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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.113 applications for variations

Australian Liquor, Hospitality and Miscellaneous Workers Union

Finance Sector Union of Australia

Shop, Distributive and Allied Employees Association

LAUNDRY INDUSTRY (VICTORIA) INTERIM AWARD 1993
(ODN C No. 21626 of 1992)
[Print K8194 [L0125]]
(C No. 20277 of 1994)

INSURANCE OFFICERS (CLERICAL INDOOR STAFFS) CONSOLIDATED AWARD 1985
(ODN C No. 00571 of 1983)
[Print H4379 [I0002]]
(C No. 30482 of 1994)

RETAIL AND WHOLESALE SHOP EMPLOYEES (AUSTRALIAN CAPITAL TERRITORY) AWARD 1983
(ODN C No. 03078 of 1982)
[Print J5408 [R0017]]
(C No. 30434 of 1994)

Various employees — Various industries

Leave - Personal/Carer's Leave Test Case - Stage 2 - various employees, various industries - aggregation - Commission approved aggregation of sick leave and bereavement/compassionate leave - cap of 5 days per annum on access to aggregated entitlement for carer's leave purposes - eligibility for bereavement leave to cover same class of persons entitled to access carer's leave - bereavement leave component cannot accumulate beyond 12 month period - access to carer's leave only when illness requires care by another - in "normal circumstances" carer's leave not available when another person has taken such leave to care for the same person - facilitative provisions - introduction of additional facilitative provisions regarding rostered days off and part-time work - overtime - no change to compensate for overtime in the context of time off in lieu of overtime - no variation to limitation that for day workers make-up time is limited to the spread of ordinary hours - unpaid leave - Commission decided against providing a general entitlement to unpaid leave in addition to aggregation of sick leave and bereavement leave - exemptions - exemptions for individual enterprises should be processed as certified agreements, enterprise flexibility agreements or as variations to awards under enterprise flexibility clauses - framework for draft orders attached.

PRESIDENT O'CONNOR
VICE PRESIDENT ROSS
SENIOR DEPUTY PRESIDENT MARSH
COMMISSIONER McDONALD
COMMISSIONER HOLMES SYDNEY, 28 NOVEMBER 1995

Contents

List of Abbreviations:

In this decision we use the following abbreviations:

ACCI:	Australian Chamber of Commerce and Industry
ACCIR:	Australian Catholic Commission for Industrial Relations
ACM:	Australian Chamber of Manufactures
ACTU:	Australian Council of Trade Unions
BCA:	Business Council of Australia
Combined States:	South Australia, Tasmania, Victoria, Western Australia
Commonwealth:	Commonwealth of Australia
HREOC:	Human Rights and Equal Opportunity Commission
MTIA:	Metal Trades Industry Association of Australia
New South Wales:	State of New South Wales
NFF:	National Farmers Federation
NPEC:	National Pay Equity Coalition
Queensland:	State of Queensland
South Australia:	State of South Australia
Tasmania:	State of Tasmania
Victoria:	State of Victoria
WEL:	Women's Electoral Lobby
Western Australia:	State of Western Australia

REASONS FOR DECISION

1 - INTRODUCTION

In the November 1994 Family Leave Test Case decision (the November 1994 decision), [Print L6900] the Commission concluded that:

> *". . . the needs of workers with family responsibilities can best be met by the introduction of increased flexibility in a range of award provisions combined with the aggregation and extension of existing leave entitlements."* [Print L6900, p.38]

At that time the Commission decided to adopt a two stage package of measures to assist workers in reconciling their employment and family responsibilities. Stage 1 of the package involved extending access to sick leave so that employees could use their sick leave entitlement to provide care or support for a member of their family who is ill and introducing a range of facilitative provisions. The specific facilitative provisions to be introduced in Stage 1 were:

- *Annual leave: to allow an employer and an employee in an enterprise or part of an enterprise to agree to allow up to one week's annual leave to be taken in single days.*

- *Hours of work: to allow an employer and an employee in an enterprise or part of an enterprise to agree to make provision for time off in lieu of overtime and the working of 'make-up' time whereby an employee may choose to perform additional work at ordinary time to make up for time lost.*

- *Unpaid leave: to allow an employer and an employee in an enterprise or part of an enterprise to agree to provide unpaid leave to enable an employee to care for a family member who is ill."* [Print L6900, p.41]

The measures included in Stage 1 were intended to take effect as soon as possible. The task of settling the orders arising from the November 1994 decision was delegated to Vice President Ross. After hearing further submissions from the parties the Vice President issued a decision which

determined the unresolved issues between the parties in relation to the form of the orders arising out of Stage 1 [Prints L9048, L9530 and L9531]. The Vice President's decision also identified a number of issues to be considered by the Commission during the course of the Stage 2 proceedings in particular:

- the quantum of sick leave available for use as family leave and in particular whether any *"cap"* should apply;

- the definition of *"family member"* for the purpose of access to sick leave;

- the rate of compensation for overtime work in the context of time off in lieu of overtime; and

- the time at which an employee may work *"make-up"* time, the level of compensation applicable to such work and the role, if any, which a facilitative provision may play in this regard.

We will return to these matters later.

Stage 2 of the November 1994 decision was to be implemented at the conclusion of a further hearing to be held in August 1995. This decision relates to those proceedings.

In the November 1994 decision it was proposed that Stage 2 would consist of two elements:

1. The aggregation of existing award provisions with respect to sick leave and compassionate/bereavement leave. Employees would be able to access the aggregated entitlement for the purpose of providing care or support for a member of the employee's family who is ill; and

2. The introduction of additional facilitative provisions with respect to:

    - the use of rostered days off; and

    - part-time work.

In addition to these two specific matters the parties would be able to raise the following issues for consideration by the Commission:

"• *further means whereby awards can be made more flexible in order to assist workers in reconciling their work and family responsibilities;*

- *whether the Commission should prescribe a general entitlement to unpaid family leave in addition to the aggregation of sick leave and compassionate/bereavement leave; and*

- *the scope for individual enterprises to seek an exemption from the measures we propose on the basis of an agreed package which has been developed to suit the needs of the enterprise and the relevant employees."* [Print L6900, pp.42-43]

At the commencement of these proceedings the President chaired a conference of the parties who agreed upon a list of issues to be addressed [see Attachment A]. This decision deals with all of these issues.

In reaching our conclusions we have done so in the context of our statutory responsibilities including s.88A, s.90 and s.90AA of the Industrial Relations Act 1988 (the Act).

In addition we have also had regard to the Commission's obligations under s.93A of the Act to take account of the principles embodied in the Family Responsibilities Convention.

For reasons outlined in 3.3.1 we have decided to substitute the nomenclature *"personal/carer's leave"* for the purpose of this decision and for all award variations arising from this decision.

2 - DEVELOPMENTS SINCE NOVEMBER 1994

Before turning to the issues requiring consideration we wish to refer to a number of developments since the November 1994 decision which form the backdrop to our deliberations in these proceedings.

2.1 Implementation of Stage 1

The form of the orders arising from Stage 1 were determined by Vice President Ross in February 1995 [Prints L9048, L9530 and L9531].

Two State jurisdictions, namely NSW and Queensland have adopted, with modifications, the November 1994 decision for application to their awards.

The variation of federal awards to provide for Stage 1 of the November 1994 decision was initially slow. The pace of implementation accelerated following initiatives taken by the Commission to centralise the award variation process. In addition the President directed the ACTU and ACCI to provide the Commission, by 2 June 1995, with a list of awards which had not been varied to provide for Stage 1 of the November 1994 decision. The Commission has acted on its own motion to vary these awards after providing the award parties with an opportunity to be heard. Approximately 140 awards have been varied by this means and a further 200 matters are in the process of being finalised.

The ACCI and ACM both submitted material based on surveys intended to assess the impact of Stage 1 of the November 1994 decision at the enterprise level. Both ACCI and ACM acknowledged that the survey results were tentative given the short period of time since the Stage 1 changes came into effect. ACCI conceded that the results of its survey were preliminary in nature and ACM stated that given the limited time scale and the small number of employers affected it did not place *"too strong an emphasis"* on the survey responses. On this basis the survey material has been of limited value in determining the issues before us.

2.2 Bargaining

The Commonwealth submitted that there was evidence of an increase in the incidence of carer's leave provisions in enterprise agreements since November 1994. In particular it was submitted that at the time of the November 1994 decision only 6 per cent of all enterprise agreements made provision for carer's leave compared with nearly 12 per cent of agreements certified since the decision. As at 8 August 1995 the Department of Industrial Relations' Workplace Agreements database showed that of the 4,754 federal enterprise agreements some 374 contained provisions which allowed an employee to take leave in order to meet caring responsibilities.

An analysis of the 374 agreements with such provisions shows:

- 117 had an entitlement to paid carer's leave which was separate from other leave entitlements;

- 19 had an entitlement to unpaid carer's leave which was separate from other leave entitlements;

- 88 agreements allowed access to special or compassionate leave for family purposes; and

- 167 allowed for the use of sick leave for caring purposes.

Of the 167 agreements that provided for the use of an employee's sick leave for caring purposes, 75 agreements allowed access to the whole of the sick leave entitlement while 14 agreements limited access to less than 3 days, 72 agreements limited access to between 3 and 5 days, with the remaining agreements generally limiting access to a range between 10 and 28 days.

