Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Family Friendly Work Arrangements
(AM2015/2)

31 October 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

LIST OF ATTACHMENTS

Attachment	Description
JES1	Joint Employer Survey – Email dated 3 August 2017 from Ai Group to its Members
JES2	Joint Employer Survey – Email dated 28 August 2017 from Ai Group to its Members
Joint Employer Survey – Responses to the survey question: *Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree*.	
JES3	Joint Employer Survey – All responses
JES4	Joint Employer Survey – All responses from respondents covered by the *Building and Construction General On-Site Award 2010*
JES5	Joint Employer Survey – All responses from respondents covered by the *Clerks – Private Sector Award 2010*
JES6	Joint Employer Survey – All responses from respondents covered by the *Commercial Sales Award 2010*
JES7	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Schools) General Staff Award 2010*
JES8	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Teachers) Award 2010*
JES9	Joint Employer Survey – All responses from respondents covered by the *Electrical, Electronic and Communications and Contracting Award 2010*
JES10	Joint Employer Survey – All responses from respondents covered by the *Food, Beverage and Tobacco Manufacturing Award 2010*
JES11	Joint Employer Survey – All responses from respondents covered by the *General Retail Industry Award 2010*
JES12	Joint Employer Survey – All responses from respondents covered by the *Graphic Arts, Printing and Publishing Award 2010*
JES13	Joint Employer Survey – All responses from respondents covered by the *Hair and Beauty Industry Award 2010*
JES14	Joint Employer Survey – All responses from respondents covered by the *Health Professionals and Support Services Award 2010*
JES15	Joint Employer Survey – All responses from respondents covered by the *Horticulture Award 2010*
JES16	Joint Employer Survey – All responses from respondents covered by the *Hospitality Industry (General) Award 2010*
JES17	Joint Employer Survey – All responses from respondents covered by the *Joinery and Building Trades Award 2010*
JES18	Joint Employer Survey – All responses from respondents covered by the *Live Performance Award 2010*
JES19	Joint Employer Survey – All responses from respondents covered by the *Manufacturing and Associated Industries and Occupations Award 2010*
JES20	Joint Employer Survey – All responses from respondents covered by the *Meat Industry Award 2010*
JES21	Joint Employer Survey – All responses from respondents covered by the *Pastoral Award 2010*
JES22	Joint Employer Survey – All responses from respondents covered by the *Plumbing and Fire Sprinkling Award 2010*
JES23	Joint Employer Survey – All responses from respondents covered by the *Professional Employees Award 2010*

JES24	Joint Employer Survey – All responses from respondents covered by the *Restaurant Industry Award 2010*
JES25	Joint Employer Survey – All responses from respondents covered by the *Road Transport (Long Distance Operations) Award 2010*
JES26	Joint Employer Survey – All responses from respondents covered by the *Road Transport and Distribution Award 2010*
JES27	Joint Employer Survey – All responses from respondents covered by the *Social, Community, Home Care and Disability Services Award 2010*
JES28	Joint Employer Survey – All responses from respondents covered by the *Storage Services and Wholesale Award 2010*
JES29	Joint Employer Survey – All responses from respondents covered by the *Timber Industry Award 2010*
JES30	Joint Employer Survey – All responses from respondents covered by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
JES31	Joint Employer Survey – All responses from respondents covered by the *Wine Industry Award 2010*
Joint Employer Survey – Responses to the survey question: *Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.*	
JES32	Joint Employer Survey – All responses
JES33	Joint Employer Survey – All responses from respondents covered by the *Building and Construction General On-Site Award 2010*
JES34	Joint Employer Survey – All responses from respondents covered by the *Clerks – Private Sector Award 2010*
JES35	Joint Employer Survey – All responses from respondents covered by the *Commercial Sales Award 2010*
JES36	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Schools) General Staff Award 2010*
JES37	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Teachers) Award 2010*
JES38	Joint Employer Survey – All responses from respondents covered by the *Electrical, Electronic and Communications and Contracting Award 2010*
JES39	Joint Employer Survey – All responses from respondents covered by the *Food, Beverage and Tobacco Manufacturing Award 2010*
JES40	Joint Employer Survey – All responses from respondents covered by the *General Retail Industry Award 2010*
JES41	Joint Employer Survey – All responses from respondents covered by the *Graphic Arts, Printing and Publishing Award 2010*
JES42	Joint Employer Survey – All responses from respondents covered by the *Hair and Beauty Industry Award 2010*
JES43	Joint Employer Survey – All responses from respondents covered by the *Health Professionals and Support Services Award 2010*
JES44	Joint Employer Survey – All responses from respondents covered by the *Horticulture Award 2010*
JES45	Joint Employer Survey – All responses from respondents covered by the *Hospitality Industry (General) Award 2010*
JES46	Joint Employer Survey – All responses from respondents covered by the *Joinery and Building Trades Award 2010*
JES47	Joint Employer Survey – All responses from respondents covered by the *Live Performance Award 2010*

JES48	Joint Employer Survey – All responses from respondents covered by the *Manufacturing and Associated Industries and Occupations Award 2010*
JES49	Joint Employer Survey – All responses from respondents covered by the *Meat Industry Award 2010*
JES50	Joint Employer Survey – All responses from respondents covered by the *Pastoral Award 2010*
JES51	Joint Employer Survey – All responses from respondents covered by the *Plumbing and Fire Sprinkling Award 2010*
JES52	Joint Employer Survey – All responses from respondents covered by the *Professional Employees Award 2010*
JES53	Joint Employer Survey – All responses from respondents covered by the *Restaurant Industry Award 2010*
JES54	Joint Employer Survey – All responses from respondents covered by the *Road Transport (Long Distance Operations) Award 2010*
JES55	Joint Employer Survey – All responses from respondents covered by the *Road Transport and Distribution Award 2010*
JES56	Joint Employer Survey – All responses from respondents covered by the *Social, Community, Home Care and Disability Services Award 2010*
JES57	Joint Employer Survey – All responses from respondents covered by the *Storage Services and Wholesale Award 2010*
JES58	Joint Employer Survey – All responses from respondents covered by the *Timber Industry Award 2010*
JES59	Joint Employer Survey – All responses from respondents covered by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
JES60	Joint Employer Survey – All responses from respondents covered by the *Wine Industry Award 2010*
Joint Employer Survey – Responses to the survey question: *If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.*	
JES61	Joint Employer Survey – All responses
JES62	Joint Employer Survey – All responses from respondents covered by the *Building and Construction General On-Site Award 2010*
JES63	Joint Employer Survey – All responses from respondents covered by the *Clerks – Private Sector Award 2010*
JES64	Joint Employer Survey – All responses from respondents covered by the *Commercial Sales Award 2010*
JES65	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Schools) General Staff Award 2010*
JES66	Joint Employer Survey – All responses from respondents covered by the *Educational Services (Teachers) Award 2010*
JES67	Joint Employer Survey – All responses from respondents covered by the *Electrical, Electronic and Communications and Contracting Award 2010*
JES68	Joint Employer Survey – All responses from respondents covered by the *Food, Beverage and Tobacco Manufacturing Award 2010*
JES69	Joint Employer Survey – All responses from respondents covered by the *General Retail Industry Award 2010*
JES70	Joint Employer Survey – All responses from respondents covered by the *Graphic Arts, Printing and Publishing Award 2010*
JES71	Joint Employer Survey – All responses from respondents covered by the *Hair and Beauty Industry Award 2010*

JES72	Joint Employer Survey – All responses from respondents covered by the *Health Professionals and Support Services Award 2010*
JES73	Joint Employer Survey – All responses from respondents covered by the *Horticulture Award 2010*
JES74	Joint Employer Survey – All responses from respondents covered by the *Hospitality Industry (General) Award 2010*
JES75	Joint Employer Survey – All responses from respondents covered by the *Joinery and Building Trades Award 2010*
JES76	Joint Employer Survey – All responses from respondents covered by the *Live Performance Award 2010*
JES77	Joint Employer Survey – All responses from respondents covered by the *Manufacturing and Associated Industries and Occupations Award 2010*
JES78	Joint Employer Survey – All responses from respondents covered by the *Meat Industry Award 2010*
JES79	Joint Employer Survey – All responses from respondents covered by the *Pastoral Award 2010*
JES80	Joint Employer Survey – All responses from respondents covered by the *Plumbing and Fire Sprinkling Award 2010*
JES81	Joint Employer Survey – All responses from respondents covered by the *Professional Employees Award 2010*
JES82	Joint Employer Survey – All responses from respondents covered by the *Restaurant Industry Award 2010*
JES83	Joint Employer Survey – All responses from respondents covered by the *Road Transport (Long Distance Operations) Award 2010*
JES84	Joint Employer Survey – All responses from respondents covered by the *Road Transport and Distribution Award 2010*
JES85	Joint Employer Survey – All responses from respondents covered by the *Social, Community, Home Care and Disability Services Award 2010*
JES86	Joint Employer Survey – All responses from respondents covered by the *Storage Services and Wholesale Award 2010*
JES87	Joint Employer Survey – All responses from respondents covered by the *Timber Industry Award 2010*
JES88	Joint Employer Survey – All responses from respondents covered by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
JES89	Joint Employer Survey – All responses from respondents covered by the *Wine Industry Award 2010*

WITNESS STATEMENTS

	Witness
1	Jeremy Lappin
2	Julie Toth
3	Benjamin Norman
4	Janet O'Brien
5	Peter Ross

1. INTRODUCTION

1. Throughout the current 4 yearly review of modern awards (**Review**), employer interests have been met with union claims to enhance employee rights and entitlements. Indeed the Fair Work Commission (**Commission**) has to date heard 11[1] 'common issues' proceedings that relate wholly, or at least in part, to such claims.

2. In each instance, the Australian Council of Trade Unions (**ACTU**) and/or its affiliates have pursued variations to several modern awards and indeed in many instances, to most modern awards, that would further its interests and that of its constituents, whilst creating additional employment costs, generating inflexibilities, inhibiting productivity and exacerbating the regulatory burden.

3. Common to many of the claims pursued by the union movement in this Review is a desire to limit the scope of an employer's prerogative.[2] In the matter now before the Commission, the ACTU is again seeking the inclusion of a new modern award term which, by its design, excludes the exercise of any discretion by an employer upon receipt of a notice from an employee with parenting and/or caring responsibilities that they seek to change their hours of work.

[1] AM2014/47 Annual Leave; AM2016/13 Annualised Salaries; AM2014/192 Apprentice Conditions; AM2016/36 Blood Donor Leave; AM2014/197 Casual Employment; AM2015/1 Family and Domestic Violence Clause; AM2014/196 Part-time Employment; AM2014/301 Public Holidays; AM2014/190 Transitional Provisions; AM2014/290 & others Accident Pay; AM2014/296 & AM2014/303 District Allowances.

[2] For example:

- AM2014/196 Casual Employment (the ACTU sought an absolute right to convert from casual to permanent employment and a prohibition on an employer's ability to engage additional casual and part-time employees until existing casual and part-time employees were offered additional hours);
- AM2016/13 Annualised Salaries (the ASU sought to vary existing annualised salary clauses such that an employer may only pay an employee by way of an annualised salary with the consent of the employee);
- AM2016/36 Blood Donor Leave (the SDA sought an absolute right to take leave for the purposes of donating blood); and
- AM2015/1 Family and Domestic Violence Leave (the ACTU sought an absolute right to take paid leave where an employee is experiencing family and domestic violence).

4. In essence, the grant of the ACTU's claim would:

- Create an absolute right for all award covered full-time employees with parenting and/or caring responsibilities (as defined), who have completed at least six months of continuous service with their employer, to convert to part-time employment.

- Create an absolute right for all award covered part-time and casual employees with parenting and/or caring responsibilities (as defined), who have completed at least six months of continuous service with their employer, to reduced hours of work.

- Allow such employees to dictate their days of work and starting/finishing times, absent any ability for the employer to decide that the arrangement sought cannot (and therefore, will not) be implemented.

- Where such an arrangement is in place; allow employees to revert to their former number of working hours within certain timeframes.

- Require that the employee's position (including status, location and remuneration) be maintained whilst the employee is working the hours they have chosen as well as subsequently, upon reversion to their former number of working hours.

5. The ACTU's claim reflects a complete disregard for the operational realities facing businesses. It purports to regulate the granting of flexible working arrangements to employees with parenting and/or caring responsibilities in a manner that overlooks a very simple proposition: that there are and will be circumstances in which an employer cannot accommodate the hours of work demanded by an employee due to legitimate business grounds – a matter that will be demonstrated through the evidence upon which we rely.

6. The Australian Industry Group (**Ai Group**) recognises the need to ensure that the safety net enables the participation in the labour force of employees with parenting and/or caring responsibilities. We consider that it should provide an

appropriately balanced ability for employees to seek flexibility as to their working hours for the purposes of accommodating their parenting and/or caring responsibilities. One of the fundamental differences that will emerge between our position and that of the ACTU in the context of these proceedings is the manner in which we perceive the efficacy of the relevant parts of the safety net presently in place which, we consider, are designed to achieve this end.

7. As we later develop, the matter here before the Commission must be considered in the context of the current legislative framework, which expressly grants employees an ability to request flexible working arrangements and, quite properly, grants employers the right to refuse such a request if there are reasonable business grounds for doing so. The modern awards system too delivers employees various means of facilitating greater flexibility.

8. At the very core of the ACTU's case is a contention that those with parenting and/or caring responsibilities are precluded from participating in the labour force due to the manner in which the safety net regulates various employment conditions and in particular, the provision of flexible working arrangements. As will become apparent later in this submission, that proposition is not properly made out in the case mounted by the ACTU; an issue that must necessarily be fatal to their claim.

9. For the reasons here outlined, and those set out in the submissions that follow, Ai Group strongly opposes the grant of the ACTU's claim.

2. THE CASE MOUNTED BY THE ACTU

10. The gravamen of the ACTU's case can be summarised as follows:

- The modern awards system should assist employees to reconcile work and family responsibilities while maintaining strong connections to the workforce.[3]

- Many part-time positions are precarious and do not offer secure employment that properly supports working parents and carers or allow them to re-enter the workforce when they are able to do so.[4]

- Existing regulatory approaches are not meeting the needs of parents and carers because access to flexible working arrangements is arbitrarily and inequitably granted.[5]

- Existing regulatory approaches are not meeting the needs of parents and carers because a significant minority of workers do not request family friendly work arrangements because they fear reprisals.[6]

- Existing regulatory approaches are not meeting the needs of parents and carers because in most cases they cannot be enforced.[7]

- Existing regulatory approaches are not meeting the needs of parents and carers because when granted, they can involve occupational downgrading in the form of less secure and lower status work.[8]

[3] ACTU submission dated 9 May 2017 at paragraph 1.

[4] ACTU submission dated 9 May 2017 at paragraph 47(c).

[5] ACTU submission dated 9 May 2017 at paragraph 2.

[6] ACTU submission dated 9 May 2017 at paragraph 45.

[7] ACTU submission dated 9 May 2017 at paragraph 2.

[8] ACTU submission dated 9 May 2017 at paragraph 2.

- Family responsibilities have a negative impact on labour force participation, employment patterns and earning patterns; particularly of women.[9]

- Discrimination against mothers in the workplace is pervasive.[10]

- Economic and productivity benefits would flow to employees, employers and the national economy from increased female labour force participation of parents and carers.[11]

- The provision proposed is necessary to ensure that the relevant awards achieve the modern awards objective.

11. The submissions that follow address each of the above propositions.

[9] ACTU submission dated 9 May 2017 at paragraph 47(d) and paragraphs 49 – 107.

[10] ACTU submission dated 9 May 2017 at paragraph 47(f).

[11] ACTU submission dated 9 May 2017 at paragraph 47(g).

3. Ai GROUP'S CASE

12. The case presented by Ai Group in opposition to the ACTU's can be summarised as follows:

- The existing safety net, including the National Employment Standards (**NES**) and modern awards, provide various mechanisms through which employees with parenting and/or caring responsibilities can seek flexibility in relation to their hours of work in order to accommodate those responsibilities. The mechanisms available are effectively being utilised by employees with parenting and/or caring responsibilities. The evidence does not establish that these mechanisms are failing to accommodate the needs of such employees or precluding them from participating in the workforce.

- More specifically, section 65 of the *Fair Work Act 2009* (**Act** or **FW Act**) is central to these proceedings. It affords a legislative right to request flexibility and a corresponding right to refuse where there are reasonable business grounds. The very vast majority of requests made are being granted; a matter that goes to the *necessity* of the ACTU's proposed clause. Further, if the ACTU's proposed clause were inserted in modern awards, the underlying policy intent of s.65 would be undermined.

- The grant of the claim would be at odds with prior consideration given by the Commission and its predecessors to issues concerning flexible working arrangements, the ability of employees to reconcile work with their family responsibilities and part-time employment more generally. The case presented by the ACTU does not warrant a departure from the approach taken in those Full Bench decisions, which was to consistently acknowledge the needs of employers and the operational realities facing businesses.

- The participation in the labour force of women has been increasing and is expected to continue increasing. Further, participation rates of men and women are converging. The data suggests that the various avenues

available to employees to seek flexibility as well as other measures designed to encourage workforce participation have been and are successful. The evidence does not establish that the grant of the claim will promote social inclusion through increased workforce participation.

- The grant of the claim would have a significant impact on business including productivity, efficiency, employment costs and the regulatory burden. The impact would be felt by individual employers as well as business at large.

- The grant of the claim would have a negative effect on productivity and efficiency across the national economy.

- The provision proposed is not simple or easy to understand.

- The Commission does not have jurisdiction to include the proposed clause, because it excludes s.65(5) of the Act in the sense contemplated by s.55(1).

- Further and in any event, the provision proposed by the ACTU is not *necessary* to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters listed at s.134(1) of the Act.

4. THE STATUTORY FRAMEWORK

13. The ACTU's is pursuing its claim in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the FW Act.

14. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

15. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

16. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.

17. We later address each element of the modern awards objective with reference to the ACTU's claim for the purposes of establishing that, having regard to s.138 of the Act, the claim should not be granted.

5. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

5.1 Preliminary Jurisdictional Issues

18. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's Preliminary Jurisdictional Issues Decision[12] provides the framework within which the Review is to proceed.

19. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[13]

20. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[14]

[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[13] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[14] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

21. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[15]

22. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to

[15] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[16]

23. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench.[17] It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.[18]

24. Accordingly, the Preliminary Jurisdictional Issues Decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

[16] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

[17] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [39].

[18] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [46].

25. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[19]

26. The ACTU's claim conflicts with the principles in the Preliminary Jurisdictional Issues Decision. Further, they have not discharged the evidentiary burden described in the above decision. Accordingly, their claim should be rejected.

5.2 Considerations Associated with Procedural Fairness

27. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variation sought and the material filed by the ACTU in support of it. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clause sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

[19] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

28. Should the ACTU or the Commission, during these proceedings, propose that modern awards be varied in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of these proceedings. If such a course is to be adopted, then a further opportunity to make submissions and/or call evidence in response to any such new proposal should be granted. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim because, for instance, such parties have not had an opportunity to be properly heard in relation to the variations ultimately sought to be made, which may well have potential implications that have not otherwise been put before the Full Bench.

6. THE COMMISSION'S JURISDICTION TO INCLUDE THE PROPOSED PROVISION IN MODERN AWARDS

29. The ACTU's proposed clause would have the effect of excluding s.65(5) of the Act for award covered employees and accordingly, the Commission does not have jurisdiction to include it in modern awards.

30. Sections 65(1), (1A), (1B) and (2) of the Act give most employees with caring responsibilities the right to request a change to their working hours. An employer is required to consider the request and give the employee a written response within 21 days (s.65(4)).

31. Section 65(5) states:

> The employer may refuse the request only on reasonable business grounds

32. This provision would be excluded for award covered employees if the ACTU's claim was accepted.

33. Subsection 55(1) provides that a modern award must not exclude *"any provision"* of the NES. Section 65(5) is obviously a provision of the NES.

34. In *4 yearly review of modern awards—Alleged NES Inconsistencies* a Full Bench considered various provisions in awards dealing with transfer of employment and annual leave. The Full Bench relevantly stated: (emphasis added)

> **[37]** We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). 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). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable. [20]

[20] [2015] FWCFB 3023.

35. As held by the Full Bench in the above decision, a provision of the NES is excluded if award terms, "in their operation … negate the effect of" the NES provision.

36. The ACTU's proposed clause in its operation would negate the effect of s.65(5) of the FW Act for award covered employees. Accordingly, the ACTU's proposed award clause excludes the NES.

37. An award term that has the effect of excluding a provision of the NES "will not be an incidental, ancillary or supplementary provision authorised by s.55(4)", as held by the Full Bench in the above decision.

38. For the above reasons, the Commission is not empowered to include the ACTU's proposed clause in awards.

39. Further, if the ACTU's proposed clause was included in an award, the clause would have no effect as a result of s.56 of the Act.

7. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

40. Issues concerning flexible working arrangements, the ability of employees to reconcile work with their family responsibilities and part-time employment more generally have been the subject of prior consideration by the Commission and its predecessors.

41. It was observed by the Commission in the Preliminary Jurisdictional Issues Decision that it should take into account previous decisions that are relevant to a contested issue and that previous Full Bench decisions "should generally be followed, in the absence of cogent reasons for not doing so": (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[21]

[21] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

42. The Commission's recent decision regarding its review of penalty rates in various modern awards (**Penalty Rates Decision**) provides examples of cogent reasons for *not* following previous Full Bench decisions: (emphasis added)

> **[255]** As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision,* while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the FW Act;
> - 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 be relevant to the weight to be accorded to the previous decision; or
> - 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.[22]

43. The aforementioned factors are relevant to assessing the significance of the decisions that follow to these proceedings.

44. For instance, each of the decisions that we here consider were handed down by Full Benches comprising of three or more members of the Australian Industrial Relations Commission (**AIRC**) of the Commission and each of the proceedings to which they relate were major cases, which involved detailed submissions, expert and lay evidence and in some insances the intervention of Commonwealth and State/Territory Governments. The decisions demonstrate the careful and considered approach taken by the AIRC and the Commission, with detailed reasons issued in each instance.

45. The decisions we here consider were, we acknowledge, made in a different statutory context in two material ways:

- To the extent that the Commission's predecessors decided to vary awards to introduce various mechanisms intended to assist employees reconcile work and family responsibilities, the threshold now imposed

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

by s.138 of the FW Act did not prevail at that time. That is to say, the AIRC's jurisdiction to introduce award terms was not limited to those terms that were *necessary* to ensure that the awards achieved the objective of providing a fair and relevant minimum safety net of terms and conditions.

- The decisions were made at a time when the relevant workplace relations legislation did not of itself create a mechanism enabling employees to seek flexible working arrangements in the manner here provided by s.65 of the Act. The Commission's predecessors issued the relevant decisions at a time when the legislation did not provide a means by which employees could formally request an alteration to their hours of work, which an employer was required to consider and could refuse on only very limited grounds.

46. We contend, however, that a different legislative context may in relevant circumstances lend support for *following* prior authorities. For instance, in the matter here before the Commission:

- Notwithstanding the absence of a high statutory bar akin to that which now applies by virtue of s.138 of the Act, the AIRC previously decided against the inclusion of new award clauses that, in many respects, were similar to those that are here being pursued; and

- The existence of a statutory right to request flexible working arrangements with a limited employer right to refuse is a very significant contextual consideration in these proceedings. Unlike the situation facing the AIRC, there is now a pre-existing scheme for making and effectively dealing with such requests in a formalised manner. Later in our submissions, we explain why the statutory scheme renders the ACTU's proposed clause unnecessary for the purposes of s.138 of the Act.

47. The factors identified in the Penalty Rates Decision, which were said to be examples of circumstances in which there may be cogent reasons for

departing from prior Full Bench decisions do not here arise; nor are we able to identify any other reason for which the Commission should depart from those decisions. There has been no significant change in circumstances that might warrant a reconsideration of the issues raised in those proceedings.[23]

48. We now propose to deal with the relevant decisions in greater detail.

7.1 Parental Leave Case (1990)

49. In July 1990, a Full Bench of the AIRC issued a decision in relation to claims brought by the ACTU regarding parental leave provisions in federal awards. The AIRC described the relevant element of the claim as follows:

> The ACTU claim includes provisions which would allow parents who qualify for parental leave to work part-time for a period of up to two years from the birth of a child, or its placement in the case of adoption. The draft clause submitted by the ACTU would permit the employee to take "part-time leave" in conjunction with part-time employment.
>
> … As proposed by the ACTU, it is an entitlement that is associated with the birth or adoption of a child and is intended to operate in areas where there is no award provision for part-time employment and independently of any restrictions in awards regulating part-time employment.[24]

50. The desirability of access to part-time employment for female employees with children was uncontested in the proceedings. In that context, the AIRC "decided to provide for part-time work for parents associated with the birth or adoption of their child"[25], however only with the agreement of the employer.[26] The clause drafted by the AIRC also required agreement as to the days of work, starting and finishing times, classification and the period of part-time employment.[27] The right to part-time employment would cease on the second

[23] This submission is not made on the basis that the absence of a material change in circumstances is a jurisdictional bar. Rather, the contention is put as a matter of merit.

[24] *Parental Leave Case* (1990) 36 IR 1 at 3.

[25] *Parental Leave Case* (1990) 36 IR 1 at 13.

[26] *Parental Leave Case* (1990) 36 IR 1 at 13.

[27] *Parental Leave Case* (1990) 36 IR 1 at 29.

birthday of the child or the second anniversary of the placement of an adopted child.[28]

51. The Full Bench also urged the ACTU and other interested parties to consider the availability of part-time employment provisions more generally for men and women.[29]

52. Importantly, notwithstanding the agreement between the parties as to the benefits of part-time employment for mothers, the AIRC decided to implement an approach that required the agreement of the employer in order for an employee to be employed on a part-time basis upon return from parental leave and further, in relation to the employee's hours of work. The decision did not create an absolute right or an ability to dictate one's hours of work.

7.2 National Wage Case (1991)

53. The AIRC continued to urge parties to give consideration to the implementation of part-time employment provisions in minimum rates awards by reference to the structural efficiency principle in its National Wage Case Decision of April 1991.

54. Specifically, the AIRC stated:

> After closely considering all of these points, we consider that if, as the parties wish, the structural efficiency principle is to be continued and extended, the appropriate course is for the Commission to determine that a structured approach should be applied to all minimum rates awards. We emphasise that such an approach should not be seen as a formula for mediocrity; a properly structured approach, together with a co-operative effort by award parties, can provide a positive thrust and accommodate different abilities and needs.
>
> We have therefore decided consistently with the ongoing implementation of structural efficiency, that wage increases in minimum rates awards will be subject to conditions. Any party to an award seeking the increases allowable under this decision must satisfy the Commission:
>
> > (a) that the parties to the award have examined or are examining both award and non-award matters to test whether work classifications and basic work

[28] *Parental Leave Case* (1990) 36 IR 1 at 13.

[29] *Parental Leave Case* (1990) 36 IR 1 at 13.

> patterns and arrangements are appropriate - the examination to include specific consideration of:
>
> > (i) the contract of employment including the employment of casual, part-time, temporary, fixed term and seasonal employees,
> >
> > (ii) the arrangement of working hours,
> >
> > (iii) the scope and incidence of the award;
> >
> > …[30]

55. The decision reflects the view held by the AIRC that greater efficiency and productivity could be achieved by the broader introduction of part-time employment provisions, however the decision did not contemplate that this would involve employee-centric flexibility to the exclusion of any employer discretion.

7.3 Family Leave Test Case – Stage 1 (1994)

56. In November 1994, a Full Bench of the AIRC issued its decision regarding an ACTU application for a test case standard with respect to special family leave (**1994 Family Leave Test Case**). The proposed clause would, in essence, have granted employees an entitlement to leave for absences relating to illness of an immediate family member.[31]

57. The AIRC dismissed the ACTU's claim, however determined that other measures should be implemented that would better meet the needs of employees with family responsibilities: (emphasis added)

> We have decided to introduce a package of measures designed to assist workers in reconciling their employment and family responsibilities. This package does not include the provision of five days special leave in the form sought by the ACTU. We have concluded that the needs of workers with family responsibilities can best be <u>met by the introduction of increased flexibility in a range of award provisions combined with the aggregation and extension of existing leave entitlements.</u> …[32]

58. The "range of award provisions" referred to included facilitative provisions that would "allow an employer and an employee in an enterprise or part of an

[30] *National Wage Case April 1991* (1991) 36 IR 120 at 165.

[31] *Family Leave Test Case* (1994) 57 IR 121 at 123 – 124.

[32] *Family Leave Test Case* (1994) 57 IR 121 at 145 – 146.

enterprise to agree to make provision for time off in lieu of overtime and the working of make-up time whereby an employee may choose to perform additional work at ordinary time to make up for time lost"[33]. The decision makes clear that the introduction of such provisions was seen as a means of introducing greater flexibility at the workplace level, thereby providing employees with a mechanism for reconciling work and family responsibilities.[34]

59. The AIRC also foreshadowed that it intended to "introduce additional facilitative provisions to provide greater flexibility with respect to the use of rostered days off and part-time work".[35]

60. It indicated that the nature and extent of such award provisions would be the subject of consideration during the second stage of the proceedings, scheduled for August 1995.[36] Additionally, at that time, parties would also be able to raise further means through which awards could be made more flexible in order to assist workers with reconciling their work and family responsibilities.[37]

61. Rather than award an additional leave entitlement, the AIRC here adopted the approach of introducing award provisions that, with the agreement of the employer, would provide employees with new flexibilities that were designed to assist in managing their caring responsibilities. None of the measures contemplated were to operate exclusively at the employee's election.

62. We shortly return to the issue of provisions enabling time off in lieu of overtime, and a recent decision of the Commission in that regard.

[33] *Family Leave Test Case* (1994) 57 IR 121 at 147.
[34] *Family Leave Test Case* (1994) 57 IR 121 at 148.
[35] *Family Leave Test Case* (1994) 57 IR 121 at 148.
[36] *Family Leave Test Case* (1994) 57 IR 121 at 148.
[37] *Family Leave Test Case* (1994) 57 IR 121 at 148.

7.4 Personal/Carer's Leave Test Case – Stage 2 (1995)

63. In the Full Bench's decision regarding the second stage of the case, it first determined certain issues of detail in relation to the provision for make-up time and time off in lieu of payment for overtime.[38]

64. It then turned to the introduction of facilitative provisions to provide greater flexibility with respect to part-time work; an issue that was said to be "the subject of considerable debate" between the relevant parties.[39]

65. The Full Bench ultimately determined that two specific areas needed to be addressed:

- The introduction of part-time work provisions into awards that did not provide for part-time work; and
- Reviewing the adequacy and relevance of existing part-time provisions against the characteristics of the particular industry or enterprise covered by the award.[40]

66. The AIRC also considered the introduction of facilitative provisions to provide greater flexibility with respect to the use of rostered days off (**RDOs**). The decision observes that there was "general agreement that flexible access to rostered days off would assist employees to balance their work and family responsibilities", however the parties were in dispute as to the means and degree of such flexibility.[41]

67. The Full Bench concluded as follows:

> Having regard to the submissions of the parties we favour a facilitative clause in respect of RDOs which has the following elements:
>
> - An employer and individual employee may agree to take an RDO at any time;

[38] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 66 – 68.

[39] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 69.

[40] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 72.

[41] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 76.

- RDOs should be able to be taken, by agreement, in part day amounts;
- By agreement some or all RDOs would be able to be accrued for the purpose of creating a bank to be drawn upon by an employee at times mutually agreed by the employer or subject to reasonable notice by the employee; and
- The general arrangement to be implemented in a particular enterprise should be subject to majority agreement before it becomes operative. …[42]

68. As for any additional forms of flexibility, the Full Bench noted that no one approach put before it by various parties "attracted broad support" and as a result it stated:

> We are of the view that a more appropriate way of implementing additional flexibility is in the context of a section 150A award review. This process allows the circumstances of the employees and the employer in the enterprise covered by the award to be taken into account.[43]

69. We again make the obvious observation that whilst the AIRC determined to introduce various new forms of flexibility in awards, none would have operated absent agreement from the employer.

7.5 Award Simplification Decision (1997)

70. In December 1997, a Full Bench of the AIRC issued a decision regarding the award simplification process and, in particular, issues associated with "allowable" award matters. In that decision, the Commission determined that the parental leave clause in the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* (**1995 Hospitality Award**), which reflected the 1990 test case standard dealt with above, was "in need of simplification" and changes were accordingly proposed to it by the AIRC.[44]

71. Further, the AIRC also decided to establish award simplification principles, according to which it would conduct the process. Relevantly, the fourth principle stated that when varying an award pursuant to the principles, the AIRC would seek to ensure that at the end of the process an award, where appropriate, included provisions enabling the employment of regular part-time

[42] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 76 – 77.

[43] *Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 77.

[44] *Award Simplification Decision* (1997) 75 IR 272 at 292.

employees.[45] This was consistent with item 49(8)(b) of the Schedule 5 to the *Workplace Relations and Other Legislation Amendment Act 1996*, which provided that the AIRC must review an award to determine that, where appropriate, "it contains provisions enabling the employment of regular part-time employees".

72. The award simplification process was clearly a vehicle through which awards were examined for the purposes of determining, amongst other things, whether they contained part-time employment provisions wherever appropriate, consistent with s.89A of the *Workplace Relations Act 1996*.

7.6 Award Simplification – Settlement of Orders (1998)

73. Parties to the 1995 Hospitality Award and other organisations subsequently raised a number of issues in the context of the settlement of orders arising from the aforementioned decision. This included the simplification of the parental leave clause: (emphasis added)

> The simplification of the parental leave test case clause was intended to meet two objectives:
>
> 1. maintain the current level of entitlements; and
>
> 2. ensure that the clause was expressed in plain English and easy to understand in structure and content.
>
> The Commonwealth submitted that aspects of the original test case clause should not be retained merely in order to replicate that decision but rather such provisions should be reviewed against the above objectives. We agree. As a consequence we do not propose to adopt a number of the variations advanced by the MTIA, the AMWU and the NUW.
>
> …
>
> In our view the Parental Leave test case clause does not establish an actual entitlement for workers to access part-time work. Rather it provides that employers may agree to part-time work but conditions are placed on that agreement. For example:
>
> - the worker must be returning to work from a period of parental leave;
> - the part-time work can only be until the child's second birthday; and

[45] *Award Simplification Decision* (1997) 75 IR 272 at 298.

