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AM2015/2 Family Friendly Working Hours Submissions in Response

30 October 2017

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Chamber of Commerce
and Industry

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1. IN SIMPLICITER

1.1 The Australian industrial framework has operated on a fundamental principle that it is the employer who ultimately organises labour within their business.

1.2 While an employer's ability to do this may be conditioned (especially in the modern age by the need to consult) it is still for an employer to determine how to deploy labour.

1.3 There is no doubt that over the past century there has been a conditioning and moderation of 'managerial prerogative' as industrial relations has moved into a contemporary world of employee engagement, values based leadership and workplace culture.

1.4 Despite this progression, this Commission, as well as all of its predecessors, has never allowed an employee to stand in the shoes of their employer and to dictate when and how they are going to work.

1.5 These proceedings therefore concern a claim which goes beyond that which has been considered in Australian industrial relations history and it is not an exaggeration to say that the Commission is now being asked to cross the 'Rubicon', fundamentally altering the paradigm under which an employer operates a business.

1.6 These proceedings require the Fair Work Commission (**Commission**) to determine whether the operation of the *Fair Work Act 2009* (Cth) (**FW Act**) requires 121 modern awards to be varied to include a clause outlined in the ACTU's draft determination filed 18 May 2017 (**Claim**).

1.7 The Claim would compel an employer to accept any request from an eligible employee for 'family friendly hours' to accommodate parental or caring responsibilities. Critically, no right of refusal would be provided to an employer, no matter how justified or warranted.

1.8 The Claim is made as part of the 4 Yearly Review of Modern Awards (**Review**) and occurs in a context where there already exists a right under s 65 of the FW Act to request flexible work arrangements.

1.9 The ACTU submits that existing regulatory approaches are not meeting the needs of parents and carers because access to flexible working arrangements is arbitrarily and inequitably granted, unable to be enforced in most cases, and even when granted, can involve occupational downgrading in the form of less secure and lower status work.[1] In appealing to the development of

[1] ACTU Submissions filed 9 May 2017 (**ACTU Submissions**) at [2]

industrial norms through test cases, the ACTU presents its Claim as the 'next chapter' in the development of family friendly working arrangements.

1.10 The Australian Chamber unreservedly opposes the Claim.

1.11 No coherent understanding of a fair and relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer.

1.12 In these submissions the Australian Chamber will:

Part A (Section 2)

Identify the Australian Chamber's understanding of the mechanics of the Claim.

Part B (Sections 3, 4 & 5)

Identify the Commission's traditional approach to intervening role in the organisation of labour, the relevance of industrial test cases and the relevant statutory context in which the Commission now operates.

Part C (Section 6)

Identify the scope and operation of s 65 of the FW Act and related statutory discrimination protections.

Part D (Sections 7, 8)

Address whether the Claim is jurisdictionally barred by s 55 of the FW Act.

Part E (Sections 9, 10)

Engage with the factual matters presented by these proceedings including our initial analysis of the evidence and an outline of the Claim in the international context in which it is made.

Part F (Section 11)

Assess the Claim against the Modern Awards Objective.

1.13 In doing so, the Australian Chamber will establish the following:

(a) the Claim is either beyond the jurisdiction of the Commission or so fundamentally contradicts the intended operation of the FW Act that it should be refused;

(b) in seeking to remove the ability of an employer to refuse a flexible work request, the Claim could not operate practically, particularly for small businesses;

(c) the Claim cannot be considered appropriate in a fair and relevant minimum safety net as it removes the ability of businesses to make decisions as how to roster their labour; and

(d) the existing provisions of the FW Act (specifically s 65) and informal arrangements operate appropriately in facilitating flexible work arrangements and this is made out by the ACTU's own case.

Australian Chamber of Commerce and Industry

PART A

2. HOW THE CLAIM APPEARS TO WORK

2.1 We identify below the Australian Chamber's understanding of the practical operation of the Claim.

2.2 We undertake this exercise at the outset in order to identify the case we are responding to and to create a reference point for our merit arguments to follow.

2.3 The Australian Chamber understands that the Claim would create an 'entitlement' to Family Friendly Working Hours, defined as an employee's existing position on a part-time basis (if the employee is fulltime) or on a reduced hours basis if the employee's existing position is part-time or casual, to accommodate the employee's parenting (sole or joint responsibility for a child of school age or younger) and/or caring responsibilities (**Flexibility Entitlement**).

2.4 The 'content' of the Flexibility Entitlement appears to have two principal characteristics, namely:

(a) an entitlement to reduced hours;

(b) an entitlement to hours which '*accommodate'* individual parental and caring responsibilities.

2.5 The Claim includes no right of refusal for an employer on any grounds.

2.6 The Claim also provides an employee with a reversion right to return to their original hours:

(a) up until their child is school aged (or at a later time by agreement);

(b) in the case of carers, within a two year period from the commencement of the family friendly arrangements (or at a later time by agreement).

(Reversion Entitlement)

2.7 To be eligible to access the Claim, an employee is required to have six months of service with the employer and sufficient evidence that they have the parenting or caring responsibilities which are the subject of the request (**Eligibility**). Eligibility extends to both permanent and casual employees.

2.8 On the basis of the above, we consider the following observations flow from the operation of the clause:

Flexibility Entitlement

2.9 An eligible employee under the Claim would in effect have the ability to determine his or her hours of work so long as those hours were referable or calibrated to the accommodation of the employee's parenting and/or caring responsibilities. This is an extraordinarily broad proposition.

2.10 The effect of Flexibility Entitlement is to allow an employee to unilaterally:

(a) redefine the contractual relationship;

(b) dictate their hours of work; and

(c) dictate when they will work those hours.

2.11 The Claim includes no right of refusal for an employer on any grounds leaving the employer to stand blithely by as the employee dictates in part how the employer's business is to be run.

2.12 Given that, in the case of parents, the Claim could be accessed by employees with either sole or joint parenting responsibilities, this means that parents would in effect be entitled to determine their preferred parenting/caring arrangements and then compel their employer/s to provide hours of work tailored to these arrangements.[2]

2.13 While the ACTU submissions in some way seek to limit the significance of the Claim to merely a reduction in hours, in granting employees an entitlement to work hours which '*accommodate*' their parenting and caring responsibilities, it appears the Claim as drafted would enable employees, on an unrestricted basis, to determine:

(a) their number of hours of work per week;

(b) the days on which they work; and

(c) the times at which they work including their starting and finishing times.

2.14 An employee's ability to determine his or her hours under the Claim:

(a) does not appear to be restricted by a limit on the number of times an employee could request changes, or the frequency of those requests (notwithstanding the ACTU's submission that the clause envisages that there will be one family friendly working hours arrangement per child);[3]

[2] It would not, for example, be sufficient to merely reduce a full time employee's hours of work from 38 to 37 in order to satisfy the requirements of the Claim.
[3] See ACTU Submissions at [184]

(b) does not appear to be conditioned by the availability of part-time employment under the terms of the relevant modern award;[4]

(c) is not conditioned by any limitation on whether the employee can be practically or efficiently substituted;

(d) does not appear to be limited by the ordinary operating hours of an employer or to an employer's requirement for labour (e.g. an employee could elect to work nights in circumstances where their employer operated during the day);

(e) may entitle an employee to work hours to which penalty rates apply (e.g. an employee could elect to work early morning, late nights or weekends); and

(f) may not have an effect on any relevant minimum engagement period (e.g. circumstances the employee elects to work 2 hours in circumstances where the relevant minimum engagement is 3 hours).

2.15 In respect of eligibility, the Claim:

(a) would be accessible from the time an employee had a child up until their youngest child completed school. This period of eligibility for parents would conceivably range from 16 years in the case of a parent with one child and would have no upper limit. In respect of parental responsibilities, the Claim would be accessible to all employees with either sole or joint responsibility; and

(b) would be available at *any* time the employee undertook caring responsibilities. Assuming caring responsibilities may arise under the Claim in respect of the care of "*frail and aged*" parents, an employee's eligibility under the Claim as a parent as their children grow older may in fact overlap with their eligibility as a carer for their parents. As such, in the case of many employees, this would provide a right to determine their hours of work for the majority of their working lives.

[4] Six modern awards do not have part time provisions
(i) *Road Transport (Long Distance Operations) Award 2010* (but does provide for casual employment);
(ii) *Maritime Offshore Oil and Gas Award 2010* (but provides for relief or project-based employment);
(iii) *Seagoing Industry Award 2010* (but does provide for casual employment);
(iv) *Stevedoring Industry Award 2010* (but does provide for casual employment, and for less than full engagement);
(v) *Mobile Crane Hiring Award 2010* (but does provide for casual employment, and part-time work for casual employees); and
(vi) *Professional Diving Industry (Industrial) Award 2010* (but does provide for casual employment).

Reversion Entitlement

2.16 While the Reversion Entitlement does include a time limit on the ability to revert to 'former working hours' (creating a 2 year 'window' for carers and approximately a 5-6 year 'window' per child for a parent), the Flexibility Entitlement is not likewise limited.

2.17 This appears to mean that under the Claim an employee with a 10 year old child could require an employer to provide reduced hours, notwithstanding that they would have no entitlement to revert.

PART B

3. THE COMMISSION'S TRADITIONAL ROLE IN INTERVENING IN THE ORGANISATION OF LABOUR

3.1 Industrial tribunals and courts in Australia have generated much jurisprudence relating to their willingness to interfere with the common law right of an employer to manage its business. Implicit in this is the balancing of employee interests with the interests of an employer in being able to operate its business as effectively and productively as possible.

3.2 While there have been shifts in thinking over the course of Australia's history, the balance of authorities and shift toward a system with enterprise bargaining at its apex suggests a reluctance to interfere with managerial prerogative absent compelling reasons.

3.3 Limitations on the impingement of managerial discretion historically rested on the interpretation of the terms "industrial disputes", "industrial matters" and "matters pertaining to the relationship between employers and employees" and were anchored back to constitutional constraints under the federal conciliation and arbitration power.[5]

3.4 An award would typically bind the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents.

3.5 Notwithstanding this historical position, a decisive shift has occurred since this time.

3.6 The system of workplace relations created by the FW Act has departed from the system of compulsory arbitration of industrial disputes. When it comes to the setting of conditions of employment the FW Act instead promotes a minimum safety net intended to encourage collective bargaining and, relative to a system of compulsory arbitration, does not emulate the same level of intervention in the collective relations between employees and employers.

3.7 Indeed, Awards are no longer made for the prevention and settlement of industrial disputes, they are made to interact with the NES in creating a fair and relevant minimum safety net.

3.8 Most importantly and of direct relevance to these proceedings, the FW Act does not provide an unfettered right for industrial instruments to override managerial discretion. In particular, the Commission has recognised that its task involves a balancing of the interests of both employers and employers and this is reflected in the limbs of the modern awards objective.

[5] See s 51 (xxxv) of the Constitution, the *Conciliation and Arbitration Act 1904* (Cth), *Industrial Relations Act 1988* (Cth) and *Workplace Relations Act 1996* (Cth).

3.9 The reluctance to impinge on the right of management to manage its business has endured in the range of contexts under current statutory framework as the Commission seeks to balance the interests of employers and employees.

3.10 This is little wonder given the object of the FW Act is '*to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*', by the means specified in s 3(a) to (g). Conferring on employees a unilateral right to determine their working hours would clearly disrupt this notion of 'balance'.

3.11 The ACTU submissions filed in support of the Claim take particular care to establish the place of the Claim in a line of industrial 'test cases' dealing with the intersection of family life and the workplace.

3.12 In appealing to that historical tradition of test cases, the ACTU identify that "*the issues that are relevant to ...* [the historical test] *cases appear with a degree of repetition in each decision, and remain of central relevance to this review*".

3.13 While much can be written and many things said about decisions made under past statutory schemes, an appeal to 'building' on this historical development cannot obscure the Commission's task in undertaking these proceedings.

3.14 That task, as outlined later in these submissions, involves ensuring that the industrial minimum safety net of the NES and modern awards is fair and relevant and requires the Commission to apply the relevant provisions of the FW Act. It is significant that these provisions are far more constrained than those relevant to previous test cases.

3.15 While elements of the NES minimum safety net may have had their genesis in test cases under previous statutory regimes, the minimum conditions outlined by the NES are now legislatively set. The Commission's task and focus in this review is to apply s 156 of the FW Act, not to seek to continue to 'build' on past test cases.

3.16 The task of the Commission in these proceedings is not to continue a 'project' or achieve a 'goal' of developing family friendly working conditions in the Australian industrial system as the submissions of the ACTU appears to suggest.

3.17 Notwithstanding our above comments, having regard to the history of test cases, particular regard should be had to a determination made in the *Parental Leave Test Case 2005* (2005) 143 IR 245 (**2005 Case**).

3.18 In the view of the Australian Chamber, the following comments of the AIRC in 2005 could easily be applicable to determining the Claim before the Commission now:

> *[186] ACCI... characterised the picture emerging from the evidence as "one of employees requesting all manner of conditions and arrangements to meet their needs and overwhelmingly one of employers seriously and appropriately considering such requests and responding."*
>
> *[187] We acknowledge that much of the employer evidence supports this view. Similarly, the ACCI/BCA Work and Family Award winners evidence the range of innovative ways in which work and family issues are addressed at the workplace level. But the evidence does not support the view that all negotiations about these issues are successful.*
>
> *[188] We accept that regard needs to be had to the circumstances of the business as well as to the reasons for the employee's request.*
>
> ***...***
>
> *[206] The objective underlying this claim, to assist employees to reconcile their work and family responsibilities, is one that all parties regard as important, as does the Commission. Although the employers and the Commonwealth criticised the claim, we think it has some merit in giving employees a right to raise relevant family considerations and have the employer give proper consideration to them. However, there are a number of aspects of the claim which have the potential to create problems. The provision is a complex one. It permits an employee to challenge a broad range of conditions related to hours and times of work using a detailed procedure. As important as the objective of the provision is, the risk of disruption to the organisation of work is significant. We are not satisfied that the benefits for employees outweigh the disadvantages for employers. In particular, we agree with the employers that the onus on the employer is too heavy. We refer in particular to that part of the claim which provides that an employer may only refuse the application if the*

employer can demonstrate that the employee's attendance at the workplace is necessary and no other option will meet the needs of the workplace or enterprise.