An ACTU review of enterprise agreements identified over 200 agreements certified by the Commission in the period August 1994 to May 1995 which included family leave provisions.

The ACCI also acknowledged that there had been an apparent upsurge in bargaining in relation to family leave since the November 1994 decision. A significant number of the agreements surveyed by ACCI allowed employees to access their sick leave for family purposes, usually subject to some form of cap on the amount of sick leave available for this purpose.

The available evidence supports a conclusion that a growing number of enterprise agreements contain provisions which allow employees to take leave to provide care and support for a member of the employee's family who is ill and that such leave is usually subject to some form of cap.

2.3 Other Findings on Reconciling Work and Family Life

In the proceedings before us a number of parties referred to a recent publication by Ilene Wolcott and Helen Glezer called *"Work and Family Life: Achieving Integration"*. This book deals with how families respond to work and family issues and draws on two major studies conducted by the Australian Institute of Family Studies for this purpose. The authors also relied on an additional 15 interviews with families conducted in late 1994. These case studies focus on the values and priorities that influence decisions about how paid work and family life are organised.

The authors made a number of findings on the evidence available to them and concluded:

"The consistent and persistent preference of women with children for part-time employment and the evidence that there is little change in the division of labour within the household are testimony to the endurance of traditional behaviour regarding gender roles in the community.

The availability of flexible hours and leave policies enabled women and men in these studies to achieve some balance between work and family demands. However, so long as it is only women who take advantage of flexible working arrangements and men are content, acquiesce to or see no other option but to work schedules that foreclose greater family participation, there will be little change to this conclusion.

Corporate culture change has to be accompanied by social changes that facilitate and encourage alternative work and family patterns . . .

As this book describes, the majority of families were generally satisfied with their work and family arrangements, particularly where women worked part-time and the workplace was supportive. The achievement of a more integrated egalitarian sharing of work and family roles remains the vision rather than the reality." [pp.ix-xx]

In reaching our decision in this matter we have taken into account the findings reached by Wolcott and Glezer as well as the material referred to in the November 1994 decision.

2.4 The Economic Context

In the performance of its functions in the matters before it the Commission must have regard, among other things, to the state of the national economy and the economic effects of any award or order that the Commission is considering [s.90].

During these proceedings the ACTU and ACCI drew on the extensive economic submissions they made to the Commission in the Third Safety Net Adjustment and Section 150A Review proceedings. The New South Wales Government took a similar approach, while the MTIA addressed the economic indicators which, in their submission, suggested a weakening of the economy.

We have considered all that has been put to us in relation to the economy. While there is no doubt that the economy is slowing from the very rapid growth in 1993/94 it appears to us that prospects for stable growth remain strong.

We now turn to consider the outstanding *"issues"* arising out of the settling of the order in relation to Stage 1 of our decision and the appropriate means of implementing Stage 2 proposals.

3 - AGGREGATION OF SICK LEAVE AND BEREAVEMENT LEAVE ENTITLEMENTS

3.1 Introduction

The November 1994 decision proposed that Stage 2 would, among other things, allow employees to access an aggregated entitlement, made up of their existing award entitlements to sick leave and bereavement/compassionate leave, in order to provide care or support for a member of the employee's family who is ill.

The general principle of aggregating sick leave and bereavement/ compassionate leave entitlements was the subject of a range of submissions in the proceedings before us. The proposals advanced by the parties covered a wide spectrum including:

- support for aggregation of the current year's sick leave entitlements and bereavement leave into a personal/family leave entitlement [ACTU, Commonwealth, HREOC - with qualifications];

- access to sick leave only for family leave purposes, provisions with varying levels of *"capping"* [BCA, Combined States, ACM, Independent Schools];

- serious reservations about any form of *"aggregation of leave entitlements, particularly bereavement leave"* [ACCI, MTIA];

- deferral of any aggregation to enable further assessment of the impact of the Stage 1 decision [Combined States];

- rejection of access to aggregated leave in favour of enterprise based agreements [NFF]; and

- rejection of aggregation of entitlements on basis of discrimination against women [NPEC, WEL].

A number of parties also advanced secondary or qualified positions.

A number of specific issues associated with aggregation arose out of the submissions made, namely:

- which entitlements, if any, should be cumulative;
- the imposition of a cap generally and when accessing particular forms of leave from the aggregated amount;
- the technical problems associated with disparate treatment in awards of bereavement leave; conditions governing the entitlement to the leave; and
- costs associated with a wider access to sick leave and bereavement leave.

We now turn to address these specific issues.

3.2 Aggregation

Having considered the material submitted we have decided to aggregate sick leave and bereavement leave and to allow access to the aggregated entitlement for specified family leave purposes.

In our opinion the aggregation of sick leave and bereavement leave and its availability for family leave purposes will assist employees to reconcile their work and family responsibilities by providing greater access to existing paid leave entitlements for this purpose.

The quantum of the aggregated entitlement will vary from award to award as existing award entitlements to sick leave and bereavement leave vary.

No party has asked us to rationalise the existing disparity in sick leave entitlements and to do so, in these proceedings, would be inappropriate.

The inclusion of bereavement leave in an aggregated entitlement is more complex than the inclusion of sick leave. The majority of awards currently provide an entitlement to a specified number of days paid leave on the occasion of the death of a person falling within a nominated class of persons. The fact that most bereavement leave provisions provide an entitlement to paid leave on a *"per occasion"* basis rather than as an annual entitlement is one reason advanced by ACCI and others in opposition to the inclusion of bereavement leave in an aggregated entitlement.

By translating the *"per occasion"* entitlement to bereavement leave into a clause providing for access for personal/carer's leave the nature of the entitlement changes and will, in the employers' view, generate a propensity for wider access to leave, with a consequential higher cost impact.

In addition, bereavement leave shares the characteristic of sick leave whereby the quantum of leave available varies between awards.

In this regard the ACTU submitted that the Commission should adopt 3 days' paid leave per occasion as a standard across all awards. The ACTU sought to retain in awards bereavement leave clauses which provide for additional leave, for example, for travel to and from remote locations.

In our view this is not an appropriate case in which to consider the standardisation of bereavement leave in the manner proposed by the ACTU. However any party may make application for the establishment of a test case standard in respect of bereavement leave consistent with the Commission's Statement of Principles. There was no argument advanced against the retention of existing bereavement leave clauses which provide for additional leave. It is not our intention to interfere with such provisions although we note ACCI's submission that in certain circumstances such as *"fly in and fly out"* the taking of bereavement leave should be at the discretion of the employer to enable rostering to be taken into account. This matter can be raised at award or enterprise level if appropriate.

The only area in which we have decided to adopt a standard approach to bereavement leave is in relation to eligibility for bereavement leave, that is the scope of the nominated class of persons. This change will mean that an employee will be able to access bereavement leave in the event of the death of a member of the employee's immediate family or household. This matter is dealt with later in this decision.

We have sought to address the concerns raised by ACCI and others by adopting a number of measures to limit the cost impact of our decision.

We also note that HREOC expressed concern that indirect discrimination against workers with family responsibilities may result from the use of sick and bereavement leave for family leave purposes where it effectively dilutes the pool of existing paid leave entitlements.

In our view the general provision of carer's leave via aggregation offers scope for wider access across the work force and as such, hopefully, will contribute to changed community perceptions and a more equitable distribution of paid and domestic responsibilities across the paid employment sector. Discrimination should be reduced not created.

3.3 Scope of Access to Aggregated Leave

3.3.1 Extent of Coverage

The orders arising from Stage 1 of the November 1994 decision provided that employees could access their sick leave entitlements in order to provide care and support for a person who was either:

- a member of the employee's immediate family; or
- a member of the employee's household.

The term *"immediate family"* was defined to include:

> *"(a) a spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and*
>
> *(b) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee."*

In these proceedings the Commonwealth, BCA and Queensland supported the retention of the existing eligibility criteria. The Commonwealth also submitted that this issue could be revised if necessary, if and when the Sex Discrimination Act 1984 was amended or if practical difficulties are experienced in the operation of the provision.

The ACTU supported access to family leave in a *"non-discriminatory way"* and submitted that the order arising from these proceedings should explicitly provide an entitlement in respect of same sex partners and persons in a relationship of traditional

kinship. The draft order submitted by the ACTU provided that employees could access their aggregated entitlement in order to provide care and support for a person who was:

"(a) a member of the employee's immediate family; or

(b) a member of the employee's household; or

(c) a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis; or

(d) a relation of the employee by traditional kinship,

without discrimination in interpretation as to race or sexual preference."

The ACTU also filed a supplementary submission which provided information in relation to a framework for determining relations of traditional kinship and the family care needs of workers of Aboriginal or Torres Strait Islander background.

In support of its submission the ACTU relied on the decision of the NSW Industrial Commission in the May 1995 State Family Leave Case [AILR Vol. 37, 1995 Jan-Jul, p.4, 133, para 5-028]. In that matter the standard clause determined by the NSW Commission provides that the entitlement to use sick leave for family leave purposes is subject to, among other things:

"(i) the employee being responsible for the care and support of the person concerned; and

(ii) the person concerned being:

(a) a spouse of the employee; or

(b) a de facto spouse, who, in relation to a person, is a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; or

(c) a child or an adult child (including an adopted child, a step child, a foster child or an ex-nuptial child), parent (including a foster parent and legal guardian), grandparent, grandchild or sibling of the employee

or spouse or de facto spouse of the employee; or

(d) a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis; or

(e) a relative of the employee who is a member of the same household, where for the purposes of this paragraph:

1. 'relative' means a person related by blood, marriage or affinity;

2. 'affinity' means a relationship that one spouse because of marriage has to blood relatives of the other; and

3. 'household' means a family group living in the same domestic dwelling."

