PR072002

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.113 applications for variation
s.107 references to Full Bench

Construction, Forestry, Mining and Energy Union
(C2001/348)

THE COAL MINING INDUSTRY (PRODUCTION AND ENGINEERING) CONSOLIDATED AWARD 1997
(ODN C No. 623 of 1989)
[Print P7386 [AW774609]]

Australian Liquor, Hospitality and Miscellaneous Workers Union
(C2001/362)

AMBULANCE EMPLOYEES - VICTORIA INTERIM ORDER [1994]
(ODN C No. 20689 of 1993)
[Print L3430 [AW766201]]

Shop, Distributive and Allied Employees Association
(C2001/2248)

RETAIL AND WHOLESALE INDUSTRY - SHOP EMPLOYEES - AUSTRALIAN CAPITAL TERRITORY - AWARD 2000
(ODN C No. 30030 of 1993)
[Print T3309 [AW794740CRA]]

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
(C2001/2251)

AUSTRALIA POST GENERAL CONDITIONS OF EMPLOYMENT AWARD 1999
(ODN C No. 25759 of 1989)
[Print S0871 [AW766597]]

The Association of Professional Engineers, Scientists and Managers, Australia
(C2001/2256)

THE RAILWAYS PROFESSIONAL OFFICERS AWARD, 1974
(ODN C No. 74 of 1957)
[Print C1263 (1974); 162 CAR 1035 [AW794731]]

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
(C2001/2514)

TENIX DEFENCE SYSTEMS PTY LTD (DRAUGHTING, TECHNICAL AND SUPERVISORY EMPLOYEES) AWARD 2000
(ODN C No. 30455 of 1995)
[Print S4438 [AW800025]]

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
(C2001/2515)

SPACE TRACKING INDUSTRY AWARD 1998
(ODN C No. 532 of 1970)
[Print R1277 [AW795978]]

The Australian Workers' Union
(C2001/2516)

HORSE TRAINING INDUSTRY AWARD 1998
(ODN C No. 3039 of 1975)
[Print R5058 [AW783476]]

CPSU, the Community and Public Sector Union
(C2001/2528)

AUSTRALIAN PUBLIC SERVICE AWARD 1998
(ODN C No. 23867 of 1995)
[Print Q7548 [AW766579]]

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
(C2001/2648)

NATIONAL ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING INDUSTRY AWARD 1998
(ODN C No. 21680 of 1990)
[Print Q4287 [AW791396]]

Finance Sector Union of Australia
(C2001/2757)

INSURANCE INDUSTRY AWARD 1998
(ODN C No. 571 of 1983)
[Print Q1907 [AW784988]]

Australian Education Union
(C2001/3141)

TEACHERS' (VICTORIAN GOVERNMENT SCHOOLS) CONDITIONS OF EMPLOYMENT AWARD 2001
(ODN C No. 31325 of 1993)
[PR902467 [AW806227]]

Australian Salaried and Medical Officers Federation
(C2001/3356)

MEDICAL OFFICERS (NORTHERN TERRITORY PUBLIC SECTOR) AWARD 1994
(ODN C No. 90073 of 1994)
[Print L5131 [AW788293]]

Flight Attendants Association of Australia
(C2001/3441)

AIRLINE OPERATIONS - FLIGHT ATTENDANTS' LONG HAUL - QANTAS AIRWAYS LIMITED - AWARD 2000
(ODN C No. 2642 of 1973)
[Print S7006 [AW765517]]

ACT and Region Chamber of Commerce and Industry
(C2001/3234)

RETAIL AND WHOLESALE INDUSTRY - SHOP EMPLOYEES - AUSTRALIAN CAPITAL TERRITORY - AWARD 2000
(ODN C No. 30030 of 1993)
[Print T3309 [AW794740CRA]]

s.113 application for variation
s.108 reference to Full Bench

Victorian Employers' Chamber of Commerce and Industry
(C2001/3687)

CLERICAL AND ADMINISTRATIVE EMPLOYEES (VICTORIA) AWARD 1999
(ODN C No. 34749 of 1995)
[Print S1367 [AW773032]]

Various employees — Various industries

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT ROSS
VICE PRESIDENT McINTYRE
COMMISSIONER GAY
COMMISSIONER FOGGO — MELBOURNE, 23 JULY 2002

Hours of work - claim by ACTU for test case standard - annualised wage rates and other matters - claim by ACCI.

REASONS FOR DECISION

CONTENTS

LIST OF MAIN ABBREVIATIONS

In this decision the following abbreviations are used:

ABS:	Australian Bureau of Statistics
ACCER:	Australian Catholic Commission for Employment Relations
ACCI:	Australian Chamber of Commerce and Industry
ACIRRT:	Australian Centre for Industrial Relations Research and Training
Act:	*Workplace Relations Act 1996*
ACT Shops Award:	*Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000*
ACTU:	Australian Council of Trade Unions
AEU:	Australian Education Union
AHEIA:	Australian Higher Education Industrial Association
AIG:	The Australian Industry Group and EEASA
ALHMWU:	Australian Liquor, Hospitality and Miscellaneous Workers Union
AMMA:	Australian Mines and Metals Association
AMWU:	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
ANOP:	ANOP Research Services Pty Ltd
APESMA:	The Association of Professional Engineers, Scientists and Managers, Australia
APS:	Australian Public Service
APS Award:	*Australian Public Service Award 1998*
ASMOF:	Australian Salaried Medical Officers Federation
ASU:	Australian Municipal, Administrative, Clerical and Services Union
Australia Post:	Australian Postal Corporation
Australia Post Award:	*Australia Post General Conditions of Employment Award 1999*

AWIRS:	*Australian Workplace Industrial Relations Survey*
AWU:	The Australian Workers' Union
CEPU:	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CFMEU:	Construction, Forestry, Mining and Energy Union
Coal Industry Award:	*The Coal Mining Industry (Production and Engineering) Consolidated Award 1997*
Coal Industry Employers:	Employers in the coal industry
Commonwealth:	Minister for Employment and Workplace Relations
CPSU:	CPSU, the Community and Public Sector Union
EEASA:	Engineering Employers Association, South Australia
Electrical Award:	*National Electrical, Electronic and Communications (Contracting Industry) Award 1998*
ETU:	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical Trades Division
FAAA:	Flight Attendants' Association of Australia
FSU:	Finance Sector Union of Australia
Horse Training Award:	*Horse Training Industry Award 1998*
ILO:	International Labour Organisation
Insurance Award:	*Insurance Industry Award 1998*
Job Watch:	Job Watch Inc
Joint States:	the States of Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania and the Northern Territory
MAS:	Metropolitan Ambulance Service (Victoria)
Medical Officers NT Award:	*Medical Officers (Northern Territory Public Sector) Award 1994*
NFF:	National Farmers' Federation

NTEU:	National Tertiary Education Industry Union
OECD:	Organisation for Economic Co-operation and Development
OHS:	occupational health and safety
Qantas:	Qantas Airways Limited
Qantas Award:	*Airline Operations - Flight Attendants' Long Haul - Qantas Airways Limited - Award 2000*
Railways Professional Officers Award:	*The Railways Professional Officers Award, 1974*
RAV:	Rural Ambulance Victoria
SDA:	Shop, Distributive and Allied Employees Association
SEAS:	*Survey of Employment Arrangements and Superannuation*
Space Tracking Award:	*Space Tracking Industry Award 1998*
Tenix:	Tenix Defence Pty Ltd
Tenix Award:	*Tenix Defence Systems Pty Ltd (Draughting, Technical and Supervisory Employees) Award 2000*
VECCI:	Victorian Employers' Chamber of Commerce and Industry
Victorian Ambulance Award:	*Ambulance Employees - Victorian Interim Order [1994]*
Victorian Ambulance Services:	MAS and RAV
Victorian Clerical Award:	*Clerical and Administrative Employees (Victoria) Award 1999*
Victorian Education Department:	Department of Education and Training (Victoria)
Victorian Teachers Award:	*Teachers' (Victorian Government Schools) Conditions of Employment Award 2001*
WAS:	*Working Arrangements Survey Australia*

PART 1 - INTRODUCTION

[1] These reasons for decision are about two claims, one by the Australian Council of Trade Unions (ACTU) and one by the Australian Chamber of Commerce and Industry (ACCI).

[2] The ACTU's claim comprises applications by unions to vary 14 awards to insert in them as a test case standard provisions relating to hours of work.

[3] ACCI's claim comprises applications by two organisations of employers to vary two awards to insert in them provisions relating to annualised wage rates and other matters.

[4] There are many parties and interveners. There is no need to distinguish between parties and interveners and we use the word *"party"* to cover both.

[5] Parties, other than the ACTU and ACCI, include:

(1) Minister for Employment and Workplace Relations (the Commonwealth);

(2) the States of Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania and the Northern Territory (the Joint States);

(3) The Australian Industry Group and Engineering Employers Association, South Australia (EEASA) (jointly, AIG);

(4) National Farmers' Federation (NFF);

(5) employers in the coal industry (the Coal Industry Employers);

(6) Australian Mines and Metals Association (AMMA);

(7) Qantas Airways Limited (Qantas);

(8) Australian Postal Corporation (Australia Post);

(9) Tenix Defence Pty Ltd (Tenix);

(10) Australian Higher Education Industrial Association (AHEIA);

(11) Department of Education and Training (Victoria) (the Victorian Education Department);

(12) Metropolitan Ambulance Service (Victoria) (MAS) and Rural Ambulance Victoria (RAV) (jointly, the Victorian Ambulance Services);

(13) Australian Catholic Commission for Employment Relations (ACCER);

(14) National Tertiary Education Industry Union (NTEU);

(15) Shop, Distributive and Allied Employees Association (SDA); and

(16) Job Watch Inc (Job Watch).

[6] A written submission was lodged by Charles Henry Norville. It is about the engagement in second jobs by employees of New South Wales Fire Brigades.

[7] Many of the employer parties are directly involved because they are bound by awards the subject of the ACTU's claim.

[8] The claims have, of course, to be considered in the light of the provisions of the *Workplace Relations Act 1996* (the Act). We set out relevant provisions in Annexure A.

[9] This decision first deals with the ACTU's claim and then with ACCI's claim.

PART 2 - THE ACTU'S CLAIM

THE APPLICATIONS

[10] The ACTU's claim is advanced by applications by various unions to vary 14 awards. The claim, put forward as seeking a test case standard, is that, subject to some exceptions which we mention below, the 14 awards be varied by deleting from them the provisions (if any) requiring an employee to work reasonable overtime and by inserting in them the following three subclauses:

*"1 **Reasonable Hours of Work***

1.1 An employer must not require an employee to work unreasonable hours of work.

1.2 Without limiting the generality of paragraph 1.1, the following are to be considered in determining what are unreasonable hours of work:

(a) the total number of hours that exceed the ordinary, or in the case of part-time workers the agreed hours of work;

(b) the total number of hours worked on any particular day or shift;

(c) the total number of hours worked over an extended period;

(d) the number of hours worked without a break;

(e) the time off between shifts;

(f) the risk of fatigue;

(g) the remuneration received for excess hours worked;

(h) the rostering arrangements;

(i) the extent of night work;

(j) an employee's workload;

(k) work intensification resulting from understaffing, and the ability of workers to meet targets while working reasonable daily hours;

(l) the time required to achieve remuneration in accordance with performance based pay schemes;

(m) the exposure to occupational health and safety hazards;

(n) an employee's social and community life; or

(o) an employee's family responsibilities.

2 Reasonable Overtime

2.1 Subject to this clause an employer may require an employee to work reasonable overtime at overtime rates - other than employees employed part-time in accordance with clause x (parental leave) of this award who cannot be required to work overtime against their wishes.

2.2 An employee may refuse to work hours in excess of ordinary hours on a particular day for reasons which may include, but not be limited to, the employee's family responsibilities or the pre-arranged personal commitments of the employee.

3 Paid Breaks after Extreme Working Hours

3.1 The provisions of this sub-clause shall apply to each type of employment, each classification and skill based career path provided for in this Award.

3.2 An employee who has worked:

(a) an average of 60 hours per week over a four week period; or

(b) 26 days over a four week period; or

(c) an average of 54 hours per week over an eight week period; or

(d) 51 days over an eight week period; or

(e) an average of 48 hours per week over a twelve week period; or

(f) 74 days over a twelve week period;

shall be entitled to a break of 2 full days before working again and to be paid for those 2 days.

3.3 An employee cannot accrue more than 2 days entitlement in accordance with paragraph 3.2 in relation to the same period of time.

3.4 The 2 days entitlement provided in paragraph 3.2 must be taken within seven days of the entitlement accruing.

3.5 The entitlement provided for in paragraph 3.2 must be taken contiguous with another non-working day which falls within the period set out in paragraph 3.4.

3.6 If an employee is not given the entitlement provided for in paragraph 3.2 within seven days of the entitlement having accrued, the employer must pay the employee an extra hourly or part thereof payment at the rate of 0.5 of the ordinary hourly rate from the end of the seven day period referred to above until the rest break is given.

3.7 The entitlement provided for in paragraph 3.2 is in addition to all other rest break and leave entitlements set out in this award.

3.8 No regard is to be had to sub-clause 3 in the application of sub-clause 1, in particular hours of work less than those described in paragraph 3.2 may be unreasonable."

[11] The first of the exceptions referred to earlier is that subclause 2, Reasonable Overtime, is not sought in the *Teachers' (Victorian Government Schools) Conditions of Employment Award 2001* (the Victorian Teachers Award) (because, the ACTU said, that award contains no reasonable overtime provision). The second and third exceptions are that the reference to employees employed part-time in accordance with a parental leave provision in subclause 2.1 is not sought in *The Railways Professional Officers Award, 1974* (the Railways Professional Officers Award) or the *Tenix Defence Systems Pty Ltd (Draughting, Technical and Supervisory Employees) Award 2000* (the Tenix Award) (because, the ACTU said, those awards do not contain any reference to such employees).

[12] We have called the three parts of the ACTU's claim *"subclauses"*. This is the term the ACTU uses. The applications to vary the awards selected by the ACTU generally seek the insertion of the three subclauses in a clause dealing with hours of work or overtime.

[13] The awards selected by the ACTU as vehicles for its claim and the applicant unions are:

	Award	Applicant union
(1)	*The Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (the Coal Industry Award)[1]	Construction, Forestry, Mining and Energy Union (CFMEU)
(2)	*Ambulance Employees - Victoria Interim Order [1994]* (the Victorian Ambulance Award)[2]	Australian Liquor, Hospitality and Miscellaneous Workers Union (ALHMWU)
(3)	*Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000* (the ACT Shops Award)[3]	Shop, Distributive and Allied Employees Association (SDA)
(4)	*Australia Post General Conditions of Employment Award 1999* (the Australia Post Award)[4]	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)
(5)	*The Railways Professional Officers Award, 1974* (the Railways Professional Officers Award)[5]	The Association of Professional Engineers, Scientists and Managers, Australia (APESMA)
(6)	*Tenix Defence Systems Pty Ltd (Draughting, Technical and Supervisory Employees) Award 2000* (the Tenix Award)[6]	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU)
(7)	*Space Tracking Industry Award 1998* (the Space Tracking Award)[7]	AMWU
(8)	*Horse Training Industry Award 1998* (the Horse Training Award)[8]	The Australian Workers' Union (AWU)
(9)	*Australian Public Service Award 1998* (the APS Award)[9]	CPSU, the Community and Public Sector Union (CPSU)
(10)	*National Electrical, Electronic and Communications Contracting Industry Award 1998* (the Electrical Award)[10]	CEPU
(11)	*Insurance Industry Award 1998* (the Insurance Award)[11]	Finance Sector Union of Australia (FSU)

(12)	*Teachers' (Victorian Government Schools) Conditions of Employment Award 2001* (the Victorian Teachers Award)[12]	Australian Education Union (AEU)
(13)	*Medical Officers (Northern Territory Public Sector) Award 1994* (the Medical Officers NT Award)[13]	Australian Salaried Medical Officers Federation (ASMOF)
(14)	*Airline Operations - Flight Attendants' Long Haul - Qantas Airways Limited - Award 2000* (the Qantas Award)[14]	Flight Attendants' Association of Australia (FAAA)

[14] The applications were lodged on various days in May and June 2001. They were referred by the President to this Bench pursuant to s.107 of the Act on 5 July 2001.

OUTLINE OF THE ACTU'S CASE

[15] In outline, the ACTU's case in favour of its claim for a test case standard is:

(1) there is a problem with working time in Australia;

(2) a large number of Australian non-managerial award employees work long hours;

(3) this number is increasing;

(4) this number is relatively greater than in all but one other Organisation for Economic Co-operation and Development (OECD) country;

(5) other countries have successfully regulated long hours;

(6) the CEPU (Electrical Trades Division (ETU)) in the Victorian construction industry has successfully regulated long hours;

(7) hours of work may be unreasonable, not only because of their length, but also for other reasons;

(8) long or unreasonable hours have deleterious effects on employees, their families, their communities and the public;

(9) the present regulatory framework is making things worse;

(10) the Commission has, in the past, appropriately regulated hours of work;

(11) the costs of the claim do not warrant refusing it;

(12) the subclauses claimed are allowable; and

(13) the subclauses claimed are appropriate to be awarded as a test case standard.

[16] The ACTU called a number of witnesses and tendered a substantial amount of documentary material. We list the witnesses. (Where a witness is the author or a co-author of a major report that was part of his or her evidence, we specify the report after the witness's name.)

- John Buchanan, Australian Centre of Industrial Relations Research and Training (ACIRRT), University of Sydney:

  - *Working Time Arrangements in Australia : A Statistical Overview for the Victorian Government* (Working Time Arrangements Report);

  - *Working Time Arrangements in Victoria and Australia*;

  - *Working Time Arrangements in Queensland*;

  - *What About the Bosses - Employers and Extended Hours of Work - Insights from Exploratory Research* (What About the Bosses Report);

  (Dr Buchanan was also a witness for the Joint States.);

- Iain Campbell, Centre for Applied Social Research, RMIT University:

  - *Cross-national Comparisons* (Cross National Comparisons Report);

- Drew Dawson, Centre for Sleep Research, The University of South Australia:

  - *Extended Working Hours in Australia: Counting the Costs* (Counting the Costs Report);

  - *Fatigue and the Law* (Fatigue and the Law Report);

- Barbara Pocock, Centre for Labour Research, Adelaide University:

  - *The Effect of Long Hours on Family and Community Life: A Survey of Existing Literature* (Family and Community Life Report);

  - *Fifty Families: What Unreasonable Hours are Doing to Australians, Their Families and Their Communities* (Fifty Families Report);

- Kathryn Heiler, Senior Analyst ACIRRT:

  - *How effectively do we regulate excessive hours of work in Australia?* (Regulating Excessive Hours Report);

  - *Working Time Arrangements in the Australian Mining Industry*;

  - *Working Time Arrangements in the Australian Coal Industry*;

- Grant Belchamber, ACTU:

  - *Reasonable Hours Test Case - Estimated Cost of Granting the ACTU Claim* (Estimated Cost Report);

- Brian Baulk, Divisional Secretary of the Communications Division of the CEPU;

- Dean Mighell, Victorian State Secretary of the Electrical Division of the CEPU;

- David Weller, contractor employed by Queensland Mining Employment Services;

- Josephine Parr, music and English teacher employed by the Victorian Education Department;

- Mark George, paramedic employed by the MAS;

- Ivan Bolta, electrician employed by Stork Electrical in Victoria;

- Reno Lia, an electrician employed by Elecraft in Victoria;

- Philip Grant, a field resources engineer employed by the Rail Infrastructure Corporation;

- Christopher Hall, a hydraulic mechanical technician employed by British Aero Space Systems;

- Bruce Nadenbousch, Director, Industrial Relations of APESMA;

- Anthony Beck, National Secretary of the FSU;

- Jeremy Allen, OH&S Policy Adviser, Mining and Energy Division of the CFMEU;

- Rodney Morris, National Secretary of Ambulance Employees Australia - a section of the ALHMWU;

- Johanna Brem, International Division Secretary, FAAA;
- Wendy Caird, National Secretary of the CPSU;
- Christopher Verco, Federal Secretary of ASMOF;
- Anthony Maher, General President of the Mining and Energy Division of the CFMEU;
- Robert Durbridge, Federal Secretary of the AEU;
- Douglas Cameron, National Secretary of the AMWU;
- Bill Shorten, National Secretary of the AWU; and
- Mark Cooper, flight attendant employed by Qantas.

[17] The evidence adduced from Dr Buchanan, Dr Campbell, Dr Dawson, Dr Pocock and Ms Heiler went mainly to the reports we have identified under the names of these witnesses. In brief:

(1) the three location-based Working Time Arrangements Reports deal with research into working hours in Australia;

(2) the Cross National Comparisons Report compares working hours and their regulation in Australia and other countries;

(3) the Counting the Costs Report deals with the effect of extended working time on employees, their families and their communities;

(4) the Family and Community Life Report is a survey of existing literature about the effect of long hours on family and community life;

(5) the Fifty Families Report is a study of the effect of unreasonable hours on employees and their families;

(6) the Regulating Excessive Hours Report is about how excessive hours are regulated in Australia;

(7) the Fatigue and the Law Report is about the way in which the law deals with fatigue;

(8) the two industry-based Working Time Arrangements Reports are about such arrangements in the mining and coal mining industries; and

(9) the Estimated Cost Report is about costs associated with the ACTU's claim.

[18] The evidence of Mr Mighell was mainly about the regulation of overtime worked by electricians in the construction industry in Victoria. The evidence of Mr Weller, Ms Parr, Mr George, Mr Bolta, Mr Lia and Mr Cooper was primarily about hours worked by them in their employment. The evidence of Mr Allen was mainly about a survey conducted by him about working arrangements in the coal mining industry. The evidence of the other ACTU witnesses, all union officials, generally related to working hours in the industries covered by their unions.

OUTLINE OF RESPONSES TO THE ACTU'S CLAIM

The Commonwealth

[19] The Commonwealth opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. In its capacity as an employer, it opposes the application to vary the APS Award on the basis that, having regard to working time arrangements of employees covered by the award, the variation is unwarranted and also on the basis that it will create disputation. The Commonwealth tendered documentary material and called the following witnesses:

- James Blake, acting Human Resources Manager, Australian Antarctic Division;
- Heather Jones, acting Assistant Statistician, Human Resources Branch, Australian Bureau of Statistics (ABS);
- Helen Lu, General Manager, Corporate Management Branch, Australian Competition and Consumer Commission;
- Gerald Byrne, Assistant Commissioner, Conditions and Environment (including Agency Agreement), Australian Taxation Office;
- Jennifer Downs, Human Relations Manager, Australian Geological Survey Organisation;
- Chris Corin, acting Assistant Executive Officer - Industrial Relations and Structures, Bureau of Meteorology;
- John Dickinson, Project Manager for Workplace Bargaining, Centrelink;
- Ian Canney, Specialist Advisor, Strategic Management and Management Support, Department of Family and Community Services; and
- Grant Barrow, Director of Employment Relations, National Library of Australia.

[20] These witnesses dealt essentially with the working time arrangements in their area of responsibility in the Australian Public Service (APS) and the impact of the claim on those areas.

ACCI

[21] ACCI opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. ACCI tendered documentary material and called the following witnesses:

- Mark Wooden, Professorial Fellow, Melbourne Institute of Applied Economic and Social Research, University of Melbourne and author of the report:

  - *Working Time Patterns in Australia and the Growth in 'Unpaid' Overtime: A review of the Evidence* (Working Time Patterns Report);

- Rebecca Westwick, Employee Relations Advisor for the National Electrical Contractors Association of Victoria; and

- Gerard Boyce, Industrial Relations Manager for the National Electrical Contractors Association (NSW and ACT).

(ACCI also called other witnesses we mention under the heading *"NFF"*.)

[22] Professor Wooden's evidence went mainly to his Working Time Patterns Report. Ms Westwick's and Mr Boyce's evidence related mainly to working hours in the electrical, electronic and communications industry and the impact of the ACTU's claim on that industry.

AIG

[23] AIG opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. AIG tendered documentary material and called the following witnesses:

- John Benson, Associate Professor - Faculty of Economics and Commerce and Deputy Director of the Centre for Human Resource Management and Organisation Studies at the University of Melbourne and author of the report:

  - *Hours of Work: A Report on a Survey of Ai Group Members on Hours of Work and the Implications of the ACTU claim for Changes to the Terms and Conditions Governing Overtime*;

- Rod Cameron, Managing Director of ANOP Research Services Pty Ltd (ANOP) and author of the report:

  - *Employee and Employer Attitudes to Working Hours and the Changing Nature of Employment in Australia Today - A Qualitative Project for the AIG Investigating Five Key Employment Sectors* (ANOP Study);

- Tony Pensabene, National Manager, Economics with AIG;

- Malcolm Davidson, General Manager of Detmark Poly Bags Pty Ltd
- Robert Thomas, machine operator/packer with Detmark Poly Bags Pty Ltd;
- Colin Norris, Engineering Division Manager with Celtite Pty Ltd;
- Neville Jukes, Director of P & J Welding Pty Ltd;
- Belinda Grant, Human Resources Manager with Air International Group Ltd;
- Victor Ruban, owner and Managing Director of Terrace Fabrications Pty Ltd;
- Ian Macleod, Human Resources Manager of CBI Constructors Pty Ltd;
- Karen Massie, Human Resources Operations Manager, Southern Region of Fuji Xerox Australia Pty Limited; and
- Ray Fitzgerald, National Industrial Relations Manager of Skilled Engineering Limited.

[24] The evidence of Dr Benson and Mr Cameron went mainly to the reports we have mentioned after their names. Mr Pensabene's evidence went mainly to international comparisons and the costs of the claim. The evidence of the other AIG witnesses dealt essentially with working hours in their establishments and the impact of the ACTU's claim.

AHEIA

[25] AHEIA opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. AHEIA tendered documentary material and called Professor Don McNicol, Vice-Chancellor and Principal, University of Tasmania, whose evidence dealt essentially with the working time arrangements of academics and the impact of the ACTU's claim on academic employment.

AMMA

[26] AMMA opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. AMMA tendered documentary material and called the following witnesses:

- Ian Masson, National Industry Manager, AMMA;
- Robert Bolton, General Manager Operations, Coflexip Stena Offshore Asia Pacific Pty Ltd;

- Michael Willett, Offshore Operations Superintendent, Woodside Energy Ltd; and

- William Stibbs, District Manager, Sedco Forex International Inc.