...

[254] We believe that the ACTU claim, based as it is upon a right to return to work on a part-time basis, is impractical and would impose costs and constraints on employers which could not be justified. Many businesses, particularly small and medium-size businesses, would be unable to provide part-time work and it would be unjust to require them to do so. We accept the employers' submission that employers should not be required to provide part-time work regardless of the circumstances of the enterprise.

3.19 With that finding in mind, it is now necessary to explore the statutory context relevant to the Commission's determination in 2017.

4. THE STATUTORY CONTEXT

4.1 As noted above, the Claim seeks to address matters which are already directly addressed by existing sections of the NES.

4.2 It is critical therefore, perhaps more so than in any other Review proceedings, to engage with the existing statutory provisions which bear directly on the subject matter of the Claim as well as the jurisdictional basis on which the Claim could be granted. In sequential order, we outline the relevant FW Act provisions as follows:

> ***Section 44***
> ***Contravening the National Employment Standards***
> *(1) An employer must not contravene a provision of the National Employment Standards.*
> *Note: This subsection is a civil remedy provision (see Part 4-1).*
> *(2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection 65(5) or 76(4).*
> *Note 1: Subsections 65(5) and 76(4) state that an employer may refuse a request for flexible working arrangements, or an application to extend unpaid parental leave, only on reasonable business grounds.*
> *Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection 65(5) or 76(4)).*
>
> ***Section 55***
> ***Interaction between the National Employment Standards and a modern award or enterprise agreement***
> *National Employment Standards must not be excluded*
> *(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.*

Terms expressly permitted by Part 2-2 or regulations may be included
(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
(b) by regulations made for the purposes of section 127.
Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.
(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).
Note: See also the note to section 63 (which deals with the effect of averaging arrangements).
Ancillary and supplementary terms may be included
(4) A modern award or enterprise agreement may also include the following kinds of terms:
(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
(b) terms that supplement the National Employment Standards;
but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.
Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
(b) that specify when payment under section 90 for paid annual leave must be made.
Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.
…
Terms permitted by subsection (4) or (5) do not contravene subsection (1)
(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).
Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

Section 65
Requests for flexible working arrangements
Employee may request change in working arrangements
(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the Carer Recognition Act 2010 *);*

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee--the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee--the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements
(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request
(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
(5) The employer may refuse the request only on reasonable business grounds.
(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;
(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

Section 136
What can be included in modern awards
Terms that may or must be included
(1) A modern award must only include terms that are permitted or required by:
(a) Subdivision B (which deals with terms that may be included in modern awards); or
(b) Subdivision C (which deals with terms that must be included in modern awards); or
(c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
(d) Part 2-2 (which deals with the National Employment Standards).
Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.
Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.
Terms that must not be included
(2) A modern award must not include terms that contravene:
(a) Subdivision D (which deals with terms that must not be included in modern awards); or
(b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).
Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

Section 137
Terms that contravene section 136 have no effect
A term of a modern award has no effect to the extent that it contravenes section 136.

Section 138
Achieving the modern awards objective
A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Section 139
Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

(b) 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;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

Section 142
Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

Section 146
Terms about settling disputes
Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the award; and

(b) in relation to the National Employment Standards.

Note: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Section 739
Disputes dealt with by the FWC
(1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
(2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or

(b) a determination under the Public Service Act 1999 *authorises the FWC to deal with the matter.*

Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).
(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.
(4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.
Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).
(5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
(6) The FWC may deal with a dispute only on application by a party to the dispute.

Section 740
Dispute dealt with by persons other than the FWC
(1) This section applies if a term referred to in section 738 requires or allows a person other than the FWC to deal with a dispute.
(2) The person must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the person dealing with the matter; or

(b) a determination under the Public Service Act 1999 authorises the person to deal with the matter.

Note: This does not prevent a person from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).
(3) If, in accordance with the term, the parties have agreed that the person may arbitrate (however described) the dispute, the person may do so.

(4) Despite subsection (3), the person must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

5. THE 4 YEARLY REVIEW

5.1 The relevant jurisdictional principles relating to the Review have been extensively addressed by the Australian Chamber and the decisions of the Commission over the past 4 years.

5.2 For present purposes, the most appropriate starting point is to outline the findings of the Full Bench in the 2017 Penalty Rates Case[6] as follows:

(a) The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

(b) Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

(c) In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

(d) The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

(i) the legislative context which pertained at that time may be materially different from the FW Act;

[6] [2017] FWCFB 1001 at [269]

(ii) the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

(iii) the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.

5.3 Referring to the Commission's decision in the Penalty Rates matter, the Commission's decision in *Casual Employment and Part Time Employment* [2017] FWCFB 3541 noted at [12] and [13] that:

> *"in order to be satisfied that a modern award is not achieving the modern awards objective, it is not necessary to make a finding that the award fails to satisfy one or more of the considerations required to be taken into account under s.134(1). The Commission's task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions…*
>
> *…the requirement in s.156(5) to review each award "in its own right" is intended to ensure that the review is conducted by reference to the particular terms and particular operation of each particular award, rather than by a global assessment based upon generally applicable conditions. However this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms, nor does it prevent the Commission from reviewing 2 or more modern awards at the same time."*

5.4 More recently, the Full Federal Court of Australia provided the following observation on the task of the Commission in the course of the Review in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty* Ltd [2017] FCAFC 123. In that decision, the Full Bench relevantly held:

> *[18] It is of the essence to appreciate that a modern award is not an instrument the product of agreement, or conciliation and arbitration as representing all the terms and conditions of employment of identified employees. Rather, together with the National Employment Standards its purpose is to provide a fair and relevant minimum safety net of terms and conditions.*
>
> *…*

[29] … it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

…

[46] … the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective. The circumstances of that variation and the view that some cap was necessary were involved in that evaluation, not by reference to some separate jurisdictional consideration about power, but as part of the evaluative review.

5.5 Synthesising the above considerations alongside the requirements of the FW Act into a relevant set of questions, the Commission in these proceedings in required to determine whether the Claim:

(a) is prohibited by s 55(1) of the FW Act (the threshold jurisdictional question);

(b) is allowable within the scope of ss 55(4), 139 and/or 142 of the FW Act;

(c) will result in modern awards which satisfy the modern awards objective only to the extent necessary in achieving a fair and relevant safety minimum net within the meaning of s 138; and

(d) is supported by materials consistent with the requirements of the Preliminary Issues Decision i.e. probative evidence properly directed to demonstrating the facts supporting the proposed variation[7], such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act.

[7] Preliminary Issues Decision, [2014] FWCFB 1788 at [23] and [60].

PART C

6. SECTION 65

6.1 As will be further expanded in these submissions, these proceedings squarely concern the operation of an existing element of the minimum safety net, namely s 65 of the FW Act.

6.2 The existence and operation of s 65 (as well as the practical and informal arrangements which currently exist in the labour market) render the Claim unnecessary and inappropriate.

6.3 In introducing the Claim, the ACTU Submissions provide a multifaceted critique of the operation of s 65 and state that s 65 neither provides "*a substantive entitlement to anything at all*"[8] nor does it constitute a guaranteed minimum set of enforceable employment standards.[9]

6.4 This critique, aimed at the adequacy of the NES, identifies the ability of an employer to refuse a request for reduced hours as a fundamental failing of the current minimum safety net.

6.5 The ACTU's characterisation of the existing right to request flexible work arrangements under s 65 of the FW Act is not only misguided but is inconsistent with practical reality (including statistical data relied upon by the ACTU's case).

6.6 The Australian Chamber does not accept that employers can refuse flexibility requests under s 65 arbitrarily or with impunity. Neither is it apparent that the existing elements of the current minimum safety net are failing to facilitate the creation of flexible work arrangements.

Origin of Section 65

6.7 As noted in the ACTU's Submissions, s 65 had its origins in the 2005 Case.

6.8 The Australian Industrial Relations Commission (**AIRC**) in the 2005 Case rejected an ACTU Application for an award provision obliging employers not to reasonably refuse a request from a worker with family responsibilities for '*a change in hours to enable the employee to provide care*'. Instead, the AIRC provided an entitlement for an employee to ask their employers for extensions of parental leave entitlements including a request to return to work from parental leave on a part-time basis. The 2005 Case determined that an employer was required to consider a request and could refuse it only on reasonable grounds related to the effect on the workplace or the employer's business.

[8] See ACTU Submissions at [111]
[9] See ACTU Submissions at [113]

6.9 Similar provisions were adopted into the National Employment Standards by way of s 65 of the FW Act. As originally enacted, s 65 permitted a national system employee who was a parent or had responsibility for the care of a child to ask their employer for '*a change in working arrangements to assist the employee to care for the child*'. Section 65 was amended by the *Fair Work Amendment Act 2013* (Cth) to broaden the application of the provision beyond children under school age or those under 18 with a disability to include:

(a) a parent, or person with responsibility for the care, of a child of school age or younger;

(b) a carer, within the meaning of the *Carer Recognition Act 2010* (Cth);

(c) a person with a disability;

(d) a person aged 55 or older;

(e) a person experiencing violence from a member of their family; or

(f) a person proving care or support needed by a member of their household or immediate family because that person is experiencing family violence.

6.10 Under s 65(1) of the FW Act, an employee may make a request to their employer for a change in working arrangements relating to their particular circumstances. A note to the subsection indicates that such changes could include changes in hours of work. Section 65(1B) identifies that a parent or carer returning to work after a child's birth or adoption may ask to work part-time to help them care for their child.

6.11 Section 65 applies to permanent employees with at least 12 months' continuous service and to long term casual employees with a reasonable expectation of ongoing work.

6.12 Requests under s 65 must be in writing and must be responded to within 21 days.

6.13 An integral feature of the 'right to request' provisions in s 65 of the FW Act is the ability for an employer to refuse a request from an employee for flexible working arrangements.

6.14 A request may only be refused on 'reasonable business grounds' and an employer must provide written details of any reason for refusal (s65(5)-(6)). The *Fair Work Amendment Act 2013* (Cth) included the addition of s 65(5A) which provides a non-exhaustive list of reasonable business grounds as follows:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

A Right of Review?

6.15 It is clear that the FW Act does not permit the Commission to deal with a dispute about whether an employer had reasonable business grounds to refuse a flexibility request.

6.16 Section 146 of the FW Act provides that a modern award must include a dispute settling term that provides a procedure for the settling of disputes under the modern award and NES. The section includes a note identifying that the Commission (see s 739 of the FW Act), or another person (see s 740 of the FW Act), must not settle a dispute about whether the employer had reasonable business grounds under s 65(5) (i.e. the 'right to request') or s 76(4) (i.e. extending a period of parental leave).

6.17 The drafting of these sections makes it clear that the Parliament did not intend to include as part of the minimum safety net a review mechanism on the ability of an employer to determine flexibility requests. As noted in the Government's NES Discussion Paper[10]:

> *Can Fair Work Australia impose a flexible working arrangement on an employer? No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.*

[10] See "National Employment Standards Exposure Draft – Discussion Paper" released by the Federal Government in February 2008.

6.18 This is also apparent from the Explanatory Memorandum to the *Fair Work Bill 2008*, which explained that "*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*".[11]

6.19 This position was reviewed and maintained by the *Fair Work Act Review 2012* where it was noted:

> *The Panel has considered the question of whether a decision to refuse a request for flexible working arrangements should be able to be appealed. Section 146 outlines the requirements for dispute settling terms under modern awards and includes a note that FWA or a person must not settle a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s. 65(5) or a request for extending unpaid parental leave under s. 76(4). While providing an appeal mechanism may help ensure that a request for flexible working arrangements is given proper consideration and that a refusal is indeed due to reasonable business grounds, this still would not provide a guarantee that a right to request would eventually succeed.*
>
> *FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.*[12]

6.20 The central tenant of support for the Claim is the ACTU's submission that the entitlements provided by s 65 are ineffective because they unable to be enforced. In pursuing this line of argument, the ACTU submits that due to the lack of an enforcement mechanism, the 'right to request' flexible work arrangements does not provide employees any substantive entitlement to anything at all. In arguing that flexible working arrangements are arbitrarily and inequitably granted, the ACTU seeks to 'paint a picture' that an employer is free to determine, at its own whim and arbitrarily if it so desires, flexibility in the workplace.

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[11] See Explanatory Memorandum to the Fair Work Bill 2008 at [258]

[12] "Towards more Productive and equitable workplaces: An evaluation of the Fair Work Legislation accessed at https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf at page 98

6.21 This position does not have sufficient regard to the processes mandated by s 65.

6.22 While lacking, at least in the FW Act context, 'a right of appeal', it would be cynical in the extreme to suggest that s 65 provides an entitlement to 'nothing at all'. Indeed, when considering the framework of s 65 as a whole, particularly s 65(4)-(6), it is apparent that the legislature did not intend the provision to provide a carte blanche to employers to dispose of flexibility requests.

6.23 This should be apparent on the face of the statistical data alone, which suggest that the rights afforded by s 65 play a considerable role in facilitating flexibility arrangements.

6.24 Those rights (for an employee) include:

(a) a right to make a formal written request (see 65(1));

(b) a right to 'an answer' to their request within 21 days (see 65(4));

(c) if the request is refused, a right to written reasons for the refusal (see 65(5)-(6)).

6.25 As will be explained more comprehensively later, the parliament has clearly elected not to permit the review of the business decisions of an employer in respect of the deployment of labour (specifically s 65(5)).

6.26 In the event of a refusal however, employers are compelled by s 65(6) to provide the reasons for that refusal. This provision is hugely significant. Not only does compliance with this provision require some form of consideration of whether to grant a request by an employer, but it also requires an employer to turn its mind to, and to document, the reasons for a refusal.

6.27 Merely because 'reasonable business grounds' under s 65(5) is not, in a strict sense, subject to a right of dispute, this does not mean that the requirement to provide the reasons for a refusal is under s 65(6) is arbitrary or meaningless. Significantly, if the employer does not provide the reasons for a refusal (including providing reasons which were not the actual reasons for refusal), a breach will arise. In circumstances where an employer is refusing a request on discriminatory grounds, s 65(6) requires an employer to state those grounds. This form of drafting opens the protections of discrimination law as discussed below.

