

27 February 2026

Committee Secretariat  
The House of Representatives Standing Committee on Employment,  
Workplace Relations, Skills and Training  
PO Box 6021  
Parliament House  
Canberra ACT 2600

By email: [employment.reps@aph.gov.au](mailto:employment.reps@aph.gov.au)

To whom it may concern,

We welcome the opportunity to provide feedback in relation to the Committee's inquiry into the operation and adequacy of the National Employment Standards (NES).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in employment and industrial law, personal injuries, abuse law, medical negligence, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Every day, our nation-wide Employment and Industrial Law team supports hundreds of Australian workers who have fallen victim to poor workplace practices by employers.

Our contributions to public policy discussions are based on the lived experience of the clients we serve, and our staff who represent them. To that end, we have limited our contribution to this inquiry to only two of the Terms of Reference:

**Term of Reference 2: The extent to which the NES is fit for purpose, having regard to the changing nature of work.**

Maurice Blackburn believes that the NES continue to play an important role in setting minimum standards for employers to ensure that workers – especially the most vulnerable workers – may enjoy basic and predictable levels of entitlements and protections in the workplace.

The changing nature of work, however, has seen an increased focus on 'flexibility' from the employers' perspective, meaning an increase in casualised and insecure employment arrangements for workers. These changes have seen the use of independent contractors (including 'gig workers') increase across all sectors of the economy.

Evidence would suggest that many of those who engage in precarious and insecure work arrangements, mainly through lack of viable alternatives, are from the most vulnerable of Australian cohorts. They include people from migrant communities (particularly those without residency or work rights), young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

Engagement in insecure work has moved from being a lifestyle choice for some, to being a last resort for many. While it may provide corporate Australia with flexibility and responsiveness, that comes at the expense of entrenching poverty and powerlessness, and widening inequality.

Despite undertaking work which in every other aspect has the hallmarks of a direct employment relationship, these low paid, vulnerable workers who are engaged as independent contractors are denied access to basic minimum labour standards.

Previous research by the Productivity Commission estimated that approximately 17 percent of workers are not covered by the protections of the Fair Work Act, and thereby the NES, because they are either independent contractors or business owners.<sup>1</sup>

Without the protections afforded within the Act and the NES, the present regulatory and legal environment places most of the responsibility on workers for addressing exploitation in the on-demand economy.

In this regard, the on-demand workforce is a 21st century phenomenon being regulated via 19th and 20th century standards.

Maurice Blackburn urges the Committee to consider how these on-demand workers should be afforded the protections and entitlement of other employees, via the NES.

#### **Term of Reference 4: The adequacy, relevance and coherence of existing NES entitlements.**

Maurice Blackburn draws the Committee's attention to three types of worker entitlements which we believe require modernisation within the NES.

##### **1. Reproductive Leave**

Maurice Blackburn believes that there is now sufficient research and evidence to suggest that access to Reproductive Leave should be enshrined as an entitlement in the Fair Work Act, via the NES.

Reproductive health has rapidly emerged as one of the most significant frontiers in modern workplace policy. While often framed as a private matter, reproductive health is a central structural determinant of women's workforce participation, economic security, and long-term labour-market outcomes. Reproductive health policies are not discretionary 'perks', but essential interventions that shape gendered inequality and the functioning of the national economy.

Historically, women were never absent from economic production - only from waged, regulated, and legally recognised labour. Prior to industrial capitalism, women's labour was indispensable in agriculture, textile manufacturing, family enterprises and domestic economies. Industrialisation did not diminish women's contributions; rather, it redefined the legal subject of the 'worker' as continuous, unencumbered, physically able, and free from reproductive or caregiving obligations. This construct aligned with male physiology and social roles, simultaneously excluding women from the formal wage economy while relying on unpaid domestic labour.

Australia inherited English labour-law norms, including coverture, rendering married women legally invisible and economically dependent. These mechanisms rested on the assumption that women's

---

<sup>1</sup> Productivity Commission Inquiry Report, Workplace Relations Framework, Volume 1, 30 November 2015 at page 107. Note - Maurice Blackburn was unable to locate a more contemporary, reliable source to update this figure. The workforce has changed significantly since 2015. The Committee might consider recommending that a review be undertaken to produce a contemporary figure which demonstrates the current ambit of the NES.

primary social purpose lay in domestic labour; the reproductive body was treated as incompatible with industrial work.