- the employer must agree to the return to the full-time job at the end of the period.

The test case provision clearly limited the circumstances in which agreement to part-time work could be reached. The part-time clause was established under an earlier legislative framework and dates back to the 1979 Maternity Leave decision. At that time not all awards made provision for part-time work.

Under the *Workplace Relations Act 1996* [s.143(IC)(b)] and the *Workplace Relations and Other Legislation Amendment Act 1996* [items 49(8)(b) and 51(7)(b)] the Commission must ensure, where appropriate, that awards contain provisions enabling the employment of regular part-time work. We would generally expect that regular part-time provisions established under the current legislative framework would be more expansive than the limited part-time provisions previously provided in the parental leave clause. Indeed this is the case under clause 15.3 of the *1998 Hospitality Award.*

In our view it is no longer necessary to maintain a part-time provision within the parental leave clause as there would generally be a regular part-time work clause elsewhere in the award. In the *1998 Hospitality Award* clause 15.3 provides for regular part-time work without the limitations inherent in the part-time provision in the former parental leave clause. As a consequence the time frame for a part-time work arrangement can now be extended beyond the child's second birthday. Further, while the agreement can be contingent on the worker returning to their full-time job at the end of the agreed part-time period of work, the employer is not limited to an agreement only being on that basis.[46]

74. By virtue of the decision made by the AIRC in the context of the 1995 Hospitality Award, part-time provisions associated with parental leave provisions were typically removed from awards during the award simplification process and, as contemplated by the above decision, awards were systematically reviewed for the purposes of determining whether part-time provisions of general application were appropriate in the context of each award.

7.7 Working Hours Case (2002)

75. The working hours case (**2002 Working Hours Case**) related to yet another attempt by the ACTU to introduce further award regulation that, amongst other things, was intended to ensure that an employee would not be required to work “unreasonable” hours of work, taking into account various factors

[46] Re *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* (Print Q5596).

including the employee's family responsibilities (**First Clause**).[47] The proposed clause would also have granted an employee the unfettered right to refuse to work overtime for reasons that may have included their family responsibilities (**Second Clause**).[48]

76. A Full Bench of the AIRC dismissed the ACTU's application for the First Clause. Amongst the many reasons provided by the AIRC for its decision, it observed that awards already contained various provisions, or types of provisions, in relation to ordinary hours of work that recognised the interaction between work and the personal and family circumstances of employees "in a significant way": (emphasis added)

> In dealing earlier with the existing safety net, we mentioned various types of leave. A number of them are designed to relieve employees from their obligation to work ordinary hours if personal or family circumstances require (for example, sick leave, parental leave, carer's leave, bereavement leave and personal leave). And, as we also said earlier, awards generally provide for limits on the length of the working day and for meal and rest breaks. The development of these provisions, often through test cases, has been in the context of the prevailing system of regulation of hours. The existence of these provisions indicates that, at least in relation to ordinary hours, the interaction between work and the personal and family circumstances of employees is already recognised in a significant way in the award safety net.[49]

77. The provision sought by the ACTU identified the various factors that would require consideration when determining "what are unreasonable hours of work",[50] in relation to which the AIRC said as follows:

> … We note, as was pointed out by many opponents of the claim, that the factors all relate to the circumstances of the employee and none to the circumstances of the employer. It is apparent that the formation of a view as to whether hours of work are unreasonable or not requires that the circumstances of both the employee and the employer be considered. … The absence from subcl 1.2 of any factors relating to the circumstances of the employer constitutes, in our view, a serious defect in the subclause. …[51]

78. As for the Second Clause, whilst the Full Bench did not grant the ACTU's application in the terms proposed, it decided to "award, as a test case

[47] *Working Hours Case July 2002* (2002) 114 IR 390 at [2].

[48] *Working Hours Case July 2002* (2002) 114 IR 390 at [2].

[49] *Working Hours Case July 2002* (2002) 114 IR 390 at [243].

[50] *Working Hours Case July 2002* (2002) 114 IR 390 at [2].

[51] *Working Hours Case July 2002* (2002) 114 IR 390 at [247].

standard, a provision spelling out an employee's rights with respect to a requirement to work overtime".[52] That award clause granted an employee the right to refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to various factors including the employee's personal circumstances such as family responsibilities.[53]

79. The non-exhaustive list contained in the clause determined by the AIRC, which identified the factors to which regard was to be had when assessing whether working the relevant period of overtime would result in an employee working unreasonable hours, expressly mentioned "the needs of the workplace or enterprise"[54]. The Full Bench noted that "the absence of any factors referable to the circumstances of the employer [was] a serious defect in the ACTU list" and that accordingly it would "include reference to the circumstances of the employer".[55]

80. The working hours test case is relevant to these proceedings for two reasons:

- The AIRC acknowledged that awards already contained numerous entitlements that, at least so far as ordinary hours of work were concerned, recognised the interaction between work and the employees' caring responsibilities. This included various forms of leave, limits on the length of the working day, and the provision of meal and rest breaks; all matters that continue to be features of the minimum safety net (either in the modern awards system or the NES). Analogously, the minimum safety net in its present form also recognises "in a significant way" the interrelationship between an employee's caring responsibilities and work, and provides various means through which employees are able to reconcile the two. In our submission the Commission should therefore conclude, consistent

[52] *Working Hours Case July 2002* (2002) 114 IR 390 at [260].
[53] *Working Hours Case July 2002* (2002) 114 IR 390 at [278].
[54] *Working Hours Case July 2002* (2002) 114 IR 390 at [278].
[55] *Working Hours Case July 2002* (2002) 114 IR 390 at [278].

with the approach taken in the working hours case that, as a result, it is not necessary to extend the minimum safety net in response to the ACTU's claim.

- The AIRC recognised the need to give consideration to the impact on employers in circumstances where employees might refuse to work ordinary hours and overtime. It did not accept the proposition that employees should be given a right, absent any caveats, to refuse to work overtime due to reasons including their family responsibilities. The AIRC found that the potential impact on the employer should be considered in determining whether the performance of overtime would result in an employee working unreasonable hours. By extension the Commission must, respectfully, conclude in these proceedings that the grant of an absolute right to employees to determine the number of ordinary hours and overtime that they will perform and when they will perform them, without any regard for the circumstances of their employer and its potential impact on the business, is both unfair and entirely inappropriate.

81. We note that the NES now places a limitation on the number of hours that an employee may be required to work in a week and gives employees the right to refuse to work additional hours if they are unreasonable.[56] Further, some modern awards contain provisions akin to the one determined in the working hours case.[57] Accordingly, as we later come to, protections of the nature determined by the AIRC in this test case remain in place for all employees including those with caring responsibilities.

[56] See s.62 of the Act.

[57] *Fast Food Industry Award 2010* (clause 26.4); *Hair and Beauty Industry Award 2010* (clause 31.1); *General Retail Industry Award 2010* (clause 29.1); *Electrical, Electronic and Communications Contracting Award 2010* (clause 26.2); *Manufacturing and Associated Industries and Occupations Award 2010* (clause 40.2); *Hospitality Industry (General) Award 2010* (clause 33.1); *Joinery and Building Trades Award 2010* (clause 30.1); *Graphic Arts, Printing and Publishing Award 2010* (clause 33.1); *Cleaning Services Award 2010* (clause 28.1); *Timber Industry Award 2010* (clause 30.11) and *Building and Construction General On-Site Award 2010* (clause 36.1).

7.8 Parental Leave Test Case (2005)

82. Of the greatest relevance to the proceedings here before the Commission is the parental leave test case of 2005. The ACTU, Ai Group, the Australian Chamber of Commerce and Industry (**ACCI**) and the National Farmers' Federation (**NFF**) made applications concerning award variations seeking greater flexibility relating to work and family responsibilities. The State and Territory Governments also put proposals before the AIRC.

83. The various claims were the subject of lengthy conciliation "followed by an arbitral proceeding of some magnitude".[58] The Full Bench observed that "there was a considerable amount of evidence from academics and researchers, employees, employers and others".[59] It described the task before it as needing to do "justice to wide-ranging and detailed cases presented in written and oral form"[60].

84. We deal with each of the relevant claims in turn.

85. **Firstly**, the ACTU proposed award variations pursuant to which an employee would have a right to apply to alter hours and times of work to meet caring responsibilities. Employers would have an obligation not to unreasonably refuse such applications. Various other limitations would be imposed on an employer's discretion to refuse a request. Where an agreement could not be reached, the issue would be dealt with pursuant to the dispute settlement procedure in the relevant award.[61]

[58] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [1].

[59] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [1].

[60] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [1].

[61] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [189].

86. The ACTU advanced propositions in support of its claim that are not dissimilar with those that it here relies upon:

- The proposed provisions were "necessary because few employees [had] access to flexible work arrangements that [allowed] them to attend work and meeting caring responsibilities"[62].
- The benefits to employees of flexible working arrangements are widely acknowledged.[63]
- The provision of flexible hours arrangements would encourage both persons in a relationship to share caring responsibilities.[64]

87. Ai Group opposed the ACTU's claim and in so doing submitted that:

- The provisions sought would be detrimental to efficiency and contrary to the objects of the *Workplace Relations Act 1996* as it then applied, because the proposed clauses sought to regulate aspects of employment best dealt with at the enterprise level.[65]
- The provisions sought would impede upon the ability of businesses to schedule staff efficiently.[66]
- The provisions sought would impose additional costs.[67]

88. The AIRC dismissed the ACTU's claim: (emphasis added)

> The objective underlying this claim, to assist employees reconcile their work and family responsibilities, is one that all parties regard as important, as does the [AIRC]. 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

[62] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [189].
[63] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [191].
[64] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [192].
[65] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [203].
[66] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [203].
[67] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [203].

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.[68]

89. The clause proposed by the ACTU would have granted the employer an ability to refuse an employee's request to change their hours of work, however it included numerous onerous requirements and limitations, which the AIRC considered inappropriate.

90. It is trite to observe that the award clause now sought by the ACTU is restrictive to a significantly greater degree, in the sense that it would afford employees an absolute right to dictate their days and hours of work, absent any employer discretion. The reasons for which the claim was dismissed by the AIRC in 2005 self-evidently have even more force in the context of the current claim.

91. **Secondly,** the ACTU sought an award-derived absolute right for an employee to work part-time upon returning from parental leave until their child reaches school age. The days of work, starting/finishing times, the employee's classification and the period of part-time employment would have to be settled between the employer and employee by agreement. Any variation would also require agreement between the employer and employee. An employer would be permitted to request but not require an employee to work overtime.[69]

92. The rationale for the claim was said to be "to ease from full-time parenting back to work".[70] In support of it the ACTU submitted that:

- There was a high demand for part-time work amongst mothers of pre-school aged children;[71]

[68] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [206].

[69] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [243].

[70] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [244].

[71] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [245].

- There were difficulties associated with combining full-time work with infant care and the lack of access to alternative full-time childcare;[72]

- Growth in permanent part-time employment had not been "satisfactory"[73] and the "labour market [had] failed to provide … secure predictable part time employment for parents of young children"[74];

- Casual employment was not an appropriate alternative because of the lack of predictability associated with it;[75] and

- The claim would reduce discrimination and in particular, indirect discrimination.[76]

93. The Full Bench summarised the case mounted by Ai Group in opposition to the ACTU's claim as follows:

> [Ai Group] also strongly opposed this claim. Its submissions and evidence focussed on the effect on employers who were unable, for one reason or another, to provide part-time work. The substance of its case was that employees should not have an absolute right to part-time work because of the impact that would have upon Australian businesses and the employment aspirations of Australian women. Like ACCI/NFF, it submitted that agreement-making on part-time work for returning parents is prevalent and there is no need for additional regulation.[77]

94. The Full Bench expressly accepted the submissions made by Ai Group and other employer representatives regarding the adverse impact that the ACTU's claim would have, if granted, on business: (emphasis added)

> We believe that the ACTU claim, based as it is upon a right to return to work on a part-time basis, is <u>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 do so. We accept the employers' submission that employers should not</u>

[72] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [245].

[73] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [246].

[74] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [248].

[75] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [246].

[76] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [246].

[77] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [251].

be required to provide part-time work regardless of the circumstances of the enterprise. …[78]

95. The AIRC found that "on balance … the provision of family friendly benefits in the workplace [was] associated with higher rates of maternal employment"[79]. It then went on to conclude as follows:

> … As we indicate later, the availability of part-time work for returning parents can be increased in a way which takes into account the circumstances of the employer's enterprise and does not require the employer to provide part-time work where such a requirement would be unreasonable in the circumstances.[80]

96. The AIRC was effectively considering a claim by the ACTU that would have granted employees returning from parental leave an absolute right to part-time employment, notwithstanding that their hours of work would be required to be the subject of agreement between the employer and employee.

97. The reasoning of the AIRC in dismissing the ACTU's claim retains its cogency for the purposes of these proceedings. That is, the grant of an absolute right to part-time employment (by virtue of a clause that would have broader application than the one sought in 2005) is "impractical and would impose costs and constraints which could not be justified". As the evidence will demonstrate, "many businesses, particularly small and medium-sized businesses, would be unable to provide part-time work and it would be unjust to require them to do so".

98. **Thirdly**, the State and Territory Governments proposed an alternate model for balancing an employee's work and family responsibilities, which was termed the "right to request" model by the Full Bench in its decision.[81] The model:

> … provided for an employee to have the right to request, for example, part-time work on return from parental leave. The right to request was conditioned by an obligation on the part of the employer to consider the request. The employer was then required to "not unreasonably refuse" the request. In determining the request, the employer was to balance the needs of the business with the needs of the employee, taking into

[78] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [255].

[79] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [255].

[80] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [255].

[81] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [342].

account a number of factors. These included both employer centred factors, for example, the cost of accommodating the request and employee centred factors such as the particular circumstances of the employee. It was submitted that [those] factors [permitted] a fair balance to be arrived at between the employee's needs and the business' needs.[82]

99. The States and Territory Governments proposed that the model apply with respect to claims for the right to return to work on a part-time basis after parental leave and the right to flexible working arrangements in terms of variations to days and hours of work.[83]

100. The State and Territory Governments submitted that the proposed model term balanced the needs of the business against the caring and family needs of the employee.[84]

101. The Full Bench concluded its decision by summarising the positions of the various parties and interveners, and determining as follows: (emphasis added)

> 392 The cases put by the parties and the evidence of numerous witnesses, taken together, reflect the need to maintain the sometimes delicate balance between the pursuit by employees of their family responsibilities and the need for employers to be free to pursue their business objectives efficiently. In looking at the areas of dispute and the positions of the parties we have reached three critical conclusions.
>
> 393 The first conclusion is that we should take a positive step by way of award provision to assist employees to reconcile work and family responsibilities. We think it likely that most employers are sensitive to the family responsibilities of their employees and do their best to accommodate those needs by adopting a flexible approach to working hours, leave and other arrangements whenever they can. There are some employers, however, who are unlikely to accommodate the family responsibilities of their employees, even where it is practicable to do so. It is with those employers particularly in mind that we have concluded that the awards should contain provisions which provide employees with a better opportunity than they now have to obtain their employer's agreement to a change in working arrangements.
>
> 394 The second conclusion is that it is important that our decision should be a cautious one and that we should not attempt to deal with all of the situations in which employees may seek additional flexibility. It is evident that the range of different conditions of employment potentially affected by the applications before us is very broad. It would be complex and potentially unfair to employers to introduce changes covering such a broad range of conditions. Furthermore we are reluctant to do so without trialling the new approach. For these reasons we have decided to confine the new award provision to one area, namely parental leave. We have decided to award a new provision in response to the parental leave claims. The provision will deal with

[82] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [342].

[83] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [343].

[84] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [344].

situations in which an employee wishes to increase the period of simultaneous unpaid parental leave, to extend unpaid parental leave from 12 months to 24 months or to return from unpaid parental leave on a part-time basis. We shall also include some matters which have been agreed to by the parties and an outstanding issue relating to consultation during parental leave.

395 Our third conclusion concerns the manner in which flexibility should be introduced. Neither the ACTU model, nor the model supported by the employers should be wholly accepted. The ACTU claim that these conditions should constitute an employee entitlement is not one we are prepared to grant. We agree with the employers that an unconditional right to additional parental leave benefits is inappropriate. It would have the potential to increase costs, reduce efficiency and create disharmony in the workplace. The employers' proposal, one which is based purely on agreement, has some merit. To take an example, an award might provide that an employer and an employee may agree that an employee could return from parental leave on a part-time basis until the child commences school. Such a provision might have some value in that it would recognise and encourage agreement about that matter. On the other hand it is equally true that there is nothing to stop the employer and the employee reaching such an agreement now. Despite that fact, and consistent with our earlier conclusion that some positive step is required, we think it is necessary to go beyond simply providing for agreement between the parties. The provision we have decided to adopt is based to a large extent on the proposals of the States and Territories. Those proposals, as we have already noted, draw on the approach contained in ss 80F and 80G of the *Employment Rights Act 1996* (UK). That approach creates an employee right to request a change in working conditions and imposes a duty upon the employer not to unreasonably refuse the employee's request. We have adopted the employee right to request in the form suggested by the States and Territories but modified the employer's obligation so that the employer may only refuse the request on reasonable grounds.

396 The provision we have decided upon is as follows:

P. Right to request

P.1 An employee entitled to parental leave pursuant to the provisions of clause [ ] may request the employer to allow the employee:

P.1.1 to extend the period of simultaneous unpaid parental leave provided for in clause [ ] up to a maximum of eight weeks;

P.1.2 to extend the period of unpaid parental leave provided for in clause [ ] by a further continuous period of leave not exceeding 12 months;

P.1.3 to return from a period of parental leave on a part-time basis until the child reaches school age,

to assist the employee in reconciling work and parental responsibilities.

P.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

…

398 There are many factors other than employment policies which might influence the employment rates of women with children. These factors might include the availability of part-time work, household income levels and social and cultural considerations. Nevertheless employment policies can be an important factor and what we propose is a measured response to the evidence and submissions, bearing in mind our obligation under s 93A of the Act to take account of the principles embodied in the Family Responsibilities Convention 1981, in particular those relating to helping workers reconcile their employment and family responsibilities.

399 We intend that the new provision should be allowed to operate for a reasonable period and then be subject to review. During that period there will be an opportunity to test the efficacy of the new provision in meeting the needs of employees and to assess any adverse effects on the ability of employers to manage their businesses efficiently. On application we shall review the operation of the provision and consider, in light of the parties' submissions, whether the provision should be retained, modified or set aside. We encourage the parties to build on the consensus so far achieved and to develop a joint approach to the assessment of the new provision. In that context we think it proper to indicate that the review process would be enhanced by the results of a professional, bipartisan survey.[85]

102. The AIRC's decision reflects an appropriate approach, bearing in mind the potential implications for business in circumstances where an employee seeks to alter their working arrangements and more specifically, their hours of work. The provision ultimately determined was considered to strike a careful balance between the needs of an employee and employer. Section 65 of the Act, which we shortly consider, reflects the outcome here reached by the AIRC, which was quite clearly a far more moderate and reasonable result than that which was sought by the union movement. Importantly, the decision dealt squarely with the issues that here arise for consideration and, in our submission, there is no warrant for departing from the approach it took in granting employees the right to *request* flexible working arrangements.

[85] *Parental Leave Test Case 2005* (2005) 143 IR 245 at [392] – [398].

7.9 Award Flexibility Case (2015)

103. Earlier in this Review, Ai Group sought the insertion of a model time off in lieu of payment for overtime clause and "make-up time" provisions in a number of awards. The claim was heard and determined by a Full Bench of the Commission. It involved a careful consideration of the 1994 Family Leave Test Case summarised earlier.

104. In deciding to grant Ai Group's claim (and indeed going beyond it by proposing the insertion of a model clause permitting time off in lieu of overtime in all awards containing overtime provisions), the Commission concluded that such a clause may encourage greater workforce participation by workers with caring responsibilities. Consistent with the 1994 Family Leave Test Case, the decision recognised the benefit that such clauses would provide to employees seeking to balance work with caring responsibilities:

> **[245]** As we have mentioned, we accept that flexible working arrangements, such as TOIL, may encourage greater workforce participation, particularly by workers with caring responsibilities. We also accept that increasing workforce participation may also result in increased economic output and productivity.[86]

105. The Commission ultimately determined to insert the model term it developed in most modern awards that contain overtime provisions.[87] Those provisions are now in operation.

106. The Full Bench also dealt with submissions put by Ai Group and those who opposed our claim, which compared the statutory framework here prevailing as compared to that which applied during the 1994 Family Leave Test Case.

107. It accepted that "there are some significant differences between the current statutory context and the context at the time the [1994 Family Leave Test

[86] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [245].

[87] *4 yearly review of modern awards—Award flexibility common issue—time off in lieu of payment for overtime—model term* [2015] FWCFB 6847, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 2602, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 4258, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 4579, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 6178 and *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 7737.

Case] was decided"[88]. The Full Bench also expressly stated that the current context is different to the extent that the statutory framework provides additional flexibilities to employees, as submitted by Ai Group in these proceedings:

> **[251]** We also acknowledge that compared to the position when the *Family Leave Test Case* was determined, the current statutory framework provides additional flexibilities, protections and rights to employees and employers, for example:
>
> - the right to request flexible working arrangements (s.65)
> - the making of IFAs under the model flexibility term (s.144)
> - personal carer's leave (ss.95–107)
> - greater flexibility in relation to the taking of annual leave (s.88).[89]

108. The Full Bench went on to describe other differences in the statutory context: (emphasis added)

> **[252]** There are two other important differences in the comparative statutory context.
>
> **[253]** The first is that the role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the AIRC (and other predecessor tribunals) in the past. The Review is essentially a regulatory function. In the Review context, the Commission is *not* creating an arbitral award in settlement of an *inter partes* industrial dispute – it is reviewing a regulatory instrument.
>
> **[254]** <u>The second important contextual difference is the modern awards objective.</u> As we have mentioned, the modern awards objective is central to the Review and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'. <u>The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.</u>[90]

109. The submission made earlier by Ai Group is again consistent with the Full Bench's decision in this matter. That is, the modern awards objective and the onus on a proponent to satisfy the Commission in respect of it are important

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[88] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [249].

[89] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [251].

[90] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [252] – [254].

matters that must be borne in mind when considering the ACTU's claim here before the Commission.

7.10 Casual and Part-time Employment Case (2017)

110. The Commission most recently gave consideration to part-time employment more generally in the context of the casual and part-time employment common issues case that related primarily to multiple claims mounted by the ACTU and its affiliates in this Review.

111. In its decision, the Full Bench provided the following summation as to the evolution of part-time employment in the awards system. Whilst it is somewhat lengthy, we reproduce it in full given its relevance to these proceedings: (emphasis added)

> **[86]** Part-time employment is, ostensibly, a simple concept, namely weekly employment for a number of hours of work per week (or per roster cycle) which is less than full-time hours. It is usually conceived as involving all of the benefits of full-time employment paid on a pro-rata basis. Certainly that is the case under the FW Act with respect to NES entitlements and unfair dismissal rights. However modern award part-time clauses typically have certain features which do not apply to full-time employment provisions. These have arisen as a result of the historical rationale for the introduction of part-time employment in awards.
>
> **[87]** Part-time employment was originally conceived as a limited facility to permit the employment of women with family responsibilities to be employed, with care required to be taken that it did not become a vehicle for the undermining of full-time employment. An early statement of this rationale was contained in *Re Clerks (State) Award*, a 1953 decision of the Industrial Commission of New South Wales (Taylor J, President). The NSW Commission said:
>
> > "Part-time Employees. - The evidence indicates that in respect of a considerable number of establishments employers are unable to get female employees to work on a full-time basis. The application seeks award approval to the employment of such persons on a part-time basis, that is to say, they shall be paid at an hourly rate multiplied by the number of hours per week so worked. The evidence further shows that the employees in respect of whom this award provision is now sought are in the main female employees who are unable for reasons which have been given to work a full working week but are able to work a portion of a working week. It is clear from the evidence that the employers seek this provision because, although they expressed themselves as being willing to employ such persons on a full-time basis, they are unable to engage them on this basis.
> >
> > …

> ‘Part-time Employees,’ on the evidence, are not in my opinion strictly casuals. They are persons who are prepared to give a portion of their time, in most instances somewhat less than the normal working week, to an employer. They do not go from place to place but are employed in the one establishment. It seems proper that provisions should be made to meet this class of employee. The evidence shows that in most instances they are married women who have domestic obligations but who are still required, perhaps by force of economic circumstances, to do some work. They cannot give a full week’s work because of their own personal problems, but such work as they can give they are employed for. It is quite proper that a just and reasonable minimum rate should be fixed for them for the work so performed. I think that it is a proper provision and the award now to be made will contain such a provision. It would only apply to female employees and there will be stringent safeguards against its possible abuse.”

[88] Consistent with this rationale, the earliest part-time employment clause in the federal Metals Award was confined in its operation to female employees.

[89] The concern that part-time employment not be used as means to reduce the hours of work of existing full-time employees was articulated by a Full Bench of the Australian Conciliation and Arbitration Commission in 1983 in *Re Vehicle Industry – Repair, Services & Retail – Award 1980*. In that matter there was an employer application for the award to be varied for an unrestricted part-time employment clause to apply to all but one classification in the award. The Commission rejected the claim in this form for the following reasons:

> “In substance, the employers’ application and the re-drafted provision which was later submitted to the Commission would allow an employer to employ part-time employees in any circumstances and as an alternative to full-time employment, without any restrictions except that part-time employment would be by mutual agreement with the persons concerned. This would be a significant extension of the basis on which part-time employment has been provided for in the past. It would enable employers to employ part-time employees, as distinct from full-time and casual employees, to meet the particular operations of a company regardless of the situation of the available labour force. However desirable this might be from the employers’ point of view, we emphasize that this is an industry which is largely non-unionised, is scattered throughout the metropolitan and country areas and is comprised of many small firms as well as the larger companies in the city areas. In those circumstances a provision such as that sought by the employers could well result in employees being forced to accept work for less hours than the weekly standard and being paid correspondingly less notwithstanding that they were available for, and desired, full-time work.
>
> As indicated earlier, although the claim was in general terms the main impact of the evidence before us was to emphasize the present plight of the industry due to the double impact of a severe and widespread drought and ‘the worst economic recession since the 1930s’ (*National Wage Decisio*n, 23rd December, 1982 (1982) 3 I.R. 1. Little evidence was put before us to demonstrate the need for such a provision in other circumstances. To the contrary, the evidence given mainly indicated that the objective was to reduce hours by allowing the transfer of existing labour to part-time employment as a temporary measure to mitigate labour costs and retain workers in employment pending economic improvement in the industry. While there has been a long

standing request by employers for a part-time employment provision in the award there was no evidence which demonstrated that there was normally a shortage of persons seeking full-time employment in the industry. Nor was there evidence of a pool of unemployed persons who could only work part-time. The whole thrust of the evidence before us was in relation to the continued employment of existing employees, and of engaging new employees, on a basis of less than full-time in the present adverse situation.

To the above extent the application before us is outside the existing principles as developed to date in respect of part-time employment. In the circumstances we do not consider that a case has been made out for a general provision in this instance and the claim as framed is refused..."

[90] The Commission instead awarded, on a short-term basis only, a limited provision to allow for a reduction of hours by agreement to deal with the recessionary circumstances then prevailing.

[91] With societal recognition that men as well as women had family responsibilities, gender restrictions on access to part-time employment were removed. In the *Parental Leave Test Case* in 1990 the ACTU advanced a comprehensive case for parental leave which included the capacity to move to part-time work for a period after the birth of a child. The ACTU's case involved the contention that the expansion of part-time work had been important in increasing the participation of women with children in the workforce, but also that it was necessary to grant award provisions to allow men to better balance their work and family responsibilities because, among other things, "female participation in the paid workforce is nevertheless hampered by an unequal sharing of parental and domestic responsibilities". The Confederation of Australian Industries responded by claiming part-time provisions which opened up part-time work to all employees generally, and contended that freeing up part-time employment for only those with young children was "unreasonable and discriminatory". The Full Bench said in relation to the part-time claims:

"On the desirability of part-time employment there is, in a sense, no issue between the ACTU and CAI or any other party or intervener. As we noted earlier, much of the argument advanced by CAI was in support of award provisions which would make part-time work available generally and not only to employees who had assumed responsibility for caring for a child after birth or adoption. This part of the ACTU claim was thus subsumed by the CAI counterclaim. The ACTU resisted, however, any suggestion that part-time work, unrestricted by provisions relating to part-time employment elsewhere in an award, should be available to parents beyond the second birthday or the second anniversary of the placement of a child. It opposed these proceedings being used to establish a general award right to part-time employment. The issue therefore was not whether part-time work should be made available in connection with the birth or adoption of a child, but rather what limits, if any, should be placed on its availability.

There are a number of cogent reasons why part-time work should be more generally available for both men and women. This is a matter raised for the consideration of the trade union movement and employers by the August 1989 national wage decision. We do not believe, however, that these proceedings should become a vehicle for establishing a general unqualified right for an employer to employ people part-time which is, in essence, the CAI counterclaim. These proceedings have their origin in the desire of the ACTU to

establish or advance a range of rights for the natural or adoptive parents of young children. It is on this basis that they have assumed the status of a test case and this decision is made, in all respects, on the basis that the ACTU has indicated that its affiliates will not resist the introduction into private sector awards of any of the provisions we may decide upon as part of an entire scheme benefiting the parents of young children.

There was, as we have said, no issue between the parties about the desirability of part-time employment for parents of young children. Further, the evidence before us makes clear the demand for such employment from parents, particularly women. The Commonwealth government and all of the States, as well as the other interveners, supported the introduction of part-time work as claimed. We have therefore decided to provide for part-time work for parents associated with the birth or adoption of their child."

[92] A significant expansion of award part-time employment provisions occurred as a result of the 1995 *Personal Carer's Leave Test Case - Stage 2*. The AIRC Full Bench made the following finding in that matter:

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

[93] The Full Bench went on to determine that, first, part-time work provisions should, on application, be introduced into awards which did not already have them and, second, that the adequacy and relevance of existing provisions should be reviewed against the characteristics of the particular industry or enterprise covered by the award. The Full Bench determined that 2 matters needed to be taken into account in the development of "fair and equitable" part-time work provisions. The first was that it was necessary to ensure that part-time employees were provided with pro-rata entitlements to the benefits available to full-time employees, including equitable access to training and career path opportunities. The second was:

"Secondly, part-time work needs to be clearly distinguished from casual employment. While the provision of pro rata benefits is one means of providing such a distinction other measures are also needed. In particular part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked.

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

[94] Part-time employment provisions awarded after the *Personal Carer's Leave Test Case - Stage 2 Decision* did not contain express restrictions limiting their operation to persons with family responsibilities, but provisions drafted in accordance with the principles established in that decision tended to be structured in a way which facilitated their utilisation by employees with family responsibilities. The part-time employment provision established for the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* as a result of the *Award Simplification*

Decision became a model clause adopted in many awards. Its features were described in a Full Bench decision issued as part of the award modernisation process conducted pursuant to Part 10A of the WR Act as follows:

> "[136] ... The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime."

[95] In many modern awards this means that part-time employees, unlike full-time employees, may not have their rostered hours changed by the employer on the provision of a specified period of notice, but must consent in writing to any change. For example, in relation to the establishment of 3 modern awards as part of the award modernisation process, the Aged Care Award, the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010*, the Full Bench said:

> "[147] ... One matter which was raised in all but the *Medical Practitioners Award 2010* related to the use of part-time employees. There are a number of common features for the use of part-time employees. To begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers. We have included a relevant provision. The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying awards but these seem not to be used in relation to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility. The private hospital industry employer associations estimated that, on average, part-timers would work an extra six hours per week. The impact of this consent is that the employee does not receive overtime for working in excess of the rostered hours when requested but is paid at the ordinary time rate.
>
> [148] We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.
>
> [149] Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38 hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written

consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforeseen circumstances on the day."

[96] In relation to the Aged Care Award, the Full Bench in *Appeal by Leading Age Services Australia NSW - ACT* confirmed that the provisions of the award allowing unilateral change to rosters without the consent of the employee were not available in the case of part-time employees, to whom a specific scheme of provisions applied which required the employee's written consent to any change in hours. The Full Bench pointed to the requirement in the award for part-time employees to have "reasonably predictable hours of work" and said:

> "[19] ... This requirement for reasonable predictability in hours of work stems, we consider, from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work. It follows that the other provisions of the Award applying to part-time employees must so far as the language permits be read as giving content to the definitional requirement of reasonable predictability in hours of work."

[97] Thus the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred. Part-time employment has been treated as peculiarly suitable for those with major family or other personal commitments in their lives, and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.[91]

112. The Full Bench recognised that part-time provisions in modern awards generally are regulated such that they require the agreement of the employer and employee in relation to various matters including hours of work. The Commission concluded that in this way, part-time employment in the awards system has been treated as "peculiarly suitable" for those with family commitments and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.

113. The decision lends support to our proposition that part-time employment provisions in the very vast majority of modern awards already provide employees with a significant means of securing working arrangements that enable them to reconcile their caring responsibilities and work.

[91] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [86] – [97].

7.11 Conclusion

114. In summary, consideration previously given by the Commission and the AIRC regarding the relevant issues supports the following propositions:

- Part-time employment, as a form of employment that under the awards system generally requires agreement between the employer and employee in order for an employee to be engaged on that basis, as well as in relation to their hours of work, has historically been considered a means of increasing female participation in the labour force as it enables employees to reconcile their caring responsibilities and work. In the context of the modern awards system, this observation remains sound when regard is had to the manner in which part-time employment is regulated in the vast majority of modern awards.