Protections beyond the FW Act

6.28 The ACTU case ignores that there are long standing and powerful legislative protections applicable to employees requesting flexible working arrangements arising under existing anti-discrimination laws.

6.29 In all Australian jurisdictions, anti-discrimination laws operate to specifically protect employees with carer's responsibilities from being unreasonably subjected to working arrangements that are inimical to family and caring responsibilities.

6.30 In the sections that follow, we outline the protections accorded in each relevant jurisdiction.

Federal protections – applicable to all Australian employees

6.31 The *Sex Discrimination Act 1984* (Cth) (**SDA**) applies to all employers in Australia.

6.32 Relevantly, it prohibits two categories of conduct that specifically pertain to family/carer's responsibilities. These categories of conduct relate to:

(a) the imposition of a condition, requirement or practice that has the effect of disadvantaging a particular sex (ie. indirect discrimination based on sex); and

(b) direct discrimination based on a person's family responsibilities.

Indirect discrimination based on sex

6.33 The combined operation of sections 5, 7B and 14 of the SDA has the effect of prohibiting an employer from imposing a condition, requirement or practice that has the effect of disadvantaging a particular sex if the imposition of the condition, requirement or practice is unreasonable in the circumstances. This is commonly referred to as a protection from 'indirect discrimination'.

6.34 These provisions have regularly been applied to prevent employers from unreasonably refusing part time or flexible working arrangements for women with carer's responsibilities. By way of example:

(a) In *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122, Driver FM considered a scenario where an employer refused to accept a female employee's request for part time working arrangements and then ultimately dismissed the employee for failing to maintain her full time working hours. Driver FM held that the conduct was indirectly discriminatory and a breach of the SDA:

> "…*because Ms Escobar was denied the opportunity to work part time, being a denial that was likely to disadvantage women because of their disproportionate responsibility for the care of children*".

Driver FM found that the refusal to "*countenance*" the possibility of part-time working arrangements was unreasonable in the circumstances and awarded damages to compensate for the loss suffered by the employee.

(b) In an earlier decision of *Hickie v Hunt & Hunt* [1998] HREOCA 8, Commissioner Evatt considered a scenario where Ms Hickie alleged that:

(i) law firm Hunt & Hunt removed a substantial portion of Ms Hickie's 'practice area' when she returned to work part time following a period of maternity leave; and

(ii) the firm failed to appoint lawyers to support and maintain her practice whilst she was on leave.

Commissioner Evatt found that the removal of Ms Hickie's practice was because she could not meet the requirement to work full time. Commissioner Evatt held that such a requirement indirectly discriminated against women in the firm, who were more likely to take significant periods of maternity leave.

Finding that this requirement to work full time was unreasonable, the Commissioner went on to state that:

> "*Hunt and Hunt have accepted that women should be able to work part time after their maternity leave. In that case, they should have approached Ms Hickie's problem by seeking alternative solutions which would have enabled her to maintain as much of her practice as possible. The firm should have considered seriously other alternatives. Ms Hickie would return in a few weeks and she was willing to work on urgent matters. Part of her practice could have been preserved for her with other arrangements."*

(c) In *Mayer v ANSTO* [2003] FMCA 2009, Driver FM considered a scenario where ANSTO denied a full time employee's request to work 3 days per week on account of carer's responsibilities. Driver FM found the refusal to be unreasonable because there was some part time work that was available to be done, even though it differed to the employee's

usual role. The refusal constituted conduct indirectly discriminatory against women and gave rise to findings of breach of the SDA and orders to pay compensatory damages.

6.35 Whilst all of the above cases relate to part-time work requests, the reasoning adopted in the cases is equally applicable to any request for flexible working arrangements which derives from a woman's maternity leave period or subsequent carer's responsibilities. The reasoning in these cases is accordingly equally applicable to requests for changed days of work, requests for earlier or later working hours or requests for alternative leave arrangements.

6.36 There are accordingly enforceable legislative protections that will prohibit and provide relief against employers unreasonably refusing flexible working arrangements in respect of the largest group of employees who bear carer's responsibilities – namely, women.

Direct discrimination based on family responsibilities

6.37 In addition to the indirect gender discrimination protections identified above, section 7A of the SDA prohibits less favourable treatment of employees because of their "family responsibilities". This prohibition on treating employees less favourably on account of family responsibilities includes less favourable treatment because of:

(a) a characteristic that appertains generally to persons with family responsibilities; or

(b) a characteristic that is generally imputed to persons with family responsibilities.[13]

6.38 Any employer who unreasonably and arbitrarily refuses flexible work requests could well be exposed to claims of direct discrimination if no rational basis can be identified for the employer's refusal.

6.39 This is borne out by cases such as *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31, where Ms Song sought to maintain a practice of leaving the workplace for approximately 20 minutes each afternoon (at approximately 3:00pm) to transfer her child from kindergarten to another carer. The employer refused to allow this practice, insisting that Ms Song take her breaks at lunch time (from 12:00pm to 1:00pm). Raphael FM found that the applicant was treated less favourably than a person without family responsibilities who would ordinarily have expected some level of flexibility in starting and finishing times and in the timing of meal breaks. The arbitrary inflexibility adopted towards Ms Song was found to differ to the treatment and flexibility that could

[13] See s7A(b) of the SDA

be expected by an employee working for the employer without carer's responsibilities. Accordingly, Raphael FM found a breach of the SDA to have taken place.

6.40 Whilst the protections in section 7A of the SDA do not extend to indirect discrimination, the decision in *Song* and other decisions of the Federal Magistrates Court (now Federal Circuit Court) demonstrate a firm preparedness of the Court to make findings of direct discrimination where refusals to make accommodations for family responsibilities appear to have no rational basis, such that the refusal is seen as an arbitrary and discriminatory act against the employee with carer's responsibilities.[14]

State and Territory based protections

6.41 The Federal protections outlined above are mirrored and supplemented by each of the State and Territory anti-discrimination laws.

6.42 All of the State jurisdictions contain provisions which mirror the SDA by prohibiting direct and indirect discrimination on the grounds of sex.

6.43 However, each State jurisdiction goes further by also prohibiting direct and indirect discrimination against employees on the grounds of their "*carer's responsibilities*" or "*family responsibilities*".

6.44 Specifically:

(a) In NSW, sections 49T and 49S of the *Anti Discrimination Act 1977* prohibit direct and indirect discrimination on the grounds of a person's responsibilities as a carer.

(b) In Victoria, the *Equal Opportunity Act 2010* (VIC) prohibits direct and indirect discrimination on the grounds of "*parental status*" and "*status as a carer*". However, the Victorian legislation goes even further to expressly mandate that employers accommodate responsibilities of parents and carers:

> "***19 Employer must accommodate responsibilities as parent or carer***
>
> *(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.*
>
> ***Example***

[14] See also *Cincotta v Sunnyhaven Limited* [2012] FMCA 110 and *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 at [36]

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend."

(c) In Queensland, the *Anti-Discrimination Act 1991* (Qld) prohibits direct and indirect discrimination based upon a number of protected attributes, including the following:

(i) parental status; and

(ii) family responsibilities.[15]

(d) In South Australia, the *Equal Opportunity Act 1984* (SA) prohibits direct and indirect discrimination based upon a number of protected attributes, including caring responsibilities.[16]

(e) In Western Australia, the *Equal Opportunity Act 1984* (WA) prohibits direct and indirect discrimination based upon a number of protected attributes, including the following:

(i) "*family responsibility*"; and

(ii) "*family status*".[17]

(f) In Tasmania, the *Anti-Discrimination Act 1984* (WA) prohibits direct and indirect discrimination based upon a number of protected attributes, including the following:

(i) "*parental status*"; and

(ii) "*family responsibilities*"[18]

(g) In the ACT, the *Discrimination Act 1991* (ACT) prohibits direct and indirect discrimination based upon a number of protected attributes, including "*parent, family, carer or kinship responsibilities*".[19]

(h) In the Northern Territory, the *Anti-Discrimination Act* (NT) prohibits direct and indirect discrimination based upon a number of protected attributes, including "*parenthood*".[20]

[15] See sections 7 and 9-11
[16] See section 85T
[17] Section 35A
[18] Sections 14 - 16
[19] Sections 7-8

6.45 The extension of indirect discrimination protections to those with family responsibilities/carers means that in each State and Territory, all employees with family/carer's responsibilities - both male and female – would have the benefit of legislative protection if their request for flexibility is unreasonably refused.

6.46 Accordingly, there is effectively already in existence a comprehensive State/Territory-based regime operating across Australia giving effect to the types of protections that the ACTU is now seeking by way of the present proceedings.

[20] Sections 7-8

PART D

7. THE PRELIMINARY JURISDICTIONAL QUESTION

7.1 Turning now to the Claim, the first question addressed by the Commission must be that of jurisdiction.

7.2 As identified above, a number of principles should be uncontroversial.

7.3 Firstly, there currently exists, in s 65 of the FW Act, an express right to request the 'reduced hours' sought by the Claim for employees of at least 12 months' service.

7.4 Secondly, this existing right to request reduced hours is expressly conditioned so that:

(a) an employer can refuse a request on reasonable business grounds;

(b) an employer's decision to refuse a reduced hours request on reasonable business grounds cannot be subject to a dispute unless a contract of employment, enterprise agreement or other written agreement expressly identifies that the Commission (or another 3rd party) deal with the matter; and

(c) an employer's decision to deny a reduced hours request on reasonable business grounds cannot be subject to a pecuniary penalty.

7.5 These proceedings occur in a context where parties have already made submissions and conducted an oral hearing in relation to the jurisdiction of the Commission.

7.6 As previously submitted by the Australian Chamber at that oral hearing, each element of the Claim must be permissible by ss 55(4), 139(1) or 142. That much should be clear from a plain reading of s 136 and confirmed by s 137 which states that any term of an award which offends section 136 has no effective operation.

7.7 Given the multiple amended claims filed by the ACTU in these proceedings, the latest iteration of the Claim has not yet been the subject of jurisdictional submissions of the parties.

7.8 It is unhelpful that, despite the obvious jurisdictional questions which arise in these proceedings, the ACTU submissions as filed do not expressly disclose the jurisdictional basis upon which the Claim is made. We simply do not know whether the ACTU grounds its Claim entirely under s 139 and s 142 or otherwise seeks to engage s 55.

7.9 It will of course be essential to the success of any claim that the ACTU outlines the jurisdictional basis of its claim. We assume for the purposes of these submissions that the ACTU grounds its Claim in s 139(1) and not s 55.

8. THE INTERACTION OF THE CLAIM WITH S 55 AND S 65

8.1 Assuming the Claim to be grounded in s 139(1), the Claim must still be permissible having regard to s 55(1) of the FW Act.

8.2 Section 55(1) of the Act provides that a term of a modern award or enterprise agreement must not exclude any provision of the NES.

8.3 The NES are a set of minimum standards that apply to the employment of all "national system employees". This is made clear by s 61 of the FW Act:

> "*The National Employment Standards are minimum standards applying to employment of employees*
>
> *(1) This part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).*"

8.4 Although the NES is the minimum standard, subsection 55(4) allows modern awards and enterprise agreements to include terms that are ancillary to, or supplement, the NES. That is, modern awards and enterprise agreements can include terms:

(a) explaining how NES entitlements are to be paid (see Note 1 under subsection 55(4)); or

(b) that increases the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

8.5 The concept of 'supplementing' the NES in the second limb of s 55(4) connotes the notion of building upon, increasing or extending.

8.6 Section 55 proceeds to explain the way in which NES provisions are affected when parties choose to supplement terms of the NES at subsection (6):

> "*(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the award or*

agreement entitlement) that is the same as an entitlement (the NES entitlement) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard , to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave."

8.7 Subsection 55(6) is directed towards achieving two related outcomes:

(a) firstly, it seeks to ensure that, where industrial instruments provide the same entitlement as an NES entitlement, employees are not entitled to 'double dip' and access the industrial instrument entitlement in addition to their NES entitlement; and

(b) secondly, the rules applicable to the NES entitlement apply to the industrial instrument entitlement, given that the entitlements are the same.

8.8 Finally, s 55(7) provides the self-evident proposition that to the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Is the Claim permitted under s 55(1)?

8.9 The Claim concerns requests for reduced working hours by parents and carers.

8.10 As developed earlier in these submissions and as acknowledged by the ACTU, the Claim addresses a significant range of circumstances which would ordinarily come within the scope of s 65.

8.11 Critically, if such a request was made under s 65 of the FW Act, the terms of s 65(5) would apply, allowing the employer to refuse such a request on reasonable business grounds. No such option exists under the scope of the Claim.

8.12 Indeed, having regard to the submissions supporting it, the Claim appears to be actually *directed* at circumventing the ability of employers to refuse requests for reduced hours under s 65(5) of the FW Act on reasonable business grounds.

8.13 The Claim therefore excludes s 65(5) and is prohibited by s 55(1) of the Act.

8.14 It is acknowledged that the scope of the Claim does not exactly correspond with the scope of s 65. For example, the service requirements for eligibility under the Claim is six months in comparison to 12 months under s 65 while the scope of the Claim only applies to family friendly working hours for parents and carers while the s 65 scope is broader.

8.15 Notwithstanding these differences, it appears to be common ground that the practical effect of the introduction of the Claim would be to exclude the operation of s 65(5) in relation to some classes of employees. This means that, where employee had an ability under both s 65 and the Claim to make a flexibility request, the limitation imposed by s 65(5) of the Act would be rendered completely ineffective as, in practical terms, an employee would always elect to use the 'absolute' right under the Claim instead of the limited right under s 65(5).