The gendered architecture was entrenched through the 1907 Harvester Judgment, which defined a 'fair wage' around a male breadwinner supporting a wife and three children. During the Second World War, women demonstrated capability and productivity at scale; yet post-war marriage bars reinstated exclusion until their removal in 1966. Equal pay decisions in 1969 and 1972 made women legally imaginable as permanent workers, but by then women's labour had become economically necessary, not supplementary.

Today, women constitute nearly half of the workforce; their participation anchors essential sectors such as health, education, care and professional services and underwrites the tax base. Yet labour law still centres an 'ideal worker' premised on uninterrupted capacity, fundamentally at odds with the biological and social realities of reproductive life. Menstruation, IVF, pregnancy and loss, perimenopause and menopause remain largely invisible in legislative frameworks, despite the economy's reliance on female labour. The policy task is clear: how should labour law respond to bodies upon which the economy already depends?

Research by the McKell Institute<sup>2</sup> defines the problem thus:

*The impact of reproductive health issues on the Australian workforce - and workers' health and wellbeing - has long been overlooked. In addition to causing serious physical and mental pain and logistical difficulties there is an ignorance, isolation and stigma around reproductive health issues that cause workers to suffer in silence, and is linked to high rates of missed work and work opportunities. Impacts from delays in diagnosis can result in significant health implications for both men and women.*

In our experience, it is in workplaces where a culture of shame exists, that workers – especially women – often avoid discussing their needs with their employer, and in turn, this can create the issues of reduced workforce participation and productivity. We believe that stigmatisation of reproductive health issues in workplaces represents the biggest barrier to accessing care.

The McKell research goes on to describe Reproductive Leave as follows:

*Reproductive leave is intended to provide workers with paid time to treat or manage a range of reproductive health issues including preventative screening for things like breast and prostate cancers; menstruation, perimenopause and menopause; chronic reproductive health conditions including poly-cystic ovarian syndrome and endometriosis; assisted reproductive health services including IVF; vasectomies; hysterectomies; and miscarriage and terminations. Reproductive leave is intended to be gender blind with access for assisted reproductive technology afforded to both parents and individuals.*

A failure to address this barrier has the potential to lead to increased reliance on personal (sick) leave and absenteeism. Cumulative personal leave entitlements are important if a worker experiences a significant and unexpected injury or illness.

The issue of depleted personal leave is one that disproportionately impacts female workers, often due to carers' duties and the needs of their reproductive body throughout their working lives.

Reproductive health and workplace inequality are inextricably linked. For a pregnant employee, her body is pushed to a Basal Metabolic Rate (BMR) (also referred to as the 'human metabolic ceiling') of 2.2 for nine months straight. An ultra marathon runner can only reach a BMR of 2.5 for a short period

---

<sup>2</sup> <https://mckellinstitute.org.au/wp-content/uploads/2024/06/Suffering-in-Silence-making-the-case-for-reproductive-leave-in-Australia-web-compressed.pdf>: p.3

before their body begins to break down. The average office worker will maintain a BMR of 1.2.<sup>3</sup> That means that pregnancy increases the energy requirements for a woman to an extent like that of an ultra-endurance athlete. Despite this, women are still expected to compete equally with their male counterparts while pregnant in the labour market, with no paid leave options under federal law.

The pregnancy example is a clear indicator of the physiological difference between male and female workers, and how it shows up as a workplace inequality. However, this is just one finite chapter a woman might experience during her working life, there are many others such as menstruation, perimenopause, IVF and menopause that create physiological barriers to equal access to the labour market.

Maurice Blackburn believes that including access to Reproductive Leave as an employment standard would destigmatise worker/employer conversations about health needs, especially for women, and encourage greater cultural awareness of the difficulties some workers may face in raising these issues.

As it stands, workers are reliant on the goodwill of their employer in adopting policies and a workplace culture which allows access to leave. This creates the untenable situation where two workers with the same reproductive health issue have very different entitlements, and therefore a very different likelihood of future health and productivity.

## 2. Unreasonable Additional Hours

Section 62 of the Fair Work Act sets out national standards related to maximum weekly hours. That section specifies, under s 62(1) that 38 is the acceptable number of hours per week. The following clause, 62(2) says that an employee may refuse to work additional hours if they are unreasonable.

Section 62(3) sets out the criteria by which reasonableness is measured when an employer asks a worker to exceed the maximum weekly hours. It says:

*(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:*

- (a) any risk to employee health and safety from working the additional hours;*
- (b) the employee's personal circumstances, including family responsibilities;*
- (c) the needs of the workplace or enterprise in which the employee is employed;*
- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;*
- (e) any notice given by the employer of any request or requirement to work the additional hours;*
- (f) any notice given by the employee of his or her intention to refuse to work the additional hours;*
- (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;*
- (h) the nature of the employee's role, and the employee's level of responsibility;*
- (i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;*
- (j) any other relevant matter.*

---

<sup>3</sup> Pontzer, H. et al. (2019). "Metabolic Limits of Human Performance." Science Advances, 5(6).

