise and respond to the full diversity of families. This places some workers and their families outside of the protection of work and care adaptations in the FW Act. We note recent improvements to the unpaid parental leave standard such that both parents can now take up to 12 months unpaid parental leave regardless of the amount leave that the other parent takes.⁸⁷

Available data suggests that the Australian working time regime is both polarised and gendered, particularly in OECD comparison.⁸⁸ A recent study by the Australian institute of Family Studies (AIFS) found, for example, while there has been strong growth in dual parental employment in couple

⁸² See Jill Murray and Andrew Stewart 'Regulation for Job Quality? Wages and Working Time under Australian Labour Law' (2015) in Chris Warhurst and Angela Knox (eds), *Job Quality in Australia*, Sydney: Federation Press, 37, 45. ([Hyperlink](#)).

⁸³ 'While Australians might be said to have a right—indeed, an obligation—to work, they lack a right to work *and care*, and lack a work-care system that genuinely and practically supports their work and their households': Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) [6.12]. ([Hyperlink](#)).

⁸⁴ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 116. ([Hyperlink](#)).

⁸⁵ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 128–129. ([Hyperlink](#)).

⁸⁶ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 130. ([Hyperlink](#)). We note both these rights to request in the NES now have enforcement mechanisms, in place since July 2023.

⁸⁷ By way of sch 2, *Fair Work Legislation Amendment (Protecting Workers Entitlements) Act 2023* (Cth); see also Department of Employment and Workplace Relations, 'Unpaid parental leave – what has changed' (Webpage) <<https://www.dewr.gov.au/protecting-worker-entitlements/resources/unpaid-parental-leave>>.

⁸⁸ See Organisation for Economic Co-operation and Development, 'LMF2.2: Patterns of Employment and the Distribution of Working Hours for Couples with Children' (Research Report, OECD Family Database, 2022).

families over time, these working time patterns remain gendered. In 2021 the male partner was employed full-time and the female partner part-time in almost half of all couple families (48%), although 44% of couple families had both parents working full-time.⁸⁹ In terms of non-parental care, women are much more likely to have a caring role than men with this gendered division of labour in unpaid care reflected in lower employment participation rates. A study by Carers Australia found that in 2021 female carers were less likely to be in paid employment than male carers and, where they were employed, female carers were more likely than male carers *not* to have access to any flexibility of working hours.⁹⁰ Limited employment participation and lack of access to flexibility to manage work and care has gendered and cumulative consequences across the life course. Carers Australia noted in a recent submission that ‘women are more likely to experience both consecutive and concurrent caring responsibilities, with many having to interrupt employment to care for children, parents, partners, or grandparents. Thus, female carers face a disproportionate barrier to maintaining workforce participation’.⁹¹

Worker-carer preferences

There is an ongoing debate in the literature, also reflected in submissions by key stakeholders, about whether the form and extent of participation in paid employment by female parents and worker-carers more generally reflects worker preferences or is a form of ‘constrained choice’. That is the choices worker-carers make in the face of gender norms as they adapt around different working time regimes, inflexible workplaces and inadequate work-care infrastructure. For parents for example, there is a complex relationship between paid work, child care and family circumstances in parental decision-making about their engagement in employment. Thus decisions about child care are not only a consequence of employment arrangements; they shape the types of paid work employment arrangements that parents take up: ‘Even from the decision to enter employment or not, parents’ views about nonparental child care as well as the availability and costs of child care, and the matching of child care to potential employment, are all part of the equation’.⁹²

A recent study found that gendered social norms, including about women’s role in unpaid care, have an important role in explaining the persistent gender gap in the different forms of employment

⁸⁹ Jennifer Baxter ‘Employment Patterns and Trends for Families with Children’ (Research Report, Australian Institute of Family Studies, 2023) Australian Institute of Family Studies 6. ([Hyperlink](#)).

⁹⁰ Centre for Change Governance and NATSEM, University of Canberra ‘Caring for Others and Yourself: The 2021 Carer Wellbeing Survey’ (Report, 2021) 44. ([Hyperlink](#)).

⁹¹ Carers Australia, Submission No 277 to Treasury, *Employment White Paper* (30 November 2022). ([Hyperlink](#)).

⁹² Jennifer Baxter, Kellie Hand and Reem Sweid, ‘Flexible Child Care and Australian Parents’ Work and Care Decision-making’ (Research Report, Australian Institute of Family Studies, November 2016) 25. ([Hyperlink](#)).

participation by men and women.⁹³ As noted in many studies, gendered patterns of working time for many worker-carers, and their location in jobs which are less secure or ineffectively regulated have ongoing consequences for women's lifetime earnings and their superannuation balances at retirement.⁹⁴

Unsocial hours

The modern award system sets out working time conditions in which employees work. For worker-carers, provisions that allow or discourage employment in non-standard or 'unsocial' hours during the week and on weekends are particularly important. There are a number of studies that suggest that reconciliation of work and care is especially difficult to achieve for parents working nonstandard hours.⁹⁵ A recent study drawing on a longitudinal analysis of HILDA data found that weekend work increased work-life conflict more for mothers than for fathers.⁹⁶ The regulation of hours under modern awards is addressed in Section 5.

Working from home

Pre-COVID-19, working from home was assumed to assist mainly women balance work and care. A 2015 study drawing on 2006 Australian Time Use data found however that for both men and women working at home for any period did not enable them to gain better work-life balance increasing the time they were able to dedicate to recreational labour. Further, while working from home gave individual women some control over how they managed paid and unpaid work, 'at a macro level working at home reinforces gendered divisions of labour inside and outside the home'.⁹⁷ A recent study has found, however, that in the context of the pandemic the relationship between working from home and work-life conflict is complex. While increased control over working time scheduling and less

⁹³ Alison Preston, 'Changing Gender Role Attitudes and the Changing Gender Gap in Labour Force Participation' (2023) 65(5) *Journal of Industrial Relations* 562. ([Hyperlink](#)).

⁹⁴ Jennifer Baxter, 'Employment Patterns and Trends for Families with Children' (Research Report, Australian Institute of Family Studies, May 2023) 22. ([Hyperlink](#)). See also Senate Economic References Committee, *Inquiry into Achieving Economic Security for Women in Retirement: A Husband is not a Retirement Plan* (Final Report, 2016). ([Hyperlink](#)).

⁹⁵ Bruno Arpino and Francesca Luppi, 'Childcare Arrangements and Working Mothers' Satisfaction with Work-family Balance' (2020) 42(19) *Demographic Research* 549, 553. ([Hyperlink](#)); See also Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014' (Report, Centre for Work + Life: University of South Australia, September 2014). ([Hyperlink](#)); Barbara Pocock and Sara Charlesworth 'Job Quality and Work-life: Unsocial Working Hours, Casual Work and Work-Life Outcomes in Australia' in Chris Warhurst and Angela Knox (eds), *Job Quality in Australia* (Federation Press, 2015) 103–125. ([Hyperlink](#)).

⁹⁶ Inga Laß and Mark Wooden, 'Weekend Work and Work-family Conflict: Evidence from Australian Panel Data' (2022) 84 *Journal of Marriage and Family* 250. ([Hyperlink](#)).

⁹⁷ Abigail Powell and Lyn Craig, 'Gender Differences in Working at Home and Time Use Patterns: Evidence from Australia' (2015) 29(4) *Work, Employment and Society* 571, 586–587. ([Hyperlink](#)).

commuting reduces work–family conflict, working from home is also associated with more unsocial work hours, which increases work–family conflict.⁹⁸ When compared to fathers in similar working time arrangements (part-time to accommodate care responsibilities), mothers experience ‘significantly higher’ levels of work-family conflict. However because women are more likely to be the primary carers, working from home is generally more beneficial for mothers than fathers, in light of mothers’ likely roles as primary carers.⁹⁹

3.3 Relationship between types of employment and work and care

What has been described as ‘contract flexibility’ in relation to work and care refers to variations from the standard employment relationship of full-time hours permanent work. These variations include casual status, short or fixed term contracts as well as gig work.¹⁰⁰ They also include ‘on-demand’ forms of part-time work, noted above, where, under the terms of some modern awards, an employee’s hours may be flexed up and down above a set of guaranteed minimum weekly hours,¹⁰¹ or where they are exposed to rostering practices which ‘extinguish any reasonable predictability of working hours’.¹⁰²

In much of the literature reviewed, casual status is associated with job insecurity.¹⁰³ Casual work and on-demand forms of part-time work have been found create working time insecurity for worker-carers,¹⁰⁴ which together with job insecurity appears to impact negatively on worker-carers as highlighted in section 5 below. For example, a study on childcare and parental employment found that parents ‘who have more control over their work hours are likely to have fewer difficulties in managing child care compared to others’.¹⁰⁵

⁹⁸ Inga Laß and Mark Wooden, ‘Working from Home and Work-Family Conflict’ (2023) 37(1) *Work, Employment and Society* 176. ([Hyperlink](#)).

⁹⁹ Inga Laß and Mark Wooden, ‘Working from Home and Work-Family Conflict’ (2023) 37(1) *Work, Employment and Society* 176, 178, 190. ([Hyperlink](#)).

¹⁰⁰ Rae Cooper, Frances Flanagan and Meraiah Foley, ‘Flexible Work Policy: Building “Good Flex” across the Life Course’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) 103, 105. ([Hyperlink](#)).

¹⁰¹ Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67–90. ([Hyperlink](#)).

¹⁰² Commonwealth, *Parliamentary Debates*, Senate, 20 September 2022, 20 (Gerard Dwyer) cited in Senate Select Committee on Work and Care, *Interim Report* (Report, October 2022) 93 [5.119]. ([Hyperlink](#)).

¹⁰³ See, eg, Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67–90. ([Hyperlink](#)).

¹⁰⁴ See, eg Shop Distributors and Allied Employees Association Submission No 37 to Senate Select Committee on Work and Care, (7 September 2022) 18. ([Hyperlink](#)).

¹⁰⁵ Jennifer Baxter, Kellie Hand and Reem Sweid, ‘Flexible Child Care and Australian Parents’ Work and Care Decision-making’ (Research Report, Australian Institute of Family Studies, November 2016) 25 ([Hyperlink](#)). See also Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Challenges of Work, Family and Care for

In its Interim Report, the Select Senate Committee on Work and Care considers the complex relationship between caring responsibilities and insecure and precarious employment, noting both that caring responsibilities can have adverse and ongoing consequences on the job security of workers.¹⁰⁶ The Committee notes that the workplace relations framework does not ‘appropriately respond to, the lived reality for working carers and has not kept pace with changing workplace environments and the needs of employees’.¹⁰⁷

One study on the interaction of casual status and work-life interference using longitudinal HILDA data, found, after controlling for job characteristics and socio-demographic characteristics, that for partnered mothers, casual employment was more positively associated with better work-life outcomes than permanent employment. However men employed on a casual basis had poorer work-life balance outcomes.¹⁰⁸ The 2014 AWALI survey found that both male and female casual worker-carers experienced lower work-life interference than those in permanent or fixed term jobs. However given those on permanent contracts work longer hours than casuals, after differences in work hours are statistically controlled, casuals experience equivalent work-life interference to workers on fixed term/permanent contracts.¹⁰⁹ This suggests that any positive link between casual status and work-life balance may be a weak one as it is ‘almost entirely traceable to the reduced working hours attached to such jobs. Temporary workers thus miss out on many of the protections and benefits afforded by a permanent contract, while in most cases not being compensated for these disadvantages by a better fit between their work and their private lives’.¹¹⁰

Indeed, in terms of casual worker-carers, much of the literature draws attention to the consequences of casual status for job insecurity generally and the lack of access casuals have to paid leave entitlements in the NES, while access to other NES are limited to regular and systematic casual employees with a reasonable prospect of ongoing employment.¹¹¹ Casual worker-carers are also seen

Australia’s Retail, Online Retail, Warehousing and Fast Food Workers’ (Report, Social Policy Research Centre, 2021). ([Hyperlink](#)).

¹⁰⁶ Senate Select Committee on Work and Care, , *Interim Report* (Report, October 2022) [5.132]. ([Hyperlink](#)).

¹⁰⁷ Senate Select Committee on Work and Care, *Interim Report* (Report, October 2022) xix. ([Hyperlink](#)).

¹⁰⁸ Inga Laß and Mark Wooden, ‘Temporary Employment and Work-Life Balance in Australia’ (2020) 32(2) *Journal of Family Research* 214, 231. ([Hyperlink](#)). The authors conclude that ‘These findings likely reflect the dominant gender regime in Australia, which assigns men the role as primary breadwinners and women the roles as primary carers and secondary earners. The income and career insecurity connected to temporary contracts thus appears to threaten men’s breadwinning capacity, whereas the flexibility provided by casual work seems to help women combine paid employment with housework and care’.

¹⁰⁹ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Report, Centre for Work + Life: University of South Australia, September 2014) 34–35. ([Hyperlink](#)).

¹¹⁰ Inga Laß and Mark Wooden, ‘Temporary Employment and Work-Life Balance in Australia’ (2020) 32(2) *Journal of Family Research* 214, [233]. ([Hyperlink](#)).

¹¹¹ See, eg, Sara Charlesworth and Jenny Malone, ‘Re-Imagining Decent Work for Home Care Workers in Australia’ (2017) 27(4) *Labour & Industry* 284. ([Hyperlink](#)); Natasha Cortis, Megan Blaxland and Sara

as disadvantaged by the low minimum casual engagement periods specified in some modern awards, with those whose working time conditions are set by awards covering low-paid workers and women seen to be disproportionately affected.¹¹² This issue is taken up in Section 5.

Somewhat paradoxically, parents and other worker-carers may take up part-time and casual work to manage their care responsibilities,¹¹³ while at the same time casual status and indeed some forms of on-demand part-time work are seen as an impediment to the working time predictability and access to paid leave required to effectively manage work and care.¹¹⁴

Charlesworth, *Challenges of Work, Family and Care for Australia's Retail, Online Retail, Warehousing and Fast Food Workers* (Report, Social Policy Research Centre, 2021). ([Hyperlink](#)).

¹¹² Raymond Markey and Joseph McIvor, 'Regulating Casual Employment in Australia' (2018) 60(5) *Journal of Industrial Relations* 593, 599, 608. ([Hyperlink](#)); Fiona Macdonald, Eleanor Bentham and Jenny Malone, 'Wage Theft, Underpayment and Unpaid Work in Marketised Social Care' (2018) 29(1) *The Economic and Labour Relations Review* 80. ([Hyperlink](#)).

¹¹³ Jennifer Baxter, Kellie Hand and Reem Sweid, 'Flexible Child Care and Australian Parents' Work and Care Decision-making' (Research Report, Australian Institute of Family Studies, November 2016) 23. ([Hyperlink](#)).

¹¹⁴ See, eg, Iain Campbell, Fiona Macdonald and Sara Charlesworth, 'On-Demand Work in Australia' in Michelle O'Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67 ([Hyperlink](#)).

4 Explicit rights to flexibility and their use

4.1 Introduction

In this section of the Report we review literature addressing rights to flexibility in the modern awards and the National Employment Standards (NES) framework, and their impact on employees' work and care responsibilities. We include research that addresses worker-carer use of broadly defined flexibility arrangements, in addition to literature that is more directly focused on specific provisions in the NES, such as the right to request flexible work arrangements, or those provisions within modern awards that enable Individual Flexibility Agreements (IFAs). A particular focus in this literature is whether all employees have access to the right to request flexible work arrangements. Currently the right is unavailable to many casual workers. While data on the use of the right is limited, it suggests that many worker-carers are unaware of the right. We also review literature addressing working from home arrangements, noting as in Section 3, the impact of the pandemic on the scope of what is seen as constituting flexible working arrangements.

The exercise of rights to flexible work arrangements are also related to other workplace relations settings in modern awards and the NES that shape work and care outcomes for employees, addressed in later sections of the Report. The capacity for worker-carers to achieve working arrangements supportive of work and care is addressed in literature addressing the arrangement of paid hours of work and access to unpaid and paid leave (reviewed in Sections 5 and 6 of this Report).

Indicative proposals for change identified in the literature and submissions to inquiries as they concern flexible work arrangements are summarised in Appendix 1.