8.16 So much is acknowledged by the ACTU at [194] of the ACTU Submissions:

> *However, it is to be expected that a stronger entitlement, access to dispute settlement and clearer requirements for documenting the arrangement may encourage an employee in these circumstances to access the ACTU's clause rather than the right to request in s. 65 of the FW Act.*

8.17 Whether or not a provision of the NES is excluded by an industrial instrument was considered in *Canavan Building Pty Ltd* [2014] FWCFB 3202 where at [36] the Full Bench held:

> ***[36]*** *Section 55(1) of the Act relevantly provides that an enterprise agreement "must not exclude" the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was the approach taken by the Full Bench in Hull-Moody. The correctness of that approach is also confirmed by the Explanatory Memorandum for the Fair Work Bill 2009 as follows:*

> "209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative ...."

8.18 This finding has been applied in the Review in the *Alleged NES Inconsistencies Decision* [2015] FWCFB 3023 at [37]:

> *Section 55(1) requires, relevantly, that a modern award "not exclude the National Employment Standards or any provision of the National Employment Standards". Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4).*

8.19 Adapting this formulation, it is apparent that s 55(1) requires, relevantly, that a modern award "*not exclude the National Employment Standards or any provision of the National Employment Standards*". Section 65(5) is a provision of the NES, and the Claim excludes s 65(5) in the sense that in its operation negates the effect of the subsection (i.e. an employer is unable to refuse a request for reduced hours on reasonable business grounds).

8.20 Another relevant determination was also made by the Commission in the *4 Yearly Review of modern awards - Common Issue - Award Flexibility* [2015] FWCFB 4466. In that case, a claim had been made for the insertion of a TOIL provision which would allow TOIL to be taken by agreement.

8.21 An argument was made by union parties in opposition to the claim that if a provision was inserted allowing TOIL to be taken by agreement, s 65(5) would be excluded i.e. an employer could refuse a flexibility request on grounds other than 'reasonable business grounds'.

8.22 As found at [2015] FWCFB 4466 at [109]-[111]:

> *[109] It seems that an award TOIL clause could only potentially exclude some or all of s65 if:*
>
> - *the clause applies in circumstances where s.65 also applies (that is; where an employee is in one of the personal circumstances specified in s.65(1A) and wishes*

to take TOIL because of those personal circumstances, is not excluded by s.65(2), and makes the request in writing setting out the details required by s.65(3)); and

- *the clause would enable a request for TOIL in those circumstances to be refused by the employer without the employer having reasonable business grounds for the refusal.*

[110] We do not consider that an award TOIL clause could lawfully operate in this way, to circumvent the protections in s.65 of the Act:

- *If a request for TOIL was made in accordance with s.65 then an employer could not assert that the provision for employer consent in the TOIL clause itself allowed it freedom to decline the request as it saw fit, as this would in effect exclude s.65(5). Therefore, to this extent, the TOIL clause would be of no effect pursuant to s.56.*

- *If a request for TOIL was made in circumstances where s.65 applies but was not made in accordance with that section, then a request for TOIL could always subsequently be made in accordance with s.65, even if it had previously been refused under the terms of the TOIL clause.*

8.23 The model clause emanating from that decision included a specific provision which addressed any potential inconsistency between the NES and the model term.

8.24 The difference in the Award Flexibility decision scenario and the one presently faced by the Commission is the 'fall-back' position identified in the second dot-point of [110] above. In the Award Flexibility Proceedings, the Commission determined that if an employee was denied a request for TOIL under the model clause, the employee could make a subsequent request for TOIL under s 65. In this way, s 65(5) could be said not to be excluded.

8.25 This 'fall back' scenario is not available within the context of the Claim. That is to say, if an employee made a reduced hours request under the Claim, an employer would have no choice but to accommodate the request and could not make a subsequent refusal of the request under s 65(5). Once the request was approved there would be no recourse to s 65(5), and thus, in our submission s 65(5) would be excluded.

In the Alternative

8.26 In the event that the Commission does not accept our above submission and considers that the Claim is not prohibited by s 55(1), the statutory framework identified above identifies an incredibly clear statutory presumption *against* the granting of the Claim.

8.27 On any reading of the relevant sections of the FW Act, it is abundantly clear that the legislature intended that flexibility requests should be subject to a regulatory regime which:

(a) at the most basic level, allows an employer to have some say in the granting of a flexibility request;

(b) takes into account the position of the employer (specifically through s 65(5) and the ability to refuse a request on reasonable business grounds); and

(c) does not provide an avenue for dispute or a right of review for employees under a modern award (see ss 44, 146).

8.28 Implicit in this framework is a legislative understanding that it is for an employer to determine how to deploy its labour and that it would be a 'step too far' to allow such decisions to be contestable by the Commission.

8.29 The Commission should have particular regard to the fact that this legislative regime has been reviewed recently, having been subject to review and maintained following the Fair Work Act Review 2012. Neither was the s 65 regime disturbed by the amendments to s 65 made by the former Labor Government pursuant to the *Fair Work Amendment Act 2013* (Cth).

8.30 The Claim seeks to upset this regime in a fundamental way, entirely removing the prerogative of the employer to make business decisions in respect of flexibility requests. Indeed this appears to be the Claim's intent.

8.31 As a matter of discretion, this should tend strongly against the granting of the Claim, regardless of the merit matters discussed below.

PART E

9. THE EVIDENCE

9.1 Having identified the statutory and jurisdictional issues relating to the Claim, we seek now to address the relevant factual and merit matters which must be determined by the Commission.

9.2 A number of factual matters present themselves on the face of the ACTU Claim:

(a) under current arrangements, the majority of flexible working requests, including those of the kind sought by the Claim (reduced hours), are granted;

(b) Australia, at least in part due to the high rate of acceptance of flexibility requests, has one of the highest rates of part-time employment in the world;

(c) part-time and unpaid work as well as caring responsibilities for children and family members are disproportionally performed by women; and

(d) in many circumstances, the accommodation of work and family responsibilities through the provision of flexible arrangements to employees can have benefits for business. So much is evident from the high percentage of flexible work requests which are granted by employers.

9.3 To the extent that the vast majority of the ACTU's case seeks to establish the above matters, they are not contested. Unsurprisingly, the Australian Chamber has a different view on the significance of these matters in respect of determining the proceedings.

9.4 The Australian Chamber submits that the evidence before the Commission should lead it to a number of conclusions:

(a) Employers operating under the existing statutory regime take flexibility requests seriously and approve a majority of requests.

(b) There is no evidence to support the proposition that employers irrationally or arbitrarily refuse flexible working requests in circumstances where those requests could be reasonably accommodated within the scope of the employer's enterprise.

(c) Employers can (and evidently do) refuse or seek modification to flexibility requests on reasonable business grounds where such requests, in the employer's assessment, cannot be reasonably accommodated.

(d) An employer is likely to accommodate a flexibility request made by an employee in circumstances where in the assessment of the manager of the enterprise:

(i) the enterprise does not require the employee to be substituted during their absence because their work can be 'covered' by other employees (and these arrangements are acceptable and equitable in relation to the other employees);

(ii) the employee can perform their work at other times; or

(iii) having regard to the cost and operational practicality, the employee is easily substitutable by external labour.

(e) An employer is more likely to refuse a flexibility request in circumstances where the employee requests not to work at a certain time at which the requirement for labour is not flexible and/or the employee is not easily substitutable.

(f) An employer's requirement for labour may not be flexible because of factors including:

(i) customer/client demand (e.g. opening hours, timetables, teaching times);

(ii) regulatory requirements (e.g. childcare ratios, WHS compliance);

(iii) work requirements involving 'teams' working simultaneously (e.g. in a production process); and

(iv) external limitations particular to certain industries (e.g. industries dependant on weather patterns or animal behaviour).

(g) An employee may not be easily substitutable because:

(i) the employee's special skills means it is difficult to source alternative labour;

(ii) the employee's qualifications or licenses means it is difficult to source alternative labour;

(iii) the employer's industry or regional location means it is difficult to source alternative labour; and

(iv) the employer's roster pattern.

Evidence of the effectiveness of the Existing Regime

9.5 The evidence before the Commission in this case leads to a conclusion that the existing regime for dealing with flexibility requests is operating effectively, having regard to interests of both employees and employers.

9.6 Without the need to address any materials filed by employer parties, the ACTU's own evidentiary case demonstrates the effective operation of the FW Act alongside informal arrangements with respect to the ability of employees to request flexible working arrangements.

9.7 In order for the Claim to succeed, the ACTU would need to demonstrate that the existing legislative regime (forming part of the fair and relevant minimum safety net) is somehow deficient or failing to appropriately facilitate flexible working arrangements in accordance with the provisions the FW Act.

9.8 Such a case would presumably be aimed at demonstrating the abuse of s 65(5) by employers in arbitrarily refusing flexibility requests or otherwise a general lack of uptake of part-time/reduced hours work in circumstances where it was appropriate and requested.

9.9 The case advanced by the ACTU does not do this.

9.10 At [115] of its submissions, the ACTU identify the following 'evidence' that the s 65 regulatory regime has been ineffective:

(a) ABS data showing that 1.8 million Australians reported they would prefer to work fewer hours than they usually worked each week and that 35 per cent of Australian men and 42 per cent of women 'always or often' felt rushed or pressed for time;

(b) the fact that the 'take up rate' of flexible work arrangements is approximately 20 per cent of Australian employees;

(c) a tiny proportion of requests are made pursuant to s 65 and awareness of the right is low;

(d) requests are concentrated in certain sectors, industries and business sizes;

(e) very few men request flexible work, and fewer still request or use reduced hours; and

(f) while the majority of employees who actually make a request have them granted or partially granted, there is a significant proportion of employees who do not ask at all, even though they are unhappy with their working conditions.

9.11 Even if the above contentions are accepted, they do not present a case to suggest that the current regulatory regime is failing or warrants radical adjustment. Taken together each of the statements above present a unsurprising picture of employer-employee activity where:

(a) there are a proportion of employees who would prefer to work less;

(b) some types of employees are more likely to need and to seek flexible arrangements;

(c) most flexibility requests are accommodated and this is largely managed on an informal basis.

9.12 These conclusions would not warrant the radical reframing of the minimum safety net in the manner proposed by the Claim.

Associate Professor Murray

9.13 The evidence of Associate Professor Murray concerns the current operation of the FW Act and 'take up' of flexibility arrangements under the current system.

9.14 Associate Professor Murray outlines a number of 'headline items' which demonstrate that the current system is working and that a change, particularly one in the radical terms of the Claim, is not necessary.

9.15 The headline items identified in the Murray Report which will be relied upon by the Australian Chamber are:

(a) around 20% of employees make requests for flexible working arrangements.[21] This will vary wildly across industries given the differing requirements of roles within those industries;

(b) a majority of requests (both informal and those made pursuant to s 65 of the FW Act) are approved in full;[22]

(c) the main reason why requests are approved is because granting a request will result in a 'win-win': the employer can retain its valued employee and the employee can continue their employment on their preferred basis;[23] and

(d) where a request is refused, the main reason for doing so is on operational grounds.

[21] See Murray Report at [23]
[22] See Murray Report at [45]-[47]
[23] See Murray Report at [9]

9.16 The Murray Report identifies that somewhere between 85-90 per cent[24] of s 65 flexible work requests are fully or at least partially granted. While the rate of approval for informal requests (those not made pursuant to s 65) appears to be slightly lower (81% completely or totally granted[25]), the proportion of requests which are granted remains extremely high.

9.17 The ACTU submissions at [45] cite data from the Australian Human Rights Commission which states that:

> "*the majority (70 per cent) of mothers who returned to work requested adjustments to their working hours, most commonly reduced hours, and the majority if request (89 per cent) were granted*".

9.18 These statistical sources suggest that, for the most part, employees and employers in Australia are managing to come to mutually agreeable flexibility arrangements.

Lay Evidence

9.19 These statistical conclusions are also supported by the lay evidence of ACTU.

9.20 Given that the witnesses who have provided statements for the ACTU are yet to be cross-examined, the Australian Chamber reserves its position to provide further submissions in respect of that witness evidence.

9.21 As a threshold matter however, a number of observations can be made in respect of the ACTU's 'lay' statements.

9.22 The evidence of the ACTU lay witnesses does no more than demonstrate the current, and we would say effective, operation of existing provisions of the FW Act.

9.23 Twelve 'lay' statements are filed. Six of these statements (van der Hilst, Bowler, Mullan, Anderson, Hammersley and Witness 1) identify scenarios where an employee has exercised their existing rights under the FW Act to make a reduced hours request and such request has been granted. While a six from twelve ratio of approval is likely to be lower than the actual experience of employees as a whole (see ACTU evidence referred to above at 9.15), these statements identify the benefits that these employees have obtained by working their preferred hours, while identifying the willingness of employers to accommodate these requests.

[24] See Murray Report at [45]-[46]
[25] See Murray Report at [46]

9.24 The Commission will also hear employer evidence, including statements from Norske Skog, Busways, Navitas and the Australian Childcare industry, which demonstrate large scale compliance with employee requests.

9.25 This 'lay' evidence aligned with the statistical evidence outlined at 9.15 provides a compelling body of material which contradicts any suggestion that "*the right to request is not assisting employees to balance their work and family responsibilities, or providing for flexible working arrangements*".[26]

Evidence concerning refusals

9.26 The Australian Chamber does not submit that employee requests under the existing regulatory framework are uniformly accepted, or for that matter that flexible and 'family friendly' working arrangements are available in every case.

9.27 Plainly this is not so.

9.28 It is the position of the Australian Chamber that:

(a) where flexibility requests are refused, such refusals are not arbitrary but would ordinarily be based on the ongoing needs of a business and balanced with a preference to satisfy and retain existing staff;

(b) there are circumstances where it is inefficient, inappropriate (or impossible) to facilitate certain employee requests, usually having regard to the operation of the employer's business and/or the requirements of an employee's role;

(c) the suitability of a particular working hours arrangement will vary from employee to employee and enterprise to enterprise;

(d) it would be entirely inconsistent with a fair and relevant minimum safety net to require an employer to accommodate a flexibility request regardless of the scope of that request or position of the employer.