[27] The evidence of these witnesses went essentially to working time arrangements in the mining, hydrocarbon production and allied industries and the impact of the ACTU's claim on these industries.

NFF

[28] NFF opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. NFF called the following witnesses:

- Graham Robertson, President of the Australian Dried Fruits Association;

- Brian Streets, Director of Amitie Pty Ltd and Director of Australian Pork Limited;

- Ronald Hards, farmer, President of the Grains Group of the Victorian Farmers' Federation, Senior Vice President of the Grains Council of Australia and member of the NFF Industrial Committee;

- William Perkins, farmer, President, Treasurer and Trustee of the South Australian Farmers Federation; and

- Lachlan Gosse, a farmer from South Australia.

[29] The evidence of these witnesses dealt with working time arrangements in various rural industries and the impact of the claim on those industries.

Australia Post

[30] Australia Post opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU and opposes the application to vary the Australia Post Award on the basis that, having regard to working time arrangements of employees covered by the award, the variation is unwarranted. Australia Post tendered documentary material and called the following witnesses:

- Stephen Ousley, Southern Operations Manager, Australia Post; and

- Dennis Killeen, Retail Area Manager, Sydney City Network, Australia Post.

[31] The evidence of these witnesses dealt with working time arrangements at Australia Post and the impact of the claim on Australia Post.

Coal Industry Employers

[32] The Coal Industry Employers oppose the ACTU's claim. They take issue with many of the contentions of the ACTU and oppose the application to vary the Coal Industry Award on the basis that, having regard to working time arrangements of employees covered by the award, the variation is unwarranted. The Coal Industry Employers tendered documentary material and called the following witnesses:

- Richard Coleman, Manager - OHS Strategy, NSW Minerals Council;
- James Huemmer, Principal and Director of Shiftwork Solutions;
- Kieren Turner, Manager, Employee Services, NSW Minerals Council;
- Mark Wooden, Professorial Fellow, Melbourne Institute of Applied Economic and Social Research, University of Melbourne; and
- Graham Gillespie, Principal of Gillespie Consulting Services Pty Ltd.

[33] The evidence of these witnesses, other than Professor Wooden, dealt generally with working time arrangements in the coal industry, considerations applicable to rostering arrangements and the impact of the claim. The evidence of Professor Wooden primarily replied to evidence of Ms Heiler about working time arrangements in the coal mining industry.

Qantas

[34] Qantas opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU and opposes the application to vary the Qantas Award on the basis that, having regard to working time arrangements of employees covered by the award, the variation is unwarranted. Qantas tendered documentary material and called the following witnesses:

- David Hine, Cabin Crew Manager, Sydney and Overseas, Qantas;
- Shayne Nealon, General Manager Long Haul Cabin Crew, Qantas; and
- Phil Armitage, Pilot, Qantas.

[35] The evidence of these witnesses dealt with the working time arrangements of long haul flight attendants employed by Qantas, the impact of the claim and a fatigue risk management project researching the impact of fatigue on flight crew.

Tenix

[36] Tenix opposes the ACTU's claim. It takes issue with many of the contentions of the ACTU. It opposes the application to vary the Tenix Award on the basis that no

evidence directly relating to Tenix or its employees covered by the award has been adduced by the ACTU.

Joint States

[37] The Joint States *"support the . . . key principles which underpin the ACTU's application and the development of a Test Case Standard with respect to reasonable hours"*. They say that these principles are:

> Principle One: employers should be prohibited from requiring employees to work unreasonable hours;
>
> Principle Two: it is appropriate for the Commission to set down criteria which will be used to determine whether hours of work are unreasonable. The Commission should develop and apply those criteria collectively and not in isolation;
>
> Principle Three: it is appropriate to provide employees with additional work-breaks if they have been required to work excessive hours; and
>
> Principle Four: principles in relation to reasonable hours of work should be applied with proper and appropriate regard to the context and particular circumstances of an industry.

[38] The Joint States also relied on the evidence of Dr Buchanan whose evidence we have mentioned in outlining the ACTU's case.

[39] On 11 December 2001, the Australian Capital Territory Government advised us that it supports *"the position put within the joint Labor Governments' submission"*.

Victorian Ambulance Services

[40] The Victorian Ambulance Services *"support the principles underpinning the Test Case standard",* but submit that *"the Draft Orders are not appropriate to the ambulance industry"*. They called the following witnesses:

- Kevin Masci, Operations Resource Manager of MAS; and
- Craig Chilton, Senior Operations Officer - Logistics for Area 7 of RAV.

[41] The evidence of the two witnesses dealt with working time arrangements in the two ambulance services in Victoria and the impact of the ACTU's claim on these services.

Victorian Education Department

[42] The Victorian Education Department, near the beginning of the case, said that it *"supports in principle the ACTU claim and . . . endorses the key principles . . . described by Ms Doyle* [Counsel for the Joint States] *in her outline . . . but does not support the variation of the Teachers (Victorian Government Schools) Conditions of Employment Award as sought by the ACTU".* The Department subsequently advised that *"it no longer intends to file and serve any submissions".*

ACCER

[43] ACCER said that it is concerned about any requirement on employees to work unreasonable hours but is also concerned with the practical effect of the claim and the subjectivity or ambiguity of parts of it.

Job Watch

[44] Job Watch supports the ACTU's claim.

ISSUES

Allowability

[45] The ACTU submitted that each of the three subclauses of its claim was either an allowable award matter within s.89A(2) of the Act or incidental to an allowable award matter and necessary for the effective operation of the awards within s.89A(6). A number of those opposing the ACTU's claim submitted that it is not one which the Commission has power to grant because of the provisions of s.89A. Section 89A is set out in Annexure A. It will be necessary to give some consideration to each of the three subclauses.

[46] We shall deal first with subclause 1. This subclause creates a duty on an employer not to require an employee to work unreasonable hours of work. It also sets out a number of factors to be considered in determining what are unreasonable hours of work.

[47] The ACTU submitted that the subclause comes within s.89A because:

(1) many awards contain a clause which permits an employer to require an employee to work reasonable overtime and such a clause is an allowable award matter. By parity of reasoning, a provision which limits the requirement to work overtime in circumstances which are unreasonable is also an allowable award matter. Accordingly, a limitation on the working of hours which are unreasonable is also allowable;

(2) it is within the words in s.89A(2)(b) *"ordinary time hours of work"* and *"variations to working hours"*;

(3) it should be characterised as creating a particular *"type of employment"* and is therefore allowable pursuant to s.89A(2)(r). The ACTU relied in that respect on ss.89A(4) and (5); and

(4) consistently with s.89A(6), the subclause is incidental to the allowable award matters in ss.89A(2)(b) and (r) and necessary for the effective operation of the awards in those respects.

[48] Subclause 1 prohibits an employer from requiring an employee to work unreasonable hours of work. It also specifies factors which must be considered in determining what are unreasonable hours. We have some doubts that such a provision is an allowable award matter. We turn first to s.89A(2)(b).

[49] The expression *"ordinary time hours of work"* in s.89A(2)(b) is a conflation of two well-established expressions in the industrial relations vocabulary - *"ordinary hours of work"* and *"ordinary time."* It is to be inferred that the composite term refers to hours which may be worked without the payment of overtime and to the regulation of those hours. The ACTU submitted that the expression should be construed to mean *"regular, normal, customary or usual hours"*[15]. We doubt that this is so. The distinction between ordinary hours and overtime is one which is deeply embedded in the Commission's awards and agreements. The notion of unreasonable hours in subclause 1 of the ACTU's claim applies to both ordinary hours and overtime. For that reason we doubt that the notion is within the term *"ordinary time hours of work"*. The ACTU also submitted that subclause 1 is within the term *"variations to working hours"* in s.89A(2)(b). We do not think that this is so. There is a distinction to be made between a provision which contains a prohibition on an employer in relation to the working hours which may be required of an employee and a provision dealing with the manner in which hours of work may be varied. We think that s.89A(2)(b) refers to the latter and not the former. The Commission's decision in *Re Teachers (Victorian Government Schools) Conditions of Employment Award 1995*[16] supports our conclusion.

[50] We turn now to the argument based on s.89A(2)(r) and ss.89A(4) and (5). The ACTU's submission invites us to recognise the existence of, or perhaps to create, a type of employment constituted by the terms of subclause 1 of its claim. That type of employment is, or would be, one in which employees may not be required to work unreasonable hours of work. It is a type of employment which, if the claim were granted, necessarily would apply to all employed under the award. We reject this argument. Section 89A(2)(r) is concerned with the nature of an employee's engagement, as the examples set out in that section indicate. It is difficult to describe the whole class of employment under the award as a type of employment. If the submission were accepted, any provision would be allowable and s.89A would be deprived of effect.

[51] The ACTU also relied on s.89A(6). It submitted that subclause 1 is incidental to the terms of ss.89A(2)(b) and (r) and necessary for the effective operation of the awards before us. We accept that subclause 1 may be incidental to *"ordinary time hours of work"*. Whether it is necessary for the effective operation of the awards is a

difficult question. We think it should more conveniently be considered, if it is necessary to do so, in light of our conclusions on the merits of the case.

[52] We now deal with subclause 2. That subclause is in two parts. The first part confers a right on an employer to require an employee to work reasonable overtime. The second confers a right on an employee to refuse to work overtime in the circumstances specified. The ACTU submits that the subclause is allowable and relies on the *Award Simplification Decision*[17]. In that decision, the Commission approved a provision for reasonable overtime which was proposed by the parties to the award. The provision was already in the award. There does not appear to have been any debate on the issue. Nevertheless, the regulation of overtime appears to us to be related directly to the prescription of ordinary time hours of work and is therefore allowable. Provision for an employer to require that an employee work reasonable overtime is a feature of many awards and has its origin in the decision of the Commonwealth Court of Conciliation and Arbitration in the *Standard Hours Inquiry 1947*[18]. We think that the provision is within the accepted meaning in industrial relations practice of the matters set out in s.89A(2)(b); see *Re Commonwealth Bank of Australia Officers Award*[19].

[53] Finally, we turn to subclause 3. This subclause provides for a two day paid break to be afforded to employees who have worked specified numbers of hours or days in specified periods. Although the provision is novel in its particulars, it is of the same kind as many award provisions providing for time off between periods of duty, particularly in relation to shift work and after working overtime. We think the subclause falls within the term *"rest breaks"* in s.89A(2)(b).

How the Evidence Should Be Viewed

[54] The ACTU made submissions as to the manner in which the evidence should be viewed. In brief, it submitted that the witnesses could be categorised as either *"global experts"* (the witnesses who were the authors of reports of a general, as opposed to industry or award specific, nature), *"industry/award experts"* (the witnesses who gave evidence about specific industries or awards) or *"individuals"* (the witnesses who gave evidence as employees or as employers). The ACTU argued that all the evidence of *"global experts"* is *"conclusive evidence"* (evidence from which conclusions critical to the making out of the case can be drawn), that the evidence of *"industry/award experts"* is either *"indicative"* (evidence which provides a context for the issues and gives a feel as to how they would apply to individuals) or *"conclusive"*, and the evidence of *"individuals"* is completely *"indicative"*. The ACTU concluded:

> *"The key to the case is understanding the expert evidence. It is this evidence which establishes the base propositions upon which the Commission can or cannot make a test case standard. It is this evidence which needs to be viewed in the smallest detail. It is this evidence which is critical. The remaining evidence is important but its importance is contextual. It provides a feel but is not determinative."*

[55] Opponents of the claim generally contested the ACTU's submissions as to how the evidence should be viewed.

[56] We have considered the competing submissions. We have before us a vast amount of evidence, documentary and oral. The evidence, if any, called by a party was a matter for it. Whether or not a party cross-examined a witness was also a matter for it. The evidence can be categorised in various ways. Some of it relates to *"global"* considerations, some to industry or award considerations and some to individual considerations. Some of it seeks to establish facts, some of it expresses opinions. We have had regard to all the evidence and to all the submissions. We should, however, emphasise that whatever views we come to about the facts, the central question we have to decide is whether the ACTU has made a case for awarding as a test case standard the three subclauses that constitute its claim.

Working Hours in Australia and International Comparisons

The contentions and responses

[57] The ACTU contended that *"working hours is a major problem in Australia"*. It submitted that the evidence providing the statistical picture of working hours in Australia made out the following propositions:

Proposition 1: Australian award workers are working long hours of work.

Proposition 2: Hours of work in Australia are increasing.

Proposition 3: Long hours of work are affecting non-managerial award workers.

Proposition 4: Long hours are being worked across a range of occupations.

Proposition 5: Long hours are being worked across a range of industries.

Proposition 6: Extended hours of work affects the low paid.

Proposition 7: Long hours of work are affecting people in large workplaces too.

Proposition 8: Employees with dependant children are hardest hit by long working hours.

Proposition 9: There is a new model of working hours arrangements.

The ACTU referred to Dr Buchanan's evidence that, as a matter of raw hours of work, people and jobs now fall into one of three general categories:

(1) standard hours (between 35 and 44 hours a week);

(2) part-time hours (less than 35 hours a week); and

(3) extended hours (more than 44 hours a week).

[58] Under the heading *"International Comparison"*, the ACTU contended for the following additional propositions:

Proposition 10: International comparisons can be done.

Proposition 11: Adjusted for full-time employees Australia is only surpassed by Korea within the OECD in terms of the average number of hours worked by its workforce.

Proposition 12: Australia has the highest proportion of workers working 50 hours or more per week in the OECD.

Proposition 13: Average working hours for full-time employees is steadily increasing.

Proposition 14: Most other countries in the OECD are seeing their average working hours decreasing, including Korea.

Proposition 15: Unlike any other country Australia's trend of increasing hours of work is driven by unpaid overtime.

Proposition 16: It is appropriate to compare Australia with other OECD countries.

[59] The submissions of opponents of the ACTU's claim included that the evidence showed that:

(1) extended hours of work are not widespread but are concentrated among the upper echelons of the workforce;

(2) there was not, at present, a widespread problem with working time patterns;

(3) most employees working long hours are not award covered;

(4) international comparisons of working hours must be treated with great caution because of data inconsistency and changing industry composition across different economies;

(5) the OECD states that overseas comparisons are not possible in absolute terms of hours worked due to differences in the ways the data is collected;

(6) working hours in Australia are not increasing;

(7) the upward trend in average working hours ended in the mid 1990s when enterprise bargaining got fully underway;

(8) with respect to unpaid overtime, the meaning of the term is unclear and the ACTU's submissions that there is a widespread incidence of unpaid overtime are greatly exaggerated; and

(9) worker preferences play an important role in the number of hours a person works. Some workers prefer long hours and the additional remuneration it brings and most employees who work extended hours do not want to work fewer hours.

Our views and conclusions

[60] The evidence satisfies us that working time arrangements and patterns of hours worked have changed significantly in Australia over recent decades.

[61] We note at the outset that there are problems with some of the ABS time series data dealing with working hours in that they relate to *"employed persons"* and do not exclude the self-employed and owner-managers. Such exclusions would be preferable because the hours worked by the self-employed and owner-managers are not determined by the formal industrial relations system. The ABS data also measure hours worked in all jobs, rather than the main job, so the data includes multiple job holders.

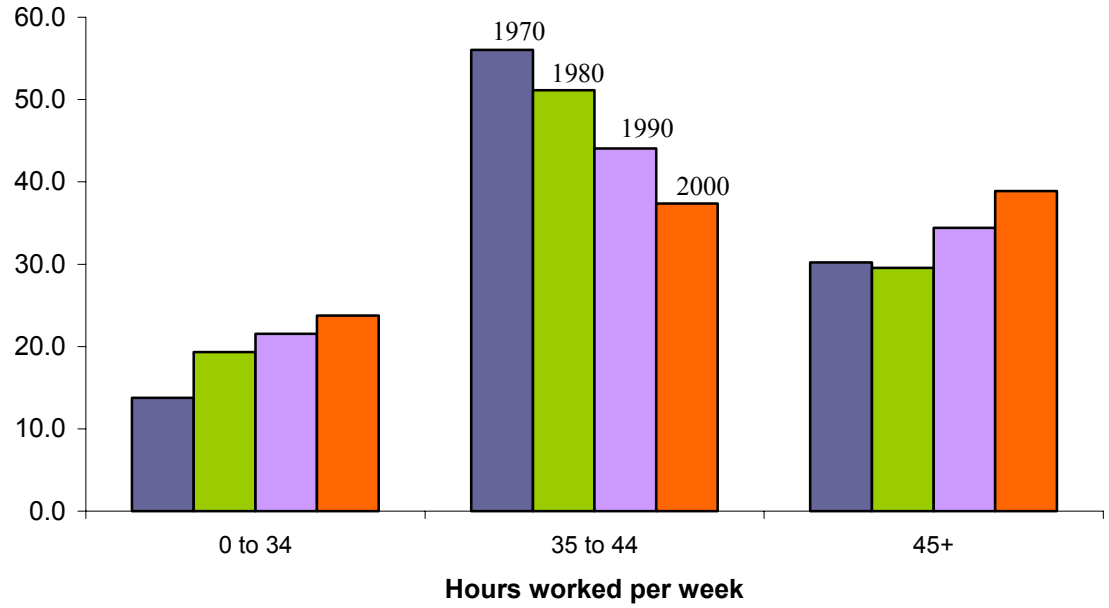
[62] Despite these limitations we have referred to this data as it is the only consistent source that can be used to examine long term trends in working hours. We later refer to some more recent ABS data which disaggregates employees and owner-managers and hence provides a more accurate snapshot of current working hours.

[63] The proportion of employed persons engaged in part-time and extended hours of work has increased over time. In 1981, 84 per cent of all employed persons in Australia were working on a full-time basis, with those working on a part-time basis making up the remaining 16 per cent. By 2000, this had changed to a full-time workforce that accounted for 74 per cent of all those employed and a part-time workforce of 26 per cent[20]. The rise in part-time employment has coincided with a growth in casual and temporary forms of employment. Some 24 per cent of all employees, and 62 per cent of all part-time employees, are employed on a casual basis[21].

[64] As Chart 1 shows, the proportion of male workers who work between 35 and 44 hours per week has steadily fallen from 56 per cent in 1970 to 37.4 per cent in 2000. The proportion of male workers who work part-time hours (1 to 34 hours) has grown, from 13.8 per cent in 1970 to 23.7 per cent in 2000. The proportion of male workers who work 45 hours per week or more has increased from 30.2 per cent in 1970 to 38.9 per cent in 2000.

Chart 1[22]

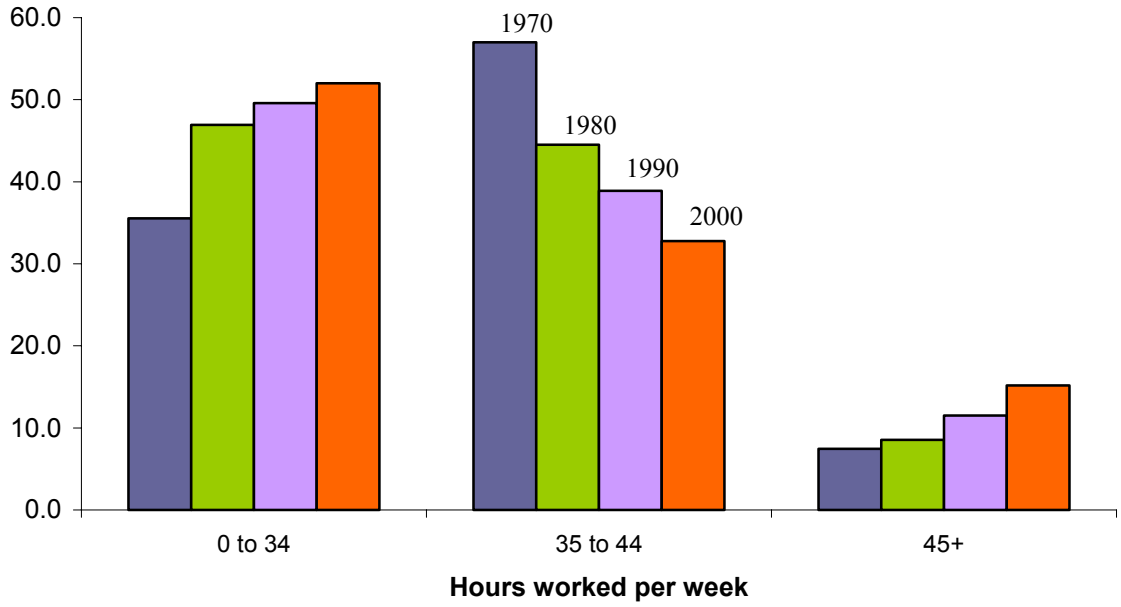
Changes in the Pattern of Working Hours for Males Over the Past 30 Years (%)



[65] There has also been a large decline in the proportion of female workers that work standard hours (Chart 2). The proportion of female workers who worked between 35 and 44 hours per week fell from 57 per cent in 1970 to 32.8 per cent in 2000. The proportion of female workers working more than 45 hours per week has risen from 7.5 per cent in 1970 to 15.2 per cent in 2000. The proportion of female workers working 49 hours or more per week has increased from 5.0 per cent in 1970 to 9.5 per cent in 2000[23].

Chart 2[24]

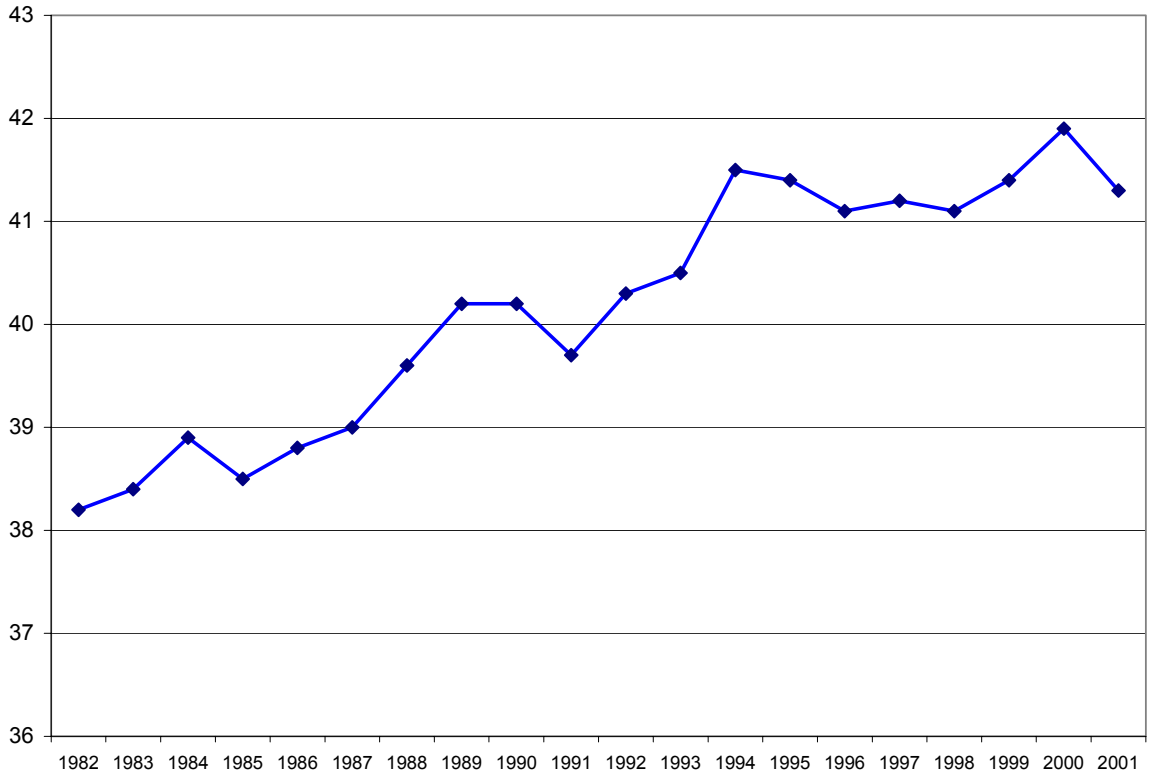
Changes in the Pattern of Working Hours for Females Over the Past 30 Years (%)



[66] Trends in hours worked for full-time employees can provide a better indication of whether there has been an increase in extended hours because these figures are not influenced by the rise in the incidence of part-time work.

[67] In this regard there has been an upward trend in the average weekly working hours of full-time employees over the past 20 years, as shown by Chart 3:

Chart 3[25]
Average Weekly Working Hours: Full-time Employees



[68] In the proceedings before us there was general agreement that in Australia weekly hours worked by full-time employees have increased over the past two decades, from 38.2 hours in August 1982 to 41.3 hours in August 2001. But the nature of the trend in the last few years was a matter of some controversy.

[69] The ACTU argued that full-time working hours continued to increase in the latter part of the 1990s, whereas the Commonwealth and ACCI contended that average hours worked by full-time employees have plateaued since 1994.

[70] It seems to us that the rate of growth in average weekly full-time hours has slowed since 1994. But of itself such a conclusion is not particularly significant. It is not known whether the trend will continue. However, what is apparent is that the level of average weekly working hours for full-time employees is significantly higher than it was 20 years ago. To that extent we agree with the ACTU's contention that hours of work in Australia are increasing.

[71] Disaggregating the average weekly hours worked by full-time employees reveals distinct changes in the trends of so-called standard hours and very long hours.

The relative proportion of full-time employed persons working between 35 and 40 hours per week has declined whilst the proportion of full-time employed persons working more than 45 hours per week has increased.

[72] In 1981, 62 per cent of all full-time employed persons worked 35 to 40 hours per week while 31 per cent worked more than 45 hours per week. By 2000, 50 per cent of all full-time employed persons worked 35 to 40 hours and 43 per cent worked more than 45 hours per week[26]. Between 1981 and 2000, the total number of all persons working more than 45 hours per week increased by 76 per cent[27]. The data referred to above include owner-managers as well as employees, whereas Table 1 sets out the hours worked by full-time employees, excluding owner-managers, over the period 1988 to 2001. The table shows that there has been an increase in the proportion of such employees working longer hours. It is also apparent that trends in working hours are influenced by the cyclical nature of the economy. The proportion of full-time employees working long hours dropped during the economic slow down of the early 1990s, before rising in 1993 and 1994. Changes in the proportion of employees working longer hours have been less marked since 1995.

