



NATIONAL ROAD TRANSPORT ASSOCIATION

**IN THE FAIR WORK COMMISSION**

**AM2015/2 & AM2015/1**

**Submissions on the 4 Yearly Review of Modern Awards**

- Family-Friendly Work Arrangements**
- Family & Domestic Violence Leave**

**1 September 2017**

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## Introduction

### **About NatRoad**

1. The National Road Transport Association (**NatRoad**) is Australia's largest nationally representative road transport association. NatRoad has been operating continuously since January 1948.
2. With members in every State and Territory, NatRoad represents road freight businesses operating throughout mainland Australia and Tasmania, ranging from small transport businesses, including sole operator and owner-driver employer businesses, through to large national fleet operators.
3. NatRoad's members are involved in general freight, livestock transport, refrigerated transport, fuel and dangerous goods transport, oversize and over-mass transport, passenger transport, and heavy vehicle recovery activities. Our transport business members operate a range of heavy vehicles including road trains, tippers, express car carriers, tankers, and bus-lines. NatRoad also represents members running businesses which are affiliated with the Australian road freight and logistics industry.
4. NatRoad receives no government or union funding.

### **Summary**

5. The National Road Transport Association (**NatRoad**) is pleased to make further submissions in respect of AM2015/1 (Family & Domestic Violence Leave) and also submissions in relation to AM2015/2 (Family-Friendly Leave Arrangements).
6. By way of summary, NatRoad does not support:
  - a. the inclusion of unpaid family and domestic violence leave in either the *Road Transport and Distribution Award 2010* or the *Road Transport (Long Distance Operations) Award 2010*; or
  - b. the inclusion of family-friendly working arrangements in either the *Road Transport and Distribution Award 2010* or the *Road Transport (Long Distance Operations) Award 2010*.
7. While recognising that the claims in respect of the above provisions as brought by the Australian Council of Trade Unions (the **ACTU**) are well-intentioned efforts to use the modern awards as a mechanism to combat the social scourge of family and domestic violence and other (female) gender-based inequalities in the workforce, there is, in our view, no evidence to support the use of such provisions in respect of the road transport industry's modern awards.
8. The Australian road transport industry is male-dominated.<sup>1</sup>
9. There is currently no empirical evidence in respect of the prevalence of family and domestic violence in the road transport industry.
10. Given this, it would not be sensible, in NatRoad's view, to mandate a broad-brush approach by varying the road transport awards to combat a social problem of unknown quantum or relevance to this industry.

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<sup>1</sup> The majority of the road transport industry's workforce are men and stakeholders report a perception that most work undertaken is stereotypically 'masculine'. Women are predominately employed in support roles such as administration, human resources, procurement and finance. While technological advances have arguably increased employment opportunities for women, barriers still exist with certain job roles considered too dangerous or impractical for females in the minds of those doing the recruiting. Although the industry has experienced growth of 28 per cent in the last decade, female representation in the industry has increased **by one per cent only**: Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 26.

11. Generalising from the 2012 Personal Safety Survey (the **PSS**) administered by the Australian Bureau of Statistics (the **ABS**)<sup>2</sup> though, in the 12-month period prior to the 2012 PSS, fewer than 1 in 100 men experienced intimate partner violence (**IPV**), compared to 1 in 50 women (only 62% of whom were employed at the time of the violence).
12. In terms of truck drivers, this equates to about 1400 men and less than 100 women (and possibly only about 62 women if we extrapolate from the percentage of women employed at the time of the violence) being subjected to IPV in that period.<sup>3</sup>
13. These figures cannot be further broken down into the number of employee truck drivers versus the number of owner-driver truck drivers (who would not be modern road transport industry award-covered). While just one victim of IPV is too many, the quantum of those likely to be affected by IPV, and who are also road transport industry award-covered, is unlikely to be large.
14. There are further (assumed) problems based on anecdotal reports from within the industry. These raise concerns about the stigma and reluctance of male truck drivers in particular to report IPV to anyone at all, let alone employers.
15. Applying an award-based right as a band-aid to a social ill that is not yet even quantified in the road transport industry, and which is unlikely to be accessed, for reasons which will be further explored below, would not be helpful, or in our view, justified at this time.
16. As the stigma around reporting mental health issues (which are often a sequela to IPV) is anecdotally less than it previously was in the road transport industry, targets of IPV may be more open to accessing personal leave to address the issues arising from family and domestic violence, rather than using an award-based right named 'family and domestic violence leave'.
17. In relation to providing access to family-friendly working arrangements under the modern awards, NatRoad considers that this issue should not even be contemplated for this industry until provision is made for part-time employment under the *Road Transport (Long Distance Operations) Award 2010* (noting that provision for part-time is already in place under the *Road Transport and Distribution Award 2010*).
18. Until provision is made to improve flexible working arrangements by allowing for part-time employment under both road transport industry modern awards – which we submit would carry less stigma than 'family-friendly' working arrangements – we consider no provision for the latter should be made under either of these awards.
19. The issue of reduced income arising from unpaid family and domestic violence leave and/or family-friendly working arrangements is also significant in respect of employee drivers, many of whom live from pay-to-pay. This is also an issue for small transport businesses (including some owner-driver businesses) which employ drivers.
20. In an industry where constant cries are made by employee associations about paying truck-drivers so-called 'safe rates', it would seem intuitively that employee and community safety on the roads would be compromised by including provisions in modern awards which clearly contemplate a reduction in income to support unpaid leave in family and domestic violence situations.
21. Further, as recommended by the [final report](#) of the Australian Small Business and Family Ombudsman (the **ASBFEO**) following its inquiry into the effect of the now defunct Road Safety Remuneration Tribunal's Payments Order (the **Payments Order**) on Australian small transport businesses:

*When developing regulation that will have a significant impact on small businesses, consideration should be given to the potential impact on people's mental health.*

<sup>2</sup> Expert report of Dr Peta Cox (26 May 2016) to the Commission at paragraph [1.2]. See also the [2012 ANROSS study](#).

<sup>3</sup> Based on 2011 ABS data on the number of truck drivers in Australia by male (141392) and female (4806) gender.

22. There is no evidence that this has been done in this case, despite the fact that the introduction of unpaid family and domestic violence leave would, like the Payments Order, disproportionately impact those small businesses that make up 97.7% of transport and logistics businesses.<sup>4</sup> The potential of Award variations of the types proposed to adversely impact on mental health should at least be contemplated.
23. While the ASBFEO's report indicated that owner-drivers and small transport business owners felt the impacts of the Payments Order more severely than others, most submissions and feedback in the ASBFEO's public forums described the negative consequences of the Payments Order in terms of [emphasis added]:
 

***financial hardship from the loss of work and income, increased financial debts and .....and significant stress on families, relationships and mental health.***<sup>5</sup>
24. Financial stress is often a precursor to, and cause of IPV and it may be that any reduced income earned by employee truck-drivers due to their accessing unpaid family and domestic violence leave, or working less hours under so-called family-friendly working arrangements, may indeed exacerbate the very problem it is meant to relieve.
25. In short, we contend that there is currently no or insufficient evidence to support the inclusion of unpaid family and domestic violence leave or family-friendly working arrangements in the road transport industry awards.
26. In our view, further industry-specific research into both of these issues is urgently required, and certainly before any scattergun approach to vary the modern awards is made by the Commission.