In addressing explicit provisions in the modern awards and the NES framework, we note the distinction between different types of provisions highlighted by the Fair Work Commission in the Work and Care Discussion Paper:

- *Requests for flexible working arrangements under section 65 of the FW Act.*
- *Flexibility terms in modern awards which enable an employer and an employee to agree to an individual flexibility arrangement (IFA) changing the effect of award clauses concerning certain matters – arrangements for when work is performed, overtime rates, penalty rates, allowances, annual leave loading*

- *Modern award facilitative provisions which enable an employer and an employee, or a majority of employees, to agree to vary particular modern award provisions by agreement.*¹¹⁵

4.2 Awareness and Use of Flexibility Arrangements

How worker-carers fulfill both their unpaid care and paid work responsibilities is a critical policy concern. Understanding the distinctions between the availability and use of flexibility arrangements, in addition to barriers to their usage, is a key research challenge. A 2019 study addressed this challenge, utilising the terminology – special working arrangements (SWAs) – to align the study with Australian Bureau of Statistics (ABS) data collection and with a particular focus on care for a person with a disability or long term health condition.¹¹⁶ This umbrella term is, however, inclusive of a wide variety of working arrangements, including paid and unpaid leave, flexible working hours and a range of employment types, which may impact the quality and sustainability of the work-care relationship in different ways. Some employment types, notably part-time and casual employment, reflect a gendered distribution of paid work and unpaid care and the constrained choices and trade-offs faced by many worker-carers, who work reduced hours to manage work and care, but may have to contend with temporal (working time) insecurity to do so.¹¹⁷

As noted in Section 3, women remain primarily responsible for unpaid care in Australia and this gender division of unpaid care significantly shapes their labour force participation and how they engage in the labour market. Focusing on pre-school children, as an example of care, women are much more likely than men to be out of the labour market if they have a pre-school child. If employed in paid work, women are much more likely than men to work part-time as it may assist them balance work and care. Yet part-time employment also impacts career progression, lifelong earnings and superannuation contributions.¹¹⁸

While the study indicated that there was high awareness of the availability of SWAs, distinctly gendered patterns in usage based on carer status were also apparent. The results indicated, primary

¹¹⁵ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024) 103. ([Hyperlink](#)).

¹¹⁶ Jeromey Temple, Briony Dow and Marian Baird, 'Special Working Arrangements to Allow for Care Responsibilities in Australia: Availability, Usage and Barriers' (2019) 3(1) *Australian Population Studies* 13. ([Hyperlink](#)).

¹¹⁷ See, eg, Judy Rose and Belinda Hewitt 'Does Part-Time Employment Status Really Reduce Time Pressure?' (2019) 55(2) *Journal of Sociology* 366. ([Hyperlink](#)).

¹¹⁸ Professor Alison Preston, Submission No 34 to Senate Select Committee Inquiry on Work and Care, (8 September 2022) 11. ([Hyperlink](#)); see also Alison Preston, 'Changing Gender Role Attitudes and the Changing Gender Gap in Labour Force Participation' (2023) 65(5) *Journal of Industrial Relations* 562. ([Hyperlink](#)).

carers¹¹⁹ were most likely to use SWAs, 70% of whom were women. Almost two-thirds of primary carers had used SWAs in the previous six months, compared with 43% of other carers and about one-fifth of non-carers.¹²⁰ Almost one in four primary carers and one in five other carers faced barriers to using SWAs to care. The major barriers included insufficient paid leave and/or the demands of their paid work commitments (requiring them to put the demands of paid work over their need for time to care).¹²¹

4.3 Right to request flexible working arrangements under section 65 of the FW Act

4.3.1 Nature of the Provision

Section 65 of the FW Act provides employees with a legal entitlement to request a change in their working arrangements if they are:

- Pregnant;
- The parent, or have responsibility for the care, of a child who is of school age or younger;
- A carer within the meaning of the Carer Recognition Act 2010 (Cth);¹²²
- A person with disability;
- Aged 55 or older;
- Experiencing family or domestic violence;
- Caring for or supporting an immediate family or household member who requires care or support because they are experiencing family and domestic violence.

This 'right to request' is limited to permanent employees who have worked with the employer for at least 12 months, or if they are regular casual employees who have worked with the employer regularly

¹¹⁹ 'Primary carers' are defined in this study as carers who provide the principal assistance for a person with a disability or long-term health condition. 'Other carers' are defined as those who also care for a person with a disability or long-term health condition while 'non-carers' are defined as all those who are not primary or other carers. Yet such non-carers may also have care responsibilities and need to access SWAs, for example parents: Jeromey Temple, Briony Dow and Marian Baird, 'Special Working Arrangements to Allow for Care Responsibilities in Australia: Availability, Usage and Barriers' (2019) 3(1) *Australian Population Studies* 13, 15. ([Hyperlink](#)).

¹²⁰ Jeromey Temple, Briony Dow and Marian Baird, 'Special Working Arrangements to Allow for Care Responsibilities in Australia: Availability, Usage and Barriers' (2019) 3(1) *Australian Population Studies* 13, 17. ([Hyperlink](#)).

¹²¹ Jeromey Temple, Briony Dow and Marian Baird, 'Special Working Arrangements to Allow for Care Responsibilities in Australia: Availability, Usage and Barriers' (2019) 3(1) *Australian Population Studies* 13, 21. ([Hyperlink](#)).

¹²² The NES on the right to request flexible work arrangements in s65 of the FW Act adopts the meaning afforded to 'carer' in the *Carer Recognition Act 2010* (Cth) s 5. This section notes that a carer is an individual who provides personal care, support and assistance to another individual who needs it because that other RTR individual: (a) has a disability; or (b) has a medical condition (including a terminal or chronic illness); or (c) has a mental illness; or (d) is frail and aged.

and systematically for at least 12 months and have a reasonable expectation of continuing to do so.¹²³ Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.¹²⁴ The FW Act provides a framework for employer responses to requests for changes to working arrangements.¹²⁵ The current provisions reflect recent amendments by the SJBPA Act.¹²⁶ which widened the circumstances in which workers-carers can make a request, and provided increased guidance to, and obligations on, employers when responding to a request. The amendments also introduced a new avenue of appeal where disputes arise about the flexible working arrangements requested.

In this section of the Report we review literature addressing the sufficiency of the right to request provisions. However we note here that these provisions were the basis of recommendations of the Senate Select Committee on Work and Care. Other indicative proposals concerning the right to request are set out in Appendix 1.

The Interim Report of the Committee recommended changes to the FW Act including section 65 to:

- make the right to request flexible work available to all workers and to remove the stigma attached to its use when confined to carers;
- replace the ‘reasonable business grounds’ provision at section 65(5) under which employers can refuse a flexible working arrangement, with refusal only on the grounds of ‘unjustifiable hardship’;
- introduce a positive duty on employers to reasonably accommodate flexible working arrangements;
- require consultation with workers about flexibility requests; and
- revise sections 738 and 739 of the Act to introduce a process of appeal to the Fair Work Commission, for decisions made by employers under section 65 refusing to allow flexible work arrangements on the grounds of unjustifiable hardship, or on ‘reasonable business grounds’.¹²⁷

¹²³ FW Act s 65(1A). We note that In 2016, over 40% of casual employees had been employed for less than 12 months with their current employer: Iain Campbell, ‘On-call and Related Forms of Casual Work in New Zealand and Australia’ (Working Paper No 102, International Labour Organization, Conditions of Work and Employment, 2018) 19. ([Hyperlink](#)).

¹²⁴ FW Act s 65(1).

¹²⁵ FW Act s 65(1).

¹²⁶ Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) ss 466-447, 459 and 469A.

¹²⁷ Senate Select Committee on Work and Care, *Interim Report* (Report, October 2022) [6.35]. ([Hyperlink](#)). This recommendation was affirmed by the Committee’s final report: see Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) [8.132]. ([Hyperlink](#)).

4.3.2 Use of the right to request provision

Research assessing the explicit use of right to request provisions indicates a persistent, low awareness of the entitlement by worker-carers.¹²⁸ Australian Work and Life Index (AWALI) data (2012) indicates only one-third of fathers and one-quarter of mothers of pre-schoolers were aware that they were entitled to request flexible work arrangements. In general, fathers were more likely to be aware of the entitlement than mothers. Women without children under 16 years old had a higher level of awareness (34.5%) than women with children under 16 (25.0%).¹²⁹ In a follow-up survey in 2014 the majority of workers were still not aware of the entitlement. Although awareness of the entitlement had increased, still less than half of workers with pre-school children and those with caring responsibilities for elders, those with chronic illness and disability were aware of the right to request.¹³⁰

Awareness of the entitlement to flexibility does not translate seamlessly to use of the entitlement. There is a low number of requests and the pattern of requests indicates a gendered distribution with women more likely to make requests compared to men.¹³¹ Those requests made were primarily care related. In 2012, the most common reasons for requesting were childcare responsibilities, particularly for women (20.3%; 11.0% of men), and to study (14.7% of women; 16.7% of men).¹³² A 2015 study which incorporated 2012 and 2014 AWALI data found the use of the right to request was primarily for a reduction in paid hours of work to support care-related arrangements.¹³³

¹²⁸ Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or Not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103. ([Hyperlink](#)); Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life: University of South Australia, September 2014). ([Hyperlink](#)); Natalie Skinner, Barbara Pocock and Claire Hutchinson, *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions* (Report, 2015). ([Hyperlink](#)). See also Carers NSW submission to Senate Work and Care regarding low awareness of entitlements generally: Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 11. ([Hyperlink](#)).

¹²⁹ Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 107–109). ([Hyperlink](#)).

¹³⁰ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life: University of South Australia, September 2014) 39. ([Hyperlink](#)).

¹³¹ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life: University of South Australia, September 2014) 38. ([Hyperlink](#)); Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 107–109. ([Hyperlink](#)).

¹³² Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 107–109. ([Hyperlink](#)).

¹³³ Natalie Skinner, Barbara Pocock and Claire Hutchinson, *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions* (Report, 2015) 19. ([Hyperlink](#)).

A study commissioned by the FWC found that in 2021 awareness of the right to request by key stakeholders such as employers, unions, employer associations and legal practitioners was widespread, although less so among employee representatives. Stakeholders reported the provision was used extensively, although there was less certainty about whether the use of the provision had increased over the three years to 2021.¹³⁴ Within this dataset, more women than men made requests, and consistent with previous data, a request to reduce the quantum of work hours was a common flexibility sought. Recognising the timing of this particular survey in 2021 after the beginning of the COVID-19 pandemic, a request to work from home also ranked highly.¹³⁵ In assessing the available research, few studies are industry or occupation-specific and therefore may not identify challenges in particular industries. As an example, a study of retail employees concludes that retail workers have ‘benefitted little if at all from employment policies expanding legal rights to request flexibility, which have promoted family-friendly arrangements in professional settings’.¹³⁶

The barriers identified by worker-carers to making a request underline the importance of workplace policy, practice and culture. Worker-carers who are dissatisfied with their working arrangements but who had not made a request, identified as ‘dissatisfied non-requesters’, referred to the influence of work and workload and supervisors’ lack of support as reasons for not making a request.¹³⁷ Culturally this may reflect normative pressures that take their form in silences around work-care matters,¹³⁸ including the stigma of men applying for care-based flexible work arrangements.¹³⁹ Such workplace environments, inclusive of prevailing managerial cultures and practices, may privilege the circumstances of workers who present as unencumbered by care responsibilities. Worker-carers face

¹³⁴ Marian Baird et al., *Formal Flexibility under the Fair Work Act: A Report Prepared for the General Manager of the Fair Work Commission* (Report, September 2021) cited in Murray Furlong, *General Manager’s Report into the Operation of the Provisions of the National Employment Standards Relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental leave Under s 653 of the Fair Work Act (Cth) 2018-21* (Report, September 2021) 17. ([Hyperlink](#)).

¹³⁵ Marian Baird et al., *Formal Flexibility under the Fair Work Act: A Report Prepared for the General Manager of the Fair Work Commission* (Report, September 2021) cited in Murray Furlong, *General Manager’s Report into the Operation of the Provisions of the National Employment Standards relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under section 653 of the Fair Work Act 2009 (2018-21)* (Report, Fair Work Commission, 2021) 18. ([Hyperlink](#)).

¹³⁶ Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Care Theft: Family Impacts of Employer Control in Australia’s Retail Industry’ (2023) 44(1) *Critical Social Policy* 106, 123. ([Hyperlink](#)).

¹³⁷ Natalie Skinner, Abby Cathcart and Barbara Pocock, ‘To Ask or not to Ask? Investigating Workers’ Flexibility Requests and the Phenomenon of Discontented Non-Requesters’ (2016) 26(2) *Labour and Industry* 103, 114. ([Hyperlink](#)).

¹³⁸ Natalie Skinner, Abby Cathcart and Barbara Pocock, ‘To Ask or not to Ask? Investigating Workers’ Flexibility Requests and the Phenomenon of Discontented Non-Requesters’ (2016) 26(2) *Labour and Industry* 103, 115–116. ([Hyperlink](#)).

¹³⁹ Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 19. ([Hyperlink](#)).

challenges in seeking to exercise a right to make a request that is inconsistent with workplace norms and where supportive supervisory structures are not in place.¹⁴⁰ The unevenness of workplace and institutional supports is also evident in research that highlights the importance of direct supervisors to worker-carers successfully accessing flexible working arrangements. Such research is not confined only to formal rights to request, under section 65 of the FW Act, but limited usage highlights the contingent nature of this right.¹⁴¹

There are some challenges to gaining further insights regarding the extent to which formal requests for flexibility are refused. The General Manager of the Commission is required to report on the operation of section 65 provisions and identify notification of disputes relating to a request for a flexible working arrangement. Between 2019 and 2021, there were a total of 113 applications to the Commission to deal with a dispute relating to a request for flexible working arrangements. Related research which informed the General Manager's report noted that stakeholders reported that requests were generally agreed and that refusals were rare.¹⁴²

4.3.3 Sufficiency of the section 65 provisions

Whether the section 65 provisions are sufficient to support worker-carers is a question taken up in the academic literature, submissions to the Senate Select Committee on Work and Care and the relevant recommendations of the Committee. A key focal point is the exclusion of many worker-carers employed on a casual basis, as part of a wider set of eligibility requirements, that privileges full-time and longer-term continuous employment. The gendered and disproportionate basis of this exclusion is evident through the greater likelihood that women hold casual jobs.¹⁴³

¹⁴⁰ Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 116. ([Hyperlink](#)).

¹⁴¹ Fiona Macdonald, Jenny Malone and Sara Charlesworth, 'Women, Work, Care and COVID' (Research Report, RMIT University, 2021) ([Hyperlink](#)); Barbara Pocock and Sara Charlesworth, 'Multilevel Work-Family Interventions: Creating Good-Quality Employment Over the Life Course' (2017) 44(1) *Work and Occupations* 23. ([Hyperlink](#)); Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 107–109. ([Hyperlink](#)); Jeromey Temple, Briony Dow and Marian Baird, 'Special Working Arrangements to Allow for Care Responsibilities in Australia: Availability, Usage and Barriers' (2019) 3(1) *Australian Population Studies* 13, 13–29. ([Hyperlink](#)).

¹⁴² Marian Baird et al., *Formal Flexibility under the Fair Work Act: A Report Prepared for the General Manager of the Fair Work Commission* (Report, September 2021) cited in Murray Furlong, General Manager's Report into the Operation of the Provisions of the National Employment Standards relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under section 653 of the Fair Work Act 2009 2018-21 (Report, Fair Work Commission, 2021) 20. ([Hyperlink](#)).