The NSW Government supported the adoption of a definition similar to that contained in the standard clause determined by the NSW Commission.

HREOC proposed that the existing definition be expanded to include workers with responsibilities for the ongoing care, support and attention of another person. HREOC also stated that explicit recognition of same sex partners was to be welcomed but noted that the broad category of household member without the need to define the specific relationship that a household member has to the employee removes the need for employees to reveal their sexual preference to their employer. The NPEC and WEL also supported broadening the definition of family.

The Combined States submitted that no circumstances had arisen since the November 1994 decision which would warrant broadening the definition of family as defined by the Commission.

The ACCI with the support of the MTIA strongly opposed any extension of the current definition and sought to restrict the expression *"a member of the employee's household"* to those members of the employee's household who are related by blood, adoption or marriage (including a de facto spouse). In the alternative ACCI submitted that the NSW standard clause could *"usefully be adopted"* with the omission of subparagraphs (d) (dealing with a same sex partner) and (e) (dealing with relationships based on affinity).

The Catholic Church employers (ACCIR) submitted that they regarded families as *"those intimate communities within society whose members are committed to each other through marriage, blood or adoption"*. However ACCIR recognised that there are many types of domestic arrangements where the persons concerned care for each other. While ACCIR did not consider such arrangements to be a family, it was submitted that where a person is genuinely in need of care then another person should have the opportunity to care for them. The ACCIR proposed that access to the aggregated entitlement should be available in respect of family members and persons other than family members who are in genuine need of care and support from the employee. ACCIR also expressed the view that the term *"carer's leave"* more appropriately reflected the range of domestic arrangements under which individual's care for each other, than implied in the term *"family leave"*.

The Australian Council of Lesbian and Gay Rights and the Australian Federation of AIDS Organisations sought clarification of the fact that the term *"household"* is sufficiently wide to include same sex relationships. Further if sick leave and bereavement leave were to be aggregated then, in their submission, eligibility for bereavement leave should cover the same class of persons entitled to access carer's leave.

We reject the ACTU's submission that the definition be extended to explicitly cover same sex partners and persons in a relationship of traditional kinship. In our view the broad category of household member covers same sex relationships. Providing a specific entitlement would require employees to reveal their sexual preference to their employer. Such an infringement of privacy is, in our opinion, undesirable.

In relation to the second aspect of the ACTU's proposal, any application to extend the existing definition to include relationships of traditional kinship should be determined in the context of a specific case. Such an approach would allow the relevant issues to be properly considered in a specific factual context.

In relation to the restriction sought by the ACCI we are not satisfied that such a limitation is warranted or supported by the terms of the November 1994 decision. That decision makes it clear that for the purpose of access to leave an employee may use such leave to care for either a member of the employee's immediate family as defined in the Sex Discrimination Act 1984 or a member of the employee's household [Print L6900, p.39]. In either case access to leave is dependent on the employee having responsibility to care for the person concerned. We have also taken into account the need to implement our decision in a non-discriminatory way.

In our opinion the orders arising from Stage 1 of the November 1994 decision do not require any amendment at this time. The existing order has, in our view, the following characteristics:

- flexibility;
- is non-discriminatory;
- protects privacy; and
- covers all the categories specified in the NSW provision.

However, as submitted by the Commonwealth, it may be necessary to revisit this issue in the future if the definition of immediate family in the Sex Discrimination Act is amended or if practical difficulties are experienced in the operation of the provision.

We also agree with the submission of the ACCIR that the term carer's leave is more appropriate than the term family leave. Accordingly we will refer to the aggregated leave entitlement as *"personal/carer's leave"* to reflect the particular options available under the provision.

We have also decided to accept the submission put on behalf of the Australian Council of Lesbian and Gay Rights and the Australian Federation of AIDS Organisations as to the coverage of bereavement leave. In our view eligibility for bereavement leave should cover the same class of persons entitled to access carer's leave. It would be illogical and perhaps discriminatory to provide employees with an entitlement to care for a sick member of their household but not provide them with leave to attend that person's funeral in the event that the latter does not recover from the illness.

3.3.2 Illness of a Family/Household Member

The existing order provides that:

> *"The employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness of the person concerned."*

The ACCI proposed two amendments to the existing order.

First, the medical certificate or statutory declaration should also state that the sick person actually requires care. It was proposed that the words *". . . and that the illness is such as to require care by another"* be added to the terms of the existing order. This proposal was not a matter of contention in the proceedings before us and we agree that it is consistent with the intention of the November 1994 decision. The orders arising from our decision will incorporate the ACCI's proposal.

Second, ACCI argued that it would be consistent with the Parental Leave Test Case order [Print J6778], to provide that no more than one employee should take leave to care for the same family member, that is there should be no double counting of employees acting as the primary care giver for the one family member at the same time. ACCI proposed that a new paragraph be inserted to provide:

> *"An employee shall not take sick leave for family purposes under this clause where another person has taken sick leave to care for the same person."*

The ACTU opposed the ACCI proposal and referred to circumstances where leave for more than one care giver may be justified, for example both parents taking leave where a child is critically ill and undergoing major surgery.

We are satisfied that both points of view have merit and therefore propose to adopt the ACCI proposed paragraph with the insertion of the qualifying words *"in normal circumstances"* at the beginning of the paragraph to address the concerns raised by the ACTU. The amended paragraph will read:

> *"In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person."*

What constitutes *"normal circumstances"* will be a matter to be determined having regard for the particular circumstances, reflecting the good sense of both the employer and employee to determine the needs of a particular case. Any disputed cases can be dealt with in accordance with the grievance procedure.

3.3.3 A Cap on Access

ACCI sought to impose a *"cap"* on the extent to which an employee could use any aggregated sick/bereavement leave entitlement to provide care or support for an ill family member. Specifically ACCI proposed that the amount of leave which could be used for this purpose in any one year should not exceed 3 days. This proposition was supported by the

Combined States whereas the Catholic Church employers supported a cap of 4 days per annum.

The MTIA submitted that if the Commission decided to aggregate sick leave and bereavement leave and to allow access to the aggregated entitlement for the purpose of carer's leave then a cap of 5 days' carer's leave per annum should apply.

The BCA, with support from the ACM, proposed that all of each current year's sick leave entitlement should be available as family leave.

The Commonwealth, New South Wales Government and the ACTU submitted that the entitlement to carer's leave should be limited to the current year's entitlement established through the aggregation of sick leave and bereavement leave. The Commonwealth also stated that in the Australian Public Service the current year's half pay sick leave entitlements should not be accessible for the purpose of carer's leave.

Those parties who advocated the imposition of a cap on the use of sick leave for family leave purposes advanced two main grounds:

- the need to minimise the economic impact of the decision; and

- in the absence of a cap employees could use all their sick leave for family purposes and not have any entitlement which could be used when they are ill themselves.

In our view there is merit in adopting a cap on access to the aggregated entitlement for carer's leave purposes. We have decided that a cap of 5 days per annum would be a fair balance between the provision of greater flexibility for employees to enable them to better balance their work and family responsibilities and the concerns expressed by ACCI and others about the need to limit the cost of any new entitlement.

A 5 days per annum cap is also consistent with the available evidence regarding the number of working days per annum used by employees to care for ill family members.

In its written submission the HREOC referred to a recent survey on this issue in the following terms:

> *"A recent survey entitled 'Childcare at Work' assesses the impact of child care arrangements on childhood illnesses and workplace absentee[is]m. 545 employees from 16 workplaces completed a questionnaire each month over a 6 month period from February to July 1994. 71% were women and 64% managers, professionals and para-professionals working ordinary hours and in full time employment.*
>
> *The survey found that an employer can expect that employees with children under 13 will take 5 days leave and use 3 days alternative work practices to care for sick children per year. The younger the child, the more leave taken."* [p.8]

This conclusion confirms the results of the survey material relied upon in the November 1994 decision. In particular reliance was placed upon a study which concluded:

> *"Some 58 per cent of the respondents in the VandenHeuvel study took some time off work over a twelve month period to care for a child or other family member, with males and females equally likely to do so [VandenHeuvel (1993) at pp.55-56]. The evidence suggests that usually a few days were taken."* [Print L6900, p.21]

Imposing a 5 days per annum cap on access to the aggregated entitlement for carer's leave purposes will also ensure that employees will continue to have access to paid leave for personal illness.

In addition to the 5 days' carer's leave cap we have also decided that there is merit in maintaining separate components within the aggregated provision and in providing a cap on access to each component. This structure will enable the aggregated entitlement to be applied in a manner which accommodates the variety of purposes for which it may be utilised.

In our view the aggregation of sick leave and bereavement leave without the adoption of a cap on each component would be inappropriate. The purpose of aggregation is to provide greater access to existing paid leave entitlements for carer's leave purposes. It is not intended to increase the amount of sick leave or bereavement leave currently provided in awards.

Capping each component of the aggregated entitlement will also address employer concerns about the potential cost of aggregation.

A practical example of the approach we intend is set out below:

NOTE: This table is contained in the published version of this decision or may be inspected on file C No. 20277 of 1994.