#### Overview of Proceedings to Date

27. On 18 April 2017, Justice Ross issued [Statement \[2017\] FWC 2189](#) which identified ten (10) incomplete Fair Work Commission (the **Commission**) Full Bench modern award review matters.<sup>6</sup> Specifically, these were matters in which former Vice President Watson (**VP Watson**) was the presiding Member but which had not been completed prior to his resignation from the Commission on 28 February 2017.
28. [AM2015/2 \(Family-Friendly Work Arrangements\)](#) was one of the 10 incomplete matters identified in [Statement \[2017\] FWC 2189](#).
29. The family-friendly work arrangements matter concerns a claim by the Australian Council of Trade Unions (the **ACTU**) to ***vary all modern awards to provide employees with an entitlement to temporarily reduced hours to accommodate their parenting and/or caring responsibilities.***
30. In [Statement \[2017\] FWC 2189](#), Justice Ross further observed that although VP Watson had published his decision in [AM2015/1 \(Family & Domestic Violence Leave\)](#)<sup>7</sup> on 27 February 2017, the day before his resignation, the other two members of the relevant Full Bench (Deputy President Gooley and Commissioner Spencer) had yet to publish their decisions in respect of that matter.
31. Subsequently, Deputy President Gooley (**DP Gooley**) and Commissioner Spencer sought Justice Ross's advice as to whether they were able to proceed to finalise and publish a decision in the family and domestic violence leave matter, having regard to s. 622 of the *Fair Work Act 2009* (Cth) (the **FW Act**).

<sup>4</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 11.

<sup>5</sup> The ASBFEO final report at page 15.

<sup>6</sup> Other than matter AM2015/1 (the Family and Domestic Violence Leave clause).

<sup>7</sup> AM2015/1 (Family & Domestic Violence Leave) concerns a claim by the ACTU to vary all modern awards to provide employees with an entitlement to 10 days paid family and domestic violence leave.

32. On 27 March 2017 Justice Ross published Statement [\[2017\] FWC 1733](#) directing interested parties to address several questions including the proper construction of s. 622 of the FW Act. A number of parties filed written submissions and appeared at a hearing on 4 April 2017.
33. In [Statement \[2017\] FWC 2189](#), interested parties were also invited to file submissions by Friday 5 May 2017 indicating whether they intended to pursue their claims in respect of the 10 incomplete matters and whether the Full Bench should be reconstituted for that purpose.
34. Submissions were received from a number of interested parties in respect of both of these issues.
35. Justice Ross considered those submissions together with earlier submissions filed in relation to matter AM2015/2 (Family-Friendly Work Arrangements) and, on 29 May 2017, issued a further statement, [Statement \[2017\] FWC 2928](#), to indicate the course of action the Commission would adopt for each matter.
36. In this further Statement, Justice Ross indicated that he was satisfied that the FW Act allowed him to reconstitute a Full Bench in circumstances where VP Watson had been the presiding Member of the responsible Full Bench and the matter had not been finalised prior to his departure. Therefore, Justice Ross proposed reconstituting the Full Bench in respect of six of the 10 incomplete matters.
37. Based on submissions received in respect of AM2015/2 – Family-Friendly Work Arrangements<sup>8</sup> Justice Ross proposed to reconstitute a new Full Bench with Deputy President Gooley, Commissioner Spencer, and a new Member.
38. On 30 June 2017 President Ross further issued Decision [\[2017\] FWC 3480](#), expressing his view that the FW Act permitted DP Gooley and Commissioner Spencer to hand down their decision(s) in AM2015/1 (Family & Domestic Violence Leave) and that their decision(s), taken together with the former VP Watson's decision [\[2017\] FWCFB 1133](#) would comprise the Full Bench decision in the family and domestic violence leave matter (AM2015/1).
39. On 3 July 2017 DP Gooley and Commissioner Spencer handed down their Decision [\[2017\] FWC 3494](#) on family and domestic violence leave.
40. Taking this Decision together with former VP Watson's decision, the **unanimous decision of the Full Bench** was to **reject the ACTU's claim to include 10 days paid family and domestic violence leave in modern awards**.
41. In rejecting the ACTU's proposal for 10 days paid family and domestic violence leave for modern award-covered employees, the Full Bench did not however reject the view that family and domestic violence is a significant community issue which requires a workplace response.
42. This position is confirmed by the majority's preliminary view that there is **a need for unpaid family and domestic violence leave and access to personal leave in a wider range of circumstance**.
43. Specifically, DP Gooley and Commissioner Spencer observed at [6]:
 

*that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees **should be able to access personal/carer's leave** for the purpose of taking family and domestic violence leave.*
44. In making its decision, [\[2017\] FWCFB 3494](#), the Full Bench observed that it was not free to decide on the merits of what would be desirable to include in modern awards; it was required to determine what is *necessary* to achieve the modern award objective.

<sup>8</sup> In its 10 May 2017 submissions, the ACTU notes that it uses the terms '*flexible working arrangements*' and '*family friendly working arrangements*' synonymously and mean any arrangement between an employer and employee that permits the employee to meet their parenting or caring obligations while also participating in paid work [paragraph 2 of ACTU's 10 May 2017 submissions].

45. The Full Bench also observed at [118] that a review of modern awards is not an *inter partes* application and hence its rejection of the ACTU's proposal does not necessarily end the matter. The Full Bench is required to **review each modern award** to determine if the awards and the NES provide a fair and relevant safety net of terms and conditions.
46. Based on the largely uncontested evidence before it, the Full Bench majority formed the preliminary view that in order to meet the modern award objectives, provisions should be inserted in modern awards allowing both for a period of unpaid family and domestic violence leave and access to personal/carer's leave for the purpose of taking family and domestic violence leave [119].
47. The majority considered that, as set out at [45] of its decision,<sup>9</sup> such unpaid leave [would] serve to confirm the significance of family and domestic violence leave as a workplace right and provide employment protection in circumstances where there is a need to access such leave.
48. On 14 July 2017, Justice Ross issued [Statement \[2017\] FWC 3696](#) where he noted at [4]<sup>10</sup> that because interested parties had not yet had an opportunity to make submissions or call evidence in respect of the preliminary views in respect of *unpaid* family and domestic violence leave, further proceedings would be necessary to provide that opportunity. He therefore listed both AM2015/1 and AM2015/2 for further mention on Friday 21 July 2017, allowing parties to make submissions as to appropriate directions for future proceedings in both matters.
49. At the 21 July 2017 mention, interested parties were invited to file written submissions by Friday 28 July 2017 prior to the Full Bench releasing draft model terms on family and domestic violence leave for comment.
50. On 21 July 2017, it was also agreed that parties be given until 30 August 2017 to file written submissions in relation to the preliminary views expressed by the majority in the 3 July 2017 Decision [\[2017\] FWC 3494](#) on family and domestic violence leave. Submissions in reply were to be filed by Wednesday 27 September 2017, with the matter listed for conference on 11 and 13 October 2017 in Melbourne and for hearing on 19 and 20 October 2017 in Sydney.<sup>11</sup>
51. On 3 August 2017, the Full Bench comprised of Justice Ross, DP Gooley, and Commissioner Spencer, issued a further [Statement and Directions \[2017\] FWCFB 4047](#) in AM2015/1 and AM2015/2 which provided amended directions in respect of both matters as follows:

***AM2015/1 – Family and Domestic Violence Leave***

*These directions concern the further proceedings in respect of the preliminary views expressed by the majority (Deputy President Gooley and Commissioner Spencer) ([\[2017\] FWCFB 3494](#) at [6]) that:*

- i. All employees should have access to unpaid family and domestic violence leave.*
- ii. Employees should be able to access their NES entitlement to personal/carer's leave for the purpose of taking family and domestic violence leave.*

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<sup>9</sup> Paragraph [45] provides While we accept that employees who experience family and domestic violence will have some protection from unfair dismissal, unlawful dismissal and adverse action we do not consider this to be sufficient. If employees have a right to family and domestic violence leave then that would be a workplace right. Employees would gain an additional protection against dismissal because an employee took family and domestic violence leave or proposed to take family and domestic violence leave would be prohibited under the Act. Currently unless the employee has such an entitlement under an enterprise agreement, the employee has no such right unless their circumstances fit the current protections. For example, there is no workplace right to be absent from work to attend court proceedings or to find alternative accommodation.'