- Modern awards and the NES also contain various other forms of flexibility and protections which originate from the aforementioned test cases. They were created to benefit employees with caring responsibilities.

- The issue of appropriate award mechanisms for granting employees an ability to seek flexibility has been considered by the Commission and its predecessors on many occasions, and has consistently raised similar issues. In every instance, the applications made by the relevant parties were the subject of detailed submissions, evidence and proceedings of a significant magnitude.

- The Commission and the AIRC have, in each case, taken a careful and measured approach, making express reference to the adverse implications that may flow to businesses from the grant of the unions' applications.

- There is no cogent reason to depart from the approach taken by the Commission and its predecessors to date, which is to have regard to the potential impact on business if the ACTU's claim were granted and

to abstain from awarding employees an absolute right to determine their hours of work.

8. THE IMPORTANCE OF FLEXIBILITY FOR BUSINESS AND THE NATIONAL ECONOMY

8.1 General Economic Conditions

115. Current economic conditions do not favour further prescription and restrictions upon labour, as sought by the ACTU. The Australian economy is facing a number of important challenges, as explained below.

116. To cope with the current economic challenges, Australia needs more flexible modern awards – not less flexible, as the ACTU's claim would result in. The ACTU's claim conflicts with the community's interests and needs to be rejected.

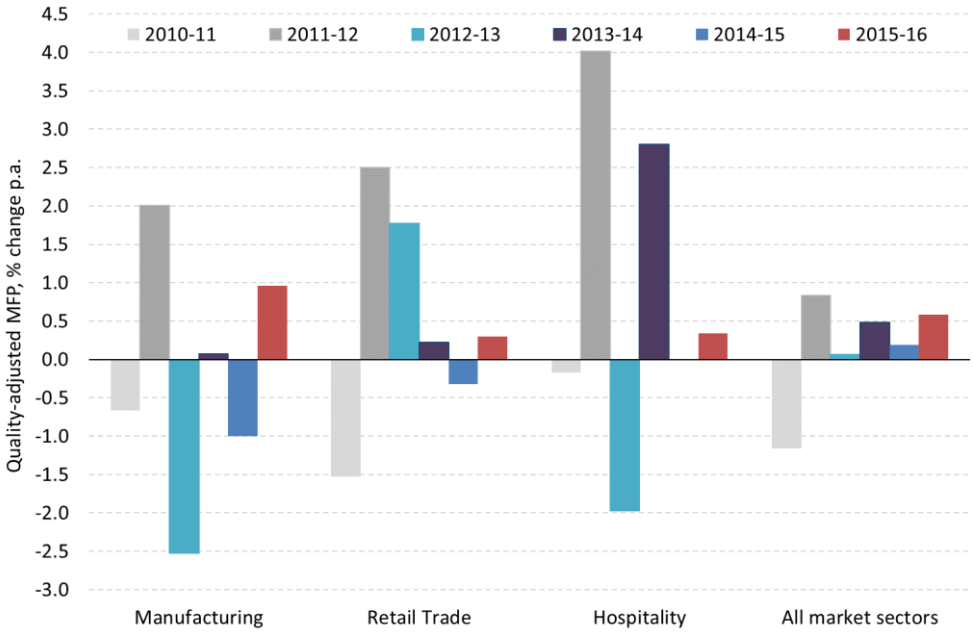
Productivity in the National Economy Remains the 'Weak Link' to Income Growth

117. The witness statement of Julie Toth[92] refers to productivity remaining the 'weak link' in the Australian economy and the absence of meaningful and sustainable productivity improvement over a long period of time.

118. At a national level, multifactor productivity (**MFP**) in Australia's market-sector industries improved by 0.9% in 2015 – 2016 and has been improving by around 1% p.a. since 2011. On a quality-adjusted hours-worked basis, MFP improved by 0.6% in 2015 – 2016. This measure has been above zero since 2011. This is an improvement from the previous decade, but it is still exceedingly weak. This weakness is contributing to weak incomes growth across the board in real terms, for both businesses and workers. In industries that are the largest employers of low-wage workers, quality-adjusted MFP improved by 0.3% p.a. in 2015 – 2016 and was flat or declined in 2014 – 2015 (see Chart 1).

[92] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 49 – 50.

Chart 1: Multi-factor productivity change, selected market sectors



Source: ABS *Multifactor productivity estimates,* December 2016.

119. The witness statement of Julie Toth[93] describes the impact of the ACTU's claim as likely having a negative effect on national productivity because it would impede business' collective ability to allocate labour to their most productive and efficient use within and between firms.

120. If the ACTU's claim was granted, there would be a negative effect on the productivity and performance of the national economy.

Australia's Ranking in Global Competitiveness is Low

121. Related to weak productivity improvement, Australia's Global Competitiveness Index score edged up by 0.1 points to 5.2 out of a possible 7 points in 2016-17.[94] This was the first change in Australia's score since 2010 – 2011. Australia's *ranking* however, slid one place to 22nd in 2016 – 2017, indicating a slight deterioration in national business competitiveness

[93] Witness statement of Julie Toth dated 26 October 2017 at paragraph 51.

[94] World Economic Forum *The Global Competitiveness Report 2016* at page 7.

compared to one year earlier. This took Australia's ranking back to its equal worst position of 22nd, reached in 2014 – 2015.

122. This combination of a better score but a worsening ranking indicates that although Australia's competitiveness score improved slightly, other countries improved by a greater extent, thus pushing Australia down one place in the rankings. Our relatively poor global position continues to reflect the commonly heard comment from business leaders that "Australia is a very expensive country in which to make things or to do business".

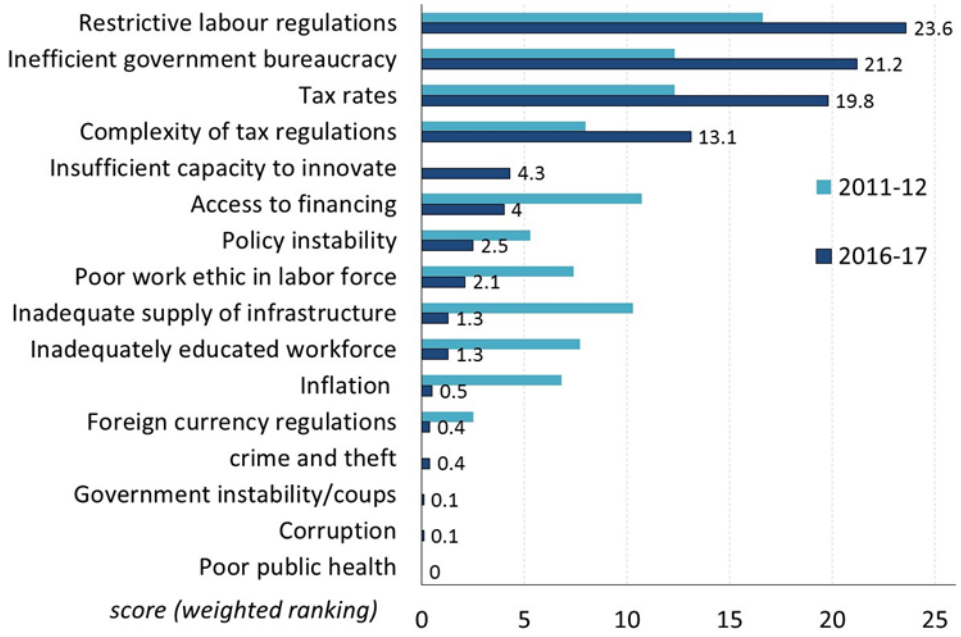
123. The World Economic Forum (**WEF**) Report also identifies the five 'most problematic factors for doing business in Australia' in 2016 – 2017, as identified by CEOs participating in the WEF's Global Executive Opinion Survey (Chart 2). These factors are:

- restrictive labour regulations;
- inefficient government bureaucracy;
- high tax rates;
- complexity of tax regulations; and
- insufficient capacity to innovate. [95]

124. Restrictive labour regulations have been identified as the most problematic factor for Australian business since 20111 – 2012. Also of note this year, 'insufficient capacity to innovate' is becoming a more prominent issue for Australian business. Compared with five years ago, restrictive labour regulations are of greater concern to Australian businesses now (scoring 23.6 points now versus 16.6 points in 2011 – 2012).

[95] World Economic Forum, *The Global Competitiveness Report 2016* at page 102.

Chart 2: Global Competitiveness indicators: Australia's "most problematic factors for doing business" in 2016-17 and 2011-12*



Source: Ai Group and WEF *Global Competitiveness Reports*

* From this list of factors, respondents were asked to select the five most problematic factors for doing business in their country and to rank them between 1 (most problematic) and 5 (least problematic). The score corresponds to the responses weighted according to their rankings.

125. The identification of restrictive labour regulations as a chief impediment to 'doing business', combined with the deterioration in Australia's ranking for global competitiveness, weighs against the Commission exercising its modern award powers to impose further restrictions on business in respect of allocating hours of work and labour. Such restrictions on business would reduce their competitiveness.

Australian Growth, Jobs and Wages in 2016 – 2017

126. Australian economic performance was positive but not outstanding in 2016. Real GDP grew by 2.4% over the year, but this included a rare fall in Q3. Nominal income growth recovered in 2016, but this was largely due to a recovery in the terms of trade and in export earnings. Its distribution is uneven, with most of the benefits of this recovery showing up in the form of stronger profits in the mining and finance industries, rather than in profit or wage

income more widely. This pattern of growth in national activity and incomes is not supporting stronger employment or wages.

127. Indicators of economic activity suggest this pattern of reasonable growth in national output and export income, but weak growth in employment and wages incomes, has continued into 2017. A complex combination of factors is contributing to this extended period of slow labour market outcomes. These factors are examined in more detail below. They include:

- **National aggregate income recovered in 2016, but remains weak and unevenly distributed**, for the purposes of generating sustainable growth in jobs and wages. In nominal terms, aggregate profits recovered to the same level in 2016 as they had been in 2011 (at the height of the previous peak in the terms of trade). The distribution of income has also become a factor for jobs and wage outcomes, since the recovery in 2016 was all in mining, rather than in the services and industrial sectors that are the biggest employers.

- **Inflation has been historically low over an extended period**, rising to just 1.5% (headline) and 1.6% (core) in Q4 2016. This has reduced the ability of businesses to raise their own prices or to pay higher wages. More positively, it also means that smaller nominal wage rises will generate real wage increases for workers, including those in low-wage jobs.

- **Employment growth is exceedingly weak nationally.** The headline unemployment rate has been stable, but rising youth unemployment and underemployment, plus falling participation, suggest significant pockets of spare capacity are building up, particularly at the lower-skilled end of the labour market.

- **Measurable productivity growth is exceedingly weak nationally**. Low productivity growth makes it extremely difficult to generate rises in real incomes, be it in the form of profits or wages. This is also contributing to a lack of improvement in Australia's global competitiveness. The lower Australian Dollar over the past two years has helped, but as for

productivity, this lack of improvement makes it extremely difficult to fund real income rises for anyone, be it in the form of profits or wages.

128. The RBA recently examined the causes of weak wages growth in its *Bulletin* (March Quarter 2017). The RBA concluded that in mining-related industries the main cause of weaker wages in 2015 – 2016 was weaker industry activity and profitability, while in the non-mining industries, slow inflation and a consequent reduction in inflation expectations seem to be the key reasons:

> Following the decline in the terms of trade, there has been a reduction in the average size of wage increases. This has been particularly pronounced in mining and mining-related wage industries. The increasing share of wage outcomes around 2–3 per cent also provides further support for the hypothesis that inflation outcomes and inflation expectations influence wage-setting. [96]

129. In addition to these contributing factors, 2017 is seeing rising pressures on business costs from electricity and gas markets. This is directly impeding businesses' ability to raise incomes for themselves or their employees. Energy prices are rising fast across the National Electricity Market and Eastern Australian gas market. Wholesale electricity prices are roughly doubling. Wholesale gas prices are at least doubling and may well rise much further. Spot prices are becoming more volatile.

130. Further employment regulation prescribing limitations on the management of hours and causing increased costs to business will not support greater wages growth.

8.2 The Importance of Labour Flexibility for Businesses

131. An employer's ability to control the hours worked by employees is critical for the efficient running of a business. Business resources are not infinite. Resources must be managed efficiently for the ongoing viability for any business. Viable businesses and businesses which grow create employment opportunities and increased job security for workers.

[96] Bishop J. and Cassidy, N., "Insights into Low Wage Growth in Australia", *RBA Bulletin*, March Quarter 2017.

132. We refer to the statement of Julie Toth at paragraph [38] in relation to the importance of labour flexibility and the efficient allocation of resources within and between businesses.

133. Business viability is strongly linked with a sustained ability to deliver quality goods and services to customers. Customer demands are challenges for most businesses, and can typically only be met when the business has the required amount of labour available. In many cases, the inability to meet commercial legal obligations with customers, suppliers, principals and other stakeholders, risks reputational damage, exposure to litigation and exposure to liquidated damages.

134. The need for a business to satisfy commercial obligations and to meet customer demands may be legitimate business grounds for refusing or modifying requests from employees for flexible work arrangements, and this must not be disturbed.

135. The impact of the ACTU's claim at the firm level by impeding the efficient allocation of labour is detailed in the statement of Julie Toth[97]. For example:

- Allocative efficiency within a firm will reduce, and may result in an employer's demand for labour not being met in full;
- The reduced hours worked by an employee could be a better match for the demand of another business, reducing allocative efficiency between firms.

[97] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 41 – 48.

8.3 Managing Work Health and Safety Obligations

136. Under work, health and safety laws, employers are required, as persons conducting a business or undertaking, to ensure the health and safety of workers and other persons.[98] This extends to, amongst other things, the provision and maintenance of safe systems of work, such as controlling hours of work.[99]

137. Managing hours worked by employees can be an important risk management strategy to control risks of employee fatigue, particularly in industries involving vehicle or plant operation, the carrying of passengers, intensive labour or rotating shifts. Indeed, in industries such as road transport, aviation and rail (to a name a few) there are specific statutory obligations on employers to implement fatigue management systems to eliminate the risk of accidents, injuries and fatalities.

138. The ability to roster hours within set parameters and to allocate appropriate persons to shifts are core managerial decisions that enable fatigue management systems to be implemented.

139. The ACTU's claim, by enabling eligible employees with caring responsibilities to determine their own reduced hours, has the potential to cause unworkable disruption to fatigue management systems. The potential consequences would include exposing employers, co-workers and the community to harm.

140. An employer's need to satisfy work health and safety obligations is a legitimate business ground on which it may refuse or modify an employee's request for flexible work arrangements. This must not be disturbed.

141. The ACTU claim is incompatible with work health and safety laws obligations and therefore should be refused.

[98] See s.19 *Work, Health & Safety Act (Cth) 2011*.

[99] See s.19(3) *Work, Health & Safety Act (Cth) 2011*.

8.4 The Fundamental Right of an Employer to Manage its Business

142. Employers have a fundamental right to manage their businesses. Determining what working hours are required to meet the demands for the businesses' products or services is a crucial element of this fundamental right.

143. The right of an employer to exercise control over the hours worked by a particular worker is a key element of the relevant tests that distinguish an employment relationship from a contract for services.[100]

144. Over the years, longstanding principles have developed regarding the right of an employer to manage its business and the importance of the Commission and its predecessors recognising this right.

145. In *Re Cram & Anors; Ex Parte NSW Colliery Proprietors' Association Ltd & Anors,* (***Cram***) the High Court held that:

> …the regulation and control of business enterprises by industrial tribunals is not a matter that goes to the jurisdiction of the tribunals. Rather it is an argument why an industrial tribunal should exercise caution before it makes an award of settlement of a dispute where that award amounts to a substantial interference with the autonomy of management to decide how the business enterprise shall be efficiently conducted.[101]

146. The exercise of caution by industrial tribunals in interfering with the autonomy of management, as referred to in *Cram*, was also a key issue in the *XPT Case.* The *"XPT Principle"* has often been referred to as a key authority in decisions of the Commission and its predecessors relating to managerial prerogative.

147. The principle stated by the Full Bench in the *XPT Case* was:

> It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.[102]

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[100] See *Hollis v Vabu Pty Ltd* [2001] HCA 44 and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[101] (1987) 163 CLR 117 at 137.

[102] *Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales* (1984) 295 CAR 188.

148. The *XPT* principle still has relevant application to matters before the Commission.

149. In *Lend Lease Project Management and Construction (Australia) Pty Ltd v CFMEU,* a Full Bench said of the "XPT Principle":

> **[27]** It may be accepted that the above principle is one which should be taken into account and given significant weight in the exercise of an arbitral discretion concerning whether the Commission should intervene in relation to a lawful business management decision by an employer…..[103]

150. In *Lloyd v Australia Western Railroad Pty Ltd,* the Full Bench overturned the originating decision and found that the principles within the *XPT Case* were a relevant starting point for any consideration by the Commission when exercising its discretion in arbitrating a dispute of the relevant type:

> **[38]** It follows that the Commissioner had the jurisdiction to deal with the dispute. The fact that the disciplinary penalty applied by the Respondent was contemplated by clause 14 of the Agreement would be an important consideration in terms of any discretionary decision to be made by the Commission. In that regard, the principles within the *XPT* case would be a relevant starting point for any consideration.[104]

151. There have also been a number of matters brought before the Commission in which the Commission has upheld an employer's right to efficiently manage its business in respect of hours of work including, for example:

- *TCFUA v Hyuck Australia*[105] (Ross VP, as His Honour then was) – regarding the introduction of rotating shifts; and
- *ANF v Fremantle Psychiatric Hospital*[106] (Dight C) – regarding the transfer of an employee to another shift.

152. In the abovementioned *Hyuck* case, recognition was given to an employer's right to determine hours of work (in this case introduce rotating shifts), but that

[103] [2015] FWCFB 1889.

[104] [2017] FWCFB 143 at [38].

[105] PR906779.

[106] Print M7311.

the impact on an employee's family and caring responsibilities could form part of what may be an unreasonable or unjust expectation in the context of a dispute before the Commission.[107] Nowadays, eligible employees with family and caring responsibilities have access to s.65 of the NES, in addition to other statutory rights and protections described throughout this submission.

153. When exercising its modern award powers in the Review, the Commission should exercise those powers in a manner that is not inconsistent with the Commission's longstanding approach in exercising caution when asked to intervene in matters of managerial autonomy.

154. To this end, the ACTU claim would impose significant restrictions on the right of an employer to manage its business, and on the efficient and productive performance of work.

[107] *TCFU v Hyuck Australia* (PR906779) at [57].

9. PARTICIPATION IN THE LABOUR FORCE BY PARENTS AND CARERS

155. In the submissions that follow we deal with participation in the labour force by parents and carers, its importance, benefits and the ACTU's key contentions in this regard.

9.1 Important Contextual Considerations

156. The material before the Commission in these proceedings, including that which has been filed by the ACTU, establishes the following important propositions that provide an essential context, which must be borne in mind by the Commission when determining the ACTU's claim.

157. **Firstly,** the female labour force participation rate has been increasing and reached a record high in August 2017 (71.9% of the civilian female population).[108] This includes a substantial increase in participation by women with children aged under 15 during 1994 – 2014 (57% to 67%).[109] Female participation in the labour force amongst older age groups, amongst whom some may have caring responsibilities for elderly parents, has also increased markedly. In August 2000, the female labour force participation rate of women aged 45 – 54 was 71.2% and it increased to 79.1% in August 2017. During the same period, the female labour force participation rate of women aged 55 – 64 increased from 36% to 60.5%.[110]

158. Further, as acknowledged by the ACTU, the labour force participation rate for men and women is converging.[111] When compared with labour force participation rates as reported by the AIRC in the 2005 parental leave case,

[108] Witness statement of Julie Toth dated 26 October 2017 at paragraph 9.

[109] Witness statement of Julie Toth dated 26 October 2017 at paragraph 11.

[110] Witness statement of Julie Toth dated 26 October 2017 at paragraph 10.

[111] ACTU submission dated 9 May 2017 at paragraph 62.

the difference in participation rates between men and women has fallen from 16% in 2004[112] to just over 11% in 2017.[113]

159. Research also reveals that increasing female labour force participation is expected to continue:

> … In 1975, only 46 per cent of women aged 15 to 64 had a job. Today around 66 per cent of women aged 15 to 64 are employed. By 2054-55, female employment is projected to increase to around 70 per cent.[114]

160. The current labour market context can appropriately be characterised as displaying a positive and promising trend in this regard, as well as having recently achieved the highest level of female participation that has been recorded since 1990.

161. **Secondly**, the female labour force participation rate of women aged 20 – 54 falls within a range of only 3.3 percentage points. That is, the differential between the lowest rate of female participation in the labour force, which occurs when women are aged 25 – 34 and the highest rate of female participation in the labour force, which occurs when women are aged 45 – 54, is 3.3 percentage points.[115] Whilst this does represent a variance in labour force participation, it represents a relatively small range.

162. **Thirdly**, whilst there has been a substantial rise in part-time employment over the past five decades (as defined by the ABS to include permanent part-time and casual part-time employees)[116], the rate of casualisation has remained relatively stable since the 1990s.[117] As stated by Ms Toth, this suggests that the growth in part-time work in this period has been stronger in permanent part-time employment than casual part-time employment.[118]

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[112] ACTU submission dated 9 May 2017 at paragraph 58.

[113] Witness statement of Julie Toth dated 26 October 2017 at Chart 1.

[114] Commonwealth of Australia, *2015 Intergenerational Report, Australia in 2055* (March 2015) at page ix.

[115] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, Figure 3.

[116] Witness statement of Julie Toth dated 26 October 2017 at Graph 1.

[117] Witness statement of Julie Toth dated 26 October 2017 at paragraph 16.

[118] Witness statement of Julie Toth dated 26 October 2017 at paragraph 16.

163. Part-time employment, as it is conceived of in the modern awards system, provides employees with considerable control and certainty over their working hours and was historically constructed in such a way for the very purposes of enabling labour force participation by persons with parenting and caring responsibilities. The steady growth of part-time employment supports the contention that part-time employment opportunities are available to and accepted by employees with parenting and/or other caring responsibilities, as well as other factors such as study commitments.

164. **Fourthly,** a recent report by the Organization for Economic Cooperation and Development (**OECD**) states that 45% of partnered working mothers aged 25 – 45 years in Australia work part-time and the "average usual weekly hours" worked by such employees is 20 hours; the second lowest number in the OECD.[119] The OECD reports that countries with partnered mothers working a higher number of weekly part-time hours are supported by "comprehensive formal childcare and pre-school services for under school-age children as well as out-of-school-hours care services for children of primary school age"[120].

165. While current female workforce participation is high and expected to increase, part-time employment arrangements, which are very commonly worked by female employees with caring responsibilities, are characterised by a small number of weekly hours relative to other OECD countries. It is trite to observe that the ACTU's claim to further entrench rights to reduced hours will not address this issue, which by its logical extension would also result in lower lifetime earnings and superannuation.

166. **Fifthly,** as we come to in greater detail at chapter 10 of our submissions, most employees now have access to various forms of flexibility that enable the participation of parents and carers in the labour force. As set out in the report of Dr Ian Watson, the majority of employees in 2015 reported that they or other employees working at a similar level at their workplace had access to

[119] Organization for Economic Cooperation and Development, *Connecting People with Jobs: Key Issues for Raising Labour Market Participation in Australia* (March 2017) at page 25.

[120] Organization for Economic Cooperation and Development, *Connecting People with Jobs: Key Issues for Raising Labour Market Participation in Australia* (March 2017) at page 25.

permanent part-time employment (77%) and flexible starting and finishing times (56%).[121]

167. **Sixthly,** the ABS national childcare survey reveals that as at 2014, substantial proportions of employed fathers and employed mothers were utilising some specific work arrangement in order to care for their child and that there has been a particularly significant increase in the proportion of employed fathers accessing such arrangements since 1996:

- 72% of employed mothers utilised some specific working arrangement to allow them to care for their children.
- 42% of employed fathers utilised some specific working arrangement to allow them to care for their children, as compared to 26% in 1996. Conversely, 58% of employed fathers were not utilising any working arrangement to allow them to care for their children, which had fallen significantly from 74% in 1996.
- 40% of employed mothers utilised flexible working hours to allow them to care for their children. This was up from 31% in 1996.
- 30% of employed fathers utilised flexible working hours to allow them to care for their children. This had almost doubled from 16% in 1996.
- 39% of employed mothers utilised part-time work to allow them to care for their children. This was up from 29% in 1996.
- The proportion of employed fathers working from home to allow them to care for their children had doubled between 1996 (7%) and 2014 (14%).[122]

[121] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Table 3.9.

[122] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Table 3.8.

168. The research available clearly demonstrates the significant extent to which employees have access to various forms of flexibility and the high levels of utilisation. We return to this matter in chapter 10 of our submissions.

169. Each of the above factors provide contextual considerations that, in and of themselves, do not lend support to the drastic approach here proposed by the ACTU. Importantly, labour force participation rates for women, who undertake the larger proportion of parenting and caring responsibilities, are expected to continue to improve. In our view the data suggests that the access to various forms of flexibility that are available as well as improvements to paid parental leave schemes and access to child care has had the desired effect and will continue to do so.

9.2 The Benefits of Labour Force Participation by Parents and Carers

170. Ai Group has long recognised the benefits of increased labour force participation by parents and carers to the Australian economy and to employers.

171. The participation of parents and carers in the workforce creates a larger tax base from which the community more broadly benefits, as it contributes to Government revenue for the provision and investment in services and support to the community. Further, increased participation economically empowers women and families; and provides a greater return on Government investment in education.[123]

172. Employers also benefit from increased labour force participation by parents and carers; many of whom offer skill, experience and qualifications that contribute to business performance and competitiveness. Further, increased participation benefits business by creating a larger pool of workers from which to employ skill and talent.

[123] Organization for Economic Cooperation and Development, *Connecting People with Jobs: Key Issues for Raising Labour Market Participation in Australia* (March 2017) at page 22.

173. There has been an abundance of research and academic literature reporting the benefits to organisations from flexible work arrangements, including family friendly working arrangements. Much of this is contained in the ACTU's material; specifically the witness statement of Dr John Stanford.

174. Critically, however, most if not all if not all of the research reporting on benefits to organisations from flexible work have not specifically examined key elements of the ACTU's claim; namely the effects of business where employees with caring responsibilities have the right to unilaterally determine their own reduced hours, absent employer discretion and a need to take into account employer operational requirements.

175. To suggest that the academic literature supports the ACTU's claim as having a beneficial impact on business, productivity and the encouragement of flexible work practices is simply an unsustainable contention.

9.3 Other Measures that Facilitate Labour Force Participation by Parents and Carers

176. Measures to increase labour-force participation by parents and carers should be a multi-faceted approach. There are a significant number of mechanisms in place through legislation, Government policy and enterprise-led initiatives, that drive increased labour force participation by parents and carers.

177. Ai Group contends that these measures have been successful and effective in boosting labour force participation based on the statistics referred above and numerous economic and labour market sources. Indeed we note that much of the data cited by the ACTU's witnesses also support this contention.

178. In light of these measures, Ai Group contends that the ACTU's claim is overwhelmingly flawed in its approach. The existing safety net (including the NES and modern awards) provides effective avenues for increased labour force participation by parents and carers. This is addressed further below in our submission. In addition, we have set out below other measures specifically designed to increase labour force participation by parents and carers.

Paid Parental Leave

179. Parental leave for both mothers and fathers generally has a positive impact on labour force participation by parents and carers.

180. The Federal Government's Paid Parental Leave (**PPL**) scheme is a statutory scheme[124] providing 18 weeks of pay at the level of the national minimum wage to eligible primary carers of a newborn baby or adopted child. Continued workforce participation is (amongst others) a key objective to the PPL scheme. Specifically the objects of the *Paid Parental Leave Act 2010* include the following:

> (1B) The objects of the paid parental leave scheme are to:
>
> (a) signal that taking time out of the paid workforce to care for a child is part of the usual course of life and work for both parents; and
>
> (b) promote equality between men and women and balance between work and family life.
>
> (1) The object of parental leave pay is to provide financial support to primary carers (mainly birth mothers) of newborn and newly adopted children, in order to:
>
> (a) allow those carers to take time off work to care for the child after the child's birth or adoption; and
>
> (b) enhance the health and development of birth mothers and children; and
>
> (c) encourage women to continue to participate in the workforce.[125]

181. To be eligible for PPL under the scheme a person must be:

- the birth mother of the newborn
- the adopting parent of the child, or
- another person caring for the child under exceptional circumstances.[126]

[124] *Paid Parental Leave Act 2010* (Cth).

[125] See ss.3A(1B) and 3A(1) of the *Paid Parental Leave Act 2010*.

[126] See Part 2-3 of the *Paid Parental Leave Act 2010*.

182. An eligible person must also:

- meet the work test for parental leave pay, based on the 13 month period before the child is expected to come into the person's care;
- meet residency requirements from the date the child comes into the person's care until the end of the PPL period;
- have received an individual adjusted taxable income of $150,000 or less in the financial year either before the date of birth or adoption or the date of the claim, whichever is earlier; and
- be on leave or not working from when you become the child's primary carer until the end of the paid parental leave period.

183. A recipient of PPL can nominate in certain circumstances when they would prefer to receive payment for the period of leave, enabling greater flexibility to ensure a person or household can receive the payment at a time that it is needed the most; whether that it be immediately after birth of a child or after a period of other paid leave provided to the person through his/her employer.

184. This flexibility enables a primary carer/household to better manage their income during their period of leave while maintaining their employment (as protected by s.84 of the FW Act).

185. We note that the positive impact of paid parental leave is acknowledged by Professor Siobhan Austen in the report she has prepared for the purposes of these proceedings:

> 26. An important study by Martin et al. (2015) used specially designed surveys to explore whether the introduction of paid parental leave (PPL) mitigated the negative impact of parenthood on women's labour force participation. A key finding was that the PPL delayed mothers' return to work in the short run, but enhanced workforce participation over the longer term. …

27. Martin et al. (2015) also found that the effect of PPL on return-to-work patterns was largely due to the scheme's positive effect on mothers in low income households and/or who were previously employed on a casual contract. …[127]

186. Parental leave for fathers is also cited as a having a positive impact on the labour market outcomes for women, with more OECD countries introducing leave arrangements for fathers as well as mothers.[128]

187. The *Paid Parental Leave Act 2010* provides for eligible fathers and partners of newborn babies or adopted children, payment of two weeks at the national minimum wage.[129]

188. Many employers also supplement the Government's PPL scheme with their own employer-funded paid parental leave. Indeed an object of the PPL Act is:

> … to complement and supplement existing entitlements to paid or unpaid leave in connection with the birth or adoption of a child.[130]

189. The Workplace Gender Equality Agency (**WGEA**) reports that 48% of reporting organisations offer paid primary carer's leave, while 36.2% offer paid secondary carer's leave. Only 7.6% of all employees on parental leave ceased employment while on parental leave.[131]

Available and Affordable Childcare

190. An essential mechanism for enabling greater workforce participation for parents is access to available and affordable child care. Regardless of what flexibilities workplaces can offer, sustainable workplace participation by parents of young children can only take place if those children are looked after by somebody else.

[127] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, paragraphs 26 – 27.

[128] Organization for Economic Cooperation and Development, *In Pursuit of Gender Equality, An Uphill Battle* (2017) at pages 203 – 204.

[129] See Chapter 3A of the *Paid Parental Leave Act 2010*.

[130] See s.3A(3) of the *Paid Parental Leave Act 2010*.

[131] Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard; Key findings from the Workplace Gender Equality Agency's 2016-1016 reporting data* (November 2016) at page 15.

191. The constraints on childcare availability and affordability have been well documented. Government policy and intervention on child care infrastructure is a more appropriate and effective way to enable workforce participation than the ill-conceived and problematic solution proposed by the ACTU.

192. Measures have been, and are being, implemented in order to improve access to affordable childcare. For instance, recent Federal Government childcare reforms are to take effect from 2 July 2018 which will streamline, and in many cases increase, the subsidy for eligible lower to middle income families who have children in child care. Key changes, as summarised by the Commonwealth Department of Education and Training, are set out below:

1. Combined family income

A family's income will determine the percentage of Child Care Subsidy for which they are eligible for, with more financial support available to lower income families.

Combined family income^	**Subsidy rate ***
Up to $65,710	85%
Over $65,710 to under $170,710	Gradually reducing to 50%
$170,710 to under $250,000	50%
$250,000 to under $340,000	Gradually reducing to 20%
$340,000 to under $350,000	20%
$350,000 or more	Nil

^ These figures will be increased by the Consumer Price Index (CPI) when the package begins in July 2018.

* Subsidy rate of actual fee charged or the maximum hourly rate cap

2. Activity level of parents

The number of hours of subsidised care families can access will be determined by an activity test. The higher the level of activity, the more hours of subsidised care families can access, up to a maximum of 100 hours per fortnight.

In families with two parents, the parent with the lowest hours of activity will determine the hours of subsidised care.

3. Type of child care service

The new Child Care Subsidy is also based on the type of child care your family accesses subject to an hourly rate cap:

- Centre-based care – $11.55^ per hour

- Family day care – $10.70^ per hour
- Outside school hours care – $10.10^ per hour[132]

193. Underlying the Federal Government's childcare reform package is the clear and explicit intention to improve workforce participation.

194. The ACTU claim will not address the problem of affordable and available child care, being the primary barrier to greater workplace participation by parents and carers of young children. Employers should not be penalised for constraints in our childcare system. The ACTU's blanket removal of an employer's ability to control resources and hours of work in respect of employing employees who require some flexibility or reduced hours of work is a flawed and ineffective approach to boosting workforce participation.

Enterprise-Led Initiatives

195. Many enterprise-led initiatives have focused on increased workplace participation and retention of employees who have caring responsibilities. Many of these initiatives go beyond the safety net of modern awards and the NES and form part of strategic approaches that build inclusive workplaces and greater gender equity.