¹⁴³ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 124. ([Hyperlink](#)); Iain Campbell and Sara Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *Australian Journal of Labour Law* 36. ([Hyperlink](#)); Sara Charlesworth and Meg Smith, 'Gender Pay Equity' in Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The*

The exclusion of worker-carers who are casually employed, in the context of growing precarity in the labour market, makes a key standard of the NES inaccessible for a significant number of workers who may be employed in casual jobs, in part to care for others. In addressing ‘who cares’, it has been argued that consideration should be given to those mature workers who provide informal care for the elderly.¹⁴⁴ Further while pregnant workers are now eligible to the entitlements of section 65 provided other conditions are met, the provisions remain only accessible to particular categories of employees, unlike flexible working provisions in the United Kingdom.¹⁴⁵ Many work and care policy advocates have proposed that extending the right to request to all workers, as in the United Kingdom and the Netherlands, would assist to normalise flexible work requests while challenging gendered stereotypes of the ideal worker.¹⁴⁶

As the right to request is currently constructed, the onus falls on employees to request working arrangements rather than on employers to provide such arrangements. This construction is a focus of the literature that supports recasting the right to flexible work arrangements as a positive duty on employers to address, rather than the onus to request resting with employees. This perspective would support a more direct accommodation of employees with parenting or carer responsibilities, more inclusively support engagement in the labour market, and a less gendered dichotomy of who is considered responsible for care.¹⁴⁷ These concerns are linked also to weaknesses identified in the enforcement and grievance resolution provisions of the right to request,¹⁴⁸ weaknesses that are

Wages Crisis in Australia: What It is and What to Do About It (University of Adelaide Press, 2018) 85. [\(Hyperlink\)](#); Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, 2014). [\(Hyperlink\)](#).

¹⁴⁴ Marian Baird and Alison Williams, ‘Ageing, Work, Care in Australia: Progress and Prospects in Meeting Sustainable Development Goals of Inclusive Growth and Gender Equality’ in Subas Dhakal, Alan Nankervis and John Burgess (eds), *Ageing in Asia and the Pacific in Changing Times: Implications for Sustainable Development* (Springer, 2022) 57–58. [\(Hyperlink\)](#).

¹⁴⁵ Dominique Allen, ‘A New Approach to Australia’s Sex Discrimination and Labour Laws is Designed to Improve Equality for Women at Work’ (2023) 27 *Industrial Law Journal* 956, 969. [\(Hyperlink\)](#).

¹⁴⁶ Dominique Allen and Adriana Orifici, ‘What Did the COVID-19 Pandemic Reveal about Workplace Flexibility for People with Family and Caring Responsibilities?’ (2022) 1 *University of New South Wales Law Journal Forum* 1, 7. [\(Hyperlink\)](#); Senate Select Committee on Work and Care, *Interim Report* (Report, October 2022) [\(Hyperlink\)](#) cited in Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) 189. [\(Hyperlink\)](#); Lisa Waddington and Mark Bell, ‘The Right to Request Flexible Working Arrangements under the Work-life Balance Directive – A Comparative Perspective’ (2021) 12(4) *European Labour Law Journal* 508. [\(Hyperlink\)](#).

¹⁴⁷ Bill Swannie, ‘Reasonable Accommodation of Employees’ Parenting and Carer Responsibilities: A Human Rights Perspective’ (2022) 48(2) *Monash University Law Review* 208. [\(Hyperlink\)](#).

¹⁴⁸ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life: University of South Australia, September 2014), 38. [\(Hyperlink\)](#); Anna Chapman, ‘Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework’ (2018) 14(1) *Journal of Law & Equality* 115, 124. [\(Hyperlink\)](#); Iain Campbell and Sara Charlesworth, ‘The National Employment Standards: An Assessment’ (2020) 33 *Australian Journal of Labour Law* 36, 44. [\(Hyperlink\)](#); Bill

exacerbated by the fact that it is worker-carers who must make the claim. Of concern is whether existing fault lines in the labour market, for example discrimination against older workers, are deepened through both the onus falling on the worker-carer to request, and deficiencies in enforcement and grievance resolution provisions.¹⁴⁹ A comparative study of Australian and Dutch labour law provisions notes favourably the procedural obligations placed on employers under the FW Act, but also observes that the right to ‘reasonable accommodation’, prominent in European regulatory frameworks, is a more substantive duty.¹⁵⁰

The proposition that the right to request provisions are insufficient is not universally supported. The advocacy for the current adequacy of the provisions assesses that the facilitative nature of the provisions should be preserved,¹⁵¹ and that the FW Act already protects against unfair or unlawful treatment against worker-carers including under adverse action provisions and unfair dismissal provisions in the FW Act.¹⁵² A related proposition is that the capacity of the right to request provisions to enable work and care is restricted, such as by the requirement that hours be worked continuously.¹⁵³ In considering the effectiveness of the right to request in supporting good work and care outcomes, the Select Senate Committee on Work and Care drew on evidence from several major Australian retail companies about their workplace arrangements and rostering practices and the ways in which these arrangements and practices were seen by unions and workers to undercut employee access to flexibility to manage work and care.¹⁵⁴

4.4 Individual Flexibility Agreements

4.4.1 Use of IFAs

An Individual Flexibility Agreements (IFA) is a written agreement used by employers and employees to change the effect of a modern award. The FW Act requires that the employer must ensure that a

Swannie, ‘Reasonable Accommodation of Employees’ Parenting and Carer Responsibilities: A Human Rights Perspective’ (2022) 48(2) *Monash University Law Review* 208. [\(Hyperlink\)](#).

¹⁴⁹ Therese MacDermott, ‘Older Workers and Requests for Flexibility: A Weak Right in the Face of Entrenched Age Discrimination’ (2015) 44(3) *Federal Law Review* 451. [\(Hyperlink\)](#).

¹⁵⁰ Lisa Waddington and Mark Bell, ‘The Right to Request Flexible Working Arrangements under the Work-life Balance Directive – A Comparative Perspective’ (2021) 12(4) *European Labour Law Journal* 508. [\(Hyperlink\)](#).

¹⁵¹ Australian Industry Group, Submission No 41 to Senate Select Committee Inquiry on Work and Care (17 September 2022). [\(Hyperlink\)](#).

¹⁵² Australian Industry Group, Submission No 41 to Senate Select Committee Inquiry on Work and Care (17 September 2022). [\(Hyperlink\)](#).

¹⁵³ Australian Chamber of Commerce and Industry, Submission No 99 to Senate Select Committee Inquiry on Work and Care (September 2022) 6. [\(Hyperlink\)](#).

¹⁵⁴ Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) 190 [8.140]. [\(Hyperlink\)](#).

worker is better off overall than the employee would have been if no IFA was agreed to.¹⁵⁵ There is limited data on the use of IFAs with the available data indicating a low incidence, a conclusion confirmed by the General Manager of the Commission who noted.

*... there are no sources of administrative data in relation to IFAs. Although IFAs have been part of the Australian industrial landscape since 2009, they remain a small part of the overall mix of industrial instruments in Australia. This makes the research in this area both difficult to conduct and difficult to extrapolate from.*¹⁵⁶

The General Manager's most recent report included commissioned research which noted that the prevalence of IFAs was low. The incidence of IFAs was spread across industries but it was not possible to estimate the incidence of IFAs.¹⁵⁷ Given there is no oversight of IFAs by the Commission and recognising that is the employer is responsible for ensuring that the employee is better off overall under an IFA, there is highly limited data through which to assess whether IFAs benefit worker-carers.¹⁵⁸ The low incidence of IFAs was the basis of a submission to the Senate Work and Care Committee that the Productivity Commission's 2015 recommendations should be reconsidered with a view to making the framework of modern awards more accessible to carers and employers.¹⁵⁹

4.5 Working from home

4.5.1 Impact of pandemic

As we noted in Section 3, the COVID-19 pandemic ignited public debate about work and care reconciliation, including the flexibility provided by working from home. The available research requires careful assessment. While the data suggests increased preference for flexibility and employer support for more flexible working arrangements for a wider group of workers, the scope, ambit and focus of

¹⁵⁵ FW Acts 144(4)(c).

¹⁵⁶ Murray Furlong, General Manager's Report into the Operation of the Provisions of the National Employment Standards relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under section 653 of the Fair Work Act 20019 (Cth) 2018-21 (Report, Fair Work Commission, 2021) vi. ([Hyperlink](#)).

¹⁵⁷ Marian Baird et al., *Formal Flexibility under the Fair Work Act: A Report Prepared for the General Manager of the Fair Work Commission* (Report, September 2021) cited in Murray Furlong, *General Manager's Report into the Operation of the Provisions of the National Employment Standards relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under section 653 of the Fair Work Act 20019 (Cth) 2018-21* (Report, Fair Work Commission, 2021) 20. ([Hyperlink](#)).

¹⁵⁸ Rafal Chomik, Alison Williams and Marian Baird, 'Legal Protections for Mature Workers' (Report, ARC Centre of Excellence in Population Ageing Research, August 2019) 4. ([Hyperlink](#)).

¹⁵⁹ Australian Chamber of Commerce and Industry, Submission No 99 to Senate Select Committee Inquiry on Work and Care (September 2022) 7. ([Hyperlink](#)).

studies varies considerably.¹⁶⁰ The impacts of working from home are not uniform and occur within a labour context where when comparing parents, in paid work, in similar working arrangements (both working part-time), mothers experience significantly higher levels of work-family conflict, while work-family conflict has decreased for fathers but not for mothers.¹⁶¹ Given women are more likely to be primary carers, working from home is found to be more beneficial for mothers than fathers. However the overall positive impact of working from home is small and most evident when the majority of working hours are undertaken at home.¹⁶²

The impacts by industry are also not uniform. For some workers the pandemic opened up new possibilities for flexible work arrangements. Right to request flexible work arrangements during the pandemic, for workers with family responsibilities, most commonly focused on flexible working hours.¹⁶³ Yet only around a third of Australian jobs could be performed working from home.¹⁶⁴ Retail workers, for example, had limited agency over hours of work and flexibility arrangements¹⁶⁵ and consistent with other public facing service industries there was loss of jobs and hours of work through each wave of the pandemic.¹⁶⁶

In terms of working from home, one study using longitudinal HILDA data and focusing on parents, suggests that post pandemic workers who are able to do so, might continue to experience its benefits given the reduced commuting time and increased schedule control it offers, as long as adequate measures are taken to protect workers from working unsocial hours.¹⁶⁷ It has also been suggested that working from home, whether as part of a formal arrangement with employers or to undertake 'supplementary' work unable to be completed within the allocated working time, may also present

¹⁶⁰ Marian Baird and Daniel Dinale, Research Report: Preferences for Flexible Working Arrangements: Before, During and After COVID-19, a Report to the Fair Work Commission (Report, November 2020) 37. ([Hyperlink](#)).

¹⁶¹ Inga Laß and Mark Wooden, 'Working from Home and Work-Family Conflict' (2023) 37(1) *Work, Employment and Society* 176, 178. ([Hyperlink](#)).

¹⁶² Inga Laß and Mark Wooden, 'Working from Home and Work-Family Conflict' (2023) 37(1) *Work, Employment and Society* 176, 187–191. ([Hyperlink](#)).

¹⁶³ Dominique Allen and Adriana Orifici, 'What Did the COVID-19 Pandemic Reveal about Workplace Flexibility for People with Family and Caring Responsibilities?' (2022) 1 *University of New South Wales Law Journal Forum* 1. ([Hyperlink](#)).

¹⁶⁴ Alison Pennington and Jim Stanford, 'Working from Home: Opportunities and Risks' (Briefing Paper, The Centre for Future Work, April 2020) 2. ([Hyperlink](#)).

¹⁶⁵ Talara Lee et al., 'Women, Work and Industrial Relations in Australia in 2021' (2022) 64(3) *Journal of Industrial Relations* 347, 35. ([Hyperlink](#)).

¹⁶⁶ Rae Cooper, Frances Flannagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" Across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia in Australia* (Sydney University Press, 2024) 103, 103. ([Hyperlink](#)).

¹⁶⁷ Inga Laß and Mark Wooden, 'Working from Home and Work-Family Conflict' (2023) 37(1) *Work, Employment and Society* 176, 191. ([Hyperlink](#)).

some costs for worker-carers.¹⁶⁸ At the material level, such costs can include the shift of expenses, such as for electricity, telephone, and office equipment from employers to employees, while working from home may also render employees' care responsibilities invisible to employers, which will further disadvantage worker-carers, especially women.¹⁶⁹ Further, it has been suggested that if mainly working from home became a condition of work that is forced on workers, 'perhaps reinforced by new technology enabling close monitoring of worker activity at home, the benefits for family life may not be forthcoming'.¹⁷⁰

Whether the pandemic exacerbated traditional gender roles through working from home arrangements is also the subject of some scrutiny and debate in the literature as discussed in Section 3.2.¹⁷¹ A study of dual earner couples during a period of enforced restrictions identified an increase in fathers' child care time from a low base. Yet mothers' unpaid work time increased more, leading to mothers being even more dissatisfied with how they and their partners shared unpaid work and care during the pandemic. Even so, relative to previous reporting, more fathers experienced high levels of time stress arising from the combination of paid work and unpaid domestic labour and care.¹⁷² For women the rise in relative equity in the division of unpaid work did not compensate for the significantly higher workloads they experienced, and left unaddressed significant public policy concerns about both paid and unpaid care work in the care economy.¹⁷³ These concerns include the failure in the broader work and care policy architecture to recognise the interconnections between workplace relations regulation and public policy provision. For example, the need to both provide paid sick and carers leave for casual employees in precarious employment and access to affordable care services. These weaknesses were seen to contribute to women disproportionately withdrawing from the labour market.¹⁷⁴

How rights to work from home will be constructed in the future is presently unclear. For the group of worker-carers whose work can be performed remotely, requests under section 65 can include a

¹⁶⁸ Natasha Cortis and Abigail Powell 'Playing Catch Up? An Exploration of Supplementary Work at Home Among Australian Public Servants' (2018) 60(4) *Journal of Industrial Relations* 538. ([Hyperlink](#)).

¹⁶⁹ Lyn Craig and Brendan Churchill, 'Working and Caring at Home: Gender Differences in the Effects of COVID-19 on Paid and Unpaid Labor in Australia' 27(1)-(2) *Feminist Economics* 310, 322. ([Hyperlink](#)).

¹⁷⁰ Inga Laß and Mark Wooden, 'Working from Home and Work-Family Conflict' (2023) 37(1) *Work, Employment and Society* 176, 191. ([Hyperlink](#)).

¹⁷¹ Meraiah Foley and Sue Williamson, 'Women, Work and Industrial Relations in Australia in 2020' (2021) 63(3) *Journal of Industrial Relations* 321, 328. ([Hyperlink](#)).

¹⁷² Lyn Craig and Brendan Churchill, 'Dual-Earner Parent Couples' Work and Care during COVID-19' (2021) 28 *Gender, Work & Organisation* 66, 7. ([Hyperlink](#)).

¹⁷³ Lyn Craig and Brendan Churchill, 'Working and Caring at Home: Gender Differences in the Effects of COVID-19 on Paid and Unpaid Labor in Australia' 27(1)-(2) *Feminist Economics* 310, 323. ([Hyperlink](#)).

¹⁷⁴ The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022), 7. ([Hyperlink](#)).

request to work from home. However, whether right to request provisions, in addition to new dispute resolution procedures introduced in the SJPB Act will be sufficient in supporting work and care is a matter of debate.¹⁷⁵ In particular recognising the construction of section 65 as an individual rather than a collective flexibility, it has been argued that by ensuring ‘new collective benchmarks’, working from home /telecommuting provisions could be generalised to regulate working from home.¹⁷⁶ Presumably, as during the pandemic in some awards, this could be achieved through modern award provisions that would collectivise entitlements to working from home for employees.

In theory at least, job-sharing could be a proposed change to working time that may be requested by an eligible employee under section 65 right to request provisions. Job-sharing arrangements are where ‘a full-time job role is divided into multiple job roles to be undertaken by two or more employees who are paid on a pro-rata basis for the part of the job each completes’.¹⁷⁷ One study examining why employees did not request flexible work in the context of the section 65 provisions, illustrated the practical difficulty of requesting job share arrangements in the context of long work hours and high workloads in a manager role in the banking industry.¹⁷⁸ In the main, however, such arrangements are negotiated at the workplace level. For example WGEA data indicates that job-sharing has been growing as a form of flexible work with 66% of organisations reporting to WGEA stating they offered job-sharing arrangements in 2022-2023.¹⁷⁹ However there is no data on usage of these arrangements.