3.4 Summary of Key Points

The characteristics of the personal/carer's leave provisions we propose are set out below.

An employee who is required to care for a sick family or household member may access up to 5 days (or equivalent part days) each year out of an aggregated sick leave and bereavement leave entitlement if required to provide care or support for an ill family member. The factors governing this leave are as follows:

- the current year's award entitlement for sick leave plus the award entitlement to bereavement leave shall be aggregated into an annual personal/carer's leave provision;

- the award entitlement will be subject to capping of days available for different purposes;

  - the total number of days which can be accessed each year from either the current year's entitlement or accumulated entitlements for carer's leave is 5 days. This may be taken in periods of less than a single day (e.g. 2 full days, 6 half days may be accessed);

  - within the current year's aggregated personal/carer's leave entitlement, the quantum that can be used for sick leave and bereavement leave is capped at the respective award levels, i.e. sick leave cannot be used to supplement the bereavement entitlement or vice versa;

  - accumulated sick leave may be accessed for sick leave, bereavement leave (subject to the relevant cap) or carer's leave (subject to total cap of five days, or part day equivalents, per annum) when the current year's entitlement is exhausted;

  - untaken sick leave component of personal/carer's leave will be treated as accumulated sick leave;

  - the bereavement leave component cannot accumulate beyond the 12 months period;

- if paid leave is exhausted, employees will have a right to take unpaid bereavement leave, subject to the relevant cap and the circumstances for eligibility set out in the relevant award, and unpaid carer's leave may be available through a facilitative clause;

· bereavement leave may be accessed by the same persons able to access carer's leave; and

- existing bereavement and sick leave clauses will require adaptation to reflect the changes we propose.

The requirements to be met in applying for carer's leave will be as follows:

· an employee shall be entitled to access carer's leave for absences to provide care and support for designated persons when they are ill and require such care and support;

· in normal circumstances an employee shall not take carer's leave when another person has taken such leave to care for the same person;

· the employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness of the person concerned, and that the illness is such as to require care by another;

· the employee must meet the criteria defined in paragraph 3.3.1 to be eligible to access the carer's leave.

During the proceedings ACCI and others expressed concern about the cost impact of any decision to aggregate sick leave and bereavement leave and to allow access to the aggregated entitlement for carer's leave purposes. We have sought to address these concerns by adopting a number of measures designed to reduce the cost impact of our decision, including:

· a 5 days per annum cap on access to the aggregated entitlement for carer's leave purposes;

· capping each component of the aggregated entitlement by reference to existing award provisions;

· the non-accumulation of the bereavement leave component of the aggregated entitlement;

- the medical certificate or statutory declaration which the employee claiming carer's leave may be required to produce must state that the illness of the person concerned is such as to require care by another; and

- in normal circumstances an employee shall not be entitled to take carer's leave where another person has taken leave to care for the same person.

In our view the measures we have adopted will significantly reduce the cost impact of our decision in relation to aggregation.

4 - FACILITATIVE PROVISIONS

4.1 General

As we have already noted Stage 1 of the package of measures determined in the November 1994 decision included the introduction of a range of *"facilitative provisions"* to assist workers in reconciling their employment and family responsibilities. It was also proposed that Stage 2 would include the introduction of additional facilitative provisions with respect to:

- the use of rostered days off; and

- part-time work.

In the course of these proceedings a range of issues has been raised in relation to the facilitative provisions included in Stage 1 and the provisions proposed to be introduced in Stage 2.

Before turning to the issues in respect of specific facilitative provisions we wish to make a number of general observations. A useful starting point in this regard is to note that a facilitative provision is that part of an award clause which enables agreement at enterprise level to determine the manner in which that clause is applied at the enterprise. A facilitative provision normally provides that the standard approach in an award provision may be departed from by agreement between an individual employer and an employee or the majority of employees in the enterprise or part of the enterprise concerned. Where an award clause contains a facilitative provision it establishes both the standard award condition and the framework within which agreement can be reached as to how the particular clause should be applied in practice.

In the September 1994 Safety Net Adjustments and Review decision [Print L5300, pp.29-32], the Commission identified facilitative provisions, together with enterprise flexibility clauses and majority clauses, as measures that would promote greater flexibility in the award system.

In the October 1995 Third Safety Net Adjustment & Section 150A Review decision (October 1995 Review decision) [Print M5600, pp.27-30] the Commission made 5 points in relation to the nature and extent of facilitative provisions.

1. At this stage the Commission intends to adopt an approach to the insertion of facilitative provisions into awards which reflects the fact that such clauses are self executing. Facilitative provisions need to be distinguished from other mechanisms which may be used to introduce flexibility at the enterprise. Enterprise flexibility clause agreements, certified agreements, enterprise flexibility agreements, consent awards or consent award variations all involve an assessment by the Commission of both the process leading to such agreements and their impact on the employees covered by them. By contrast the use of facilitative provisions at the enterprise level is not subject to Commission scrutiny.

2. Facilitative provisions should continue to protect employees while allowing appropriate flexibility for individual enterprises in the way an award clause is implemented.

3. Facilitative provisions should not be a device to avoid award obligations because the Commission is obliged to ensure, among other things, that *"employees are protected by awards that set fair and enforceable minimum wages and conditions of employment that are maintained at a relevant level [s.88A]."* [August 1994 Review of Wage Fixing Principles decision [Print L4700, pp.33]]

   Neither should the adoption of a facilitative provision result in unfairness to the employees covered by the award. Given the lack of Commission scrutiny in relation to the operation of these clauses, a proposal that a facilitative provision should not operate to reduce ordinary time earnings is inadequate to ensure that in all cases unfairness to employees will not occur.

In order to provide the necessary protection and prevent unfairness the Commission will generally only insert facilitative provisions which require majority agreement at the enterprise level before they become operative. For example:

> *"The employer and the majority of employees at an enterprise may agree to establish a system whereby the employer and individual employees may agree to take an RDO at any time despite any award provision to the contrary."*

In essence facilitative provisions should require a majority decision to introduce a particular form of flexibility which may then be utilised by agreement between the employer and individual employees.

Once a majority decision has been taken its terms should, in order to provide a record of them, be set out in the time and wages records kept in accordance with regulations 131A-131R of the Industrial Relations Regulations.

The Commission considers that these safeguards are appropriate given the self executing nature of facilitative provisions and the fact that facilitative provisions have a capacity to directly or indirectly affect all employees at an enterprise.

In circumstances where the Commission has decided that it is appropriate that a facilitative provision require the agreement of a majority of employees at an enterprise prior to the introduction of a particular type of flexibility, then the relevant provisions should also provide that:

(a) unions which are both party to the relevant award and who have members employed at the particular enterprise must be informed of the intention to utilise the facilitative provision and be given a reasonable opportunity to participate in negotiations regarding its use;

(b) participation by a union in this process does not mean that the consent of the union is required prior to the introduction of the agreed flexibility arrangements at the enterprise. Unions will not have a right to veto the introduction of such arrangements;

(c) union involvement and the requirement for majority consent are only required at the time a decision is made to introduce a particular form of flexibility at the enterprise. Thereafter the only requirement is agreement between the employer and an individual employee to access the agreed flexibility.

The Commission may also decide to establish a monitoring process under which a particular facilitative provision is, after a reasonable period, reviewed to consider its impact in practice.

Such a process can be used to ensure that the practical operation of a facilitative provision is:

- not unreasonably impeding the introduction of greater flexibility at the enterprise level; or

- resulting in unfairness to employees.

If these objectives are not being met then the provision may be amended.

4. Award parties are not required to include facilitative provisions in all award clauses. An award-by-award process is preferable as it allows the needs and circumstances of the enterprises and employees covered by the award to be properly taken into account in accordance with s.88A of the Act. However all award parties must specifically address the use of facilitative provisions as a means of making their awards more relevant and better suited to the needs of individual enterprises. In this regard, award parties should consider giving priority to an examination of award provisions which affect the organisation of work or the efficiency of enterprises covered by the award.

5. Facilitative provisions should be used to promote the efficient organisation of work at the enterprise level and be designed to avoid the prescription of matters in unnecessary detail.

We intend to apply these guidelines to the issues before us. As the October 1995 Review decision was handed down after the conclusion of the proceedings before us, we will provide the parties with an opportunity to make further submissions in relation to the

application of these guidelines to the particular facilitative provisions dealt with in this decision. This can be done during the proceedings to settle the orders arising from this decision.

Before turning to specific facilitative provisions, we wish to deal with a general submission put by the ACTU in relation to the scope of the facilitative provisions. The ACTU submitted that the facilitative provisions should only be available in the context of leave to care for ill family members.

The limitation proposed by the ACTU was opposed by the ACCI, MTIA, the Combined States and others.