Table 1[28]
Hours Worked by Full-time Employees Excluding Owner-managers %

	41-48 hours	49-59 hours	60-69 hours	70+ hours
1988	17.1	9.3	2.8	1.8
1989	17.5	10.2	3.2	1.8
1990	16.3	9.2	3.3	1.9
1991	15.8	8.9	3.3	1.8
1992	16.2	9.9	3.8	1.7
1993	17.2	10.4	4.0	1.9
1994	18.6	11.9	4.8	2.1
1995	18.4	11.8	4.3	2.1
1997	18.4	11.8	5.0	2.4
1998	18.5	11.8	4.5	2.3
2000	19.0	12.5	5.1	2.4
2001	18.9	12.1	4.4	2.0

[73] In summary, there has been a substantial reduction in the proportion of workers who work what have traditionally been regarded as *"standard hours"*. This has not been accompanied by a compensating alteration in the proportion of workers who work a particular number of hours per week but by a generalised dispersion in the working hours. There has been a significant increase in part-time and casual employment as well as a significant increase in the number of employees working extended hours. We accept the ACTU's contention that there is a new model of working time arrangements. Using the statistical material available we accept that three distinct working time regimes can be identified:

(1) standard hours (between 35 and 44 hours a week);

(2) part-time hours (less than 35 hours a week); and

(3) extended hours (more than 44 hours a week).

[74] We next turn to the question of who works extended hours.

[75] While we accept the ACTU's contentions that extended hours are worked across a range of occupations, industries and income levels, it is also apparent that a higher proportion of employers and self-employed persons work extended hours than would be expected when considering the total proportion of people in the workforce who work extended hours. Almost two out of three employers (65 per cent) and almost half of all self-employed workers (45 per cent) work 45 hours or more per week[29].

[76] This compares to less than a quarter of wage and salary earners (23 per cent) working extended hours. However, in absolute terms over half of those working extended hours are wage and salary earners.

[77] Occupational status and income level are also positively related to extended hours. Generally speaking, well paid, highly skilled jobs have a higher incidence of long hours than lower skilled, lower paid employment.

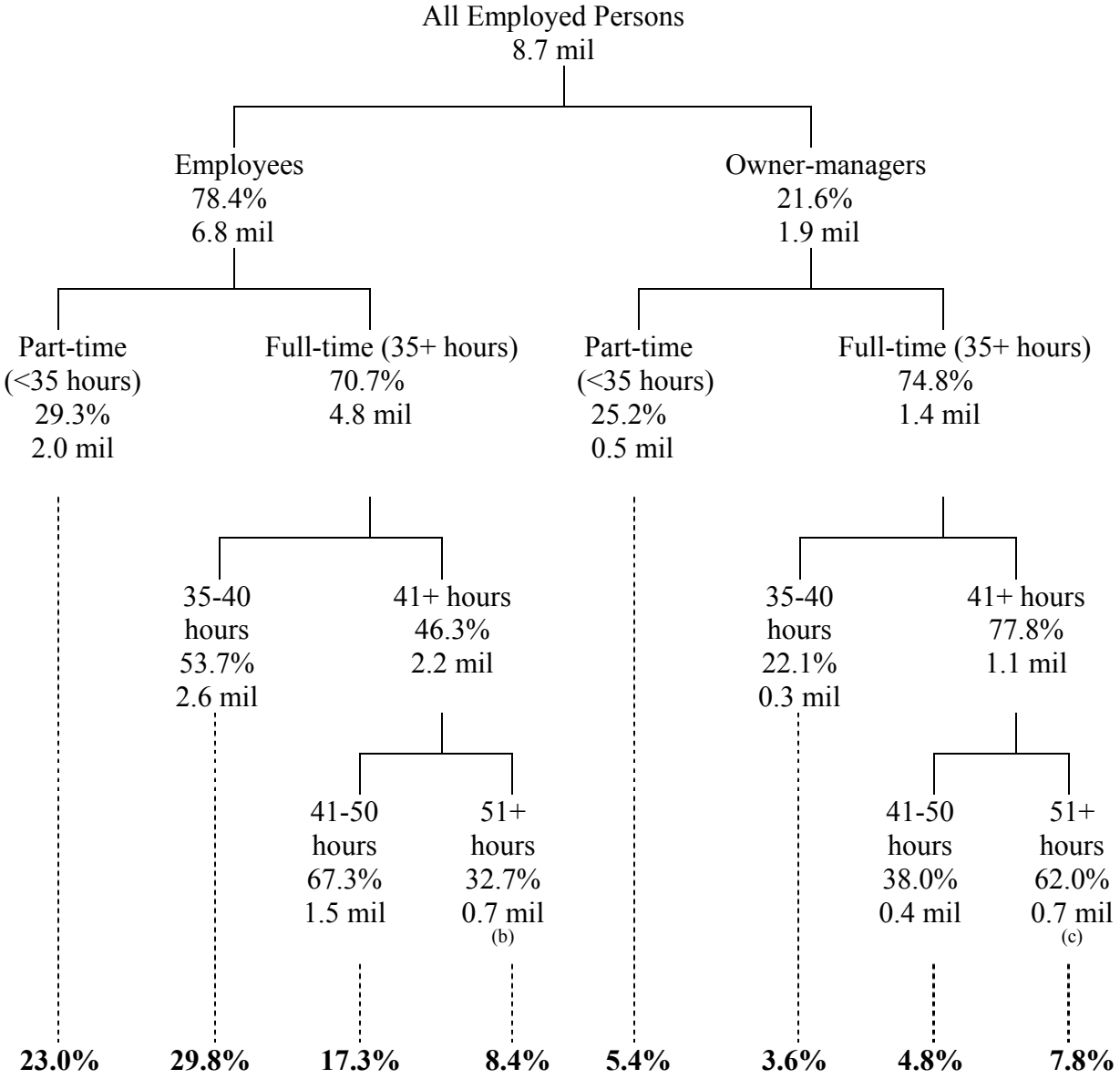
[78] The Working Time Arrangements Report examined groups in the workforce which had a larger proportion of persons working extended hours than the national average in order to develop a *"Basic Profile of the Extended Hours Worker"*[30]. This material tells us which groups are more likely to work extended hours, namely older males, in either professional jobs or a trade, who earn above-average incomes.

[79] As to the current position, the ABS *Survey of Employment Arrangements and Superannuation* (SEAS)[31] provides a snapshot of working hours during the period April to June 2000. According to these data, about 3.3 million Australians work overtime, or 38.3 per cent of the employed workforce. Of these, two-thirds were employees and about a third were owner-managers.

[80] Consistent with the data on extended hours, the working of overtime is more prevalent among particular occupational groups. About one-quarter of managers and administrators are working more than 19 hours overtime each week.

[81] Diagram 1 illustrates how dispersed the working population is in terms of working hours. Employees working 35 to 40 hours per week account for 29.8 per cent of all the employed workforce. A significant proportion of all employed persons (28.4 per cent) are part-timers and over 38 per cent of all employed persons work more than 40 hours per week. Some 732,000 employees (or 10.8 per cent of all employees) and 680,088 owner-managers (or 35.8 per cent of all owner-managers) work more than 50 hours per week.

Diagram 1[32]
The Current Distribution of Working Time in Australia, April - June 2000



[82] The next issue we deal with is the incidence of unpaid overtime.

[83] The ACTU contended that Australia's trend of increasing hours of work is driven by unpaid overtime. In this regard, as noted earlier, the ACTU relied on one of the conclusions in Dr Campbell's paper *Cross-national Comparisons*.

> *"In short, in comparison with the US and the UK, Australia can claim not only that it has the largest increases in average working hours for full-time employees but also that the extra hours worked by these employees are less likely to be paid for. Around one half of all full-time employees in Australia regularly put in extra hours, but only a minority is paid for these extra hours. This suggests a distinctive and quite urgent challenge for policy-makers."*[33]

[84] The Commonwealth and ACCI disputed the ACTU's contentions on this issue and submitted that the evidence did not support the proposition that there has been an

increase in the incidence of unpaid overtime hours. ACCI argued that the proportion of persons working unpaid overtime is relatively low, just 11 per cent of all employees, and has been trending downwards since 1995.

[85] The differences between the parties on this issue turn largely on the interpretation of ABS data and in particular upon how the parties categorise unpaid overtime.

[86] Data on the incidence of paid and unpaid overtime are available through an irregular ABS survey of employees, *Working Arrangements Survey Australia* (WAS)[34], which was conducted in 1993, 1995, 1997 and 2000. In this survey, overtime is defined as *"work undertaken which is outside, or in addition to, ordinary working hours of the respondent in their main job, whether paid or unpaid"*. Respondents are asked if they usually work overtime in their main job, and how many hours of overtime they usually work. Those who usually work overtime are then asked whether their most recent period of overtime was paid or not paid. In addition to the category of *"paid overtime"*, the survey offers a number of other categories - *"included in salary package"*, *"time off in lieu"*, *"unpaid"* and *"other arrangements"*. The results of the WAS surveys in respect of the payment method for overtime are summarised in Table 2.

Table 2
Overtime Payment Method 1993, 1995, 1997 and 2000
Working Arrangements Survey
(% of employees regularly working overtime)

Overtime payment method[(a)]	**1993**	**1995**	**1997**	**2000**
Paid overtime	40.1	40.7	37.7	38.4
Included in salary package	[(b)]	19.7	22.7	21.2
Time off in lieu	5.3	4.0	3.8	5.2
Unpaid overtime	53.4	34.8	34.9	33.5
Other arrangements	1.1	0.8	0.9	1.7
TOTAL	100.0	100.0	100.0	100.0

Notes: [(a)] As determined by the method of remuneration that applied in the most recent episode of overtime.
[(b)] Not separately identified. Presumably included under *"unpaid overtime"*.

[87] Dr Campbell, upon whose evidence the ACTU relied, regards the three additional ABS categories - *"time off in lieu"*, *"salary packaging"* and *"other arrangements"* - as unpaid overtime. Dr Campbell bases his view on the fact that such overtime is not directly compensated by a monetary payment linked to the number of overtime hours worked[35].

[88] The ACTU then combines all of the not paid overtime categories to produce Table 3 which shows the incidence of unpaid overtime as a proportion of those who work overtime.

Table 3
Incidence of Overtime Which is Not *"Paid Overtime"*
(% of persons who work overtime)

	1993	1995	1997	2000
Not *"paid overtime"*	59.9	59.3	62.3	61.6

[89] Professor Wooden, upon whose evidence the Commonwealth and ACCI rely, takes a different view. He does not regard the provision of an immediate pay benefit as determinative of whether overtime should be regarded as paid or not. In his Working Time Patterns Report, Professor Wooden says:

> *". . . while earnings may not vary across pay periods with variations in overtime hours worked, this does not mean that the overtime hours are not remunerated. Salary packages, for example, may be negotiated which build in some expectation of regular hours beyond the minimum specified in an award or agreement, and which may compensate the employee accordingly. According to the data presented in Table 6, for example, about 21 per cent of employees working regular overtime in 2000 indicated that overtime pay had been included in their salary package, while a further 5 per cent stated that they received time off in lieu.*
>
> *This, however, still leaves I suggest a substantial proportion of employees - around 850,000 in November 2000 - who were not aware of any compensation that they had received for the overtime hours they had worked. Such workers are described by the ABS as working unpaid overtime. Again, however, caution needs to be exercised when interpreting the data in this way. It is suspected that there still may be many persons who are reasonably well paid on the implicit assumption that their job will involve hours of work beyond the contractual norm, but which were not explicitly accounted for when negotiating the annual salary package. Included here, for example, would be many high paid managers and many persons working in the better paid professions (such as doctors and lawyers)."*[36]

[90] Professor Wooden's summary of the WAS data on unpaid overtime for the years 1995, 1997 and 2000 is set out in Table 4 below.

[91] Table 4 provides the basis for ACCI's submission that the proportion of persons working unpaid overtime is relatively low - at 11 per cent of all employees - and has been trending downwards.

Table 4[37]
The Incidence of Regular 'Unpaid' Overtime Working, 1995, 1997 and 2000
(% of employees)

	1995	1997	2000
Males			
Full-time employees	13.6	12.5	12.1
Part-time employees	2.5	2.5	2.5
All employees	12.5	11.4	10.8
Females			
Full-time employees	17.1	16.5	16.1
Part-time employees	5.6	6.4	5.0
All employees	12.4	12.2	11.3
Persons			
Full-time employees	14.8	13.9	13.5
Part-time employees	4.9	5.5	4.3
All employees	12.4	11.7	11.0

[92] It seems to us that there are difficulties in both of the approaches outlined above. Categorising *"time off in lieu"*, *"salary packaging"* and *"other arrangements"* as forms of unpaid overtime is, we think, too simplistic. What is meant by *"unpaid overtime"* in the WAS surveys is far from clear. In his evidence, Dr Buchanan agreed with the proposition that there was *"a great deal of ambiguity about the term"*. Dr Campbell also acknowledged that it is a *"murky area"*:

> *"The very concept of overtime that is not paid can be seen as blurred and open to question. When we say that overtime is 'not paid' we mean that it is not directly compensated with monetary payment linked to the number of extra hours worked in the week. But there may still be some reward for extra hours. This can include formal or informal arrangements for time-off-in-lieu (TOIL), arrangements for high base salaries in return for availability to work extra hours as required (either specific as in some averaged hours arrangements or more general as with many managerial and professional employees). It can also include more diffuse rewards such as the favour of workmates or the favour of the employer (perhaps expressed in performance bonuses or, more brutally, through continued retention of the employee in employment)."*[38]

[93] The approach taken by the ACTU would tend to overstate the incidence of unpaid overtime.

[94] There are also problems with ACCI's contention that the proportion of persons working unpaid overtime is just 11 per cent of all employees and is trending downwards. Three points may be made about this contention.

[95] The first is that the 11 per cent being referred to is the proportion of all employees working unpaid overtime, not just full-time employees. In this regard, we agree with Dr Campbell's observation that it is the unpaid overtime of full-time employees which is responsible for long hours and hence it is appropriate to focus on the proportion of full-time employees who work unpaid overtime. On Professor Wooden's calculations, 13.5 per cent of full-time employees work unpaid overtime.

[96] The second point is that the WAS survey understates the incidence of unpaid overtime. One of the reasons for this is that the data relate to *regular* overtime hours and not *irregular* overtime hours. The limitations of the WAS survey data are acknowledged by Professor Wooden. According to Professor Wooden the SEAS data *"probably provide a better guide to the level of 'unpaid' working"*[39].

[97] As previously noted the SEAS data provide a snapshot of working hours during the period April to June 2000. According to these data 17.7 per cent of employees worked unpaid overtime in the previous four weeks[40].

[98] The final point relates to ACCI's assertion that unpaid overtime is trending downwards. Given the level of ambiguity about what constitutes unpaid overtime and the limited number of observations available we do not think it is appropriate to express a view about the trend with respect to the incidence of unpaid overtime.

[99] The approach taken by ACCI, in our view, understates the level of unpaid overtime.

[100] We are satisfied that a significant proportion of employees work overtime hours which are unpaid in the sense that the overtime is not directly compensated by a monetary payment linked to the number of overtime hours worked. On the material before us we are unable to determine the proportion of employees working unpaid overtime with any precision, other than to say that it is at least 17.7 per cent of employees.

[101] The next issue we deal with is employee preference.

[102] Working time preferences can vary substantially amongst employed people and are determined by various factors, including the number of hours currently worked, whether the worker is paid for all hours, consumption patterns and family and personal commitments. Table 5 shows the working time preferences for all full-time employees based on the SEAS. There is a greater preference for fewer hours for the same pay as the number of hours currently worked increases. Overall, 16 per cent of all full-time employees would like to work fewer hours and almost one-third (32 per cent) of employees working more than 60 hours a week want to work fewer hours. About two-thirds of all full-time employees were satisfied with the hours they currently work.

Table 5[41]
Full-time Employees in Main Job, Usual Hours by Preferred Hours, Australia, 2000

	Preferred Working Hours				
Usual hours worked each week in main job	**More hours for more pay**	**Same hours for same pay**	**Fewer hours for less pay**	**Fewer hours for same pay**	**Total**
	----------%----------				**'000**
35-39	20.5	68.0	6.6	3.5	1478.3
40	17.3	69.8	6.8	5.1	1123.7
41-50	15.6	65.5	9.6	8.4	1504.1
51-60	9.6	62.8	11.5	15.3	517.3
More than 60	5.1	61.6	11.4	20.7	214.7
All full-time employees	*16.4*	*66.8*	*8.3*	*7.7*	*4838.1*

[103] We next deal with international comparisons.

[104] Cross-national comparisons of working hours was the subject of considerable debate in the proceedings. The ACTU contended that:

> *"Australia compares unfavourably by international standards in relation to extended working hours. Far from being the land of the long weekend, Australia now ranked among the highest working hours countries in the world."*

[105] We have earlier set out propositions the ACTU advanced under the heading *"International Comparison"*. They included:

(1) international comparisons can be done;

(2) adjusted for full-time employees Australia is only surpassed by Korea within the OECD in terms of the average number of hours worked by its workforce; and

(3) Australia has the highest proportion of workers working 50 hours or more per week in the OECD.

[106] The ACTU's contentions are primarily based on the evidence of Dr Campbell. In his Cross National Comparisons Report, Dr Campbell makes a number of observations about working hours in Australia relative to other OECD countries. Some of the points from Dr Campbell's report are as follows:

(1) for most of the twentieth century working hours in all advanced capitalist societies underwent a long term process of decline. In the last 20 years or so this process of convergence in working time patterns has been replaced by more diversity and even divergence amongst countries;

(2) Australia (with the United Kingdom and the United States) is one of the few OECD countries where there is evidence of a trend towards longer full-time working hours; and

(3) allowing for variations in the part-time share, Australia has average working hours that seem longer than most other OECD countries. Average annual hours tend towards the very top of the rankings, comparable with the United States, though not as high as Korea.

[107] In his Working Time Patterns Report, Professor Wooden challenged the claim that working hours are, by world standards, relatively long in Australia. Professor Wooden advanced three reasons why the available data *"should not be used to support such a strong conclusion"*, namely:

(1) *"Differences in survey methodology and in calculation methods between countries, render most comparisons inappropriate."* For example, data from household surveys (which collect information from individuals) produce much higher estimates of hours worked than establishment surveys (which involve the collection of data from employers). Comparisons of hours across countries should not mix data from establishment-based surveys with data from household-based surveys. Difficulties also arise as a result of differences in the way annual hours are calculated. There are two main ways of computing hours. The *"direct"* method allows total hours to be computed from a single source. Alternatively, where the *"component"* method is used different components of hours are calculated from different sources. For some countries not all of the components of working hours are included. For example, in the Netherlands only *"contracted hours"* are included, overtime (whether paid or unpaid) is not included. According to Professor Wooden, Dr Campbell ignores these methodological differences. In particular he says that Dr Campbell erroneously reports that annual working hours in Australia are now higher than in Japan. But the two data sources used are not comparable. Unlike the Australian data the primary source of the Japanese data is from establishment-based surveys, which will almost certainly underestimate the total hours worked;

(2) *"An upward bias in the methodology used by the ABS to generate estimates of annual working hours."* The working hours data on Australia reported by the OECD comes from the ABS and is based on Labour Force Survey data. The Labour Force survey is conducted monthly. The ABS estimates annual working hours by using data for four of the 12 survey months - February, May, August and November. The choice of these months will cause working hours to be overstated because they are all periods when leave taking is relatively less common; and

(3) *"The Euro-centric nature of the comparisons."* Most cross-national comparisons of labour market data, especially on working time, are dominated by European countries. Increasingly the competitors for Australian export markets are not in Europe but elsewhere. There are many other regions of the world where comparisons may be even more relevant

but are ignored, either because of the absence of comparable data or because it is convenient to do so.

[108] Professor Wooden was cross-examined about his criticisms of Dr Campbell's paper. In the course of that cross-examination Professor Wooden accepted that a number of his criticisms were *"not that important"* - for example the differences between actual hours and usual hours data is not relevant to the calculation of annual average hours. It was also apparent that he was not challenging the use of the OECD data for the purpose of identifying trends, just the use of the data to compare levels, that is, working hours across countries at a particular time.

[109] In relation to the suggestion of an *"upward bias"* in the ABS methodology, Professor Wooden said that he did not know how other countries reported hours - and hence if they also had an *"upward bias"* - and accepted that he was not an expert on how working hours data is compiled in other countries. In any event it appears that the *"upward bias"* in the ABS data to which Professor Wooden refers amounts to an overstatement of about three per cent.

[110] Professor Wooden also accepted that if the cross-country data for average annual hours is adjusted to allow for variations in part-time employment (as Dr Campbell did[42]), then because Australia has a much higher incidence of part-time employment than other countries which are identified as high working time countries, Australia would rise relatively in the average annual hours rankings (as Dr Campbell found).

[111] During the course of his evidence Dr Campbell also addressed the criticisms made of his paper by Professor Wooden. In relation to the criticism that he failed to have regard to differences in survey methodology, Dr Campbell notes that, of the 18 countries listed in his Table 1, ten use household survey data. The remaining countries do not - as Professor Wooden implied - use establishment data, rather, they use establishment-based data *together with* household survey data. Dr Campbell suggested that the differences between using household survey data on the one hand, and using household data together with establishment data, on the other, is not likely to be significant. Using Finland as an example, a comparison of the two methodologies gives rise to a difference of two percentage points in the results derived from the two methods. Dr Campbell concluded on this point in these terms:

"PN4089

. . . the problem with using establishment-based data is the risk of underestimation of unpaid overtime. If we actually look at the countries with which we are concerned, the countries in which this risk might arise are precisely those countries which are household surveys, so there isn't a problem here in Australia, we use a household survey, zip, no problem. The US, the UK, they all use household surveys to make these comparisons. There is no problem that arises here as a result of the difference in the methods. The countries that do use a mix of the methods tend to be those countries that we know from other information are not countries where there is likely to be a problem, because they are not countries in which there is likely to be a large volume of unpaid overtime . . . to my knowledge in most of these countries which use a mix of methods, there

is not a problem because there is not likely to be the unpaid overtime which could cause a problem . . .

PN4090
. . . And I think if you actually look at it closely, it is clear that there is nothing in it; there is no punch in this particular point."

[112] After considering all of Professor Wooden's criticisms, Dr Campbell said that they do not address his major points which were to do with trends in Australia in comparison to other countries. In relation to criticism that the comparisons have a *"Euro-centric focus"* Dr Campbell said:

"PN4105
. . . other OECD countries, are precisely the closest comparators with Australia. They are the countries which have over the past 100 years built up a platform of minimum labour standards over things like employment security, working time wages, and which have produced dynamic prosperous modern economies. These are the countries that we can compare such social indicators with . . . we compare life expectancy with those countries. We compare our health system with those countries . . . working time duration is to do with labour, it is to do with the way in which people live their lives. This is a classic sort of social indicator in my point of view. Of course this is why we chose them. Now, this is not euro-centrism, this is to do with comparing with other OECD countries."

[113] Mr Pensabene, called by the AIG, also gave evidence relating to cross-national comparisons of working hours. Mr Pensabene took a sectoral approach to the issue and assembled the most recent International Labour Organisation (ILO) data on average weekly working hours in manufacturing in 16 countries, for the years 1990 to 1999. On the basis of this material Mr Pensabene, and AIG, submitted that:

(1) there has been no significant lengthening in working hours;

(2) the trend in many other countries is variable and not necessarily toward shorter working hours;

(3) Australia is not ranked among the highest working hours in the world - rather we are a middle ranking country.

[114] Mr Pensabene's analysis of the ILO statistics was the subject of trenchant criticism by Dr Campbell. According to Dr Campbell the data used by Mr Pensabene is not standardised as claimed, but rather is *"a jumble of quite incompatible statistics"*. Dr Campbell gives a number of examples to illustrate his point that the data sources used are not appropriate for comparative purposes. For example, the data for some countries (such as Japan) relates to *"employees"*, for others the reference population is *"total employed"* (e.g. Spain and Italy) or in the case of the United Kingdom, full-time employees on adult rates of pay. If the reference population is *"total employed"*, that will produce a higher number of average working hours than if only *"employees"* are considered. This is because the *"total employed"* includes the self-employed who tend to work longer hours than employees.

[115] Mr Pensabene was taken to these criticisms during cross-examination and accepted that:

(1) *"employed persons"* as opposed to *"employees"*, are two *"very different populations"*;

(2) there are variations between countries in relation to what is described as *"manufacturing"*. For example, Australia and Spain describe manufacturing differently;

(3) the figures for Japan and Spain are not comparable in that they are based on different reference populations and refer to different descriptions of manufacturing;

(4) the figures for Japan, Australia and Italy are not comparable as the reference populations are different;

(5) the exclusion of part-time employees and youth wage workers from the United Kingdom data would have the effect of raising the average number of working hours relative to Japan, Spain, Italy and Australia, which all include part-time employees in their data; and

(6) no adjustment had been made to the data presented to take account of differences in reference populations.

[116] We now return to the ACTU's contention regarding the cross-national material. We begin by accepting the proposition that *"international comparisons can be done"*, provided they are done, as Dr Campbell put it, *"cautiously and scrupulously"*.

[117] In relation to the ACTU's other contentions (*"adjusted for full-time employees Australia is only surpassed by Korea within the OECD in terms of the average number of hours worked by its workforce"* and *"Australia has the highest proportion of workers working 50 hours or more per week in the OECD"*) we would not express the position in such clear-cut terms. In our view it is appropriate, having regard to the limitations in the data, to adopt a more cautious approach. We note that the OECD report upon which the ACTU's propositions are based states that its data on annual hours are:

> *". . . intended for comparison of trends over time; [and that] they are unsuitable for comparison of the level of average annual hours of work for a given year, because of differences in their sources."*[43]

[118] In this context we accept the points from Dr Campbell's paper, as set out above. It seems to us that the criticisms made of Dr Campbell's paper by Professor Wooden were qualified by his responses under cross-examination and by the explanation provided by Dr Campbell during the course of his evidence.

[119] In relation to Mr Pensabene's evidence on this issue, it seems to us that the analysis which he undertook is compromised by the methodological limitations to

which we have referred. There may be some substance in AIG's submission to the effect that variations in average working hours between countries may result from factors such as the industry mix of the economy. No analysis was undertaken to test the validity of this proposition and we are not able to reach a concluded view as to the significance of such factors.