¹⁷⁵ Andrew Stewart, Shae McCrystal and Anthony Forsyth, ‘Will Pay be Better and Jobs More Secure? Analysing the Albanese Government’s First Round of Fair Work Reforms’ (2023) 36(2) *Australian Journal of Labour Law* 104, 119. ([Hyperlink](#)).

¹⁷⁶ Sue Williamson and Alicia Pearce, ‘COVID-Normal Workplaces: Should Working from Home be a ‘Collective Flexibility?’’ (2022) 64(3) *Journal of Industrial Relations* 461. ([Hyperlink](#)).

¹⁷⁷ Workplace Gender Equality Agency, *Flexible Work* (Webpage) ([Hyperlink](#)).

¹⁷⁸ Natalie Skinner Abby Cathcart and Barbara Pocock, ‘To Ask or not to Ask? Investigating Workers’ Flexibility Requests and the Phenomenon of Discontented Non-Requesters’ (2016) 26(2) *Labour and Industry* 103, 113. ([Hyperlink](#)).

¹⁷⁹ Female-dominated industries are the most likely to offer job sharing: Workplace Gender Equality Agency, *Gender Equality Scorecard 2022-2023* (Report, November 2023) 63–64. ([Hyperlink](#)).

5 Regulating and organising hours of work

5.1 Introduction

In this section of the Report we review literature addressing the regulation and organisation of the hours of work in the modern awards and the National Employment Standards (NES) framework, and its impact on employees' work and care outcomes. This scope includes the maximum and minimum hours of work, the arrangement and rostering of hours including consultation provisions regarding changes to rosters, and overtime recognising the interconnection between these provisions.

Within much of the material reviewed there is an emphasis on the impact of differences in the regulation of the hours of work for part-time and casual employees, in comparison to full-time workers. These differences are evident in provisions that enable low minimum hours of engagement and low guaranteed minimum hours of work, practices that can contribute to underemployment and a requirement that employees be routinely available and flexible if they are to secure additional hours of work.

We note, as elsewhere, the interrelated nature of matters addressed in other sections of the Report. The capacity for worker-carers to manage their work and care responsibilities, through changes to both the quantum and scheduling of their paid work hours, may involve the use of flexibility provisions which are reviewed in Section 4. In this section of the Report, we reference the Commission's review of hours provisions in 25 modern awards.¹⁸⁰ We also review submissions to the Senate Select Committee on Work and Care recognising that several recommendations of the Committee address the regulation of hours.

Indicative proposals for change to the NES and modern award safety net for work and care identified through the literature, submissions to inquiries and inquiry findings as they concern the regulation and hours of work are summarised in Appendix 1.

5.2 Maximum working hours

5.2.1 Long working hours

The NES provides for a maximum 38 hours of work per week plus 'reasonable additional hours'. While this NES standard is applicable to all employees covered by the national workplace relations system, data available on hours worked indicates that the standard is routinely exceeded with particular and adverse impacts on women. In 2021, two out of five (40%) employed Australians worked more the

¹⁸⁰ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024). [\(Hyperlink\)](#).

NES maximum hour standard of 38 hours. The distribution of long working hours is gendered in that the majority of long hours workers are men. One in ten employed men worked more than 50 hours a week, while women, particularly in service sectors such as retail and care, are more typically distributed in short hour and poorer quality jobs.¹⁸¹

This disparity and growing polarisation in working time has three ramifications. Firstly, it has an impact for the immediate and future income security of women over the life course. Secondly, long hours are challenging to combine with care – women are either unable to meet the hours expectations of such positions because of their care obligations, or their employment choices are constrained by the long working hours of their partners in couple households. Thirdly, the pattern of long working hours by men constrains their contribution to unpaid care.¹⁸² More generally, long working hours have a detrimental impact on mental health, a conclusion that is evident for both Australian and German workers, recognising that the regulation of long working hours is framed differently between these jurisdictions.¹⁸³ It has been argued that addressing the gendered pattern and impacts of long working hours could be supported through a two-stage process: one, capping the current legislated standard of 38 hours per week to 38 hours per week; two, adopting a shorter working week, a measure which would facilitate more equal shares of paid and unpaid work.¹⁸⁴

5.3 Minimum working hours

The Commission's Work and Care Discussion Paper indicated that most, but not all the 25 awards reviewed, contain 'guaranteed hours' provisions for part-time workers although the agreed regular pattern of hours may not be the same each week. Twenty of the 25 awards provide that part-time employees have reasonably predictable hours of work. In broad terms, awards vary as to whether any agreed pattern of work is consistent each week and whether agreement is required for a change to

¹⁸¹ The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 3. ([Hyperlink](#)).

¹⁸² Lyndall Strazdins et al., Submission No 122 to Senate Select Committee Inquiry on Work and Care (September 2022) 4. ([Hyperlink](#)); The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 7. ([Hyperlink](#)); see also Huong Dinh et al., 'Parents' Transitions into and out of Work-Family Conflict and Children's Mental Health: Longitudinal Influence via Family Functioning' (2017) 194 *Social Science & Medicine* 42. ([Hyperlink](#)); Huong Tinh, Lyndall Strazdins and Jennifer Welsh, 'Hour-Glass Ceilings: Work-Hour Thresholds, Gendered Health Inequities' (2017) 176 *Social Science & Medicine* 42. ([Hyperlink](#)).

¹⁸³ Steffen Otterbach et al., 'Working-time Regulation, Long Hours Working, Overemployment and Mental Health' (2021) 32(22) *International Journal of Human Resource Management* 4659, 4678–4679. ([Hyperlink](#)).

¹⁸⁴ Lyndall Strazdins et al., Submission No 122 to Senate Select Committee Inquiry on Work and Care (September 2022) 6 ([Hyperlink](#)); Evidence to Senate Select Committee on Work and Care, Canberra, 8 December 2022, 37 (Lyndall Strazdins). ([Hyperlink](#)).

the regular pattern of work and guaranteed hours of work.¹⁸⁵ In the following sub-section we address minimum engagement periods and guaranteed minimum hours provisions. We note the close correspondence between these provisions and those concerning rostering and the scheduling and flexibility of hours worked in addition to minimum guaranteed hours of work.

5.3.1 Minimum engagement periods and low minimum hour periods

Artificially low or zero hours contracts and low minimum engagement periods contribute to inferior working time standards and an absence of hours and income continuity. A 2012 study found there was a gendered distinction between the working time regulation in the Social, Community, Home Care and Disability Services (SCHADS) Award, including the absence of minimum engagement periods for part-time employees, compared to employees covered by the Manufacturing Award.¹⁸⁶ However, as a consequence of a decision by the FWC in the 2014 Modern Award Review,¹⁸⁷ part-time home care and disability support employees are now entitled to a two hour minimum engagement, with other part-time community services employees entitled to a three hour minimum engagement.¹⁸⁸ We note this is still below the four hour minimum engagement for both casual and part-time employees in the Manufacturing Award.¹⁸⁹

The fragmentation of working time for casual workers and permanent part-time home care and disability support employees is facilitated by the limited working time protections within the SCHADS Award. The two hour minimum engagement period for casual employees is the same for permanent part-time employees, who are typically employed on low minimum guaranteed weekly hours contracts. Work for both casual and part-time employees may be characterised by broken and multiple short shifts contributing to some employees being underemployed but without the working time certainty to secure income through additional and separate employment.¹⁹⁰ While the SCHADS Award provides that permanent part-time workers are entitled to pro-rata conditions of full-time

¹⁸⁵ Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024) 99-102. ([Hyperlink](#)).

¹⁸⁶ Sara Charlesworth and Alexandra Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?' (2012) 54(2) *Journal of Industrial Relations* 164. ([Hyperlink](#)).

¹⁸⁷ *4 Yearly Review of Modern Awards – Casual Employment and Part-time Employment* [2017] FWCFB 3541. ([Hyperlink](#)).

¹⁸⁸ Fair Work Commission, *Social, Community, Home Care and Disability Services Industry Award 2010* (1 January 2010) cl 10.5. ([Hyperlink](#)).

¹⁸⁹ Fair Work Commission, *Manufacturing and Associated Industries and Occupations Award 2020* (29 May 2020) cls 10.2, 11.2. ([Hyperlink](#)).

¹⁹⁰ Sara Charlesworth and Jenny Malone, 'Re-Imagining Decent Work for Home Care Workers in Australia' (2017) 27(4) *Labour & Industry* 284, 289. ([Hyperlink](#)); See also Sara Charlesworth and Alexandra Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?' (2012) 54(2) *Journal of Industrial Relations* 164. ([Hyperlink](#)).

work, weaknesses in working-time regulation for part-time employees arguably provide for inferior employment outcomes and working time protection compared to full-time employees. These conditions provide employers with considerable flexibility in how they deploy part-time employees, that, in some instances approximates casual employment.¹⁹¹

Generally, a disadvantage to employees of artificially low guaranteed minimum hour working arrangements is that hours worked in addition to the guaranteed hours are paid at ordinary time rather than overtime rates (up to 38 hours a week). The lack of certainty in working time is not compensated through any form of wage premium.¹⁹² A 2018 study in the disability support sector, highlighted how extremely low guaranteed minimum hours, when combined with weak protection of changes to rosters, contributed to instability and irregularity in working time and income.¹⁹³ In the aged care sector, under both the Aged Care and SCHADS Awards, permanent part-time arrangements often result in insufficient guaranteed weekly hours, while workers are required to make themselves available to employers for a wider span of hours in order to secure additional hours of work and sufficient income.¹⁹⁴

Studies in home care for older people and the disability support sector also observe that fragmented working time and income insecurity is further affected by particular types of work tasks not being accounted for or recognised as ‘work’. A driver of low income for home care workers is that travel time between home care visits is not considered to be working time, in that each visit or episode of care is considered to be a separate one, with no remuneration or recognition of the time taken in travelling between clients as paid working time. In contrast travel time is recognised as work in the Aged Care Award.¹⁹⁵ In the disability support sector, funded by the National Disability Insurance Scheme (NDIS), the administration work required of employees and travel time is not recognised as

¹⁹¹ Sara Charlesworth, ‘Partial Protection? The Regulation of Home Care Workers’ Working’ in Colin Fenwick and Valérie Van Goethem (eds) *Regulating for Equitable and Job-Rich Growth* (Edward Elgar, 2017) 133. [\(Hyperlink\)](#).

¹⁹² Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67–90. [\(Hyperlink\)](#).

¹⁹³ Fiona Macdonald, Eleanor Bentham and Jenny Malone, ‘Wage Theft, Underpayment and Unpaid Work in Marketised Social Care’ (2018) 29(1) *The Economic and Labour Relations Review* 87. [\(Hyperlink\)](#). See also Donna Baines et al., ‘Precarity and Job Instability on the Frontlines of NDIS Support Work’ (Report, Centre for Future Work, September 2019) 34. [\(Hyperlink\)](#); Natasha Cortis et al., ‘Reasonable, Necessary and Valued: Pricing Disability Services for Quality Support and Decent Jobs’ (Research Report, Social Policy Research Centre, June 2017). [\(Hyperlink\)](#).

¹⁹⁴ Aaron Hart, Dina Bowman and Shelley Mallett, *Improving the Health of Older Aged Care Workers* (Report, Brotherhood of St Laurence, 2019) 5. [\(Hyperlink\)](#).

¹⁹⁵ Sara Charlesworth, ‘Partial Protection? The Regulation of Home Care Workers’ Working’ in Colin Fenwick and Valérie Van Goethem (eds) *Regulating for Equitable and Job-Rich Growth* (Edward Elgar, 2017) 143. [\(Hyperlink\)](#).

working time in the SCHADS award.¹⁹⁶ Such practices, most notably unpaid overtime, are evident in feminised social services. They are impacted by underfunding and requirements to meet client demand. In combination such practices make working time highly contested and provide workers with limited agency as to how they manage their work and care.¹⁹⁷

5.4.Span and spread of ordinary hours of work

Award provisions concerning the span or spread of hours typically address when employees, both casual and permanent, can be rostered to work their ordinary hours of work without attracting overtime or penalty rates. The review of awards by the Commission reported differences in 25 modern awards as to whether ordinary hours of work include work on the weekends. Most but not all awards distinguish between work undertaken on weekdays and weekends but not all awards include a stipulated spread or span of ordinary hours of work. There are also distinctions as to whether awards specify a maximum number of daily hours, or whether there are limits on the number of days per week where a worker can be rostered and whether hours are to be averaged over an extended period. There are differences between awards as to whether work outside of ordinary hours attracts an overtime or penalty payment.¹⁹⁸

The scheduling of hours is a key work and care consideration given the need for working time predictability to manage ongoing care responsibilities such as care for children, elders or people with disability. This is particularly crucial in relation to unsocial hours. Studies have highlighted social and emotional benefits of parents spending time with their children on the weekend¹⁹⁹ and the conflicts that arise for worker-carers through their work being scheduled at ‘unsocial’ times.²⁰⁰ Further, affordable child care may not be accessible on weekends.²⁰¹ Weekend work increases work-family conflict, a finding evident for both couple and single parents and equally impactful for both mothers and fathers. Mediating factors include the extent to which worker-carers have agency over the

¹⁹⁶ Natasha Cortis et al., ‘Reasonable, Necessary and Valued: Pricing Disability Services for Quality Support and Decent Jobs’ (Research Report, Social Policy Research Centre, June 2017). ([Hyperlink](#)).

¹⁹⁷ Social Policy Research Centre, University of New South Wales, Submission No 19 to Senate Select Committee Inquiry on Work and Care (Natasha Cortis and Megan Blaxland) (September 2022) 5–6. ([Hyperlink](#)).

¹⁹⁸ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 89–98. ([Hyperlink](#)).

¹⁹⁹ Lyn Craig and Judith Brown, ‘Weekend Work and Leisure Time with Family and Friends: Who Misses Out?’ (2014) 76(4) *Journal of Marriage and Family* 710, 723. ([Hyperlink](#)).

²⁰⁰ Natasha Cortis et al., ‘Reasonable, Necessary and Valued: Pricing Disability Services for Quality Support and Decent Jobs’ (Research Report, Social Policy Research Centre, June 2017). ([Hyperlink](#)); Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014* (Research Report, Centre for Work + Life: University of South Australia, September 2014). ([Hyperlink](#)).

²⁰¹ Productivity Commission, ‘A Path to Universal Early Childhood Education and Care’ (Draft Report, November 2023) 49. ([Hyperlink](#)).

scheduling of weekend hours, a facility not typically available to employees scheduled to work on weekends. While as set out above, the FW Act provides for workers to seek flexibility in their working time arrangements, provisions, such as the right to request flexible work arrangements, are routinely not available to all casual workers.²⁰² Further there are currently limited rights to refuse to work rosters on weekends, with the ‘right to refuse’ not seen as included in the award and NES safety net.²⁰³

5.5 Pattern of work, rosters, rostering

Under the FW Act, modern awards are permitted to include terms concerning arrangements for when work is performed, including hours of work, rostering, notice periods and variations to working hours.²⁰⁴ Multiple award provisions contribute to the rostering provisions for workers including the span of hours, the stipulation of ordinary hours of work and explicit rostering provisions. The Commission’s review of 25 awards reports those provisions concerning changes to rosters, provide for a broad range of notification periods and exceptions to notice periods.²⁰⁵ There is varying practice on whether the modern awards reviewed enable the rostering of hours outside of previously advised availability or in excess of guaranteed regular hours.²⁰⁶ Similarly there is a range of provisions concerning broken shifts, namely whether there is any specific consideration of broken shifts, whether the award provides for shifts that are broken into multiple parts by an unpaid meal break, whether the award provides a span of hours for broken shifts, and whether the award requirement is that hours are worked continuously.²⁰⁷

5.5.1 On-demand flexibility, unpredictable rosters

Rostering instability and unpredictable work hours is impactful for all employees but is particularly adverse for worker-carers. In the retail industry poor rostering practices, enabled by weak award protections and employer practice, marginalise many workers’ income security and deny them the

²⁰² Inga Laß and Mark Wooden, ‘Weekend Work and Work-family Conflict: Evidence from Australian Panel Data’ (2022) 84 *Journal of Marriage and Family* 250, 268-269. ([Hyperlink](#)).

²⁰³ Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) xviii [8.126]. ([Hyperlink](#)).