196. Across Ai Group's membership, such initiatives include:

- fostering greater female participation and promotion to managerial levels, including through mentoring programs, scholarships for further tertiary study and unconscious bias training;
- targeted female recruitment, including reviewing recruitment processes and job descriptions for certain roles in male-dominated industries;
- expanding flexible work to encompass job redesign, flexible teams and remote or 'mobile' working;

[132] Australian Government, Department of Education and Training, *New Childcare Package* https://www.education.gov.au/ChildCarePackage, accessed 20 October 2017.

- building on flexible leave policies throughout the organisation, including extending paid parental leave arrangements to fathers and partners;
- conducting pay equity analysis relevant to their organisations; and
- building organisational KPIs around workplace inclusion.

197. The WGEA Gender Equality Scorecard for 2015 – 2016 found that 62.9% of reporting organisations had a policy or strategy for flexible working arrangements.[133] WGEA also found that while organisations were more likely to offer more formal work arrangements in the form of part-time employment, job-sharing and leave, many informal arrangements existed for flexible hours, time off in lieu, compressed working weeks and telecommuting.

198. Critical to such flexible work initiatives, is that they are developed in ways that work within an employer's organisation and operation, having regard to their capacity to accommodate such flexibility. The unworkable prescription and intervention sought through the award system by the ACTU would seriously undermine the current enterprise-level momentum to increase flexible work options. Instead we are likely to see divisive workplace cultures based on rigid entitlements favouring flexible work rights for some groups of employees over others.

9.4 The Reasons for Non-Participation by Parents and Carers

199. The reasons for non-participation or reduced participation in the workforce by parents and carers are many and varied. It should not be presumed that access to family friendly working hours is the sole remedy. Importantly, the drastic approach proposed by the ACTU, which involves the removal of an employer's right to control hours of work in relation to employees with parenting and/or caring responsibilities, seriously overstates the alleged lack

[133] Workplace Gender Equality Agency, *Australia's gender equity scorecard; Key findings from the Workplace Gender Equality Agency's 2015-2016 reporting data* at page 15.

of workplace flexibility and the extent to which it impacts on an employee's decision to participate in the workforce.

200. In respect of parents and carers of young children, particularly those who care for newborns and infants, there are some obvious reasons why periods away from work are needed.

201. **Firstly**, and most obviously, an absence from work is necessitated by the process of giving birth and recovery from birth.

202. **Secondly**, an absence from work may be necessitated to care for a child particularly where the child is breastfed. While breastfeeding does not preclude women from returning to work, and many mothers still breastfeed while working (through a variety of arrangements from expressing milk or access to children for breastfeeding while working), the physical nature and frequency of breastfeeding (typically every 3- 4 hours or more for a newborn) are factors as to why women may choose not to return to work.

203. **Thirdly,** access to affordable and available child care may result in parents not participating in the workforce. Child care is a critical piece of economic and social infrastructure that enables workforce participation. Regardless of levels of workplace flexibility, many parents will be unable to work at all if child care arrangements are not in place, whether that be through informal care arrangements (such as grandparents), nannies, family day care or child care centres.

204. **Fourthly**, financial considerations such as the earnings of a person's partner are an important consideration for some employees when determining whether / when to return to work, particularly when considered in the context of the high cost of child care services.

205. **Fifthly,** personal preferences for how young children are cared for play a significant role in determining whether and if so when parents return to work after the birth of a child. We do not anticipate that it is controversial in these proceedings that many mothers elect not to participate in the workforce after the birth of a child because they have a preference for caring for and spending

time with their child, rather than accessing any form of child care. Such preferences may be considered by a parent in the context of their overall job satisfaction for reasons that are not associated with the flexibility that is or is not afforded to them by their employer. A similar rationale might also apply to those who have caring responsibilities for, for instance, a person with a medical condition, disability or an elderly parent.

206. The ACTU seeks to impose an extreme regulatory change on business that will not overcome or alter the many reasons why employees choose not to return to the workforce or postpone their return after the birth of a child. Indeed, the ACTU's claim entirely disregards the existence of such factors and appears to proceed erroneously on the basis that the non-participation of parents in the workforce is attributable largely if not wholly to the regulation of hours of work in the minimum safety net; a matter that is quite clearly not made out on the material before the Commission.

9.5 The Alleged 'Motherhood Pay Penalty' and 'Occupational Downgrading'

207. The ACTU claims that after women become parents, they experience a level of occupational downgrading, leading to lower lifetime earnings and superannuation, whereas men, on the other hand, do not generally experience the same impact on their employment and earnings once they become parents. The ACTU relies on the witness evidence of Professor Siobhan Austen and Dr Ian Watson and, in particular, their analysis of labour market and Household, Income and Labour Dynamics in Australia (**HILDA**) survey data reflecting the differing impact of parenthood on men and women.

208. Professor Austen refers to the particular pattern of women transitioning from full-time to part-time work or changing employers. Evident in Professor Austen's report is that:

- Australian evidence on the issue of occupational downgrading is relatively small;[134]
- Findings from the 2008 British research paper of Connolly and Gregory concerning occupational downgrading is based on labour market and household data in the United Kingdom, not Australia[135] and as such its findings should be given little weight by the Commission in these proceedings;
- The Australian evidence includes Venn and Wakefield's analysis of HILDA data from 2001 to 2005[136] which shows that:
    - men are more likely than women to have changed employers when moving from full-time to part-time employment[137];
    - mothers with children under 13 years are less likely to change employers when moving from full-time to part-time employment;[138]
    - 80% of people (men and women) who moved from full-time to part-time employment moved to a job with the same or higher skill level;[139] and
    - only 13% of mothers who moved from full-time to part-time employment moved to a job with a lower skill level; almost the

[134] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, paragraph 35.

[135] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, paragraphs 30 – 34.

[136] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, paragraphs 35 – 40.

[137] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 10.

[138] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 10.

[139] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 11.

same percentage of mothers who moved from full-time to part-time employment moved to a job with a higher skill level (12%). The remaining three-quarters of mothers who moved from full-time to part-time employment moved to a job with the same skill level.[140]

- Venn and Wakefield also conclude that: (emphasis added)

  Some anecdotal evidence suggests that people who move from full-time to part-time employment, particularly mothers with young children, sacrifice job seniority or skill level in order to work hours that allow them to better balance work and family. However, our results suggest that, at least at the broad skill level examined here, very few people who make this transition move to a lower skill level job.[141]

- The employment transitions of Australian women are characterised by a relatively high rate of transition to part-time work.[142]

- The analysis of HILDA data waves 2001 to 2015 show that occupational upgrading is associated with women remaining in, or transitioning to, full-time employment. The same pattern was found for mothers of newborn children.[143]

209. Two propositions can be distilled from this evidence:

- There is an insufficient evidentiary basis for concluding that Australian women are systematically occupationally downgraded as a result of motherhood.

- At its highest the research suggests that an inference can be drawn; that occupational downgrading may result due to a transitional to part-time work.

[140] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 11.

[141] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 15.

[142] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, paragraph 45.

[143] Statement of Professor Siobhan Austen dated 5 May 2017 at Annexure SA-3, Figures 13 and 14.

210. The evidence in this regard self-evidently cannot form a proper basis for the grant of a unilateral employee right to reduced and self-selected hours of work for employees with parenting and caring responsibilities across the modern awards system.

The Differing Impact of Parenthood on Men and Women

211. The ACTU extensively relies on labour force data analysis to demonstrate differing employment patterns for men and women following the impact of parenthood. It submits that such differences contribute to lower lifetime earnings and superannuation, which in turn contributes to gender inequality. Much of this analysis however does not examine why such differing employment patterns exist in the first place.

212. Some of the many and various reasons for gendered differences in employment patterns following parenthood are referred above in section 9.4. Gendered differences in employment patterns are also based on gendered differences in domestic arrangements and responsibilities. Men are more likely to continue full-time work following parenthood, while women generally assume a greater level of unpaid caring and domestic work in the household.

213. The ACTU's claim optimistically assumes that by enforcing further prescription on rights to flexible work, men as well as women will apply in equal numbers for family friendly working hours and that as a result, men will assume domestic duties to a greater degree.

214. Section 65 of the FW Act offers a gender neutral statutory right to request flexible work arrangements and has done so for almost eight years. Men, and indeed fathers, have had the benefit of this statutory right to care for young children or others throughout this period, yet its take up is very low.[144] This suggests that the existence of a mere right or mechanism to seek flexibility is necessarily an insufficient and ineffective means of addressing any gender

[144] Pay Equity Unit, Fair Work Commission, *Australian Workplace Relations First Findings Report: Consolidated Content from Online Publication* (29 January 2015) at Table 4.10.

disparity in the share of unpaid domestic duties undertaken by men and women.

215. There is no evidence to assume (including none lead by the ACTU) that the proposed new form of regulation will entice a greater number of men to work flexibly and thus contribute to a greater gender equality both in the workplace and within the household. Indeed, the ACTU say it is only "hoped" that their claim will "encourage men and women to share caring roles more equitably".[145]

216. Each of the ACTU's lay witnesses who give evidence about caring responsibilities for young children are mothers. No evidence has been led from any fathers. Further, the witness evidence of many of the mothers, but for a few exceptions, give very little detail as to why it is that the fathers of their children play a lesser role in caring for them such that it is the mothers who are required to vary their employment arrangements and reduce their earnings.

The Gender Pay Gap

217. The ACTU submits that the "Australian labour market is characterised by a high degree of occupational and industry segregation"[146] and that according to a KPMG report, "industries and occupations with high representation of male employees have higher levels of pay"[147]. The ACTU also relies on the Commission's 2016 Annual Wage Review decision, in which it was observed that some research suggests that "differences in the types of jobs done by men and women, such as industry [and] occupation", amongst many other factors influence the gender pay gap.[148]

218. In the absence of other groups of employees (especially fathers) taking up flexible working arrangements pursuant to the ACTU's clause (of which there

[145] ACTU submission dated 9 May 2017 at paragraph 177.

[146] ACTU submission dated 9 May 2017 at paragraph 102.

[147] ACTU submission dated 9 May 2017 at paragraph 102.

[148] ACTU submission dated 9 May 2017 at paragraph 94.

is no evidence), the proposed clause may simply result in employers accommodating a higher incidence of employees working reduced hours in industries that currently have greater female participation which, according to the ACTU, does not include male-dominant industries with higher levels of pay.[149] Therefore, the ACTU's claim may lead to a further concentration of part-time employment in certain female dominated industries. This may exacerbate gender segregation along pre-existing industry and occupational lines.

219. To the extent that the ACTU submits that there is a need for its proposed clause because the gender pay gap is caused, in part, by part-time and casual employment which is utilised by women with caring responsibilities[150]:

- The evidence does not establish that caring responsibilities are *causing* women to accept part-time or casual roles that lead to greater pay inequity; and
- The ACTU's clause proposed to grant employees a right to *reduce* their hours of work which may have the effect of *increasing* the gender pay gap if considered on a weekly basis. To this end, the ACTU's claim is incongruous with its concerns regarding the gender pay gap.

220. Whilst the ACTU asserts that the "absence of family friendly working hours is a significant contributor to the gender pay gap"[151] and that its proposed clause will "assist more men to access reduced hours to undertake caring work"[152] as a means of addressing the gap, the material before the Commission does not make out either proposition such that its proposed clause might be warranted.

[149] ACTU submission dated 9 May 2017 at paragraph 102.

[150] ACTU submission dated 9 May 2017 at paragraphs 94 and 231.

[151] ACTU submission dated 9 May 2017 at paragraph 232.

[152] ACTU submission dated 9 May 2017 at paragraph 232.

Increased Use of Casual Employees

221. A key consequence of the ACTU's claim on employer operations is the need for employers to address the absence of the employee with caring responsibilities working reduced hours. Many of these employers may be required to fill those absences in order to meet service requirements and other demands on the business.

222. Where employers are able to engage employees during those absences, such employment opportunities are likely to be for a limited fixed duration, involving limited days and hours of work. As the results of a survey conducted by Ai Group along with other employer associations will bear out (subsequently referred to as the Joint Employer Survey – see section 12.1), many employers will likely seek to cover the absences of employees who reduce their hours pursuant to the ACTU's clause through the use of casual labour including labour hire employees; an outcome that, as we understand it, would be at odds with the union movement's charge against "non-standard" forms of employment.

Part-time Opportunities for Employees Who Do Not Have Parenting and Caring Responsibilities

223. As stated by Ms Toth, the most common reason for which employees seek to work part-time is in order to combine employment and study commitments.[153]

224. The ACTU's proposed clause may result in employers accommodating part-time working arrangements for employees with parenting and/or caring responsibilities as defined by the clause to the disadvantage of other employees who also seek to work part-time due to reasons including study commitments. This is because employers cannot limitlessly accommodate part-time employment.

225. By extension, the impact of the ACTU's claim may ultimately be to discourage or exclude employees from the workforce where they seek to work part-time

[153] Witness statement of Julie Toth dated 26 October 2017 at paragraph 18.

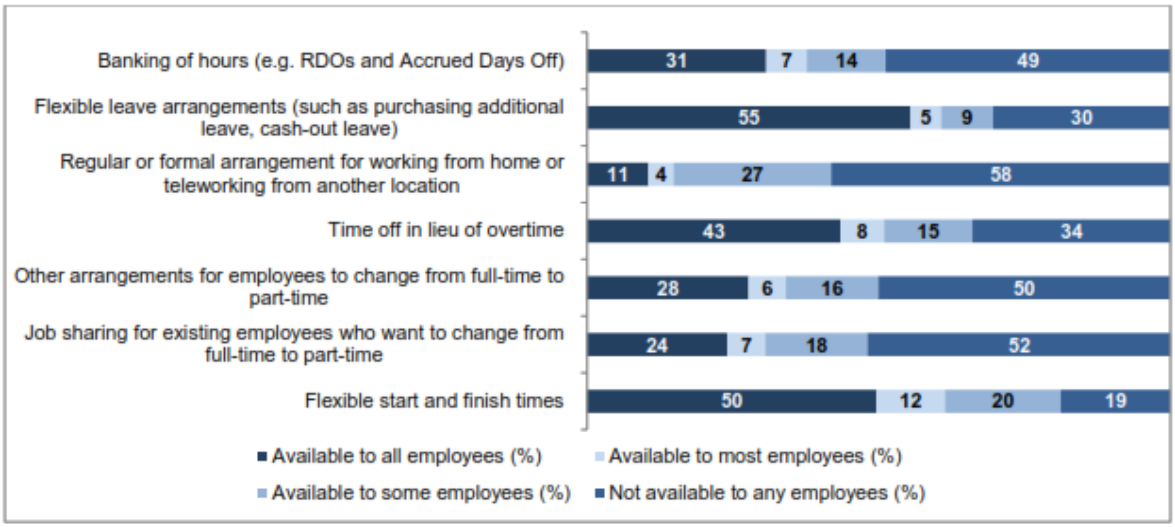
but do not have parenting or caring responsibilities for the purposes of the proposed clause.

10. EXISTING AVENUES FOR FAMILY FRIENDLY WORK ARRANGEMENTS

226. The modern awards system, together with the NES, provides various avenues for employees to seek family friendly work arrangements. In addition, awards and the Act contain certain protections for employees which are designed to ensure that, where necessary, work does not unreasonably interfere with an employee's personal commitments and more specifically, their caring responsibilities.

227. The Australian Workplace Relations Study First Findings Report (**First Findings Report**) provides some insight into the availability of flexible working arrangements. It reveals that as at 2014, amongst the 3,057 enterprises surveyed, 50% reported that flexible starting and finishing times were available to their employees. Other arrangements such as flexible leave arrangements, time off in lieu of overtime and banking hours (e.g. rostered days off) were also reported as being available in a significant proportion of enterprises, as can be seen in the chart below:[154]

Figure 4.4: Availability of flexible work practices to employees of the enterprise, per cent of enterprises



[154] Pay Equity Unit, Fair Work Commission, *Australian Workplace Relations First Findings Report: Consolidated Content from Online Publication* (29 January 2015) at page 30.

228. We observe at the outset that research relied upon by the ACTU establishes that the overwhelming majority (80.7%) of all requests made by employees for changes to their working arrangements are granted, with no significant difference between the data collected in relation to males and females.[155] This includes requests made pursuant to s.65 as well as any other means.

229. In the submissions that follow, we deal with employee entitlements and benefits in the current safety net that provide employees with an avenue to obtain flexible working arrangements, and examine their utility for the purposes of ensuring that employees are able to facilitate their caring responsibilities whilst maintaining their employment. Many of these were noted by the Full Bench in the 2002 Working Hours Case as demonstrating that "the interaction between work and the personal and family circumstances of employees [was] already recognised in a significant way in the award safety net".[156] In our submission this remains the case and indeed is all the more so in light of the right at s.65 of the Act to request flexible working arrangements.

10.1 The Right to Request Flexible Working Arrangements

10.1.1 The Legislative Scheme

230. Section 65 gives employees a right to request flexible work arrangements under the NES.

231. Given the centrality of s.65 to these proceedings, we here address the operation of the current statutory provisions as well as the ACTU's contentions regarding the alleged deficiencies or shortcomings of the legislative provisions and the ACTU's associated justifications for its proposal.

232. The ACTU's submissions seek to downplay the utility of s.65. Indeed, they go so far as to suggest that it is "failing meet the FW Act's objective in s.3(d) of assisting employees to balance their work and family responsibilities and

[155] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 43.

[156] *Working Hours Case July 2002* (2002) 114 IR 390 at [243].

providing for flexible working arrangements." In so doing the ACTU seeks to establish that the system, only relatively recently developed by Parliament (and expanded even more recently), is so fundamentally deficient as to necessitate the Commission taking the radical step of effectively developing an alternate and very different mechanism to be applied within the award system.

233. We shortly address the ACTU's relevant contentions in detail but commence by observing that the ACTU's approach fails to properly or even reasonably acknowledge the beneficial role of the current legislative mechanism. Crucially, the ACTU's submissions fail to acknowledge that there is any necessity to balance the interests of both employers and employees in the operation of any such mechanism.

The Legislative Provisions

234. As of 1 January 2010, s.65 of the FW Act introduced a new legislative right for permanent employees with a minimum of 12 months' continuous service, and long term casual employees with a reasonable expectation of ongoing employment on a regular and systematic basis, to request a change to their working arrangements to assist the employee to care for a child.

235. The provision was in the following terms:

> **Division 4—Requests for flexible working arrangements**
>
> **65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> (1) An employee who is a parent, or has responsibility for the care, of child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:
>
> (a) is under school age; or
>
> (b) is under 18 and has a disability.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> (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.

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

236. Legislative amendments in 2013 altered employer obligations flowing from s.65 in various respects.[157] The amendments significantly expanded application of the entitlement. They both broadened the categories of circumstances that gave rise to an employee's eligibility for the entitlement and introduced a very flexible nexus between the existence of such circumstances and both the employee's capacity to make a request and the form of change that might be sought.

Section 65(1) now provides:

Employee may request change in working arrangements

(1) If:

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

[157] *Fair Work Amendment Act 2013*. The amendments to s.65 were operative from 1 July 2013.

(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.

237. Section 65(1A) lists the circumstances referred to in s.65(1)(a). It provides:

(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.

238. For the request to be made pursuant to s.65 it must be in writing and set out details of the change sought and the reasons for the change.[158] An employer is then required to give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.[159]

239. Subsection 65(5) provides that: "The employer may refuse the request only on reasonable grounds." If the request is refused, the written response provided by the employer must "detail the reasons for the refusal."[160]

240. Only employees with 12 months of continuous service and long term casual employees with a reasonable expectation of continuing employment on a

[158] See s.65(3).

[159] See s.65(4).

[160] See s.65(6).

regular and systematic basis are entitled to make a request pursuant to s.65.[161]

241. Section 65(1A) was introduced as part of the 2013 amendments and sets outs a non-exhaustive list of 'reasonable business grounds'. These are stated to include the following:

> (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.

242. Subsection 65(1B) was also introduced as part of the 2013 amendments and makes it clear that a person who is a parent, or responsibility for the care of a child, may request to work part-time.

243. Section 66 clarifies that:

> This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

244. Section 66 was inserted into the FW Act to ensure that employees are able to benefit from State "right to request" laws, such as those that operate under Victorian State legislation. The following extract from the Explanatory Memorandum for the *Fair Work Bill 2008* is relevant:

[161] See s.65(2).

272. The intention of clause 66 is to ensure the application to national system employers and their employees of more beneficial State or Territory laws that confer a right to request flexible work arrangements and deal with discrimination in relation to parental or carer responsibilities. For example, this clause is intended to enable the operation of provisions in the *Equal Opportunity Act 1995* (Vic) that oblige an employer in Victoria to accommodate an employee's responsibilities as a parent or carer and that prescribe remedies if an employer breaches those obligations. (See also paragraph 27(1)(a) of the Bill.)

245. The provisions in the *Equal Opportunity Act 1995* (Vic), referred to in the above paragraph, preserve the right of an employer to reasonably refuse to accommodate the responsibilities that an employee has as a parent or carer. The provisions are reproduced below:

17 Employer must accommodate responsibilities as parent or carer of person offered employment

(1) An employer must not, in relation to the work arrangements of a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.

Example

An employer may be able to accommodate a person's responsibilities as a parent or carer by offering work on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from home.

(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that a person has as a parent or carer, all relevant facts and circumstances must be considered, including—

(a) the person's circumstances, including the nature of his or her responsibilities as a parent or carer; and

(b) the nature of the role that is being offered; and

(c) the nature of the arrangements required to accommodate those responsibilities; and

(d) the financial circumstances of the employer; and

(e) the size and nature of the workplace and the employer's business; and

(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so;

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the person of not making such accommodation.

246. It can be seen that the Victorian legislation enshrines a balanced approach to the interests of employers and employees, similar to s.65 of the FW Act. Such a balanced approach is nowhere to be found in the ACTU's claim.

The Policy Intent of Section 65

247. The right to request provisions were intended to encourage cooperation though open dialogue between employees and their employers, about achieving meaningful flexibility in the workplace that benefits both parties.

248. This intent is reflected in the following question and answer in the Federal Labour Government's NES Discussion Paper (p.12) which was released during the development of the NES:

> **'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.

249. The policy intent of s.65 was also explained in the following extract from the Explanatory Memorandum for the *Fair Work Bill 2008*:

> **Division 4 – Requests for flexible working arrangements**
>
> 258. Division 4 establishes a right to request flexible working arrangements in certain circumstances. The intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements.

250. The ACTU's claim conflicts with the policy intent of s.65, and would seriously undermine the policy intent.

The 2011 – 2012 FW Act Review and the Productivity Commission Inquiry

251. Since the FW Act was implemented there have been two major reviews into the Act:

- The 2011 – 2012 review of the Act; and
- The Productivity Commission Inquiry into the Workplace Relations Framework (2015).

252. In both reviews, the ACTU argued that s.65 needs to be amended to give employees and unions the right to challenge an employer's refusal of an employee's request for flexible work arrangements in the Commission and in the Courts. In both reviews, these ACTU arguments were rejected.

Overlap Between s.65 and the ACTU's Proposal

253. There is substantial overlap between s.65 and the ACTU;s proposal, although the ACTU's clause would apply to casual employees who do not meet the eligibility criteria in s.65(2) of the Act and to other employees who have 6 months' continuous service but less than the 12 months as required under the Act.

254. The circumstances covered by s.65(1) would largely cover the circumstances in which an employee would have parenting responsibilities or caring responsibilities, as contemplated under clause X.4.1 and clause X.4.2 of the ACTU proposal. Section 65, however, applies in a broader range of circumstances.

255. It is important to appreciate that s.65 enables an employee in certain circumstances (i.e. those identified in s.65(1)(a)), to seek a change in their working arrangements "if the employee would <u>like</u> to change his or her working arrangements <u>because</u> of those circumstances…" (emphasis added).[162] Having regard to the ordinary meaning of the term 'because', as drawn from the Macquarie Dictionary, it merely requires that an employee wants a change

[162] See s.65(1)(b).

for reason of the circumstances or due to the fact of the circumstances. It is in a sense broader than the approach originally taken under s.65 of providing that the change must be sought "..to assist the employee to care of the child…".

256. Further, the change that could be sought pursuant to s.65 must now only be one that is "relating to" the relevant circumstances. This enables an employee to seek a very broad range of changes. The legislation does not require that the change must be *necessary* to attend to any activity associated with the experiences identified in clause s.65(1)(a).

257. Section s.65 does not require that the change in arrangements be sought to 'accommodate' a person's parenting or caring responsibilities, as is contemplated in the ACTU proposal. It appears to us that s.65 would apply in circumstances caught by the proposed ACTU proposal, but would also give employees with parenting responsibilities and caring responsibilities a right to request reductions in hours or changed hours of work which they would not be eligible to obtain under clause X.1.1 of the ACTU's proposal. The test under clause X.1.1 is substantively different to that which applies under s.65(1)(b) of the Act. We do not here suggest that the legislative test is appropriate for inclusion in the ACTU proposed clause (given the different entitlement it would provide for), but observe that the subtleties in the different approaches adopted in s.65 and the ACTU proposal are apt to confuse employers and employees given the overlapping nature of the provisions.

The Merits of a 'Right to Request' and a 'Right of Refusal'

258. The defining feature of the right established under s. 65 is that it constitutes a right to request a change in working arrangements[163] and a corresponding obligation on an employer to either grant or refuse the request.[164] However,

[163] See s.65(1).

[164] See s.65(4).

an employer is *only* permitted to refuse the request if it has reasonable business grounds for doing so.[165]

259. At the heart of the ACTU's concerns regarding the scheme in s.65 is their contention that it constitutes a right to request *only* and that it is consequently an inadequate mechanism. Their views in this regard appear to particularly focus on a concern regarding the absence of an enforcement mechanism for the current provision and the fact that an employer has a capacity to refuse a request that is made under the Act. The point is made at paragraph 111 of its submission:

> Employees have always been entitled to request a variation to their working conditions. Due to the lack of enforcement mechanism, the 'right to request' flexible work arrangements does not provide employees any substantive entitlement to anything at all. It is a right to request a change to working arrangements only, not a right to changed working arrangements, with no capacity for an employee to challenge an adverse decision. Section 65 merely places minimum procedural requirements on employees and employer when a request for flexible working arrangements is made under the FW Act.[166]

260. At paragraph 113 the ACTU submits:

> In any event, s.65 is located in what is supposed to be a guaranteed minimum set of enforceable employment standards. In its current form, it does not meet these criteria – the provision in s.65 are neither guaranteed nor enforceable. They do not represent a 'minimum' condition or standard in relation to flexible working arrangements. On the contrary, all an employer has to do is respond to a request in writing, providing reasons if a request is refused.[167]

261. The ACTU seek to remedy the inadequacies that it perceives through a proposal that affords an employee an award derived absolute right to changed working arrangements, in the form of reduced hours of work. The following points may be made in response.

262. **Firstly**, the ACTU's submissions fail to acknowledge the utility of a right to request, as encapsulated in s.65, given the generally supportive attitudes of employers to such matters. We address this point in greater detail later, but here observe that the evidence is that in the very vast majority of cases where

[165] s.65(5)

[166] ACTU submission dated 9 May 2017 at paragraph 111.

[167] ACTU submission dated 9 May 2017 at paragraph 113.

an employee makes a request, either formally or informally, for some form of flexibility in relation to their working arrangement, it is either accommodated as requested or with modification. Given this context, the value of s.65 cannot be underestimated. This alone reveals the hollow basis for the ACTU's criticisms and claim.

263. **Secondly**, the ACTU submission does not afford due weight to the requirement under the Act that an employer grant the request unless there are reasonable business grounds for refusal. We acknowledge that s.65 is not a civil remedy provision. However, it cannot be presumed that it is consequently disregarded by employers. There is no evidence of widespread non-compliance with the provision.

264. **Thirdly**, s.65 establishes a workplace right, as contemplated by s.341. Accordingly, s.65 ensures that the various protections contemplated in s.340 to 345 of the Act apply in the context of, or in relation to, requests made under the statute. We address this point later in our submissions.

265. **Fourthly**, a right to request plays a role in encouraging employees to make requests and in shaping an employer's response to such requests. The Explanatory Memorandum for *Fair Work Bill 2008* expressly provided that the intention of s.65 was to "promote discussion between employers and employees about the issue of flexible working arrangements."[168] Indeed, notwithstanding the relatively limited use of formal requests under s.65, it could be expected that existence of such a right under the Act serves as a catalyst for informal requests. For example, it is highly foreseeable that in many small businesses the nature of the relationship between an employer and their employees will be such that it is unlikely the employee will feel the need to resort to issuing a notice under s.65. That does not mean that the legislation is not playing a role in facilitating such discussions.

266. **Fifthly**, the ACTU submissions fails to recognise that s.65 operates as a mechanism to both balance the legitimate interests of employers and

[168] Paragraph 258.

employees, and to encourage such parties to adopt a cooperative approach to the implementation of flexible working arrangements. This is crucial to avoid unfair, unworkable and ultimately untenable outcomes that might flow from an unfettered employee right to change their working hours, as contemplated within the ACTU's proposal.

267. The capacity of an employer to refuse an employee's request on reasonable business grounds can be expected to encourage employees, who will often be very much aware of such matters, to have regard to this consideration when identifying the change in arrangements that they may seek. Moreover, it serves to encourage employee to engage in a level of compromise in relation to such matters. An employee is entitled to make a further request which addresses the employer's reasons for refusal and, if this occurs, an employer is required to accept the request unless there is another relevant basis for refusal.

268. The ACTU proposal shifts the balance much too far in favour of the employee and removes the need for any consideration of the requirements of their employer. It is odds with the modern awards objective, to the extent that it fails to strike a fair balance between the interests of employers and employees.

269. Moreover, the heavy-handed nature of the proposal it is at odds with that element of the object of the Act that speaks to the provision of a "balanced framework for cooperative and productive workplace relations".[169] In this regard we acknowledge that s.3 contemplates achievement of this objective by, amongst other things, "assisting" employees to balance their work and family responsibilities. The reference to assist should not be regarded as suggesting the employers should simply accommodate all parenting and caring responsibilities of employees. Rather the reference suggests an acknowledgement that there are limitations on the role that an employer can be expected to play is this regard. We contend that s.65 (and the various other

[169] See s.3.

flexibilities and protections available under the safety net) appropriately assist employees to balance their work family responsibilities.

270. **Sixthly,** the ACTU position does not properly account for the utility of the discrete obligation under s.65(4) requiring that an employer provide the employee who makes a request with a written response indicating whether it is granted or refused within 21 days and the associated obligation under s.65(6) that such a response include details of the reasons for a refusal. The receipt of such information will facilitate further consideration by the parties of alternate arrangements that may overcome the reasons for the employer's refusal. Such documentation will also assist an employee who may seek redress if they contend that their employer has engaged in unlawful discrimination or in the context of unfair dismissal proceedings. We discuss such separate causes of action and their potential interplay with the operation of s.65 later in these submissions.

Reasonable Business Grounds

271. The ACTU addresses the notion of 'reasonable business grounds' at paragraphs 119 to 123 of their submissions[170]. As observed by the ACTU, prior to the 2013 amendments the FW Act did not define 'reasonable business grounds' or provide examples of what may constitute 'reasonable business grounds'.

272. The list of grounds now in the Act represents a recognition by the Legislature of some of the kinds of problems that an employer may confront when faced with a request for a change in their working arrangements pursuant to s.65.

273. The Explanatory Memorandum for the *Fair Work Amendment Bill 2013* provides that "the list of reasonable business grounds is not exhaustive and such grounds will be determined have regard to the particular circumstances of each workplace and the nature of the request made." The Act rightly reflects the reality that the potential impact of changes to an employee's hours will

[170] ACTU submission dated 9 May 2017.

vary based on such matters. For this reason, the employer parties cannot be expected to provide evidence of all the circumstances in which the clause would provide problems in the context of the 122 modern awards that are the subject of the proceedings.

274. The Full Bench should approach its consideration of the proposed clause on the basis that s.65(5A) identifies a non-exhaustive list of the kinds of difficulties that could flow from the ACTU's claim and it should accordingly not grant the claim unless it is satisfied, on the material, that such considerations would never arise or that, as a matter of merit, an employer should never have a right to refuse an employee's request for changed working hours notwithstanding such matters. Neither conclusion could reasonably be reached on the material provided by the ACTU.

275. The ACTU's observe that the factors identified in s.65(5A) relate to the employer's interests only and do not require any consideration of the circumstances of employees, or the impact that a rejection of a request will have on the employee or their family. However, they do not identify the significance they attach to such observations.

276. Regardless, it is unsurprising that the factors identified in s.65 reflect an employer's perspective. The default position under s.65 is that an employer must grant a request. An employee does not need to establish that there will be an adverse impact upon either their family or themselves in order to make a request. We also make the point that the basis for refusing a request under s.65 is relatively narrow. It does not permit rejection of a request on the basis of the personal outlook or values of a manager or some irrelevant consideration unconnected to the business of the employer. The Act includes a sensible objective standard that properly reflects the reality that the selection of an employee's hours of work cannot be divorced from the realities of the reasonable requirements and circumstances of their employer.

277. At paragraph 123 the ACTU [171] points to the absence of significant consideration by the Commission of the phrase, 'reasonable business grounds'. There is no evidence before the Commission to suggest that there is any widespread confusion regarding what constitutes 'reasonable business grounds'.

Enforcement of Section 65

278. As observed by the ACTU,[172] the FW Act expressly limits the capacity for the Commission to deal with disputes concerning whether an employer has reasonable business grounds under s.65(5) to refuse an employee's request.

279. Section 739 and s.740(2) are in relevantly similar terms save that one provision relates to disputes that are dealt with by the FWC while the other governs disputes that are dealt with by persons other than the FWC.

> (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)).

280. Section 44 prevents orders being made in relation to a contravention of s.65(5).

281. The above provisions reflect the Legislature's clear intent that there not be an avenue for the agitation of industrial disputes concerning an employer refusal of a request on reasonable business grounds and that employers not be penalised for decisions they make in relation to this issue.