<sup>10</sup> As DP Gooley and Commissioner Spencer also observed, at [120] of their decision [\[2017\] FWC 3494](#) on family and domestic violence leave.

<sup>11</sup> [Statement \[2017\] FWCFB 3865](#).

### **Directions**

1. *All interested parties shall file comprehensive written submissions and any further witness statements or documentary evidence on which the party seeks to rely by **4.00 pm on Friday 1 September 2017**.*
2. ***On or before 4.00 pm on Friday 29 September 2017**, interested parties are to file comprehensive written submissions in reply and any witness statements or documentary evidence in reply.*
3. *All submissions filed should address the issues set out in Attachment B to the 2 August 2017 Statement. Submissions are not limited to the issues identified in Attachment B.*
4. *The matter will be listed for Conference before me on 11 and 13 October 2017 in Melbourne.*
5. *The matter will be listed for oral Hearing on 19 and 20 October 2017 in Sydney.*
6. *All material should be sent in a Word document to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).*
7. *Copies of any submissions filed in response to these directions will be published on the [AM2015/1—Family and domestic violence clause](#) page of the Commission's website.*
8. *Liberty to apply.*

### **AM2015/2 – Family-Friendly Leave Provisions**

1. *Any party opposing the ACTU's claim shall file comprehensive written submissions and any witness statements or documentary material on which the party seeks to rely, by **4.00 pm on Friday 6 October 2017**.*
2. *The ACTU and any other interested party supporting the ACTU's claim shall file any reply evidence written submissions and evidence in reply by **4.00 pm on Friday 3 November 2017**.*
3. *The matter will be listed for a directions hearing on **Wednesday 8 November 2017** for the purpose of scheduling the evidence. At that hearing, all parties intending to participate in the hearing must be in a position to inform the Commission of the witnesses required for cross-examination, and an estimate of the length of time required for cross-examination.*
4. *The matter will be listed for hearing on **12-14 December 2017** and **18-22 December 2017**, inclusive.*
5. *Liberty to apply.*



## **AM2015/1 – Family and Domestic Violence Leave Submissions**

52. In [Statement and Directions \[2017\] FWCFB 4047](#) of 3 August 2017, the Commission asked that comprehensive submissions and any further witness statements be filed by Friday 1 September 2016. Any such submissions were to address, but were not limited to, the following issues (as identified at Attachment B to the Statement and Directions):<sup>12</sup>

### **A. Unpaid Domestic Violence Leave**

#### **1. Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?**

53. NatRoad submits that there should be no entitlement to unpaid family and domestic violence leave in either the *Road Transport and Distribution Award 2010* or the *Road Transport Long Distance Award 2010* (collectively the **Road Transport Awards**).
54. While acknowledging that family and domestic violence is a serious, insidious, and odious social problem, it is not one that is easily capable of resolution - certainly not in the road transport industry where the nature of the problem has not even begun to be understood, and absolutely not by the mere inclusion of unpaid family and domestic violence leave in the Road Transport Awards.
55. Most employees covered by the Road Transport Awards are truck drivers, the majority of whom are male. The most current Australian Bureau of Statistics (**ABS**) data, which dates to 2011, indicates that there were at that time a total of 141,392 male truck drivers and 4,806 female truck drivers working in Australia. On these figures, less than 3.4% of the truck driving population in Australia is female.
56. There is no available breakdown in relation to the number of those truck driver workers who are covered (or not covered) by the Road Transport Awards, as the ABS figures also cover owner-driver truck drivers, who may or may not employ other truck drivers.

#### **A (Female) Gendered Problem in a Male-Dominated Industry**

57. However, what we do know is that family and domestic violence is a gendered problem. As Dr Michael Flood indicated in his evidence before the Commission, 'family violence is overwhelmingly a crime against women'.<sup>13</sup>
58. It is unclear then, how inserting family and domestic violence leave into the Road Transport Awards, which cover a predominantly male industry, is necessary to achieve the modern award objective of a fair, necessary, or *relevant* minimum safety net of terms and conditions.

#### **No Empirical Evidence of the Nature or Extent of the Domestic Violence Problem**

59. Another significant issue is that there is absolutely no data to indicate the extent of family and domestic violence amongst truck drivers or in the road transport industry.
60. If there is no evidence to indicate the extent of a problem in an industry, it would seem illogical to prescribe a new entitlement in respect of that 'problem'.
61. While anecdotal evidence suggests that many male truck drivers are subjected to family and domestic violence of all types, both while they are at work and while they are at home, there is no empirical evidence to support this claim.
62. This highlights the need for further research to establish an evidence base in respect of the nature and extent of the problem - not the ill-considered application of an award band-aid to what may be a minor abrasion or alternatively, a life-threatening haemorrhage.

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<sup>12</sup> Statement and Directions [2017] FWCFB 4047 at paragraph [3].

<sup>13</sup> Statement of Michael Flood (6 May 2016), paragraph [3.6].

### **Domestic Violence as a Road Safety Issue**

63. With respect to the road transport industry, anecdotal evidence provided to NatRoad suggests that that family and domestic violence against truck drivers at work may take the form of persistent unwanted telephone calls from current and former partners both whilst the worker is driving, and also during the prescribed driver rest periods mandated under the Heavy Vehicle National Law. This behaviour is obviously at the other end of the spectrum from what is commonly perceived as violence: physical assault.
64. These sorts of constant and abusive interruptions make it impossible for the driver to either concentrate on his or her driving task or to rest during prescribed rest periods. This means therefore that the driver may present an increased safety risk to him or herself and to the broader community when both when driving, and also when he or she ultimately resumes work, still tired and probably emotionally exhausted after an inadequate rest break caused by constant and unwanted interruptions.
65. Managing fatigue and work is an ongoing safety issue for truck drivers (and by extension, for the rest of the community) and having prescribed rest periods or the driving task itself intruded upon by a domestic violence perpetrator represents a significant community risk.

### **The Stigma of Domestic Violence Among Males**

66. However, providing for domestic violence leave under the Road Transport Awards is unlikely to assist truck drivers, particularly male truck drivers. Based on anecdotal evidence only, male truck drivers are generally not going to admit that they are a victim of domestic violence (even if they are able to characterise what they are experiencing as family or domestic violence). This is not a population that typically asks for help, and the stigma that surrounds male victims, particularly those in a male-dominated industry, does not encourage reporting.
67. Sadly, men who find themselves as victims of family and domestic violence are often viewed as, or made to feel emasculated and weak. Men are encouraged 'to fight back' and may be ridiculed for 'accepting' or 'allowing' the abuse. Often others don't know how to approach a conversation about domestic violence with a man for fear of adding insult to injury, or because they don't believe a man can be a domestic violence victim.<sup>14</sup>
68. The way masculinity is constructed in Western society excludes weakness and assumes men will be physically dominant over each other and over women. Men are often expected to be violent and 'in control', and particularly in control of women.<sup>15</sup>
69. At the same time, they are 'supposed to' suppress their emotions and "suck up" whatever adversity life throws at them. Whenever a man steps outside of the act-like-a-man box, he may be ridiculed as weak or as not being a 'real' man. For men, the greatest hindrance is often shame – 'you're not a man if you're suffering in an unsafe relationship.' This toxic view of masculinity may cause men to become perpetrators of domestic violence. But when they are victims, it can stop them from coming forward. The stigma, and the fear of not being believed, can be so strong that men simply don't report the abuse.<sup>16</sup>
70. Interestingly, (anecdotal) evidence suggests that male truck drivers in particular are more likely to 'own' family and domestic violence as a problem if it is couched in terms of one of its consequences, post-traumatic stress disorder (**PTSD**) rather than as violence.<sup>17</sup>