²⁰⁴ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) [33]. ([Hyperlink](#)).

²⁰⁵ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 149, 173–174. ([Hyperlink](#)). See also Sara Charlesworth and Alexandra Heron, ‘New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture’ (2012) 54(2) *Journal of Industrial Relations* 164, 175-176 concerning differences between the SCHADS and Aged Care Awards concerning notices of changes to rosters. ([Hyperlink](#)).

²⁰⁶ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 173–180. ([Hyperlink](#)).

²⁰⁷ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 164–166. ([Hyperlink](#)).

ability to provide care in preferred ways, described as ‘care-theft’.²⁰⁸ Within the industry employer-driven flexibility is evidenced through regular adjustments to the number of hours worked.²⁰⁹ While the General Retail Industry Award requires full-time hours to be agreed and those of part-time workers to be ‘reasonably predictable’, the reported experience of retail industry employees is they are subject to unstable scheduling, with some employers implementing an ‘on-demand flexibility’ presuming that workers are able to change start and finish times or days of work. There is some evidence changes may be advised unilaterally and without agreement or consultation.²¹⁰ Through such rostering practices, resources for care are depleted and the impact of requirements for almost constant availability, leads to the reorganisation of care plans and impacts employees’ children and others who rely on them for care and support.²¹¹

‘On-demand’ flexibility or ‘on call’ work extends beyond the retail industry and operates in tandem with the practice of minimum-hour work arrangements and casual work arrangements. Women with caring responsibilities are disproportionately likely to be ‘on-demand’ workers in either casual employment or in short-hours part-time employment. The irregular, fragmented hours inherent in on-demand work adversely affects worker-carers. In particular, this working-time insecurity and underemployment dislocates daily life and provides limited control over work-care schedules.²¹²

5.6 Overtime (paid and unpaid)

5.6.1 Provisions in modern awards

The Commission’s review of selected modern awards notes that the payment of overtime is connected to the relationship between ordinary or guaranteed hours, the span of hours, days worked, type of employment and other award provisions and that there is a varied approach to the relation between

²⁰⁸ Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Care Theft: Family Impacts of Employer Control in Australia’s Retail Industry’ (2023) 44(1) *Critical Social Policy* 106. ([Hyperlink](#)).

²⁰⁹ Serena Yu and David Peetz, ‘Non-Standard Time Wage Premiums and Employment Effects: Evidence from an Australian Natural Experiment’ (2019) 57(1) *British Journal of Industrial Relations* 33. ([Hyperlink](#)).

²¹⁰ Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Care Theft: Family Impacts of Employer Control in Australia’s Retail Industry’ (2023) 44(1) *Critical Social Policy* 106. ([Hyperlink](#)).

²¹¹ Natasha Cortis, Megan Blaxland and Sara Charlesworth, ‘Care Theft: Family Impacts of Employer Control in Australia’s Retail Industry’ (2023) 44(1) *Critical Social Policy* 106. ([Hyperlink](#)). See also Natasha Cortis, Megan Blaxland and Sara Charlesworth, *Challenges of Work, Family and Care for Australia’s Retail, Online Retail, Warehousing and Fast Food Workers* (Report, Social Policy Research Centre, 2021). ([Hyperlink](#)); Shop Distributive and Allied Employee Union Submission No 83 to Senate Select Committee Inquiry on Work and Care (September 2022). ([Hyperlink](#)). See also oral evidence of the Working Women’s Centre of South Australia about rostering practice in the cleaning industry to the Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) 116 [6.32]. ([Hyperlink](#)).

²¹² Iain Campbell, Fiona Macdonald and Sara Charlesworth, ‘On-Demand Work in Australia’ in Michelle O’Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 80, 86. ([Hyperlink](#)).

overtime and casual loading provisions in modern awards. While overtime penalty rates may be reasonably consistent, they are applied differently to full-time, part-time and casual workers. Some awards provide for time off in lieu of overtime and there is variation as to whether equivalent time to the overtime payment or to actual time worked.²¹³

5.6.2 Prevalence of overtime (paid and unpaid)

Overtime is a prevalent feature of the Australian labour market, with 2022 data indicating that seven in ten workers reporting having performed work outside of scheduled working hours. Of those that completed overtime, almost half (44%) reported often performing overtime to meet workplace expectations, while almost another third (31%) reported performing overtime sometimes. The most common reason for overtime is having too much work (36%), followed by staff shortages (28%). Men are more likely than women to perform overtime (78% compared to 64%), a finding linked to women's disproportionate share of unpaid family and caring work.²¹⁴

5.7 Working hours regulation

In addition to addressing specific provisions regarding the hours of work and the flexibility to manage work and care, submissions to the Senate Select Committee on Work and Care and the Productivity Commission Inquiry into an unpaid carer leave entitlement addressed broader questions of employment regulation.²¹⁵ Submissions to these inquiries featured different perspectives. Some submissions held award regulation to be key to addressing insecure work and low pay.²¹⁶ A contrasting view is that modern awards are too prescriptive and directive and there is insufficient opportunity for employers and workers to determine their mutual interests, without the intervention of a third party.²¹⁷

²¹³ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 185–191. ([Hyperlink](#)). See also Sara Charlesworth and Alexandra Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture' (2012) 54(2) *Journal of Industrial Relations* 164, 176, concerning differences between the SCHADS, Aged Care and Manufacturing Awards regarding notice of roster changes. ([Hyperlink](#)).

²¹⁴ Eliza Littleton and Lily Raynes, 'Call Me Maybe (Not): Working Overtime and a Right to Disconnect in Australia' (Research Paper, The Centre for Future Work at the Australia Institute, November 2022) 4–10. ([Hyperlink](#)).

²¹⁵ The Productivity Commission, in the context of assessing whether the NES should include an extended unpaid carer's leave entitlement, noted that there were disparate views as to whether support for carers was best facilitated by an additional entitlement or through bespoke flexibility arrangements: Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 26–29. ([Hyperlink](#)).

²¹⁶ Australian Council of Trade Unions, Submission No 122 to Senate Select Committee Inquiry on Work and Care (September 2022). ([Hyperlink](#)),

²¹⁷ Judith Sloan, *Industrial Relations in a Post-COVID World* (Analysis Paper No 12, Centre for Independent Studies, August 2020) ([Hyperlink](#)).

6 Leave availability and accessibility

6.1 Introduction

In this section of the Report we review literature addressing rights to paid and unpaid leave in the modern awards and the National Employment Standards (NES) framework, and their impact on employees' work and care responsibilities. The NES includes 12 minimum standards of employment, five of which explicitly concern leave entitlements:

- (Unpaid) parental leave and related entitlements (Division 5);
- Personal/carer's leave, compassionate leave and family and domestic violence leave (Division 7);
- Annual leave (Division 6);
- Long service leave (Division 9).

The relevant NES set out the quantum of leave and any particular requirements concerning access to leave. As noted above casual employees, apart from family and domestic violence leave, are explicitly precluded from rights to paid personal/carer's leave, compassionate leave and annual leave. Modern awards can include provisions concerning the taking of leave, in addition to specifying leave entitlements that exceed the NES standard. Modern awards may also specify the access of part-time and casual workers to leave provisions. The Commission's review of 25 modern awards identifies distinctions between awards in these matters. To situate our review of the relevant literature, we initially present a brief summary of the NES entitlements and outline broadly the distinctions in modern awards identified by the Commission.

While our review does address the NES on unpaid parental leave, we do not include explicit consideration of paid parental leave as such provision is outside the scope of the Modern Awards Review. Yet the adequacy of Australia's paid parental leave scheme is central to debates about work and care in Australia.²¹⁸ Part of this centrality owes its place to the importance of those institutional measures that address or respond to, even if partially and weakly to date, the gendered impact of parenthood on long-term earnings and retirement wealth. Parenthood is associated with higher longer-term earnings for men, an association not evident for women, differences that are

²¹⁸ The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 6. ([Hyperlink](#)).

consequential for the retirement wealth of women and men.²¹⁹ Paid parental leave is also part of complex institutional context whereby rights to unpaid parental leave and return to work ‘guarantees’ are within the scope of the FW Act and explicitly included in the NES. In contrast it is the Parental Leave Act²²⁰ that is the legislative basis of Australia’s nationally funded system of paid parental leave. Other forms of paid parental leave may also be available through enterprise agreements and workplace policies.²²¹ There are also inconsistencies between the eligibility provision for paid parental leave compared to those for unpaid parental leave.²²² Most notable, eligibility for unpaid parental leave requires 12 months of continuous service, a requirement that excludes employees with intermittent and fragmented employment arrangements. In contrast eligibility for paid parental leave ‘enables greater flexibility in the amount and regularity of work required for eligibility’.²²³

Consistent with other sections of this Report, we review submissions to the Senate Select Committee on Work and Care recognising that a number of recommendations of the Committee address access to leave and the quantum of leave entitlements. Leave arrangements for carers was also a matter addressed by the Productivity Commission through the examination of the potential economic and social impacts of adding an entitlement to extended unpaid carer leave to the National Employment Standards.²²⁴ A key context for the Productivity Commission Inquiry was the work of the Royal Commission into Aged Care Quality and Safety which identified that more support of informal carers in the aged care system was required.²²⁵ To that end, Recommendation 43 made by the Royal Commission asked the Australian Government to review whether the NES should be amended to

²¹⁹ Siobhan Austen and Astghik Mavisakalyan, ‘Gender Gaps In Long-Term Earnings And Retirement Wealth: The Effects of Education and Parenthood’ (2018) 60(4) *Journal of Industrial Relations* 492. ([Hyperlink](#)). See also Alison Preston and Elisa Birch, ‘Women, COVID-19 and Superannuation, (2021) 24(2)*The Australian Journal of Labour Economics* 175. ([Hyperlink](#)).

²²⁰ Paid Parental Leave Act 2010 (Cth).

²²¹ Marian Baird, Myra Hamilton, and Andrea Constantin, ‘Gender Equality and Paid Parental Leave in Australia: A decade of giant leaps or baby steps?’ (2021) 63 (4) *Journal of Industrial Relations* 546; see also Iain Campbell and Sara Charlesworth, ‘The National Employment Standards: An Assessment’ (2020) 33 *Australian Journal of Labour Law* 36, 47. ([Hyperlink](#)).

²²² Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour* 184, 189. ([Hyperlink](#)); Gillian Whitehouse and Michelle Brady, ‘Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints Within The Australian Policy Framework’ (2019) 29(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 257, 263-5. ([Hyperlink](#)).

²²³ Gillian Whitehouse and Michelle Brady, ‘Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints Within The Australian Policy Framework’ (2019) 29(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 257, 265. ([Hyperlink](#)).

²²⁴ Productivity Commission, ‘A Case for An Extended Unpaid Carer Leave Entitlement?’ (Inquiry Report, 15 September 2023). ([Hyperlink](#)).

²²⁵ *Royal Commission into Aged Care, Quality and Safety: Final Report: Care, Dignity and Respect* (Final Report, 1 March 2021) vol 3A, 1. ([Hyperlink](#)).

provide for an additional entitlement to unpaid carer leave.²²⁶ Through their inquiry the Productivity Commission focused exclusively on unpaid leave and did not address paid leave requirements, despite several submissions to the Productivity Commission Inquiry arguing for the extension of paid carers leave to casual workers,²²⁷ an issue that is discussed below.

Indicative proposals for change, identified through the literature and in select submissions to inquiries as they concern leave entitlements are summarised in Appendix 1.

6.2 Leave Provisions in NES

The following table summarises the leave entitlements provided by the NES.²²⁸

Unpaid parental leave and related entitlements	Employees are entitled to 12 months of unpaid parental leave if they have completed 12 months of continuous service with their employer. Standard applies to employees who have, or will have, responsibility for the care of a child. Guarantees a return to work for eligible employees. Casual employees are included if they have: been working for their employer on a regular and systematic basis for at least 12 months; and a reasonable expectation of continuing work for their employer on a regular and systematic basis, had it not been for the birth (or expected birth) or adoption (or expected adoption) of a child. Each parent can take up to 12 months unpaid parental leave, or up to 24 months, if they request the additional 12 months and their employer agrees. An employee’s entitlement to unpaid parental leave is not affected by how much leave their partner takes. The leave can be taken as a single continuous period, flexibly (up to 100 days), or a combination of both. Employees can take up to 100 days of their unpaid parental leave flexibly at any time within 24 months of a child’s birth or adoption. There are additional entitlements including to rights to consultation while on leave about any employer decisions that may impact an employee’s pre-parental leave position; unpaid special parental leave, where an eligible employee is not fit
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²²⁶ *Royal Commission into Aged Care, Quality and Safety: Final Report: Care, Dignity and Respect* (Final Report, 1 March 2021). ([Hyperlink](#)).

²²⁷ See as example, Carers NSW Submission No 20 to Productivity Commission Inquiry into Carer Leave (August 2022) ([Hyperlink](#)); The Women, Work and Policy Research Group and the Australian Work + Family Policy Roundtable, Submission No 54 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)); Shop Distributive and Allied Employers Union, Submission No 38 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)); and Australian Nursing and Midwifery Federation, Submission No 39 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)).

²²⁸ Based on review of provisions in Part 2-2 of the FW Act and information available through the Fair Work Ombudsmen website, <<https://www.fairwork.gov.au>>.

	for work because of a pregnancy-related illness, miscarriage or termination; and transfer to a safe job or paid 'no safe job' leave, where an eligible employee cannot continue in their normal job or continue to work at all because no alternative safe job is available.
Paid personal/carer's leave	All employees, excluding casual employees, are entitled to leave – a total of 10 days leave for full-time workers and pro-rata for part-time workers (based on ordinary hours of work).
Unpaid carer's leave	Casual employees are entitled to 2 days leave each time an immediate family member or household member of the employee required care and support because of illness, injury or an unexpected emergency. Full-time and part-time employees can also access this entitlement but only if they have exhausted their paid personal/carer's leave.
Compassionate leave	<p>Employees can take compassionate leave if:</p> <ul style="list-style-type: none"> • a member of their immediate family or household dies, or contracts or develops a life-threatening illness or injury; • a baby in their immediate family or household is still born; • they have a miscarriage; or • their current spouse or de facto partner has a miscarriage. <p>Employees are entitled to 2 days compassionate leave each time they meet the criteria. Full-time and part-time employees receive paid compassionate leave, paid at the base pay rate for the ordinary hours they would have worked. Casual employees are entitled to 2 days unpaid compassionate leave.</p>
Family and domestic violence leave	All employees are entitled to 10 days of paid family and domestic violence leave each year.
Annual leave	All employees, excluding casual employees, are entitled 4 weeks of annual leave based on their ordinary hours of work or 5 weeks of annual leave where they are a shift-worker.
Long service leave	Under the NES, an employee is entitled to long service leave in accordance with their applicable pre-modernised award.

6.3 Leave provisions in modern awards

The Commission's review of 25 awards included an assessment of whether awards simply referred to or reflected the NES provisions or provided additional entitlements.

- Paid personal/carer's leave - all 25 awards referred to the NES standard.²²⁹
- Compassionate leave - 24 modern awards refer to the NES standard while the Higher Education General Staff Award provides for 3 days of compassionate leave per occasion.²³⁰
- Annual leave – most awards do not provide casual employees with access to annual leave, an exception is the Manufacturing Award, where casual vehicle manufacturing employees engaged in the technical field are entitled to a casual loading of 17.5% together with annual leave and annual leave loading on a pro rata basis.²³¹
- Ceremonial leave - this form of leave is not addressed in the NES and the majority of modern awards do not provide for ceremonial leave for First Nations employees. This exclusion is in addition to the difficulties faced by First Nations Australians in accessing care and support services.²³²

6.4 Who is a carer, what is care?

Access to paid and unpaid carer's leave in the FW Act is limited to 'immediate family' and 'household members' only. Immediate family is defined as a spouse, defacto partner, child, parent, grandparent, grandchild or sibling of the employee. Submissions to the Senate Select Work and Care and the Productivity Commission noted this definition was unnecessarily limited²³³, poorly aligned to the care needs of the worker-carers and the current provision of unpaid informal care. The definition of who is a carer and what types of care are held to be eligible in practice means that the workplace relations system excludes access to leave for particular types of care. Access to leave provisions, it is argued, should support work and care for people with different care responsibilities and be inclusive of care requirements across the life course and include activities associated with the organisation of formal

²²⁹ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 238. ([Hyperlink](#)).