In the November 1994 decision we did not intend that the facilitative provisions determined would be restricted in the manner proposed by the ACTU. That decision states that the package of measures decided upon were intended to represent an appropriate balance between a number of objectives including:

> *". . . introducing greater flexibility into the award system consistent with the Commission's statutory obligation to ensure that 'awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees interests are also properly taken into account' [section 88A(c)]."* [Print L6900, p.39]

The November 1994 decision also envisaged that the range of facilitative measures to be introduced would facilitate the introduction of greater flexibility at the workplace level. In particular the Commission stated:

> *"The approach we have adopted is consistent with the submissions of ACCI that the award system at present inhibits the capacity of employers and employees to reconcile work and family responsibilities. ACCI submitted that awards should be amended in a number of respects, including to provide for more flexibility in the use of annual leave entitlements, to amend award provisions which prevent employers allowing employees to make-up time at ordinary time rates at a time agreed between them, to remove restrictions on part-time work, provide adequate flexibility in rostered days off, and to introduce fully flexible working hours.*
>
> *We also note that the measures to be introduced will facilitate the introduction of greater flexibility at the workplace level and a number of the studies we have referred to reported that employees saw additional flexibility as the primary means of reconciling work and family responsibilities."* [Print L6900, pp.41-42]

The limitation proposed by the ACTU would mean that employees would have no access to the facilitative provisions for reasons other than the illness of a member of the employee's household or immediate family. If this limitation were adopted employees would not have access to the flexibilities provided in the package of measures we have determined for the purpose of attending, for example, school events and curriculum days. This would be contrary to existing practice. As noted in the November 1994 decision the most common method used by employees with dependent children to arrange time off to attend such events was flexible work arrangements. The evidence submitted in the Stage 1 proceedings was that 2 out of 3 employees with dependent children arranged time off for these child related activities by using make-up time, flextime or rostered days off [Print L6900, pp.29-30].

We reject the limitation proposed for the reasons given.

4.2 Annual Leave

In the November 1994 decision the Commission decided to introduce a facilitative provision to allow an employer and an employee to agree to allow up to one week's annual leave to be taken in single days [Print L6900, p.41]. The orders arising from that decision include the following provision:

> *"**3. Annual Leave***
>
> *3.1 Notwithstanding the provision of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods not exceeding five days in any calendar year at a time or times agreed between them.*
>
> *3.2 Access to annual leave, as prescribed in paragraph 3.1 above, shall be exclusive of any shutdown period provided for elsewhere under this award.*
>
> *3.3 An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least 5 consecutive annual leave days are taken."*

No specific proposal to vary this aspect of the orders arising from the November 1994 decision was submitted in these proceedings.

The only change we propose to make to the existing facilitative clause would be to make it clear that up to 5 days' annual leave per annum may be taken in single day periods or parts of a single day. This matter may be the subject of submissions by the parties in the settlement of the orders.

4.3 Make-up Time

The introduction of a facilitative provision to allow an employer and an employee to agree to the working of *"make-up"* time whereby an employee may choose to perform additional work to make up for time lost was part of the Stage 1 package determined in the November 1994 decision [Print L6900, p.41]. In his decision settling the orders arising from Stage 1 Vice President Ross stated:

> *"Given the limited nature of the material available to the Commission at this stage I have decided to adopt a cautious approach pending a fuller consideration of this issue by the Family Leave Test Case Bench in the August 1995 proceedings. Accordingly make-up time will only be able to be worked during the spread of ordinary hours and will accrue at ordinary rates."* [Print L9048, p.13]

The orders arising from that decision include the following provision:

> *"**5.1 Make-up Time***
>
> *5.1 An employee may elect, with the consent of their employer, to work 'make-up time', under which the employee takes time off ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award."*

In this decision settling the relevant orders Vice President Ross stated that the time at which an employee may work make-up time, the level of compensation applicable to such work and the role, if any, which a facilitative provision may play in this regard would need to be reconsidered in the Stage 2 proceedings.

In a subsequent decision which varied the Metal Industry Award 1984 - Parts I and II to provide for Stage 1 of the November 1994 decision Senior Deputy President Marsh granted an application by the MTIA, supported by ACM, which distinguished the position of shift workers in respect of make-up time [Print M0900]. As a result of her Honour's decision subclause 18C(b) of Part I of the award provides:

"(b) An employee on shift work may elect, with the consent of their employer, to work make-up time under which the employee takes time off ordinary hours and works those hours at a later time, at the shift rate which would have been applicable to the hours taken off."

In these proceedings the ACTU submitted that make-up time should only occur within the ordinary spread of hours and consistent with other award provisions. Further where awards currently provide for flexibility, for example in relation to hours and rosters, the Commission should exercise its discretion as to whether the facilitative clause is required. The ACTU argued that to allow make-up time to be worked at any time would be contrary to the general principle that time worked outside ordinary hours should be compensated at a higher rate.

The ACCI, MTIA and others submitted that an employer and employee should be permitted to agree to make-up time outside of ordinary hours, for example at night or the weekend.

There was general support for the approach taken by Senior Deputy President Marsh in relation to shift workers.

At this stage we are not prepared to vary the current limitation that for day workers make-up time be limited to the spread of ordinary hours. We adopt the approach taken by Senior Deputy President Marsh in the Metal Industry Award in relation to shift workers.

In circumstances where, in the context of a particular award, limiting make-up time to the spread of ordinary hours creates a substantial impediment to the use of make-up time then an application may be made for a special case to review this aspect of our decision in relation to a particular award.

The issue of whether make-up time can be accessed by individual agreement between an employer and an employee or whether the agreement of a majority of employees at an enterprise is required before individuals may use make-up time may be addressed by the parties in the settlement of the orders.

4.4 Time Off in Lieu of Payment for Overtime

The introduction of a facilitative provision to allow an employer and an employee to agree to time off in lieu of payment for overtime was part of the Stage 1 package determined

in the November 1994 decision [Print L6900, p.41]. In the decision settling the orders arising from Stage 1 Vice President Ross concluded:

> *"In my view the objectives of the Test Case decision can best be met by providing that time-off in lieu be at ordinary time. I would however add two limitations:*
>
> - *existing award provisions dealing with time-off in lieu of overtime should not be amended until this matter is finally determined by the Commission after the August 1995 proceedings; and*
>
> - *the order will ensure that employees retain the right to be paid out at overtime rates.*
>
> *The approach adopted will assist employees in reconciling their employment and family responsibilities while maintaining an incentive to bargain and introducing greater flexibility into the award system."* [Print L9048, p.10]

The orders arising from that decision include the following provision:

> *"**4. Time Off in Lieu of Payment for Overtime***
>
> *4.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.*
>
> *4.2 Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate, that is an hour for each hour worked.*
>
> *4.3 An employer shall, if requested by an employee, provide payment, at the rate provided for the payment of overtime in the award, for any overtime worked under paragraph 4.1 of this subclause where such time has not been taken within four weeks of accrual."*

The decision settling the relevant orders stated that the rate of compensation for overtime worked in the context of time off in lieu of payment would need to be reconsidered in the Stage 2 proceedings.

In these proceedings the ACTU argued that time off in lieu should be at overtime rates, that is if the overtime rate is time and a half then one and a half hours time off accrues for every overtime hour worked. The ACTU also sought clarification in relation to the level of protection afforded to existing award conditions prescribing time off in lieu of payment for overtime at overtime rates.

The existing time-for-time approach to the rate of compensation for overtime taken as time off in lieu of payment was supported by ACCI, MTIA, BCA, ACM, the Combined States and others.

ACCI also submitted that existing award provisions providing time off in lieu at penalty rates should be replaced by the standard order arising from Stage 1, with those opposing such an application bearing *"a very heavy burden"* of demonstrating why the standard order should not apply. In this context we note that MTIA submitted that such existing award provisions should not be affected by our decision in this matter.

A number of parties also sought to amend subclause 4.3 of the standard order to provide for the payment of overtime worked, at the request of the employee, where the time off in lieu had been requested by the employee but had not been taken within one year of accrual. The current standard order only provides for the *"banking"* of time off in lieu for a period of four weeks.

We have not been persuaded to depart from the form of order determined by Vice President Ross. In relation to the issue raised by the ACTU concerning the level of protection to be afforded to existing award provisions we have decided that such provisions should be retained. Accordingly where an award currently provides for time off in lieu of payment for overtime at overtime rates then that part of the package we have determined should not be inserted into the award in question. In this regard the approach adopted by the Commission in the variation of the Victorian Local Authorities Interim Award 1991 [Print M2701] is appropriate.

In relation to the proposed variation of subclause 4.3 of the standard order we are satisfied that the existing provision represents an appropriate balance and should be retained. The capacity to bank overtime is dependent upon employer consent and if an employer is concerned about the potential payout of a large bank of overtime then consent for further banking can be withheld. In practice it would be desirable for the employer and employee(s) to address this issue when making an agreement and set a ceiling at that time if they so wish.

Providing a delay of one year in order to receive payment for overtime worked may well discourage some employees from utilising this provision. Further an employee's circumstances may change such that they need access to the money rather than to the time off. In some instances the changed circumstances may well bring about an urgent need for the employee to access the *"banked"* overtime money.

The issue of whether time off in lieu of payment for overtime can be accessed by individual agreement between an employer and an employee or whether the agreement of a majority of employees at an enterprise is required before individuals may enter into agreements with their employer to take time off in lieu may be addressed by the parties in the settlement of the order.

4.5 Part-time Work

One of the issues identified in the November 1994 decision for consideration in these proceedings was the introduction of facilitative provisions to provide greater flexibility with respect to part-time work.

This issue was the subject of considerable debate in the proceedings before us.

4.5.1 The Submissions

The ACTU and ACCI put detailed submissions which were at the opposite ends of the spectrum of views presented to us.

The ACTU strongly opposed the introduction of facilitative provisions in relation to part-time work. It was submitted that the introduction of such provisions would serve only to *"reduce award protections in relation to part-time work, exacerbate the difficulties in balancing work and family, as well as negating much of the equal employment initiatives adopted over the last decade"*.