9.29 The evidence before the Commission will demonstrate this both at a practical and theoretical level.

9.30 At a theoretical level, the Murray Report provides examples which explain reasons why an employer may be unable to accommodate a flexibility request including:

(a) lack of replacement employees to fill particular shifts, particularly in smaller teams;

[26] See ACTU Submission at [114]

(b) difficulty in rostering in accordance with employee preferences, particularly complex rosters such as shift rosters;

(c) difficulty in meeting client demand in customer-facing roles;

(d) difficulty in accommodating employee preferences in particular patterns of work e.g. fly-in fly out arrangements.

9.31 These theoretical examples align with the lay evidence in the proceedings.

9.32 Restricting these submissions to those witnesses providing evidence for the Australian Chamber, the evidence includes:

(a) the Cleaver Statement which provides evidence of the difficulty of accommodating reduced hours requests where:

(i) the nature of the work being performed requires roles to be performed simultaneously (team-based work) and does not allow different roles to be performed at different times;

(ii) employee specialisation (and potentially regional location) makes substitution of employees difficult or costly;

(b) the Fraser Statement provides evidence of the difficulty of accommodating reduced hours requests where:

(i) industry specific regulatory regimes require a certain number of employees, meaning different roles cannot be performed at different times;

(ii) employee qualification and skills makes substitution of employees difficult or costly;

(iii) scarcity in the labour market of appropriate replacement employees makes substitution difficult;

(iv) existing award provisions would not allow certain arrangements to be undertaken practically;

(c) the Rizzardo Statement provides evidence of the difficulty of accommodating reduced hours requests where client demand is limited to set times which are inflexible, meaning work cannot be performed at alternative times.

9.33 The above evidence demonstrates circumstances where the difficulty in accommodating a request may result in reasonable business grounds which would justify a refusal.

9.34 The ACTU has filed five lay witness statements identifying an employee's dissatisfaction that their requests for reduced hours in their current role were not accommodated.

9.35 In each scenario, the inability of the employer to accede to the employee's request was supported by operational reasons including:

(i) availability of work (Czerkesow Statement);

(ii) satisfaction of the inherent requirements of the role (Johnson Statement, Routley Statement, Sinclair Statement); and

(iii) inability to accommodate the precise employee preference due to complexities in rostering (Jones-Vadala Statement).

9.36 These witnesses primarily outline their personal arrangements and their difficulties with their attempts to balance their family and work life. Common across these witnesses (and all the statements filed by the ACTU) are the following issues:

(a) the difficulty of managing caring responsibilities shared between partners and their respective working arrangements;

(b) identifying care requirements for children including arrangements where daycare or family members provide care;

(c) difficulties around placing responsibilities on family members to provide care;

(d) difficulties organising paid childcare including a need to identify and pay for a minimum amount of days, requirements to pay for daycare in circumstances where it was not needed;

(e) the balancing exercise between the income generated from work and the cost of childcare;

(f) time pressures faced by parents in seeking to balance work and domestic responsibilities including maintenance of the home and development activities for children;

(g) a preference to spend 'quality time' with one's child, including attendance at significant events (e.g. school and sport events).

9.37 The Australian Chamber does not wish to downplay the relevance or importance of the above issues for employees with children (or caring responsibilities).

9.38 That being said, it is not the touchstone of these proceedings for the Australian Chamber to defend every conceivable refusal made by an employer of a flexibility request.

9.39 Neither is it sufficient for the ACTU to merely identify an example of employer's decision in respect of a flexible work request which it does not agree with to demonstrate that radical regulatory change is warranted.

9.40 Given that the relevant question before the Commission concerns the construction of a fair and relevant minimum safety net, the Commission's determination must consider the minimum safety net as whole.

9.41 One relevant aspect of that consideration is whether employee and employer interests are being appropriately balanced.

9.42 Having regard to the employer evidence, and considering the specific cases brought by the ACTU, the proposition that access to flexible working arrangements is arbitrarily and inequitably granted must be rejected.

9.43 Simply put, there is no evidence to support the proposition that employers irrationally or arbitrarily refuse flexible working requests in circumstances where those requests could be accommodated within the scope of the employer's enterprise. All of the witness evidence identified in these proceedings present reasons for any refusal of flexibility request. In the submission of the Australian Chamber, these reasons are cogent and based on each employer's assessment of the needs of their business, customers and employees.

9.44 In respect of equity, it is accepted that under the current provisions of the FW Act, some roles are more conducive to flexible and variable working arrangements than others. Similarly the evidence in these proceedings discloses that the ability of a business to accommodate a flexible working request will vary based on the characteristics of the role and of the business. This necessarily means that some employees will be able to access flexible working arrangements of a type which others cannot.

9.45 For example, one theme that arises from the material is that larger organisations are more readily able to accommodate employee flexibility. This forms an important element of the ACTU's case in

that it submits that family friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award reliant employees working in smaller workplaces. [27]

9.46 A review of the evidentiary material filed in the case does suggest that larger organisations may be better placed to accommodate flexibility requests for a number of reasons. These reasons can include:

(a) the existence of larger teams meaning that an employee's role can more readily be 'covered' during periods of absence; and

(b) more advanced and efficient training and recruitment arrangements meaning that substituted labour is more readily available.

9.47 Far from giving rise to unfairness, this is the ordinary and necessary result of a fair and relevant minimum safety net which includes consideration of the needs of the employer. While provisions in awards themselves may stand in the way of accommodating any flexibility arrangement requested by an employee, beyond this there are practical and operational considerations that may make requests unreasonable and therefore the minimum safety net has to be constructed in consideration of this.

9.48 In the submission of the Australian Chamber, a fair and relevant safety net could not **compel** an employer to accommodate an employee's request, regardless of the practical difficulty or cost, particularly in the case of a small business.

9.49 Notably, small businesses are more award reliant than large businesses and alone account for around 34 per cent of total employees on award classification wages with 35 per cent of employees in a small business paid award classification wages.[28]

9.50 In the submission of the Australian Chamber, many small businesses simply do not have the flexibility to accommodate the precise preferences of employees with parental or caring responsibilities. In many small businesses, an employee may be the only employee working at a particular time, or otherwise may be working in a very small team. In circumstances where that employee sought under the Claim to be absent at a time in which they could not be substituted, the necessary effect of the Claim would be that the business would close (for at least that period).

[27] See ACTU Submissions at [45]
[28] See [2017] FWCFB 3500 at [266]

9.51 The vulnerability of small business is particularly apparent from the responses to the Joint Employer Survey.

9.52 An illustrative sample of responses from the Joint Employer Survey concerning small business arrangements is outlined below:

- *"Reason are simple we are very small business. Staffs numbers on a roster are limited. We just could not find anyone to cover that persons shift"*[29]
- *"Small busy business, need all on board. We will be flexible on a case by case for late start or early finish if child is sick etc, Everyone has a specific job, if they are away internal and customer service is seriously affected"*[30]
- "*Work is time specific and still needs to be done by someone. We are a small business and can't always replace the skill required"*[31]
- *"we are a small manufacture and our business is seasonal and we couldn't afford to have workers starting and finishing at different times as it would affect our production line. Which would make us run late with our deliveries"*[32]
- *"In a small business where there is minimal backup in any individual role, it could make it very hard to cover for people who did not attend work. It would also create a president for others to then change their hours of work. It may prevent hours of work being aligned with when the work needs to be performed"*[33]
- *"Being a small business it would impact other staff and increase costs by either having additional resources or an increase in workload by other employees"*[34]
- *"We are a small business and once you have lost 1 or more employees out of our work force at critical times it would greatly effect the way we could service our customer base. At least at the present we are able to asses the situation and make an informed decision on what is the best solution for both the company and our employees"*[35]
- *"We are a small business and try to accommodate everyones needs however we still need to be able to run our business and need staff here at the peak times. The problem could be, what if everyone couldn't work a particular time slot for the same reason"*[36]
- *"For us to run a successful small business we rely on running to a tight schedule and budget. As we only have four employees on site without being able to have the whole team available for some tasks, or being unable to split into two teams of two it would be unworkable to have one employee working different hours to the rest of the team. As some*

[29] Joint Employer Survey, Attachment JES3, Response ID 3974
[30] Joint Employer Survey, Attachment JES3, Response ID 111
[31] Joint Employer Survey, Attachment JES3, Response ID 3274
[32] Joint Employer Survey, Attachment JES3, Response ID 3554
[33] Joint Employer Survey, Attachment JES61, Response ID 401
[34] Joint Employer Survey, Attachment JES61, Response ID 487
[35] Joint Employer Survey, Attachment JES61, Response ID 1256
[36] Joint Employer Survey, Attachment JES61, Response ID 2523

of our employees are apprentices it would also mean that I as the builder could have to work extra hours on site to supervise their work, over and above the extra long hours I already work. Some tasks also require three people and this would mean other works would also have to change their hours to suit this one worker to have work to do. In a larger business this may work but in a small business such as ours it would be unworkable"[37]

- *"This would make a small business less productive in such a competitive environment. Our business relies on continuity of project work with some roles to maintain client confidence"*[38]
- *"We are a relatively small business and the impact of this would be a significant financial impact by having to cover hours no longer worked by other employees and in some instances requiring 2 staff to work together outside normal hours to ensure appropriate supervision and mitigate WH&S risks. We have a view that we will accommodate reasonable requests at present with staff requests, however removing the right of the business to refuse or modify a request (particularly if it is unreasonable) would not be a positive approach"*[39]

The Joint Employer Survey

9.53 In addition to the above, the results of the Joint Employer Survey provide broad support for the conclusions outlined by the Australian Chamber at 9.4.

9.54 This evidence is principally useful to:

(a) support the proposition that employers operating under the existing statutory regime take flexibility requests seriously and have approved of a majority of relevant requests;

(b) identify a range of illustrative scenarios (far broader than the lay witness evidence brought in this case) demonstrate practical difficulties in the granting on flexibility requests.

9.55 In terms of statistical data, the Australian Chamber identifies the following results arising from the Joint Employer Survey:

(a) almost half (48.87%) of employers surveyed have received a request from an employee to change their hours of work (including days of work and starting/finishing times) because the employee had parenting or caring responsibilities;

(b) almost half (48.64%) of the employers surveyed agreed to every request made;

(c) almost half (48.24%) of the employers surveyed agreed to some, but not all, requests made;

[37] Joint Employer Survey, Attachment JES61, Response ID 2609
[38] Joint Employer Survey, Attachment JES61, Response ID 3012
[39] Joint Employer Survey, Attachment JES61, Response ID 3804

(d) of those instances where an employee's request resulted in a change in working hours, 33.37% stated requests were implemented without modification, 22.87% were agreed to with some modification while 43.76% indicated that in some cases requests were implemented without modification and in some cases with modification.

9.56 These statistical results correspond with other evidence in these proceedings which suggest that employers approve of a majority of flexibility requests.

9.57 The 'free-text' response data arising from the Joint Employer Survey also provides qualitative support for the proposition advanced by the Australian Chamber that employers at general level seek to accommodate employee requests wherever possible.

9.58 What is particularly apparent from the survey responses are the number of responses which identify that employers recognise the benefits of providing flexibility to staff where it is available.

9.59 Examples of these responses include:

(a) *"I have long term employees and we all try to work in together to get the best results for all parties"*[40]

(b) *"We run our business to the mutual benefit of both ourselves and our employees, so any changes that may and done so in consultation with the employees and management to find a solution that suits the employee but doesn't adversely effect the running of our business. We want to work with our employees and keep them happy"*[41]

(c) *"We look to support staff as much as possible, just like we do for staff studying, those with family responsibilities or sick family members. A happy workforce means a great place to work"*[42]

(d) *"To best suit the needs of the mother and with sufficient flexibility of both parties, we were able to organise our work program to both get the benefits"*[43]

(e) *"We were able to accommodate changes in a way that was mutually beneficial which results in a continued harmonious team and management relationship"*[44]

(f) *"I try to keep everybody happy. Communication and both coming to a happy medium for will keep my business running well!!"*[45]

(g) *"These changes were made because the employees in question were very valuable to us, their role enabled flexibility, their request was accompanied by excellent reasons and fulfilling their request did not impact our business negatively (it did mean rearranging and modifying other aspects of work but it, ultimately, wasn't negative)"*[46]

[40] Joint Employer Survey, Attachment JES32, Response ID 508
[41] Joint Employer Survey, Attachment JES32, Response ID 538
[42] Joint Employer Survey, Attachment JES32, Response ID 540
[43] Joint Employer Survey, Attachment JES32, Response ID 634
[44] Joint Employer Survey, Attachment JES32, Response ID 4005
[45] Joint Employer Survey, Attachment JES32, Response ID 4132
[46] Joint Employer Survey, Attachment JES32, Response ID 4300

(h) *"We have one employee who works from home two days a week - on those days her hours are fully flexible. As long as her work is completed in a timely manner, we're all happy"*[47]

9.60 The results of the Joint Employer Survey also serve to reinforce some of the wider principles identified by the Australian Chamber's submissions at 9.4. Consistent with that paragraph, the Joint Employer Survey provides illustrative examples reflecting that:

(a) an employer will more readily approve a flexibility request made by an employee in circumstances where in the assessment of the manager of the enterprise:

(i) the enterprise does not require the employee to be substituted during their absence because their work can be 'covered' by other employees (and these arrangements are acceptable and equitable in relation to the other employees).