²³⁰ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 25. ([Hyperlink](#)).

²³¹ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 226. ([Hyperlink](#)).

²³² Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) 146. ([Hyperlink](#)). See also Centre for Disability Research and Policy, Submission No 7 to Senate Select Committee Inquiry on Work and Care (August 2022) (Damian Mellifont and Jennifer Smith-Merry) 16. ([Hyperlink](#)).

²³³ Carers Australia, Submission No 36 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)).

care services.²³⁴ Eligibility requirements should also be inclusive of diverse families and household situations, different cultural practices and support shared care within families and communities.²³⁵

Worker-carers who are excluded from the current statutory definition include:

- Worker-carers from Culturally and Linguistically Diverse (CALD) communities who provide care to their extended family;²³⁶
- First Nations worker-carers who provide care within their kinship system;²³⁷
- Worker-carers who provided care to members of the community, who fall outside traditional constructs of family.²³⁸

More broadly members of the LGBTQIA+ community experienced challenges in having their relationships recognised as partners or family.²³⁹

6.5 Extending the access and quantum of leave entitlements

The literature reviewed for this Report addresses access to leave and the quantum of leave entitlements under the NES in five interrelated areas:

- The exclusion of casual employees from a number of leave provisions in the NES;
- Access to paid personal and carer's leave by casual employees;
- Extending the quantum of unpaid leave for employees, noting the particular focus of the conclusions of the Productivity Commission about extending the entitlement to support informal care of older people;

²³⁴ Australian Nursing and Midwifery Federation – Victorian Branch, Submission No 1 to Senate Select Committee Inquiry on Work and Care (September 2022) 3, 5. ([Hyperlink](#)); Working Women's Centre, South Australia, Working Women Queensland, Northern Territory Working Women's Centre, Submission No 94 to Senate Select Committee Inquiry on Work and Care (September 2022) 3. ([Hyperlink](#)); Centre for Future Work, Submission No 72 to Senate Select Committee Inquiry on Work and Care (September 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 7–8. ([Hyperlink](#)).

²³⁵ Centre for Future Work Senate Select Committee Inquiry on Work and Care (September 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 7–8. ([Hyperlink](#)).

²³⁶ Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care (8 September 2022). 10. ([Hyperlink](#)).

²³⁷ National Aboriginal Community Controlled Health Organisation, Submission No 5 to the Productivity Commission Inquiry Into Carer Leave (August 2022) 3. ([Hyperlink](#)); Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care (8 September 2022), 10; see also Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future* (Report, December 2020) 328. ([Hyperlink](#)).

²³⁸ Shop Distributive and Allied Employee Union Submission No 83 to Senate Select Committee Inquiry on Work and Care (September 2022) 27. ([Hyperlink](#)).

²³⁹ LGBTIQ Health Australia, Submission 103 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 2–3. ([Hyperlink](#)); Carers NSW, Submission No 27 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 10. ([Hyperlink](#)).

- Access to paid leave and payment of the casual loading;
- Separating personal and carer’s leave and the quantum of personal and carer’s leave entitlements.

Prior to addressing this literature we note the available data on leave use. Data requested from the Senate Select Committee on Work and Care identifies a stable pattern of usage of each of two categories of leave (sick leave; maternity, paternity, bereavement, family and carer’s leave) in the period 2016-2020, with an average leave of three days per employee per annum for each of sick leave and other leave.²⁴⁰

Unpaid and paid leave arrangements support workers align their paid work with their work outside of life, including caring responsibilities. Casual employees have less access to paid and unpaid leave entitlements, including personal/carer’s leave, annual leave and parental leave. This lack of access means that it is more difficult for casual employees than it is for other employees to manage their paid work and care needs.²⁴¹

The disproportionate engagement of women in casual employment underlines the complex relationship between employment choice and care needs. As we noted in Section 2, this relationship is impacted by and reflected in inadequate institutional supports for work and care and women’s disproportionate share of unpaid care work. Women are often engaged in casual employment because of their care needs and yet their casual employment status provides them with highly limited access to leave that would assist them better manage their work and care.²⁴² Several submissions to the Senate Select Committee on Work and Care supported extending paid personal/carer’s leave to casual workers to support them balance work and care responsibilities.²⁴³ The availability of paid

²⁴⁰ The Department of Employment and Workplace Relations (DEWR) provided data to the Committee using the findings of the Household Income and Labour Dynamics in Australia (HILDA) survey, Senate Select Committee on Work and Care, *The Senate Select Committee on Work and Care: Interim Report* (Report, October 2022) 74 [5.16]. [\(Hyperlink\)](#). We note the data are not clear as to whether employees were casual or permanent or full-time or part-time.

²⁴¹ Iain Campbell, ‘On-call and Related Forms of Casual Work in New Zealand and Australia’ (Working Paper No 102, International Labour Organization, Conditions of Work and Employment, 2018) 28. [\(Hyperlink\)](#); see also Sara Charlesworth and Jenny Malone, ‘Re-Imagining Decent Work for Home Care Workers in Australia’ (2017) 27(4) *Labour & Industry* 284, 289–290. [\(Hyperlink\)](#); Sara Charlesworth and John Howe, ‘The Enforcement of Employment Standards in Australia: Successes and Challenges in Aged Care’ (2018) 34 *International Journal of Comparative Labour Law and Industrial Relations* 111, 119. [\(Hyperlink\)](#); Sara Charlesworth and Meg Smith, ‘Gender Pay Equity’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia: What It is and What to Do About It* (University of Adelaide Press, 2018) 85. [\(Hyperlink\)](#)

²⁴² Centre for Future Work Senate Select Committee Inquiry on Work and Care (September 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 9. [\(Hyperlink\)](#).

²⁴³ Shop Distributive and Allied Employee Union Submission No 83 to Senate Select Committee Inquiry on Work and Care (September 2022) 3 [\(Hyperlink\)](#); Australian Nursing and Midwifery Federation, Submission No 84 to Senate Select Committee Inquiry on Work and Care (September 2022) 10. [\(Hyperlink\)](#).

family and domestic violence leave to casual workers provides a framework that recognises the importance of income and job protection for casual workers, and one that could be extended to personal/carer's leave.²⁴⁴

Extending paid leave to casual workers may be viewed as incompatible with the payment of a casual loading, which is broadly understood to be payment as compensation for the lack of paid leave entitlements. This positioning however ignores key aspects of labour market practice and is at odds with providing better work-care supports for employees employed on a casual basis. There is evidence that while casual work is insecure, many casual workers have been employed by their current employer for an extended period, rather than short intermittent, sporadic episodes of employment.²⁴⁵ The casual loading may also no longer adequately compensate for all the disadvantages of casual employment, such as the lack of job security and access to career progression, and there is some evidence that not all casual workers receive the casual loading.²⁴⁶ There is also scope for consideration of systems of portable leave entitlements to support improved and sustainable work-care balance, including a better sharing of care.²⁴⁷

The Productivity Commission assessed that extended unpaid carer leave in the NES for care of older people would have few positive impacts and pose some costs. Key to this finding was the assessment that there would be limited take up of the entitlement and that extended unpaid leave would neither increase workforce participation nor the number of informal carers or reduce the demand for formal care. Yet the Productivity Commission also concluded that assessing the impacts of an extended unpaid leave entitlement was challenging as the evidentiary basis was limited.²⁴⁸ Its reservations

²⁴⁴Centre for Future Work Senate Select Committee Inquiry on Work and Care (September 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 9. ([Hyperlink](#)). See also Iain Campbell and Sara Charlesworth, 'Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards' (2023) 36 *Australian Journal of Labour Law* 232. ([Hyperlink](#)).

²⁴⁵ In 2016, almost 60% of casual employees had been employed for more than 12 months with their current employer: Iain Campbell, 'On-call and Related Forms of Casual Work in New Zealand and Australia' (Working Paper No 102, International Labour Organization, Conditions of Work and Employment, 2018) 19. ([Hyperlink](#)); See also Iain Campbell and Sara Charlesworth, 'Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards' (2023) 36 (3) *Australian Journal of Labour Law* 232, 238. ([Hyperlink](#)); and Sarah McKenzie and Emma Dawson, 'Towards Fairness and Security: Reforming Casual Employment in Australia' (Report, Per Capita, July 2023). ([Hyperlink](#)).

²⁴⁶ Iain Campbell and Sara Charlesworth, 'Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards' (2023) 36 (3) *Australian Journal of Labour Law* 232, 255. ([Hyperlink](#)); see also Inga Laß and Mark Wooden, 'The Structure of the Wage Gap for Temporary Workers, Evidence from Australian Panel Data' (2019) 57(3) *British Journal of Industrial Relations* 453, 473–474. ([Hyperlink](#)).

²⁴⁷ Centre for Future Work Submission to the Senate Select Committee on Work and Care (September 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 9. ([Hyperlink](#)); see also in regards to long service, Ray Markey et al., 'Extending Employment Entitlements to Non-standard Workers: Alternative Models for Long Service Leave Portability' (2016) 58(1) *Journal of Industrial Relations* 46 ([Hyperlink](#)).

²⁴⁸ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 1–8. ([Hyperlink](#)).

noted, the Productivity Commission provided a model entitlement for extended leave for carers of older persons which identified duration (1-12 months), notice period (one month) and eligibility requirements (12 months continuous service). Casual workers would be deemed eligible if they were 'regular' casual employees.²⁴⁹ The Productivity Commission further examined the merit of an unpaid entitlement for other types of care, such as care for people with disability or illness, regardless of their age, and concluded that a case for this entitlement is similar to that for carers of older people.²⁵⁰ The Productivity Commission concluded that if the NES were amended to include an entitlement to extended unpaid carer leave, on the grounds of equity and administrative simplicity, the entitlement should be available to all carers, not simply carers of older people.²⁵¹

A key distinction between the scope of work between the Senate Select Committee and the Productivity Commission was that the Productivity Commission did not address paid leave entitlements. Noting this difference in scope, in broad terms, the findings of the Productivity Commission concerning the merit of extending an unpaid carer leave entitlement stood in contrast to some submissions to it and to findings of the Select Senate Work and Care Committee. In general terms those submissions supported an extended period of unpaid leave not only for care of older people but to address a wider range of care needs.²⁵² The importance of unpaid leave and extending the current quantum of leave, most notably for casual workers, was also positioned against the gendered pattern of unpaid caring work and casual employment. Casual workers have limited access to paid entitlements and the current entitlement is set at two days unpaid leave.²⁵³ In assessing the impact on business of changes to the unpaid carers leave entitlement, the Productivity Commission was asked to consider the research concerning the impact of sick and parental leave, which suggests that any costs to employers are likely to be outweighed by the benefits.²⁵⁴ Both the Senate Select

²⁴⁹Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 7. ([Hyperlink](#)).

²⁵⁰ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 5. ([Hyperlink](#)).

²⁵¹ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 6. ([Hyperlink](#)).

²⁵² See as an example, Shop Distributive and Allied Employee Union Submission No 83 to Senate Select Committee Inquiry on Work and Care (September 2022) 29. ([Hyperlink](#)); Carers Australia, Submission No 10 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 5. ([Hyperlink](#)); Shop Distributive and Allied Employers Union, Submission No 38 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)); Carers Australia, Submission No 36 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)).

²⁵³ The Women, Work and Policy Research Group and the Australian Work + Family Policy Roundtable, Submission No 54 to Productivity Commission Inquiry into Carer Leave (August 2022) 2–3. ([Hyperlink](#)).

²⁵⁴ The Women, Work and Policy Research Group and the Australian Work + Family Policy Roundtable, Submission No 54 to Productivity Commission Inquiry into Carer Leave (August 2022) 2–3. ([Hyperlink](#)).

Committee and the Productivity Commission received submissions about the impact of leave, notwithstanding its benefits, on business operations.²⁵⁵

A consistent theme through the findings of the Productivity Commission was that there may be other measures, other than extending the unpaid carers leave entitlement to address work and care. The Productivity Commission noted that use of the recently amended right to request flexible work arrangements within the NES and also Individual Flexibility Agreements (IFAs) may provide better ways to support carers.²⁵⁶ The Productivity Commission concluded that amendments to the NES may improve support to informal carers and provide them with greater flexibility including through removing the requirement that two days unpaid carer leave can only be taken when an employee's paid carer leave entitlement is exhausted²⁵⁷ recognising that only permanent full-time and part-time employees have access to paid leave. Linked to these measures was the review of care relationships of what are considered to be eligible occasions of care.²⁵⁸

A matter addressed in several submissions to the Senate Select Committee and the Productivity Commission was that an exclusive reliance on unpaid carer's leave should not be at the expense of policy measures that would support the access, availability and quality of paid care.²⁵⁹ In part these submissions were reflected in the Senate Select Committee recommendations concerning the importance to work and care architecture of early childhood education and care, disability and aged care²⁶⁰ and the Productivity Commission findings concerning access to formal care and respite care services for aged care recipients.²⁶¹

There is also some concern expressed in several submissions to the Select Senate Committee on Work and Care that the entitlement of personal/carer's leave combines two very different forms of leave; one to do with an employee's own health, and the other to support their care requirements for others.

²⁵⁵ See as examples, Evidence to Senate Select Committee on Work and Care, Canberra, 16 September 2022, 52 (Alexi Boyd). ([Hyperlink](#)); Australian Small Business and Family Business Ombudsmen, Submission No 26 to Productivity Commission Inquiry into Carer Leave (August 2022). ([Hyperlink](#)).

²⁵⁶ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 4, 25. ([Hyperlink](#)).

²⁵⁷ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 5. ([Hyperlink](#)).

²⁵⁸ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 5, 10. ([Hyperlink](#)).

²⁵⁹ Australian Services Union, Submission No 23 to Senate Select Committee Inquiry on Work and Care (17 September 2022) 8–9 ([Hyperlink](#)); Australian Services Union, Victorian and Tasmanian Branch, Submission No 30 to Productivity Commission Inquiry into Carer Leave (August 2022) 1, 5. ([Hyperlink](#)).

²⁶⁰ Senate Select Committee on Work and Care, *Final Report* (March 2023): see as an example recommendations 1 [8.11], 3 [8.31], 10 [8.62]. ([Hyperlink](#)).

²⁶¹ Productivity Commission, 'A Case for An Extended Unpaid Carer Leave Entitlement?' (Inquiry Report, 15 September 2023) 9, 67. ([Hyperlink](#)).

A part-time or full-time employee may use all their personal/carer's leave entitlements, in addition to annual leave, for caring responsibilities at the expense of using leave for their own well-being.²⁶² These concerns informed proposals for an increased quantum of paid carer's leave not only to address this distinction but also to reflect the lived experience of caring requirements more adequately.²⁶³ Such considerations, at times, occurred in the context of an assessment that the current personal and carer's leave entitlement of 10 days was inadequate to address personal and caring leave needs.²⁶⁴

6.6 Unpaid parental leave

The current unpaid parental leave and related entitlements standard reflects changes made through the SJPB Act²⁶⁵ and the Fair Work Legislation Amendment (Protecting Worker Entitlements) Act.²⁶⁶

Changes introduced through the SJPB Act addressed requests for extending the period of unpaid parental leave by a further 12 months. Through the amendments, employers are required to respond to a request within 21 days, either granting the request, or refusing the request only after discussion between the employer and employee and a genuine attempt to reach an agreement. Employers must have regard to the consequences of refusal and may only do so on reasonable business grounds. Changes included a dispute resolution process.²⁶⁷ This change meant that requests for an extension of unpaid parental leave, together with the right to request provisions, now include dispute resolution and enforcement provisions.²⁶⁸ These changes, in combination, may, however, not support pregnant women who have encountered unfair treatment at work, and may have relied upon informal

²⁶² Carers Tasmania, Submission No 85 to Senate Select Committee Inquiry on Work and Care (8 September 2022) 9–10. See also Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 5 ([Hyperlink](#)).

²⁶³ Australian Nursing and Midwifery Federation, Submission No 84 to Senate Select Committee Inquiry on Work and Care (September 2022) 8–9 ([Hyperlink](#)).