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<sup>14</sup> Skylar Baker-Jordan, 'Male victims of domestic violence are being failed by the system' (*The Independent*, 13 March 2017) accessible at <http://www.independent.co.uk/voices/domestic-violence-male-victims-shelters-government-funding-stigma-a7626741.html>.; Zosia Belksi, 'Denied and Dismissed' (*The Globe and Mail*, 16 November 2016) accessible at <https://beta.theglobeandmail.com/life/relationships/male-victims-of-domestic-abuse-struggle-againststigma/article32874829/?ref=http://www.theglobeandmail.com&>.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> This suggestion is based on anecdotal evidence and feedback provided to NatRoad from a person works in a road transport industry specific counselling service.

71. Apparently, this is because there is less stigma around mental health issues such as PTSD than there previously was.<sup>18</sup>
72. Absences from work on account of mental health concerns such as PTSD are arguably already catered for under the personal leave provisions of the National Employment Standards (**NES**); however, this again is an area calling out for empirical research.
73. However, NatRoad reiterates that while there is no reliable evidence of the nature or extent of family and domestic violence in the road transport industry no claim can be made for any necessity to include unpaid domestic and family violence in the road transport awards.

### **Financial Issues**

74. A further concern is that (anecdotally) many truck drivers, whether they are employee drivers or owner-operators, work hand-to-mouth from week-to-week with no financial back-up or support.
75. Providing access to unpaid leave, in respect of an issue like family and domestic violence, which truck drivers would generally not recognise, acknowledge, or report is unlikely contribute in any meaningful way to a fair and relevant safety net – it would arguably also worsen any extent financial problems the worker is already facing.

## **2. If there is to be an entitlement to unpaid domestic violence leave in Modern Awards, then:**

### **2.1 What is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?**

76. If, despite NatRoad's submissions, the Commission decides to include unpaid family and domestic violence leave provisions in the Road Transport Awards, NatRoad relies on its [preliminary submissions of 27 July 2017](#).

### **2.2 The circumstances in which the leave entitlement arises, including:**

#### **(a) the definition of 'family and domestic violence' for the purposes of the clause;**

77. If, despite NatRoad's submissions, the Commission decides to include unpaid family and domestic violence leave provisions in the Road Transport Awards, NatRoad submits that the proposed definition is not appropriate because there is no reference to the employed person who is presumably the target (or whose family or household member is the target) of the violent behaviour. It is therefore too broad and uncertain in its operation.
78. That is, the ACTU claim defines family and domestic violence leave for the purposes of the proposed clause as follows:  
  
*Family and domestic violence is any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household.*
79. Further, in relation to its potential application in male-dominated industries such as the road transport industry (which is not supported), consideration might be given to changing the name of the leave. This might help alleviate some of the stigma reportedly associated with reporting this type of violence, let alone accessing the leave to manage the difficulties arising from it.
80. It might, for example, simply be defined as 'violence leave' or 'personal safety violence leave'.
81. The thrust of the current definition is physical harm or threat of such harm. It doesn't recognise that other forms of abuse such as 'coercive control'<sup>19</sup> may in fact be more harmful to targets. It

<sup>18</sup> Ibid.

<sup>19</sup> Stark (2007) describes 'coercive control' as an ongoing process whereby abusers use various means, including often, but not always, escalating physical violence, to 'hurt, humiliate, intimidate, exploit, isolate and dominate their victims' Evan Stark, *Coercive control: How men entrap women in personal life* (Oxford University Press 2007). Feminists argue that coercive control is motivated primarily by traditional attitudes toward gender roles and made possible by sexual inequality that has placed men historically at an advantage both socially and economically. Victims of coercive control experience a "generalized fear": Andy

is possible for example, for an abuser to exert total dominance without recourse to physical violence.<sup>20</sup>

82. In other words, the proposed definition is too narrow because it does not incorporate other common forms of family and domestic violence such as psychological abuse, economic or financial abuse, verbal abuse, and coercive control’.
83. However, NatRoad does not support expanding the proposed definition of family and domestic violence to capture these other aspects of family and domestic violence as it would be fraught with difficulty, complexity, and uncertainty, would create more problems than it solves, and would generally be unhelpful in the current context.

## **2.2 The circumstances in which the leave entitlement arises, including:**

**(b) the circumstances in which leave may be accessed (e.g. attending an appointment related to the violence); and**

**(c) who may access the entitlement**

84. If, despite NatRoad’s submissions, the Commission decides to include unpaid family and domestic violence leave provisions in the Road Transport Awards, in relation to the above questions, NatRoad seeks to rely on its [preliminary submissions of 27 July 2017](#).
85. Further, NatRoad considers that there must be a direct and immediate relationship between the violence and the purpose of accessing of the leave. For example, if the employee needs to move house urgently, needs to attend unscheduled court hearings, or to have an emergency medical assessment (for example in the case of sexual assault or other trauma).
86. Where there is some capacity to use other forms of leave in such circumstances, consideration should be given to requiring that the other form of leave is required to be utilised in the first instance.

**2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.**

**2.4 How would an employee access the entitlement (notice and evidentiary requirements)?**

**2.5 The availability of leave for part-time and casual employees.**

**2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.**

**2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.**

87. If, despite NatRoad’s submissions, the Commission decides to include unpaid family and domestic violence leave provisions in the Road Transport Awards, in relation to the above questions, NatRoad seeks to rely on its [preliminary submissions of 27 July 2017](#).
88. Further, in NatRoad’s view, it would be logical for part-time employees to only be entitled to a pro- rata amount of the leave to which full-time employees are entitled (which in the case of the *Road Transport (Long Distance Operations) Award 2010*, is currently nil as there is no entitlement to part-time work).
89. Casual employees should not be entitled to unpaid leave as they generally have a right to refuse work: *Reed v Blue Line Cruises Pty Ltd* (1996) 73 IR 420 at 425. Casual employees also

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Myhill, ‘Measuring Coercive Control: What Can We Learn From National Population Surveys?’ (2015) 21(3) *Violence Against Women*, 355, 357.

<sup>20</sup> Andy Myhill, ‘Measuring Coercive Control: What Can We Learn From National Population Surveys?’ (2015) 21(3) *Violence Against Women*, 355, 358, citing Evan Stark (2007).

receive a casual loading to compensate for the lack of entitlement most forms of leave that apply to full-time and part-time employees.