Occupational Health and Safety Effects of Long Hours

[120] The ACTU submitted that the evidence showed that long hours have occupational health and safety effects on employees. The ACTU drew a number of propositions from the evidence:

Proposition 1: After 48 hours of work per week there is a tension between the amount of time spent at work and the amount of time available for sleep.

Proposition 2: A reduction in sleep causes fatigue at work and this increases the risk of accidents.

Proposition 3: Significant fatigue can be compared to alcohol intoxication.

Proposition 4: Long hours are bad for your health.

Proposition 5: Insurance companies recognise the effects of long hours when they set premiums.

Proposition 6: The externalities associated with long hours of work cost Australia significantly more than $3 billion annually.

[121] Some of these propositions are relatively uncontentious although a number of issues arose during the hearing as to the occupational health and safety effects of long hours. We discuss them in the following paragraphs.

[122] As to the ACTU's first and second propositions, Professor Dawson's evidence indicates that there is a direct correlation between lack of sleep, fatigue and an increase in accidents. Further, the Counting the Costs Report contends that there is a relationship between extended hours of work and safety[44]. The report includes:

> *"Long work hours are widely accepted in the research literature as a major contributor to fatigue (Akerstedt & Gillberg, 1980; Carey & Fishburne, 1989; Arnold et al., 1997; Buchanan & Bearfield, 1997; Burton & Turrell, 2000; Parliamentary Inquiry, 2000). Indeed, research findings show that as hours of work increase, sleep is reduced with a concurrent elevation in fatigue and reduced levels of alertness (Carey & Fishburne, 1989). This results from both the increased fatigue due to longer hours of work and decreased sleep opportunity [i.e. recuperative time]. As such, once employees work more than 48 hours per week, the increased competition between sleep and other activities of daily living results in significant reductions in sleep (Dawson, 1997) . . .*

. . . high fatigue levels have been shown to increase accident risk (Lauber & Kayten, 1988; Carey & Fishburne, 1989; Yedida et al., 1993; Green, 1995; Rosekind et al., 1995; Smith, 1996; Revicki et al., 1997; Hanecke et al., 1998; Nocera & Strange-Khursandi, 1998; Epstein et al., 2000; Gander et al., 2000; Kim et al., 2000; Kitahara et al., 2000; Parliamentary Inquiry, 2000) . . .

Over the last decade, much research has explored the risks and dangers of fatigue. Specifically, studies show an exponential increase of accident risk beyond the eighth hour of work . . .

Research has demonstrated that fatigue-related impairment is not dissimilar to the effects of moderate alcohol intoxication. In humans, fatigue delays response and reaction times, negatively impacts on logical reasoning and decision making and impairs hand-eye co-ordination - all critical safety issues in the workplace. A significant body of research has concluded that fatigue is rapidly emerging as one of the greatest single safety issues now facing industry . . .

It is our belief that extended hours of work are one of the principal contributory causes of sleep loss and subsequent fatigue related accidents and injuries."[45]

[123] The Commonwealth disputed the ACTU's contention - and by implication Professor Dawson's evidence - and argued that there is insufficient evidence to show a direct causal connection between fatigue and increased accident rates. The Commonwealth relied on the fact that the current Comparative Performance Monitoring Report reveals that the incidence of injury and frequency of injury per 1000 employees across all industries have both decreased consistently since 1997. Similarly, the Australian average of frequency of injuries per million hours worked has decreased consistently over the same period.

[124] It was argued that, if the ACTU's contention were correct, one would have expected injury rates to have increased over time with the increase in the proportion of employees working extended hours.

[125] Professor Dawson dealt with this issue - in the context of addressing some AMMA material - during his evidence in chief. In essence Professor Dawson contended that it is an error of logic to say that just because injury rates are decreasing and we are working longer hours therefore we do not have a fatigue-related problem. Other factors may be at work, as Professor Dawson notes:

". . . what we have found in many of the organisations that we have looked at is that you have two things working in opposing directions, that is you have improving safety through declining incidents related to other factors, for example, protection, education, and training, counterpoised by increasing levels of accidents and injuries due to, for example, fatigue or other aspects. So when you unpick this a little bit, just because the over-all level is declining doesn't mean that the effects of long hours of work are not necessarily there. What we find in many of the sites - in fact road transport in Australia is a very good example of this - the relative contribution of fatigue-related accidents to overall accident and injury rates in Australia is going up exactly because of that."

[126] Professor Dawson was not cross-examined on this issue. Indeed, much of Professor Dawson's evidence relating to the link between extended hours, sleep loss and subsequent fatigue-related accidents, was not subjected to any serious challenge.

[127] We accept Professor Dawson's evidence. Further, we broadly accept the ACTU's first two propositions. We say we broadly accept them because we think that they should be subject to a number of qualifications. In our view, the link between extended hours of work, sleep loss, fatigue and accidents is not as straightforward as is suggested by the ACTU.

[128] In this regard, we note that in his evidence Professor Dawson separated fatigue from hours of work and argued that *"controlling hours of work isn't necessarily a good way of controlling fatigue"*. Professor Dawson expanded on this proposition in these terms:

> *"PN2549*
> *. . . The reason behind that is, to determine how tired somebody is based on the number of hours they have worked on these dimensions is difficult, because it doesn't actually deal with the fundamental issue. If you want to know how tired somebody is you have to know how much sleep they are getting, and that is the fundamental issue that you need to focus on."*

[129] We accept that working extended or long hours of work is likely to give rise to a risk of fatigue. But a number of factors will impact on whether the number of hours worked cause fatigue. In particular:

(1) the nature of the task being performed;

(2) the timing and duration of work and non-work periods. As Professor Dawson observed *". . . working 40 hours a week would make you incredibly tired . . . And conversely . . . just because somebody is working 48 hours a week doesn't mean that they will necessarily be tired"*. The organisation of working hours impacts on fatigue. For example, shift-workers as a group obtain significantly less sleep than those not working shift work. This is because sleep is available at biologically inappropriate times which reduces the quality and quantity of that sleep[46]; and

(3) non-work factors contribute to fatigue, not just the number of working hours and the nature of the work being performed[47]. Non-work related fatigue factors are highly variable from individual to individual. Examples of such factors include: *"the impact of sleep disorders, alcohol and drug use, social/family pressures, health status and effectiveness of coping strategies"*[48].

[130] Finally, in relation to the ACTU's selection of 48 hours of work per week as the point at which a tension emerges between work and the time available for sleep, we note that Professor Dawson described hours of work as a *"graduated hazard"*. He explained this to mean that there is no artificial transition point at, for example, 48 hours per week, such that *"over 48 it gets really bad and anything under that is okay"*.

However, Professor Dawson qualified this statement somewhat in that *"once you start working consistently more than 50 hours a week there are generally a large number of research papers that will show significant effects"*.

[131] We now turn to consider the other propositions advanced by the ACTU in relation to the occupational health and safety effects associated with extended hours of work.

[132] The first of these is the proposition that *"significant fatigue can be compared to alcohol intoxication"*. We accept that there is uncontested evidence in support of this proposition[49].

[133] The second proposition is that *"long hours of work are bad for your health"*. In this regard the Counting the Costs Report reviews the literature on this issue and concludes that extended hours of work, particularly when associated with shift work, are linked with significant reductions in health status. Examples of such adverse health effects include increased alcohol consumption and smoking[50], cardiovascular problems[51], infertility and miscarriage[52] and psychological depression[53].

[134] The Commonwealth and others contest the link between long working hours and adverse health effects and rely on Professor Wooden's evidence in this regard. In his Working Time Patterns Report, Professor Wooden uses *Australian Workplace Industrial Relations Survey* (AWIRS) employee data and the 1995 Health Survey to examine the correlation between the incidence of work related illness and injury and hours usually worked. He concludes that:

> *"Overall, there is very little in [the AWIRS evidence] to suggest that long working hours has contributed to a significant deterioration in health for the majority of persons working those long hours . . .*
>
> *The evidence presented here suggests that the majority of long-hours workers are coping quite well, as reflected in rates of stress-related illness that are not much higher than that experienced by other employees working a more standard span of hours."*[54]

[135] But we note that Professor Wooden makes a number of qualifications to his conclusions, in particular he says:

(1) the data on which they are based are *"far from ideal"*[55];

(2) the AWIRS employee data only provides a *"crude test"* of the hypothesis that long working hours are detrimental to health[56];

(3) what constitutes a stress related illness in the AWIRS data is *"highly subjective and may well vary across respondents"*[57]; and

(4) adverse health consequences may have caused some workers to reduce their hours of work, which will not be captured in a single point-in-time observation. Further, some health effects, such as a higher risk of heart

disease, may take many years to become apparent and cross-section data are not well placed to pick up such effects[58].

[136] In his summary of the health consequences of long working hours, Professor Wooden says that having regard to these limitations *"Overall, therefore, the possibility of adverse health consequences from long working hours cannot be dismissed"*.[59]

[137] In our view, the balance of the evidence supports a finding that there are adverse health consequences associated with extended hours of work, particularly when associated with shift work. A number of factors affect the extent of such adverse consequences, including the nature of the task being performed, the timing and duration of work and non-work periods and non-work factors such as the impact of sleep disorders and social and family pressures.

[138] The next ACTU proposition is that *"Insurance companies recognise the effect of long hours when they set premiums"*. We accept that there is uncontested evidence in support of this proposition[60], but we doubt its relevance to the determination of the matters before us.

[139] The final ACTU proposition is that *"The externalities associated with long hours of work cost Australia significantly more than $3 billion annually"*. The figure of $3 billion is taken from the Beyond the Midnight Oil Report into the transport industry and is referred to in the Counting the Costs Report[61]. However, as the Commonwealth notes in its submission, the figure is an estimate based on 1993 road accident data. It assumes that 20 per cent of all road accidents are fatigue-related. Yet not at all fatigue-related road accidents are work related and therefore cannot all be claimed to be the result of the driver having worked long hours. We agree with the Commonwealth's submission on this issue, namely, *"these findings cannot be utilised for guidance in other industries, or even for other modes of transport"*. We accept that the cost of the externalities associated with long hours of work are likely to be significant, but the evidence before us does not provide a sound basis for estimating those costs with any precision.

[140] Before we leave the matter of fatigue and health considerations related to long hours of work, we briefly mention the matter of second jobs. This matter was the subject of Mr Norville's written submission, referred to earlier, and was touched on by others including the Victorian Ambulance Services and Qantas. The matter of second jobs appears to us to have direct relevance to the issues before us. It is, perhaps, a matter that warrants further investigation in the light of the evidence about the deleterious effects of long hours of work.

The Effect of Long Hours on Employees, Their Families and Their Communities

[141] As to the effect of working long hours on employees, their families and their communities, the ACTU relied on two reports by Dr Pocock – the Family and Community Life Report and the Fifty Families Report. The ACTU advanced the following propositions on the basis of this material:

Proposition 1: There is an inherent tension between work and family which is seriously exacerbated by long hours of work.

Proposition 2: Long hours of work by parents has an adverse effect on children.

Proposition 3: Long hours of work mean that there is less *"self"* time in which to recover.

Proposition 4: Long hours of work has an adverse effect on couples' relationships.

Proposition 5: All members of the family suffer when one member of the family suffers.

Proposition 6: Dual income households have greater difficulty balancing work and family.

Proposition 7: Long hours of work disproportionately affect women.

Proposition 8: When families are undermined then the entire social fabric is undermined.

Proposition 9: When workers have reduced their hours of work this has had a positive effect on families.

Proposition 10: Long hours of work means that people are less involved in their community.

Proposition 11: Balancing work and family is becoming more difficult.

[142] The Family and Community Life Report is a review of existing research dealing with the relationship between working hours and family life. The report concludes that the weight of the research evidence suggests that *"extended hours of work have serious negative effects on the institution of the family, on relationships and upon civil society and community"*[62].

[143] The report draws on both Australian and overseas research in support of its general conclusion. For example, in Australia, Glezer and Wolcott found that:

> *"For workers with family responsibilities, time appears to be the major juggernaut of those who are combining paid work with family responsibilities - time for children, time with partners, time for elderly parents, and time for household chores, personal leisure, and meeting the demands of work . . . 66 per cent of men and 23 per cent of women of the 2688 respondents in the study were working more than 41 hours per week. The data confirm that the hours of work, particularly long hours, influenced significantly how work affected home life.*
>
> *Half of all employed men and 46 per cent of employed women who worked 41 or more hours felt work interfered with home life compared to less than one-quarter*

(22 per cent) of women and the small proportion of men who worked less than 30 hours a week."[63]

[144] Having found that in Australia long working hours are one of the main predictors of work interfering with home life, Glezer and Wolcott argue:

> *"There are only so many hours in a day and days in a week. Families require time and energy to nurture and enjoy. Work requires time and effort to earn essential income and keep businesses profitable. If families are important to an individual's well-being as parents and partners and to the community in the form of involved citizens, then a better way has to be found to enable these commitments to be integrated. The current trends to long and pressured hours at work, the ubiquitous presence of work at home with laptops, faxes and mobile phones, combined with fear of potential redundancy if work doesn't take priority over family demands, does not engender a positive or satisfying environment for family and community life."*[64]

[145] The results of the Glezer and Wolcott study are consistent with a 1994 ABS survey on work and family which found that the main reason given by parents who had difficulties managing work and the care of children was that working hours were too long (34 per cent)[65].

[146] The link between time scarcity caused by paid work and the quality of family life is also established in research in other countries, such as the United States[66] and the United Kingdom[67].

[147] As to the Fifty Families Report, the ACTU submitted that it *"provides a robust qualitative account of the effects of unreasonable hours on employees and their families"* and that the main findings of the report are:

> *"Australia has a long hours culture.*
>
> *Long hours of work can be unreasonable hours of work.*
>
> *Pressured hours of work can be unreasonable hours of work.*
>
> *Pressures at home have a bearing on the reasonableness of hours at work.*
>
> *Unpredictable hours of work can be unreasonable hours of work.*
>
> *Shift work can make hours of work less reasonable.*
>
> *Unusual times of work add to the unreasonableness of the hours of work.*
>
> *Intense hours of work can be unreasonable hours of work.*
>
> *A lack of control over when you work can make working time unreasonable.*
>
> *A lack of power about working time can make that time unreasonable.*

Understaffing is a reason why people work long hours.

Many people work long hours because they have no choice.

Some people work long hours because they need the money.

Many people work long hours because they are committed to the job.

Long hours of work can have profound affects on individuals.

Some people stop engaging in their hobbies because of long hours of work.

Long hours of work can mean that individuals cease to have a private life.

Long hours of work is bad for your health.

Long hours of work can make people obsessed with work.

Long hours of work can be bad for families.

New technology is bringing work into the home.

Long hours of work can mean that parents rush their children.

Long hours of work can give rise to difficulties for adolescent children.

Long hours of work is bad for a couple's relationship.

When one person is affected by long hours of work the family is affected.

Long hours of work can force parents to choose between family and work.

You become aware of being a long hours worker when it is too late.

Long hours workers believe that the solution requires a legal standard."

[148] The ACTU contended that the outcome of the Fifty Families study is broadly complementary with quantitative material presented in the case. The results provide a human picture of the impact of long and unreasonable hours on Australian workers which supports the application.

[149] AIG also commissioned qualitative research into the changing nature of employment and working hours issues. The research was conducted by ANOP in mid September 2001 and consisted of five interviews with employers and 14 focus group discussions consisting of ten employee focus groups of between six and nine participants and four employer focus groups of between three and six participants. The participants in the ANOP Study were drawn from five industry sectors - information technology, call centres, labour hire, manufacturing and construction. All of the employees were randomly recruited to the focus groups with the exception of some

members of the labour hire group who were recruited with the assistance of AIG member companies. The recruitment of the employee participants was undertaken by a company independent of both AIG and ANOP. No employees were informed of the precise topics to be discussed in the groups prior to the commencement of the focus groups. All focus groups were facilitated by an ANOP staff member with each focus group session lasting approximately one and a half hours.

[150] While there are some similarities between the results of the ANOP Study and the Fifty Families Report, a number of differences are also apparent. Across the five industry sectors in the ANOP Study working hours varied widely - from long and unpredictable (in information technology), to regimented 38 hour working weeks with no overtime (in call centres and manufacturing). In direct contrast to the Fifty Families Report, the ANOP Study concluded that unreasonable or long working hours was not an issue for the majority of the employees.

[151] These differences are unsurprising given the manner in which the participants in each study were selected. The Fifty Families Report is an analysis of 54 families who experience long hours or unreasonable hours. It is a qualitative study from the perspective of employees who work long or unreasonable hours, and their families. The ANOP Study is not so focussed - it is simply a study of employees who work in five industry sectors, without regard to the nature of their working hours.

[152] As mentioned earlier, there are some similarities between the two studies. In particular, the ANOP Study notes that satisfaction with working hours depends on numerous factors, not just the number of hours actually worked. Issues such as the unpredictability of work, family circumstances, travel to and from work, financial constraints and obligations also determined whether an individual wanted to work fewer hours or as many hours as possible.

> *"I haven't got any of that - wife, kids, mortgage. I can work as much as I want with no worries." (employee)*

> *"I travel 2 hours each way to get to work because I use public transport and it kills me! Everyday - 4 hours a day. It's too much." (employee)*[68]

[153] AIG also relied on a study by Dr Virginia Lewis of the Australian Institute of Family Studies - *Family and Work: The Family's Perspective*[69] - in support of the proposition that achieving a successful work and family balance is less about time and more about actively managing and communicating with children. Dr Lewis's paper is one of the studies reviewed by Dr Pocock in the Family and Community Life Report. At pages 21-22 of her report, Dr Pocock says:

> *"Lewis recently undertook interviews with parents and children from 47 families in Melbourne. The non-random group included 'only a couple of families having a parent who reported working more than 50 hours a week' and probably under-represents families who are having trouble coping with work/family challenges (2001: 13-14). Lewis concludes that 'time' is only* one *of the critical factors that influence quality of family life' (2001: 14). Nonetheless it is critical, and 'time was a major and recurring theme in the interviews' (2001:1). As in Galinsky's*

study the majority of children in the study felt that the parents worked 'about the right amount of time'. However, most of the children talked about the impact that work has on the time that parents spend with them and 'the responses were divided roughly evenly between those saying that they wished their parents spent more time with them and those who said their parents currently spend enough time with them' (2001: 7). Just under a third of parents in the study wanted to have more time with their children and 'some parents had changed jobs to reduce pressure, although they lost work status and income' (2001: 8). Some children in the study showed great delight when their parents' hours became more reasonable (eg they gave up shift work).

The parents conclude that there are more important issues than just 'length of time' that affect children's relationships with their parents. However, 'time' was important in the views of both children and parents in the study. This extended to primary school children and beyond:

> *It was clearly the case that children in primary school prefer to have parents participate actively in their school lives. Some of the younger children who were interviewed expressed this directly, and openly acknowledged that they felt bad if parents did not participate (2001: 9).*

Lewis finds 'that it is important to children that parents share significant moments in their lives' - whether the children are primary or secondary school age. While children valued the incomes that their parents earned, some 'talked about lack of time spent with their parents as a negative consequence of their parents working' and nearly all the children referred 'to the impact of work, on [parents'] time spent with children' (2001: 11)."

[154] To the extent that the Lewis study suggests that children need *"quality time"*, it is consistent with the findings from other studies which are reviewed in the Family and Community Life Report[70]. But as Dr Pocock notes *"a first and necessary condition is time itself, the thing that parents working long hours have least to offer"*[71].

[155] We return to the Fifty Families Report. This report was the subject of criticism by opponents of the ACTU's claim. The criticism went to matters such as the small number of persons interviewed, the method used to select the interviewees, the conduct of the interviews and the conclusions drawn from the interviews.

[156] We note that the Fifty Families Report says that it:

". . . makes a first analysis of just over 50 (54 to be precise) families who experience long hours or hours that are 'unreasonable' like very long hours, changes in time zones, irregular shift work, unpredictable hours, or combinations of these. Our study includes individuals and, in almost two-thirds of cases, their partners."[72]

"This study analyses the effects of unreasonable hours of work amongst 54 employees who work unreasonable hours, based on interviews with each employee and where possible, separate interviews with their partners."[73]

[157] The method used was to interview a number of persons:

> *"In total 89 interviews were conducted over a two month period in May and June 2001; 54 of these were with workers identified as working unreasonable hours; 35 of these were with partners, some of whom also worked unreasonable hours."*[74]

[158] These persons were selected as follows:

> *"Our group of interviewees was generated in the following way. Union organisers were asked to generate a list of names of employees working long/unreasonable hours in the areas of employment covered by the ACTU award vehicles. We defined long/unreasonable hours as those in excess of approximately 48 per week in a 12-week cycle, or of longer hours for shorter periods of time, or hours that created unsafe work or significant loss of amenity to employees. In general, we asked and were supplied with, a list of around a dozen names of employees in each industry or occupational area. In a number of cases, union organisers sent out email messages to members seeking the names of employees working long hours. In other cases, organisers spoke at member's and delegate's meetings, asking members and delegates to nominate the names of co-workers (or themselves) who worked long hours. In some cases committee members of professional associations were invited to participate.*
>
> *We sought a mix of employees by occupational area. We aimed for a mixture of men and women, and a sample that included in each industry group, at least some with family responsibilities. We then selected randomly from the lists supplied and worked from the list until we had agreement from, in general, three or four employees in each award area who were willing to be interviewed."*[75]

[159] The report says:

> *"The selected group of interviewees represents those who work paid or unpaid long hours, erratic shift hours, unpredictable hours, long shifts of continuous work and night work."*[76]

[160] A protocol for the research was established, including the interview procedure, and interview questions were determined. They included:

> *"2. Could you describe your current hours arrangements?*
>
> *5. Just thinking about yourself, how do these hours affect you?*
> *(probe on stress, safety, general health, enjoyment of job, relations with co-workers . . .)*
>
> *6. Thinking about your family or home situation, how do these hours affect that?*
> *(probe on kids, other dependents, moods, other . . .)*

9. In general, how would you say working these hours affects your marriage? (probe only if it is comfortable on intimacy, health of relationship)

11. How do you think things in your life would be different if you worked more reasonable hours?

13. Do you think it would help if: [show card here]"[77]

[161] At some point a letter was given to the interviewees, or potential interviewees, which includes:

> *"Are you, or is your partner, working long hours of paid or unpaid work? If you work, or your partner works very long hours we'd like to hear about your experiences.*
>
> *. . .*
>
> *The study is funded through the Australian Council of Trade Unions. Findings will be used to support their submission to the Australian Industrial Relations Commission to change Awards to restrict unreasonable hours of work. If you agree, we may wish to contact you to provide further information to assist the claim."*

[162] The report acknowledges some of the limitations of the study resulting from the method used[78]. It says:

> *"An ideal way of collecting qualitative data about the effect of unreasonable hours on households is by means of extended interviews of a large group of randomly selected employees working long hours, along with interviews of their other household and community members, over some years. This 'rolls royce' method would allow longitudinal analysis of the effects of long hours, and - through a large enough randomised sample - permit extended analysis across a wide diversity of employees."*

[163] The reports states:

> *"In this study we elected to rely primarily upon the qualitative method of interviews as our main source of data, supplemented by some more general quantitative data. This is because our primary purpose was to undertake an extended, open-ended conversation with those affected by unreasonable hours about their various impacts, some of which we expected we could not predict in advance."*[79]

[164] As appears from what has been said, the Fifty Families Report is essentially derived from the interviews of 54 employees and the partners of 35 of them. The interviewed workers were selected from persons who, in the view of union officials, were *"working long/unreasonable hours in the areas of employment covered by the ACTU award vehicles"*. The report sets out or summarises the views of the persons interviewed and the authors express some views of their own.

[165] The ANOP Study was also subjected to some criticism. In particular the ACTU advanced the following criticisms of ANOP's methodology:

(1) the study only relates to five industry sectors, two of which are not characterised by long working hours;

(2) the report is compromised by interviewer bias; and

(3) misleading information was given to the focus group participants about the ACTU claim.

[166] In relation to the second point, we note that under cross-examination by Mr Marles (for the ACTU) Mr Cameron (the author of the ANOP Study) seemed to accept that the report had been influenced by matters other than the expressed views of the participants.

[167] It seems to us that the main issue in contention in relation to both the Fifty Families Report and the ANOP Study is whether the views expressed by those interviewed can be taken as representative of the views of others employed in the same industries. We think that while both studies provide some useful insights into the impact of working hours on family life and community involvement, the extent to which one can make generalisations on the basis of these studies is necessarily constrained by the limited number of participants and the qualitative nature of the research.

[168] We have earlier set out the propositions for which the ACTU contends. Many of these are we think self-evident or a matter of common-sense. Without analysing each proposition separately, we will accept that they can be supported by the evidence.

[169] The relationship between working hours and family and community life is complex. In some cases, earnings from longer working hours relieve the stress resulting from financial difficulties. In other cases, long working hours have negative consequences. Whether negative consequences occur often depends on a range of factors such as the extent of an employee's family responsibilities and his or her engagement in community activities.

The Effect of Long Hours on Employers

[170] The ACTU made submissions with respect to the effect of long hours and related matters on employers. These submissions relied mainly on the What About the Bosses Report prepared by Dr John Buchanan and others. The ACTU contended that a number of propositions can be drawn from the evidence:

Proposition 1: Employers have a divergence of views about working time.

Proposition 2: Many employers believe they could cope with reasonable hours initiatives.

Proposition 3: Employers are working long hours too.

Proposition 4: Reasonable hours are important in staff retention.

Proposition 5: Many employers see extended hours as adversely affecting productivity.

Proposition 6: Many employers believe that long hours of work carry hidden costs for the business.

Proposition 7: There are structural issues which prevent further spread of reasonable hours.

Proposition 8: Many employers felt the claim was fair.

Proposition 9: Deviations from patterns of long hours are possible, but are limited.

Proposition 10: Co-ordinated change to hours regimes has worked.

Proposition 11: It appears that a response to the issue of working time is needed at a macro level.

[171] Opponents of the ACTU's claim argued that the What About the Bosses Report was of no or little value, mainly because of the smallness of the sample (23 employers).