For example:

- "*Made it so it didn't coincide with other employees working in that same area having the same day/time off and that we had adequate skill sets to cover the days activities*"[48]
- "*I was had other staff available to swap their days and times with. It was mutually beneficial for both employees to change their days. In another instance, I had another employee suitably qualified to finish her hours in one role (lifeguard) and then move into another role (teacher) at the centre to take up the additional hours that still needed to be filled. As the teaching role was a minimum of 1 hour, the other employee was able to get an additional hour of work, the original employee was able to finish early and the clients were looked after*"[49]
- *"To obtain an "even cover" in the office, there was give and take and we swapped their days and others days to accommodate peoples need to care for children. It often changes depending on where people are at with their work and home priorities. At the end of the day, in administration, there are a set number of hours and people are responsible enough to work their hours when they need to and are grateful for the flexibility. We negotiate on hours/days and whether people work from home or in the office"*[50]
- *"Happened once - the position in question was an administration role in the front office - first point of call in a small working environment. Modifications were made to days requested as it had to be agreed with*

[47] Joint Employer Survey, Attachment JES32, Response ID 1292
[48] Joint Employer Survey, Attachment JES32, Response ID 541
[49] Joint Employer Survey, Attachment JES32, Response ID 567
[50] Joint Employer Survey, Attachment JES32, Response ID 932

other staff who were then expected to cover the times this employee would be out of the office"[51]

- "*The change in hours required the cooperation from two other employees to modify their hours to ensure trading hours cover for the business*"[52]
- "*Example A: to move from f/time to p/time and finish at 3:30pm each day, not 5pm. This was agreed to, as we evaluated the time of day and it was not the busiest and could be handled by a 2nd person already assisting. Example B: was already p/time, child started school and wanted to change days, this was agreed to, as another p/time staff member was able to work in with this employee to swap days*"[53]

(ii) the employee can perform their work at other times;

For example:

- "*As a production manufacturer set shifts are in place as people work in teams to achieve required production within set shifts and structure. In the case of an adjustment to someone's hours i.e. a change from afternoon shift to day shift, for example, can usually be accommodated providing there is a suitable position or job swap available*"[54]
- "*One employee needs to leave work early on Friday to pick up kids. He simply starts earlier on those days*"[55]
- "*We have a few employees that wanted to only work 4 days. In this case were able to extend plant hours on the 4 days to cover the lost production on the 5th day*"[56]
- "*We have one employee who regularly changes his hour of work in order to undertake tertiary education. The duties of this employee was not going to dramatically affect the daily operations of the business by changing his hours*"[57]
- "*They were able to complete some of their tasks still remotely*"[58]
- "*We were able to accommodate the request within the operational needs of the business. 60% of roles could realistically operate outside normal operational hours without an impact on service delivery*"[59]

(iii) having regard to the cost and operational practicality, the employee is easily substitutable by external labour.

[51] Joint Employer Survey, Attachment JES32, Response ID 1087
[52] Joint Employer Survey, Attachment JES32, Response ID 1293
[53] Joint Employer Survey, Attachment JES32, Response ID 3492
[54] Joint Employer Survey, Attachment JES32, Response ID 256
[55] Joint Employer Survey, Attachment JES32, Response ID 1738
[56] Joint Employer Survey, Attachment JES32, Response ID 2450
[57] Joint Employer Survey, Attachment JES32, Response ID 2574
[58] Joint Employer Survey, Attachment JES32, Response ID 3289
[59] Joint Employer Survey, Attachment JES32, Response ID 3610

For example:

- "*For one of our permanent hourly supervisor, we were able to be flexible and change her days to Tue, Wed, Thur working and Monday and Friday off. We employed an extra supervisor to cover for the two days she was no longer working*"[60]

(b) an employer is more likely to refuse a flexibility request in circumstances where the employee requests not to work at a certain time at which the requirement for labour is not flexible and/or the employee is not easily substitutable. The requirement for labour may not be flexible because of factors including:

(i) customer/client demand (e.g. opening hours, timetables, teaching times);

For example:

- "*We have customers coming in to pick up stock and this person is in that area. So needs to be here when we are open.*"[61]
- "*Our business is essentially a sales based business and relies on customer contact. It is essential that our employees are available to communicate with our customers during our customers normal working hours. It would be detrimental to our business to have employees working at times when customers cannot contact them or when customers want to contact them and can't*"[62]
- "*We have to fit in with our customers delivery requirements and customers hours of work so it is not practical to move the majority of employees working days or hours*"[63]
- "*For particular roles, it is not possible to change the days or starting times because of the customer requirements for service. No point to have personnel present when the work isn't*"[64]
- "*The request did not allow the business to continue operating according to its customer promise. In some cases - retail stores need to be open from 9 to 5 and it is unreasonable to staff it the way the request would require*"[65]
- "*The role was in the sales administration area and needed to be in the office between 9-5 to coincide when customers were most likely to place*

[60] Joint Employer Survey, Attachment JES32, Response ID 2042
[61] Joint Employer Survey, Attachment JES3, Response ID 50
[62] Joint Employer Survey, Attachment JES3, Response ID 119
[63] Joint Employer Survey, Attachment JES3, Response ID 380
[64] Joint Employer Survey, Attachment JES3, Response ID 1111
[65] Joint Employer Survey, Attachment JES3, Response ID 3737

their purchase orders. These needed to be processed expeditially to meet customer delivery dates particularly interstate"[66]

- "*Manufactruing work cells and other customer/project driven timelines determine the days and hours required to be worked to honour contracted commitments*"[67]
- "*For productivitiy and customer service reasons. If the request would cause an imbalance of available labour to the workload eg. if at peak times there would have been insufficient 'hands on deck' or vice versa*"[68]
- "*The business would have lost the ability to provide an acceptable level of service to clients. Losing clients isn't something that can be considered. This would impact all staff not just the employee wishing to change their hours*"[69]
- "*The work that was to be completed had to be done over specific hours due to the needs of clients and our opening hours that we are obligated to run due to lease agreements. The work could not be done at another time, or in a shortened time or taken home. We run a Swimming Pool and Learn to Swim Lessons to if the gates shut at 7pm then we need a Lifeguard there at 7pm. If swim classes are on until 6pm as that's the only time parents can get their children to lessons after finishing work themselves then a teacher needs to be in the water. Due to the Award and minimum hours it would be impossible for me to regularly get a Teacher for 1hr shift due to the travel and prep time if one Teacher was not to finish the full shift. For a Lifeguard as shifts are a min 3hrs I have to look how I am to roster the whole day so the shifts are long enough and breaks are had and covered. Very often I am paying an additional 3hrs for someone to be there due to a 30min break*"[70]
- "*Our business is a support based business for other manufacturers specialising in tight tolerance work. We are customer driven and workload fluctuates with customer requirements it is detrimental for my business to supply customer needs when they require them. Being a high Tec small business we will not exist without having staff on hand to fulfil customer demand and quick turn around requirements*"[71]

(ii) **regulatory requirements (e.g. childcare ratios, WHS compliance)**;

For example:

[66] Joint Employer Survey, Attachment JES3, Response ID 4074
[67] Joint Employer Survey, Attachment JES3, Response ID 4740
[68] Joint Employer Survey, Attachment JES3, Response ID 5313
[69] Joint Employer Survey, Attachment JES3, Response ID 3886
[70] Joint Employer Survey, Attachment JES3, Response ID 567
[71] Joint Employer Survey, Attachment JES61, Response ID 800

- "*We need to ensure the safety of our employees and that they have adequate supervision, we cannot have someone working alone*"[72]
- "*...Workshop roles: WHS issues if working alone in workshop so need to be within normal work hours...*"[73]
- "*Working in construction, sites are closed at times set by the responsible builder. Anything outside these times was not acceptable*"[74]
- "*To ensure another employee was working/present at same time due to workplace health and safety issues*"[75]
- "*It would have meant that the school was not able to meet its duty of care toward children or that students would not have been supported in achieving educational outcomes in the best way possible*"[76]
- "*We work in the early childhood industry and need to have consistent staff with consistent hours to keep our families and especially our children happy. In this industry, you cannot have too many new faces as it upsets the routine of our babies through to our kinder children*"[77]
- "*We could not operate an effective organisation as we would be required to employ staff at times which suit them not when the business needs to have staff on duty to comply with the Education and Care Services National Regulations with respect to staff to child ratios*"[78]
- "*As we are a supported Residential care, Would be very difficult to Roster for the legislative Act And Regulations we work under. The residents rights decide when they require their care. It would be difficult to attract workers without caring/parenting responsibility to work around the staff that do have those responsibilities*"[79]
- "*We operate long day care centres for young children with fixed, regular operating hours. We also operate an RTO and provide accredited and non-accredited training solutions to clients. Therefore, we operate in a service environment which typically requires employees to work particular shifts and particular days to meet the needs of our clients (students and families). The impact of a request to change hours which we could not accommodate operationally would mean either we would incur additional costs over and above our normal operating costs with no change to*

[72] Joint Employer Survey, Attachment JES3, Response ID 1564
[73] Joint Employer Survey, Attachment JES3, Response ID 5700
[74] Joint Employer Survey, Attachment JES3, Response ID 1699
[75] Joint Employer Survey, Attachment JES32, Response ID 4511
[76] Joint Employer Survey, Attachment JES3, Response ID 2803
[77] Joint Employer Survey, Attachment JES3, Response ID 3881
[78] Joint Employer Survey, Attachment JES61, Response ID 3714
[79] Joint Employer Survey, Attachment JES61, Response ID 3746

productivity, or we may have to make the position redundant, or we may need to unreasonably change the roster for other employees"[80]

(iii) work requirements involving 'teams' working simultaneously (e.g. in a production process);

For example:

- "*One person wanted to leave at about 1:30pm to pick up children from school. Normal work finish time was 3:15pm. The person worked in a production team which required all members to run the production line...*"[81]
- "*Working in a team based production work-cell, where safety and efificency required their skill and experience*"[82]
- "*didnt fit with operational requirements. we needed certain tasks done at times, and changing affects other tasks down the line*"[83]
- "*Our business relies upon teamwork to succeed. Where part of the team is missing for part of the shift it makes it very difficult to meet production targets and put a lot of pressure on remaining employees. Market pricing is already very tight and there no room to employ extra employees to cover the short falls*"[84]
- "*If our employees had the right to choose their work days & start/finish times, it would create havoc; as most employees would no doubt look where they could have long weekends. This company runs a 24 hour/5 day shift operation plus a dayshift operation which operates in line with the shift productions streams. This would no doubt impact our capability to process enough material that would allow a long term continuation of our customers processes*"[85]
- "*As a manufacturing business, each part of the process is dependant on the other so this could create significant disruptions if some employees are working different hours or days. Not mention issues such as safety which requires at least two employees be on site at any one time and also financial impact depending on what shifts, allowances, penalty rates these change in hours or days might attract*"[86]
- "*The company would accommodate people where possible. The company is only small with limit resources. To run the manufacturing production line a team is required and the line can't run if there are insufficient people. In short, the team all needs to be here for the same hours for the line to run.*

[80] Joint Employer Survey, Attachment JES61, Response ID 3761
[81] Joint Employer Survey, Attachment JES3, Response ID 266
[82] Joint Employer Survey, Attachment JES3, Response ID 620
[83] Joint Employer Survey, Attachment JES3, Response ID 4302
[84] Joint Employer Survey, Attachment JES3, Response ID 4705
[85] Joint Employer Survey, Attachment JES61, Response ID 86
[86] Joint Employer Survey, Attachment JES61, Response ID 163

Obvious impacts if line can't be run, or can't be run efficiently: loss of business, loss of productivity, loss of income and business becomes non competitive"[87]

- "*As a small business (ave 10 employees) its hard to see how this could work in production. We have work "teams" so other members of the teams would have to adjust to suit. There would be rostering issues to ensure safe coverage*"[88]

(iv) **external limitations particular to certain industries (e.g. industries dependant on weather patterns or animal behaviour)**;

For example:

- "*The business is a dairy farm, with milking times set around the health and welfare of the cows, as well as milk-company pick up times. Its not workable for the business to change milking times when some staff have changes in their life that makes it more difficult to get to work or stay at work...Many jobs require doing at specific times, for example, cows have to be fed the right amount at the right time*"[89]
- "*The times when we need our employee to commence at the usual time, has been when mustering has to be undertaken, which requires an early start on account of location and time involved in this exercise, or when we are fencing away from the homestead...*"[90]
- "*During performance seasons and/or touring, flexibility to working hours are not possible due to the fixed nature of performance times*"[91]
- "*We are not flexible with casual seasonal staff during the harvest season. All of our harvest tasks start 15mins before the sun rises and there is no flexibility with starting later when you are part of a large 30-40 person harvest team. During the winter Non harvest period our work hours are reduced and we only employ a small number of casual staff (30 predominately men for manual labouring/ building and construction of tunnels) during this period. To date no one has requested a change to employees hours/ days off*"[92]
- "*Working events that required immediate and ongoing commitment and immediate attention eg. crop spraying, harvesting, hay making or shearing/crutching, lamb marking, footparing that involve significant costs if they are not done at the right time, on time and by the right people*"[93]

[87] Joint Employer Survey, Attachment JES61, Response ID 266
[88] Joint Employer Survey, Attachment JES61, Response ID 2456
[89] Joint Employer Survey, Attachment JES3, Response ID 2437
[90] Joint Employer Survey, Attachment JES3, Response ID 888
[91] Joint Employer Survey, Attachment JES3, Response ID 1284
[92] Joint Employer Survey, Attachment JES3, Response ID 2042
[93] Joint Employer Survey, Attachment JES3, Response ID 2165

- "*We are a dairy farm milking times make changing work times much more difficult*"[94]
- "*School bus driver requested to change her hours to work between 10am and 2pm due to change in circumstance in her family and she now needed to look after her grandchild who attended school. Unfortunately school bus drivers are required between 7am and 9 am then again between 2pm and 5pm. It was not possible to grant this request*"[95]
- "*As above, many of our roles are resident care orientated, and there are time related requirements to be adhered to, such as meals times, hygiene, medication, and daily living activities. These times are really not able to be flexed on an individual or ad-hoc basis. If there is a possibility to change to another shift, that has been done, but may also involve a reduction in hours or loss of other penalties*"[96]
- "*As farmers our work is dictated largely by the weather and season. We have times of the year when work must be done in a timely manner and we cannot be flexible. However outside of these times we will always try to accommodate our workers' needs. In addition when we first interview a potential employee we are very clear about the times of year and circumstances when we cannot be flexible*"[97]
- "*This would be unworkable for us. We conduct our work between 7.00am and 5.00pm, 5 or 6 days a week. We need to make the most of the available light hours to work our livestock, fix and build new fences, operate machinery, etc.... You cannot efficiently do this at random hours of the day. We also have animal welfare considerations for our stock. We are in a remote location and we need to be careful that we yard our stock in such a way that we reduce the total amount of time that the stock are off feed and out of their natural environment when trucking them to markets or another property*"[98]

(c) An employee may not easily substitutable because:

(i) the employee's special skills means it is difficult to source alternative labour;

For example:

- "*The employee's skillset was unique to them* "[99]