90. In NatRoad's view, the confidentiality provisions are unnecessary because employers generally maintain appropriate levels of privacy and confidentiality with respect to their employees. There is also legislation such as the *Privacy Act 1988* (Cth) which contains provisions relating to dealing with personal information. These provisions capture many employers.<sup>21</sup>

## **2.8 Relationship/interaction with other forms of leave.**

91. If, despite NatRoad's submissions, the Commission decides to include unpaid family and domestic violence leave provisions in the Road Transport Awards, in relation to the above questions, NatRoad seeks to rely on its [preliminary submissions of 27 July 2017](#).
92. Further, NatRoad contends that unpaid family and domestic violence leave should not be accessed in circumstances where paid personal/carer's leave is available, which is consistent with the approach in sub-section 103(3) of the FW Act which provides that an employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

## **B. Extension of the NES entitlement to personal/carers leave to domestic violence leave**

### **1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?**

93. In NatRoad's submissions the Full Bench of the Commission does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.
94. It can be argued that doing so would be inconsistent with the meaning of, and the conditions associated with the taking of personal/carer's leave under the FW Act at s 244 and s 97 respectively.
95. An award provision purporting to extend "paid personal/carer's leave" to include circumstances beyond those set out in s 97 of the FW Act (e.g. to include leave to attend an emergency hearing or to urgently organise a change of accommodation) is inconsistent with the meaning of the term 'paid personal/carer's leave' in the FW Act.
96. Section 55(1) of the FW Act provides that a modern award must not exclude any provision of the NES, except as allowed by ss 55 (2) -(5) of the FW Act.
97. The effect of s 55(1) of the FW Act was considered by a Full Bench of the Commission in *4 yearly review of modern awards—Alleged NES Inconsistencies* [2015] FWCFB 3023 where it was said that at paragraph [37] that a provision which operates to exclude the NES will not be 'an incidental, ancillary or supplementary provision...'
98. If paid personal/carer's leave may be taken for reasons beyond those in s 97, the leave cannot legitimately be considered to be 'paid personal/carer's leave', and therefore the employee would no longer be entitled to take the full NES entitlement of 10 days each year of paid personal/carer's leave for the purpose for which it was intended. An award provision with this effect would, in our view, exclude the NES and breach s.55(1).

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<sup>21</sup> See the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/privacy-law/rights-and-responsibilities>.

**2. If so, should the NES entitlement to personal/carers leave be extended to incorporate domestic violence leave?**

99. In NatRoad's submissions the Full Bench of the Commission does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave. Ergo, the NES entitlement should not be extended.

**3. If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then:**

**3.1 The circumstances in which the NES entitlement to personal/carers leave can be accessed for the purposes of domestic violence leave? This issue requires a consideration of definitional issues regarding domestic violence for the purposes of the clause, the purposes for which the leave could be accessed and who can access the entitlement.**

100. In NatRoad's submissions the Full Bench of the Commission does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave. Ergo, there are no circumstances in which the NES entitlement to personal/carer's leave should be able to be accessed for the purposes of family and domestic violence leave.

**3. If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then:**

**3.2 Should there be a cap on the amount of personal/carer's leave that can be taken for family and domestic violence leave purposes?**

101. In NatRoad's submissions the Full Bench of the Commission does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave. Ergo, the question of a cap is irrelevant.

**3.3 If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave:**

- a) should the leave entitlement be available in full at the start of each year, or accrue?**
- b) what notice and evidentiary requirements should apply?**
- c) should leave be available to part-time and casual employees?**
- d) what confidentiality provisions should apply?**
- e) should such leave count towards continuity of service?**

102. In NatRoad's submissions the Full Bench of the Commission does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave. Ergo, there should be no extension of the NES entitlement in relation to the above.

**NatRoad's Position**

103. NatRoad has a number of concerns about providing for family-flexible working arrangements in the modern awards, but particularly in the road transport industry awards.
104. In NatRoad's view it is not necessary for the Commission to vary the road transport awards to achieve the modern award objective.

## AM2015/2 – Family Friendly Leave Arrangements

### **The Union Claim**

105. The Commission's power to order that modern awards be varied to include the ACTU's family-friendly working hours clause is found in section 139(1)(b) of the *Fair Act 2009* (Cth) (the **FW Act**), which provides [emphasis added] that modern awards may include terms about the 'type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the **facilitation of flexible working arrangements, particularly for employees with family responsibilities.**'<sup>22</sup>
106. The Australian Council of Trade Union's (the **ACTU's**) proposed variation includes a right to part-time work for full-time employees, or reduced hours of work for employees who are already part-time or casual.<sup>23</sup>
107. The ACTU seeks to vary all modern awards, including those of most significance to the road transport industry and NatRoad members (namely, the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*) by including a clause relating to family-friendly issues.
108. Specifically, the ACTU seeks **to provide employees with an entitlement to temporarily reduced hours of work to accommodate their parenting and/or caring responsibilities** [paragraph 1 of [ACTU's 10 May 2017 submissions](#)].
109. The ACTU's original claim filed on 15 June 2015 related solely to 'primary carers' returning from parental leave.
110. The claim was subsequently amended to entitle both men and women with parenting responsibilities (whether or not they have taken parental leave and whether or not they are 'primarily responsible' for caring for the relevant child) to reduce their working hours to accommodate their parental responsibilities.<sup>24</sup>
111. The ACTU's original claim did not apply to 'carers' but the proposed amended clause does.<sup>25</sup>
112. The amended clause includes a 'right to revert' to former working hours up to when a child reaches school age (in respect of employees with parenting responsibilities) or for up to two years from the commencement of a family-flexible working arrangement (in the case of other carers).<sup>26</sup>

### **Rationale**

113. The ACTU points out that Australia has one of the highest rates of part-time work in the developed world and that the majority of this work is performed by women. This leads to negative ramifications for women over their working lives as evidenced by reduced earnings and superannuation accumulation. Further, the national economy is also adversely impacted by this disparity.<sup>27</sup>
114. While acknowledging that family-friendly work arrangements cannot address all the unfair consequences of women's under-representation in paid work and over-representation in unpaid work, the ACTU argues for structural reform to enable increased and more secure paid employment for parents and carers over the work life-cycle.<sup>28</sup>

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<sup>22</sup> ACTU 10 May 2017 submissions, paragraph 21.

<sup>23</sup> *Ibid*, paragraph 25.

<sup>24</sup> ACTU 10 May 2017 submissions at paragraphs 176-177.

<sup>25</sup> Defined in the ACTU clause as an employee who is 'responsible for providing personal care, support and assistance to another individual who needs it on an ongoing or indefinite basis because that other individual has a disability; a medical condition (including a terminal or chronic illness); or is frail and aged': paragraph 178 of the ACT 10 May 2017 submissions.

<sup>26</sup> ACT 10 May 2017 submissions paragraphs 184-185.

<sup>27</sup> ACTU 10 May 2017 submissions at paragraph 2.

<sup>28</sup> *Ibid*, paragraph 3.

## **Historical Overview of Flexible Work in Australia**

115. Since the late 1980s, part-time work has been a commonplace term of employment in Australia.<sup>29</sup> At this time, the necessity for a more flexible labour force was considered as part of the structural efficiency principle (**SEP**).<sup>30</sup> Consequently, the issue of part-time work (and casual employment) was, in the view of the Full Bench of the Australian Industrial Relations Commission (**AIRC**), an issue to be considered for award inclusion.<sup>31</sup>
116. In 1990, in the *Parental Leave Case*,<sup>32</sup> the Full Bench of the AIRC noted that ‘*there are a number of reasons why part-time work should be more generally available for both men and women.*’
117. In 2005, in the *Parental Leave Test Case*, both the ACTU and a number of employers sought a range of variations to award provisions that would better assist employees to balance work and family responsibilities. The Full Bench of the AIRC was supportive of rights to request parental leave and part-time work for a period after a return from such leave. Following the publication of its decision, however, the Commonwealth Government enacted the Work Choices legislation, which excluded these rights as allowable award matters.<sup>33</sup> Nevertheless almost 20 percent of approximately 2200 pre-modern awards were varied to include some form of parental leave.<sup>34</sup>
118. In 2009, the new FW Act contained a right for parents and carers to request part-time work (section 65). By the time the modern awards came into effect in 2010, all but seven of the 122 modern awards included clauses allowing part-time work, though all contained compulsory flexibility terms.<sup>35</sup> Those that still do not contain provision for part-time work (now only six awards) do provide for casual or contract work.<sup>36</sup>
119. In 2014, the Australian Human Rights Commission (the **AHRC**) published the outcomes of its research around pregnancy discrimination and return to work. The ARHC survey showed that 36 per cent of employees returning to work after the birth or adoption of a child experienced discrimination when requesting flexible working arrangements.<sup>37</sup> Other research indicates that family-friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces.<sup>38</sup>