In support of its submission the ACTU relied on statistical data which showed that over the past 14 years the incidence of part-time work has more than doubled. On this basis the ACTU argued that there was no evidence to support the submissions made on behalf of employers that current award clauses dealing with part-time work were restricting access to part-time work through lack of flexibility.

It was also submitted on behalf of the ACTU that current award provisions dealing with part-time work were in many instances inserted by arbitration and reflected the particular requirements and circumstances of the enterprises covered by the award.

The Commonwealth supported the introduction of facilitative clauses which were co-operative in nature, reflected genuine agreement within a defined scope and which do not undermine the award safety net. In the Commonwealth's submission a facilitative provision should establish the bounds for part-time work arrangements within which an individual worker will then need to agree to his or her particular arrangements with the employer.

ACCI supported increased flexibility in relation to part-time work. In particular ACCI sought the inclusion of part-time work provisions in all awards. Where provisions already existed ACCI sought to have restrictions on the form of work, such as ratios and the requirement for union agreement, removed. In this regard ACCI tendered a draft order providing for the removal of any restrictions relating to:

- limiting the number of employees who may work part-time;
- establishing quota as to the ratio of part-time to full-time employees who may work;
- prescribing a minimum or maximum number of hours a part-time employee may work; or
- requiring consultation with, consent of or monitoring by a union.

ACCI argued that the removal of current provisions was required because these aspects of awards were *"highly inflexible"* and failed to provide the appropriate flexibility for family requirements by creating a barrier to part-time employment for some employees. ACCI supported the use of facilitative clauses which provide for agreement between the individual and the employer rather than requiring agreement between the employer and the majority of employees at the enterprise level.

Other employer organisations supported the introduction of facilitative clauses for part-time work.

BCA argued that the number and pattern of part-time work hours should be determined by mutual agreement between the employer and employee, but stressed the importance of retaining the pro rata entitlements for part-time employees. Similarly MTIA submitted that existing restrictions on the minimum or maximum number of ordinary hours which may be worked on any day or in any week and restrictive ratios as to the number of employees who may work on a part-time as compared to a full-time basis should be removed. The MTIA also supported the introduction of greater flexibility in the number of part-time hours worked and in start and finish times.

4.5.2 The Evidence

The incidence of part-time work has increased over time. In 1993, 24 per cent of all workers were part-time, an increase from 12 per cent in 1973 and 17 per cent in 1983. Further:

- 75 per cent of part-time workers were women (90 per cent of the increase in the labour force participation rate of women between 1973 and 1993 is due to an increase in the participation in the part-time labour market);

- the incidence of part-time work was highest among married women at 47 per cent compared to 35 per cent for unmarried women;

- the incidence of part-time work among men was 10 per cent [ABS Cat. No. 4012.0, p.103].

The study by Wolcott and Glezer (1995) noted at p.13 that:

> *"Over the past decade, about half of all new jobs created have been part-time. Over 70 per cent of part-time jobs created since 1970 have been filled by women, and three-quarters of all part-time jobs are held by women. About 40 per cent of employed women compared with 10 per cent of employed men now work part-time (Committee on Employment Opportunities 1993). Overall, the proportion of employed people working part-time in 1993 was 24 per cent compared with 9 per cent in 1966 and 12 per cent in 1973. Both men and women who work part-time work on average 15 hours per week."*

The evidence also shows an employee preference for part-time work.

As noted in the November 1994 decision an ABS survey, *"Alternative Working Arrangements 1986"*, indicated that, overall, 12 per cent of women working full-time compared with 5 per cent of men preferred to work fewer hours. One-third of women compared with 11 per cent of men who were looking for work declared a preference for part-time work. Nearly two-thirds of people who wished to work fewer hours were in the child-bearing age range of 25-45 [Print L6900, p.21].

At present a significant number of awards do not contain any form of part-time work clause. The Joint Survey of major awards shows that some 14.6 per cent of awards surveyed do not provide for part-time work [Ref: Attachment 2 to ACCI's written submission in reply].

The Wolcott and Glezer study concluded that their research, and the literature generally, showed unequivocally that one of the main ways that families juggle work and family commitments is by mothers working part-time [Wolcott and Glezer (1995) at p.80]. This finding is supported by the table below which summarises the responses to one of the surveys of mothers working part-time which was relied on by Wolcott and Glezer.

NOTE: This table is contained in the published version of this decision or may be inspected on file C No. 20277 of 1994.

Wolcott and Glezer conclude that the preference of women for part-time work reflects the present reality that women are more likely to be in charge of family responsibilities:

> *"Families interviewed by the Australian Institute of Family Studies for the three studies examined in this book clearly reveal that, for the majority of families with depending children, the way they achieve the integration of employment with family caring responsibilities is having one partner, almost always the mother, work part-time in paid work. Despite public and private protestations of egalitarianism and, in many couples, a genuine belief that family tasks and child care were shared responsibilities, it was overwhelmingly mothers who provided this solution to balancing work and family roles by working part-time and shouldering what Hochschile (1989) called the 'second shift' of family work."* [p.181]

It is apparent from the evidence that part-time employees are an integral part of the labour force. Part-time employment is one of the ways in which families reconcile their work and family commitments. The evidence shows an employee preference for part-time work, particularly among women.

4.5.3 Changes Proposed

The submissions of the parties and our assessment of the evidence lead us to conclude that there is merit in introducing additional flexibility in relation to part-time work. In our view two specific areas need to be addressed:

- the introduction of part-time work provisions into awards which do not currently provide for part-time work; and

- reviewing the adequacy and relevance of existing provisions against the characteristics of the particular industry or enterprise covered by the award.

The part-time work issue presents a challenge. It is imperative that the use of part-time work is accompanied by award provisions which reflect fairly the requirements of those accessing it and those providing it. Those provisions must be:

- fair and non-discriminatory;

- capable of flexible application; and

- applied in the absence of coercion or intimidation.

In relation to the development of fair and equitable part-time work provisions 2 matters must be taken into account.

First, provisions dealing with part-time work need to ensure that employees employed on a part-time basis are provided pro rata entitlements to the benefits available to full-time employees. The failure to provide such pro rata entitlements may be discriminatory as submitted by HREOC:

> *"Given that women comprise a substantial proportion of the part-time and casual work force, employment offering less favourable terms and conditions to part-time than to full-time workers may be found to discriminate indirectly against women. The European Court of Justice has ruled that employment policies or pay practices which disadvantage part-time workers constitute indirect discrimination against women, where women form a greater percentage of the part-time work force. Consequently, any entitlements offered to full-time workers must be offered to part-time workers on a pro rata basis."* [HREOC written submission, p.31]

In our view the provision of pro rata benefits should include equitable access to training and career path opportunities. The importance of this issue was highlighted in the Wolcott and Glezer study in the following terms:

> *"The linking of part-time work to women with family responsibilities has reinforced the notion that those on the 'mummy track' are less committed to pursuing a career than full-time workers. Consequences of this perception can include less access to training opportunities and company-sponsored child care benefits (Junor, Barlow and Patterson 1994)."* [p.13]

> *"Some of the potential limitations associated with part-time work are revealed when we look at satisfaction with training and advancement opportunities. Women working part-time were least satisfied with training options compared with men and especially women working part-time were significantly less satisfied in this respect."* [p.48]

Second, part-time work needs to be clearly distinguished from casual employment. While the provision of pro rata benefits is one means of providing such a distinction other measures are also needed. In particular part-time work provisions should specify the minimum

number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked.

Regularity in relation to hours worked is an important feature of part-time employment. In the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. For example, if hours of work are subject to change at short notice it can create problems for organising child care as these arrangements generally require stable hours and predictable timing. In this regard HREOC submitted that:

> *". . . from the point of view of workers with family responsibilities, the flexibility provided by casual work is often more imagined than real. Many casuals are in the position of having sporadic and inadequate work which requires them to be on call to ensure that such work as is available will continue to be offered to them. Family commitments, such as the care of a sick child, are not so predictable as to allow this on call availability."* [HREOC written submission, p.33]

A new part-time work clause should include a monitoring process under which a part-time work provision is, after a reasonable period, reviewed to consider its impact in practice. This process should be applied to test the practical operation of a facilitative provision including the tests that the clause does not:

- unreasonably impede the introduction of greater flexibility at the enterprise level; or

- result in unfairness to employees covered by the clause.

Part-time work clauses in awards should include an anti-discrimination provision to ensure that part-time employees are not discriminated against in relation to employment opportunities such as training, personal development, career advancement.

Despite the challenge presented, viable part-time work provisions must be made available; to do otherwise would fail to meet the requirements of employees themselves.

4.5.4 The Introduction of Part-time Work

Upon application appropriate part-time work provisions should be inserted into awards which do not currently provide for part-time work. We have formed this view as a general proposition on equity and consistency grounds. Awards need to be varied to ensure

that employers and employees can generally access part-time work on a fair and equitable basis.

The form of a particular part-time work provision should be determined having regard to the needs of the particular industries and enterprises while ensuring that employees' interests are properly taken into account.

A part-time work clause should also incorporate appropriate facilitative provisions and this is an issue we address in the next section of our decision.

Consistent with normal practice all award parties must be notified of the intention of a party to seek to vary the award to introduce a provision dealing with part-time work.