[171] ACTU submission dated 9 May 2017.

[172] ACTU submission dated 9 May 2017 at paragraphs 124 – 125.

282. The ACTU accepts that its proposal would overlap with the operation of s.65, where parents and carers with at least 12 months' service wish to access reduced hours.[173] In addressing the interaction between the proposed clause and s.65 they submit:

> … It would still be open to an employee in this category to use s.65 if they wished. 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.[174]

283. At paragraph 192 the ACTU further observes that:

> It is envisaged that disputes under the clause would be dealt with in the usual way, under the dispute settlement provisions of the relevant award or by the Federal Court or Federal Circuit Court where a breach of the award is alleged.[175]

284. The ACTU's claim is a blatant attempt to circumvent the intended operation of s.65 of the FW Act by asking the Full Bench to create a new right for a matter that falls squarely within the ambit of s.65. It would, at least for practical purposes, remove the operation of s.65.

285. Without demurring from our argument that the Commission does not have the jurisdiction to grant the claim (see Chapter 6), we observe that the ACTU's submissions extracted above reflect an absence of reality and practicality.

286. Section 65 establishes a scheme that, in its totality, has been designed and established to promote discussion between employees and their employers regarding the implementation of flexible work arrangements. This is reflected in the structure of the s.65 and is attested to in the Explanatory Memorandum for the *Fair Work Bill 2008* and the Explanatory Memorandum for the Bill implementing the 2013 changes. The claim would negate the intended operation of s.65 by enabling an employee to unilaterally dictate what hours they will work, and by removing the employer's right to refuse a request on 'reasonable business grounds'.

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[173] ACTU submission dated 9 May 2017 at paragraph 194.

[174] ACTU submission dated 9 May 2017 at paragraph 194.

[175] ACTU submission dated 9 May 2017 at paragraph 192.

287. Ultimately, the clause proposed would oblige an employer to grant an employee access to a change in their work arrangements in circumstances that the Legislature has made emphatically clear that an employer should not be compelled to so grant (on account of 'reasonable business grounds').

288. It would also expose employers to penalties and dispute proceeding in the event that they refused to implement the arrangement because of 'reasonable business grounds', in circumstances where the Legislature has decided that this is not appropriate.

289. The Full Bench should not create an award clause that would have the effect of imposing indirectly an outcome that the Legislature has deliberately not imposed.

290. In the 2011 – 2012 Fair Work Act Review and in the Productivity Commission's Inquiry into the Workplace Relations Framework, the ACTU argued at length that an employer's refusal on 'reasonable business grounds' of an employee request for flexible work arrangements should be able to be challenged in the Commission and in the Courts. In both Reviews, the ACTU's arguments were rejected and the merits of the employer's right to reasonable refusal were confirmed.

291. The content of ss.739 and 740, is a relevant consideration in weighing what constitutes a fair and relevant safety net of minimum terms and conditions comprising modern awards and the NES (see s.134(1)). The Commission should not form the view that a limitation deliberately included in one key part of the safety net (i.e. the NES) should be removed through provisions in another key part of the safety net (i.e. modern awards).

Conclusions Regarding Section 65

292. What flows from the above analysis is the following key propositions of relevance to any assessment of the merits of the ACTU claim:

- s.65 provides an expansive entitlement to a broad range of employees.

- The legislative entitlement in s.65 has only relatively recently been included within the Australian workplace relations system.

- The entitlement in s.65 has been substantively expanded only very recently by the Legislature.

- The deficiencies alleged by the ACTU regarding the operation of s.65 are overstated and without a proper basis.

- There is significant overlap between the operation of s.65 and the proposed ACTU clause both in terms of employees who would have an entitlement and the kind of change that could be implemented pursuant to the respective schemes.

- There are various differences in the manner in which the two schemes would operate and, if the ACTU's claim was granted, such differences would confuse employees and employers.

- The ACTU proposal is at odds with the policy intention underpinning the implementation of s.65 and would negate the intended operation of s.65.

293. The maintenance of an employer's right to refuse a request for a change in working arrangements on 'reasonable business grounds' under s.65(5) strikes a fair balance between the interests of employers and employees, and facilitates the parties adopting a co-operative approach to the implementation of flexible work arrangements. Moreover, the employer right guards against the unreasonable and unworkable outcomes that would obviously flow from the adoption of heavy-handed and impractical approach proposed by the ACTU.

10.1.2 The Utilisation of the Right to Request Flexible Working Arrangements

294. We now turn to the extent to which the right to request flexible working arrangements under s.65 of the Act has been utilised since its implementation and the data sources available that lend support for the proposition that it is

operating as an effective means of providing employees with an avenue to flexible working arrangements.

A Quantitative Study: The General Manager's 2015 Report about Section 65

295. In November 2015, the General Manager of the Commission published a report into the operation of provisions of the NES relating to requests for flexible working arrangements (**General Manager's 2015 Report about s.65**). The quantitative data contained in that report is based on the Australian Workplace Relations Study (**AWRS**); a survey conducted by the Commission of 7883 employees[176] and 3057 enterprises[177], which is representative of employers and employees covered by the FW Act.[178] The data collected was weighted up to population estimates sourced from ABS catalogues.[179]

296. The General Manager's 2015 Report about s.65 provides the most recent, reliable and comprehensive research that is currently available regarding the utilisation of the right to request flexible working arrangements under the NES since 2012 and the manner in which such requests are treated by employers.

[176] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 11.

[177] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 10.

[178] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 10.

[179] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 11.

297. The quantitative results reported can be summarised as follows:

	Reported by Employers	Reported by Employees
Incidence of Requests for Flexible Working Arrangements[180]		
All requests made / received	40.4%	27.9%
Request made / received in accordance with s.65	1.3%	4.1%
No requests received / made	58.5%	69.2%
Reasons for Requests Pursuant to s.65[181]		
To care for child/children	73.0%	Child/children under school age: 54.8% Child/children of school age: 42.7%
To care for a family member (e.g. elderly parent)	28.4%	14.8%
Changes in Working Arrangements Pursuant to s.65[182]		
Reduction in hours worked	66.8%	20.6%
Change start/finish times	57.1%	61.3%
Change days worked	56.4%	35.2%
Change in shift arrangements or rostering	14.4%	5.9%
Change from full-time to part-time	Not Reported	14.5%
Outcome of Requests Pursuant to s.65[183]		
Granted	All granted: 90.2% Some granted: 9.1%	85.8%
Granted, but with some changes	All granted: Not Reported Some granted: 25.5%	12.1%
Refused	Not Reported	2.1%

[180] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at pages 18 and 26.

[181] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at pages 23 and 30.

[182] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at pages 23 and 32.

[183] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at pages 25 and 32.

298. The report provides the following additional explanation of the data regarding the outcome of requests made pursuant to s.65 of the Act as reported by employers: (emphasis added)

> Obviously, given that only 9 per cent of employers refused a request for flexible working conditions at first instance, there is a very limited amount of data available to be analysed with respect to refusals. Nonetheless, enterprises that rejected some of the requests made were also asked whether subsequent discussions led to the request being accepted on a different basis: 40 per cent of those who rejected the request at first instance also rejected it after further discussions. Putting this another way, 60 per cent of enterprises that had rejected at least one request initially had accepted a variation of the request after discussions.[184]

299. We note that various elements of the General Manager's Report about s.65 are also cited by Dr Jill Murray, a witness called by the ACTU, in the report she has prepared for the purposes of the present proceedings, which focuses on employees' access to flexible working arrangements.[185]

300. In our submission, the quantitative data contained in the General Manager's Report about s.65 of the Act lends support for the following propositions:

- Section 65 of the Act is being utilised by a small proportion of employees seeking flexible working arrangements and where such requests are made, the very vast majority of requests are being granted. **Importantly, only 2% of employees reported that their request was refused and only 9% of enterprises reported that some (but not all) requests they received pursuant to s.65 of the Act were not granted.** In total 91% of employees who made a request pursuant to s.65 of the Act reported that they were satisfied with the outcome.[186]

[184] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 25.

[185] Statement of Dr Jill Murray dated 6 May 2017 at Annexure JM-3.

[186] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 33.

- A significant proportion of requests made and received pursuant to s.65 of the Act are for the purposes of caring for children and/or other family members. Accordingly, in broad terms, the right to request under s.65 of the Act is being utilised by employees with the types of personal circumstances that would also give rise to a right to change their hours of work under the ACTU's proposed clause. To this extent, there is significant overlap between the operation of s.65 and the potential operation of the provision sought by the ACTU.

- A significant proportion of requests made and received pursuant to s.65 of the Act seek changes to an employee's hours of work. Accordingly, in broad terms, the right to request under s.65 of the Act is being utilised by employees to seek the types of changes to their working arrangements which, under the ACTU's proposed clause, they would have an absolute right to determine. To this extent, there is significant overlap between the operation of s.65 and the potential operation of the provision sought by the ACTU.

- One of the legislative purposes underpinning the introduction of s.65 of the Act is, as we have earlier stated, to encourage discussions between an employer and employee. The General Manager's Report about s.65 establishes that this is being achieved under the current framework. In the majority of instances (60%), enterprises that had rejected at least one request initially, subsequently accepted a variation of the request after discussions. Of those employees whose request for flexibility was accepted with some changes, 80.3% stated that they were satisfied with the outcome.[187] Further, 85% of employees reported that they discussed their request for flexible working arrangements with their employer before putting it in writing and in the very vast majority of instances (92.8%) this did not deter the

[187] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 33.

employee from proceeding to make their request in writing, nor did it lead them to alter the terms of their request.[188]

301. Each of the findings we have articulated are open to the Commission and should be made. Further, they quite clearly demonstrate the efficacy of s.65 and make glaringly obvious that in the very significant majority of cases, employees requests for flexible working arrangements (which includes changes to hours of work) are being granted. The heavy-handed one-size-fits-all clause proposed by the ACTU is impossible to justify as being *necessary* for the purposes of ensuring that awards, *together with the NES*, provide a fair and relevant minimum safety net when the research so plainly reveals that the union movement's grievances about the operation of the current safety net are unsubstantiated.

A Qualitative Study: The Report to the Commission Prepared by the Centre for Work + Life

302. For the purposes of the General Manager's Report about s.65, the Commission also contracted the Centre for Work + Life from the University of South Australia to obtain qualitative research on matters relating to s.65 of the Act[189] (**Centre for Work + Life Report**). The report is based on telephone interviews conducted during 2012 – 2013[190] of 25 employees who had made a formal written request under the NES for flexible working arrangements[191] and 14 employers who had received such requests (albeit not necessarily from

[188] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 30.

[189] Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 14.

[190] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 1.

[191] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 12.

any of those 25 employees).[192] The employees and employers are not identified in the report and accordingly, their responses to the survey cannot be tested. Accordingly, whilst a collective consideration of the survey responses may allow the Commission to conclude that they are demonstrative of certain propositions or support certain observations, the responses provided by specific employees or employers should not be given undue weight.

303. With that in mind, we point to the following relevant key findings that were made by the authors of the Centre for Work + Life Report.

304. **Firstly,** there was said to be a "consistent perception" amongst employer participants in the survey that the introduction of the right to request in the FW Act had resulted in more careful and considered decision-making with regard to requests for flexible working arrangements.[193] In our submission this demonstrates that employers are mindful of their obligations under the FW Act when considering requests made for flexible working arrangements and as a result, give careful consideration to that which has been sought. It can also reasonably be anticipated that as employers' understanding and experiences of dealing with requests made under the statutory regime grow, the trend described by the Centre for Work + Life Report will continue.

305. **Secondly**, the most common process for request-making reported by employees and employers involved employees first discussing their request with the employer.[194] As we have earlier submitted in the context of the General Manager's Report about s.65, this suggests that the relevant provisions of the FW Act are effectively serving their purpose of promoting a dialogue between employers and employees which is designed to encourage

[192] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 14.

[193] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 3.

[194] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 3.

them to cooperatively engage in discussions regarding the flexibility sought by the employee.

306. **Thirdly**, the majority of employees received their employers' response to their request within 21 days, usually by email.[195] This is again a matter that goes to the efficacy of the right to request under the NES and employers' compliance with those provisions.

307. **Fourthly**, the majority of employees reported that their request was accepted in full by their employer and most were confident that it would be maintained for as long as they required it.[196] This is consistent with the General Manager's Report about s.65 and, as we shortly come to, the survey conducted by Ai Group and other employer associations which is here in evidence before the Commission.

308. **Fifthly**, employers' consideration, motivations and treatment of requests made pursuant to s.65 was described as follows: (emphasis added)

> Employer participants also reported that the accepted the majority of requests. They understood and respected employees' needs to care for children, and recognised their key role in enabling individuals to both engage in paid work and provide (or organise) childcare. Employer participants attributed rare occasions of requests for refusals to organisational or business factors that could not be overcome, such as staff shortages. In these circumstances, many of these employers spoke of their attempts to negotiate alternative options so as to at least partially meet employees' requests. …
>
> …
>
> Employer participants also emphasised the importance of meeting both organisational and employee needs when considering request to change work arrangements. Many employers took a win-win perspective to flexibility requests – the organisation retains valued and productive employees and the individual worker has the capacity to engage in paid work and care for their children. …
>
> …

[195] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 3.

[196] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at page 3.

> Employers were also aware of this strong link between access to flexibility and employee retention. Indeed, retaining staff was one of the main drivers of employees' willingness to support flexible work arrangements, particularly with regard to the retention of employees valued for their skills, knowledge and productivity.[197]

309. The above passage suggests that employers overwhelmingly grant employee requests and where they are not able to do so, they will endeavour to negotiate an alternate arrangement. It also makes clear that employers generally are compassionate and understanding of employees' caring responsibilities and, furthermore, recognise and are motivated by the benefit of retaining employees by accommodating their needs for flexibility.

10.1.3 The Outcomes of Requests for Flexible Working Arrangements

310. In addition to the observation already made regarding the very low proportion of requests for flexible working arrangements that are refused under the current framework, we make the following observations about the extent to which such requests are refused or, in some cases, are partially granted.

311. **Firstly,** on any reading of the material before the Commission, including the employer survey results which we turn to later in this submission, the Full Bench cannot conclude that requests for flexible working arrangements made pursuant to s.65 of the Act are systematically being refused or that where they are being refused, there are not reasonable business grounds for doing so. Indeed it would appear that the ACTU does not seek to contend as much. Further, the reasons cited by employers for having refused requests for flexible working arrangements in the survey conducted by Ai Group and other employer associations closely align with the grounds listed at s.65(5) of the Act.

312. In such circumstances, the grant of the ACTU's claim cannot be justified as being *necessary* to ensure that awards are providing a fair and relevant minimum safety net. The material before the Commission instead establishes that the current regime is effectively providing a balanced and fair mechanism

[197] Centre for Work + Life, Skinner N, Pocock B and Hutchinson C; *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, A Report to the Fair Work Commission* (2015) at pages 3 – 4 and 6.

for seeking flexibility that takes into account the needs of employees and employers and that in the very vast majority of circumstances requests are granted.

313. We note that the material does *not* establish that where requests are granted, this is not without consequence for the employer and the Commission should not conclude that that is so. Indeed, the evidence that will be led by Ai Group provides examples where employers have borne the inconvenience that has arisen as a consequence of granting a request for flexibility which they considered that they were required to grant by virtue of requirements of at s.65 and/or other relevant factors.[198] The NES, however, appropriately enables an employer to give consideration to the degree to which it will be faced with additional costs, productivity implications and other adverse consequences when determining whether to grant a request.

314. **Secondly,** the ACTU submits that "supervisors and managers play a key role in determining access to flexible working arrangements, and an environment of informality is more likely to mean that decisions about requests are subject to the personal outlook and values of the line manager, rather than company policies or legislative requirements".[199]

315. The mere existence of a supervisor or manager's personal views or values does not necessarily establish that employers are refusing requests in contravention of s.65 of the Act, which permits employers to refuse requests where there are reasonable business grounds. There is no probative evidence that establishes that the personal views of decision-makers are in fact influencing the outcomes of requests made for flexible working arrangements or that where they have some influence, there are not also reasonable business grounds for refusing the request.

316. Where it is detected that specific personnel within organisations are influenced by their personal values in a manner that results in the refusal of requests for

[198] Witness statement of Janet O'Brien dated 30 October 2017 and witness statement of Peter Ross dated 24 October 2017.

[199] ACTU submission dated 9 May 2017 at paragraph 137.

flexible working arrangements in contravention of s.65, this is an issue that should be dealt with by way of training and education. Any isolated instances of such behaviour (which we do not concede arise) do not warrant the disproportionate response proposed by the ACTU.

317. **Thirdly,** some research relied upon by the ACTU suggests that decisions made in relation to requests for flexible working arrangements are influenced by "issues not mentioned in the legislation: for example, employers "were more likely to accept flexibility requests where the employee is highly valued, perceived to be trustworthy and could not be expected to maintain their performance and productivity when working flexibly".[200]

318. The research does not establish that in such circumstances, the request would have been refused if made by another employee or that requests made by employees who are not perceived as "highly valued" (to the extent that that arises), are being refused in contravention of s.65 of the Act. Further, it might also be argued that certain flexibility sought by an employee who is highly skilled and experienced would not give rise to reasonable business grounds for refusal however in the case of an employee who is less experienced and less skilled, the cost implications or the productivity losses may be greater. Such an assessment is an entirely legitimate and appropriate outcome that is permitted by the Act. Further, there is no prohibition on an employer "going above and beyond" to retain certain employees by accommodating their requests for flexibility despite the existence of reasonable business grounds for refusing them. We assume that the union movement does not seriously contend that employers should not do so and in our view, it is entirely unfair to saddle such businesses with the ACTU's unreasonable solution.

319. **Fourthly**, the ACTU submits that employees whose requests are declined or only partially granted experience "high levels of work-life interference"[201]. Without accepting that that is in fact so, we simply observe that the current safety net is not designed, nor is it intended, to deliver employees with an

[200] Statement of Dr Jill Murray dated 6 May 2017 at Annexure JM-3, paragraph 52.

[201] ACTU submission dated 9 May 2017 at paragraph 135.

absolute right to accommodate their caring responsibilities in all circumstances. Rather, as we have dealt with earlier, the safety net strikes an appropriate balance between an employee's desire for flexibility due to their caring responsibilities and the operational realities facing businesses. We do not contend that it will (or does) in all circumstances facilitate any and all alterations sought by employees to their working arrangements and we acknowledge that in some instances, an employee's working arrangements will cause some "work-life interference". We consider, however, that the safety net should (and presently does) carefully balance the often conflicting circumstances of employees and their employers, which would be entirely undermined if the ACTU's claim were granted.

10.1.4 The Non-Utilisation of the Right to Request Flexible Working Arrangements

320. We note at the outset that the majority of employees who do not make requests for flexible working arrangements are content with their working arrangements.[202]

321. The ACTU's case is, nonetheless, in part driven by the notion that a proportion of employees do not currently request changes to their working arrangements even though they are dissatisfied with them. They are referred to in the relevant literature as "discontented non-requesters". We make the following submissions in relation to this aspect of the ACTU's case.

322. **Firstly**, there is some suggestion in the ACTU's case that there remains a lack of awareness about the right to request under the NES and that as a result, employees who are dissatisfied with their working arrangements are not seeking changes.[203]

323. It is trite to observe that the implementation of the ACTU's clause is by no means an appropriate way of addressing any alleged lack of awareness amongst the ACTU's constituents. Indeed, one of the primary roles of

[202] Statement of Dr Jill Murray dated 6 May 2017 at Annexure JM-3, paragraph 105.

[203] Statement of Dr Jill Murray dated 6 May 2017 at Annexure JM-3, paragraph 107.

employer associations and unions alike is to educate their respective memberships about their rights and obligations. To the extent that employees remain unaware of their rights under s.65 of the Act, despite their existence for over seven years, it is of course open to the union movement to educate their members of their ability to seek changes to their working arrangements pursuant to the NES and the very limited bases upon which an employer has the right to refuse such a request.

324. We also observe that the very research relied upon by the ACTU establishes that awareness of the right to request increased significantly between 2012 and 2014[204] and in our submission, it can reasonably be assumed that over time that awareness will continue to grow.

325. Further and in any event, the research does not establish correlation or causation between increased awareness and the number of requests being made to change working arrangements. That is, whilst the proportion of employees aware of the right to request grew by 12 percentage points between 2012 and 2014,[205] the proportion of employees who made a request (pursuant to s.65 or otherwise) remained at just over 20%.[206]

326. Accordingly, any lack of awareness about the existing framework should be addressed by way of education, bearing in mind that whilst it may serve to encourage some employees to make a request, increased awareness has not resulted in a greater proportion of employees requesting changes to their working arrangements to date. Crucially however, the failure of the union movement to educate their constituents cannot justify the introduction of the provision here sought by the ACTU.

[204] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 39.

[205] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 39.

[206] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 40.

327. **Secondly,** a closer examination of the sources upon which the ACTU seeks to rely in support of this proposition demonstrates that the prevalence of the alleged vice is overstated.

328. The 2014 Australian Work and Life Index (**AWALI**) survey was summarised and compared with earlier AWALI survey results by Skinner and Pocock in a report published by the Centre for Work + Life.[207]

329. In the 2014 survey, 60.8% of non-requesters were content with their then working arrangements, with no difference between men and women. A further 15% of non-requesters reported that flexibility was not possible or available in their job. The remaining 24.1% of non-requesters "gave various reasons for not requesting. The sample sizes for each of these groups were too small to enable reliable reporting" (emphasis added).[208]

330. The report reveals that overall a small proportion of respondents did not request changes to their working hours despite being dissatisfied with them and further, the authors were unable to reliably report on the extent to which this was due to specific reasons other than a perceived lack of availability of flexibility, due to the very small sample sizes. As a result, the 2014 AWALI survey does not enable an assessment as to the other reasons for which non-requesters did not seek changes to their working arrangements or the prevalence of non-requesters refraining from making a request due to any such reasons.

331. An article published by Skinner, Cathcart and Pocock is also relied upon by the ACTU. The authors there gave consideration to the 2012 AWALI survey and said the following about those employees who were discontent with their working arrangements but had not requested changes: (emphasis added)

> … An additional 15.0% indicated that flexibility was not possible in their job (collated from response options 'not convinced employer would allow it', 'job does not allow it' and 'flexibility not possible or available'). Very few respondents (3.0% or less)

[207] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014).

[208] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 43.

provided other reasons, such as not feeling confident to ask, unable to afford reduction in income, or concerns about negative impact on work colleagues. …[209]

332. This publication suggests that a particularly small proportion of respondents did not seek flexible working arrangements due to reasons such as fear of reprisals and that overall, the proportion of discontented non-requesters is small.

333. **Thirdly,** to the extent that employees do not request flexible working arrangements because they fear reprisals from their employer[210], there are various measures and protections that form part of the safety net which are designed to ensure that employees are not unfairly dismissed, subject to other adverse action or discriminated against by virtue of the fact that they have caring responsibilities and/or in circumstances where they seek to access a workplace right, such as that prescribed in s.65. We deal with this matter in greater detail in the following chapter. For present purposes it is suffice to note that such measures have the effect of affording employees an avenue to seek a remedy if they are in fact unfairly dismissed or adversely affected in some other way and, importantly, the existence of such mechanisms also serve to deter employers from taking action that would fall foul of those provisions. In our experience, the unfair dismissal regime, general protections and anti-discrimination legislation significantly influences employer behaviour as they are aware of their obligations and the risks of not fulfilling them.

334. These are matters that should allay employee fears of reprisals. To the extent that they are not aware of the existing protections for employees with parenting and caring responsibilities; this too is an issue that goes to the need for greater education.

335. **Fourthly**, to the extent that it is alleged that employees do not request flexible working arrangements because they consider that "flexible work is frowned

[209] Skinner N, Cathcart A and Pocock B, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 *Labour and Industry* 103 at page 7.

[210] ACTU submission dated 9 May 2017 at paragraph 134(c).

on"[211], we make the obvious point that this goes only to the perception of the employee and no higher. It does not establish that the relevant employers do in fact "frown on" flexible working arrangements, nor is there any probative evidence here before the Commission in support of that proposition.

336. Further, such an allegation is inconsistent with our experience of advising employers who receive requests for flexible working arrangements. We consider that in the vast majority of circumstances, not only are employers aware of their legal obligations, they very often take a compassionate and flexible approach whereby they seek to accommodate requests wherever possible, even where it imposes some difficulty on the business. We do not doubt that this is in part motivated by their desire to ensure that they can retain employees in whom the business has invested the time and expenses associated with recruitment and training.

337. If in a small number of instances there remain a need for cultural change, this is again a matter for training and education. The implementation of an award clause that is so clearly problematic in its operation is not an appropriate solution.

338. **Fifthly,** according to the research relied upon by the ACTU, some "discontented non-requesters" did not make a request because they considered that flexibility was "not possible or available" in their jobs.[212] These were respondents who stated in the 2014 AWALI survey that they had not made a request because they were "not convinced [their] employer would allow it"; their "job [did] not allow it" or "flexibility was possible or available".[213]

339. We again note that the survey responses reveal only the perception of the employee and do not establish that flexibility was in fact "not possible or available" or that any request made would have been rejected. In the alternate, it may also be inferred that in some instances the flexibility desired could not

[211] ACTU submission dated 9 May 2017 at paragraph 134(b).

[212] ACTU submission dated 9 May 2017 at paragraph 132.

[213] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 43.

have been accommodated due to reasonable business grounds and to that extent, the employee's assessment was accurate. Little turns on this other than to reinforce why an employee cannot be permitted to dictate their hours of work.

340. It is also relevant that in the 2014 AWALI survey sample, which was relied upon in the Skinner, Cathcart and Pocock article cited by the ACTU[214], there was an over-representation "of those with higher qualifications, older workers and those in professional occupations"[215]. It can reasonably be inferred that not all such employees would be award covered and/or that such employees are more likely to perceive that flexibility is not available to them because of the inherent requirements of their roles as compared to many award-covered positions.

341. **Sixthly,** the ACTU submits that "Skinner and Pocock found that a large number of discontented non-requesters are men"[216]. The specific publication there relied upon by the ACTU is not clear. In any event, we note that the 2014 AWALI research reveals that the proportion of non-requesting men and women who were content with their then working arrangements was not statistically significant (61.1% and 60.5% respectively) and, by extension, the proportion of "discontented" non-requesters was not statistically significant.[217] To the extent that the ACTU contends that the proportion of male discontented non-requesters is greater than female discontented non-requesters; this is not borne out in the material.

342. **Seventhly,** the 2012 AWALI survey, the 2014 AWALI survey and the 2012 General Manager's Report about s.65, to the extent that they are relied upon

[214] Skinner N, Cathcart A and Pocock B, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 *Labour and Industry* 103.

[215] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 12.

[216] ACTU submission dated 9 May 2017 at paragraph 133.

[217] Centre for Work + Life, Skinner N and Pocock B, *The Australian Work and Life Index; The Persistent Challenge: Living, Working and Caring in Australia in 2014* (2014) at page 43.

in support of the ACTU's propositions regarding discontented non-requesters, must be treated with a certain degree of caution.

343. The surveys conducted were not limited to award-covered employees; a matter that goes to their relevance to the current proceedings. Of course it is difficult to assess precisely the extent to which its utility is undermined in circumstances where the proportion of award-covered and award-free survey respondents is not known.

344. It appears to us that in each case, respondents could provide one or more responses to the relevant survey question. Where multiple reasons were identified, the survey does not identify which of those was the primary reason or the extent to which one prevailed over another. It is of course reasonable to infer that there may have been a number of factors that resulted in a survey respondent opting not to make a request, however the survey results are somewhat opaque in this regard.

345. It is also not clear whether the surveys allowed respondents to identify any other reasons why they elected not to make a request, which were not associated with their employer. If such responses were received, they are not set out in the relevant reports. For example, it may be that an employee is not satisfied with their current working arrangements but decides not to make a request to change them because there is a degree of uncertainty arising from their caring responsibilities (e.g. a possible change to the availability of child care) and as a result they are aware that they would necessarily need to seek a further change to their working arrangements within a relatively short period of time. As a result, they may have elected to defer making any request at the time of the survey. Alternatively, a parent may choose not to make a request for changes to working arrangements at a particular point in time because their partner is concurrently seeking to make certain changes to their working arrangements which, if implemented, would alleviate the need for them to seek a change. The surveys relied upon do not reveal the extent to which such factors result in employees falling within the category of "discontented non-requesters".

346. **Eighthly,** there is no evidence that discontented non-requesters would be encouraged to seek a change under the ACTU clause. In particular, the ACTU has not established that the alleged fear of reprisals will be alleviated by the implementation of the proposed clause, which we anticipate would in many circumstances have a particularly adverse impact on an employer's operations. Indeed, the possibility of such an outcome may instead have the effect of fostering an employee's perception that they may be treated unfairly or discriminated against if they changed their hours pursuant to the proposed clause.

10.2 Individual Flexibility Arrangements

347. On 28 March 2008 the Honourable Julia Gillard MP, then Minister for Employment and Workplace Relations, made a request pursuant to s.576C(1) of the *Workplace Relations Act 1996* that the AIRC commence the process of award modernisation. Clauses 10 and 11 of the original request stated that:

> 10. The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.
>
> 11. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.

348. When the FW Act was subsequently enacted, it required that all modern awards and enterprise agreements contain a flexibility term enabling an employee and employer to make an individual flexibility arrangement (**IFA**).[218]

349. A Full Bench of the AIRC considered the Minister's request and determined that for the purposes of the model award flexibility term, employers and employees should be permitted to reach agreement about a range of matters including "arrangements for when work is performed".[219] In so doing the Full Bench made reference to s.576J of the *Workplace Relations Act 1996*, which listed the matters that may be dealt with in modern awards and, more

[218] See ss 144(1) and 202(1) of the Act.

[219] *Request from the Minister for Employment and Workplace Relations – 28 March 2008* [2008] AIRCFB 550 at [187].

specifically, s.576J(1)(c) which permitted the inclusion of award terms regarding "arrangements for when work is performed including, hours of work, rostering, notice periods, rest breaks and variations to working hours".

350. Accordingly, the AIRC formulated a model flexibility clause that permits agreement between an employer and employee to vary the application of award clauses concerning arrangements for when work is performed including, hours of work, rostering, notice periods, rest breaks and variations to working hours. In practical terms, this means that an employer and employee may reach an agreement that, for instance, the application of the span of ordinary hours clause is varied in relation to the employee such that ordinary hours may be worked outside the span otherwise prescribed by the award.

351. The ability to make an IFA effectively provides an avenue for employers and employees to make changes to an employee's working hours including days of work and starting/finishing times; matters that would be dictated by an employee under the ACTU's model clause.

352. In determining the content of the model clause, the AIRC "attempted to develop a model flexibility clause which is simple to understand and easy to apply [and] provides a reasonable level of protection for employees."[220] The AIRC's stated intention was also to ensure that the process of making an IFA was "a relatively simple and informal negotiation".[221]

353. The AIRC's intention is self-evidently borne out in the model flexibility clause now found in all modern awards. It provides a simple and easy to understand mechanism that enables an employer and employee to discuss and develop an IFA which, importantly, must "result in the employee being better off overall

[220] *Request from the Minister for Employment and Workplace Relations – 28 March 2008* [2008] AIRCFB 550 at [187].

[221] *Request from the Minister for Employment and Workplace Relations – 28 March 2008* [2008] AIRCFB 550 at [185].

at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to".[222]

354. The better off overall requirement provides an important safeguard that ensures that the implementation of an IFA does not result in an employee trading off terms and conditions to their detriment. Rather, the model flexibility clause enables a consideration of an employee's individual circumstances (including parenting and/or caring responsibilities) and permits an employer and employee to agree to change how certain award clauses apply to an employee having regarding to those circumstances, so long as such changes result in the employee being better off overall.

355. Quite appropriately, discussions regarding the implementation of an IFA necessarily allow an employer to ventilate any operational concerns it might have about specific changes to working hours proposed by an employee and ultimately an employer may elect not to agree to a proposed IFA, for example, due to the operational consequences on the business.

The Utilisation of IFAs

356. In November 2015, the General Manager of the Commission released a report examining the AWRS data in relation to IFA use during the period from 26 May 2012 to 25 May 2015[223] (**General Manager's Report about IFAs**).

357. The data from the General Manager's Report about IFAs can relevantly be summarised as follows:

- 13.7% of employers made at least one IFA during the reporting period.[224]

[222] See for example clause 7.3(b) of the *Aboriginal Community Controlled Health Services Award 2010*.

[223] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015).

[224] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 5.1.

- The vast majority of employers stated that the reason they did not make an IFA was either because they preferred to use informal/undocumented arrangements instead (43.2%), no employees sought a flexible work arrangement (39.9%), or that adequate flexibility was already provided by the terms of the modern award (15.7%) or enterprise agreement (5.1%).[225]

- A very small proportion of responses reported that an IFA was not used because of concerns relating to perceived inadequacies in the operation of IFAs. These responses included that IFAs do not allow sufficient flexibility (2.1%), IFAs are not reliable in the longer term due to the ability to unilaterally cancel them on notice (0.6%), or concerns about penalties if an IFA is used incorrectly (0.5%).[226]

- Both men and women access IFAs in similar proportions:

  There is little difference between the proportion of female employees and male employees who have agreed to an IFA with their employer (just over 2 per cent of females compared with just under 2 per cent of males).[227]

- Employees with dependent children under the age of 15 were almost twice as likely to have made an IFA than employees without dependent children (3.0% and 1.7% respectively).[228]

- Over three quarters of IFAs (75.5%) reported by employers modified the application of award clauses concerning arrangements for when work is performed.[229]

[225] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 5.5.

[226] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 5.5.

[227] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 27.

[228] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 5.12.

[229] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 6.1.