[172] We note that the What About the Bosses Report said of itself:

> *". . . this paper has a modest objective. To identify and explore the key issues that need to be examined if any comprehensive answer to the first research question is to be obtained. The paper is exploratory and does not purport to offer definitive answers. The research design has, consequently, involved making the best use of the limited secondary material that is available."* [80]
>
> *"While our research has been exploratory, our research design has not been arbitrary or ad hoc. To gain insights into employer attitudes and behaviour we have interviewed employers directly. To help generate information relevant to the current claim we have, wherever possible, focussed on interviewing employers covered by Awards associated with the claim."* [81]
>
> *"Open-ended interviews were conducted with 23 employers over the phone between August and October 2001. Interviews were conducted on the basis of an interview protocol. . . . Notes from each interview were written up. This raw material was then used to produce four 'sectoral' commentaries. These resulted in the following chapters:*
>
> - *material from employers of strappers (Chapter 2)*
> - *material from professional services and 'professional hours' employers (Chapter 3)*

- *material from employers and managers of blue collar labour (Chapter 4)*

- *material from the Victorian electrical contracting industry (Chapter 5).”*[82]

“This research design meant that many of the firms studied were amongst the best in the country in terms of management of working hours. Findings from these cases should not, therefore, be regarded as indicative of ‘typical’ practice. Rather they highlight both what is possible but also the limits of ‘the possible’ in the current situation.”[83]

[173] We do not think it necessary to analyse each proposition. Bearing in mind that only 23 employers were interviewed we think that references to *“many employers”* in the propositions over-state the situation. However, we accept that the views on which the propositions are based were stated by some of the employers interviewed and that some other employers might have similar views.

[174] In relation to the propositions that *“Many employers believe they could cope with reasonable hours initiatives”* and *“Many employers felt that the claim was fair”*, there is a considerable body of other employer evidence expressing opposition to the ACTU’s claim. For example:

(1) Ms Westwick, Employee Relations Advisor for the National Electrical Contractors Association of Victoria, described the claim as *“restrictive and inflexible in an industry where employers are subject to client demand and requirements”*;

(2) Mr Macleod, Human Resources Manager of CBI Constructors Pty Ltd, said that, if the claim were granted and more people were employed, it would lead to additional accommodation and travel costs for work sites in remote locations;

(3) Mr Fitzgerald, National Industrial Relations Manager of Skilled Engineering Ltd, said that if the claim were granted it *“would potentially be a disaster”* and *“would seriously jeopardise our ability to service our clients and meet short term projects which require long hours to be performed”*;

(4) Mr Davidson, General Manager of Detmark Poly Bags Pty Limited, said that the proposal that employees be allowed paid breaks after working *“extreme hours”* would, if granted, *“impose a substantial cost burden upon the Company and prevent us from continuing to run on a 24 hour/7 day basis. This would make it very difficult for the Company to survive against imported product.”*; and

(5) the survey of members of AIG and the AHEIA, conducted by Professor Benson, also revealed a level of employer apprehension about the ACTU’s claim[84].

[175] We note that the ACTU also relied on the Counting the Costs Report in support of some of its contentions as to the effect of long hours on employers. In his review of the literature, Professor Dawson deals with the relationship between extended hours of work and productivity. He concludes that a number of *"studies have shown that employee productivity per hour for 10 to 12 hour shifts is significantly lower than for an 8 hour shift. For example, one study by Heslegrave et al (2000), found workers on 10 hour shifts reported significant performance impairment for alertness, memory and attention compared to 8 hour shifts."*[85]

[176] The relationship between extended hours of work and productivity is complex. It can depend on how one measures productivity. In some circumstances, the direct cost of hiring additional employees to relieve workload pressure may be greater than the cost of having existing employees work for longer periods, at overtime rates. Employing additional employees usually entails extra training and administration costs. There is also some evidence to suggest that a payroll tax based on the number of employees, rather than hours worked, is more likely to increase the incentive to keep employee numbers down but hours up[86].

[177] Against these direct cost considerations is the evidence that employee performance declines when extended hours are worked.

[178] We think that there would be instances where the working of extended hours would adversely affect productivity, particularly where the employees concerned are engaged in cognitive tasks that are more susceptible than other tasks to the effects of fatigue on performance.

The Effect of Long Hours on the Public

[179] The ACTU made submissions as to the effect of long hours on the public, including that the evidence supported the proposition *"Unreasonable hours of work is a public safety hazard"*. It argued that, while fatigue-related accidents and medical negligence cases are the most dramatic examples of the effect of extended hours on the public, wherever the public is exposed to fatigued employees, it is at risk. The ACTU also referred to the public health costs associated with diseases arising from the working of long and unreasonable hours. We accept that fatigued employees may be a risk to the public and that there are public health costs associated with diseases. We note Professor Dawson's evidence:

> *"PN2549*
> *. . . just because you are working 40 hours a week - I could put those 40 hours a week together in a way that would make you incredibly tired. And conversely there are ways, as with the project that we are doing with Qantas at the moment, is that just because somebody is working 48 hours a week doesn't mean that they will necessarily be tired."*

Existing Regulatory Framework

Introduction

[180] The ACTU submitted that the existing regulatory framework governing working hours *"is making things worse"*. It then dealt with the regulatory framework established by awards, enterprise agreements and occupational health and safety laws. We deal with these in turn.

Awards

[181] As to regulation by awards, the ACTU put forward three propositions. The first is *"Traditional regulation of long hours of work have been through overtime penalties which create a disincentive for an employer to work an employee these hours"*. The ACTU derived this proposition from the evidence of Ms Heiler; in particular, the following passage from her Regulating Excessive Hours Report:

> *"With respect to the issues of the regulation of overtime or excessive hours, it was assumed that the retention of a 'living wage', industry awards which often set overtime limits, the payment of overtime rates and 'penalties' would act effectively to control excessive hours, and by acting as a disincentive for employers to insist on long hours. The assumption was - and perhaps still is - that the problem of excessive hours was an isolated one and one best left to local deliberation that weighed up the interests and needs of workplace parties."*[87]

[182] The ACTU's second proposition is *"Working patterns are now much more diverse"*. This is derived from the following views in the Regulating Excessive Hours Report:

> *"A range of inter connected factors have emerged across the Australian labour market to render the existing mechanisms for regulating excessive hours redundant.*
>
> *These include:*
>
> - *Increased dispersion and fragmentation of hours arrangements*
> - *Increased pressure to increase trading and operating hours*
> - *Strong disincentives to control overtime and excessive hours in some industries*
> - *Move away from compensating long and non-standard hours*
> - *Weakening of local controls over overtime levels through fragmented and individualized bargaining."*[88]

[183] The third proposition is *"The absence of a limit on maximum hours is a regulatory gap"*. It is again derived from the Regulating Excessive Hours Report which includes:

> *"This means that the issue of maximum hours has not been one that the Australian system has ever really grappled with in a systematic, codified way. However, the fact that Australian tribunals have not in the past dealt with these issues systematically or in a general way does not obviate the need to deal with them now. As will be argued, the assumption that the setting of overtime payments and other penalty rates for weekend and night work would act as an effective 'disincentive' for employers no longer holds. As a mechanism for more broadly regulating excessive hours, they would only be effective so long as there were other associated controls, such as controls over trading hours, or industrial agreements that limited operating times, or local or industry agreements that set overtime limits. The failure to set any kind of limit on or standard for maximum hours is now a profound gap in our regulatory system that needs to be addressed. Dealing with the issue of excessive or unreasonable hours in an ad hoc way is clearly no longer an appropriate way to deal with a problem that is systemic."*[89]

[184] The Commonwealth took issue with propositions 1 and 3. As to the first, it argued that the ACTU's own evidence suggested that overtime penalties are an incentive for some employees to seek overtime. As to the third proposition, the Commonwealth disputed that the absence of a limit on maximum hours is a regulatory gap. It argued that the various hours provisions and safeguards that are allowable award matters can provide ample protections for employees under the existing regulatory framework, in particular, where such provisions have been expressed facilitatively. The Commonwealth referred to the nature and extent of hours and related provisions in awards.

[185] AIG's written submissions included:

> *"31. There are currently 2210 federal awards: AIRC Award Simplification Status Report, 31 January 2002.*
>
> *32. There are very significant differences between the hours of work provisions of different awards. The hours of work provisions of many awards have been arrived at following extensive arbitration. In the case of other awards, the provisions were achieved by consent. Ai Group believes that it will be impossible for the Commission to fully understand the implications of inserting the ACTU's proposed clause into all industry and company-specific awards, given the vast differences in the approaches which different awards take to hours of work issues. Hence, our submission in sections 21.1 and 2.4 above, that the ACTU will find it impossible to meet the onus of proof in this matter given that it is pursuing a test case clause.*

[186] We come to proposition 1 in a moment. Proposition 2 is largely uncontentious and is supported by evidence and we accept it.

[187] Proposition 3 is, as we have said, derived from views expressed by Ms Heiler in the Regulating Excessive Hours Report. It is true that awards do not fix *"a limit on maximum hours"*. Neither does the ACTU's claim seek to fix, directly, such a limit. Subclause 1 is a prohibition on an employer requiring an employee to work *"unreasonable hours"*. Subclause 2 relates to *"reasonable overtime"*. Subclause 3 entitles an employee to a break after working a specified number of hours or days. The principal question we have to consider is whether we should fill any *"regulatory gap"* by awarding these three subclauses as a test case standard.

[188] We return to proposition 1. In our view it understates the extent and detail of current award regulation of long hours. This is an important matter as the ACTU seeks the insertion of its three subclauses as a test case standard. Awards typically contain extensive and detailed provisions regulating hours of work; for instance, provisions about ordinary hours, span of hours, shift work and overtime. We deal with this matter in more detail under the subheading *"The Existing Hours of Work Safety Net"* under the heading *"Decision"*.

Enterprise agreements

[189] As to the existing regulation of working hours by enterprise agreements, the ACTU drew a number of propositions from the evidence:

Proposition 1: Many enterprise agreements change working hours regimes.

Proposition 2: When enterprise agreements change working hours regimes mostly they do so to provide for the needs of business.

Proposition 3: Many agreements average hours of work.

Proposition 4: Many enterprise agreements alter shift rosters.

Proposition 5: An effect of bargaining is that more time is being spent at work.

Proposition 6: An effect of bargaining is that more of the responsibility for recuperation is being shifted to the employee.

Proposition 7: Enterprise agreements serve to provide for more non-permanent employees.

Proposition 8: Traditional framework of hours' regulation is being bargained away.

[190] The ACTU contended that propositions 1 to 6 are supported by views expressed in the Working Time Arrangements Report and the evidence of Dr Buchanan. Proposition 8, the ACTU submitted, is supported by the views expressed by Ms Heiler in the Regulating Excessive Hours Report.

[191] Opponents of the ACTU's claim took issue with various of these propositions; in particular that an examination of certified agreements suggests that hours provisions

are heavily skewed to employer-only flexibility and that they have increased hours while reducing the penalties for overtime worked.

[192] While we accept that there is evidence that supports the ACTU's propositions, we doubt that they support the ACTU's claim for a test case standard. Agreements simply reflect a bargain reached by the parties . If agreements are to be certified they must (subject to some limited exceptions - see s.170LT(3) of the Act) pass the no-disadvantage test. And, unions affiliated to the ACTU are parties to the great majority of certified agreements.

Occupational health and safety laws

[193] As to the regulation of working hours by occupational health and safety (OHS) laws, the following propositions were put by the ACTU:

Proposition 1: OHS laws treat fatigue in a *"piecemeal"* way.

Proposition 2: There are not many guidelines that deal with fatigue.

Proposition 3: Prosecutions for breaches of OHS laws are rare.

Proposition 4: The benefits which may arise from a risk management approach to fatigue are yet to be realised.

Proposition 5: Risk management is a cover for doing nothing.

Proposition 6: OHS laws are narrow in their focus.

[194] These propositions are generally derived from the evidence of Ms Heiler, the Regulating Excessive Hours Report and the evidence of Professor Dawson.

[195] Opponents of the claim generally took issue with these propositions and submitted that OHS laws provide protection for all employees and are an effective way of dealing with unreasonable working hours where they impact on the health and safety of workers.

[196] Occupational health and safety laws are a matter for the Parliaments that enact them. Any perceived defects in such laws, or in their enforcement, are matters for consideration by these legislatures or by enforcement agencies. Inherent in the ACTU's propositions is that the granting of its claim will fill, or help fill, a gap left by occupational health and safety laws. The question, however, we have to decide, and do so later, is whether the three subclauses which comprise the ACTU's claim are justified as a test case standard.

Overseas experience in regulating extended hours

[197] The ACTU submitted that regulating extended hours works and that this is demonstrated by both the overseas experience and local experience. As to the overseas

experience, the ACTU sought to make out a number of propositions from the evidence:

Proposition 1: The French working time laws have been a success in reducing hours of work, benefiting the lives of French employees and increasing employment while improving productivity.

Proposition 2: The United Kingdom working time laws have had a lesser effect than those in France but the potential long-term effects are still significant.

Proposition 3: Australia's working time laws are more porous than those of Europe.

Proposition 4: The European Union Working Time Directive uses many of the same concepts as the claim.

Proposition 5: The claim is mild.

Proposition 6: When countries have sought to deal with the problem of unreasonable hours it has worked.

[198] Opponents of the claim submitted that overseas regulation:

(1) differs from the regulation sought by the ACTU's claim;

(2) has not been as successful as the ACTU contends;

(3) is less extensive than the existing regulation in Australia;

(4) contains provisions such as opt-outs and averaging; and

(5) is part of a regulatory system different from that in Australia;

[199] There are, of course, various ways in which extended hours can be regulated. The ACTU seeks that hours be regulated by varying awards to include in them the subclauses we have set out earlier. This form of regulation differs from the forms of regulation overseas to which we have been referred.

[200] The European Working Time Directive of 23 November 1993 as amended includes that, subject to certain exceptions and averaging provisions, the number of hours worked is not to exceed 48 a week. The regulation in France to which the ACTU points is a 35 hour week. The form of regulation in the United Kingdom to which the ACTU refers is The Working Time Regulations 1998, which fix an average of 48 hours as the maximum number of hours that may be worked in a week (subject to various exceptions). The ACTU is not claiming a 48 hour week maximum or a 35 hour week. In these circumstances, we find the information and views about the regulation of hours in the European Union of limited relevance.

[201] We also note the evidence that a number of countries outside the European Union have regulated the maximum number of hours that may be worked (for example, Norway and Turkey). None of the regulation we have been referred to, however, is the same as that sought by the ACTU. On the other hand, we note that there is evidence that a number of countries have not legislated for a maximum working week (for example, the United States and New Zealand).

[202] One of the ACTU's propositions is that *"Australia's working time laws are more porous than those of Europe"* which is supported by a passage from Dr Campbell's Cross National Comparisons Report:

> *"The Australian system, in contrast to most regulatory systems, is missing the crucial maxima, eg definitions of maximum overtime hours and maximum daily and weekly hours. Provisions for overtime premia - even where they exist - cannot be a substitute for maxima, since they generally offer only an arbitrary, often - fragile barrier to employer pressures for extended hours. This omission opens up major gaps in Australia, in which extended hours working, often in poor quality forms, can survive and flourish. If we take into account the prevalence of other gaps, eg gaps in coverage and gaps in enforcement, it is clear that the Australian system, in contrast to most regulatory systems, is extremely porous. It provides many opportunities for extended hours and even very extended working hours."*[90]

We note, however, that prescribing the *"crucial maxima, eg definitions of maximum overtime hours and maximum daily and weekly hours"* is not part of the ACTU's claim.

[203] The next ACTU proposition is that *"The European Union Directive uses many of the same concepts as the claim"*. In support, the ACTU says that the *"Directive deals specifically with night work"* and *"considers hours of work in broad terms"*. In our view, because of the differences between the European Working Time Directive and the ACTU's claim, these considerations provide limited support for the ACTU's claim.

[204] The ACTU then asserts that *"The claim is mild"*. In support it submitted that it is a *"far milder form of regulation compared with the Aubry law in France or the Working Time Regulation in the UK"*. This submission highlights that the ACTU's claim differs from the French (Aubry) and the United Kingdom laws. The relevant consideration is not whether the ACTU's claim is *"mild"*, but whether it is appropriate having regard to the material before us.

[205] Finally, the ACTU says *"When countries have sought to deal with the problem of unreasonable hours it has worked"*. First, we note the overseas regulation is not of *"unreasonable hours"* but of hours by reference to their number. Second, even if it were accepted that the steps taken by overseas countries have worked, this does not necessarily advance the ACTU's case because of the differences between its claim and the overseas regulation.

[206] We note that the Cross National Comparisons Report includes:

"Other countries have successfully avoided lengthening working hours through regulatory initiatives. In some cases such as France and the UK recent initiatives have been explicitly targeted at such developments and have been successful. They provide a rich source of lessons for Australia. The major lesson would seem to be: that well-designed regulation to control extended hours and to reduce hours can be effective and can work to the benefit of all. In my opinion, parallel regulatory initiatives in Australia are urgently needed."[91]

[207] No doubt the European Working Time Directive is a significant development in the regulation of working hours in Europe. It is difficult to evaluate its effect, however, particularly in the United Kingdom where there is provision for opting-out on an individual basis. In any event, the regulatory approach sought by the ACTU's claim is not a *"parallel regulatory initiative"* to those adopted in France and the United Kingdom. The passage quoted from the Cross National Comparisons Report raises the question whether the ACTU's claim is a *"well designed regulation"*. We deal with this latter point later when considering the terms of the subclauses that constitute the ACTU's claim.

Local experience in regulating extended hours

[208] As to the local experience in regulating extended hours, the one proposition that the ACTU sought to make out from the evidence is *"The Victorian ETU campaign to cap hours of work at 48 hours per week in the construction industry has been a success in reducing hours of work, benefiting the lives of ETU members and increasing employment in the industry"*. In our view, even if the ACTU's proposition is accepted as correct, the basic problem with it is that the ACTU is not claiming *"to cap hours of work at 48 hours per week"*. That benefits may have flowed from what happened in the Victorian ETU situation does not, we think, of itself, indicate that the ACTU's claim will lead to similar benefits.

History of Regulation of Hours by the Commission

[209] As to this matter, the ACTU submitted that the Commission had established community standards as to hours of work in the *Timber Workers Case*[92], the *44 Hour Case*[93], the *40 Hour Case*[94]and the *National Wage Case 1983*[95]. The ACTU's arguments included that:

(1) it has been an historic function of the Commission to regulate extended hours of work, that the evidence showed that there was a need for a public policy response and that the Commission was the institution from which the response needed to come;

(2) a common theme in these cases was the recognition of the legitimate aspirations of working people in seeking reasonable hours of work;

(3) through these cases there was an acknowledgement that long working hours had an adverse impact on the health and safety of employees;

(4) in these cases, the Commission balanced the legitimate aspirations of employees against any potential impact on the productivity of industry;

(5) the present claim does not impact adversely on economic output or productivity; and

(6) as each of these cases dealt with the issue of better hours practices, industry managed to move on and improve its productive output.

[210] The ACTU also referred to the introduction of reasonable overtime clauses in awards as a result of the *40 Hour Case*[96] and submitted that overtime is one area of working time where regulation exists and has a standard of reasonableness attached to it. Most awards, the ACTU submitted, provide an employer with a right to require an employee to work reasonable overtime and, by implication, an employer does not have the right to work an employee unreasonable overtime.

[211] The ACTU, after referring to a number of cases relating to the number of hours of overtime that may or may not be reasonable, submitted:

(1) in summary, there are circumstances in which 44 to 45 total hours per week are seen to be reasonable. There are no cases which indicate that regular overtime giving rise to working weeks in excess of 48 hours per week is reasonable. There are cases which indicate that overtime giving rise to working weeks regularly in excess of 48 hours is unreasonable; and

(2) while the circumstances vary, it can be said that the borderline between reasonableness and unreasonableness exists somewhere between an overall working week of 44 and 48 hours. In any event the limit of reasonableness is less than the descriptions of extreme hours set out in subclause 3 of its claim.

[212] We have had regard to the history to which the ACTU has referred us. The issue, however, before us is whether the ACTU's present claim is justified. The claims in the Timber Workers, 44 Hour and 40 Hour cases were for a reduction in standard hours of work. The *National Wage Case 1983* established a principle with respect to claims for a reduction in standard hours to 38 a week. The ACTU's claim before us does not seek a reduction in standard hours. We acknowledge that some of the matters raised in the standard hours cases also arise in the present case; for instance, the health and safety aspects of long working hours. The significance of these issues in the present case has, however, to be considered by us in the light of the ACTU's present claim.

Other Issues

Does the claim promote bargaining?

[213] The ACTU submitted that its claim would promote bargaining. In this respect, it relied on the evidence of a number of union officials who each said in their written statement of evidence:

"I believe that the inclusion in awards of a standard on reasonable hours of work will assist in bargaining on hours and reasonable hours of work. This will be achieved because the clause will:

- *provide a minimum standard with respect to reasonable hours of work in our industry;*

- *establish an award standard that we will seek to improve on in the bargaining process;*

- *provide a framework within which we will bargain on the issue of reasonable hours;*

- *clearly place reasonable hours of work, by its inclusion in awards, onto the bargaining agenda; and*

- *allow for the development of more specific provisions to meet the particular circumstances of an enterprise during the bargaining process."*

[214] The ACTU submitted that, whereas bargaining about hours of work had exacerbated the problem of unreasonable working hours, the clause would have the effect of redirecting bargaining in the direction of reasonable working hours. Also, it argued, impediments to bargaining about hours will be removed and there will be more bargaining as a result of the clause. Opponents of the claim took issue with the ACTU's submissions.

[215] If the ACTU's claim for a test case standard were granted it would alter the award safety net and have an effect on whether an agreement passed the no-disadvantage test (see Part VIE and s.170LT(2) of the Act). The safety net provision sought by the ACTU would lead to a greater focus, than at present, on hours of work in bargaining. In our view, however, the subjects of bargaining will largely depend on the claims and counter-claims of the participants. The evidence shows that the three subclauses comprising the ACTU's claim have not in substance been the subject of claims against employers in enterprise or workplace bargaining. There is, of course, nothing to prevent the subclauses being pursued in bargaining. The question before us is whether the ACTU's claim is justified on its merits.

The needs of the low paid

[216] Section 88B(2)(c) of the Act, among other things, requires us to have regard to *"when adjusting the safety net, the needs of the low paid"*. The ACTU's claim, if granted in whole or in part, involves an adjustment to the safety net.

[217] The ACTU submitted that the proposition: *"The claim will assist the low paid"* is made out on the evidence that almost half a million full-time non-managerial employees earning less than $40,000 a year work more than 48 hours a week and this makes up half of all full-time non-managerial workers working in excess of 48 hours. Against this, it is we think likely that, in some cases, the remuneration of employees

will be reduced if the ACTU's claim is granted. We take both considerations into account, as well as the other material before us, in complying with s.88B(2)(c).

Costs of the claim

[218] The ACTU submitted that the evidence justified the proposition: *"The cost of the claim, both at macro and micro levels, is small in any terms and immeasurably small compared to the externality cost of unreasonable hours of work"*. The ACTU relied, in particular, on the evidence of Mr Belchamber contained in his Estimated Cost Report. Opponents of the ACTU's claim submitted that granting it will involve substantial costs. ACCI submitted that its detailed costing should be accepted and that the ACTU's claim did not satisfy the economic considerations required by the Act (see ss.88B(2)(b), 90(b) and 3(a)). In the light of the conclusion to which we come, as to the terms of the ACTU's claim, we do not need to express a view about this matter.

DECISION

Introduction

[219] In the previous section of this decision we have dealt with a number of issues raised by the ACTU's claim. We now consider whether we should award a test case standard in the terms of the three subclauses sought by the ACTU. Those subclauses, in brief, are:

(1) subclause 1, *"Reasonable Hours of Work"*, prohibiting an employer from requiring an employee to work unreasonable hours of work (to be determined by a consideration of factors);

(2) subclause 2, *"Reasonable Overtime"*, entitling an employer to require an employee to work reasonable overtime at overtime rates and entitling an employee to refuse to work hours in excess of ordinary hours in the circumstances specified; and

(3) subclause 3, *"Paid Breaks after Extreme Working Hours"*, entitling an employee who has worked specified numbers of hours or days in specified periods to a two day paid break (and related provisions).

[220] Having regard to the material before us, including as to the regulation of hours overseas and locally, it is to be noted that, in the present case, the ACTU is not claiming any of the following forms of regulation:

(1) the prescription of the maximum number of hours that an employee may work;

(2) the prescription of the maximum number of hours of overtime that an employee may work; or

(3) a reduction in ordinary (standard) hours of work.

The Existing Hours of Work Safety Net

[221] The ACTU's claim, if successful, will result in the three subclauses that comprise the claim being inserted in awards generally as a test case standard. Awards generally are not silent with respect to hours of work but, as we said earlier, *"awards typically contain extensive and detailed provisions regulating hours of work; for instance, provisions about ordinary hours, span of hours, shift work and overtime"*. These current award provisions constitute the present safety net with respect to hours of work. The ACTU's claim, accordingly, does not seek the insertion of its three subclauses into a vacuum, but into an already regulated area.

[222] The ways in which awards presently regulate hours of work vary. Typically, an award will contain provisions with respect to ordinary hours and overtime. Usually, ordinary hours will be quantified (for example, 38 per week) and be subject to a number of limitations as to the manner in which they are worked, for example, limits on the length of working days, the spread of hours within which daily hours are to be worked, meal and rest breaks and breaks between shifts. Overtime, in contrast to ordinary hours, will usually not be quantified and will generally be subject to a test of reasonableness.

[223] The ACTU has chosen 14 awards as vehicles for its test case claim. We give some examples of the regulation of hours of work in these awards. The examples are not exhaustive.