4.5.5 Review of Existing Provisions

Existing award provisions dealing with part-time work should be reviewed to ensure that they meet the needs of the relevant employers and employees. This process should include consideration being given to the insertion of appropriate facilitative provisions.

We agree with the Commonwealth's submission that the review of part-time work clauses in awards is *"best undertaken at the award level where any special considerations, and the views of the parties can be taken into account, including in any arbitration"*.

In our view the review of these provisions should take place in the context of the section 150A review of the award. To assist in this process we have decided to make three general observations which should be taken into account in framing suitable provisions for insertion into awards:

First: The Commission will adopt a positive but cautious approach to the introduction of facilitative clauses for part-time work. Caution is necessary because of the sensitive nature of the issue both historically and at the present time, and the need to avoid negative consequences which may generate discriminatory or inequitable outcomes. In addition, while some aspects of part-time work may be determined or varied at award level, several aspects of the application of the provision will be self executing at the enterprise level. Caution is warranted where no monitoring of the Commission is involved.

Second: The adoption of a part-time work facilitative provision should not be a device to avoid award obligations or result in unfairness to employees covered by the award. Consistent with the need to protect employees subject to the facilitative provision the Commission will guard against contrived or discriminatory outcomes in the application of part-time work.

Third: The Commission will insert into awards part-time work clauses which provide a number of levels at which part-time work provisions may be accessed. Some provisions should only be altered by a variation of the award. Others may be capable of variation by majority agreement at the enterprise or by agreement between an employer and individual employee.

(a) At award level.

Certain aspects may only be determined or varied at award level. For example, the pro rata wages and conditions of work which form the safety net for part-time workers.

Consistent with normal practice all award parties must be notified of the intention of a party to introduce part-time work provisions into an award or to vary the provision at award level. A variation to the award at enterprise level through an enterprise flexibility clause will form a schedule to the award.

(b) At enterprise level.

Generally, the Commission will only insert facilitative provisions for part-time work which can be accessed at the enterprise level by agreement between the majority of employees and the employer before they become operative.

Before using a facilitative provision to introduce flexibility at the enterprise level the following steps should generally be taken:

(i) unions which are <u>both</u> party to the relevant award <u>and</u> who have members employed at the particular enterprise must be informed of the intention to utilise the facilitative provision and be given a reasonable opportunity to participate in negotiations regarding its use;

(ii) participation by a union in this process does not mean that the consent of the union is required prior to the introduction of flexibility in relation to part-time work. Unions will not have the right to veto the introduction of flexibility; and

(iii) union involvement and the requirement for majority consent are only required at the time a decision is made to introduce a particular type of flexibility at the enterprise. Thereafter agreement to use the agreed flexibility will be between the employer and individual employees.

The list of which issues require majority agreement will depend on the circumstances of the industry or enterprise. In general however, any provision which may affect more than an individual employee should be subject to majority vote.

Issues which may be subjected to a requirement of majority agreement include:

· determination of core hours which must be worked by all employees; or

· varying the ratio of part-time to full-time employees; or

· establishment of a process for monitoring part-time work arrangements at enterprise level.

Once a majority decision has been taken its terms should, in order to provide a record of it, be set out in the time and wages records kept in accordance with the Industrial Relations Regulations 131A-131R.

(c) Agreement between the employer and individual employee:

Within the framework established by the processes under (a) and (b) part-time work may be accessed by agreement between an individual employee and the employer. Such issues which may be determined in this way may include:

· hours of work (subject to minimum hours determined at award level and core hours determined by agreement between the majority of employees and the employer); and

- conversion from part-time to full-time work.

Unions need not be involved in the implementation of part-time work provisions which are subject to agreement between the employer and individual employees.

Where awards already provide for part-time work and have been working satisfactorily so far as the employer, employees and union(s) are concerned, no changes will be made (either at the award or enterprise level) other than where appropriate pro rata entitlements and non-discriminatory clauses (e.g. in relation to training, career progression, etc.) need to be inserted in the award.

4.6 Rostered Days Off

In the November 1994 decision the Commission indicated that it intended to introduce a facilitative provision to provide greater flexibility with respect to the use of rostered days off (RDOs).

In these proceedings there was general agreement that flexible access to rostered days off would assist employees to balance their work and family responsibilities. However there was some dispute as to the means of facilitating such flexibility and the degree of flexibility to be permitted.

The ACTU supported a facilitative provision in respect of rostered days off subject to 4 *"key protections"*, namely the provision:

- will only apply after the employee's entitlement to paid personal/carer's leave was exhausted;

- will only apply to family leave absences;

- will be general and simply provide an employee with an opportunity to use their rostered day off. The provision should not try to replicate or circumvent the wide range of RDO arrangements negotiated at enterprise level; and

- the Commission should retain a discretion to vary the standard RDO facilitative provision, or not include it, where the award parties consent or special circumstances warrant a departure from the standard provision.

ACCI opposed the key protections proposed by the ACTU and submitted that it would be *"highly desirable"* for a facilitative provision to allow employees to use their RDOs at any time by agreement between the employer and employee. However ACCI was opposed to any proposal for RDOs to be banked and taken at any time as of right.

The MTIA submitted that, by agreement, all RDOs should be able to be rescheduled at short notice. Further, by prior agreement, some or all RDOs would be able to be accrued for the purpose of creating a bank to be used for personal or family care to be drawn upon by an employee at times mutually agreed by the employer or subject to reasonable notice by the employee.

The BCA, with the support of ACM, submitted that it was important that a facilitative provision in respect of RDOs be worked out in the context of the operational needs of the enterprise.

For the reasons we have already given we do not consider that it is appropriate to limit any facilitative provision to circumstances where leave is required to care for ill family members as proposed by the ACTU.

Having regard to the submissions of the parties we favour a facilitative clause in respect of RDOs which has the following elements:

- an employer and individual employee may agree to take an RDO at any time;

- RDOs should be able to be taken, by agreement, in part day amounts;

- by agreement some or all RDOs would be able to be accrued for the purpose of creating a bank to be drawn upon by an employee at times mutually agreed by the employer or subject to reasonable notice by the employee; and

- the general arrangement to be implemented in a particular enterprise should be subject to the majority agreement before it becomes operative. For example:

> *"Despite any award provision to the contrary, the employer and the majority of employees at an enterprise may agree to establish a system under which the employer and individual employees agree to take an RDO at any time."*

Other protections may also be desirable having regard to the comments made by the Commission in the October 1995 Review decision [Print M5600, pp.27-30]. This could be addressed by the parties in the proceedings to settle the orders arising from our decision.

4.7 Additional Flexibilities

One of the issues identified in the November 1994 decision for debate in these proceedings was additional means whereby awards could be made more flexible in order to assist workers in reconciling their work and family responsibilities.

While a number of the parties in the proceedings before us addressed this issue no one approach attracted broad support.

We are of the view that a more appropriate way of implementing additional flexibility is in the context of a section 150A award review. This process allows the circumstances of the employees and the employer in the enterprise covered by the award to be taken into account.

5 - UNPAID CARER'S LEAVE

In the November 1994 decision the Commission decided to introduce a facilitative provision to allow an employer and an employee in an enterprise or part of an enterprise to agree to provide unpaid leave to enable an employee to care for a family member who is ill [Print L6900, p.41]. The orders arising from that decision include the following provision:

> *"**2. Unpaid Leave for Family Purpose***
>
> *2.1 An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family member who is ill."* [Print L9530]

One of the matters reserved in the November 1994 decision for consideration in these Stage 2 proceedings was whether the Commission should prescribe a general entitlement to unpaid family leave in addition to the aggregation of sick leave and bereavement leave [Print L6900, p.43].

In these proceedings the ACTU submitted that employees who have exhausted their paid family leave entitlements should be able to take unpaid leave in order to meet their family care responsibilities. Such an entitlement would replace the existing facilitative

provision. The ACTU's support for an entitlement to unpaid leave was dependent on such leave only being available after any paid leave entitlement had been exhausted.

The Commonwealth submitted that the overall package developed by the Commission in Stage 1 of the November 1994 decision along with the aggregation of sick leave and bereavement leave is comprehensive and accordingly it is not necessary to establish an entitlement to unpaid leave.

The granting of a general entitlement to unpaid leave was also opposed by ACCI, MTIA, BCA, ACM, the Combined States and others. The main arguments advanced against such a proposal were:

- the provision of unpaid leave should be dealt with through the bargaining system; and

- the adverse economic impact on businesses.

Having regard to the package of measures to be introduced we have decided not to provide a general entitlement to unpaid leave at this time.

However we acknowledge the point made on behalf of the ACTU that where an employee needs to provide care for a person with a chronic illness or disability the package we have determined may not be sufficient. In this regard we note that an ABS publication entitled *"Focus on Families: Caring in Families - Support for Persons who are Older or have Disabilities"* [ABS Cat. No. 4423.0; Exhibit ACTU 1 - Tag 11] found that 30 per cent of *"principal carers"* who were not currently working had given up work because of their caring responsibilities [ABS Cat. No. 4423.0, p.30]. The ABS publication concluded that:

> *"Some of the indirect costs of caring may include the need for carers to reduce their hours of work or to give up work altogether."* [ABS Cat. No. 4423.0, p.30]

Once a reasonable period of time has elapsed after the implementation of the package of measures we have determined we would, on application, give further consideration to the provision of a general entitlement to unpaid leave.