- Employers reported that employees entering into IFAs were better off overall due to having an improved wage/salary (45.4%), the ability to meet non-work commitments (e.g. relating to the care of children) (47.8%), and/or better work-life balance (53.7%).[230]

- The largest outcome of an IFA reported by employees was having flexible hours to better meet non-work-related commitments (42.0%). A significant proportion of employees also reported that they received an increased wage/salary (26.3%), or received increased/new allowances (16.1%) as a result of entering into an IFA.[231]

- The vast majority of employees (75%) indicated that they had not sacrificed pay or conditions in order to benefit from their IFA.[232]

358. We submit that the General Manager's Report about IFAs supports the following findings by the Commission:

- IFAs are used extensively to vary the effect of award clauses concerning arrangements for when work is performed.

- IFAs very commonly result in employees being better off overall because they enable those employees to facilitate their parenting and/or other caring responsibilities.

- In the very vast majority of circumstances, employees do not sacrifice pay as a result of the implementation of an IFA.

359. IFAs are an effective and appropriate method by which employees may facilitate changes to their working arrangements, that have significant

[230] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 6.5.

[231] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at Table 6.8.

[232] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 37.

safeguards in place to ensure they provide genuinely beneficial outcomes for employees, including those with parental or carer's responsibilities.

Response to the ACTU's Submissions

360. The ACTU makes a number of assertions regarding the suitability of IFAs in providing access to family friendly arrangements in its submissions, including that:

- the use of IFAs is low, and awareness of their availability is low;[233]
- workers are encouraged to 'trade off' entitlements in exchange for flexibility;[234]
- the use of IFAs exacerbates the gender pay gap and penalises carers;[235]
- the ability to terminate IFAs provides unworkable uncertainty for employees with caring responsibilities.[236]

361. Contrary to the above ACTU contentions, there is a complete absence of any probative evidence in these proceedings that might establish that IFAs are operating in a way that disadvantages employees. Further, the use of IFAs incorporates several inherent safeguards designed to prevent the sort of disadvantage alleged by the ACTU.

362. **Firstly**, the evidence relied upon by the ACTU does not establish that IFAs are not providing a fair outcome for employees. The ACTU relies on the report of Dr Jill Murray, which cites the results of the General Manager's Report about IFAs that 14% of employees had 'sacrificed' pay or conditions in order

[233] ACTU submission dated 9 May 2017 at paragraph 146.
[234] ACTU submission dated 9 May 2017 at paragraph 147.
[235] ACTU submission dated 9 May 2017 at paragraph 147.
[236] ACTU submission dated 9 May 2017 at paragraph 147.

to benefit from an IFA.[237] However, this figure provides no useful insight into whether IFAs are operating unfairly to employees for several reasons:

- The question is based on a subjective view of the employee concerned and relied entirely on self-selection. Employees were simply asked: "By having this individual flexibility arrangement, did you sacrifice your pay or conditions in order to benefit from having it?"[238]

- What constitutes 'sacrificing' pay or conditions is not defined in the questionnaire or the AWRS data, and the nature of the statistic does not provide a sense of what the purported 'sacrifice' constituted, or the scope of the purported 'sacrifice.'

- Where an employee has agreed to 'sacrifice' some aspect of their pay or conditions, an employee must still be better off overall under the IFA.

- Three-quarters of the employees reported that they had not 'sacrificed' pay or conditions and 84% of employees reported that they considered themselves better off overall under their IFA.[239] Therefore, a significant majority of employees considered themselves better off overall and a significant majority did not 'sacrifice' pay or conditions.

363. **Secondly**, all IFAs must be genuinely agreed to between employers and employees,[240] and ensure that the employee is better off overall than if the IFA had not been agreed to.[241]

364. The requirement that IFAs be genuinely agreed to is, for the purposes of the model flexibility term contained in modern awards, reinforced by an express

[237] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 3 and Statement of Dr Jill Murray dated 6 May 2017 at Annexure JM-3 at paragraph 96.

[238] Australian Workplace Relations Study 2013 - 2014 Employee Questionnaire, question G9.

[239] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012 – 2015* (November 2015) at page 37.

[240] See ss.144(4)(b) and 203(3) of the Act.

[241] See ss.144(4)(c) and 203(4) of the Act.

prohibition on employees being subjected to coercion or duress in making an IFA.

365. These protections can be comprehensively enforced. For the purposes of the FW Act, a breach of these is taken to be a breach of the flexibility term of the modern award.[242] Consequently a breach of a requirement contained in a flexibility term contravenes section 45 of the FW Act – a civil remedy provision.[243]

366. In addition, seeking to enter into an IFA, refusing to enter into an IFA, or seeking to terminate an IFA constitutes the exercise of a workplace right.[244] As a result, any adverse action taken against an employee for exercising these rights will constitute a breach of the general protections under the FW Act, and result in the breach of civil remedy provision/s.[245]

367. An aggrieved employee, a relevant union, or the Fair Work Ombudsman may take action against the employer seeking a range of orders from the Federal Court or Federal Circuit Court, including declarations, reinstatement, compensation and imposition of significant pecuniary penalties.[246]

368. The ACTU has not provided any evidence to suggest that these protections found in the model flexibility term are not working as intended.

369. **Thirdly**, the ACTU suggests that IFAs operate unfairly to employees because the ability to terminate on "relatively short notice" makes IFAs "inappropriate and unworkable."[247]

370. The issue of termination of IFAs on notice was extensively addressed by the Full Bench in the 2012 Modern Awards Review.[248] In those proceedings, Ai

[242] See s.145(3) of the Act.

[243] See s.539 item 2 of the Act.

[244] See s.341(2)(g) of the Act.

[245] See s.340 of the Act.

[246] See s.539 item 2 and 545(1) of the Act.

[247] ACTU submission dated 9 May 2017 at paragraph 147.

[248] *Modern Awards Review 2012—Award Flexibility* [2013] FWCFB 2170.

Group proposed that the notice period to terminate an IFA be extended from four weeks, as was provided by the flexibility term in modern awards at that time, to 90 days.[249] The ACTU strenuously opposed an increase in the notice period.[250]

371. The Full Bench ultimately extended the period of notice on which IFAs can be unilaterally terminated to 13 weeks. In the course of the decision, the Full Bench held that:

> **[174]** For our part, we accept that the provision of a longer unilateral termination notice period would provide greater certainty to the employer and individual employee parties to IFAs. A longer notice period would also reduce an existing disincentive for employers entering into IFAs.[251]

372. As a result, an employee is given three months' notice in circumstances where an employer unilaterally seeks to terminate an IFA, thus giving the employee a considerable period of time to make any necessary arrangements associated with their parenting and/or caring responsibilities.

373. Further, in reaching its decision, the Full Bench noted that where an employee is not better off overall as a result of entering into an IFA, or an IFA has not been genuinely agreed to, the FW Act includes an additional right for an employee to terminate the IFA on 28 days' notice.[252]

374. Accordingly, the current provisions regarding the termination of IFAs effectively prevent an employee from being locked into an IFA which does not benefit them while providing an appropriate level of protection and certainty to employees in circumstances where their employer seeks to terminate an IFA.

375. **Fourthly**, in relation to the ACTU's concern that only a small number of employees utilise IFAs, and 'awareness of their availability is low',[253] our submissions have already dealt with the reasons why the ACTU's claim is not

[249] *Modern Awards Review 2012—Award Flexibility* [2013] FWCFB 2170 at [162].

[250] *Modern Awards Review 2012—Award Flexibility* [2013] FWCFB 2170 at [166].

[251] *Modern Awards Review 2012—Award Flexibility* [2013] FWCFB 2170 at [174].

[252] *Modern Awards Review 2012—Award Flexibility* [2013] FWCFB 2170 at [185].

[253] ACTU submission dated 9 May 2017 at paragraph 146.

an appropriate vehicle for remedying any alleged lack of awareness or education regarding existing avenues for flexible working arrangements.

10.3 Informal Arrangements

376. In addition to the various formal means of implementing flexible working arrangements, it is of course open to employers and employees to informally agree to change an employee's working hours. In our experience, such arrangements are very common and operate in a manner that is mutually beneficial to employers and employees. These arrangements are generally put in place as a product of verbal discussions between the employer and employee (often finalised in writing), which by their very design involve a ventilation of the employee's personal circumstances and the working arrangements they seek, as well as what can reasonably be accommodated by their employer. Whilst such discussions may not be characterised by the same degree of formality as requests made pursuant to s.65 of the Act or the introduction of an IFA, informal arrangements can be (and, in our experience, are) a very effective avenue for flexible working arrangements that facilitate an employee's parenting and/or other caring responsibilities.

377. The First Findings Report summarises the relevant data in relation to informal arrangements and demonstrates that a significant proportion of employees who indicated that they had made a request for flexible working arrangements did so verbally and their request was accepted:

> The AWRS can provide some insight into how informal arrangements are established in relation to how requests were made: verbally or in writing. Of the 28% of employees who indicated that they had made a request for a flexible working arrangement, almost two-thirds (62%) had made the request verbally which was later accepted by their employer (17% of the broader employee workforce had made a verbal request for a flexible working arrangement that had been accepted).[254]

[254] Pay Equity Unit, Fair Work Commission, *Australian Workplace Relations First Findings Report: Consolidated Content from Online Publication* (29 January 2015) at page 32.

378. The ACTU makes the following unfounded assertions regarding informal arrangements:

- The current regulatory environment *has caused* a high level of informality regarding flexible working arrangements;[255] and
- That high level of informality *has hindered* equitable access to flexible working arrangements for Australian employees.[256]

379. There is no evidence that establishes that the prevalence of informal arrangements is a direct consequence of the current regulatory framework. To the extent that the ACTU relies upon the alleged lack of awareness of the right to request under s.65 of the Act, as we have earlier submitted, that is a matter for education and employee awareness.

380. There is also no probative evidence that establishes that, as a product of informal arrangements frequently being implemented, "equitable access" to flexible working arrangements has been "hindered". Equitable access to such arrangements has been ensured, at the very least, by the statutory regime found in the NES and award mechanisms such as the model flexibility clause, which place various constraints on an employer's discretion to refuse requests for flexibility. This, coupled with the protections existing in the safety net for employees who seek some form of flexibility (as detailed in this submission), ensure that the system does not rely entirely upon the notion that only those employees engaged in "supportive working environments who feel comfortable asking for changes"[257] will seek such changes.

10.4 Award Regulation of Hours of Work

381. Modern awards, in various ways, place limitations on the hours that an employee can be required to work. The precise terms of such provisions and the manner in which they operate differ, which is of course entirely appropriate

[255] ACTU submission dated 9 May 2017 at paragraph 138.

[256] ACTU submission dated 9 May 2017 at paragraph 138

[257] ACTU submission dated 9 May 2017 at paragraph 138.

when regard is had to the broad range of industries and occupations that awards cover.

382. Some broad observations can nonetheless be made:

- All modern awards impose an upper limit on the number of ordinary hours that a full-time employee or casual employee can be required to work. In most awards this is 38, however some awards impose a cap of 35 ordinary hours.[258] We deal with the regulation of part-time employees' ordinary hours of work below.

- A significant number of modern awards impose a limit on the number of ordinary hours that can be worked on any one day or shift.[259] Such clauses typically apply to all categories of employees; full-time, part-time and casual.

- Several awards also impose an upper limit on the number of days or shifts in a week that an employee can be required to work. Some go further by requiring that, for instance, the employee be granted a prescribed number of *consecutive* days off.[260]

[258] For example, the *Black Coal Mining Industry Award 2010* and the *Stevedoring Industry Award 2010*.

[259] For example, *Aged Care Award 2010* (clause 22.1(c)); *Black Coal Mining Industry Award 2010* (clause 23.1(b)); *Business Equipment Award 2010* (clause 27.1(a)); *Cement and Lime Award 2010* (clause 20.3); *Children's Services Award 2010* (clause 21.2); *Cleaning Services Award 2010* (clauses 24.1(a) and 24.2(a)); *Clerks – Private Sector Award 2010* (clauses 25.1(c) and 28.3(c)); *Commercial Sales Award 2010* (clause 21.4); *Concrete Products Award 2010* (clause 22.5); *Contract Call Centres Award 2010* (clause 24.2); *Electrical Power Industry Award 2010* (clauses 24.1(b) and 24.2(b)(ii)); *Electrical, Electronic and Communications Contracting Award 2010* (clauses 24.10(c)(i) and 24.11(c)(i)); *Fast Food Industry Award 2010* (clause 25.3); *General Retail Industry Award 2010* (clause 27.3); *Hair and Beauty Industry Award 2010* (clause 28.3); *Health Professionals and Support Services Award 2010* (clause 23.2); *Horticulture Award 2010* (clause 22.1(c)); *Hospitality Industry (General) Award 2010* (clause 29.1); *Nurses Award 2010* (clause 21.2); *Pharmaceutical Industry Award 2010* (clause 23.3(c)); *Premixed Concrete Award 2010* (clause 20.3); *Restaurant Industry Award 2010* (clause 31.2); *Road Transport and Distribution Award 2010* (clause 22.3); *Security Services Industry Award 2010* (clause 21.2); *Social, Community, Home Care and Disability Services Award 2010* (clause 25.1); *Telecommunications Services Award 2010* (clause 20.2); *Waste Management Award 2010* (clause 27.2); and *Wine Industry Award 2010* (clauses 28.2(f) and 28.3(d)).

[260] For example, *Cleaning Services Award 2010* (clauses 24.1(a) and 24.2(a)); *General Retail Industry Award 2010* (clause 28.10); and *Hair and Beauty Industry Award 2010* (clauses 30.2 and 30.3).

- Awards typically require the payment of a higher rate for the performance of ordinary hours at certain times. This can include work performed on weekends and work performed at certain times of the day (e.g. shiftwork). As the Full Bench observed in the Penalty Rates Decision, whilst "deterrence is no longer a relevant consideration in the setting of weekend penalty rates … the imposition of a penalty rate may have the *effect* of deterring employers from scheduling work at specified times or on certain days".[261]

- Awards typically require the payment of a higher rate for the performance of work outside ordinary hours; that is, overtime. We consider that the Full Bench's comments in the Penalty Rates Decision cited above are equally relevant to award obligations for the payment of overtime.

- Some (11) awards also contain provisions that give employees the right to refuse to perform overtime where the performance of such overtime would result in the employee working unreasonable hours.[262] Such clauses have their origin in the 2002 Working Hours Case, which we have summarised earlier.

383. The types of provisions here identified necessarily have the effect of creating limits on the performance of ordinary hours of work which, in part, place a fetter on the extent to which work may interfere with an employee's personal commitments, including caring responsibilities.

[261] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [158].

[262] *Fast Food Industry Award 2010* (clause 26.4); *Hair and Beauty Industry Award 2010* (clause 31.1); *General Retail Industry Award 2010* (clause 29.1); *Electrical, Electronic and Communications Contracting Award 2010* (clause 26.2); *Manufacturing and Associated Industries and Occupations Award 2010* (clause 40.2); *Hospitality Industry (General) Award 2010* (clause 33.1); *Joinery and Building Trades Award 2010* (clause 30.1); *Graphic Arts, Printing and Publishing Award 2010* (clause 33.1); *Cleaning Services Award 2010* (clause 28.1); *Timber Industry Award 2010* (clause 30.11) and *Building and Construction General On-Site Award 2010* (clause 36.1).

10.5 Maximum Weekly Hours under the NES

384. The NES, by force of s.62(1), prohibits an employer from requiring or requiring an employee to work more than the following number of hours in a week, unless the additional hours are reasonable:

- For a full-time employee: 38 hours;
- For an employee who is not a full-time employee: the lesser of 38 hours and the employee's ordinary hours of work in a week.

385. Further, s.62(2) grant an employee the right to refuse to work additional hours beyond those referred to above if they are unreasonable.

386. The Act lists various factors that *must* be taken into account when determining whether the additional hours are reasonable or unreasonable for the purposes of ss.62(1) and 62(2). This includes, at s.62(3)(b), the employee's personal circumstances including family responsibilities. Consideration must also be given to the notice given by the employer of any request or requirement to work the additional hours.[263]

387. Sections 62(2) and 62(3) reflect the test case standard determined by the AIRC in the 2002 Working Hours Case. They enable an employee to refuse to work additional hours in the prescribed circumstances. In so doing, however, s.62(3) strikes an important balance by also requiring that consideration be given to various matters associated with the employer including the needs of the workplace or enterprise,[264] the notice provided by the employee of their intention to refuse to work the additional hours[265] and the usual patterns of work in the relevant industry (or part of the industry).[266]

[263] See s.63(3)(e) of the Act.

[264] See s.62(3)(c) of the Act.

[265] See s.62(3)(f) of the Act.

[266] See s.62(3)(g) of the Act.

388. The Explanatory Memorandum for the *Fair Work Bill 2009* provided the following useful explanation in relation to the factors listed at s.62(3): (emphasis added)

> 250. The relevance of each of these factors and the weight to be given to each of them will vary according to the particular circumstances. In some cases, a single factor will be of great importance and outweigh all others. Other cases will require a balancing exercise between factors. For example:
>
> - There may be a situation where, although an employer provides advance notice of the requirement to work additional hours and the requirement to work those hours is based on the needs of the workplace, the hours are nonetheless unreasonable when the risks to employee health and safety or the employee's family responsibilities are taken into account.
>
> - The significant remuneration and other benefits paid to a senior manager, together with the nature of the role and level of responsibility, may be sufficient to ensure that additional hours are reasonable in many cases.
>
> - The additional hours an employee is required to work may also be reasonable if the hours are worked at a particular time and in a particular manner in order to meet the employer's operational requirements, or are worked in accordance with a particular pattern or roster that is prevalent in a particular industry, such as the fly-in-fly-out arrangements in the mining industry. The fact that a requirement to work additional hours is set out in the offer of employment accepted by an employee will also be relevant, though not determinative.

389. As can be seen on the face of the provisions and based on the Explanatory Memorandum, s.62 requires a consideration of the relevant circumstances in order to determine whether the additional hours requested or required would be reasonable. The assessment will necessarily turn on the facts of each case, having regard to a range of factors pertaining to the employee and the employer.

390. Section 62 provides an important and effective means of ensuring that an employee can refuse a request or requirement to work additional hours due to their caring responsibilities. There is no evidence before the Commission that this protection has been ineffective in achieving that end.

10.6 The Model Consultation Clause about Changes to Rosters or Hours of Work

391. All modern awards contain a model clause that requires an employer to consult with an employee where the employer proposes to change an employee's regular roster or ordinary hours of work. The clause is in the following terms: (numbering taken from the *Manufacturing and Associated Industries and Occupations Award 2010*): (emphasis added)

> **9.2 Consultation about changes to rosters or hours of work**
>
> **(a)** Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.
>
> **(b)** The employer must:
>
> **(i)** provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);
>
> **(ii)** invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and
>
> **(iii)** give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.
>
> **(c)** The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.
>
> **(d)** These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

392. The clause requires that an employer give consideration to an employee's views about the impact that the proposed change might have, including any impact that it might have in relation to their caring responsibilities.

393. Subclause (c) contains an important caveat in respect of an employee who has "irregular, sporadic or unpredictable working hours". Accordingly, where, for example, a casual employee works irregular hours (which may well be the

case because of the nature of their role or the work they perform), the requirement to consult does not arise.

394. The model term was inserted by a Full Bench of the Commission in light of legislative amendments made to the Act in 2013. Section 145A was inserted by Parliament as one of several "family friendly measures" that were implemented at the time. Section 145A requires that each modern award include a term that "requires the employer to consult employees about a change to their regular roster or ordinary hours of work"[267]. Section 145A(2) mandates, amongst other things, that the award clause require an employer to invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities)[268] and to consider those views[269].

395. The Revised Explanatory Memorandum to the *Fair Work Amendment Act 2013* makes clear that the amendment to the Act was intended to ensure an additional means of assisting employees to balance their work and caring responsibilities:

> Part 4 - Consultation about changes to rosters or working hours
>
> Overview
>
> 41. Part 4 of Schedule 1 inserts new content requirements for modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work. The intention of the amendments is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employees regular roster or ordinary hours of work, particularly in relation to the employees family and caring arrangements, by requiring employers to genuinely consult employees about such changes and consider the impact of the change in making such changes raised by employees.
>
> Item 19 - After section 145
>
> 42. Subdivision C of Division 3 of Part 2-3 of the FW Act sets out terms that must be included in modern awards.

[267] See s.145A(1)(a) of the Act.

[268] See s.145A(2)(b) of the Act.

[269] See s.145A(2)(c) of the Act.

43. Item 19 inserts new section 145A, which relates to changes to regular rosters or ordinary hours of work. New paragraph 145A(1)(a) provides that modern awards must include a term that requires employers to genuinely consult with employees about changes to their regular roster or ordinary hours of work.

44. Regular roster in new paragraph 145A(1)(a) is not defined. It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award. The employer will be required to inform employees about the proposed change to their regular roster or ordinary hours of work and invite employees to give their views on the impact of the proposed change (particularly any impact upon the employees family and caring responsibilities), and consider those views.

45. The amendments will ensure that employers cannot unilaterally make changes that adversely impact upon their employees without consulting on the change and considering the impact of those changes on those employees family and caring responsibilities.

46. New paragraph 145A(1)(b) provides that the term must allow for the representation of those employees for the purposes of the consultation. A person representing an employee for the purposes of new paragraph 145A(1)(b) could be an elected employee or a representative from an employee organisation.

47. New subsection 145A(2) sets out the consultation process to be included in the term of the modern award. The term must require an employer to consult with employees about a change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change;
- inviting employees to give their views about the impact of the change (including any impact in relation to their family and caring responsibilities); and
- considering any views put forward by those employees about the impact of the change.

Illustrative example

Gabrielle has worked 4 days a week with Wednesdays off for several years. Her employer knows that she has school aged children and that she cares for her elderly mother on her day off. Her employer has decided to change the arrangements under which Gabrielle works such that she will no longer be able to take Wednesdays off. Before changing her regular rostered hours of work, in accordance with the consultation term included in the applicable modern award, Gabrielle's employer will be required to provide information to her about the proposed change, give her an opportunity to raise with her employer the impact of the proposed change on her (including in the context of her family and caring responsibilities) and require the employer to consider Gabrielle's views on that impact before making any changes.

48. The dispute resolution mechanisms of the relevant workplace instrument will apply to the operation of the consultation term.

396. This legislative intent was also relevant to the Commission's decision when determining the precise form of the model term:

> **[34]** An issue in contention in these proceedings was whether a term of the kind mentioned in s.145A required an employer to consult employees about a *proposed* 'change to their regular roster or ordinary hours of work' or whether the obligation to consult could be satisfied *after* a definite decision to implement a change has been made or a change has been implemented.
>
> **…**
>
> **[36]** The legislative purpose and context is also important. The provision which inserts s.145A into the FW Act appears in Schedule 1 of the 2013 *Amendment Act*. Schedule 1 is titled 'Family Friendly measures'. The insertion of s.145A into the FW Act is one of a number of measures intended to assist employees to balance their work and family or caring responsibilities. So much is clear from the title to Schedule 1, the nature of the other measures contained in that schedule and the reference in s.145A(2)(b) to providing employees with an opportunity to give their views about the impact of the change in their regular roster or ordinary hours of work, 'including any impact in relation to their family or caring responsibilities'.
>
> **[37]** Interpreting s.145A such that the obligation to consult could be satisfied *after* a definite decision has been made or *after* a change had been implemented would be antithetical to its legislative purpose. Once a change has been implemented the disruption to family or caring responsibilities has already occurred. Section 145A is intended to provide an opportunity to inform the employer of the impact of a change to an employee's regular roster or ordinary hours of work and so that the employer may consider those views. …
>
> **[38]** The clear intent of the provision is that the employer be provided with the employee's views about the impact of the change so that those views may be considered *before* the change is implemented or a definite decision is made. The Revised Explanatory Memorandum confirms that legislative purpose …[270]

397. By virtue of the model term, an employer is prohibited from making changes to an employee's regular roster or ordinary hours of work without first consulting with them about the proposed change. The process of consultation involves an employee being given an opportunity to explain what impact, if any, the change might have on the employee's personal circumstances and the employer must, by force of the award clause, have regard to the employee's views.

[270] *Consultation clause in modern awards* [2013] FWCFB 10165 at [34] – [38].

398. Quite properly, the clause does not go on to require that an employer must not implement the proposed change to an employee's ordinary hours of work or regular roster if an employee expresses the view that it will adversely impact them. Neither the Legislature nor the Commission in determining the terms of the clause sought to introduce such a limitation on the employer's prerogative. In this way, the clause strikes an appropriate balance between the need to have regard to an employee's caring responsibilities and the ability of an employer to exercise their discretion in determining whether to change an employee's hours of work.

399. There is no evidence before the Commission in these proceedings of any disputes having arisen regarding the operation of the consultation clause or that employers have failed to consult and consider an employee's views, as required by the clause.

10.7 Part-time Employment

400. Subject to a small number of exceptions,[271] the vast majority of modern awards permit employment on a part-time basis. That is, employees may be engaged under those awards to work less than full-time hours.

401. Importantly, the majority of awards which permit part-time employment require that the employee's hours of work must be the subject of agreement between the employer and employee upon engagement. Indeed this is the case in 83 of the 122 modern awards.[272] A significant majority of those awards require

[271] *Maritime Offshore Oil and Gas Award 2010; Mobile Crane Hiring Award 2010; Professional Diving Industry (Industrial) Award 2010; Seagoing Industry Award 2010;* and *Stevedoring Industry Award 2010.* The *Road Transport (Long Distance Operations) Award 2010* also does not currently permit part-time employment, however the Commission's recent decision in relation to the casual and part-time employment common issues granted Ai Group's claim to introduce part-time provisions in that award. The precise form of the variations to be made have not yet been determined.

[272] *Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Air Pilots Award 2010; Aircraft Cabin Crew Award 2010; Airline Operations – Ground Staff Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Ambulance and Patient Transport Industry Award 2010; Amusement, Events and Recreation Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Asphalt Industry Award 2010; Black Coal Mining Industry Award 2010; Broadcasting and Recorded Entertainment Award 2010; Building and Construction General On-Site Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Children's Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Coal Export Terminals Award 2010; Commercial Sales Award 2010; Concrete Products Award 2010;*

that such an arrangement can be varied only by a further agreement between the employer and employee. Typically, hours worked in excess of the agreed hours are treated as overtime and require the payment of a higher rate of pay.

402. Certain awards also define a part-time employee as one whose hours are 'reasonably predictable' or who is engaged to work 'a regular pattern' of hours. Such award provisions contemplate an ability to forecast an employee's hours of work and suggest that there will be some repetition or pattern as to how and when they are worked.

403. As a consequence of such award provisions, part-time employment necessarily affords an employee greater certainty; both financially and in respect of the times at which the employee will be engaged in the performance of work.

404. The rigidity of part-time employment provisions grants little flexibility to an employer. To the contrary, they give employees considerable influence over the days and times at which they will work as compared to full-time and casual employment.

Corrections and Detention (Private Sector) Award 2010; Dry Cleaning and Laundry Industry Award 2010; Educational Services (Post-Secondary Education) Award 2010; Educational Services (Schools) General Staff Award 2010; Electrical Power Industry Award 2010; Fast Food Industry Award 2010; Fitness Industry Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Funeral Award 2010; Gardening and Landscaping Services Award 2010; General Retail Industry Award 2010; Graphic Arts, Printing and Publishing Award 2010; Hair and Beauty Industry Award 2010; Health Professionals and Support Services Award 2010; Hospitality Industry (General) Award 2010; Joinery and Building Trades Award 2010; Journalists and Published Media Award 2010; Legal Services Award 2010; Live Performance Award 2010; Local Government Industry Award 2010; Mannequins and Models Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Meat Industry Award 2010; Miscellaneous Award 2010; Nursery Award 2010; Nurses Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Pest Control Industry Award 2010; Pharmaceutical Industry Award 2010; Pharmacy Industry Award 2010; Plumbing and Fire Sprinklers Award 2010; Port Authorities Award 2010; Ports, Harbours and Enclosed Water Vessels Award 2010; Premixed Concrete Award 2010; Quarrying Award 2010; Racing Clubs Events Award 2010; Racing Industry Ground Maintenance Award 2010; Rail Industry Award 2010; Registered and Licensed Clubs Award 2010; Restaurant Industry Award 2010; Road Transport and Distribution Award 2010; Seafood Processing Award 2010; Security Services Industry Award 2010; Silviculture Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Sporting Organisations Award 2010; State Government Agencies Award 2010; Storage Services and Wholesale Award 2010; Sugar Industry Award 2010; Supported Employment Services Award 2010; Surveying Award 2010; Telecommunications Services Award 2010; Textile, Clothing, Footwear and Associated Industries Award 2010; Timber Industry Award 2010; Transport (Cash in Transit) Award 2010; Travelling Shows Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; Waste Management Award 2010; Water Industry Award 2010 and *Wine Industry Award 2010.*

405. As acknowledged by the Full Bench in the very recent decision regarding the casual and part-time employment common issues proceedings,[273] part-time employment in the modern awards system is particularly suitable to the needs of employees with caring responsibilities and indeed the provisions now found in modern awards reflect their historical rationale; to enable and encourage the participation of women with children in the labour force. To this extent, the modern awards system provides a significant avenue for family friendly working arrangements that should not be overlooked by virtue of the simple fact that its existence is now so commonplace. Their operation, coupled in particular with the right to request flexible working arrangements under s.65 of the Act, provide a clear path enabling employees with such responsibilities to participate in the labour force.

406. We note that there is little if any probative evidence before the Commission that might establish that employers take an unreasonable or unaccommodating approach when faced with a request from a part-time employee to work particular hours upon engagement or to a request to subsequently change that arrangement during the course of their employment.

10.8 Casual Employment

407. Casual employment, by its very nature, affords employees and employers greater flexibility than any other form of employment. Relevantly, a casual employee cannot be required by their employer to work at a particular time. A casual employee is thereby able to refuse to work at any time due to their caring responsibilities at any time.

[273] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [86] – [97].

10.9 Time off in Lieu of Overtime

408. We have earlier in this submission dealt with the 1994 Family Leave Test Case by virtue of which provisions enabling time off in lieu of overtime payments were first introduced.[274] As can be seen from that decision and the more recent decision of the Commission in this Review,[275] such award clauses have been considered by the Commission as a form of flexibility for employees for the purposes of balancing their personal commitments and their work commitments.

409. As we earlier observed, by virtue of the Commission's decision of 2015, provisions permitting time off in lieu of overtime are now found in the vast majority of modern awards.[276] The model clause determined by the Commission also contains various additional "safeguards" that were not present in the award clause established by the earlier test case of 1994. The model clause is in the following terms (numbering taken from the *Clerks – Private Sector Award 2010*):

> **27.5 Time off instead of payment for overtime**
>
> **(a)** An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
>
> **(b)** Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 27.5.
>
> **(c)** An agreement must state each of the following:
>
> **(i)** the number of overtime hours to which it applies and when those hours were worked;

[274] *Family Leave Test Case* (1994) 57 IR 121.

[275] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466.

[276] *4 yearly review of modern awards—Award flexibility common issue—time off in lieu of payment for overtime—model term* [2015] FWCFB 6847, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 2602, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 4258, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 4579, *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 6178 and *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 7737.

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule H. There is no requirement to use the form of agreement set out at Schedule H. An agreement under clause 27.5 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 27.5 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 27.5 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause 27.5 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 27.5 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 27.5 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 27.5.

410. Time off in lieu remains a relevant and important flexibility available to employees. There is no evidence before the Commission which establishes that such provisions have been ineffective or that employers have not agreed to employee requests for time off in lieu of overtime either historically, or in the context of the modern awards system. As stated by the Full Bench in 2015: (emphasis added)

> **[262]** Third, the ACTU contends that employers will never actually be able to access the provisions because an employer will 'say no' in cases where they derive no benefit. This submission is simply an assertion with no evidentiary foundation. Awards have contained TOIL clauses in similar terms to those sought by Ai Group for about 20 years, yet no evidence has been adduced of employer intransigence in relation to the utilisation of the provisions. Further, the safeguards in the model TOIL term we propose will provide an incentive for employers to agree to granting TOIL at a time of the employee's choosing.[277]

411. This "incentive" was further explained by the Commission as follows: (emphasis added)

> **[275]** Subclause 1.2(e) is an important safeguard. It provides that if requested by the employee, the employer must pay the employee for any accrued entitlement to take TOIL which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the first pay period following the request for payment. Under subclause 1.2(a)(ii), this requirement must be reflected in every written agreement to take TOIL. As well as preserving an employee's right to access their entitlement to be paid at the appropriate overtime rate, subclause 1.2(e) will provide employers with an incentive to agree to granting an employee's request to take TOIL at a particular time.[278]

[277] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [262].

[278] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [275].

412. Additionally, whilst Ai Group sought an employer right to direct an employee to take accrued time off, this was not granted by the Commission. Instead it stated: (emphasis added)

> **[270]** Subclause 1.2(c) and (d) provide the framework within which the employee and employer are to agree on when the TOIL is to be taken. Such an agreement must be reached within four weeks of the overtime being worked or the overtime must be paid out at overtime rates (subclause 1.2(c)). Pursuant to such an agreement the TOIL must be taken within 12 weeks of the overtime being worked, or the overtime must be paid out at overtime rates (subclause 1.2(d)).
>
> **[271]** We have considered the alternate proposal advanced by Ai Group intended to address the potential for the indefinite accrual of TOIL. It will be recalled that Ai Group proposed a clause in the following terms:
>
> "(d) Subject to an employee's right under (c), where the employee and employer are unable to reach agreement within 12 months as to when the time off in lieu will be taken, the employer may require the employee to take time off in lieu at a time of its choosing. This will be subject to the employer providing the employee with at least 4 weeks' notice of the need to take such time off."
>
> **[272]** It seems to us that including a right to direct an employee to take TOIL at a time of the employer's choosing is inimical to the nature of the facilitative provision.
>
> **[273]** <u>The model term is intended to provide employees with a means of trading overtime pay for time off at a time which assists them to balance their work and non-work commitments. The TOIL is intended to provide a benefit to the employee and be taken, subject to the agreement of their employer, at a time of their preference.</u> The benefit to the employer is in the calculation of TOIL (i.e. an hour for hour rather than at the relevant overtime penalty rate).
>
> **[274]** Further, we are not persuaded that TOIL should accrue for 12 months; in our view a 12 week time period is sufficient given that the employer receives the benefit of the employee's labour at the time the overtime is worked.[279]

[279] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [270] – [274].