[224] The ACT Shops Award[97] includes the following provisions:

> **PART 6 - HOURS OF WORK, BREAKS, OVERTIME, SHIFT WORK, WEEKEND WORK**
>
> **23. HOURS**
>
> 23.1 Weekly hours
> 23.2 Commencing times
> 23.3 Ceasing times in retail shops
> 23.4 Span of hours for warehouse and wholesale employees
> 23.5 Special provision for substituted late shopping night
> 23.6 Make up time
>
> **24. ROSTERS FOR FIVE DAY WEEK**
>
> 24.1 Ordinary working hours
> 24.1.5 Sunday work
> 24.2 Break between shifts
> 24.3 Five or less employees - rostering by mutual agreement
> 24.4 Store managers - rostering by mutual agreement
> 24.5 Twenty or more employees - ordinary hours
> 24.6 Between nine and twenty employees - ordinary hours
> 24.7 Nine or less employees - ordinary hours
> 24.8 Definition of regular basis

24.9 Rosters
24.10 Rostered days off (RDO)

25. BREAKS

25.1 Meal breaks
25.2 Rest breaks

26. OVERTIME

26.1 Payment for working overtime
26.2 Overtime - Monday to Saturday
26.3 Overtime - Sundays
26.4 Overtime - holidays
26.5 Overtime - newsagencies
26.6 Time off in lieu of payment for overtime
26.7 Rounding up of overtime hours
26.8 Overtime to stand alone
26.9 Alternative time off in lieu of overtime arrangements

27. SHIFT WORK

27.1 Application
27.2 Full-time employees
27.2.1(a) Monday to Friday
27.2.1(b) Saturday
27.2.1(c) Sunday
27.2.2 Juniors
27.3 Regular part-time employees
27.4 Casual employees
27.5 Overtime
27.6 Crib breaks and rest pauses
27.7 Exemptions

28. LATE NIGHT AND SATURDAY WORK

29. SUNDAY AND HOLIDAY WORK

29.4 Savings - Sunday work

[225] The APS Award[98] includes the following provisions:

24. HOURS OF WORK

24.1 Weekly hours
24.2 Flextime
24.3 Rostered days off
24.4 Span of hours
24.5 Local variations

24.6 Worked continuously
24.7 Time off in lieu
24.8 Make up time
24.9 Hours of duty for part-timers
24.10 Home based employment

25. OVERTIME

25.1 General conditions
25.2 Rates
25.3 Rest relief after overtime
25.4 Minimum payment
25.5 Emergency duty
25.6 Restriction duty

26. SHIFTWORK

26.1 General conditions
26.1.1 Definition
26.1.2 Payments stand alone
26.1.3 Annual leave
26.1.4 Introduction of shifts
26.1.5 24 hour limit
26.1.6 Exchange of shifts
26.1.7 Averaged shift penalties
26.1.8 Penalty rates
26.1.10 Notice of shift change

26.2 Public holiday duty
26.2.1 Minimum payment
26.2.2 Day off in lieu
26.2.3 Payment
26.2.4 Holiday definition

26.3 Twelve hour shifts

26.4 Overtime
26.4.1 General conditions
26.4.2 Definition
26.4.3 Saturday rate
26.4.4 Emergency duty
26.4.5 12 hour shiftworkers

[226] The Coal Industry Award[99] includes:

PART 6 - HOURS OF WORK, BREAKS, OVERTIME, SHIFT WORK, WEEKEND WORK

24. HOURS OF WORK

24.1 Ordinary Hours of Work
24.2 Length of Shifts
24.3 Number and Spread of Shifts
24.4 Starting and Finishing Places
24.5 6 and 7 Day Roster Employees
24.6 Rostered Days Off (RDO)

25. BREAKS

25.2 When a Crib Break is to be Taken

26. OVERTIME

26.2 Overtime Rates of Pay
26.3 Reasonable Overtime
26.4 Rest period after Working Overtime
26.5 Call-back
26.6 Working on after Knock-off Time on 7 Ordinary Hour Shifts
26.7 Working on after Knock-off time on Shifts other than 7 Ordinary Hours

27. SHIFT WORK - UP TO EIGHT ORDINARY HOUR SHIFTS

27.1 Definitions
27.2 Shift Work Rates
27.3 Change of Shift for Permanent Day Shift Employees

28. WEEKEND WORK

28.1 Minimum payment for work on Saturday and Sunday
28.2 Payment for Weekend Work for Monday to Friday employees
28.3 Payment for Weekend Work for 7, 6 or 5 Day Weekend Roster Employees

[227] The three examples we have given are all of the normal regulation of hours of work on the basis of ordinary time and overtime. At least two of the awards in the 14 selected by the ACTU (the Victorian Teachers Award[100] and the Qantas Award[101]) do not regulate hours of work in these ways.

[228] The Victorian Teachers Award includes:

*"**6. TERMS OF EMPLOYMENT***

6.1 Teachers may be employed full-time or part-time on either an ongoing, fixed term or casual basis.

6.2 A teacher employed full-time is employed to work 76 hours a fortnight.

. . .

7. TEACHING HOURS

. . .

7.2 A teacher may be required to teach, and shall not be required to teach in excess of, the maximum standard number of hours per week of face to face teaching.

7.3 The maximum face to face teaching hours will be twenty hours per week for a secondary school teacher unless the teacher supervises sporting activities of students on a structured basis for a period of two hours per week in which case the face to face teaching hours will be 18 hours 40 minutes per week.

7.4 The maximum face to face teaching hours for a primary school teacher will be 22 hours 30 minutes per week."

[229] The Qantas Award (which applies to long haul flight attendants) includes the following provisions:

PART 6 - HOURS OF WORK, REST BREAKS AND OVERTIME

18. ALLOCATION AND SCHEDULING OF DUTY

18.1 Bid period
18.2 Flying lines
18.3 Period between patterns
18.4 Allocation of flying and reserve lines
18.5 Flying of patterns
18.6 Bid period limitations
18.7 Open time

19. FLIGHT DUTY PERIOD LIMITATIONS

19.1 Multi Sector operating flight duty periods
19.2 Single sector operating flight duty periods
19.3 Combination operating and deadheading flight duty periods
19.4 Deadheading flight duty periods
19.6 Measurement of flight duty periods

20. RESERVE AND STANDBY DUTY

20.1 Standby duty
20.1.1 Allocation of standby duty
20.1.8 Measurement of standby duty
20.2 Reserve duty

21. GROUND DUTY

21.1 Allocation
21.2 Reallocation
21.3 Standard of proficiency and completion of ground duty
21.4 Measurement of ground duty
21.5 Hours of ground duty

22. DUTY HOUR CREDITS

22.1 Accrual
22.2 Pattern duty hour credits
22.2.2 Flight duty credits
22.2.3 Away from base credit
22.3 Approved paid leave
22.4 Standby
22.5 Ground duties
22.6 Ground duty in excess of eight hours
22.7 Approved courses
22.8 Cancelled or removed duty after reporting
22.9 Flight Attendant not entitled to duty hour credits
22.10 Duty Hour credit recalculation

23. REST PERIODS, MINIMUM BASE TURNAROUND AND DUTY FREE TIME

23.1 Rest Periods during flight duty
23.2 Rest Periods following flight duty
23.2.1 Minimum rest period
23.2.2 Minimum rest period during extended flight duty periods
23.3 Minimum base turnaround time
23.4 Duty free time at base
23.4.5 Infringement of designated duty free days - Flying Line Holders
23.4.10 Infringement of designated duty free days - Reserve Line Holders

24. PAY PROTECTION

24.1 Flying Line Holders
24.2 Pay protected hours - Flying Line Holders
24.2.2 No conflict between patterns
24.2.3 Conflict between patterns due to assignment and/or standby duty
24.2.4 Conflicts between patterns due to downline disruptions
24.2.5 Overprojection
24.3 Types of Pay Protection
24.3.1 Normal offsettable pay protection
24.3.2 Pattern limited pay protection
24.3.3 Fixed pay protection
24.3.4 Multi-offsettable pay protection
24.3.5 Failure to confirm duty or meet responsibility
24.4 Reserve line holders

[230] Another feature of the existing award safety net is that it provides for various forms of leave which will affect the number of hours an employee works. Types of leave include annual leave, long service leave, sick leave, parental leave, bereavement leave, personal leave and carer's leave. As to annual leave, while the normal amount is four weeks a year, additional leave is provided for some categories of employees having regard to the particular circumstances of their employment. For instance, additional annual leave is normally prescribed for certain categories of shift workers. Also, various categories of employee such as journalists, school teachers and ambulance employees are entitled to additional annual leave. (The last two mentioned categories are covered by awards included in the 14 selected by the ACTU as vehicles for its claim.) The ACTU's claim must be seen against the existing detailed award provisions relating to hours of work. The present safety net provisions are therefore an important consideration.

The Claim for a Test Case Standard

[231] The ACTU claim seeks a test case standard. There was considerable debate before us as to the nature of the case required to establish such a standard. We do not find it necessary or think it useful to express a view about this issue in abstract. The central question before us is whether the three subclauses sought by the ACTU are, in whole or in part, justified as a test case standard. We deal with each subclause in turn.

Subclause 1, *"Reasonable Hours of Work"*, of the ACTU's Claim

The subclause

[232] Subclause 1 of the ACTU's claim is:

> *"1 **Reasonable Hours of Work***
>
> *1.1 An employer must not require an employee to work unreasonable hours of work.*
>
> *1.2 Without limiting the generality of paragraph 1.1, the following are to be considered in determining what are unreasonable hours of work:*
>
> *(a) the total number of hours that exceed the ordinary, or in the case of part-time workers the agreed hours of work;*
>
> *(b) the total number of hours worked on any particular day or shift;*
>
> *(c) the total number of hours worked over an extended period;*
>
> *(d) the number of hours worked without a break;*
>
> *(e) the time off between shifts;*
>
> *(f) the risk of fatigue;*

(g) the remuneration received for excess hours worked;

(h) the rostering arrangements;

(i) the extent of night work;

(j) an employee's workload;

(k) work intensification resulting from understaffing, and the ability of workers to meet targets while working reasonable daily hours;

(l) the time required to achieve remuneration in accordance with performance based pay schemes;

(m) the exposure to occupational health and safety hazards;

(n) an employee's social and community life; or

(o) an employee's family responsibilities."

Contentions and responses

[233] As to the effect of subclause 1, the ACTU advanced the following propositions as justified by the evidence:

Proposition 1: A reasonable hours standard is necessary and appropriate.

Proposition 2: Employers agree that a standard of reasonableness is an appropriate limit on working hours.

Proposition 3: The factors in subclause 1.2 are relevant to what constitutes unreasonable hours of work.

[234] In support of proposition 1, the ACTU relied on the following extracts from various reports in evidence:

(1) *"The ACTU test case is certainly a step in the right direction in addressing the issue of extended working hours. The initial point made, that "an employer must not require an employee to work unreasonable hours of work", is fundamental to the work hours debate. The point is absolutely essential and should be embedded into the industrial relations landscape."*[102]

(2) *"The ACTU proposal is effective in that it provides standard limitations on working hours that should be the basis for industry operation."*[103]

(3) *"The problem with the Australian system is also a result of the striking failure to modernize the system in the past twenty years. Australia, together with its trans-Tasman neighbour, appears unusual in cross-national*

comparison in the extent to which it succumbed to neoliberal notions of labour market deregulation. Policy makers in Australia have grafted on to an inadequate inherited system of awards and an even more inadequate system that fosters small islands of single-employer collective agreements and a sea of individual contracting. The effect is to widen the gaps within which very extended hours can emerge.

The distinctive Australian experience of lengthening hours is linked to the inadequacies of the current system of working-time regulation. Part of the solution to extended hours should be sought in regulatory initiatives to improve the system."[104]

(4) *"It is important that we move forward in Australia to designing appropriate regulatory initiatives to tackle the problem of extended hours."*[105]

(5) *"Unless there is some protection and relief from pressures for employees to work extended hours, the literature suggests that the equilibrium of many families affected by long hours is at risk."*[106]

(6) *"Given the diversity of Australian workplaces and the people within them, it is our belief that hours of work can be managed most appropriately at the enterprise or industry level. . . . In our opinion, it may be difficult to define generalised prescriptive regulations that would suit all workplaces on all occasions without introducing significant structural rigidities."*[107]

(7) *"Establishing guidelines in broad parameters which establish operational 'limits' on excessive hours but which allows for flexibility within these broad limits, and secondly, define the factors that should be taken into account when assessing the appropriateness of schedules, is neither new nor radical. Indeed, the setting of some kind of statutory, common set of standards but allowing for flexibility within these broader limits is now a well-established approach in other countries to the issues of controlling excessive hours. As yet, this is not an approach adopted in Australia on a general level. The principle of this approach is broadly consistent to the one contained within the recent ACTU reasonable hours test case."*[108]

[235] In support of proposition 2 (*"employers agree that a standard of reasonableness is an appropriate limit on working hours"*), the ACTU referred to the circumstance that, when employer witnesses were asked whether employees should be required to work unreasonable hours, they answered no.

[236] In support of proposition 3 (*"the factors in subclause 1.2 are relevant to what constitutes unreasonable hours of work"*), the ACTU referred to the circumstance that similar factors had been identified in the Counting the Costs and the Fifty Families Reports and in cases about reasonable overtime.

[237] As to whether subclause 1 is workable, the ACTU submitted that:

(1) the subclause essentially embodies a sense of reasonableness;

(2) the law is laced with tests of reasonableness in almost every area and the interpretation of the concept is one with which the law is totally familiar and comfortable;

(3) the 15 factors specified in the clause make the determination of what is not unreasonable hours of work clearer because they provide the Commission and Courts with guidance in interpreting the clause;

(4) even without this guidance, however, the clause would be clear and workable;

(5) both unions and employers see, within the notion of reasonableness, a common-sense approach;

(6) reasonable overtime provisions exist in awards. These clauses give no guidance as to how reasonable overtime is to be interpreted, yet employers have no trouble dealing with such clauses in practice and those asked felt the reasonable overtime clauses worked well in practice;

(7) the document, tendered by AMMA called *"Fatigue Management for the Western Australia Mining Industry"*[109] lists a set of risk factors that bear a resemblance to some of the factors in the ACTU's clause 1; for example, *"work shifts or schedules", "night shifts"* and *"types of work";*

(8) these guidelines are supported by, and found to be workable by, AMMA; and

(9) employers believe that occupational health and safety laws are workable. This is demonstrated by the evidence of Mr Coleman, a witness for the Coal Industry Employers.

[238] Opponents of the claim, to varying degrees, took issue with these contentions.

Decision on subclause 1

[239] The ACTU stated that the purpose of subclause 1 is to *"place a comprehensive standard of reasonableness in relation to the manner and amount of working time into the award system."* The manner in which the subclause is intended to operate is explained in the following passage from the ACTU's written submissions of September 2001:

"490 The standard of reasonableness being sought in this application goes beyond the amount of overtime worked in any particular week. It applies to the whole gamut of working time. It applies to what is an appropriate number of hours to be worked in any one shift. It applies to what is an appropriate configuration of shiftwork. It applies to what is an appropriate amount of hours to be worked at night. It applies to what is an appropriate amount of time to be allowed to an employee to enjoy his or her family and social life. It applies to the extent to which work intensification and

incentive based schemes have affected the actual number of hours being worked. That is, the standard of reasonableness being sought here applies to the entire breadth of the concept of working hours."

[240] As we said earlier, awards presently regulate hours of work in various ways, typically, by prescribing a specified number of ordinary hours (subject to various limitations on the way in which they can be worked) and providing for overtime (unquantified, but often subject to a test of reasonableness). It is clear that what the ACTU seeks in subclause 1 is a substantial alteration to the manner in which working time has been regulated in awards of this Commission for almost a century. Because subclause 1 operates with respect to *"unreasonable hours of work"*, it would render a requirement to work ordinary hours specified by number (as well as a requirement to work overtime) subject to a test of reasonableness. Most awards specify ordinary hours of 38 per week and employers and their full-time employees are able to plan on that basis. If the subclause were implemented in the terms in which it is sought, the concept of a specified number of ordinary hours for a week's work would be undermined. The certainty and predictability of the normal working week for award employees based on a number of hours would give way to an imprecise and less predictable test based on reasonableness. This would have serious consequences.

[241] It is, we think, inherently inconsistent with the concept of quantified ordinary hours that a requirement to work ordinary hours may render an employer in breach of an award on the basis that the hours are *"unreasonable hours of work"*. For instance, in a case where ordinary hours are quantified at 38 a week, it is, in our view, inappropriate that an employer be at risk of being in breach of subclause 1 because, having regard to, for example, *"the employee's social and community life"* 38 hours work in that week may be considered unreasonable.

[242] In support of its contention that *"a standard of reasonableness"* should be adopted, the ACTU relied on the views of expert witnesses to support the proposition that *"a reasonable hours standard is necessary or appropriate"*. It submitted that reasonableness is a concept well known to the law. It also relied on cases as to the meaning of *"reasonable overtime"*. It pointed to the use of the concept of reasonableness in statutes, including, for instance, in the *Occupational Health and Safety (Commonwealth Employment) Act 1991* which, among other things, requires an employer to *"take all reasonably practicable steps"* to achieve certain objectives. We have taken all the submissions about *"a standard of reasonableness"* into account. While such a standard may be appropriate in many circumstances it is as we have indicated a standard which is necessarily imprecise. It has apparently worked satisfactorily in relation to overtime but we are not persuaded that it should be applied on a test case basis in conjunction with a specified number of ordinary hours of work. The specification of a number of ordinary hours for a standard working week is a proven method of regulation which has the great benefit of clarity. People know where they stand. If we were to overlay the standard working week with a standard of reasonableness, we think that many situations would arise in which an employer would not be in a position to know in advance what hours are to be regarded as reasonable for each employee. This would make planning very difficult and might lead to downtime and increased labour costs.

[243] In dealing earlier with the existing safety net, we mentioned various types of leave. A number of them are designed to relieve employees from their obligation to work ordinary hours if personal or family circumstances require (for example, sick leave, parental leave, carer's leave, bereavement leave and personal leave). And, as we also said earlier, awards generally provide for limits on the length of the working day and for meal and rest breaks. The development of these provisions, often through test cases, has been in the context of the prevailing system of regulation of hours. The existence of these provisions indicates that, at least in relation to ordinary hours, the interaction between work and the personal and family circumstances of employees is already recognised in a significant way in the award safety net.

[244] Some awards, as we have already noted, do not regulate hours by reference to ordinary hours and overtime. The Victorian Teachers Award and the Qantas Award, two of the awards selected by the ACTU as vehicles for its claim, are in this category. We have earlier set out outlines of the provisions of these awards which regulate hours of work.

[245] The Victorian Teachers Award regulates hours by, in brief, providing that a full-time teacher is employed to work 76 hours a fortnight and prescribes maximum face to face teaching hours. It can, we think, be assumed that these teaching hours are appropriately fixed. No one argued that the Commission's decisions relating to the fixation of teaching hours in Victoria are wrong. If subclause 1 were inserted in the award, an employer requiring an employee to perform face to face teaching for a time less than the maximum prescribed in the award might be in breach of the award because the hours were nevertheless unreasonable. In circumstances where a Full Bench has fixed maximum hours for face to face teaching it would be inappropriate to provide that fewer hours of face to face teaching might be unreasonable.

[246] The Qantas Award regulates the hours of long haul flight attendants by the provisions that we outlined earlier. These provisions are lengthy and detailed and are, no doubt, crafted to meet the circumstances of the employment of Qantas long haul flight attendants. Evidence was given about the way the working patterns of long haul flight attendants are fixed, including by a seniority based bidding system. The evidence also included that one of the most heavily bid for patterns (Sydney-Los Angeles-Melbourne-Sydney) included two 14 hour sectors across time zones. In these circumstances, it would, we think, be inappropriate to insert in the Qantas Award a clause that might enable hours required to be worked pursuant to the present system of regulation (for instance, the 14 hour sectors referred to above) to be challenged on the basis that they are unreasonable.

[247] We turn now to the 15 factors listed in subclause 1.2. We note, as was pointed out by many opponents of the claim, that the factors all relate to the circumstances of the employee and none to the circumstances of the employer. It is apparent that the formation of a view as to whether hours of work are unreasonable or not requires that the circumstances of both the employee and the employer be considered. The ACTU placed reliance on decisions about reasonable overtime. These decisions, however, make it clear that the circumstances of both employee and employer must be looked at. For instance, in *Metal Trades Employers Association v Boilermakers Society of*

Australia[110], the Commonwealth Industrial Court (Dunphy and Morgan JJ) said at page 334:

> *"reasonable overtime is not one way; it must be considered in relation to the worker's conditions and also in relation to the employer's business . . ."*

The absence from subclause 1.2 of any factors relating to the circumstances of the employer constitutes, in our view, a serious defect in the subclause. While we note that the ACTU contends that the 15 factors are not exhaustive, a clause specifying 15 factors all related to the employee's circumstances, and none relating to the employer's, may well be interpreted as giving greater weight to the specified factors than to other factors.

[248] We acknowledge that a number of the factors listed, for instance *"the risk of fatigue"* and *"an employee's workload"* are relevant considerations when the effect on employees of work performed in ordinary time is being considered. Issues about such matters, however, can be dealt with in various ways, including under dispute settlement procedures. As we have mentioned already there are various leave provisions which may also be of assistance. Furthermore, the evidence indicates that, in many of the awards which are before us, such issues have been addressed in enterprise negotiations.

[249] Another matter which we think tells against subclause 1 is that it is likely to create disharmony at the enterprise level on the question of what hours are to be regarded as reasonable. The possibility that ordinary hours might be found to be unreasonable, the range and variety of the factors specified and the absence of any reference to the needs of the employer's undertaking, taken together, are likely to lead to disputation not only between employees, and their representatives, and employers, but also between employees themselves.

[250] The ACTU submitted that employers agree that a standard of reasonableness is an appropriate limit on working hours. This submission is based on the circumstance that a number of witnesses called by employers, in cross-examination, expressed the view that employees should not be required or asked to work unreasonable hours. We do not think that this evidence advances the ACTU's case. In any event, most employer witnesses said that subclause 1 was impractical or costly or both and, almost without exception, employers opposed it.

[251] For these reasons we are not prepared to grant subclause 1. However, as will be seen later, we have decided to award, as a test case standard, a provision spelling out an employee's rights with respect to a requirement to work overtime.

Subclause 2, *"Reasonable Overtime"*, of the ACTU's Claim

The subclause

[252] Subclause 2 of the ACTU's claim is:

*"2 **Reasonable Overtime***

2.1 Subject to this clause an employer may require an employee to work reasonable overtime at overtime rates - other than employees employed part-time in accordance with clause x (parental leave) of this award who cannot be required to work overtime against their wishes.

2.2 An employee may refuse to work hours in excess of ordinary hours on a particular day for reasons which may include, but not be limited to, the employee's family responsibilities or the pre-arranged personal commitments of the employee."

Contentions and responses

[253] As to the effect of subclause 2, the ACTU submitted that:

(1) subclause 2 represented no more than the safety net that exists at the moment;

(2) there is no intention to disturb this provision;

(3) subclause 2 establishes an exemption to the requirement to work reasonable overtime. This exemption from reasonable overtime for personal reasons is a reflection of the existing safety net;

(4) it is not its intention to make this subclause an issue in the case; and

(5) if necessary, it is prepared to review the wording of the clause so that it reflects the safety net.

[254] The ACTU's submissions then listed a number of decisions about reasonable overtime and contended that the proposition: *"Employers think reasonable overtime operates fairly"* was supported by the evidence.

[255] As to whether subclause 2 was workable, the ACTU submitted that, as mentioned when dealing with subclause 1, most awards contain reasonable overtime provisions and there is little or no trouble in their application and the evidence shows that many employers do not require their employees to work overtime if, for personal or family reasons, it is not possible.

[256] Opponents of the claim generally took issue with the ACTU's contentions.

Decision on subclause 2

[257] As previously mentioned, the ACTU's claim deletes existing reasonable overtime provisions in awards that contain them. Subclause 2.1 reinstates these provisions. Subclause 2.2 introduces a new entitlement under which, for certain reasons, employees may refuse to work certain hours. It is subclause 2.2 which is controversial.

[258] The ACTU, in its written submissions of March 2002, said:

> *"It is not the intention of the ACTU to make this sub-clause an issue in the case. This sub-clause is not written with a view to altering the safety net. If there is a view that this is the effect of the clause then the ACTU is prepared to review the wording of the clause so that it reflects the safety net."*

Similar remarks are contained in the ACTU's reply submission of May 2002.

[259] At the beginning of the final oral submissions on 11 June 2002, the President said:

> *"PN14672*
> *Mr Marles, there is one matter I would like to raise with you. It concerns . . . the second part of the claim, . . . the one entitled Reasonable Overtime. And of the second subclause, on one view of it, that subclause confers largely unqualified right on an employee to refuse to work in excess of ordinary hours. A number of submissions have already been made which are critical of that part of the claim for that reason and that is because the right of refusal is largely unqualified. Now, that apparently unqualified right does contrast with the first part of the claim, the one entitled Reasonable Hours of Work which is based on a concept of unreasonable hours. Would it not be more in keeping with that approach and more appropriate if the right to refuse to work in excess of ordinary hours was also subject to a test of reasonableness? For example, subclause 2 could provide that an employee could refuse overtime if working the overtime would result in unreasonable hours of work. I am not calling on you for a response to that immediately, but we would be interested in any submission the ACTU might make on that method of dealing with the regulation of overtime. We would also be interested in any additional submissions from any other party or intervener on the same question. I should say that no conclusions should be drawn about our attitude to any other part of the claim from this question, but it is a matter that has occurred to us and we thought we should raise it with you."*

Mr Marles (for the ACTU) responded:

> *"PN14673*
> *Your Honour, it might be worth me just reiterating something very briefly which I think we have - because there has been some confusion over subclause 2 and we have attempted to be as clear about this as possible, really from the first directions hearing. It was not our intention to make subclause 2 an issue in this claim. It is meant to reflect the existing safety net, as I think we have said often. . . . We are content with the existing safety net. In other words, if we have put words in there which the parties don't believe reflect the existing safety net, we are content to negotiate what is the existing safety net. Indeed, we are content with the existing safety net, which means that we are very keen that this not be an issue in this case. We have not argued subclause 2 at all in our submissions, so in answer to your proposition, we are completely relaxed with it, but so, too, would we be relaxed with the existing reasonable overtime clauses in awards. The reason why we put it in the claim was to try and give a sense of how the two new subclauses,*

being subclause 1 and subclause 3, co-exist if you like with the existing reasonable overtime clauses in awards and I think in retrospect, if we had our time again, we probably would not have altered words in subclause 2 because it has caused a lot of controversy we didn't intend to cause."

[260] As will be seen later, we have decided to award, as a test case standard, a provision spelling out an employee's rights with respect to a requirement to work overtime. It is, therefore, unnecessary to say anything more about subclause 2 of the ACTU's claim.

Subclause 3, *"Paid Breaks after Extreme Working Hours"*, of the ACTU's Claim

The subclause

[261] Subclause 3 of the ACTU's claim is:

*"**3 Paid Breaks after Extreme Working Hours***

3.1 The provisions of this sub-clause shall apply to each type of employment, each classification and skill based career path provided for in this Award.