6 - FORM AND STRUCTURE OF THE ORDER

We intend that the package of measures determined in this decision should take effect as soon as possible. The orders arising from our decision will be settled by Senior Deputy President Marsh after providing the parties with an opportunity to be heard. A draft framework order is attached to this decision [see Attachment B].

During the course of the proceedings before us an issue arose as to the way in which any order arising from our decision should be inserted into an award. In this regard the orders arising from Stage 1 of the November 1994 decision have been inserted into awards in two ways:

- as a stand alone clause; or

- as a series of subclauses in award clauses dealing with sick leave, annual leave and overtime.

The ACTU submitted that the structure of family leave provisions should be consistent across awards. It was argued that a discrete and consolidated family leave provision should be developed by the Commission.

The MTIA opposed the ACTU's proposal and submitted that the most appropriate course was to provide for a family leave clause that reflected the Commission's facilitative provision in relation to part-time work and referred to the other parts of the award where the relevant provisions could be found. This approach was adopted, by consent, in the variation of the Metal Industry Award.

ACCI expressed the view that many award parties may find it appropriate to distribute the various aspects of the family leave order throughout the award, having regard to the particular circumstances of the award and the needs of the parties. ACCI submitted that such a distribution may be an appropriate means of including the test case provisions in the award however the parties should not be restricted to this particular option.

In our view the proposal advanced by the MTIA is the most appropriate and is consistent with the Commission's guidelines on consistent award formatting. However we acknowledge that such an approach may not be appropriate in all cases and the views of the parties to the award in question should be taken into account.

7 - SCOPE FOR EXEMPTIONS

One of the issues identified in the November 1994 decision for further consideration in these proceedings was the scope for individual enterprises to seek an exemption from the measures we propose on the basis of an agreed package that has been developed to suit the needs of the enterprise and the relevant employees.

The measures we have determined and which will be reflected in the orders arising from our decision will form part of the award safety net. Accordingly we agree with the submission put by the MTIA that exemptions for enterprises which have agreed packages should be processed as certified agreements, enterprise flexibility agreements or as variations to an award under the relevant enterprise flexibility clause. Such agreements will need to satisfy the *"no disadvantage test"*.

The operation of the no disadvantage test is dealt with in the EFA Test Case [Print M0464, pp.43-49] and we endorse the comments of the decision in that case. In relation to test case standards the Commission stated that the no disadvantage test was intended to protect *"well established and accepted community standards"* [Print M0464, p.45]. In our view such standards, including test case decisions such as this one, should be accorded substantial weight by the Commission in the exercise of its discretion in relation to the no disadvantage test [cf: August 1995 Review decision, Print M5600, p.52].

8 - CONCLUSION

The measures we have decided to introduce in this decision constitute the second stage of a two stage package that began with the November 1994 decision.

The complete package of measures represents, in our view, an appropriate balance between the following objectives:

- helping workers to reconcile their employment and family responsibilities consistent with the Commission's obligations under section 93A of the Act to take account of the principles embodied in the Family Responsibilities Convention;

- promoting enterprise bargaining by maintaining an incentive to bargain;

- introducing greater flexibility into the award system consistent with the Commission's statutory obligation to ensure that *"awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees' interests are also properly taken into account"* [section 88A(c)];

- the need to have regard to the economic impact of our decision pursuant to the Commission's obligations under section 90 of the Act.

The measures we have introduced also reflect the legislative intention that the award system needs to change in response to changed industrial needs. Such an approach is also consistent with the views expressed by the Commission in the September 1994 Safety Net Adjustments and Review decision [Print L5300, p.52].

In this regard we wish to emphasise that this test case decision will result in the variation of the safety net of minimum wages and conditions of employment. The award safety net is intended to underpin bargaining. As such, variations in the safety net should not, in our view, pre-empt the outcome of bargaining. Rather such award variations should follow outcomes in the bargaining process.

On this basis the measures we have decided to implement can be reviewed over time having regard to prevailing industrial, economic and social circumstances.

BY THE COMMISSION:

PRESIDENT

ATTACHMENT A

ISSUES TO BE ADDRESSED IN FULL BENCH PROCEEDINGS

Merit Issues

1. Means whereby awards can be made more flexible? Facilitative clauses.

2. Should there be a general entitlement to unpaid family leave in addition to the aggregated sick and bereavement leave?

3. The scope for individual enterprises to seek an exemption from the proposed measures?

Technical issues - *"Scope of access"*

1. Make-up time.

2. Time off in lieu.

3. Definition of family member.

4. Quantum of sick leave to be used as family leave.

5. *"Requirement"* of care.

6. *"Double-dipping"*.

ATTACHMENT B

FRAMEWORK FOR DRAFT ORDERS

1. Personal/carer's leave

[Draft to be Submitted]

[This subclause will deal with the aggregation of sick leave and bereavement leave applying the principles set out in pp.8-22 in Print M6700.]

2. Carer's leave

2.1 An employee with responsibilities in relation to either members of their immediate family or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, up to five days per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill.

2.2 The employee shall, if required, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

2.3 In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person.

2.4 Carer's leave may be taken for part of a single day.

2.5 The entitlement to use sick leave in accordance with this subclause is subject to:

2.5.1 the employee being responsible for the care of the person concerned; and

2.5.2 the person concerned being either:

2.5.2(i) a member of the employee's immediate family; or

2.5.2(ii) a member of the employee's household.

2.5.3 the term **immediate family** includes:

2.5.3(i) a spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee; and

2.5.3(ii) a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee.

2.6 The employee shall, wherever practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

3. Unpaid carer's leave

3.1 An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

4. Annual leave

4.1 Notwithstanding the provision of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods or part of a single day not exceeding a total of five days in any calendar year at a time or times agreed between them.

4.2 Access to annual leave, as prescribed in paragraph 4.1 above, shall be exclusive of any shutdown period provided for elsewhere under this award.

4.3 An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least five consecutive annual leave days are taken.

5. Time off in lieu of payment for overtime

5.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.

5.2 Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate, that is an hour for each hour worked.

5.3 An employer shall, if requested by an employee, provide payment, at the rate provided for the payment of overtime in the award, for any overtime worked under paragraph 5.1 of this subclause where such time has not been taken within four weeks of accrual.

6. Make-up time

6.1 An employee, other than an employee on shift work, may elect, with the consent of their employer, to work make-up time, under which the employee takes time off ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award.

6.2 An employee on shift work may elect, with the consent of their employer, to work make-up time under which the employee takes time off ordinary hours and works those hours at a later time, at the shift work rate which would have been applicable to the hours taken off.

7. Grievance process

7.1 In the event of any dispute arising in connection with any part of this clause, such a dispute shall be processed in accordance with the dispute settling provisions of this award. **[Note: Grievance process to be inserted where not already provided in an award.]**

8. Rostered days off

[To be Drafted]

The facilitative provision should have the following elements:

- an employer and individual employee may agree to take an RDO at any time;
- RDOs may be taken, by agreement, in part day amounts;

- by agreement some or all RDOs would be able to be accrued for the purpose of creating a bank to be drawn upon by an employee at times mutually agreed by the employer or subject to reasonable notice by the employee; and

- the general arrangement should be implemented in a particular enterprise and should be subject to the majority agreement before it becomes operative.

Appearances:

E. Rubin with *J. George* for all respondent unions and the Australian Council of Trade Unions (intervening), with *S. Slezenger* for the Financial Services Union.

R. Hamilton for the Victorian Employers' Chamber of Commerce and Industry, The Retail Traders' Association of New South Wales, the Confederation of A.C.T. Industry, the Insurance Employers Industrial Association, the Australian Chamber of Commerce and Industry (intervening) and the National Farmers Federation (intervening).

K. Heaney with *P. Drever and G. Doxey* for the Minister for Industrial Relations for the Commonwealth (intervening).

S. Amendola with *P. Richards* and *D. Hilderbrand* for Her Majesty the Queen in right of the State of Victoria (intervening), for Her Majesty the Queen in right of the State of South Australia (intervening), with Ms Field for Her Majesty the Queen in right of the State of Western Australia (intervening).

K. Boland with *D. White* for Her Majesty the Queen in right of the State of New South Wales (intervening).

C. Guerin for Her Majesty the Queen in right of the State of Queensland (intervening).

B. Watchorn for The Australian Chamber of Manufactures and its respondent members.

S. Cullen and *R. Boland* for the Metal Trades Industry Association of Australia, the Metal Trades Industry Associations National Construction Council, the Engineering Employers Association of South Australia and the Air Conditioning and Mechanical Contractors Association of Australia Limited.

Commissioner S. Walpole for the Human Rights and Equal Opportunity Commission (intervening).

J. Oaks with *K. Nopp* for the Association of Independent Schools of Victoria, the Association of Independent Schools of the Australian Capital Territory, the Association of Independent Schools of Western Australia, the South Australian Schools Board, the Association of Independent Schools of Tasmania and the Association of Independent Schools of New South Wales (intervening).

C. Andrades for the Australian Council of Lesbian and Gay Rights and the Australian Federation of AIDS Organistions (intervening).

V. Winley for the Business Council of Australia (intervening).

P. Gair with *M. Adams* for the Australian Catholic Commission for Industrial Relations (intervening).

C. Harnath for The Master Plumbers' and Mechanical Services Association of Australia (intervening).

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