10.10 Make-up Time

413. Make-up time provisions are contained in 36 modern awards.[280] Like provisions permitting time off in lieu of overtime, they too originate from the 1994 Family Leave Test Case and were specifically introduced to enable employees to reconcile work and caring responsibilities.

414. The following form of words appears in several of the relevant awards:

> An employee may elect, with the consent of the employer, to work make up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in this award.[281]

415. Some awards also contain a provision specific to shiftworkers, which provides a more beneficial arrangement:

> An employee on shiftwork may elect, with the consent of their employer, to work make up time under which the employee takes time off during ordinary hours and works those hours at a later time, at the rate which would have been applicable to the hours taken off.[282]

416. We again make the obvious observation that there is no evidence or indeed suggestion that make-up provisions are not serving their purpose or that they

[280] *Airport Employees Award 2010* (clause 20); *Alpine Resorts Award 2010* (clause 22.5); *Aluminium Industry Award 2010* (clause 21.9); *Animal Care and Veterinary Services Award 2010* (clause 24.5); *Banking, Finance and Insurance Award 2010* (clause 22.6); *Business Equipment Award 2010* (clause 28.6 - for shiftworkers only); *Cemetery Industry Award 2010* (clause 21.3); *Children's Services Award 2010* (clause 21.8); *Clerks—Private Sector Award 2010* (clause 27.6); *Contract Call Centre Award 2010* (clause 24.12); *Educational Services (Post-Secondary Education) Award 2010* (clause 24.7); *Educational Services (Schools) General Staff Award 2010* (clause27.3); *Educational Services (Teachers) Award 2010* (clause B.4.3 (early childhood services)); *Fitness Industry Award 2010* (clause 24.6); *Food, Beverage and Tobacco Manufacturing Award 2010* (clause 30.7); *Funeral Industry Award 2010* (clause 21.4); *Graphic Arts, Printing and Publishing Award 2010* (clause 30.8); *Journalists Published Media Award 2010* (clause 19.6); *Legal Services Award* 2010 (clause 29); *Local Government Industry Award 2010* (clause 21.7); *Manufacturing and Associated Industries and Occupations Award 2010* (clause 36.7); *Marine Tourism and Charter Vessels Award 2010* (clause 20.8); *Meat Industry Award 2010* (clause 35); *Mobile Crane Hiring Award 2010* (clause 21.8); *Port Authorities Award 2010* (clause 19.7); *Registered and Licensed Clubs Award 2010* (clause 26.9); *Restaurant Industry Award 2010* (clause 31.3); *Seafood Processing Award 2010* (clause 23.7); *Storage Services and Wholesale Award 2010* (clause 22.5); *Telecommunications Services Award 2010* (clause 20.11); *Timber Industry Award 2010* (clause 32); *Transport (Cash in Transit) Award 2010* (clause 23.3); *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (clause 24.6); *Waste Management Award 2010* (clause 27.5); and *Wine Industry Award 2010* (clause 27.6).

[281] See for example clause 36.7(a) of the *Manufacturing and Associated Industries and Occupations Award 2010*; clause 27.6(a) of the *Clerks – Private Sector Award 2010* and clause 24.12 of the *Contract Cal Centre Award 2010*.

[282] See for example clause 36.7(b) of the *Manufacturing and Associated Industries and Occupations Award 2010.*

do not provide a meaningful form of flexibility for employees with caring responsibilities.

10.11 Annual Leave

417. All full-time and part-time employees accrue annual leave under the NES, which accumulates from year to year.[283] That leave can be taken with the agreement of the employer, for any purpose. An employer must not unreasonably refuse a request to take such leave.[284]

418. Unlike times gone by, the safety net does not of its own force require the taking of annual leave. As was observed by the Full Bench in the recent award flexibility common issues proceedings, the current statutory framework provides "greater flexibility in relation to the taking of annual leave" when compared to comparable regulation of this issue when the 1994 Family Leave Test Case was decided.[285]

419. In addition, by virtue of a decision made by the Commission earlier in this Review, the very vast majority of awards now permit the taking of annual leave in advance of its accrual.[286]

420. There is no evidence in these proceedings that employers take an unreasonable approach to the granting (or not granting) of requests for annual leave where an employee seeks to do so due to their caring responsibilities. In our view, the basic provision of annual leave in the NES provides a means by which employees can seek to be absent due to their family responsibilities.

[283] See s.87 of the Act.

[284] See s.88 of the Act.

[285] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466.

[286] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406.

10.12 Personal/Carer's Leave

421. All full-time and part-time employees have an entitlement to paid personal/carer's leave under the NES. The leave accrues progressively according to the employee's ordinary hours of work and accumulates year to year. A full-time employee is entitled to 10 days of leave for each year of service, whilst a part-time employee's entitlement will accrue on a pro-rata basis.[287] The leave can be taken to provide 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 of:

- A personal illness, or personal injury, affecting the member; or
- An unexpected emergency affecting the member.[288]

422. In addition, all employees (including casual employees) are entitled to two days of unpaid carer's leave for each occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- A personal illness, or personal injury, affecting the member; or
- An unexpected emergency affecting the member.[289]

423. Paid and unpaid personal/carer's leave are non-discretionary, in the sense that so long as an employee is entitled to the leave, takes it in accordance with the aforementioned provisions of the NES and complies with the notice and evidentiary requirements at s.107 of the Act, an employee may take the leave. The Act does not otherwise grant an employer the right to refuse the leave.

424. The ACTU has not called any evidence in these proceedings that might go to the efficacy of these leave entitlements or to establish that it is "not

[287] See s.96 of the Act.

[288] See s.97(b) of the Act.

[289] See s.102 of the Act.

sufficient"[290] to assist parents and carers who would otherwise be granted an absolute right to decide their hours pursuant to the award clause it seeks. In our submission, the relevant provisions of the NES provide employees with a significant and important benefit that enables their absence from work to care for a member of their immediate family or household in the prescribed circumstances.

10.13 Compassionate Leave

425. All employees are entitled to two days of compassionate leave for each occasion when a member of the employee's immediate family member or member of the employee's household contracts or develops a personal illness that poses a serious threat to his or her life, or sustains a personal injury that poses a serious threat to his or her life.[291] The leave may be taken to spend time with the relevant member of the employee's immediate family or household.[292] Full-time and part-time employees are entitled to payment whilst on such leave.[293]

426. Compassionate leave provides another form of leave in circumstances where an employee has caring responsibilities.

10.14 Parental Leave and the Return to Work Guarantee

427. Employees other than casual employees, who have completed at least 12 months of continuous service[294], are entitled to 12 months of unpaid parental leave[295]. Some casual employees are also entitled to unpaid parental leave.[296] Employees may also request an extension to their leave of up to 12 months.[297]

[290] ACTU submission dated 9 May 2017 at paragraph 142.
[291] See s.104 of the Act.
[292] See s.105 of the Act.
[293] See s.106 of the Act.
[294] See s.67(1) of the Act.
[295] See s.70 of the Act.
[296] See s.67(2) of the Act.
[297] See s.76 of the Act.

428. Importantly, s.84 of the Act provides a "return to work guarantee":

> **Return to work guarantee**
>
> On ending unpaid parental leave, an employee is entitled to return to:
>
> (a) the employee's pre-parental leave position; or
>
> (b) if that position no longer exists--an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

429. There can be no doubt that the parental leave provisions in the NES, including the return to work guarantee, are designed to encourage and ensure female participation in the labour force after the birth of a child and to maintain the mother's connection to her prior employment should she seek it. This is acknowledged by the ACTU.[298]

430. Further, s.84(b) appropriately recognises that there may be circumstances in which an employee's position does not exist upon their return to work, in which case the employee would be entitled to return to a comparable position that is available. This is in stark contrast to the approach adopted by the ACTU at proposed clause,[299] which we later come to.

10.15 Long Service Leave

431. A substantial proportion of employees are entitled to long-service leave, either through the NES, State long service leave laws or through an enterprise agreement.

432. Long service leave entitlements vary. Typically an employee is entitled to take long service leave after 10 – 15 years of service, and is entitled to pro rata long service leave payment on termination after 5 – 10 years of service.

[298] ACTU submission dated 9 May 2017 at paragraph 145.

[299] See in particular definition of 'existing position'.

433. ABS data reveals that 25 per cent of persons have remained with the one employer for at least 10 years and a further 19 per cent have remained with one employer between five to 10 years.[300]

434. Some long service leave laws provide additional leave entitlements for those with particular family responsibilities. For example, the *Long Service Leave Act 1955* (NSW), provides a general pro rata long service leave entitlement for employees who terminate their own employment after 10 years or service, but employees who terminate their employment "on account of illness, incapacity or domestic or other pressing necessity" are entitled to pro rata long service leave after five years or service.

435. In August 2017, the Victorian Government announced its intention to introduce a *Long Service Leave Bill 2017* into Parliament that would replace the *Victorian Long Service Leave Act 1992*. The Victorian Government has released an information paper[301] which outlines the key changes that will be incorporated within the new Bill. These include the following provisions which are aimed at assisting employees with family responsibilities:

- There will be flexibility for employees to take long service leave in any number of periods with the agreement of the employer, including taking an unlimited number of single days of leave;
- An employee will be able to take long service leave after seven years of service (currently pro rata long service leave is payable on termination of employment after seven years of service but leave can only be taken after 10 years of service);
- New averaging arrangements will apply when calculating entitlements for employees who have worked different ordinary hours during their employment with a company; and
- Paid parental leave and up to 12 months of unpaid parental leave will count as service.

[300] Australian Bureau of Statistics 2015, *Labour Mobility, Australia, February 2013*, Cat no. 6209.0, Table 05.

[301] Victoria State Government, *Victorian Government Long Service Leave Bill 2017 – Making Long Service Leave Fairer for Everyone* (August 2017).

10.16 Conclusion

436. Ai Group advances the following contentions based on our extensive consideration of existing avenues for family friendly work arrangements that are available to employees pursuant to the safety net.

437. **First and foremost**, the safety net in various respects acknowledges and assists employees to reconcile their parenting and/or caring responsibilities with their employment. The observations made by the Full Bench in the 2002 Working Hours Test Case about the then safety net[302] carry even greater force in the current context. The safety net presently provides a greater number of effective mechanisms for flexible working arrangements than has traditionally been the case.

438. **Secondly**, the existence and operation of s.65 of the Act is a consideration that is central to these proceedings. The evidence demonstrates that it effectively encourages employers and employees to discuss and modify working arrangements; and that the very vast majority of requests made are being granted. There is certainly no evidence that might lead the Commission to conclude that there is any systemic refusal of requests by employers or that requests are being refused in circumstances where there are no "reasonable business grounds" as required by s.65(5) of the Act.

439. **Thirdly**, the First Findings Report reveals that part-time employees and in particular female part-time employees, report a very high degree of satisfaction with the flexibility available to them to balance work and non-work commitments. The degree of satisfaction amongst all employees (including full-time, part-time and casual) in relation to the flexibility available to them to balance work and non-work commitments as well as the hours they worked was also high.[303] The material supports the proposition that employees generally have access to the necessary flexibility in order to

[302] *Working Hours Case July 2002* (2002) 114 IR 390 at [243].

[303] Pay Equity Unit, Fair Work Commission, *Australian Workplace Relations First Findings Report: Consolidated Content from Online Publication* (29 January 2015) at Table 6.1.

facilitate their caring responsibilities, regardless of the basis upon which they are employed, however the level of satisfaction is particularly high amongst part-time employees.

440. **Fourthly,** the ACTU's claim extends well beyond the various elements of the safety net here considered and is out-of-step with each of them because the ACTU's proposed clause would operate at the dictate of the employee.

441. **Fifthly,** the maintenance of an employer's right to refuse a request for a change in working arrangements on "reasonable business grounds" under s.65(5) strikes a fair balance between the interests of employers and employees, and facilitates the parties adopting a co-operative approach to the implementation of flexible work arrangements. Moreover, the employer right guards against the unreasonable and unworkable outcomes that would obviously flow from the adoption of heavy-handed and impractical approach proposed by the ACTU.

442. **Sixthly**, there is considerable overlap between the entitlement proposed by the ACTU and the existing entitlements here canvassed. This is relevant in two ways:

- The safety net already provides ways in which the relevant group of employees can attend to their caring responsibilities through the provision of various forms of flexibilities. This tells against the *necessity* of the proposed clause.

- As we develop in chapter 13, the ACTU's proposed clause does not confine the employee's right to decide their hours of work to that which is *necessary* in order for the employee to fully accommodate all activities associated with their parenting and/or caring responsibilities. Further, the proposed clause does not require an employee to have regard to such activities when deciding their hours of work. As a result, an employee would be permitted to decide that they will "work" at times when they will in fact seek to be absent from

work pursuant to an entitlement to one of the many employee benefits here considered.

11. EXISTING PROTECTIONS FOR PARENTS AND CARERS

443. The existing safety net provided by the FW Act contains various protections for employees with parenting and/or other caring responsibilities. In addition, anti-discrimination legislation continues to operate alongside the FW Act and provides an additional avenue through which employees are able to dispute their dismissal or other action taken by their employer if they consider that it was as a consequence of their parenting and/or caring responsibilities.

444. We here deal with the relevant legislative schemes.

11.1 The Unfair Dismissal Regime

445. The unfair dismissal regime under the FW Act is of course well known to the Commission and accordingly, we do not propose to detail its mechanics in great detail.

446. An employee has been unfairly dismissed if the Commission is satisfied that the person has been dismissed; the dismissal was harsh, unjust or unreasonable; the dismissal was not consistent with the Small Business Fair Dismissal Code (if relevant); and the dismissal was not a case of genuine redundancy.[304]

447. An employee has been dismissed if their employment was terminated on the employer's initiative[305] or if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.[306]

448. Section 390 of the Act grants the Commission jurisdiction to order a remedy if it finds that an employee was unfairly dismissed. Relevantly, the Act places primacy on the grant of reinstatement. That is, it requires that the Commission must not order the payment of compensation unless it is satisfied that

[304] See s.385 of the Act.

[305] See s.386(1)(a) of the Act.

[306] See s.386(1)(b) of the Act.

reinstatement is inappropriate[307] and it considers that an order for the payment of compensation is appropriate in all the circumstances of the case.[308]

449. The unfair dismissal provisions of the FW Act provide employees with an opportunity to contest their dismissal in circumstances where they consider it to have been unfair. The Commission will first attempt to conciliate the matter, before listing it for arbitration, subject to any jurisdictional issues that might be raised. The Commission's processes are specifically designed to provide employees and, in particular, self-represented litigants, a cost-effective process that does not involve many of the technicalities and formalities that might otherwise be experienced in proceedings before the Courts.

450. The unfair dismissal provisions of the FW Act have a deterrent effect. That is, they almost inevitably cause employers to carefully consider the processes they adopt and the decisions they make associated with dismissing employees because they are aware of and concerned by the risk of being met with the allegation that they unfairly dismissed an employee for the purposes of the Act.

451. Examples of the unfair dismissal regime operating to protect employees with parenting and/or other caring responsibilities can readily be found. For instance, in *Jaymon Hocking v Tackle World Adelaide Metro*, [309] the Commission was required to determine whether Mr Hocking had resigned from his employment or whether he was dismissed at the initiative of the employer; an issue that was disputed between the parties.[310] In essence, by virtue of a change made by his employer to his regular roster, Mr Hocking was required to work on several weekends and as a consequence, he could not see his children on those weekends. He only had access to them every second weekend as they otherwise lived with his ex-wife. The change to his

[307] See s.390(3)(a) of the Act.

[308] See s.390(3)(b) of the Act.

[309] [2015] FWC 8070.

[310] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [2].

roster was implemented to allow the relevant Store Manager to work on Saturdays because, despite it being the busiest day for the store, sales were below expectations. Rostering him to work on Saturdays was an attempt to improve sales.[311]

452. The employee requested that the new roster be changed in light of his caring responsibilities every second weekend, however such changes were not made. The employee subsequently resigned.[312]

453. In the course of her deliberations, Deputy President Bartel noted:

> **[22]** A resignation by an employee in circumstances where new or changed working requirements are incompatible with the employee's family and caring responsibilities, has been held to be a forced resignation in previous decisions of this Commission or its predecessors. While the statutory context was different, and accepting that each case turns on its own facts and circumstances, the decisions are indicative of the recognition that is accorded to employee responsibilities outside of employment.[313]

454. The Commission concluded that the employer had failed to comply with their consultation obligations under the *General Retail Industry Award 2010*[314] in relation to the change to the employee's regular roster and, in light of various other factors associated with the employer's conduct[315], that:

> **[27]** On the evidence before the Commission the roster was capable of modification that would enable the application to spend at least some time with his children on weekends and have Mr Rymell rostered on Saturday. In my view the actions and inactions of the respondents represent a course of conduct hat left the application with no real choice but to resign. As such I find that the application has been dismissed within the meaning of s.386(1)(b) of the Act.[316]

455. The Deputy President found that the there was no valid reason for the dismissal[317], that the dismissal was harsh, unjust and unreasonable and as a result, that the employee was unfairly dismissed[318]. In light of the fact that the

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[311] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [15].
[312] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [15].
[313] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [22].
[314] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [17].
[315] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [25].
[316] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [27].
[317] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [30].
[318] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [34].

employee had since found alternate employment and the degeneration of the employee's relationship with the respondent, the Commissioner decided to award compensation instead of reinstatement.[319]

456. The decision provides but one example of an employee's ability to seek a remedy in circumstances where it is established that they were unfairly dismissed for reasons associated with their family and/or other caring responsibilities.

11.2 General Protections

457. Part 3-1 of the FW Act provides general workplace protections. Relevantly, an employer must not take adverse action against an employee because the employee has a workplace right[320], has exercised a workplace right[321], proposes to exercise a workplace right[322] or to prevent the employee from exercising a workplace right[323].

458. A workplace right is defined as:

- An entitlement to the benefit of a workplace law, workplace instrument or order made by an industrial body[324];
- An ability to initiate or participate in a process or proceedings under a workplace law or workplace instrument[325] (which includes a conference or hearing conducted by the Commission[326], court proceedings under a workplace law or instrument[327], making or terminating an individual flexibility arrangement[328], making a request for flexible working

[319] *Jaymon Hocking v Tackle World Adelaide Metro* [2015] FWC 8070 at [35] – [49].
[320] See s.341(1)(a)(i) of the Act.
[321] See s.341(1)(a)(ii) of the Act.
[322] See s.341(1)(a)(iii) of the Act.
[323] See s.341(1)(a)(b) of the Act.
[324] See s.341(1)(a) of the Act.
[325] See s.341(1)(b) of the Act.
[326] See s.341(2)(a) of the Act.
[327] See s.341(2)(b) of the Act.
[328] See s.341(2)(g) of the Act.

arrangements under the NES[329], dispute settlement for which provision is made by or under a workplace law or instrument[330] and any other process or proceedings under a workplace law or instrument[331]); or

- An ability to make a complaint or inquiry to a person or body, having the capacity under a workplace law to seek compliance with that law or a workplace instrument [332] ; or in relation to the employee's employment[333].

459. 'Adverse action' is defined as action taken by an employer against an employee where the employer dismisses the employee [334] , injures the employee in their employment[335], alters the position of the employee to the employee's prejudice[336] or discriminates between the employee and other employees of the employer.[337]

460. By force of s.341(3) of the Act, a prospective employee is taken to have the workplace rights that they would have if they were employed in the prospective employment by the prospective employer.

461. 'Adverse action' in relation to a prospective employee is defined as action taken by a prospective employer where they refuse to employ the prospective employee[338] or discriminate against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.[339]

[329] See s.341(2)(i) of the Act.
[330] See s.341(2)(j) of the Act.
[331] See s.341(2)(k) of the Act.
[332] See s.341(1)(c)(i) of the Act.
[333] See s.341(1)(c)(ii) of the Act.
[334] See s.342(1), Item 1(a) of the Act.
[335] See s.342(1), Item 1(b) of the Act.
[336] See s.342(1), Item 1(c) of the Act.
[337] See s.342(1), Item 1(d) of the Act.
[338] See s.342(1), Item 2(a) of the Act.
[339] See s.342(1), Item 2(b) of the Act.

462. Section 351 of the FW Act provides an important additional protection for employees and prospective employees against adverse action: (emphasis added)

> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, subsection (1) does not apply to action that is:
>
> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> …
>
> (3) Each of the following is an ***anti-discrimination law***:
>
> …
>
> (ad) the *Sex Discrimination Act 1984*;
>
> (a) the *Anti-Discrimination Act 1977* of New South Wales;
>
> (b) the *Equal Opportunity Act 2010* of Victoria;
>
> (c) the *Anti-Discrimination Act 1991* of Queensland;
>
> (d) the *Equal Opportunity Act 1984* of Western Australia;
>
> (e) the *Equal Opportunity Act 1984* of South Australia;
>
> (f) the *Anti-Discrimination Act 1998* of Tasmania;
>
> (g) the *Discrimination Act 1991* of the Australian Capital Territory;
>
> (h) the *Anti-Discrimination Act* of the Northern Territory.

463. Section 351 prohibits an employer from taking adverse action against an employee on the basis of their sex, family or carer's responsibilities or pregnancy.

464. We acknowledge that s.351(1), together with s.351(2)(a), could be read one of two ways. On one view, s.351(1) prohibits adverse action against an

employee in respect of the various protected attributes there identified, including family and carer's responsibilities, unless the relevant action is not unlawful under the anti-discrimination legislation in force in the place where the action is taken. By extension, this means that where, for instance, s.351(1) identifies a protected attribute that is not a protected attribute under the relevant anti-discrimination legislation, s.351(1) does not prohibit adverse action taken by virtue of that attribute.

465. The Explanatory Memorandum to the *Fair Work Bill 2009*, however, suggests that a more expansive reading of s.351(1) should be adopted. It states:

> 1429. The exception in paragraph 351(2)(a) ensures that action authorised by or under a State or Territory anti-discrimination law (defined in subclause 351(3)) is not adverse action under subclause 351(1). This would occur, for example, where the action is exempt from being discrimination because it was taken to protect the health and safety of people at a workplace (see the relevant exemption in section 108 of the Anti-Discrimination Act 1991 (Qld)).

466. The Explanatory Memorandum suggests that a specific action is not adverse action for the purposes of s.351(1) if the relevant anti-discrimination legislation expressly authorises such action. The above paragraph goes on to provide an example of that. Another example can be found in the *Anti-Discrimination Act 1977* (NSW), which renders it unlawful for an employer to discriminate against an employee on the grounds of the person's responsibilities as a carer by dismissing the employee. [340] Section 49V(4)(b), however, provides an exception to this:

> (4) Nothing in subsection … (2) (c) renders unlawful discrimination by an employer against a person on the ground of the person's responsibilities as a carer if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her responsibilities as a carer:
>
> …
>
> (b) would, in order to carry out those requirements, require arrangements that are not required by persons without those responsibilities as a carer and the making of which would impose an unjustifiable hardship on the employer.

[340] See s.49V(2)(c) of the *Anti-Discrimination Act 1977* (NSW).

467. The proper interpretation of s.351(1) does not here fall squarely for determination and further we note that caring responsibilities for an employee's child or other immediate family member (however defined or described) is a protected attribute under all anti-discrimination law identified at s.351(3) [341], save for the legislation applying in the Northern Territory which prohibits discrimination on the grounds of 'parenthood'.[342] Accordingly, by force of both s.351(1) and the various anti-discrimination acts (separately and together), discrimination against employees on the grounds of their caring responsibilities for their children and/or other immediate family members is expressly prohibited in at least all parts of Australia save for the Northern Territory. We return to this issue in greater detail below.

468. Pursuant to ss.365 and 372, an employee may make an application to the Commission in circumstances where they consider that they have been the subject of adverse action. Further, ss.340 and 351 are civil remedy provisions.

469. Where an application is made pursuant to s.365 of the Act (i.e. because the employee has been dismissed), the Commission must first deal with the application through means other than arbitration. This may include, for instance, mediation or conciliation.[343] Where the matter is not resolved through that process, the parties may notify the Commission that they agree to the Commission arbitrating the dispute.[344]

470. Where an application is made pursuant to s.372 of the Act (i.e. because the employee has not been dismissed), the Commission must conduct a conference to deal with the dispute if the parties agree to participate.[345] Further, if the Commission considers, based on the material before it, that a

[341] See *Sex Discrimination Act 1984* (Cth) at ss.4A and 7A; *Anti-Discrimination Act 1977* (NSW) at ss.49S and 49V; *Equal Opportunity Act 2010* (Vic) at ss.4 and 19; *Anti-Discrimination Act 1991* (QLD) at s.7 and the Schedule; *Equal Opportunity Act 1984* (WA) at ss.4 and 35A; *Equal Opportunity Act 1984* (SA) at ss.5 and 85T; *Anti-Discrimination Act 1998* (Tas) at ss.3 and 16; and *Discrimination Act 1991* (ACT) at ss.7 and Dictionary,

[342] *Anti-Discrimination Act* (NT) at ss.4 and 19.

[343] See s.368(1) of the Act.

[344] See s.369 of the Act.

[345] See s.374 of the Act.

general protections court application would not have reasonable prospects of success, it is required to advise the parties accordingly.[346]

471. The general protections scheme is self-evidently designed to protect employees from adverse treatment by their employer in circumstances where they, relevantly, make a request pursuant to s.65 of the Act.

472. The Commission will from its own experience recognise that the scheme contained at Part 3-1 of the Act provides employees with a mechanism that enables them to bring a dispute to the Commission which is dealt with in a relatively informal way, with the primary intention of trying to resolve the matter. Importantly, the Act also grants the Commission jurisdiction to arbitrate disputes brought to the Commission pursuant to s.365 of the Act where the parties so agree. This provides an alternate to pursuing an action through the Courts.

473. Earlier, in relation to the unfair dismissal regime, we pointed to the deterrent effect of those provisions of the Act. Those submissions are equally apposite here. Part 3-1 of the Act also serves a preventative purpose.

474. The operation of the general protections scheme can be seen in various decisions of the Commission and the Courts.

475. For instance, in *Ms Hanina Rind v Australian Institute of Superannuation Trustees,* [347] the respondent argued that the Commission did not have jurisdiction to deal with Ms Rind's application which was made pursuant to s.365 of the Act, because she had not been dismissed from her employment.[348]

476. The facts of the case can be summarised as follows. Ms Rind, whilst on a period of parental leave, commenced discussions with the respondent regarding returning to work. Specifically, she sought to work part-time and

[346] See s.375 of the Act.

[347] [2013] FWC 3144.

[348] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [4].

made a formal request to this effect[349] pursuant to the enterprise agreement applying to her agreement which granted her a right to make such a request and permitted the respondent to refuse only on reasonable business grounds[350]. The terms of the relevant clause of the enterprise agreement were relevantly similar to s.65 of the Act. Her request was effectively refused[351] and Commissioner Lewin found that the refusal was not reasonable.[352] The Commissioner considered that the respondent's failure to carry out its obligations under the enterprise agreement was relevant conduct which could be taken into account when considering whether Ms Rind was constructively dismissed[353] and commented as follows: (emphasis added)

> **[55]** When judging the weight of the inimical conduct of unreasonably refusing Ms Rind's request to return to work part time in particular circumstances of this case the gravitas or seriousness of that conduct should be viewed from the contemporary vantage point, which affords considerable importance to the ability of women to give birth to children without foreclosing their employment due to the consequences of family formation.[354]

477. The Commissioner ultimately concluded that because of the course of conduct in which the respondent had engaged (i.e. the unreasonable refusal of her request), Ms Rind was justified as treating the employment relationship as having come to an end and as a result, she was constructively dismissed.[355] Accordingly, the Commission had jurisdiction to deal with the application.[356] The Commissioner foreshadowed in his decision that the application would subsequently be listed for conference.[357]

[349] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [20].

[350] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [15].

[351] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [21] and [34].

[352] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [21] and [49].

[353] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [52].

[354] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [55].

[355] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [56].

[356] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [64].

[357] *Ms Hanina Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [64].

478. As an example of a decision of the Courts, we refer to *Wilkie v National Storage Operations Pty Ltd*[358], in which the Federal Circuit Court of Australia found that the respondent contravened the general protections provisions of the FW Act, including s.351.[359]

479. On one occasion, Ms Wilkie advised that she needed to collect her son from school on a specific day because the arrangements usually in place for picking him up could not proceed on that day. The employer denied her request to finish work early, however she nonetheless left the workplace as foreshadowed. The Court found that the employee had in effect sought to take personal/carer's leave under the NES; that is, the employee took the leave "to provide care or support" to a member of her immediate family (i.e. her son) because of "an unexpected emergency" affecting that family member. [360] The "first and final" warning letter consequently issued to the employee, which cited her non-attendance at work on that afternoon, was found to be a contravention of ss.340(1) and 351 of the FW Act.[361]

480. The Court also found that the respondent's subsequent decision to transfer Ms Wilkie to another worksite was motivated, at least in part, by her use of personal leave due to medical reasons and/or family responsibilities. [362] Further, the accompanying change to her title from Centre Manager to Assistance Centre Manager was found to be an alteration in her position to her prejudice, as it reduced her status and level of responsibility[363] and indeed that it was of such a significant degree that the employer was effectively terminating the old contract and seeking to replace it with a new one.[364] In so

[358] [2013] FCCA 1056.

[359] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [103].

[360] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [52] – [62].

[361] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [103].

[362] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [79].

[363] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [89].

[364] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [93].

doing the Court ruled that the respondent was in breach of s.351 of the FW Act.[365]

481. The Court stated that the applicant's resignation amounted to her acceptance that the employer's action in demoting her evinced an intention on the employer's part to no longer be bound by the contract.[366] In effect, the employer's demotion of the applicant constituted a repudiation of her contract and as a result, her employment had been terminated at the initiative of the employer,[367] which again resulted in a finding that the respondent was in breach of s.351 of the Act.[368]

11.3 Anti-Discrimination Legislation

482. Commonwealth and State/Territory anti-discrimination legislation provides another source of protection to employees with parenting and caring responsibilities. The legislation affords sophisticated and carefully constructed statutory safeguards by prohibiting discrimination. Whilst the FW Act's general protections regime includes discrimination as a form of adverse action[369], the FW Act does not exclude the operation of anti-discrimination legislation.[370]

483. As we have earlier mentioned, caring responsibilities for an employee's child or other immediate family member (however defined or described) is a protected attribute under all State/Territory anti-discrimination law identified at s.351(3) as well as under the Commonwealth *Sex Discrimination Act 1984* [371], save for the legislation applying in the Northern Territory which prohibits

[365] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [103].

[366] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [95].

[367] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [100].

[368] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 at [103].

[369] See s.342(1), item 1(d) of the Act.

[370] See s.27 of the Act.

[371] See *Sex Discrimination Act 1984* (Cth) at ss.4A and 7A; *Anti-Discrimination Act 1977* (NSW) at ss.49S and 49V; *Equal Opportunity Act 2010* (Vic) at ss.4 and 19; *Anti-Discrimination Act 1991* (QLD) at s.7 and the Schedule; *Equal Opportunity Act 1984* (WA) at ss.4 and 35A; *Equal Opportunity Act 1984* (SA) at ss.5 and 85T; *Anti-Discrimination Act 1998* (Tas) at ss.3 and 16; and *Discrimination Act 1991* (ACT) at ss.7 and Dictionary.

discrimination on the grounds of 'parenthood'.[372] Most of the relevant State/Territory anti-discrimination legislation expressly prohibits direct and indirect discrimination[373] against persons with caring responsibilities for their child(ren) or other immediate family members. Sex and pregnancy are also protected attributes under most if not all anti-discrimination legislation.

484. The ACTU correctly identifies that an employee may have remedies under the relevant anti-discrimination legislation if an employee considers they have been discriminated against by the employer's handling or refusal of their request.[374] Anti-discrimination legislation provides specific mechanisms through which employees can pursue an action in the event of alleged discrimination. This will generally involve a conciliation conference as the first step, in a forum that is clearly designed to allow the parties to ventilate the relevant issues and seek to resolve the matter in a non-adversarial environment. Where such conciliation is unsuccessful, the matter can be pursued through the appropriate tribunal or court.

485. A review of the case law reveals many examples of instances in which employers have been found to be in breach of federal anti-discrimination legislation on the basis of their caring responsibilities.[375] They demonstrate the effectiveness of the *Sex Discrimination Act 1984* (Cth) and State/Territory anti-discrimination legislation.

486. For instance, in *Escobar v Rainbow Printing Pty Ltd (No 2)*[376], Ms Escobar, a payroll accounts clerk, had been working at a small printer business prior to taking parental leave. She was refused part-time work when she sought to return. The employer's denial of part-time work was said by the Federal Magistrates Court to be "likely to disadvantage women because of their

[372] *Anti-Discrimination Act* (NT) at ss.4 and 19.

[373] See for example *Equal Opportunity Act 2010* (Vic) at s.7; *Anti-Discrimination Act 1991* (QLD) at ss.8 and 9; *Anti-Discrimination Act 1998* (Tas) at ss.14 – 16; and *Discrimination Act 1991* (ACT) at s.8.

[374] ACTU submission dated 9 May 2017 at paragraph 126.

[375] See for example Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at pages 251 – 252.