²⁶⁴ Carers Tasmania, Submission No 37 to Productivity Commission, *Inquiry into Carer Leave* (August 2022) 19. ([Hyperlink](#)); Carers NSW, Submission No 27 to Senate Select Committee on Work and Care, (8 September 2022) 14. ([Hyperlink](#)); see also additional comments by Australian Greens and Recommendation 8 calling for 10 days of personal leave and 10 days of carer's leave, Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) 212. ([Hyperlink](#)).

²⁶⁵ Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) sch 1, s 25B.

²⁶⁶ Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth) sch 2.

²⁶⁷ Andrew Stewart, Shae McCrystal and Anthony Forsyth, 'Will Pay be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms' (2023) 36(2) *Australian Journal of Labour Law* 104 ([Hyperlink](#)).

²⁶⁸ Senate Select Committee on Work and Care, *Final Report* (Report, March 2023) 111 [6.4].([Hyperlink](#)); see also Andrew Stewart, Shae McCrystal and Anthony Forsyth, 'Will Pay be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms' (2023) 36(2) *Australian Journal of Labour Law* 104 ([Hyperlink](#)).

strategies to negotiate modifications to their duties to address the effects of pregnancy as the provisions regarding special leave and alternative duties are unchanged.²⁶⁹

These SJBP amendments directly addressed concerns raised in several submissions to the Senate Select Committee on Work and Care concerning flexibility. While acknowledging these changes, the Senate Select Committee reaffirmed its recommendation to introduce a positive duty on employers to ‘reasonably accommodate’ flexible working arrangements.²⁷⁰

The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act introduced greater flexibility in the taking of unpaid parental leave under the NES, namely:

- *increased flexibility for working parents by allowing them to take up to 100 days of their 12-month unpaid parental leave entitlement flexibly (was formerly 30 days;)*
- *allowing pregnant employees to access their flexible leave entitlement up to 6 weeks before the expected date of birth of their child;*
- *removing restrictions that prevent employees who are married or in a de facto relationship from taking more than 8 weeks of unpaid parental leave at the same time;*
- *ensuring both parents can take up to 12 months of unpaid parental leave, regardless of the amount of leave the other parent takes. Further, both parents can request an extension of up to 12 months, without impacting the amount of leave available to the other parent.*²⁷¹

These changes to the NES standard respond to submissions advocating changes to enable couple parents to share care more easily and over a longer period.²⁷² A matter of ongoing review is the capacity of the NES standard to protect the return to work guarantee in the standard, particularly where the pre-parental leave job is no longer available.²⁷³

²⁶⁹ Adriana Orifici and Dominique Allen, ‘Expecting More: Rethinking the Rights and Protections Available to Pregnant Workers under the Fair Work Act 2009 (Cth)’ (2022) 50(4) *Federal Law Review* 50 ([Hyperlink](#)).

²⁷⁰ Senate Select Committee on Work and Care, *Final Report* (Final Report, March 2023) [2.39]. ([Hyperlink](#)).

²⁷¹ Department of Employment and Workplace Relations, ‘Unpaid parental leave – what has changed’ (Webpage) <<https://www.dewr.gov.au/protecting-worker-entitlements/resources/unpaid-parental-leave>>.

²⁷² The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee Inquiry on Work and Care (8 September 2022). ([Hyperlink](#)).

²⁷³ See, eg, Alexandra Heron and Sara Charlesworth, ‘Effective Protection of Pregnant Women at Work: Still Waiting for Delivery?’ (2016) 29(1) *Australian Journal of Labour Law* 1, 22. ([Hyperlink](#)); Adriana Orifici and Dominique Allen, ‘Expecting More: Rethinking the Rights and Protections Available to Pregnant Workers under the Fair Work Act 2009 (Cth)’ (2022) 50(4) *Federal Law Review* 504. ([Hyperlink](#)).

7 Conclusion

Introduction

The scope of the literature reviewed in this Report is relatively narrow in the context of recent Australian literature on work and care. Within Australia's broader work-care regime, the review is focused at the 'safety net' level of the work-care 'institution' of workplace relations regulation. That is, the pay and conditions of work set out for employee worker-carers in the National Employment Standards (NES) and modern awards. These conditions comprise the basic set of employee protections in the FW Act, as well as the regulatory 'adaptions' in some provisions explicitly designed to accommodate worker-carers.

The majority of Australia's worker-carers are covered by the FW Act and its provisions remain central to a decent work-care regime. It is important to recognise, however, as set out in Section 1, that in practice for worker-carers, the way in which the FW Act operates in shaping work care outcomes interacts with work and care infrastructure and institutions, such as paid parental leave, early childhood education and care, the tax-transfer system, as well as with the societal work-care culture characterised by gendered social norms and practices. How employees 'do' work and care is also shaped by their workplace, the industry in which it is located, as well the ways in which work is organised, employer policy and practice and their workplace's 'work-care culture'. Preferences and practices about how paid and unpaid care could or should be best organised at the household level are also crucial.

Institutional background

Regulation has been historically important to Australian work-care architecture. Australia has had a long and distinctive history in labour regulation in respect of explicit recognition of, and accommodations, for worker-carers. After Australia ratified ILO Convention 156 on Workers with Family Responsibilities in 1990, the then Industrial Relations Act 1991 (Cth) was amended to prevent and eliminate discrimination including based on sex, family responsibilities and pregnancy. These reforms also introduced a requirement for the then Australian Industrial Relations Commission to take account of Convention 156 in its deliberations. Today, Convention 156 is similarly reflected in a consideration in the FW Act's object that seeks to assist employees 'balance their work and family responsibilities by providing for flexible working arrangements'.

The 'test case' mechanism that had existed in Australian workplace relations regulation was historically innovative in international comparison in achieving collective minimum standards designed to assist worker-carers, which were then generalised into conditions across awards. Explicit

minimum standards won through such test cases for worker-carers included widening eligibility for certain casuals to unpaid parental leave and introducing paid carer's leave. Improvements won through test cases in rights to job security and in working time conditions were also important.

In 2009, the FW Act introduced what were originally 10 substantive legislated National Employment Standards. There are now 12 substantive NES in the FW Act, several of which have been broadened in scope, most recently with paid family and domestic violence leave added to the NES on other paid and unpaid leave. This right was then extended to all employees, after Australia ratified ILO Convention 190 on Violence and Harassment in 2023. Two key rights for worker-carers, in the right to request an extension of unpaid parental leave in the parental leave and related entitlements standard and the right to request flexible working arrangements standard, were further bolstered by access to dispute resolution in the FW Act which came into effect in 2023. At the same time, these advancements have taken place against the backdrop of a system of regulation in the NES and awards that is still arguably structured around the normative male employee working full-time or longer in ongoing employment.

Labour market and institutional context for work-care

The literature reviewed for this Report charts the broader context of changes in the labour markets in which many employees both work and care. While there has been a significant increase in the employment participation of women, strong gender differences remain in the patterns and forms of employment with women continuing to dominate part time and casual work, particularly those with young children. The gendered polarisation of working time in Australia has also persisted over time. This is where men, including those with care responsibilities, remain more likely to work long and even very long hours and women, particularly those with care responsibilities, are more likely to engage in short hours part-time or casual work.

At the same time there have been profound changes in the ways in which work is organised, which is reflected in the rise of non-standard work, including increasing employer use, particularly in some feminised service industries, of inadequate working time protections in modern awards. This has led to what might be termed 'just-in time' rostering of casual and many part-time worker-carers employed on low minimum hours contracts. While casual and part-time workers may require additional hours of work to support income security, many worker-carers have limited autonomy over when those hours may be scheduled. Further, hours worked in excess of their guaranteed minimum do not always attract the wage premia that accrue to full-time workers. Unsocial hours and fragmented hours worked across the day and the week has also been made possible by porous working time conditions in many modern awards. Such conditions make it difficult for those worker-carers who require predictability to manage both work and care. Working time insecurity is significant problem faced by

worker-carers today, an issue that is increasingly raised in the literature and in submissions by carers', women's and other advocacy groups as well as unions.

As documented in much of the literature in this review, and as discussed by the Select Senate Committee on Work and Care, there is a complex relationship between caring responsibilities and insecure conditions of work. Caring responsibilities mean that many worker-carers who want to work shorter hours to manage their care responsibilities compromise their job security and /or their working time security to do so. The current workplace relations framework has arguably not been able to keep pace with, or been able to respond to, the changing nature of work and its organisation at the workplace level *and* the evolving needs of worker carers – both for predictability and working time security as well as some working time autonomy to respond to irregular care needs.

Rethinking regulation

It has been suggested that the COVID-19 pandemic has been a catalyst for rethinking regulation around work arrangements for worker-carers. During the first waves of the pandemic, the lack of access to paid leave for casual employees and the inadequate quantum of paid leave for part-time and full-time worker carers became evident to the broader community. Casual employees were not entitled to paid leave, while other part-time and full time employees in sectors with high public contact, such as in retail, health and care, found that the quantum of their paid personal/carers leave was inadequate. This situation highlighted both the public health consequences of a lack of, or limited access to, paid leave and the dilemmas faced by many worker-carers as to whether to lose a day's pay or work while ill or despite pressing care responsibilities.

Yet the fault line in protections and access to worker-carer adaptations for casual employees is both long-standing and endemic as highlighted in much of the literature reviewed. Casual employment means worker-carers have no access to many of the paid leave entitlements in the NES, apart from paid domestic and family violence leave. Further a worker-carer's employment status as full-time, part-time or casual (and then whether a regular or irregular casual) is determinative of the extent of access to working time protections in modern awards.

The pandemic has also seen a national conversation around working from home and the blurring of boundaries between work and care more broadly. The strong preferences of some employees to work from home where their work makes this possible has required many employers and workplaces to be adaptive in response. At the same time, however, most worker-carers who rely on the FW Act safety net are not able to work from home. For those who can, the evidence on improvements in work care outcomes is complex. Some studies suggest that for individual women, more likely to be the primary carers, working from home may provide them with some control over how they manage work and

care. However several studies on couple families have found that women working from home experience greater work-care conflict than their male partners.

The new conversations opened up during the pandemic in rethinking regulation around work and care in the FW Act safety net were taken up most recently in the Select Senate Committee Inquiry into Work and Care and in its reports and recommendations for change. There was also some attention paid to the related issues of job security and working time security in the Senate Committee Inquiry into Job Security, including in its reports and recommendations for change, and a Productivity Commission Inquiry into unpaid carer's leave following a recommendation of the Royal Commission on Aged Care Quality and Safety.

In this context, two intersecting debates in the literature and in submissions to the above and other inquiries suggest that regulatory reform to improve work and care outcomes for employees may not be easily achieved and will certainly be contested. There are often different perspectives on what constitutes positive or beneficial flexibility for worker-carers that supports rather than hinders their engagement in both paid work and unpaid care. These different perspectives are most evident in assessments of the impact and sufficiency of current provisions in modern awards and the NES and in proposals for changes to them discussed in Sections 4-6.

The second debate is around whether the form and extent of participation in paid employment by worker-carers more generally reflects worker preferences or is a form of 'constrained choice' - the choices worker-carers make in the face of gender norms as they adapt around different working time regimes, inflexible workplaces and inadequate work-care infrastructure. Some of the literature focuses on worker-carer decision-making about their engagement in paid work in the context of access to, and the costs of, other work and care supports available such as ECEC. A few recent studies highlight the ways in which gendered social norms and practice, including women's greater responsibility for unpaid care, both structure and reflect the different hours and forms of employment participation by male and female worker-carers.

The NES and Modern Award Safety Net : Worker-carer experiences

Much of the literature reviewed has focused on worker-carer experiences of the adequacy and effectiveness of explicit regulatory adaptations designed to support worker-carers, the regulation and organisation of hours of work, and the availability and accessibility of both paid and unpaid leave, all set out in the National Employment Standards (NES) and the modern awards framework.

As highlighted in the body of this Report, in this literature casual employment status is seen as determinative of access, and the basis of that access, to explicit worker-carer accommodations. Casual and part-time status is also seen to limit access to modern award working time protections that

provide the stability and the predictability that many worker carers require in their engagement in paid work while also meet their caring responsibilities.

One of the key regulatory adaptations in the NES is the right to request flexible work arrangements. This right is the most frequently referenced regulatory adaptation in the literature. Much of the literature highlights eligibility limits in terms of requirements for 12 months service and that casuals must be in effect be regular casuals, who have a reasonable expectation of continuing to be so. Limitations to the groups of employees who are eligible to make a request is also taken up in the literature. Several barriers to the use of both formal and informal requests for flexibility identified by worker-carers underline the importance of workplace policy, practice and culture, particularly the importance of direct supervisors to worker-carers in successfully accessing flexible work arrangements that suit their needs. The literature also highlights the consequences of using flexible work arrangements in what has been termed 'flexibility stigma', which is experienced by women and also by men who may wish to work flexibly to manage work and care. Advocates have proposed that extending the right to request to all workers would assist to normalise flexible work while challenging such stigma and gendered stereotypes of the ideal worker.

Modern awards are foundational in the regulation and organisation of hours of work for most worker-carers. In the literature there is an emphasis on the differences in the regulation of hours of work for part time and casual employees in comparison to full time workers. Such differences are exemplified in provisions that enable low minimum engagements for casual and part time workers and low 'guaranteed' minimum hours of work for part time workers. These practices contribute both to under-employment and a requirement that employees be 'available' to secure additional hours of work. Driven by changes in the ways in which working time and rostering is managed in labour intensive service sectors such as retail and care, the last decade has seen the rapid fragmentation of working time both across the day and the week for many casual and permanent part time worker carers. This fragmentation underpins the working time insecurity so inimical to good work care outcomes.

Rights to paid and unpaid leave are set out for the most part in the NES and reflected in modern award provisions. Casual employees, apart from family and domestic violence leave, do not have rights to paid personal/ carer's leave, annual leave or compassionate leave. They have some rights to limited periods of unpaid carers leave and to unpaid compassionate leave and, based on 12 months service with their employer and where they are employed as a regular casual with reasonable prospects of continuing to be so, they can access 12 months unpaid parental leave, and the return to work job guarantee that is part of the related unpaid parental leave rights.

One of the most frequent critiques in the literature reviewed is that access to paid and unpaid carer's leave is limited to immediate family and household members only. It is argued that access to leave should support worker-carers with different care responsibilities and be inclusive of work-care requirements across the life course, and also include activities associated with the organisation of formal and informal care. Some literature reviewed also addresses the quantum of leave entitlements in terms of extending the quantum of unpaid carers leave and separating out paid personal and carer's leave and the quantum of both entitlements. Advocates also argue for the importance of these changes being secured through universal entitlements rather than by way of individual worker-carer negotiation. Indicative details of these and other proposals for change raised in the literature and in submissions from several key advocacy groups are set out in Appendix 1.

Much of the literature considered in this review suggests that changes need to be made to the basic architecture of NES and modern award working time provisions of the FW Act to better support worker-carers.

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) inserted a new aim to 'promote job security and gender equality' into the object of the FW Act, which may well present an important impetus to regulatory innovation. Perhaps of more immediate significance are the new factors the Fair Work Commission is required to consider in its application of the FW Act's modern award objective - the need to improve access to secure work across the economy and achieving gender equality, including through providing workplace conditions that facilitate women's full economic participation.

The recent extension of a relatively new NES on paid domestic and family violence leave to all employees, including casual employees, and the major case the Fair Work Commission intends to initiate to insert a model 'right to disconnect' into modern awards, are innovative in international comparison. These regulatory reforms provide a promising basis for substantive change to better support worker-carers, both through FW Act mechanisms in respect of modern award entitlements and through the Federal Parliament in respect of improvements to the NES.