[94] Joint Employer Survey, Attachment JES3, Response ID 2725
[95] Joint Employer Survey, Attachment JES3, Response ID 3343
[96] Joint Employer Survey, Attachment JES3, Response ID 3421
[97] Joint Employer Survey, Attachment JES32, Response ID 1062
[98] Joint Employer Survey, Attachment JES61, Response ID 4949
[99] Joint Employer Survey, Attachment JES3, Response ID 2274

- "*Work is time specific and still needs to be done by someone. We are a small business and can't always replace the skill required*"[100]
- "*We are a small family run business with client deadlines and very specific staff skills required to complete our work. Allowing our employees to determine their hours would mean not being able to build to our client's specified build times and lead times that would be unpalatable to new clients...*"[101]

(ii) **the employee's qualifications means it is difficult to source alternative labour**;

For example:

- "*We have a large mechanised and irrigated dairy farm involving experienced dairy workers plus a highly skilled dairy manager and machinery manager. The latter is in charge of numerous tractors, cultivation and feeding equipment, plus maintenance and operation of complex pumps and irrigation systems. The dairy farmer manages the milking, health and nutrition of a large herd as well as supervising staff. It is extremely difficult to find skilled staff for both of these positions and the dairy manager is on a 457 visa as we found it impossible to employ a local person with the necessary skills. If either of these positions were modified to involve decreased hours of work or restricted to only working on weekdays, for instance, it would have a huge impact on the efficiency and safety of our business. Asking inexperienced staff to cover for skilled employees if the skilled worker has chosen not to work at the usual times is likely to result in dangerous mistakes and situations...*"[102]
- "*Key staff members with mandatory qualifications are required at various times of the week, dictated by production schedules. It may be difficult to source other, equally qualified people to fill in for key staff for occasional work in this regional area of Australia. Alternatively, the business could find itself incurring considerable expenses to pay casual fill-in staff to undertake training courses and also to work additional shifts to clock up the necessary experience to take on a key role. This workplace also has set business hours during which time administration staff must be on the premises....*"[103]

(iii) **the employer's industry or regional location means it is difficult to source alternative labour**;

For example:

[100] Joint Employer Survey, Attachment JES3, Response ID 3274
[101] Joint Employer Survey, Attachment JES61, Response ID 562
[102] Joint Employer Survey, Attachment JES61, Response ID 2521
[103] Joint Employer Survey, Attachment JES61, Response ID 923

- "*For staff in remote locations or with unique skills we may not be able to backfill absences*"[104]
- "*...It is also very common for agricultural staff to live in a house on the farm due to distances from local towns. Should any worker on the farm, who is occupying a house on the farm, choose to reduce their hours to a part-time position, then it would be very difficult to find another part-time person to travel a long distance to work on the farm*"[105]
- "*As a rural enterprise we struggle to find experienced or qualified employee's and if we then have no control in the hours worked by employee's, we would be impacted greatly by this decision with productivity and efficiency*"[106]
- "*We would adjust our staffing levels to accommodate them, as we value our staff. We have ongoing problems finding good staff in our regional area, so will do anything whereever possible to keep them happy*"[107]
- "*If this was the case it would impact significantly financially on the business within increased labour costs and seriously reduce in our shift and staff movement flexibility to manage daily operations and meet market demand. Operating in a regional area also does not allow us the luxury of extra experienced staff as they are not available*"[108]

(iv) **the employer's roster pattern makes it difficult for the employer to substitute the employee**:

For example:

- "*Some alterations are manageable while others are not, its not always that simple to just change / shorten shifts & cover with the existing team, and usually these requests don't generate enough hours to replace with additional employees*"[109]
- "*employee wanted to change the shift rotation pattern we were unable to do this as the employee is currently working 2 days a week and another part time employee is working 3 days a week so we were unable to accept a shift rotation change - this would have resulted in having extra people on one rotation and not enough on the other rotation*"[110]
- "*As a production manufacturer set shifts are in place as people work in teams to achieve required production within set shifts and*

[104] Joint Employer Survey, Attachment JES61, Response ID 561
[105] Joint Employer Survey, Attachment JES61, Response ID 2521
[106] Joint Employer Survey, Attachment JES61, Response ID 2293
[107] Joint Employer Survey, Attachment JES61, Response ID 4098
[108] Joint Employer Survey, Attachment JES61, Response ID 4118
[109] Joint Employer Survey, Attachment JES3, Response ID 3114
[110] Joint Employer Survey, Attachment JES3, Response ID 4809

structure. In the case of an adjustment to someone's hours ie. a change from afternoon shift to day shift for example can usually be accommodated providing there is a suitable position or job swap available"[111]

9.61 The Australian Chamber notes that reliance on the Joint Employer Survey is not necessary to establish that employers by and large are accommodating of employee requests. Such a finding is already established by the ACTU's own case.

9.62 The Joint Employer Survey is relied upon to demonstrate a 'reality' of practical issues with compliance in respect of flexibility requests. It should therefore be accepted as evidence of the experience of businesses in accommodating requests and provides some insight into issues dealt with by employers in operating under the current legislative arrangements.

9.63 The findings of the Joint Employer Survey are also broadly consistent with a similar survey undertaken by the Victorian Automobile Chamber of Commerce and the Motor Traders' Association of New South Wales (**Vehicle Survey)** which primarily concerns the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**Vehicle Award**).

9.64 The only material statistical difference between the results of the Joint Employer Survey and the Vehicle Survey is that the Vehicle Survey appears to have a higher rate of Respondents (63.8% vs 48.92%) who had not, since 2010, received a request from any employees to change their hours of work (including days of work and starting/finishing times) because they have parenting responsibilities and/or caring responsibilities (e.g. for a person with a disability).

9.65 As such, our submissions above can also be taken in a general sense to apply to the Vehicle Survey and the Vehicle Award.

Other Matters

9.66 There are a number of other peripheral matters in relation to the evidence which the Australian Chamber wishes to address.

Non-Requestors

9.67 The ACTU submits that the statistical analysis of the existing regulatory regime is also compromised by the phenomenon of the "*discontented non-requestor*".

9.68 By way of example, the Murray Report at [68] outlines data that 15% of workers reported that flexibility was "not possible or available" in their jobs.[112] Other data suggests that 50% of male partners to mothers of children under 2 who did not use flexible work arrangements considered that flexible work arrangements were unavailable in their jobs.[113]

[111] Joint Employer Survey, Attachment JES32, Response ID 256
[112] See Murray Report at [68]
[113] See Murray Report at [67]

9.69 The ACTU submits[114] that there is a large proportion of employees who do not ask for flexibility arrangements because:

(a) they think their application would be rejected so it is not worth asking; or

(b) they think flexible work was frowned upon and potential could result in reprisals.

9.70 In the submission of the Australian Chamber, there is no evidence (in fact the evidentiary position suggests strongly to the contrary) that employees are self-regulating their requests on the basis that employers will arbitrarily refuse their requests. It appears much more likely that such self-regulation occurs as a result of an individual employee's understanding that some flexibility requests are not possible or practical in their role. A decision not to ask for an impractical (or impossible) accommodation is not something which demonstrates any inherent unfairness or failure of the existing minimum safety net, but merely an employee's rational assessment of whether their preferences can be accommodated within the scope of their current role.

9.71 It is of course acknowledged that, as inferred by Dr Murray at [68] of her Report, an employee's perception that flexible working arrangements are not possible in a particular role will not always be correct.

9.72 It is also true that an employer's assessment that flexible working arrangements are not possible in a particular role may not always be correct.

9.73 This does not (and in light of the balance of the evidentiary material filed in this case, cannot) establish that a particular employee's preferences are possible to accommodate in every role, in every case (as would be required by the Claim).

9.74 As the evidence discloses, there are many scenarios in which a particular employee's preferences are either not possible to accommodate or would impose limitations or costs which are not sustainable.

9.75 In the view of the Australian Chamber, the best and most appropriate judges of whether certain working arrangements are possible in a particular enterprise are those managing that enterprise.

9.76 Where an employer makes an inappropriate decision following a flexibility request, the appropriate protections and remedies are outlined from 6.28 above.

[114] See [134] of ACTU Submissions

9.77 Merely because employers may (it seems in limited circumstances) incorrectly determine that flexible working arrangements are not possible in a particular role does not make it appropriate to entirely remove the ability employers to make an assessment whether flexibility can be accommodated.

Gender

9.78 A substantial proportion of the ACTU's case is directed toward issues relating to gender.

9.79 The witness statement of Professor Austen seeks to provide an overview of the statistical differences between the genders in respect of the labour market.

9.80 The statement identifies that in Australia:

(a) women have a proportionally lower labour market participation;

(b) women are more likely to work part-time;

(c) there is a high degree of occupational segregation in Australia;

(d) women in general perform a proportionally higher amount of unpaid caring work.

(e) parenthood has a negative correlation with the participation of women in the workforce.

9.81 It is agreed that the "*impact of parenthood on females is large*".[115]

9.82 It is also uncontroversial that taking on caring or child-rearing responsibilities will impact the labour force participation of an individual, given the finite nature of a person's time.

9.83 As it is a current reality that in general terms women perform proportionally more childrearing and caring duties, it has as necessary consequence that, in general terms, women's workforce participation is lower.

9.84 There is of course also a wider debate as to the responsibility of an individual's choice to have children, alongside an individual's (or often couples) choice to rationally determine how to best balance financial and caring responsibilities.

9.85 Beyond that broader political debate, the relevant question before the Commission in these proceedings when considering the evidence of Professor Austen must be: what effect would the Claim have on the position of women in the Australian labour force?

[115] See Austen Statement at i

9.86 Given the radical nature of the Claim (and lack of comparable legislative arrangements), it is difficult to predict what effect the Claim would have on labour marker participation of women.

9.87 It does seem however, that, should the Claim make it easier to work part-time, it is more likely than not to increase the proportion of women working part-time and also to increase the proportion of unpaid caring work performed by women.

9.88 This appears to be acknowledged by ACTU in its submissions at [3]:

> *Family friendly work arrangements cannot alone solve the problem of women's underrepresentation in paid work and overrepresentation in unpaid work. But for as long as Australian women continue to do the majority of unpaid child-rearing and care work to the detriment of their connection with the labour force, there is a strong need for structural reform to enable greater and more secure workforce participation for parents and carers over the life cycle.*

Dr Stanford

9.89 The evidence of Stanford Report can be dealt with briefly.

9.90 Clearly, the implementation of family friendly arrangements can result in benefits for employers.

9.91 As the evidence makes out, the accommodation rates of flexibility requests and the rate of part-time work is high.

9.92 Given the current legislative paradigm allows an employer some ability assess the business effect of granting a flexible working arrangements before they do so, it follows that the benefits outlined at [6] of the Stanford Report are likely to arise in many cases.

9.93 Acting rationally as an employer, this means that employers are more likely to accommodate flexibility requests which result in benefits to the employer and are only likely to accommodate flexibility requests which do not result in prohibitive costs.

9.94 The fundamental difficulty of the Stanford Report is that the data on which it is based arises from systems where employers can exercise a 'right of refusal'. The Stanford Report therefore entirely fails to engage with the Claim proposed by the ACTU.

9.95 None of the data identified by Stanford Report relates to an industrial relations system in which an employee can elect to work their chosen hours, regardless of the position of the employer. This is so because it appears no such system exists.

9.96 Dr Stanford's description of the types of costs arising for employers in implementing flexibility arrangements[116] and his assessment that, on the basis of quantitative research, those costs are either 'modest' or nil[117] is therefore of almost no probative value whatsoever.

9.97 Likewise, conclusions such as those found at [10] of the Stanford Report that employers who have implemented family-friendly flexibility in working hours confirm that few have found the measures to be onerous and most indicate their general satisfaction are meaningless in respect of the context of the Claim.

10. THE OVERSEAS EXPERIENCE

10.1 In case it is not already apparent from the terms of the Claim, it is relevant to note that not only is the Claim is a radical departure from the current Australian position, the granting of the Claim would result in a system unique in the industrial world. Our review cannot identify any similar international legislation that allows an employee what is in effect an unfettered right to choose their hours of work.

10.2 The current section 65 entitlement in Australia to request flexible work mirrors flexible work entitlements in other international jurisdictions such as the United Kingdom, Germany and New Zealand.

10.3 In these jurisdictions, an employee has a right to request flexible work arrangements and this request can be denied on the basis of operational/business grounds. In Germany, an employee can challenge an employer's decision in Court, however, in line with the current Australian entitlement, there is no right to dispute a decision made by an employer in relation to flexible work arrangements in the UK and New Zealand.

10.4 The Netherlands also has variations of flexible work legislation, with the most recent flexible work legislation coming into force from 1 January 2016. While the Flexible Working Hours Act (Wet Flexibel Werken) seeks to make the combination of work and private life easier, the legislation maintains core similarities to section 65 including:

(a) an employee can only request to change hours of work and/or workplace; and

(b) the employer can refuse the request on the basis of substantial business reasons.

[116] See Stanford Report at [8]
[117] See Stanford Report at [9]

10.5 An indicative summary table of the Australian Chamber's research into these arrangements is included at Schedule 1.

PART F

11. THE MODERN AWARDS OBJECTIVE

11.1 The modern awards objective in s 134(1) of the FW Act is central to the Review. The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards (NES) provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. We address each element of the modern awards objective below.

Relative living standards and the needs of the low paid

11.2 Section 134(1)(a) is written differently from other limbs (except perhaps 134(1)(e)). It requires consideration of 'relative living standards' and the 'needs of the low paid' generally. 'Relative living standards' and the 'needs of the low paid' are related but not identical considerations. Neither phrase is defined in the Act but they are relevant to the modern awards objective (s 134(1)), the low paid bargaining regime (s241) and the minimum wages objective (s 284).

11.3 The Commission has made a number of observations about the phrase 'relative living standards' including that central to the examination of relative living standards is the extent to which low paid workers are able to purchase the essentials for a decent standard of living and to engage in community life.[118]

11.4 The Commission has focused on the comparison between award reliant employees and other employed employees, especially non managerial employees.