There is a lack of jurisprudence to provide guidance as to how the criteria listed in s 62(3) are to be interpreted.

Since the introduction of the NES in January 2010, there has been very little testing of the provisions within s 62(3) in the courts. Because the s 62(3) test is broad, subjective, and highly fact-dependent, it is often too difficult, costly, and risky for workers to challenge employers' assertions of 'reasonableness', which in turn contributes to the very limited development of case law. The development of case law is important in progressing an understanding of how the provisions should be interpreted. Shifting the burden of establishing that the additional hours are reasonable to the employer akin to the general protections provisions is one potential solution. Further, there is a need to strengthen s 62(3)(b) by specifying that 'personal circumstances' include:

- pregnancy and reproductive health related limitations,
- carer responsibilities,
- disability or chronic health conditions.

This aligns with contemporary WHS and anti-discrimination principles.

Australia ranks 34<sup>th</sup> out of 41 OECD countries in terms of protecting its workers from having to work 'very long hours', with an estimated 12.5% of workers falling into that category.<sup>4</sup> This places us below other economies such as the UK (10.8%), the USA (10.4%) and Canada (3.3%).

Our experience is that the incidence of workers seeking assistance in legally refusing demands for unreasonable additional hours are increasing.

Clearly s 62 is not achieving its desired goal of protecting workers from the impacts of overwork, or readjusting the power asymmetry between the requirements of the employer and the needs of the worker.

We urge the Committee to recommend the provision of additional guidance as to how s 62(3) is to be interpreted – ie, clearer directions on what is and what is not considered reasonable.

### 3. Redundancy Pay

Section 119 of the Fair Work Act sets out the standards expected in relation to redundancy pay.

As noted in our response to Term of Reference 2, a number of the NES have failed to keep pace with changes in the nature of working arrangements in Australia. Workers engaged in the on-demand economy are not entitled to the same benefits or protections afforded under the Act. This is true of redundancy pay. Redundancy pay is simply not available to gig workers, as there is no requirement for platforms to adhere to the NES. As discussed earlier, this inordinately impacts vulnerable cohorts such as women, young people, workers from immigrant backgrounds and those returning to the workforce – ie, those worst placed to financially cope with redundancy or argue against the legitimacy of a redundancy.

We are also seeing a number of instances where women are experiencing unfair treatment due to their employers' misunderstanding of their duties in circumstances where redundancy and parental leave intersect.

Redundancy is still a common method of discrimination against women who are pregnant, or on parental leave.

---

<sup>4</sup> See for example: <https://www.abc.net.au/news/2024-02-26/overtime-overwork-burnout-what-are-reasonable-office-hours/103483722>

Section 119(2) of the ACT sets out the standards related to the quantum of redundancy pay to which a redundant worker is entitled. Maurice Blackburn has general concerns as to whether the figures in the table are still appropriate to enable a worker to survive financially in the weeks and months following a redundancy.

We also note that the disruptive impact of AI on the workforce may ultimately prove significant. Recent large-scale redundancies prompted by AI announced by large Australian technology companies and foreshadowed by banks, reflect that that risk may be materialising quicker than anticipated.

There is some, not fanciful, prospect of significant job losses across whole sectors. In light of that, we believe it would be expedient and timely for the Committee to consider whether minimum redundancy entitlements ought be increased.

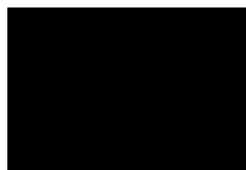
Increasing severance payments in addition to broader programs providing for retraining or redeployment assistance, and earlier consultation before roles are automated, may cushion the shock of large-scale technological displacement and help prevent workers falling into long-term unemployment. They also discourage employers from adopting an aggressive 'automation-first' approach by making it costly to shed labour without planning, thereby ensuring that the productivity gains from AI are shared more fairly and preventing the widespread social and economic harm that rapid, unmanaged technological change can cause.

Please do not hesitate to contact me and my colleagues via the contact details below if we can further assist with the Committee's important work.

Yours faithfully,



**Patrick Turner**  
Principal Lawyer  
[Maurice Blackburn Lawyers](#)



**Jessica Miscamble**  
Associate  
[Maurice Blackburn Lawyers](#)