Appendix 1 Proposals for changes to workplace relations settings in the NES and Modern Awards

The Table below presents a summary snapshot of indicative proposals for change to the National Employment Standards and modern award provisions raised in the literature reviewed for this Report and in advocacy group submissions. They do not include proposals by unions or employer groups as the FWC anticipates that proposals by these parties will be raised in the consultations and submissions as part of the work and care stream of the Modern Awards Review.²⁷⁴

These proposals focus on the *current* provisions in the FW Act and seek to address what are perceived to be deficiencies in these regulatory settings in terms of improving outcomes for worker-carers.²⁷⁵

These indicative proposals are not exhaustive and are in addition to those recommendations by the Senate Select Committee on Work and Care identified in the FWC Discussion Paper on Work and Care in Table 1.²⁷⁶ Thus these proposals should be read in conjunction with the relevant recommendations made by the Select Committee on Work and Care.

²⁷⁴ As noted in Section 1, these elements include the FWC's Discussion Paper on Work and Care; this Literature Review; a survey of employers; and consultations with interested parties. See Fair Work Commission, 'Discussion Paper: Work and Care' (Discussion Paper, 29 January 2024) 9. [\(Hyperlink\)](#).

²⁷⁵ Thus proposals in literature before 2022 which addressed the lack of enforcement mechanisms in NES rights to request both flexible work arrangements and the extension of unpaid parental leave now present in the FW Act are not included here. Further, since the right to disconnect has been very recently inserted in the FW Act via the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth), proposals on this right are also not included here. We note that a major case on a model term on the 'right to disconnect' in modern awards is now before the FWC. President's Statement, *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* 27 February 2024, at [33]-[36].

²⁷⁶ Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper, 29 January 2024) [17]. [\(Hyperlink\)](#).

Key Areas for Change	Indicative proposals to improve work care outcomes for employees
National Employment Standards and Modern Awards Framework	
The use of casual employment, where work is ongoing and regular, may create working time insecurity and limits access to paid leave for casual worker-carers.	A new definition of casual employment restricted to work which is intermittent, seasonal or unpredictable. ²⁷⁷
The gendered assumption in many FW Act provisions of the normative worker employed on a full time, continuing basis does not adequately support most worker-carers.	Re-design the industrial relations system so that shorter hours employment is no longer seen as a deviation from that norm, subject to inferior employment protections, conditions, training and career paths. ²⁷⁸ Rights to family-friendly working time arrangements and stable work for all employees should be minimum standards in NES. ²⁷⁹
The limits in some NES on eligibility for employees with less than 12 months of service excludes worker-carers who do not meet this service requirement from accessing provisions supportive of work and care.	Eligibility requirements for several NES, such as in the right to request flexible work arrangements, should be widened to include those with less than 12 months of service. ²⁸⁰
Paid and Unpaid Carer's leave	
Restrictive definitions of caring relationships and types of care in the NES exclude relationships outside family/household members, particular types of care and the arrangement of both formal and informal care.	Eligibility for paid and unpaid carer leave entitlements should be in line with the <i>Carer Recognition Act 2010</i> definition. ²⁸¹ Eligibility for carer's leave should include those with extended family members and friends and the provision of routine care such as support with the activities of daily living or attending appointments. ²⁸² Paid and unpaid carer's should be available to those caring for immediate and extended family members and close friends and community members. ²⁸³ Carer's leave should support shared care within families, households and the community. ²⁸⁴ Unpaid carer's leave should be available to all carers. ²⁸⁵

²⁷⁷ Rae Cooper, Frances Flanagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" Across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia in Australia* (Sydney University Press, 2024) 103, 118. ([Hyperlink](#)).

²⁷⁸ National Foundation for Australian Women, Submission No 4 to Senate Select Committee on Work and Care (7 September 2022) 2. ([Hyperlink](#)).

²⁷⁹ Centre for Future Work Submission to the Senate Select Committee on Work and Care September 22, 2022 (Fiona Macdonald, Sienna Parrott and Andrew Scott) 7 ([Hyperlink](#)).

²⁸⁰ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 124. ([Hyperlink](#)).

²⁸¹ Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 11. ([Hyperlink](#)).

²⁸² Carers NSW, Submission No 27 to Senate Select Committee on Work and Care (8 September 2022) 10, 13. ([Hyperlink](#)).

²⁸³ National Aboriginal Community Controlled Health Organisation, Submission No 5 to the Productivity Commission Inquiry Into Carer Leave (August 2022) 3. ([Hyperlink](#)).

²⁸⁴ Centre for Future Work Submission to the Senate Select Committee on Work and Care (September 22, 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 7-8. ([Hyperlink](#)).

²⁸⁵ The Women, Work and Policy Research Group, Submission No 28 to Productivity Commission Inquiry into Carer Leave (August 2022) 5. ([Hyperlink](#)).

Paid and Unpaid Carer's leave continued	
The requirement for part-time and full-time employees to use their paid personal/carer's leave entitlement before they can access unpaid carer's leave reduces worker-carer access to personal leave for their own illness and their autonomy about the use of their care entitlements	Remove requirement that unpaid carers leave can only be accessed when paid personal/carer's leave is exhausted. ²⁸⁶
Inadequacy of both paid and unpaid carer's leave.	Entitlement should be available to carers of people of all ages. ²⁸⁷ Entitlement to request an extended period of unpaid carers leave. ²⁸⁸ Increase the current duration of both paid and unpaid carer's leave. ²⁸⁹ Review the model entitlement to an extended period of unpaid leave proposed by the Productivity Commission. ²⁹⁰
Personal/carer's leave	
Inadequacy of annual quantum (10 days) of joint paid personal/ carer's leave entitlement especially for workers-carers who may also be living with a disability or illness and/or have insufficient leave for their own well-being.	Increase the personal/carer's leave standard from 10 to 20 days per annum with 10 days to be non-cumulative and accessible for paid carer's leave. ²⁹¹ Review the adequacy of the current quantum of 10 days leave in recognition that the current entitlement is inadequate to address care needs. ²⁹²
Casual workers do not have access to paid personal/ carer's leave, an exclusion that negatively impacts their work and care outcomes.	Extend paid personal/carer's leave to casual workers. ²⁹³ Investigate options for providing personal leave to all casual workers. ²⁹⁴ Assess the adequacy of paid and unpaid carer's leave including for carers in insecure or precarious employment. ²⁹⁵

²⁸⁶ Carers Tasmania, Submission No 85 to Senate Select Committee on Work and Care (8 September 2022), 11. ([Hyperlink](#)); Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 5. ([Hyperlink](#)).

²⁸⁷ Carers Australia, Submission No 10 to Senate Select Committee on Work and Care (8 September 2022) 2.

²⁸⁸ National Aboriginal Community Controlled Health Organisation, Submission No 5 to the Productivity Commission Inquiry Into Carer Leave (August 2022) 3. ([Hyperlink](#)).

²⁸⁹ The Women, Work and Policy Research Group, Submission No 28 to Productivity Commission Inquiry into Carer Leave (August 2022) 6. ([Hyperlink](#)).

²⁹⁰ See Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 7. ([Hyperlink](#)).

²⁹¹ Carers Tasmania, Submission No 37 to Productivity Commission, Inquiry into Carer Leave (August 2022) 19. ([Hyperlink](#)).

²⁹² Carers NSW, Submission No 27 to Senate Select Committee on Work and Care, (8 September 2022) 14. ([Hyperlink](#)).

²⁹³ Carers NSW, Submission No 27 to Senate Select Committee on Work and Care (8 September 2022) 13. ([Hyperlink](#)); Centre for Future Work Submission to the Senate Select Committee on Work and Care (September 22, 2022) (Fiona Macdonald, Sienna Parrott and Andrew Scott) 7-8. ([Hyperlink](#)); The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee on Work and Care (8 September 2022) 2. ([Hyperlink](#)); Iain Campbell and Sara Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *Australian Journal of Labour Law* 36, 44. ([Hyperlink](#)).

²⁹⁴ Brotherhood of St Laurence, Submission No 53 to Senate Select Committee Inquiry on Work and Care (September 2022) 5. ([Hyperlink](#)).

²⁹⁵ Carers Australia, Submission No 42 to Senate Select Committee Inquiry on Job Security (31 March 2022) 8. ([Hyperlink](#)).

Personal/carer's leave continued	
The current practice of combining personal and carer's leave into a single provision, alongside the current quantum of leave, means some worker-carers may exhaust the provisions to address care needs with insufficient leave for their own well-being.	Review the current practice of combining personal and carer's leave into a single provision. ²⁹⁶ Review whether personal/carer's leave should be part of same entitlement and the quantum of leave. ²⁹⁷
Annual leave	
Casual worker-carers ineligible for paid annual leave	Extend paid annual leave provisions to casual workers. ²⁹⁸
Right to request flexible work arrangements	
Limits on eligibility for casual workers.	Extend right to all casual employees. ²⁹⁹
Limits on groups of workers who are eligible .	Extend right to all workers. ³⁰⁰
The current construction of the RTR places the onus on the worker-carer to make the request.	Reframe right to request as a positive duty for employers and to increase capacity to access right to request arrangements. ³⁰¹ Strengthen provisions and requirements to provide a more supportive environment for flexibility requesting. ³⁰²
Unpaid parental leave	
The differences in the eligibility provisions between the <i>Parental Leave Act 2010</i> (Cth) and the unpaid parental leave standard results in inconsistencies in access to these provisions most notably for employees in fragmented employment	Review the eligibility requirement concerning 12 months continuous employment in the unpaid parental leave standard. ³⁰³

²⁹⁶ Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 10. ([Hyperlink](#)); Carers NSW, Submission No 27 to Senate Select Committee on Work and Care For (8 September 2022) 13-14. ([Hyperlink](#)).

²⁹⁷ Productivity Commission, *A Case for An Extended Unpaid Carer Leave Entitlement?* (2023) 10. ([Hyperlink](#)).

²⁹⁸ National Foundation for Australian Women, Submission No 4 to Senate Select Committee on Work and Care (7 September 2022) 4. ([Hyperlink](#)); Campbell and Sara Charlesworth. 'Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards' (2023) 36 *Australian Journal of Labour Law* 232.

²⁹⁹ Anna Chapman, 'Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework' (2018) 14(1) *Journal of Law & Equality* 115, 124. ([Hyperlink](#)); Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 117. ([Hyperlink](#)).

³⁰⁰ Lisa Waddington and Mark Bell, 'The Right to Request Flexible Working Arrangements under the Work-life Balance Directive – A Comparative Perspective' (2021) 12(4) *European Labour Law Journal* 508. ([Hyperlink](#)).

³⁰¹ Rae Cooper, Frances Flanagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" Across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), *At a Turning Point: Work, Care and Family Policies in Australia in Australia* (Sydney University Press, 2024) 118. ([Hyperlink](#)); Bill Swannie, 'Reasonable Accommodation of Employees' Parenting and Carer Responsibilities: a Human Rights Perspective' (2022) 48(2) *Monash University Law Review* 208. ([Hyperlink](#)).

³⁰² Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To Ask or not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26(2) *Labour and Industry* 103, 117. ([Hyperlink](#)).

³⁰³ Gillian Whitehouse and Michelle Brady, 'Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints Within The Australian Policy Framework' (2019) 29(3) *Labour & Industry: A Journal of the Social and Economic Relations of Work* 257, 263-5. ([Hyperlink](#)).

Maximum working hours	
The incidence and impact on work and care of long working hours over the NES on maximum hours of work of 38 hours	Cap full-time hours to 38 hours per week to address the gendered pattern of long working hours ³⁰⁴ Adopting a shorter working week to facilitate more equal sharing of paid and unpaid work ³⁰⁵
Working Time	
Inferior conditions under modern awards for part-time employees relative to full-time workers and for casual workers employees relative to permanent employees.	Ensure part-time employees receive the same minimum hours, penalty and overtime rates as full-time employees in their awards, and that casual employees workers receive the same base rates of pay for the same job as ongoing workers. ³⁰⁶
The 'casualisation' of on-demand part-time work over guaranteed minimum hours	Provide non-negotiable working time standards for part-time employees ³⁰⁷ Reinstate the distinction between casual and permanent employment. ³⁰⁸
Insecure working time and working time arrangements for part-time worker-carers facilitated by modern award working time provisions	Review full range of award changes in care sector that have widened the scope for using permanent part-time employment as casual work without the necessity for a casual loading, and often without overtime rates. ³⁰⁹
The use of low guaranteed minimum hours part-time contracts where additional hours worked do not attract overtime premia	Review whether such practices breach the principle of equal treatment between full-time and part-time employees as contained in <i>ILO Convention 175 Concerning Part-time Work</i> . ³¹⁰ Review whether shorter hours workers receive the same penalty rates and overtime rates of pay as longer hours workers in their industry. ³¹¹
Minimum engagement periods are too low for casuals and part-time worker-carers in some modern awards in feminised sectors	Increase minimum engagements in line with those in male-dominated awards such as the Manufacturing Award (currently set at 4 hours) ³¹²

³⁰⁴ The Australian Work + Family Policy Roundtable, Submission No 22 to Senate Select Committee on Work and Care (8 September 2022) 7. ([Hyperlink](#)); Lyndall Strazdins et al., Submission No 122 to Senate Select Committee on Work and Care (September 2022) 6. ([Hyperlink](#)).

³⁰⁵ Lyndall Strazdins et al., Submission No 122 to Senate Select Committee on Work and Care (September 2022) 6. ([Hyperlink](#)).

³⁰⁶ National Federation of Australian Women, Submission No 4 to Senate Select Committee on Work and Care (September 2022) 4. ([Hyperlink](#)).

³⁰⁷ Natasha Cortis, Megan Blaxland and Sara Charlesworth, 'Care Theft: Family Impacts of Employer Control in Australia's Retail Industry' (2023) 44(1) *Critical Social Policy* 106, 126; The Australian Work + Family Policy Roundtable, *Work + Care in a Gender Inclusive Recovery: A Bold Policy Agenda for a New Social Contract* (December 2020). ([Hyperlink](#)).

³⁰⁸ Natasha Cortis, Megan Blaxland and Sara Charlesworth, 'Care Theft: Family Impacts of Employer Control in Australia's Retail Industry' (2023) 44(1) *Critical Social Policy* 106, 126. ([Hyperlink](#)).

³⁰⁹ National Federation of Australian Women, Submission No 4 to Senate Select Committee on Work and Care (September 2022) 3. ([Hyperlink](#)).

³¹⁰ Iain Campbell, Fiona Macdonald and Sara Charlesworth, 'On-Demand Work in Australia' in Michelle O'Sullivan et al. (eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries* (Springer, 2019) 67-90 ([Hyperlink](#)).

³¹¹ National Federation of Australian Women, Submission No 4 to Senate Select Committee on Work and Care (September 2022) 3-4. ([Hyperlink](#)).

³¹² Sara Charlesworth, 'Partial Protection? The Regulation of Home Care Workers' Working' in Colin Fenwick and Valérie Van Goethem (eds) *Regulating for Equitable and Job-Rich Growth* (Edward Elgar Publishing, 2017) 133, 141. ([Hyperlink](#));

Rostering	
<p>Poor working time security in changes to rosters for with little notice or consultation for worker-carers</p>	<p>Changes to NES and awards to improve rostering protections for permanent and casual workers, to ensure they have levels of certainty and predictability of working hours and income needed to organise their care responsibilities and other aspects of their lives.³¹³</p> <p>Improved rostering rights in modern awards for to provide for greater predictability in rosters, advanced notice of roster changes and genuine consultation regarding changes to rosters.³¹⁴</p> <p>Improved regulation of working hours and rosters to support the creation of better quality jobs in the care economy³¹⁵</p>

Sara Charlesworth and Alexandra Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture' (2012) 54(2) *Journal of Industrial Relations* 164, 178. [\(Hyperlink\)](#).

³¹³ Natasha Cortis, Megan Blaxland and Sara Charlesworth, *Challenges of Work, Family and Care for Australia's Retail, Online Retail, Warehousing and Fast Food Workers* (Report, Social Policy Research Centre, 2021) 64, 67, 95. [\(Hyperlink\)](#).

³¹⁴ Natasha Cortis, Megan Blaxland and Sara Charlesworth, 'Care Theft: Family Impacts of Employer Control in Australia's Retail Industry' (2023) 44(1) *Critical Social Policy* 106, 123. [\(Hyperlink\)](#).

³¹⁵ Australian Council of Social Services, Submission No 107 to Senate Select Committee Inquiry on Work and Care (30 September 2022) 6. [\(Hyperlink\)](#).