3.2 An employee who has worked:

(a) an average of 60 hours per week over a four week period; or

(b) 26 days over a four week period; or

(c) an average of 54 hours per week over an eight week period; or

(d) 51 days over an eight week period; or

(e) an average of 48 hours per week over a twelve week period; or

(f) 74 days over a twelve week period;

shall be entitled to a break of 2 full days before working again and to be paid for those 2 days.

3.3 An employee cannot accrue more than 2 days entitlement in accordance with paragraph 3.2 in relation to the same period of time.

3.4 The 2 days entitlement provided in paragraph 3.2 must be taken within seven days of the entitlement accruing.

3.5 The entitlement provided for in paragraph 3.2 must be taken contiguous with another non-working day which falls within the period set out in paragraph 3.4.

3.6 If an employee is not given the entitlement provided for in paragraph 3.2 within seven days of the entitlement having accrued, the employer must pay the employee an extra hourly or part thereof payment at the rate of 0.5 of the ordinary hourly rate from the end of the seven day period referred to above until the rest break is given.

3.7 The entitlement provided for in paragraph 3.2 is in addition to all other rest break and leave entitlements set out in this award.

3.8 No regard is to be had to sub-clause 3 in the application of sub-clause 1, in particular hours of work less than those described in paragraph 3.2 may be unreasonable."

Contentions and responses

[262] As to the effect of subclause 3, the ACTU submitted that the evidence established that each of the periods of time worked which would entitle an employee to two days paid leave constitutes *"extreme hours"*. It put the following propositions:

Proposition 1: Some employers concede the fairness of a two day break.

Proposition 2: A two day break will have a beneficial recuperative effect.

[263] As to whether subclause 3 is workable, the ACTU submitted that the following three propositions were made out:

Proposition 1: Employers need only exercise their wit, which they are reluctant to do.

Proposition 2: Rostering can do wondrous things.

Proposition 3: The entitlement will be easier to cope with than sick leave.

[264] Opponents of the claim generally took issue with the ACTU's contentions and argued that the subclause would involve considerable cost to employers. A number of parties pointed out that the entitlement to a two day break arises whether the relevant daily or hourly limits are exceeded voluntarily or involuntarily and submitted that:

(1) the provision would operate as an incentive to work more overtime for those who are willing and able to work it;

(2) there is no justification for the hours and days specified in subclause 3.2 which trigger the entitlements specified in subclause 3; and

(3) entitlements of the kind with which subclause 3 deals are best left to the parties in enterprise negotiations.

Decision on subclause 3

[265] In our view, the ACTU has failed to make out a case for awarding subclause 3 as a test case standard.

[266] The ACTU, in support of subclause 3, submitted that the hours and days specified in subclause 3.2 constitute *"extreme hours"* and then advanced the propositions we have set out earlier. In its September 2001 written submissions, the ACTU said:

> *"512. The rationale for this sub-clause is that an employee ought to have time off when he or she has been particularly busy.*
>
> *. . .*
>
> *514. The break is to give the employee time to recover from having worked extreme hours. . . .*
>
> *. . .*
>
> *519. The parameters established as part of this clause are very broad. They describe working hours which in the European Union will be unlawful. However, this sub-clause will not make it unlawful to work somebody these hours but simply provide for a break when these hours are worked.*
>
> *520. By international standards it is a very moderate solution to the effect of working extreme hours. Indeed if there is any criticism of this sub-clause it is that it is too conservative."*

[267] As appears from paragraph 514 above, the purpose of subclause 3 is *"to give the employee time to recover from having worked extreme hours"*. This purpose, we think, highlights a basic problem about subclause 3. If the hours specified in it are *"extreme"* and require at least two paid days recuperation, the appropriate remedy would seem to be a prohibition on the working of such hours. The ACTU, however, does not seek such a prohibition. A prohibition would also seem to be consistent with a basic tenet of the ACTU's case, that is, that the working of *"extreme"* hours is bad for the employee, the employee's family, the employee's community and society generally. Subclause 3, instead of seeking to prohibit *"extreme"* hours, provides a benefit in the form of a break of two paid days for employees who have worked such hours and, presumably, suffered the deleterious effects of so doing. Subclause 3, accordingly, fails to come to grips with the problems caused by the working of *"extreme"* hours. Indeed, we think that the subclause may, in some circumstances, act as an encouragement for some employees to work *"extreme"* hours so as to obtain the paid break or the penalty payment if the break is not given within the specified time.

[268] The basic problem with subclause 3, to which we referred in the previous paragraph, is further highlighted by the reference in paragraph 519 of the ACTU's September 2001 written submissions to working hours in the European Union. As we said earlier, laws in the European Union regulate long hours by fixing a maximum

number of hours which may be worked in a period (subject to averaging and exceptions). Neither subclause 3, nor any other part of the ACTU's claim, seeks this. Paragraph 519 goes on to acknowledge that this is so and to say that, by international standards, subclause 3 is *"a very moderate solution to the effect of working extreme hours"*. No *"solution"* would be required if the *"effect"* were avoided. The ACTU says in its paragraph 520 that *"if there is any criticism of this sub-clause it is that it is too conservative"*. Whether the clause be conservative or radical, the question is whether the ACTU has made out a case for it as a test cast standard. We can accept that, depending, perhaps, on what the employee does during the two day break, the subclause may *"have a beneficial recuperative effect"* (to use the words in one of the ACTU's propositions). We, however, are of the view that, if there is a problem of the magnitude contended for by the ACTU, the appropriate course is to fix the problem, not to provide *"a beneficial recuperative effect"*.

[269] Another proposition put by the ACTU is *"some employers concede the fairness of a two day break"*. It is derived from views expressed by two witnesses called by employers; Ms Lu called by the Commonwealth and Ms Westwick called by ACCI. In a case of this breadth and with respect to these witnesses, we do not think that their views are sufficiently persuasive in our consideration of whether subclause 3 should be awarded as a test case standard. Their views were expressed in the abstract whereas we must consider the likely effect of the subclause in a wide range of circumstances and in the face of employer opposition to it.

[270] The ACTU's other propositions are *"Employers need only exercise their wit, which they are reluctant to do"* and *"Rostering can do wondrous things"*. We accept that, if subclause 3 were awarded, employers could take various steps to avoid it or to minimise its effect. The ACTU's fifth proposition is *"The entitlement will be easier to cope with than sick leave"*. This may be so. Neither proposition, in our view, however, carries much weight in our consideration of whether the ACTU has made out a case for the awarding of subclause 3 as a test case standard.

[271] Because subclause 3 is sought as a test case standard, if it were awarded as such, it would be inserted in awards generally. Awards, as we noted earlier, presently regulate hours of work in various ways. A common method is by prescribing ordinary hours and including provisions about overtime. Other methods, such as those used in the Victorian Teachers Award and the Qantas Award (previously outlined), are also used. If subclause 3 were inserted into awards generally, it would entitle employees to two paid days off, or penalty payments if the days off are not granted within the specified time, regardless of the award provisions about hours of work.

[272] Although the ACTU submitted that the *"global"* evidence was the real focus of its case, in our view, the evidence from the field is important in considering whether the test case standard sought should be awarded. The material in relation to the industries regulated by the 14 awards selected by the ACTU was varied. There was no evidence of the ACTU's present claim having been pursued by unions at the enterprise level. Although there was some evidence about difficulties that unions had experienced in bargaining about hours, the evidence shows that, in cases where bargaining has taken place, agreements have been reached; for example, in relation to Australia Post and Qantas. The evidence also reveals a diversity of hours of work

arrangements which suggests that a provision such as subclause 3 would be impractical, at least in some awards. To take one example, the evidence concerning Australia Post's operations is that the subclause would have effect during the peak November-December period when most of the overtime is worked, yet average overtime for full-time employees in 2000-2001 was less than two hours per week. To take another example, the evidence from MAS indicates that subclause 3 may have effect because the current agreed rosters provide for the concentration of duty in a relatively small number of days. The rosters, however, also provide for long periods of time off duty and an average of 42 hours per week over an eight week period, not allowing for overtime. Further, evidence from AMMA demonstrated the impact which the subclause would have on agreed even-time rosters which operate in many parts of the hydrocarbons and mining industries; particularly in remote areas where fly-in fly-out systems operate.

[273] We also have doubts about the operation of the subclause in awards which do not have a conventional method of regulating hours of work. The Victorian Teachers Award, as already noted, provides for 76 hours per fortnight and specifies limits on the amount of face to face teaching. Hours of duty are not subject to any other regulation and there is no overtime provision. All other work performed by teachers, whether performed at school or elsewhere, is unrecorded. The quantum and type of work may vary from teacher to teacher depending on a range of factors. Similar considerations apply to work performed by academics. Awards applying to academics, speaking generally, do not regulate their hours of work and AHEIA submitted that it would be impractical for them to do so. Flight attendants employed under the Qantas Award are not paid according to a conventional hours model but according to duty hours, including duty hours which are credited to the flight attendant because of the nature of other duty time. Subclause 3 is not easily married with the schemes of regulation that these awards contain.

[274] The *"global"* evidence specifically relied on by the ACTU in support of subclause 3 is:

> *"Research has shown that employees require sufficient time to recover from undesirable side effects arising from work . . . For example, increased time off for recovery in a sample of nurses was shown to increase social satisfaction on subsequent work days . . . Therefore, researchers have recommended at least two consecutive days off per working week, thereby allowing a maximum of five consecutive work days per roster . . ."*[111]

This passage, in our view, provides little or no support for subclause 3. Subclause 3 does not provide for *"two consecutive days off per working week"* or *"a maximum of five consecutive work days per roster"*. It provides for a two day break (to be taken contiguous with another non-working day) within seven days of working the hours and days specified in subclause 3.2 during the periods specified in that subclause. These periods range from four weeks to 12 weeks.

[275] For the reasons we have given, we reject the claim for subclause 3 as a test case standard.

A Test Case Standard

[276] Having rejected the ACTU's claim for a test case standard in the terms sought by it, the question arises as to whether some other provision is justified as a test case standard. Section 120 of the Act (set out in Annexure A), in brief, provides that we are not restricted to the specific relief sought by the ACTU but may include in an award anything which we consider necessary or expedient for the purpose of preventing or settling the industrial dispute or preventing further disputes.

[277] We have decided to award a test case provision of a more limited kind than that sought by the ACTU. The evidence satisfies us that there are problems that occur when employees are required to work long hours. Long hours of work can adversely affect the health and safety of employees and have a negative impact on their family and community life. Whether any of these effects occurs depends upon things such as the nature of the job, the timing and duration of work and non-work periods and the arrangement of working hours. The evidence suggests that a number of highly variable personal factors may also be significant, including the employee's non-work activities. Long hours will generally arise when the working of overtime is required. Award provisions requiring an employee to work reasonable overtime are common. The ACTU submitted that, by implication, an employee has a right to refuse to work unreasonable overtime. In our view, it is appropriate to award a test case standard which will confer a right on an employee to refuse to work overtime in circumstances where the working of such overtime would result in the employee working unreasonable hours. It will permit the employee's ordinary hours to be taken into account in deciding whether overtime is unreasonable, but the right of refusal it confers will only operate in relation to overtime.

[278] In our opinion, it is desirable that the test case provision should provide some guidance to the parties on the matters which should be taken into account in deciding whether the working of overtime would result in an employee working unreasonable hours. We have considered whether the factors listed in subclause 1 of the ACTU's claim should be included. We have already indicated that the absence of any factors referable to the circumstances of the employer is a serious defect in the ACTU list. We shall include reference to the circumstances of the employer. We are also conscious that the provision must be capable of application to a broad range of situations. For that reason we think it is preferable to deal with matters on a general level rather than to attempt to list every factor which might possibly be relevant. We do not intend that the provision should, as a general rule, be applied so as to interfere with rostered overtime particularly when the roster has been agreed in advance. Partly for that reason we shall include reference to the amount of notice (if any) which has been given of the requirement to work overtime and to the amount of notice (if any) given by the employee of the intention to refuse the overtime. The provision is only intended to be included in awards that specify ordinary time and provide for overtime. It will include a reference to the well established right of an employer to require an employee to work reasonable overtime. The provision we have decided on is the following:

> *"**1.1** Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.*

1.2 *An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:*

1.2.1 *any risk to employee health and safety;*

1.2.2 *the employee's personal circumstances including any family responsibilities;*

1.2.3 *the needs of the workplace or enterprise;*

1.2.4 *the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and*

1.2.5 *any other relevant matter."*

[279] An employee's right to refuse to work overtime in circumstances where the working of such overtime would result in the employee working unreasonable hours is implicit in the existing award provisions dealing with the obligation to work reasonable overtime. But we think that there are a number of advantages in making such a right explicit and moreover the evidence before us supports the creation of an award right of the type we have determined. The provision of an explicit right to refuse to work overtime in the circumstances specified will provide employees with a firmer basis upon which to refuse to work unreasonable overtime. In this context the ANOP Study recounts that some of the employees in the focus groups expressed the view that providing employees with the right to say no to working overtime was a positive step[112].

[280] The criteria we have adopted in relation to the exercise of the right to refuse to work overtime are also generally supported by the material before us. A majority of the employer respondents (64.3 per cent) to Professor Benson's survey of AIG and AHEIA members supported an employee's right to refuse to work overtime on a particular day on the basis of the employee's family responsibilities. Further, the survey respondents overwhelmingly supported the inclusion of criteria referring to the needs of the business (95.2 per cent) and to an employer's responsibility to provide a safe and healthy work environment (93.6 per cent)[113].

[281] The creation of an explicit right also has the advantage of providing an opportunity for overtime issues to be raised at an early stage. Any issues about the appropriateness of the exercise of such a right can be quickly determined through the dispute settlement mechanism in the relevant award. A weakness in the current reasonable overtime provisions is that an employer may be found to be in breach of the provision some time after the working of the overtime in question. The new award right will provide the potential for greater certainty for both employers and employees.

[282] The provisions we have determined are justified by the evidence before us, are allowable and comply with the Act.

[283] As we noted earlier, s.88B(2)(c), among other things, requires us to have regard to *"when adjusting the safety net, the needs of the low paid"*. We have done this; see our earlier comments under the subheading *"The needs of the low paid"*.

[284] The provision that we have decided upon is not intended to interfere with the regulation of part-time work in connection with parental leave as provided for in various test case decisions. Some modification may be needed to ensure there is no interference.

[285] The words *"at overtime rates"* in subclause 1.1 of our provision may need to be deleted or added to in particular cases; for instance, when the award provides for time off in lieu of overtime.

[286] The orders necessary to give effect to this part of our decision should be drafted and filed by the ACTU. The orders will be settled by Commissioner Gay with recourse to the Full Bench.

Conclusion

[287] Working time arrangements and patterns of hours worked have changed significantly in Australia over recent decades. There has been an upward trend in the average working hours of full-time employees over the past 20 years such that there has been an increase in the proportion of employees working long hours. There are adverse health consequences associated with working long hours, particularly when associated with shift work. In addition to the adverse effect of working long hours on employees, there are adverse effects on their families and their communities. We have sought to address some of these issues by creating an explicit award right for an employee to refuse to work overtime in circumstances where it would result in the working of unreasonable hours. The nature of working hours and their impact on employees, their families and communities is subject to change over time. It may be appropriate to review the effectiveness of the provision we have decided to award after it has been in operation for some time.

PART 3 - ACCI'S CLAIM

INTRODUCTION

[288] On 19 June 2001, ACCI lodged an application to vary the Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000 (the ACT Shops Award)[114]. The application was lodged on behalf of the ACT and Region Chamber of Commerce and Industry. On 12 July 2001 the Victorian Employers' Chamber of Commerce and Industry (VECCI) filed applications to vary the Clerical and Administrative Employees (Victoria) Award 1999 (the Victorian Clerical Award)[115], the Storage Services - General - Award 1999[116] and the Business Equipment Industry - Technical Service - Award 1999[117]. All four applications were referred to this Bench by the President. The third and fourth applications mentioned were withdrawn during proceedings before us on 16 July 2001. We are concerned in this part of our decision with the disposition of the two remaining applications, those in relation to the ACT Shops Award and the Victorian Clerical Award.

[289] The applications to vary the ACT Shops Award and the Victorian Clerical Award, as finally proposed, include the following principal elements:

(1) an annualised wage rate based on an average of one hour of overtime per week (subject to agreed variation) over 12 months as an option to the existing wage rates provisions;

(2) a provision permitting employers to establish an overtime register to record employees' overtime preferences;

(3) a provision permitting annual leave to be taken in single days.

[290] The applications were initially described as counter claims. In its final submissions, however, ACCI's position was that the applications stood as claims in their own right. While the claims were initially pursued on the basis that our decision on them would have general application throughout the award system, that approach was significantly modified by the following passage in ACCI's reply submissions:

> *"[1.16] We accept the very substantial evidentiary burden which is imposed on any party which seeks to advance an award variation as a test case standard. Having examined the submissions of parties on the issue of whether the ACCI applications (and indeed those of the ACTU) are capable of sustaining test case variations, we accept that the ACCI application suffers the same difficulties as the ACTU application in this regard, and accept that the Commission may not have been provided with sufficient basis to award this variation across the award system at this time. We nevertheless urge its adoption at least in the awards ACCI has brought forward in this case, and contend that the variation sought in ACCI's application is a variation with merit and the capacity to improve the operation of the award system, and that it should be recognised as such."*

[291] We agree with the conclusion tentatively expressed in this passage that the evidence in support of the applications, being confined to the two awards in question, is too narrow. The case advanced by ACCI does not provide a sufficient basis for considering the merits of the applications in relation to any other awards. A number of parties submitted that we should confine our decision to the two awards in question. We intend to do so. Our decision in relation to them will not be of a test case nature. On that limited basis the Commonwealth and AIG supported the applications, although with some reservations. The applications were opposed by the ACTU and the SDA.

[292] The application was supported by two statutory declarations, one by Mr Gregory, Manager, Workplace Relations and Policy of VECCI and the other by Mr Morphett, Director, Workplace Relations of the ACT and Region Chamber of Commerce and Industry. Reliance was also placed on Australian and international material advocating the need for flexibility in labour arrangements to enable employers to respond to market conditions. It was submitted by ACCI that *"awards should provide a framework for flexible work practices, not restrict or prevent flexibility"*. It was submitted by Mr Morphett that the three variations *"are based on the underlying need to provide employers and employees with a full range of options for organising their working life consistent with there being a proper Award safety net"*.

THE SALARY OPTION CLAIM

[293] We turn first to that part of the applications which deals with the salary option. The provision is the same in each of the applications. We set out the relevant terms of the application to vary the ACT Shops Award:

> *"**18.4 Annualised Wage Rates***
>
> *18.4.1 (a) An employee and employer may agree to an employment arrangement based on annualised wages.*
>
> *(b) The annualised wages agreement shall be in writing, the employer shall keep a copy while it is in force, and shall provide a copy to the employee before the annualised wage arrangement commences operation.*
>
> *(c) The agreement shall state the date on which the arrangement comes into force, which shall be after the date on which the agreement is entered into.*
>
> *(d) The arrangement shall continue in force for the period of twelve months from the date of commencement unless terminated before that date.*
>
> *(e) At the conclusion of the twelve month period the arrangement shall continue unless terminated or varied by the parties under this clause.*
>
> *18.4.2 The weekly award entitlement to pay for the employee under clause 20* Payment of Wages *shall be the annualised wage in clause 18.4.6* Annualised Wages *divided by 52.*
>
> *18.4.3 (a) The employee and employer may agree in writing to annualise any or all of the allowances set out in clause 21.*
>
> *(b) The agreed amount shall be the average allowances received by that employee under clause 21 during the period of employment of that employee with the employer during the previous year. The average allowance received per week or per fortnight as the case may be shall be added to the amount set out in clause 18.4.2.*
>
> *(c) Where an employee is a new employee and there is no amount of previous average allowances, the employer and employee may agree on an average allowance amount which is equivalent to that of a comparable employee doing comparable work.*
>
> *(d) Where a business is a new business with no employees, the employer and employee may agree on an estimated average amount which shall be used in place of the entitlements in clause 21.*

(e) At the completion of the year the employer shall in consultation with the employee compare the amount paid in allowances under this agreed arrangement with the amount the employee would have received under clause 21 but for the arrangement, and shall pay the employee any shortfall in the next pay period.

18.4.4 (a) The agreement may be terminated by either party providing four weeks written notice.

(b) Following the expiry of the notice the employee shall no longer be paid in accordance with clause 18.4, but shall revert to payment under clause 18.2.

18.4.5 (a) The annualised wage rate set out below includes an average of one hours overtime per week paid at the rate of time and a half, and that may be worked at the times provided by clause 26 to be paid at that rate, with no pay additional to that set out in the annualised wage rates.

(b) If the employee works more than the annual amount of 1 hour overtime per week then the employee shall be entitled to additional overtime pay at the rates set out in clause 26 after the completion of 1,872 annual hours.

(c) The employer and employee may agree on a different average amount of overtime per week, and the annualised wage rate shall be adjusted to reflect the different average amount on the basis of the formula: 48x1.5xAgreed Average Amount of Overtime. That amount shall be added to the annualised wage rate in place of the amount set out below under the heading 'Plus 1 Hours 1½ Time Overtime Per Week'. The work cycle referred to in clause 24.1.7(e) shall be adjusted to include the different agreed component of average overtime hours.

(d) At the completion of the year the employer shall in consultation with the employee compare the amount paid in overtime under this agreed arrangement with the amount the employee would have received but for the arrangement, and shall pay the employee any shortfall in the next pay period.

(e) Where an employee leaves his or her employment before the period of twelve months referred to in clause 18.4.1(d) has elapsed, the employee shall be paid the difference between the amount that the employee would have received under the Award if the employee had not been working under annualised wage agreement, and the amount that the employee did receive under the annualised wage system for that part of the twelve months employment under clause 18.4.1(d).

18.4.6 Where an agreement under clause 18.4.1 has been entered into and the date of effect has commenced, the employee shall be entitled to the following annual wage:

No	*Classification*	*Annualised Base Rate*	*Plus 1 Hours 1½ Time Overtime Per Week*	*Total Annualised Wage Rate*
1	*Shop Assistant*	*24,533.60*	*898.93*	*25,432.53*
1	*Ticket Writers, namely employees engaged on designing and/or lettering price tickets and/or show cards*	*24,533.60*	*898.93*	*25,432.53*
1	*Demonstrations, namely employees engaged in demonstrating goods*	*24,533.60*	*898.93*	*25,432.53*
1	*Office Assistants*	*24,533.60*	*898.93*	*25,432.53*
1	*Cashier*	*24,533.60*	*898.93*	*25,432.53*
1	*Retail Merchandisers*	*24,533.60*	*898.93*	*25,432.53*
2	*Shop walker or floor supervisor, namely employees engaged in walking floors, directing customers, supervising sales and/or checking bills*	*24,970.40*	*909.85*	*25,880.25*
3	*Section heads, namely employees appointed in this position in a section of a shop where there are four or more employees*	*24,970.40*	*909.85*	*25,880.25*
4	*Window dressers, namely employees principally engaged in dressing windows*	*24,845.60*	*905.30*	*25,750.90*
5	*Order person and outdoor order person, namely employees engaged in collecting orders and/or soliciting business and/or selling away from the employer's*	*24,970.40*	*909.85*	*25,880.25*

	place of business			
6	*Ticketwriter who has passed an appropriate technical college course*	*25,116.00*	*915.16*	*26,031.16*
7	*Telephone attendants*	*24,325.60*	*886.36*	*25,211.96*
8	*Stenographer, namely an adult typist required to have shorthand qualifications*	*24,871.60*	*906.25*	*25,777.85*
9	*Machine Operators*	*24,700.00*	*900.00*	*25,600.00*
10	*Shop assistants in charge of shop or department in a shop, not being a shop assistant temporarily in charge during the absence of persons ordinarily in charge of the shop or department but including employees employed as relieving shop assistants in charge of a shop*			
	Without duty of buying:			
	0 to 4 assistants	*25,100.40*	*914.59*	*26,014.99*
	5 to 12 assistants	*25,537.20*	*930.24*	*26,467.44*
	13 to 25 assistants	*26,088.40*	*950.40*	*27,038.80*
	Over 25 assistants	*26,494.00*	*964.80*	*27,458.80*
	With duty of buying:			
	0 to 4 assistants	*25,178.40*	*917.28*	*26,095.68*
	5 to 12 assistants	*25,662.00*	*934.56*	*26,596.56*
	13 to 25 assistants	*26,306.80*	*958.32*	*27,265.12*
	Over 25 assistants	*26,670.80*	*971.04*	*27,641.84*
11	*Restaurant Worker*	*24,533.60*	*893.28*	*25,426.88*
12	*Tradesperson*	*26,374.40*	*960.48*	*27,344.88*

18.4.7 Part-time employees may be employed on an annualised wage which is pro rata the amount set out in clause 18.4.6 minus the overtime component. The same pro rata rule shall be applied to other conditions, including the hours of work for work cycles referred to in clause 24.1.7(e), which shall be adjusted to remove the average overtime hours component."

[294] ACCI contended that if the salary option is adopted:

(1) productivity will improve as a result of overtime not attracting additional remuneration;

(2) employers will be better able to manage peaks and troughs in workload while maintaining stable labour costs;

(3) administrative costs will fall;

(4) aggregate working time is likely to decrease; and

(5) financial budgeting will be easier and more accurate.

[295] The ACTU opposed the salary option on the grounds that:

(1) it will lead in practice, in the workplaces where it is adopted, to an increase in standard working hours from 38 to 39 per week;

(2) productivity will not improve;

(3) employees will be exploited and unreasonable hours of work will be encouraged;

(4) administrative costs will not reduce;

(5) budgeting will not be improved;

(6) employees entitled to overtime at the end of the year will suffer a financial penalty by reason of the delay; and

(7) while many enterprise agreements provide for salaries rather than wages, the agreement provisions are specific to the circumstances of the enterprise.

[296] In relation to the Victorian Clerical Award, the ACTU relied on a witness statement from Martin Foley, Branch Executive President of the MEU/private sector Victorian Branch of the Australian Municipal, Administrative, Clerical and Services Union (ASU). Mr Foley indicated in his statement that VECCI, while being involved in the simplification of the award in 1999, did not raise any issue related to annualised pay during the process, that there has been no demand from employers for a provision of the kind in the application and that, if granted, the provision would not lead to more flexibility for employees and would entrench extended working hours.