### **The Union Case: Necessity**

120. A term should be included in a modern award “*only to the extent necessary to achieve the modern award objective.*”<sup>39</sup>
121. The ACTU suggests that pointing to existing rights to flexible work is insufficient to meet the claim of necessity because those rights are (currently) inadequate. The imbalance of power between employees and employers often negates the right to request flexible work and the ACTU therefore seeks to tilt the (flawed) starting assumption that all employees are available to work full-time to one which recognises employees need to reconcile work and family obligations.<sup>40</sup>

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<sup>29</sup> Ibid, paragraph 26. We note though that part-time work is still not provided for under the *Road Transport (Long Distance Operations) Award 2010*.

<sup>30</sup> Under this principle (wage) increases were available if parties to an award formally agreed to cooperate positively in a fundamental review of the award with a view to implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs: <https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/historical-material/methods-wage-adjustment-10>

<sup>31</sup> ACTU 10 May 2017 submissions at paragraph 27.

<sup>32</sup> (1990) AIRL 284, 8

<sup>33</sup> ACTU 10 May 2017 submissions at paragraphs 35-38.

<sup>34</sup> Ibid paragraph 39.

<sup>35</sup> Ibid paragraph 40.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 42, 45.

<sup>38</sup> Ibid, paragraph 45.

<sup>39</sup> Section 10 of the FW Act.

<sup>40</sup> ACTU 10 May 2017 submissions at paragraph 46.



122. The ACTU argues the proposed family-friendly clause is necessary seven key reasons:
- a. both men and women regard employment, parenthood and caring as important aspects of their lives;
  - b. caring for young children falls largely to women (who therefore make-up the majority of part-time workers with dependent children);
  - c. part-time work is insecure and precarious and doesn't properly support re-entry to the full-time work when the employee is able to do so;
  - d. family responsibilities negatively impact on the employment patterns and occupational status of mothers;
  - e. existing regulations do not meet the needs of parents and carers;
  - f. there is pervasive discrimination against mothers in the workplace; and
  - g. there would be economic and productivity benefits to employees, employers, and the national economy if more women were able to work.<sup>41</sup>
123. In support of the claimed reasons supporting 'necessity' for a family-friendly clause in awards, the ACTU states *inter alia*:
- a. since the early 1970s female participation in the labour force has increased while male participation has fallen – and rates are converging (but not the same),<sup>42</sup>
  - b. as at February 2017, 47 per cent of women worked part-time<sup>43</sup> compared to 18.7 per cent of men (the higher rates of part-time employment for women is not a proxy for flexible working arrangements; not all part-time employment is voluntary) with a considerable growth in part-time employment since 2000 (an increase of 57 per cent for women and 94 per cent for men),<sup>44</sup>
  - c. women commonly used working part-time (39 per cent) and flexible working hours (40 per cent) to reconcile work and family obligations as compared to 5 per cent and 30 per cent of men using these respective arrangements for those reasons;<sup>45</sup>
  - d. the use of part-time work by mothers to manage parenting responsibilities has declined and remains almost non-existent for fathers;<sup>46</sup>
  - e. the 'right to request' flexible working arrangements is not enforceable and there is no capacity for employees to challenge adverse decisions;<sup>47</sup>
  - f. about 18 per cent of women who transition from full-time to part-time work experience an occupational downgrading by way of a move from permanent to casual work compared to 30 per cent of fathers (though only a small number of fathers make this transition) – 'parenting can be costly in terms of job security';<sup>48</sup>
  - g. the largest increase in part-time employment between 2007-2014 was in women in high income brackets;<sup>49</sup>

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<sup>41</sup> Ibid, paragraph 47.

<sup>42</sup> Ibid, paragraphs 50, 58, and 62.

<sup>43</sup> 'Part-time' employment refers to less than 35 hours per week (whether permanent or casual) ACTU 10 May 2017 submissions at paragraph 74.

<sup>44</sup> Ibid, paragraphs 70, 72, 74.

<sup>45</sup> Ibid, paragraph 76.

<sup>46</sup> Ibid, paragraph 110.

<sup>47</sup> Ibid, paragraph 111. But what about general protections and discrimination causes of action? To this end see paragraph 126.

<sup>48</sup> Ibid, paragraphs 87(d) and 89.

<sup>49</sup> Ibid, paragraph 99.

- h. the fertility rates of Australian women have declined from a peak of 3.6 babies per woman in 1961 to below 2 babies per woman in 2002, with average fertility rates of 1.8 - 2.0 births per woman from 2005-2015;<sup>50</sup>
- i. Australia's '*dependency ratio*'<sup>51</sup> is increasing with (apparent) implications for workforce participation (that is, there is an assumption that people >65 have more (family) care needs which will need to be met by workers – and predominantly female workers who bear the brunt of child, disability, long-term condition, and elder care);<sup>52</sup>
- j. women in low income households tend to increase their attachment to paid work when informal care needs arise, whereas other women are more likely to drop out of the paid workforce to accommodate those obligations;<sup>53</sup>
- k. Australia's "*employment ratio*"<sup>54</sup> (which 'are primarily influenced by gender, the life cycle, and the economic business cycle') suggests a gender gap of 11 per cent in favour of men (with more men working across all stages of the life cycle except for teenagers) with the gender gap greatest during women's peak child-rearing ages of 30-39;<sup>55</sup>
- l. after children, most men continue to work full-time, regardless of the age of their children, while most women aged 35-44 with children work part-time, with sole parents more likely to need family-friendly work arrangements to maintain their connection to the workforce;<sup>56</sup>
- m. in couples *without dependent children* where the male/partner worked full-time, 23.2 per cent of female/partners worked part-time compared to 34.5 percent if there were dependent children;<sup>57</sup>
- n. the majority (46.3 per cent) of women in couples of working age *without dependent children* worked full-time<sup>58</sup> compared to 32 per cent who worked part-time<sup>59</sup> (**note this is incorrect** – the figure is in fact 31.2 per cent);<sup>60</sup>
- o. the majority (38 per cent) of women in couples of working age *with dependent children* worked part-time<sup>61</sup> (**note this incorrect** – the figure is in fact 39 per cent) compared to 29 per cent who worked full-time<sup>62</sup> (**note this is incorrect** – the figure is in fact 28.4 per cent);<sup>63</sup>
- p. thirty per cent of female/partners *with children* are not in the workforce (**note this is incorrect** – the correct figure is 21 per cent with 9 per cent marginally attached to the workforce) compared to 19 per cent of those without dependent children (**note this is incorrect** – the correct figure is 14.2 percent with 5 percent marginally attached to the workforce);<sup>64</sup>
- q. the number of mothers in employment increased dramatically (from 69 to 89 per cent) as the age of their youngest child increased<sup>65</sup>, while the proportion of fathers in employment remained above 90 per cent regardless of the age of the youngest child [**note that this**

<sup>50</sup> Ibid, paragraph 53.