11.5 Employees' relative living standards are also affected by the level of wages an employee earns, hours they work, household circumstances and tax transfer payments.

11.6 When considering the needs of the low paid, the Commission has generally adopted the notion that low paid persons are those who are award reliant and receive a rate of pay that as an adult full time equivalent would place them below two thirds of the median adult ordinary time earnings.[119]

11.7 The relative living standard of employees is affected by the level of wages they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.[120] It

[118] [2014] FWCFB 3500 at [302]
[119] Id at [391]
[120] [2017] FWCFB 1001 at [171]

is also relevant that the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a negative impact on their relative living standards and on their capacity to meet their needs.[121]

11.8 Given that the Claim provides eligible employees with a unilateral right to determine their hours in accordance with their parenting/caring responsibilities and preferences, it follows that the Claim will benefit low paid employees who access entitlements under it.

11.9 The effect of the Claim would also likely be material on the *relative* living standards of the low paid, given that it would bestow on all Award-covered employees an entitlement to determine their hours, an extraordinary proposition which would provide low-paid award-covered employees with a level of unprecedented autonomy not shared by the vast majority of non-low-paid employees.

The need to encourage collective bargaining

11.10 It is not apparent how the Claim would encourage collective bargaining.

11.11 As previously submitted, placing a one size fits all clause in all modern awards simply changes the scheme of the BOOT against which enterprise bargaining occurs rather than promote collective bargaining itself.

11.12 Given that the Claim is not a modern award claim per se, but rather an attempt to extend (and neutralise) some elements of the NES, it is unsurprising that no attempt has been made to justify the Claim in any particular industry.

11.13 In reality, whether such a clause is relevant in collective bargaining for a specific enterprise should simply be left to that enterprise (for the employer and employees) to determine through bargaining.

11.14 For some enterprises, workplace flexibility available under the Claim may be rarely utilised (e.g. in workforces with very young staff) while in others, workplace flexibility will have central relevance.

11.15 Bargaining in these circumstances will allow an employer to consider the size of their enterprise, the profile of their workforce, whether they receive any countervailing benefit in return and any issues they have in terms of their broader approach to flexibility.

11.16 Significantly, this was also a factor taken into consideration by the Panel in the *Fair Work Act Review 2012* where it was noted:

[121] [2017] FWCFB 1001 at [173]

> *Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.*[122]

11.17 It is also relevant to note that the analogy used by the ACTU at [222] of its Submissions in respect of the inclusion of part-time employment in the Fire Fighting Award is not apt.

11.18 With respect, it is difficult to countenance an argument that the introduction of the Claim could encourage collective bargaining in respect of this issue, or that the current arrangements of the NES operate as an effective prohibition on bargaining in respect of flexible working arrangements.

11.19 While the Australian Chamber acknowledges that it would be unlikely in the extreme for any employer to agree to an enterprise agreement clause in the form of the Claim, leaving open the possibility of employers bargaining for workplace flexibility would encourage collective bargaining in satisfaction of this clause.

11.20 Once included in modern awards, and having regard to the application of the BOOT, it is hard to imagine how the Claim could be extended or modified in the course of bargaining. As such, it cannot be said to encourage bargaining.

11.21 In simple terms, the more in the minimum safety net, the less 'room' to bargain. In this sense, the Claim positively offends this limb.

The need to promote social inclusion through increased workforce participation

11.22 Section 134(1)(c) requires that the Commission take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[123]

11.23 The granting of the Claim will result in employees performing less paid work. Indeed, many of the witness statements filed in these proceedings express a preference to work less.

11.24 The evidentiary position in respect of 'obtaining employment' is less clear.

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[122] "Towards more Productive and equitable workplaces: An evaluation of the Fair Work Legislation accessed at https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf at page 98

[123] [2017] FWCFB 1001 at [179]

11.25 At [226] of its submission the ACTU submits that the Claim will enable those parents and carers who are unable to access flexible work to re-enter the workforce. It is unclear whether this submission is referring to employees who are currently on parental leave and unwilling or unable to return to their role or whether it is a broader submission suggesting that the Claim will facilitate the re-entry of employees not currently employed back into the workforce.

11.26 It is difficult to understand how the Claim will facilitate the re-entry of unemployed persons back into the workforce given that such employees will not be eligible under the Claim.

The need to promote flexible modern work practices and the efficient and productive performance of work

11.27 The ACTU's submission in respect of s 134(1)(d) is fundamentally misguided.

11.28 At [228] of its submission, the ACTU identify that section 134(1)(d) is "*significant*" in the context of the Claim application in that "*Family friendly working hours are by their nature flexible, modern work practices*".

11.29 This submission amounts to identifying an equivalence in the use of the word 'flexible' both in s 134(1)(d) and 'flexible work arrangement'.

11.30 It should be plain that the use of the word 'flexible' in s 134(1)(d) refers to flexible work practice from the perspective of the employer[124] while the use of the word 'flexible' in 'flexible working arrangements' refers to flexibility from the perspective of the employee.

11.31 This limb of the modern awards objective is aimed squarely at promoting:

(a) flexible modern work practices; and

(b) the efficient and productive performance of work.

11.32 The language in this limb of section 134 is aimed at the nature of the work practices and then to the performance of work as regulated by the modern award to achieve a particular goal.

11.33 It would seem uncontroversial that this limb would require:

(a) ensuring that there are no artificial barriers to the performance of work; and

(b) ensuring appropriate fluidity of the use of labour without unnecessary or arbitrary restrictions.

[124] [2017] FWCFB 1001at [117]

11.34 In our submission, and as the evidence will disclose, the granting of the Claim would in many circumstances place an unworkable restriction on the use of labour.

11.35 As disclosed by the evidence, where substitution of employees is rendered difficult due to the nature of an employee's role, the enterprise's operation, shift pattern or regulatory environment, the Claim would operate as extraordinary fetter on production or trading, before even considering the relevant costs.

11.36 No reasonable assessment of flexible modern work practices and the efficient and productive performance of work could place unilateral control of work hours in the hands of eligible employees.

The need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts;

11.37 This sub-section is neutral to the determination of the Claim.

The principle of equal remuneration for work of equal or comparable value

11.38 With respect, the ACTU's submissions in respect of this limb are mistaken.

11.39 The expression 'equal remuneration for work of equal or comparable value' is defined in s 302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.

11.40 The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.[125]

11.41 As found by the Penalty Rates Full Bench[126]:

> *Further, even if it was shown that a reduction in Sunday penalty rates disproportionately impacted on women workers that fact would not necessarily enliven s.134(1)(e). Section 134(1)(e) requires that we take into account the principle of equal remuneration for men*

[125] [2017] FWCFB 1001at [207]
[126] [2017] FWCFB 1001at [215]-[216]

and women workers 'for work of equal or comparable value'. Any reduction in Sunday penalty rates in these awards would apply equally to men and women workers.

However, if it was shown that a reduction in penalty rates did disproportionately affect female workers then it is likely to have an adverse impact on the gender pay gap. Such an outcome may well be relevant to an assessment of whether such a change would provide a 'fair and relevant minimum safety net', but it does not necessarily enliven s.134(1)(e).

11.42 This limb of the modern awards objective is therefore a neutral consideration.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

11.43 It is convenient to address these two limbs together.

11.44 The Claim's effect on business, productivity, employment costs and regulatory burden will vary between businesses.

11.45 In scenarios where flexibility is already granted to employees under existing formal or informal arrangements, it is likely that the submissions of the ACTU will be correct: business may attain some mutual benefit arising from the flexibility arrangement and no additional regulatory, productivity or commercial detriment will arise.

11.46 In these circumstances, the Claim would be of no effect (with the arrangements having already been made either informally or through s 65).

11.47 The relevant question then becomes: what will be the business impact of the enforced granting of flexibility requests in circumstances where there are reasonable business grounds to refuse those requests.

11.48 If reasonable business grounds exist to refuse a request, it is axiomatic that it is against an employer's best interests to grant the request.

11.49 It is of course then a fallacy to suggest that the same benefits will arise in circumstances where a request would have ordinarily been refused on reasonable business grounds.

11.50 In circumstances where an employer considers, and it is in fact so, that a flexibility request will create unreasonable, unnecessary or untenable administrative or commercial burdens, no benefit

will flow to the employer and considerable harm may be done if it is compelled to accept an employee's request under the Claim.

11.51 Exercise of an entitlement under the Claim may require:

(a) the inefficient use of labour;

(b) an employer to engage substituted labour for impractical periods;

(c) where substituted labour is insufficient, a plant or service to shut down having regard to operational or legislative requirements.

11.52 If applied in practically every modern award, the Claim has the potential to effect employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

11.53 It is acknowledged that the Claim would result in an entitlement of considerable simplicity. It is relevant to note however that the sheer absurdity of the Claim in respect of certain scenarios (particularly those which render production or trade impossible) would create considerable confusion.

11.54 The overlap between the Claim and the s 65 regime would also be a relevant factor in this assessment.

11.55 Finally, a clause that enables an employee to unilaterally vary the agreed terms of their engagement in an unfettered way so long as they have parental or carer's responsibility cannot be said to be giving rise to system stability. Much of the demand for part-time and casual work comes from award-reliant service sector industries. These sectors, by their very nature, attract parents and carer's because they offer flexible work forms. It is feasible that small businesses in the sector could face disruption to their business operations and staffing arrangements to accommodate all changes to working arrangements, particularly where the preferred working hours of employees are not complimentary to or in line with the preferences of other employees or customer needs.

12. CONCLUSION

12.1 Whatever the aims of the Claim, the scope of the Claim extends well beyond what to necessary to achieve a fair and reasonable minimum safety net of modern awards and the NES.

12.2 As was developed in the 2005 Case, and confirmed by the Commission in this Review, in constructing a fair and relevant minimum safety net, regard needs to be had to the circumstances of the business as well as to employee preference.

12.3 In seeking to empower eligible employees to unilaterally determine their hours, the ACTU seeks a system which is entirely impractical and one which would impose costs and constraints on employers which could not be justified.

12.4 Simply put, employers should not be required to accommodate employee preference regardless of the circumstances of the enterprise. Flexible work for employees can have benefit for businesses, this is obvious, however such benefits will vary from business to business and employee to employee.

12.5 There currently exists a flexibility regime under the FW Act which is not only at odds with the Claim but already appears to be largely effective in accommodating employees.

12.6 Granting the Claim would inappropriately usurp that existing regime, and should not be entertained given:

(a) the Claim is either beyond the jurisdiction of the Commission or so fundamentally contradicts the intended operation of the FW Act that it should be refused;

(b) in seeking to remove the ability of an employer to refuse a flexible work request, the Claim could not operate practically, particularly for small businesses;

(c) the Claim cannot be considered appropriate in a fair and relevant minimum safety net as it removes the ability of businesses to make decisions as how to roster their labour; and

(d) the existing provisions of the FW Act (specifically s 65) and informal arrangements operate appropriately in facilitating flexible work arrangements and this is made out by the ACTU's own case.

SCHEDULE 1

	Australia	Netherlands	UK	Germany	New Zealand
Where does right come from?	ACTU Claim	Flexible Work Act or Wet Flexibel Werken	Part 8A of the Employment Rights Act Supported by the Flexible Working Regulations 2014 and a Code of Practice	Part-time and Fixed Term Employment Law 2000 ("Gesetz über Teilzeit und befristete Arbeit 2000 BGBI I 2000") (normal right) 6 Gesetz zum Erziehungsgeld und zur Elternzeit (Bundeserziehungsgeltgesetz (BErzGG) (Parental leave right)	Part 6AA Employment Relations Act (NZ)
Right to flexible work	Right to temporarily reduced working hours with a right to revert to former working hours after arrangement ceases	Right to request change hours of work and/or workplace (work from home)	Right to request flexible work arrangements	Right to request a reduction in working time Also a right for new parents (both mothers and fathers) to request a temporary reduction of their working time to between 15 - 30 hours per week for the duration of their parental leave (of up to three years after the birth of a child)	Right to request flexible work arrangements
Eligibility	Employees with parental responsibilities for the care of child of school age or younger or carers responsibilities	N/A - no limit	N/A - no limit	N/A - no limit	N/A - no limit
Ability for employer to refuse/qualification of entitlement	No - employer must implement provided that the employee meets eligibility requirements	Yes - employer must have compelling business interest/substantial business reason to refuse request to change hours. Employer does not need to have compelling business interest/substantial business reason for request to change workplace but must consult with employee first before refusal	Yes - employer must consider the request in a 'reasonable manner'. If employers refuse requests, then the decision must be based on one of the following factors: • the burden of additional costs; • an inability to reorganise work among existing staff; • an inability to recruit additional staff; • detrimental impact on quality of service; • detrimental impact on performance (of the individual and/ or the organisation	Employer has to make the change as long as there are no proven "business or organisational reasons" for a refusal which "substantially influence the organisation of work or safety or carry disproportionate costs'	Yes - can be refused on recognised business grounds including: • Cannot reorganise work among existing staff • Cannot recruit additional staff • Negative impact on quality • Negative impact on performanc e • Not enough work during the periods the employee proposes to work • Planned structural

	Australia	Netherlands	UK	Germany	New Zealand
			); • detrimental effect on ability to meet customer demand; • insufficient work for the periods the employee proposes to work; • planned structural change to the business.		changes • Burden of additional costs • Negative effect on ability to meet customer demand.
Dispute resolution	Disputes may arise in relation to: • Employers refusal to implement arrangement • Employee's eligibility • Whether reasonable notice was provided • Whether or not required details were included in notice • Practical details of the arrangement including days and hours, length and date of reversion	N/A	N/A	Employees can challenge the employer's decision in court	Yes - employees can make a formal complaint but only if the employer hasn't properly followed the process for notifying of their decision. Cannot take action because the employer refused their request or because they disagree with the ground given
Eligibility	Six month minimum service requirement. Notice must be reasonable and evidence must be provided that would satisfy a reasonable person of their carers or parental responsibilities	Six month minimum service requirement. Employers employing less than 10 employees are excluded from statutory scheme	Must be employed for more than 26 weeks.	Six month minimum service requirement. Employer has to employ more than 15 staff	

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Witness Statements

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