[297] In opposing the inclusion of the salary option in the ACT Shops Award the SDA tendered and relied on the witness statements of a service supervisor employed under the award and Ian Blandthorn, National Assistant Secretary of the SDA. It adopted the ACTU submissions and made some additional ones. It submitted, relying on the common law principle of set-off, that the salary option proposal could be implemented by agreement without the need for an award variation. It further submitted that there is no demand from employees for the arrangements which VECCI

is seeking, that the provision would add an unnecessary layer of complexity to the award, that no employer has given evidence indicating the need for a facilitative provision of such magnitude and that only one employer has sought to negotiate a salary option provision with the SDA.

[298] While there is no evidence that the number of awards which contain provision for payment by way of salary has increased, there is no doubt that salary arrangements are becoming more prevalent in certified agreements as a replacement for more traditional overtime systems. On the evidence in this case, however, bargaining in the retail industry with the SDA has been extremely limited. This may be partly explained by Mr Morphett's evidence that in the retail industry many businesses, particularly smaller businesses, can find it difficult to enter into formal workplace agreements with their employees. We do not think it is appropriate that the Commission as currently constituted should deal with the matter. Because any decision we make on the merits of the claim would only apply to the awards in question, it is more appropriate that the claim should be dealt with by a single member of the relevant industry panel. Any decision in these proceedings, regardless of the formal position, is likely to be regarded as being of a test case nature.

[299] We think that the issues associated with the implementation of the clause are better dealt with by a single member of the Commission through the process of conciliation and, if necessary, arbitration having regard to the circumstances of the industry and the types of enterprises covered by the award. If the employers represented by ACCI wish to pursue the matter a fresh application or applications should be filed.

THE OVERTIME REGISTER CLAIM

[300] The second element of the applications is that which permits employers to establish an overtime register to record employees' overtime preferences. The clause in each application is in the same form:

> *"An employer may establish an overtime register in which employees shall be able to record their desire to work overtime and any other relevant matters."*

[301] ACCI submitted that the provision would:

(1) underpin the common employer practice of ascertaining employee preferences and availability in relation to overtime, aligning business needs with employee interests;

(2) be an important mechanism for furthering work and family/lifestyle objectives;

(3) assist with employer planning; and

(4) reduce absenteeism.

[302] The clause does not make the establishment of an overtime register compulsory. Nor, if a register were established, would it be compulsory for employees to express their preferences in relation to overtime. It is clear that the clause would not impose any obligations or establish any entitlements. The provision is sought to reinforce the existing practice of many employers. It is difficult to see how a provision of that kind could be part of a safety net award.

[303] We doubt whether the provision is an allowable award matter. It deals with a matter which cannot be readily brought within any of the paragraphs in s.89A(2). It is not a s.89A(6) provision because a provision which does not create any obligations or rights could not be said to be necessary for the effective operation of an award. It was not suggested that, absent such a provision, employers would be unable to establish an overtime register. We think that the idea which lies behind the provision is a good one and we would encourage employers to attempt to match business needs to the overtime preferences of employees wherever it is practicable to do so. For the reasons we have just given, however, we do not intend to vary the awards.

THE ANNUAL LEAVE CLAIM

[304] The third element of the applications is a provision permitting annual leave to be taken in single days. This claim is made in relation to the ACT Shops Award only. The terms of the clause sought are:

> *"Annual leave must be taken in a continuous period, unless the employer and the employee agree that the leave shall be taken in other periods, which may include single day periods of annual leave."*

[305] ACCI submitted, inter alia, that granting the application would:

(1) give support within the award to a common and established practice which has the support of both employers and employees;

(2) provide greater flexibility and permit annual leave to be used for a variety of purposes;

(3) assist employees to meet their work, family and other personal responsibilities; and

(4) give employees greater freedom to achieve their personal goals.

[306] The ACTU and the SDA oppose the clause. They pointed out that the ACT Shops Award already provides a method whereby single day annual leave can be taken. Clause 30 Annual Leave includes the following provision:

*"**30.9 Alternative annual leave arrangements***

Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of single day annual leave absences, provided that:

30.9.1 *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.*

30.9.2 *Access to annual leave, as prescribed in 30.10 above, shall be exclusive of any shutdown period provided for elsewhere under this award.*

30.9.3 *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.*

30.9.4 *Clause 30.10 is subject to the employer informing each union which is both party to the award and which has members employed at the particular enterprise of its intention to introduce an enterprise system of RDO flexibility, and providing a reasonable opportunity for the union(s) to participate in negotiations.*

30.9.5 *Once a decision has been taken to introduce an enterprise system of single day annual leave, in accordance with this clause, its terms must be set out in the time and wages records.*

30.9.6 *An employer shall record these short term annual leave arrangements in the time and wages book."*

[307] The ACTU also drew our attention to the *Personal/Carers' Leave Test Case*[118]. The framework for draft orders which is contained in Appendix B to that decision contains a clause permitting annual leave to be taken in single days up to a maximum of five days at the employee's request[119].

[308] The taking of annual leave in single days has been the subject of Full Bench consideration in relatively recent times. The first decision is the *Family Leave Test Case*[120]. In that case the Commission decided to permit annual leave to be taken in single days up to a maximum of five by agreement at the employee's request[121]. The *Family Leave Test Case* led directly to the *Personal/Carers' Leave Test Case* and the framework provision which has been mentioned. While clause 30.9 of the ACT Shops Award is not in the same terms as the framework provision contained in Appendix B to the *Personal/Carers' Leave Test Case,* it is modelled directly on that framework provision. As we have already noted, while the application before us was initially pursued on a test case basis, we are not dealing with it on that basis. Furthermore, clause 30.9 was recently re-adopted by consent, with only minor amendment, during the award simplification proceedings[122]. The award simplification proceedings provide

an opportunity to challenge award provisions that have the effect of restricting or hindering productivity and to raise issues relevant to the operation of facilitative provisions such as clause 30.9. The fact that the employer respondents consented to the current provision during the award simplification proceedings is a material consideration. No evidence has been adduced tending to show that clause 30.9 is not operating effectively or that for some other reason it requires amendment. Indeed we have been given no information about the operation of clause 30.9 at all. In the circumstances we have decided not to grant this part of the application.

BY THE COMMISSION:

PRESIDENT

Appearances:

R. Marles, A. Watson and *M. Bisset* for the Australian Council of Trade Unions and for the Construction, Forestry, Mining and Energy Union, CPSU, the Community and Public Sector Union, the Finance Sector Union of Australia and the Flight Attendants' Association of Australia.

J. Ryan for the Shop, Distributive and Allied Employees Association.

J. Nucifora for the Australian Municipal, Administrative, Clerical and Services Union.

K. McAlpine for the National Tertiary Education Industry Union.

M. Saunders for the Australian Salaried Medical Officers Federation.

L. Gale for the Australian Education Union.

Z. Angus for The Australian Workers' Union.

I. Bryant and *S. Herrington* for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

T. Veenendaal for the Australian Liquor, Hospitality and Miscellaneous Workers Union.

M. Nicolaides for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

M. Butler for the Association of Professional Engineers, Scientists and Managers, Australia.

R. Doyle for the States of Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania and the Northern Territory.

G. McNamera and *J. Carter* for the Victorian Government.

R. Jackson and *C. O'Grady* for the Victorian Department of Employment, Education and Training.

T. Shipstone for the Queensland Government.

E. Cole, P. Drever, *A. O'Brien, L. Kendle, J. Macken* and *S. Cooper* for the Commonwealth Minister for Employment and Workplace Relations.

M. Moir, *S. Smith* and *T. Halls* for The Australian Industry Group and the Engineering Employers Association, South Australia.

J. Bates, D. Gregory, C. Harris, S. Barklamb and *R. Hamilton* for the Australian Chamber of Commerce and Industry and on behalf of the Australian Retailers' Association, the ACT and Region Chamber of Commerce and Industry, Australian Business Limited, Evans Deakin Industries, the National Electrical and Communications Association and the

Insurance Council of Australia and with *R. Calver* and *D. Harris* for the National Farmers' Federation.

G. Watson for employers in the coal industry and with *R. Dalton* and *N. Ogilvie* for Tenix Defence Pty Ltd.

P. Tilbrook, I. Argall and *C. Pugsley* for the Australian Higher Education Industrial Association.

I. Masson, *P. Gallagher* and *L. O'Brien* for Australian Mines and Metals Association.

M. Tehan, J. Bourke, M. McKenny, *P. Ryan* and *R. Furlan* for the Australian Postal Corporation.

J. Isles and *M. Murphy* for the Metropolitan Ambulance Service (Victoria) and Rural Ambulance Victoria.

H. McKenzie and *R. Bunting* for Qantas Airways Limited.

S. Vosti for National Express Group Australia trading as M-Tram, M-Train and V-Line Passenger, Melbourne Transport Enterprises trading as Connex Trains and for Metrolink Victoria trading as Yarra Trams.

C. Shaw for Freight Australia.

J. Ryan for the Australian Catholic Commission for Employment Relations.

B. Larkins for the State Rail Authority of New South Wales.

Date and place of hearing:

2001.
Melbourne:
June 20 (before Giudice J);
July 16;
November 19, 20, 21, 22, 23, 26, 27, 28, 29, 30.

2002.
Melbourne:
January 23;
February 4, 5, 6, 7, 8;
Sydney:
February 11, 12, 13, 14;
Melbourne:
February 19 (before Giudice J);
June 11, 12, 13.

Decision Summary

Conditions of employment – hours of work – overtime – restrictions on overtime – shiftwork – night work – payment by results – incentive programmes – claim by ACTU re working hours prohibiting employee work unreasonable hours based on fifteen factors, claim concerning reasonable overtime enabling employees to refuse to work certain hours for certain reasons and claim for employee having worked extreme specified hours and days in specified periods to two day paid break and if break not given within seven days, to penalty rates until it is – ACTU claim supported by States and Territories and opposed by Commonwealth and employer interests – evidence that working time arrangements and patterns of hours worked have increased significantly in Australia over recent decades – noted Australia is one of few OECD countries with trend of longer full-time working hours – various adverse consequence of working long hours noted – ACTU's claim for test case standard rejected in terms sought – refused claim prohibiting employee to work unreasonable hours to be determined by consideration of specified factors – certainty and predictability of normal working week for award employees based on number of hours would give way to an imprecise and less predictable test based on reasonableness – specification of number of ordinary hours for standard working week is proven method of regulation with great benefit of clarity whereas to overlay standard working week with standard of reasonableness would make planning very difficult without employers knowing in advance what hours are reasonable for each employee – not appropriate to insert standard of reasonableness in awards with hours provisions specific to circumstances of employment covered by them – awards generally provide various types of leave, limits on length of working day and meal and rest breaks thereby already significantly recognising at least in relation to ordinary hours the interaction between work and personal and family circumstances of employees – factors to be considered in claim determining reasonable hours excluded employer considerations – refused claim to give employee specified paid breaks after having worked extreme hours – instead of seeking to prohibit extreme hours, it seeks to provide benefit for employees who have worked them – claim seeks to entitle employees to its benefits regardless of existing award provisions regulating hours of work – evidence revealing diversity of hours of work arrangements suggests claim would be impractical in at least some awards – global evidence relied on not supportive of claim – more limited test case provision awarded – appropriate to award test case standard to confer employee right to refuse overtime in circumstances where such overtime would result in unreasonable hours having regard to health and safety, employee's personal circumstances including family responsibilities, needs of the workplace or enterprise, notice, and any other relevant matter – permits employee's ordinary hours to be considered when determining whether overtime is unreasonable – right of refusal relates only to overtime – employer retains right to require employee to work reasonable overtime at overtime rates – wage rates – annualised rates – claim by ACCI to vary two awards to provide annualised wage rates, an overtime register to record employees' overtime preferences and provision

permitting annual leave to be taken in single days – case advanced re annualised wage rates insufficient basis for considering merits of application to other awards – not of test case nature – claim better dealt with having regard to industry and types of enterprises covered by award – doubt overtime register is allowable matter – claim to vary single award to provide for taking annual leave in single days refused because matter addressed in adoption of family leave test case provision and award simplification process in relevant award.

Working Hours Case: Applications by the Construction, Forestry, Mining and Energy Union to vary The Coal Mining Industry (Production and Engineering) Consolidated Award and others

C2001/348 and others PR072002
Giudice J
Ross VP
McIntyre VP
Gay C
Foggo C Melbourne 23 July 2002

ANNEXURE A

MAIN PROVISIONS OF RELEVANCE OF THE *WORKPLACE RELATIONS ACT 1996*

3 Principal object of this Act

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and

(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

(d) providing the means:

  (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

  (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards.

88A Objects of Part (VI)

The objects of this Part are to ensure that:

(a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and

(b) awards act as a safety net of fair minimum wages and conditions of employment; and

(c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and

(d) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that:

(i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and

(ii) uses a case-by-case approach to protect the competitive position of young people in the labour market, to promote youth employment, youth skills and community standards and to assist in reducing youth unemployment.

88B Performance of Commission's functions under this Part

(1) The Commission must perform its functions under this Part in a way that furthers the objects of the Act and, in particular, the objects of this Part.

(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.

(3) In performing its functions under this Part, the Commission must have regard to the following:

(a) the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed;

(b) the need to support training arrangements through appropriate trainee wage provisions;

(ba) the need, using a case-by-case approach, to protect the competitive position of young people in the labour market, to promote youth employment, youth skills and community standards and to assist in reducing youth unemployment, through appropriate wage provisions, including, where appropriate, junior wage provisions;

(c) the need to provide a supported wage system for people with disabilities;

(d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex;

(e) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

. . .

89A Scope of industrial disputes

Industrial dispute normally limited to allowable award matters

(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):

(a) dealing with an industrial dispute by arbitration;

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order.

Allowable award matters

(2) For the purposes of subsection (1) the matters are as follows:

(a) classifications of employees and skill-based career paths;

(b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;

(c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;

(d) incentive-based payments (other than tallies in the meat industry), piece rates and bonuses;

(e) annual leave and leave loadings;

(f) long service leave;

(g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave;

(h) parental leave, including maternity and adoption leave;

(i) public holidays;

(j) allowances;

(k) loadings for working overtime or for casual or shift work;

(l) penalty rates;

(m) redundancy pay;

(n) notice of termination;

(o) stand-down provisions;

(p) dispute settling procedures;

(q) jury service;

(r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;

(s) superannuation;

(t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

(3) The Commission's power to make an award dealing with matters covered by subsection (2) is limited to making a minimum rates award.

Limitations on Commission's powers

(4) The Commission's power to make or vary an award in relation to matters covered by paragraph (2)(r) does not include:

(a) the power to limit the number or proportion of employees that an employer may employ in a particular type of employment; or

(b) the power to set maximum or minimum hours of work for regular part-time employees.

(5) Paragraph (4)(b) does not prevent the Commission from including in an award:

(a) provisions setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work; or

(b) provisions facilitating a regular pattern in the hours worked by regular part-time employees.

(6) The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.

. . .

90 Commission to take into account the public interest

In the performance of its functions, the Commission shall take into account the public interest, and for that purpose shall have regard to:

(a) the objects of this Act and, in particular, the objects of this Part; and

(b) the state of the national economy and the likely effects on the national economy of any award or order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.

93A Commission to take account of Family Responsibilities Convention

In performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:

(a) preventing discrimination against workers who have family responsibilities; or

(b) helping workers to reconcile their employment and family responsibilities.

120 Relief not limited to claim

Subject to section 89A, in making an award or order, the Commission is not restricted to the specific relief claimed by the parties to the industrial dispute concerned, or to the demands made by the parties in the course of the industrial dispute, but may include in the award or

order anything which the Commission considers necessary or expedient for the purpose of preventing or settling the industrial dispute or preventing further industrial disputes.

143 Making and publications of awards etc.

(1) Where the Commission makes a decision or determination that, in the Commission's opinion, is an award or an order affecting an award, the Commission shall promptly:

(a) reduce the decision or determination to writing that:

(i) expresses it to be an award;

(ii) is signed by at least one member of the Commission; and

(iii) on which it is signed; and

(b) give to a Registrar:

(i) a copy of the decision or determination; and

(ii) a list specifying each party who appeared at the hearing of the proceeding concerned.

(1A) For the purposes of subsection (1), none of the following is an award or an order affecting an award:

(a) a decision to certify an agreement under Part VIB;

(b) an award under section 170MX.

(1B) The Commission must, if it considers it appropriate, ensure that a decision or determination covered by subsection (1):

(a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level; and

(b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and

(c) does not contain provisions that have the effect of restricting or hindering productivity, having regard to fairness to employees.

(1C) The Commission must ensure that a decision or determination covered by subsection (1):

(a) where appropriate, contains facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award provisions are to apply; and

(b) where appropriate, contains provisions enabling the employment of regular part-time employees; and

(c) is expressed in plain English and is easy to understand in structure and content; and

(d) does not contain provisions that are obsolete or that need updating; and

(e) where appropriate, provides support to training arrangements through appropriate trainee wages and a supported wage system for people with disabilities; and

(ea) if it applies to work that is or may be performed by young people-protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards and assists in reducing youth unemployment by including, if, on a case-by-case basis, the Commission determines it appropriate, junior rates of pay;

and

(f) does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

170LT Certifying an agreement

(1) If an application is made to the Commission in accordance with Division 2 or 3 to certify an agreement, the Commission must certify the agreement if, and must not certify the agreement unless, it is satisfied that the requirements of this section are met.

(2) The agreement must pass the no-disadvantage test (see Part VIE).

(3) If:

(a) the only reason why the Commission must not certify an agreement is that the agreement does not pass the no-disadvantage test; and

(b) the Commission is satisfied that certifying the agreement is not contrary to the public interest;

the agreement is taken to pass the no-disadvantage test.

. . .

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[1] AW774609
[2] AW766201
[3] AW794740CRA
[4] AW766597
[5] AW794731
[6] AW800025
[7] AW795978
[8] AW783476
[9] AW766579
[10] AW791396
[11] AW784988
[12] AW806227
[13] AW788293
[14] AW765517
[15] see *Kezich* v *Leighton* (1974) 131 CLR 362 per Gibbs J at p. 365.
[16] Print S3201, 15 February 2000 esp. at paragraph [26].
[17] Print P7500 (1997) at pp.20 and 149, 75 IR 272 at pp. 288-289 and 402.
[18] (1947) 59 CAR 581 at pp. 609, 612.
[19] (1997) 74 IR 446 at p. 458.
[20] ABS unpublished data, Labour Force Survey. Figures are based on annual averages of monthly data. Cited in *Working Time Arrangements in Australia: A Statistical Overview for the Victorian Government* ACIRRT 2001 (Working Time Arrangements Report), Exhibit ACTU 2, Tab 1 at p. 12.
[21] Ibid., unpublished data from the ABS Survey of Education and Training 1997, cited in Working Time Arrangements Report, Table 5 at p. 18.
[22] ABS Labour Force (Cat No 6203.0); Correspondence from the Commonwealth dated 18 June 2002, reworked Chart 1 from Exhibit Commonwealth 16.
[23] Exhibit Commonwealth 16, Appendix 1 at p.36.
[24] ABS Labour Force (Cat No 6203.0); Correspondence from the Commonwealth dated 18 June 2002, reworked Chart 2 from Exhibit Commonwealth 16.
[25] Derived from Exhibit Commonwealth 1, unpublished data, ABS Cat. No. 6203.0.

[26] Working Time Arrangements Report, Exhibit ACTU 2, Tab 1 at p. 13.
[27] Ibid. at p. 15.
[28] ABS *Survey of Employee Earnings, Benefits and Trade Union Membership* (Cat No.6310.0), Exhibit Commonwealth 16, Table 2 at p. 45.
[29] Working Time Arrangements Report, Exhibit ACTU 2, Table 7 at p. 21.
[30] Ibid. at pp. 22-23.
[31] ABS Catalogue No. 6361.0.
[32] Working Time Arrangements Report, ABS Catalogue No. 6361.0, Exhibit ACTU 2, Tab 1, Diagram 1 at p. 11.
[33] Campbell I., *Cross-national Comparisons* (Cross National Comparisons Report), Exhibit ACTU 2, Tab 2 at p. 15.
[34] ABS Catalogue No. 6342.0.
[35] Campbell I., *Full-time Employees and the Expansion of Unpaid Overtime in Australia,* Exhibit ACTU 2, Tab 2, Attachment G at p. 15.
[36] Wooden M., *Working Time Patterns in Australia and the Growth of 'unpaid' Overtime: A Review of the Evidence,* October 2001, (Working Time Patterns Report), Exhibit ACCI 2 at p. 12.
[37] Ibid. pp. 13-14.
[38] Campbell I., *Full-Time Employees and the Expansion of Unpaid Overtime in Australia,* a paper prepared for the International Seminar on Working Time, Gelsenkirchen, 18-20 February 1999; Exhibit ACTU 2, Tab 2, Attachment G at p. 15.
[39] Ibid. at p. 14.
[40] ABS Catalogue No. 6361.0, Table 6 at p. 24.
[41] *Employment Arrangements and Superannuation, Australia,* ABS Catalogue 6361.0, Table 10 at p. 28.
[42] See Cross National Comparisons Report, Exhibit ACTU 2, Tab 2 at p. 8.
[43] Evans J., Lippoldt D. and Marianna P., *Labour Market and Social Policy - Occasional Paper No. 45 Trends in Working Hours in OECD Countries*, February 2001, Exhibit Commonwealth 16 at p.81.
[44] A report commissioned by the Queensland Department of Industrial Relations and written by Dawson D., McCulloch K. and Baker A. of the Centre for Sleep Research at the University of South Australia, see Exhibit ACTU 3 at Tab 3.
[45] Ibid. at p. 14.
[46] Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 14.
[47] Ibid. at pp. 2-3.
[48] *Fatigue Modelling,* Counting the Costs Report, Exhibit ACTU 2, Tab 3, Appendix E at pp. 2-3.
[49] For example see Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 21.
[50] Steptoe et al, (1998) and Shields (1999), cited in Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 23.
[51] Hayaski et al, (1996); Costa (1999), cited in Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 24.
[52] Tuntiseranee et al, (1998); Henderson (1997), cited in Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 24.
[53] Shields (1999), cited in Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 25.
[54] Working Time Patterns Report, Exhibit ACCI 2, Tab 1 at p. 25.
[55] Ibid.
[56] Ibid. at p. 23.
[57] Ibid. at p. 25.
[58] Ibid.
[59] Ibid.
[60] See Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p. 30.
[61] Ibid. at p. 28.
[62] Family and Community Life Report, Exhibit ACTU 2, Tab 4 at p. 4.
[63] Glezer H. and Wolcott I., *Work and Family Matters Report* (1999) at pp. 69-75.
[64] Ibid at p. 75.
[65] Cited in Wolcott I. and Glezer H., *Impact of the Work Environment on Workers with Family Responsibilities* (1995), Family Matters at pp. 15-19.
[66] Sanchez L. and Thomson E., *Becoming Mothers and Fathers: Parenthood, Gender and the Division of Labour* in (1997) 11 (December) *Gender and Society* 747-773.
[67] Cited in Glezer and Wolcott 1999:74.
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[69] *Family and Work: The Family's Perspective,* Exhibit AIG 2 at Tab 9.
[70] Galinsky E., *Ask the children: what America's children really think about working parents*. (New York, William Morrow and Company, 1999), Family and Community Life Report, Exhibit ACTU 2.
[71] Family and Community Life Report, Exhibit ACTU 2, Tab 4 at p. 19.

[72] Fifty Families Report, Exhibit ACTU 2, Tab 5 at p. 8.
[73] Ibid. at p. 10
[74] Ibid.
[75] Ibid. at p. 11-12.
[76] Ibid. at p. 13.
[77] Ibid. at p. 10 and attachments.
[78] Ibid. at p. 13.
[79] Ibid. at p. 15.
[80] Buchanan J., *What About the Bosses - Employers and Extended Hours of Work - Insights from Exploratory Research* (What About the Bosses Report), Exhibit ACTU 6 at p. 4.
[81] Ibid. at p. 5.
[82] Ibid. at pp. 5-6.
[83] Ibid. at p. 6.
[84] Benson J., *Hours of Work: A Report on a Survey of Ai Group Members on Hours of Work and the Implications of the ACTU claim for Changes to the Terms and Conditions Governing Overtime* (Hours of Work Report*),* 22 October 2001, Exhibit AIG 2 at Tab 2.
[85] Counting the Costs Report, Exhibit ACTU 2, Tab 3 at p.16.
[86] Harcourt T. and Kenna S., Discussion Paper on Working Time ACTU, (1997), cited in Counting the Costs Report, Exhibit ACTU 2, Tab 3 at pp. 15-16.
[87] *How effectively do we regulate excessive hours of work in Australia?* (Regulating Excessive Hours Report), Exhibit ACTU 2, Tab 6 at p.4.
[88] Ibid. at p. 5.
[89] Ibid.
[90] Cross National Comparisons Report, Exhibit ACTU 2, Tab 2 at p. 21.
[91] Ibid. at p. 2.
[92] (1920) 14 CAR 811
[93] (1927) 24 CAR 755
[94] (1947) 59 CAR 581
[95] 4 IR 429
[96] 59 CAR 581 at 609 and 612
[97] AW794740CRA
[98] AW766579
[99] AW774609
[100] AW806227
[101] AW765517
[102] Counting the Costs Report, Exhibit ACTU 2 at Tab 3.
[103] Ibid.
[104] Cross National Comparisons Report, Exhibit ACTU 2, Tab 2.
[105] Ibid.
[106] Family and Community Life Report, Exhibit ACTU 2 at Tab 4.
[107] Counting the Costs Report, Exhibit ACTU 2 at Tab 3.
[108] Regulating Excessive Hours Report, Exhibit ACTU 2 at Tab 6.
[109] *Fatigue Management for the Western Australia Mining Industry,* Exhibit AMMA 1, Appendix 5.
[110] (1960) 4 FLR 333
[111] see Exhibit ACTU 1 paragraph 518 and Exhibit ACTU 23 volume 2, paragraph 1235.
[112] ANOP Study, Exhibit AIG 2, Tab 1 at p. 46.
[113] Hours of Work Report, Exhibit AIG 2, Tab 2, Tables 20, 22 and 23.
[114] C2001/3234
[115] C2001/3687
[116] C2001/3686
[117] C2001/3688
[118] (1995) 62 IR 48
[119] 62 IR at 81
[120] (1994) 57 IR 121
[121] 57 IR at 147
[122] Print S4541, 5 September 2000.