<sup>51</sup> The ratio of people >65 ("dependents") to those of "working age" (15-64); dependents per 100 persons of working age.

<sup>52</sup> ACTU 10 May 2017 submissions at paragraph 56-57, 78-79

<sup>53</sup> Ibid, paragraph 80.

<sup>54</sup> The number of employed persons/civilian population > 5 years of age.

<sup>55</sup> ACTU 10 May 2017 submissions at paragraphs 59, 62

<sup>56</sup> Ibid, paragraphs 63-64.

<sup>57</sup> Ibid, paragraph 67 and Report of Dr Ian Watson dated 4 May 2017 (the **Watson Report**) at table 3.4 on page 42

<sup>58</sup> Ibid, paragraph 19 and the *Watson Report* at table 3.4 on page 42.

<sup>59</sup> ACTU 10 May 2017 submissions at paragraph 68.

<sup>60</sup> See the *Watson Report* at table 3.4 on page 42.

<sup>61</sup> ACTU 10 May 2017 submissions at paragraph 68.

<sup>62</sup> Ibid.

<sup>63</sup> See the *Watson Report* at table 3.4 on page 42.

<sup>64</sup> ACTU 10 May 2017 submissions at paragraph 68 and the *Watson Report* at table 3.4 on page 42.

<sup>65</sup> The cost and availability of childcare is likely to be a factor in this disparity.

**refers to cases where children were in childcare** - where children *did not attend childcare* the number of male parents employed was about 88 per cent);<sup>66</sup>

- r. the gender pay gap in weekly earnings is 31 per cent – this inequity is compounded when assessing life time earnings and superannuation (with a 53 per cent gap between the average individual superannuation account balance of men and women aged 50);<sup>67</sup>
- s. the greatest contributing factor to the gender pay gap is sex discrimination (38 per cent) followed by industrial and occupational segregation – with lower rates of return for education being indicative of workplace discrimination and industries and occupations with more male employees attracting high rates of pay);<sup>68</sup>
- t. (the ACTU asserts) the right to family-friendly working hours to accommodate caring responsibilities can reduce work/life interference;<sup>69</sup>
- u. a minority of Australian employees *cannot or do not* access family-friendly working arrangements which are (apparently) far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces;<sup>70</sup>
- v. while about 20 per cent of all employees request flexible working arrangements each year<sup>71</sup> and most (63 – 90 percent) are granted, of those who *do not* request flexibility, many<sup>72</sup> are discontented with their working arrangements – a large number of these ‘discontented non-requestors’ were men who did not ask for reasons such as:
  - i. (a belief in) anticipated refusal;
  - ii. (a belief) leadership frowned on flexible work; and
  - iii. (a belief) the workplace was openly hostile to flexible
- w. according to a 2013 Ernst and Young Report, ‘*women in flexible work roles*’ (*part-time, contract or casual*) *appear to be the most productive members of our workforce*’ and that Australian and New Zealand employers could save at least \$1.4 billion by employing more productive females in flexible roles (including by reducing absenteeism and staff turnover);<sup>73</sup> and
- x. according to a 2017 OECD report of Australian labour force participation, inactive women and/or women working part-time (who are more likely to be caring for young children) are one of the greatest sources of untapped potential;<sup>74</sup>

## **Evidence**

124. In support of its proposed award variation, the ACTU seeks to rely on the evidence of three expert and 12 lay witnesses. An outline of the expert evidence obtained is provided below.

### **Professor Siobhan Austen**

125. The expert evidence of [Professor Siobhan Austen](#) focuses on what impacts (including any differences between males and females), if any, (a) being a parent and/or (b) being a carer has on female and male employees in respect of: (a) Labour force participation rates over time,

<sup>66</sup> ACTU 10 May 2017 submissions at paragraph 69 and the *Watson Report* at [113] – [114] on page 51.

<sup>67</sup> ACTU 10 May 2017 submissions at paragraphs 93-95.

<sup>68</sup> *Ibid*, paragraphs 99-100, 102.

<sup>69</sup> *Ibid*, paragraph 107.

<sup>70</sup> *Ibid*, paragraph 109.

<sup>71</sup> Associate Professor Jill Murray, ‘*Report to the Fair Work Commission*’ May 2017, page 3, paragraph 2. This rate has not changed markedly since the introduction of section 65 (the right to request flexible working arrangements) of the Fair Work Act 2009 (Cth) in 2010.

<sup>72</sup> According to Dr Murray, about one-quarter of employees who are not happy with their working arrangements do not make a request for change. *Ibid*, paragraph 5.

<sup>73</sup> *Ibid*, paragraphs 150-151.

<sup>74</sup> *Ibid*, paragraph 156.

including where possible information about participation rates after an employee has ceased being a parent or carer; (b) The nature of labour force participation and experiences of paid work over time, including, without limitation, changes in employment status (e.g., permanent, casual, contract), industry and enterprise- (e.g., retail, education, construction); and skill levels (e.g., skilled and unskilled labour); and (c) Lifetime earnings (including superannuation).

### Dr Ian Watson

126. The expert evidence of [Dr Ian Watson](#) focuses on the

**(A) The paid work and the paid workforce** - the demographic profile of the Australian working population based on the most recent available data, addressing the following factors and including a discussion of recent and/or long-term trends where relevant: (a) The absolute size and composition of the paid workforce; (b) The relative size of the working age population compared with the total population; (c) The age structure of the Australian population; (d) The dependency ratio in Australia; (e) The size of the paid workforce relative to the working age population; (f) The employment rate, disaggregated by gender and age; (g) The number of working parents and carers, disaggregated where possible by the age of the child or children, and by gender; (h) Australian fertility rates; (i) The proportion of men and women in the paid workforce, disaggregated by age group; (j) The number of hours of paid work undertaken by those in the paid workforce, disaggregated by age and gender; and (k) Any other factors you consider are relevant, explaining why.

**(B) Families, households and unpaid caring/parenting responsibilities** – the profile of the composition and size of Australian families and households based on the most recent available data, addressing the following factors and including a discussion of recent and/or long-term trends where relevant: (a) The number of households in Australia; (b) The number of people per household; (c) Different types of family structures; (d) The geographic location of families and households; (e) When children leave the family home; (f) Participation of family members in higher education; (g) Marriage, separation and divorce; (h) Child bearing; (i) The living arrangements of older people, children and adults with a disability; (j) The size and nature of the dependent population.

**(C) Combining paid work and unpaid parenting/caring responsibilities** - the relevant data, including a discussion of recent and/or long-term trends where relevant, on whether and how Australians combine paid work and unpaid caring and/or parenting responsibilities, including (if possible): (a) the number of individuals, families; households and employees with unpaid caring and/or parenting responsibilities (distinguishing between parenting and caring responsibilities), and (b) the characteristics of such employees and their working arrangements.

### Dr Jill Murray

127. The expert evidence of [Dr Jill Murray](#) focuses on the effectiveness of the 'right to request' flexible working arrangements under section 65 of the FW Act, the right to return to pre-parental leave positions etc, under section 84 of the FW Act, the effectiveness of the individual flexibility arrangements (IFA) in modern awards as per section 144 of the FW Act (particularly in relation to those with caring roles), and information about the nature and use of the above mechanisms in respect of things like the characteristics of employees and employers (e.g. age, gender, employment status, award-covered, enterprise agreement-covered, etc.,) and the size of the employer's business).

128. Dr Murray's evidence provides that even though almost 1 in 5 Australian workers request flexible working arrangements each year, the majority of requests are not made under section 65 of the FW Act (also referred to as the National Employment Standards 'right to request' provision).<sup>75</sup> Most requests are made of large and medium employers and most are

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<sup>75</sup> The *Murray Report*, May 2017, page 3, paragraph 2. This rate has not changed markedly since the introduction of section 65 (the right to request flexible working arrangements) of the *Fair Work Act 2009* (Cth) in 2010.

approved.<sup>76</sup> The main reason for refusal was operational grounds including the difficulty of finding another person to cover someone working part-time.<sup>77</sup>

129. Women make most requests for flexible work, while men, including fathers are most likely to continue working full-time.<sup>78</sup> Most requests are also made in female-dominated industries and by permanent, rather than casual or fixed-term contract workers.<sup>79</sup>
130. The utilisation of Individual Flexibility Arrangements (**IFAs**) (which are available under the modern awards) is low at about 2% of all Australian workers. Sixty percent of employees who had initiated an IFA identified the goal as being better managing non-work commitments.<sup>80</sup>

### **NatRoad's Position**

131. NatRoad has a number of concerns about providing for family-flexible working arrangements in the modern awards, but particularly in the road transport industry awards.
132. One of NatRoad's key concerns is that the ACTU is seeking to address what is, on its own evidence, very much a (female) gendered problem, through making changes to the awards covering what is not only a very male-dominated industry, but also an industry dominated by small business enterprises which can ill-afford such provisions - even if the evidence existed that family-friendly work arrangements were relevant to or necessary in the road transport industry.
133. NatRoad contends that there is no such evidence.
134. For NatRoad's members, concerns centre chiefly around things like:
  - a. the existing (yet under-utilised) access to flexible working arrangements via mechanisms such as IFAs;
  - b. workforce issues (e.g. existing skills shortage in the industry, an ageing workforce, the difficulty of attracting young workers, and increased casualisation, etc.);
  - c. the possible adverse consequences on the industry's workforce in response to changes in technology (e.g. the introduction of autonomous vehicles will likely see a reduction in the number of truck drivers required);
  - d. the heavy cost and regulatory burden already impacting on the industry;
  - e. the cost (particularly for small businesses) of introducing such provisions;
  - f. the adverse impact on operations (e.g. if the driving task is from Melbourne to Cairns or Sydney to Perth, it is difficult to work those jobs around part-time or family-friendly working arrangements);
  - g. and the lack of evidence around the need for such provisions, particularly in a male-dominated industry such as the road transport industry.

### **Existing Access to Workplace Flexibility**

135. About 25% of Australian workers are not happy with their working arrangements and yet they do not request a change.<sup>81</sup> If these workers do not seek change by using existing rights, why would they be likely to seek change or flexible working arrangements if they were provided with additional rights - particularly males working in a male-dominated industry?

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<sup>76</sup> The *Murray Report*, May 2017, page 4, paragraph 8.

<sup>77</sup> The *Murray Report*, May 2017, page 4, paragraph 10.

<sup>78</sup> The *Murray Report*, May 2017, page 3, paragraph 6.

<sup>79</sup> The *Murray Report*, May 2017, page 4, paragraph 7.

<sup>80</sup> The *Murray Report*, May 2017, page 4, paragraph 18-19.

<sup>81</sup> The *Murray Report*, May 2017, page 3, paragraph 5.

136. In NatRoad's experience the under-utilisation of IFAs and group facilitative provisions under the award system, particularly in the road transport industry, is due to a number of factors.
137. Importantly, this includes a lack of knowledge by both employers and employees about the existence and possibilities of IFA. This is an education issue (including about improving general community and industry awareness and knowledge of awards) not a rights, entitlement or access issue.
138. NatRoad is continually advising members about the benefits of IFAs and is seeing a gradual increase in uptake with increased awareness of the benefits of IFAs. NatRoad considers IFAs provide a viable alternative but under-utilised alternative to including family-friendly work arrangements in the modern awards.

### **Workforce Issues**

139. There are 48,747 registered businesses in the road freight transport industry ranging from single truck operators to large multi-national corporations with a projected employment growth of 4.5% to 2022.<sup>82</sup> The transport and logistics business composition is 97.7% small business, 2.1% medium business, and 2.0% large business, with New South Wales being home to 36% of these businesses.<sup>83</sup>
140. There has been an increased casualisation of the workforce in the period 1984 to 2016 and part-time work in the period has doubled from 10% to more than 20% in 30 years.<sup>84</sup>
141. The majority (87.17 per cent) of employers reported experiencing a skills shortage in the last 12 months, with truck drivers being number one on the skills shortage list. The reasons for the skills shortages were identified by employers as being shortage of skilled/qualified persons, ageing workforce/current staff retiring, remuneration, employment conditions, unattractive job/poor industry image (not seen as 'professional'), and the cost/time to achieve the requisite qualification.<sup>85</sup> Career progression is often limited in driving roles and career pathways are often not clear and the workforce is the second oldest workforce in the country, with a large proportion of workers set to retire in the next decade.<sup>86</sup>
142. The nature of the industry workforce as outlined above, including the predominance of small business, the significant level of skills shortage and recruitment difficulties are all factors that make including family-friendly working arrangements in the road transport industry awards, extremely problematic.

### **Technology Issues**

143. The sector is changing at a phenomenal pace. Transport companies require their workforce to be agile and responsive to meet the skills demands created by new technologies, automation and other innovations as they evolve.<sup>87</sup>
144. In Australia, mining companies are already using autonomous vehicles. Transport vehicles or robots, equipped with artificial intelligence (**AI**) technology allowing the transport of materials to a target location while calculating the optimal route and avoiding humans and obstacles is already available. The introduction of automation and robotics in the industry will have a major impact on the economy and workforce as well as other supporting industries with some asserting that driverless truck technology will be implemented in Australia within the decade.<sup>88</sup>

<sup>82</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 7.

<sup>83</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 11.

<sup>84</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 21.

<sup>85</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 25.

<sup>86</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 26.

<sup>87</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 29.

<sup>88</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 13.

145. Crowdsourcing delivery or transport management systems is already a reality. The lessons learnt from Uber and other service platforms is that businesses need to be proactive when devising strategies for providing better services to customers or risk being left out of the market. The impact of new technologies on industry jobs of the future cannot be underestimated and both the Commission and employee organisations need to be mindful of these changes.<sup>89</sup>
146. As increased automation and driverless vehicle technologies develop, it is probable that employers may elect to increasingly use them to do the traditional work of truck drivers, particularly when costs and the regulatory burden on business, and the costs, entitlements and demands of employee drivers, increase.

### ***Part-time Employment***

147. Access to part-time work is currently not available under the *Road Transport (Long Distance Operations) Award 2010*. It seems incongruous to introduce provisions for family-friendly working arrangements (which essentially permit a form of part-time work) into an award which does not yet even have access to part-time work.

### ***The Regulatory Environment***

148. Changes to the regulatory environment directly affect the industry's workforce with companies requiring to upskill or re-train workers to meet new requirements e.g. changes to the Heavy Vehicle National Law such as chain of responsibility and fatigue management, and changes to work health and safety (**WHS**) laws. Industry has indicated that compliance, WHS skills and driving are the highest priority over the next five years.<sup>90</sup>
149. Availability for upskilling and/or re-training of employees to ensure compliance may be adversely impacted through paid/unpaid absences on account of any family-friendly working arrangements that may be in place.

### **Conclusion**

150. In conclusion, NatRoad does not support the introduction of family-friendly working arrangements into the road transport industry awards.

### **National Road Transport Association**

1 September 2017

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<sup>89</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 15.

<sup>90</sup> Australian Industry Standards, Transport and Logistics IRC [Skills Forecast 2017](#) at page 33.