[376] [2002] FMCA 122.

disproportionate responsibility for the care of children." The Court rejected the employer's argument that, as a small business, it could not offer part-time positions and found that the effective imposition of full-time work was unreasonable. The Court found indirect sex discrimination.[377]

487. Another example can be found in *Cincotta v Sunnyhaven Ltd.*[378] Ms Cincotta had been a permanent full-time worker and an acting supervisor prior to taking parental leave. After parental leave she asked to return initially on reduced hours so as to meet her childcare responsibilities, which her employer refused. The employer offered her the hours she needed if she resigned and became a casual which she agreed to do. The Court found that a reason for Ms Cincotta accepting casual work was her family responsibilities and that discrimination had occurred.[379]

488. Examples of such decisions made under State/Territory anti-discrimination legislation can also be readily found.[380]

489. As can be seen, anti-discrimination legislation provides important and powerful protections to employees who contend that they have been discriminated against by their employer. They also serve as a deterrent to employers who widely understand that they may be severely penalised if they are found to be in breach of the relevant provisions. Importantly, anti-discrimination legislation also provides mechanisms through which employees may seek redress if they have been discriminated against.

[377] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at pages 251.

[378] [2012] FMCA 110.

[379] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at pages 252.

[380] See for example *Construction, Forestry, Mining and Energy Union (New South Wales Branch) v South Western Sydney Local Health District* [2016] NSWIRComm 1047 and *Bonner v Secretary, Department of Industry* [2017] NSWCATAD 229.

The Australian Human Rights Commission: *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014*

490. In 2014 the Australian Human Rights Commission (**AHRC**) published a report titled '*Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014'* (**AHRC Report**). It relates to an inquiry conducted by the AHRC which examined the prevalence of experiences of discrimination relating to pregnancy at work and return to work after parental leave.[381] The ACTU relies on the following findings made in the AHRC Report:

- Discrimination against mothers in the workplace is 'pervasive'.[382]
- Of the 1576 or 78% of mothers surveyed who returned to work after the birth or adoption of a child, 36% reported discrimination when returning to work.[383]
- Of the 1576 or 78% of mothers surveyed who returned to work after the birth or adoption of a child, 50% reported discrimination when requesting flexible working arrangements.[384]
- Of the 23% of mothers surveyed who were still on leave or had not returned to work, one in ten could not find work or could not negotiate return to work arrangements.[385]

[381] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 3.

[382] ACTU submission dated 9 May 2017 at paragraph 47(f).

[383] ACTU submission dated 9 May 2017 at paragraph 45 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 29.

[384] ACTU submission dated 9 May 2017 at paragraph 45 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 29.

[385] ACTU submission dated 9 May 2017 at paragraph 45 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 47.

- Of the mothers surveyed who reported experiencing discrimination at work during their pregnancy, 22% did not return to the workforce as an employee.[386]

- Of the mothers surveyed who did not report experiencing discrimination at work during their pregnancy, 14% did not return to the workforce as an employee.[387]

- Of the mothers surveyed who reported that they were discriminated against at some point, 32% looked for another job or resigned.[388]

491. It essential to understand that, as the AHRC Report itself identifies, at its highest these results reveal only the extent to which the respondents *perceived* that they had been "discriminated" against.

492. Further, the term "discrimination" is used very loosely and very widely throughout the AHRC Report and for the purposes of the survey that was conducted by it. It was not confined to discrimination in the sense contemplated by anti-discrimination legislation: (emphasis added)

> Respondents were asked … <u>if they had ever been 'treated unfairly or disadvantaged'</u> (the plain-English definition of discrimination) because they were pregnant; because they took or requested to take leave to care for the child; because of their family responsibilities and breastfeeding/expressing in their first job after the birth of the child – and if so, what was the nature of that unfair treatment.[389]

493. The conception of "discrimination" in the report even included the employee survey respondents' perceptions of whether they experienced any "negative

[386] ACTU submission dated 9 May 2017 at paragraph 85 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 33.

[387] ACTU submission dated 9 May 2017 at paragraph 85 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 33.

[388] ACTU submission dated 9 May 2017 at paragraph 85 and Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 33.

[389] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 25.

attitudes" from any co-workers at any stage during their pregnancy or return to work.

494. Accordingly, the data cited above does not reveal the extent to which those respondents had in fact been the subject of any discrimination in the legal sense. As the report states: (emphasis added)

> The prevalence data captures respondents' perceptions of the ways in which they were treated as a result of their pregnancy, parental leave and return to work following parental leave.
>
> While only a court can determine whether there has been a breach of relevant legislation, the results indicate the prevalence of behaviour and action that could amount to discrimination due to an employee's pregnancy, requests for or taking of parental leave and return to work following parental leave (which potentially enlivens the SDA grounds of sex, pregnancy, family responsibilities and/or breastfeeding discrimination). The results should not be interpreted as findings as to whether unlawful discrimination had in fact occurred.[390]

495. In addition, we note that the AHRC did not verify employee experiences with their respective employers.

496. The Commission should accordingly place little if any weight on the findings cited above upon which the ACTU seek to rely. We also note that in the recommendations ultimately made by the AHRC, it did not suggest that the right of employers to refuse requests pursuant to s.65(5) of the FW Act should be removed. Instead it recommended the introduction into the Act of a positive obligation on employers to reasonably accommodate requests for flexible working arrangements;[391] implicit in which is an acceptance that employers should be granted a discretion to refuse such requests in certain circumstances.

[390] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 25.

[391] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014* at page 12.

11.4 Conclusion

497. Access to unfair dismissal remedies, the general protections under the FW Act and anti-discrimination legislation provides employees with important and powerful protections in circumstances where they have parenting and/or caring responsibilities, including where the seek flexible working arrangements pursuant to s.65 by virtue of those responsibilities. As we have earlier stated, this is an issue that goes to the ACTU's contentions regarding "discontented non-requesters" who allegedly do not make requests for changes to their working arrangements despite being dissatisfied with them, due to a fear of reprisals. The existence of effective protections such as those we have here identified serve to ensure that:

- Employees have access to a remedy or redress where they have in fact been unfairly dismissed, subjected to adverse action or discriminated against;

- Employees who are fearful of making requests are assured that they will have access to such avenues should their employer unfairly dismiss them, subject them to adverse action or discriminate against them; and

- Employers are deterred from unfairly dismissing employees, subjecting them to adverse action or discriminating against them because of their caring responsibilities and/or because they seek flexible working arrangements as a result of those responsibilities.

498. Further, the material before the Commission does not establish that employers are systematically unfairly dismissing employees, subjecting them to adverse action or discriminating against them by virtue of their caring responsibilities. There is certainly insufficient evidence to suggest that such treatment of the relevant group of employees is widespread or that it warrants the approach proposed in these proceedings by the ACTU.

12. THE EVIDENCE RELIED UPON BY Ai GROUP

499. In the submissions that follow, we summarise the evidence relied upon by Ai Group.

12.1 The Joint Employer Survey

500. For the purposes of these proceedings, Ai Group joined with various other employer associations (many of whom are affiliated with ACCI), to conduct a survey of their respective members (**Joint Employer Survey**). The survey goes to three principal issues:

- The extent to which the survey respondents' businesses have received requests from their employees to change their hours of work (including days of work and starting/finishing times) due to their parenting and/or other caring responsibilities since the beginning of 2010;
- Where such requests were received, their treatment by the business; and
- The potential impact of the ACTU's claim on the survey respondents' businesses.

501. The Joint Employer Survey asked respondents a series of closed, numeric and importantly, open-ended questions. The evidence of is contained in the witness statement of Jeremy Lappin, filed by Ai Group, and the attachments to it.

502. In the submissions that follow we provide some context to the conduct of the survey, describe the profile of the survey respondents and summarise various aspects of the survey results that are relevant to the ACTU's claim.

12.1.1 The Conduct of the Survey

503. The Joint Employer Survey invited members of Ai Group and various other employer associations to respond to a series of questions relevant to the

ACTU's claim. The survey was conducted using LimeSurvey; an online survey software regularly utilised by Ai Group for many of the surveys it conducts.

504. The survey was completed by respondents anonymously and no identifying information about the survey respondents or their businesses was collected. 'Cookies' were installed in the browsers of survey respondents once they completed the survey as a means of preventing them from completing the survey more than once.

505. The survey was sent via email to members of participating employer organisations on 3 August 2017 (**Attachment JES1**) with a subsequent email reminding them to participate if they had not already done so on 28 August 2017 (**Attachment JES2**). The text of the email was carefully crafted by Ai Group and ACCI to ensure that its recipients properly understood the context and purpose of the survey, without expressing a view about the merits of the ACTU's case.

506. The survey remained open for a period of five weeks; from 3 August 2017 – 8 September 2017 inclusive.

12.1.2 The Survey Questions

507. A copy of the survey questions, which were drafted by Ai Group and ACCI, can be found at Attachment A to Mr Lappin's statement.

508. The questions were underpinned by the survey 'logic', which is also set out in the document containing the survey questions.

509. For instance:

- A respondent who answered "*no*" or "*don't know*" to the question "*Is your business covered by one or more modern award?*" was not then asked "*Which modern award(s) cover your business?*".

- A respondent who answered "*no*" or "*unsure*" to the question "*Since the beginning of 2010, has your business received a request from any employee(s) 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)" was not then asked whether the business agreed to change the employee(s) hours of work.

510. The survey logic was carefully determined to ensure that survey respondents were asked only questions that were relevant to them, based on their previous responses.

12.1.3 The Profile of the Survey Respondents

511. The Joint Employer Survey was completed by 2,616 employers[392] of small, medium and large enterprises in a vast range of industries. The sample size is a substantial one and by virtue of that fact alone, the survey results carry significant probative value. Collectively, the respondents to the Joint Employer Survey employ 177,479 employees.[393]

512. Of the 2,616 respondents that completed the survey, 2,032 stated that they were covered by one or modern award. [394] Given the nature of the proceedings here before the Full Bench, it is upon those 2,032 responses that Ai Group relies. The submissions that follow and the analysis attached to Mr Lappin's statement relates to those responses only, to the exclusion of respondents who stated that their business is not covered by a modern award or they are unsure if their business is covered by a modern award.

513. The survey respondents collectively identified that they are covered by 99 of the 122 modern awards, demonstrating a broad cross section of industries.[395] Twenty or more respondents identified that they are covered by each of the following 29 modern awards:[396]

[392] Witness Statement of Jeremy Lappin, dated 26 September 2017 at paragraph 8.

[393] Witness Statement of Jeremy Lappin, dated 26 September 2017 at paragraph 9.

[394] Witness statement of Jeremy Lappin, dated 26 September 2017 at paragraph 11(b).

[395] Witness statement of Jeremy Lappin dated 26 September 2017 at Attachment D, pages 4 – 5.

[396] Witness statement of Jeremy Lappin dated 26 September 2017 at Attachment D, pages 4 – 5.

	Award[397]	Number of Respondents
1	*Building and Construction General On-Site Award 2010*	201
2	*Clerks – Private Sector Award 2010*	503
3	*Commercial Sales Award 2010*	68
4	*Educational Services (Schools) General Staff Award 2010*	35
5	*Educational Services (Teachers) Award 2010*	26
6	*Electrical, Electronic and Communications and Contracting Award 2010*	36
7	*Food, Beverage and Tobacco Manufacturing Award 2010*	43
8	*General Retail Industry Award 2010*	63
9	*Graphic Arts, Printing and Publishing Award 2010*	31
10	*Hair and Beauty Industry Award 2010*	120
11	*Health Professionals and Support Services Award 2010*	28
12	*Horticulture Award 2010*	94
13	*Hospitality Industry (General) Award 2010*	69
14	*Joinery and Building Trades Award 2010*	34
15	*Live Performance Award 2010*	52
16	*Manufacturing and Associated Industries and Occupations Award 2010*	472
17	*Meat Industry Award 2010*	36
18	*Pastoral Award 2010*	350
19	*Plumbing and Fire Sprinkling Award 2010*	20
20	*Professional Employees Award 2010*	90
21	*Restaurant Industry Award 2010*	91
22	*Road Transport (Long Distance Operations) Award 2010*	21
23	*Road Transport and Distribution Award 2010*	87
24	*Social, Community, Home Care and Disability Services Award 2010*	28
25	*Storage Services and Wholesale Award 2010*	100
26	*Timber Industry Award 2010*	21
27	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	45
28	*Wine Industry Award 2010*	23

514. The analysis undertaken by Mr Lappin relates to each of the above awards.

515. As we later develop, a consideration of the responses provided by employers covered by these and other modern awards provide an important and valuable insight into the considerations and issues that are pertinent to specific industries and occupations.

[397] Whilst more than 20 respondents identified that they were covered by the *Miscellaneous Award 2010*, given the nature of its coverage, it has not been included in Mr Lappin's analysis.

516. The survey respondents also represent businesses of various sizes, as demonstrated in the table below:[398]

Number of Employees[399]	Number of Respondents	% of Respondents
1 – 19	1,108	54.5%
20 – 199	762	37.5%
200 or more	162	7.97%

517. Given that over 50% of employers surveyed were small businesses, the survey offers a unique understanding of the manner in which such businesses deal with requests for flexible working arrangements and the potential impact of the ACTU's claim on them.

12.1.4 The Survey Results – Quantitative Results – Requests Received for Changes to Hours of Work

518. Survey respondents were asked whether their business has received any requests from their employees for changes to their hours of work because they have parenting responsibilities and/or other caring responsibilities since the commencement of 2010; that is, the commencement of the modern awards system and the NES.

519. The question was deliberately not limited in its terms to requests made formally by reference to s.65 of the Act or some other mechanism. Accordingly, the question invites the respondent to contemplate both formal and informal requests received.

[398] Witness statement of Jeremy Lappin, dated 26 September 2017 at Attachment C.

[399] The increments selected for present purposes align with those that were used in the AWRS First Findings Report.

520. As can be seen, virtually the same number of respondents stated that their business had received at least one request as those who stated that their business had not received any requests:[400]

Since the beginning of 2010, has your business received a request from any employee(s) 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)?		
	Number of Respondents	**% of Respondents**
Yes	993	48.9%
No	994	48.9%
Unsure	45	2.2%
Total	**2,032**	**100%**

521. The results demonstrate that a significant proportion of businesses have received one or more request for changes to an employee's hours of work because they have parenting and/or caring responsibilities, since 2010. This is clearly a matter that goes to the potential impact of the ACTU's claim.

522. The survey also demonstrates that of those who have received a request of the nature contemplated by the preceding question, the very vast majority of respondents stated that their business either always granted requests received or granted at least some requests received, whilst not granting others. Only 2.6% of respondents stated that their business had never granted a request received.[401]

Did the business agree to the employee(s) change of hours (including days of work and starting/finishing times)?		
	Number of Respondents	**% of Respondents**
Yes, each time the business agreed to change the employee(s) hours of work	483	48.6%
No, each time the business did not agree to change the employee(s) hours of work	26	2.6%
In some cases, the business agreed, in other cases the business did not agree	479	48.2%
Unsure	5	0.5%
Total	**993**	**100%**

[400] Witness statement of Jeremy Lappin, dated 26 September 2017 at Attachment D, page 8.

[401] Witness statement of Jeremy Lappin, dated 26 September 2017 at Attachment D, page 10.

523. The flexible and accommodating approach taken by employers in response to requests for flexible working arrangements is also demonstrated in many of the open-text responses received. Several additionally refer to the ability to reach a compromise between the employer and employee as a product of discussions held between them after a request was made, which is particularly relevant to the survey question we deal with next. For instance:

152	Our policy is to accommodate the requests of our dedicated staff wherever possible while always ensuring that the operations of the business and the ability of other employees to do their jobs are not jeopardised.
171	Again, based on the needs of the business, the skills of that particular person etc. But we also try to understand what is the issue. We have even offered to pay for childcare in a couple of instances. This was not taken up by the employee as they were then able to request one of their extended family or friends to take care for the child. We have not approached these issues unreasonably. We offer flexibility i.e. laptops, phones, etc where this makes sense, but this is just not possible for some roles.
316	With any request for change of work times, any modification to the original request was done with consultation with the employee to ensure both theirs and the business needs were met. We have never not been able to find a compromise that works for all parties.
538	We run our business to the mutual benefit of both ourselves and our employees, so any changes 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.
540	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.
641	We have some girls ask for less hrs due to family commitment and less days. We have always been flexible with our girls as don't want to loose good staff. Most of our staff members have children the only one that dosen't is our full timer.
2174	Most times we are happy to work around employee requests but in the very busy times of the year, staff having unscheduled time off is very difficult as an employer to fill that gap. If the employee really needed the time off for family reasons then we have generally shuffled other staff around to keep machinery operating.
2535	There are certain operating hours that require the support of the employee. The terms were negotiated with both the best interests of the employee and the business were considered with the prime focus being on retaining the valued team member.
3357	Due to the nature of the tasks peformed by the employee - such as positions that could not be performed offsite or outside set business hours. Wherever possible, flexiblity was provided (ie request for shorter shifts).
3442	The needs of the employee's children was taken into consideration because of a disability and for the peace of the family unit. The mental state of the employee was also taken into consideration. We accommodated the changes, but it was difficult as the repercussions are that the rest of the team have to absorb more early and late shifts as a consequence.

3705	We are happy to consider all requests to comply with hours of work request, however in some cases where employees work as part of a group i.e factory this is not always possible
3747	If the hours requested did not suit the demands of the business, they were not agreed to. We worked with the employee to determine what alternatives could work for both parties.
3815	We try to be family friendly and try to find mutually agreeable compromises.
3821	In order to accomodate a Work/Life Balance without any disruption/impost to services rendered by our business
3838	We look at each request case x case. In some cases there is a clear case to support the request - and we support flexible work practices where possible. In others the requests may fall outside the Award (ie. parental leave request during the first 12 months)
3938	There has never been an instance when we have not considered the full situation of an employee and not made any changes at all. We have always worked with the employee to ensure their needs were met along with the needs of the business.
4132	I try to keep everybody happy. Communication and both coming to a happy medium for will keep my business running well!!
4300	We are very flexible with our working parents and carers and tend to agree to almost every request for different work hours. Some roles in our company, however, demand specific hours to be worked and removing the ability for us to negotiate with our staff members might create challenges in these roles. We are also a small-medium business and are currently juggling numerous part-timers. as we continue to grow and more workers take on parenting and caring duties we may hit a time when having the chance to negotiate will become even more important to us. With many of our team members filling 'single point of failure' roles we need to be creative in the way we juggle individual's personal needs. Removing our right to negotiate flexible hours with our team members feels unfair and a bit frightening. Even though we are currently the kind of organisation who says 'yes' to almost every request.
4593	Management and the staff member had a discussion about the best outcome for them. In each case, the staff member approached management with a request for flexibility generally. The mode of working, including the days of work, were determined by agreement by both parties, with the overall result being suitable for both parties.
5536	It would have been detrimental to our business. In all cases we negotiated with the employee's. We try to accommodate caring responsibilities as much as we can.
5540	Based on discussion and negotiation in order to generate the best benefit for the individual and the company. Generally only minor tinkering - we like to have a reasonably flexible approach when working with staff on out of work challenges.
5681	Our School believes that all employees have the right to request flexible working arrangements. When a request is received, it is reviewed with the operational requirements of the School. This may include timetables, class requirements and the needs of the students. We actively work with employees to meet their needs without compromising the needs of the School.

524. The survey went on to inquire as to the extent to which requests were granted in the form sought, or whether some modification was made to the days of work and/or starting/finishing times proposed by the employee:[402]

Thinking about the instances in which the business agreed to change the employee(s) hours of work (including days of work and starting/finishing times):		
	Number of Respondents	**% of Respondents**
The business agreed to change the employee(s) hours of work as per the request, without any modification	321	33.4%
The business agreed to change the employee(s) hours of work, with some modification to the hours of work that they had originally requested	220	22.9%
In some cases the business agreed to change the employee(s) hours of work as per the request without any modification and in other instances the employee(s) hours of work with some modifications to the hours of work they had originally requested	421	43.8%
Total	**962**	**100%**

525. As can be seen, 66.7% of the relevant group of respondents stated that all requests received were modified or at least some requests received were modified before being granted. Only a third of requests were granted without any modification to the hours of work proposed by the employee.

12.1.5 The Survey Results – Qualitative Results – Requests for Changes to Hours of Work – Not Granted

526. The Joint Employer Survey provides an important insight into the reasons why businesses have not granted requests received from their employees to change their hours of work.

527. Respondents who indicated that their business had not granted some or all requests received from their employees for a change to their working hours were asked: *Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree*.

[402] Witness statement of Jeremy Lappin, dated 26 September 20177 at Attachment D, page 12.

528. All 462 responses received to this question are set out at **Attachment JES3** to this submission. Amongst those responses, various common themes emerge. We here provide examples of responses that relate to each of those themes, noting that the lists of responses provided is by no means exhaustive.

529. Many respondents stated that the grant of the request would have had the effect of **increasing costs and/or adversely impacting upon efficiency and productivity**. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
332	Working in the premixed concrete industry, our peak working time is first thing in the morning. We have been unable to accommodate staff wishing to alter their start times as it has large effects on productivity.
386	The adverse impacts on productivity coupled with the cost implications as well as the negative impacts on the team where such situations included having to split the managerial aspects of a role between multiple employees.
658	The change would have had serious impact on workflow and productivity. In turn this would create some issues that would incur cost penalties for us (by requiring overtime to be undertaken and paid for or by customer delays leading to financial or reputational penalties).
1668	Most jobs in this company need to be done at a specific time, changing these times would adversely impact on efficiency and workflow.
1877	It was not practical and would have caused productivity issues
2165	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
2271	For employees covered by the Building and construction General on-site Award, Surveying Award and the Road Transport Award it is not efficient to modify the standard working hours and greatly impacts on the day to day productivity onsite.
2411	It wasn't workable in our workplace. It was going to cost us extra in wages.
2431	Normal work hours are from 7 - 4.30. The business can't afford to work hours that require someone to be paid overtime rates
3263	It would not work the schedule or the business would lose money by changing hours.
3642	The workers hours requested did not suit the operational aspect with the business and would have created additional costs to the business
4224	made running the business much more expensive or less efficient
4693	There may of been limited options due to operating needs and work requirements i.e. the role could not be completed away from the employees place of work, or the changes requested would of lowered productivity or been disruptive to the business.

530. These responses demonstrate that there are instances in which requests are received by businesses which, if granted, would result in additional employment costs and an adverse impact on the operations of the business; matters that may legitimately form the basis upon which an employer has discretion to refuse a request for flexible working arrangements made under s.65 of the Act.[403]

531. The potential consequences raised by employers are matters that go squarely to ss.134(1)(d) and 134(1)(f). As a matter of logic, if the requests referred to by the respondents above were made pursuant to the ACTU's proposed clause and the employer were compelled to accommodate it, the employee's altered working arrangements may have had an adverse impact on the efficient and productive performance of work; and increased employment costs. The survey responses suggest that those employment costs may arise in different forms including the payment of wages (e.g. overtime or other penalty rates).

532. A significant number of survey respondents referred to the business' **inability to respond to customer demands or requirements** if the request was granted. Many also made mention of **the nature of the relevant employee's role; that being a customer facing one**, which had a bearing on the employer's ability to grant their request. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
50	We have customers coming in to pick up stock and this person is in that area. So needs to here when we are open. He wanted to start earlier and finish earlier so he could go fishing,.
75	The hours were not compatible with customer requirements
119	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 customer's 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 but can't.

[403] See s.65(5A)(a) and 65(5A)(d).

122	The changes requested would have had an impact on our ability to meet the needs of our customers and would have put undue financial pressures on the company.
182	The employee required to work at times that was impracticable for the business and when normal duties could not be performed and requested hours would have left business unable to assist customers and therefor put business in jeopardy
205	Was a very customer focused role and really could not change the hours
380	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.
1111	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.
1408	After consideration, it was deemed that the employee's role did not lend itself to changes in hours of work without disruption to customer service.
1926	hours suggested were unworkable for the works that need completing due to urgency of the work particularly around shift work and completing tasks during acceptable office hours where our clients expect to be able to get answers and resolve issues
2319	Either the employee wanted to work on days which weren't substantiated by customer demand or The employee wanted to work on days/times where they didn't have the requisite skillset to fill the position.
2443	We manage a call centre, so we have to keep coverage on the phones
2711	Asking for less hours that left the reception unattended. Asking for less weekend work, which is our busiest time and not able to cover the reduction with existing staff.
2860	because the needs of the business in providing the service to its client did not align with the request of the staff.
3109	The requested changes would have impact on our ability to deliver required services and meet our obligations under service agreements.
3173	We need to have the right skills available at the right time - we manage our rosters to meet the demands of our customers and this must underline nay requests to change hours
3392	The position required a full time employee to meet with customers and hence there was no opportunity to amend the position to effectively a part-time one.
3597	Being an SME we need to cater to our customers during normal business hours. As we have a small team, we cannot accommodate all requests for changing of start/finish times.
3771	Did not meet the business requirements of the role. Eg: customers must be able to contact the employee in that role 5 days a week during normal business hours
3809	Customer , contractor or supplier interactions were required during the requested time off.
3980	Impractical for business to be able to service customers
4060	The need to satisfy business requirements and customer demands.
4074	The role was in the sales administartion area and needed to be in the office between 9-5 to coincide when customers were most likely to place their purchase orders. These needed to be processed expeditially to meet customer delivery dates particularly interstate.

4135	Could not accommodate to continue to service customers
4316	The employee requested to change staring & finishing times to allow her flexibility in dropping off and picking up children from outside of school activities. We agreed to trial the change for a 6 week period to asses how it would impact our operations. As her position was reception and a primary part of her role was to man the front office and phones the change in working hours did not work for our business as it left us without a receptionist during our busy late afternoon period. We also look at other options such as job sharing but no feasible option were able to be found so the employee returned to her original working hours.
4384	In the event the employee's position negatively impacted on our customers.
4640	Customer facing roles that require coverage
5148	to suit production and customer requirements
5604	Because it would have affected our ability to operate to a level that would meet our customers requirements
5797	customer interaction required for role, times not suitable for business arrangements.

533. Various roles performed by award-covered employees involve the performance of work that is driven primarily by customer demand. Other employees are required to undertake tasks that are inherently customer-facing. In such circumstances, the days and times at which such work is required to be performed is contingent upon customer demand for the business' services.

534. The absence of an employee from customer-facing roles or during times at which customers demand the business' services can, as stated in some of the responses above, have a critical bearing on the service provision of those businesses and as a result, their performance and competitiveness. This issue too is contemplated as a basis upon which an employer may refuse a request made pursuant to s.65 of the Act; that is, because the new working arrangement requested by the employee would be likely to have a significant negative impact on customer service.

535. Reference was also made by various respondents to other **elements or features of the employee's role or the inherent nature of the work they performed**, which resulted in the business refusing the request made. Some survey respondents made specific reference to the **impracticalities of implementing a job share arrangement** for similar reasons. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
150	Due to position employee/s held and the hours required in the role.
151	Due to their duties and responsibilities and the reason for request
180	Due to the processes the employee was required to perform required a lot of supervising and his ulterior motive was for a position on a shift in order to receive penalty rates.
401	When there was a major impact on the nature of the employment such as moving from full time to part time of 3 days a week, and that would not allow them to properly perform the role.
403	Due to current new ERP system implementation and the impact on the demands of the role on the project, expertise of the employee that could not be replaced easily as well as the impact on the remaining team members should the full reduced days be agreed on.
515	It could not fit into the company's production schedule. The worker requested to change from full time to part-time position but the company needed a full time worker to perform the work.
682	role did not allow them to do so effectively
738	Because a change of work hours would have meant we did not have the staff to complete the essential tasks at the time that was critical to running our farm
823	Hours for some set activities are set by either the weather, daylight, or other contractors making changes very difficult or in many cases not possible.
924	Primarily because the changed hours of the employee would not have been suitable for the operations of the business, or the employee was in a managerial position which required full time staff supervision
1001	Rehearsal hours were fixed
1148	It was not practical given the needs of the business - role was required on site at certain times
1284	During performance seasons and/or touring, flexibility to working hours are not possible due to the fixed nature of performance times.
1311	Certain tasks need to be completed at specific times ie milking cows and it is essential to have staff available at those times
1325	At times the demands of the crop cycle and harvesting/packing work flow do not allow much flexibility of staffing arrangements.
1697	Particular patterns of work, critical stages of a project (eg a concrete pour) may have prevented the employee from being able to determine their own hours of work - they are not individual free agents, they are part of a team.
1699	Working in Construction, sites are closed at times set by the responsible builder. Anything outside these times was not acceptable.
1740	Because our work hours are set. We work inside peoples homes at times and are subject to noise restrictions. The team needs to all be at work for the same time periods. There is also a WHS issue. That employee ultimatly left our employ and is now a subcontractor for another business....Full time. So now we compete with a builder who isn't paying super or long service. Hardly fair
2042	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.
2044	The working day for builders does not work before 6am and after 6pm for the reasons listed above, noise restrictions, access to building sites etc
2274	The employee's skillset was unique to them
2437	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. It's not workable for the business to change the milking times when some staff have changes in their life that makes it more difficult to get to work or stay at work. Staff are given the option of input into the roster every fortnight. They have the option of picking which days they work and which milkings they work. Hours of work for permanent staff are set around the farm systems but a bit flexible, with the emphasis being on that specific jobs are done properly, not necessarily at a specific time every time. Many jobs require doing at specific times, for example cows have to be fed the right amount at the right time.
2693	The day the employee wanted off work was the day that all the weekly reporting had to be done and send to the executive management at corporate head quarters. This was a core part of their job and the due date could not be changed as these reports are due from all over the world on this day.
2725	We are a dairy farm milking times make changing work times much more difficult
3343	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.
3400	Part of our organization runs based on events, these events are often planned and booked in 12+ months in advance. Roles that have a inherent event participation sections make it near impossible to change working hours around parenting or caring preferences.
3421	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.
3881	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
4417	Our business required 5 days per week coverage for the position in question and the request was for less days per week. The position was not able to work in a job share scenario.
4573	Due to operational requirements. We have fixed times where work is operationally required to be done and this work cant be changed to a different time as the aircraft wont wait!!!!
4675	The skill-set that the employee has and the area he operates in would have resulted in severe disruption to the business. A revised submission of flexible working hours was requested and subsequently granted.
4962	not suitable given airline schedule

5556	A full time position didn't lend itself to part time hours or job sharing.
5681	On occasions where we have not agreed, it is because it directly impacted on another employee – i.e. job share arrangement where the other employee was unable to change their days/hours.

536. The responses above provide examples of a diverse range of circumstances in which the nature of the role or the work performed by an employee necessarily renders it impractical to change the employee's hours as sought by them, in addition to reasons associated with customer service which we have dealt with above. For instance:

- The employee was a full-time employee performing work that simply could not be undertaken on a part-time basis;[404]
- The position did not lend itself to job-sharing;[405]
- The employee performed a supervisory role;[406]
- The employee possessed certain essential skills or expertise;[407] and
- The employee performed work that was time-critical (i.e. it had to be performed at a certain time of the day);[408]

537. Examples such as these demonstrate that there are a range of factors that fetter an employer's ability to facilitate a change to an employee's hours of work at the employee's election and the operational impossibilities that businesses may face as a result.

[404] Response ID 401 and response ID 515.

[405] Response ID 4417 and response ID 5516.

[406] Response ID 180.

[407] Response ID 403.

[408] Response ID 738, response ID 1001, response ID 1148, response ID 1284, response ID 1311, response ID 1697, response ID 1699, response ID 2042, response ID 2044, response ID 2437, response ID 2693, response 2725, response ID 3343, response ID 3421, and response ID 4573.

538. The **opening or trading hours of the business** were also often cited as limitations upon the business' ability to grant requests for changes to hours of work. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
276	can't work outside normal week day hours. most activities are work based for control and information.
567	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.
1898	Due to operational restraints for example office open hours.
2909	The requests were not reasonable and could not be fitted into the core operational hours
4210	we only trade dinner

539. These survey responses are relevant because the ACTU's proposed clause does not, on its face, involve any consideration of the opening hours of the employee's place of work. Indeed it would allow an employee to determine that they seek to work at a time that the business is not operating; a clearly ludicrous outcome.

540. Other survey respondents said that the relevant requests were not granted due to the **business' shiftwork arrangements or production hours**. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
266	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. The person also wanted a full time income. The person understood that if they required a full time hours with the company, in a job that was available, they would need to work normal production hours.
1260	Too difficult to accommodate if not working a particular shift on an ongoing basis. Too diffcult to allocate a special roster to accommodate. Production workers are recruited on the basis they can be flexible.
2160	It usually depends on the area of the business that the person works in. In the office environment the request is often approved but if the person works in the factory which has fixed starting times very often modified start and finish times do not work so in those cases the change of work times was not approved.
3317	It is a production environment and the machines need two operators present during each shift.
3961	We rely on that staff to fill that particular shift. Other staff did not have the experience or qualifications to fill the shift
4065	certain number of employees required to cover shifts
4317	Hours requested were outside of current shift structures.
4528	The change of hours requested was not within current shift patterns.
4549	later starting times and later finishing times does not suit our business - we work as a team and can not have someone staying back later just to clock up their hours - also can not run plant the extra hour a day for no reason
4705	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.
5813	We could not alter our production times

541. Whilst we return to this issue later in our submissions, for present purposes it is sufficient to note that the fixation of a system of shifts, for example in a manufacturing environment, which are determined to start and finish and specific times, can render it impracticable to grant a request from an employee to alter their working hours such that they do not align with the operations' shift

patterns. This is demonstrated through numerous responses above and the evidence of Peter Ross, which we turn to shortly.

542. The responses also make reference to the interdependency of employees working on a particular shift and the need to maintain a specific mix of skills in order for the shift to operate efficiently and productively (or indeed, to operate at all).

543. It appears that some survey respondents were aware of requests from employees who sought work at times where there was **little or no work for them to perform**. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
315	Didn't suit the business needs to have extra staff members at a quieter time
2677	No meaningful work could take place during the proposed hours as the studetns were not present
2738	The business does not require staff on site during the hours where there is little or no work to be done.
2782	Employees must be available to co-inside with work availability. We cannot pay wages for unproductive personnel.

544. It is trite to observe that businesses make assessments as to their demand for labour based on the nature of work that is required to be performed and, importantly, the volume of work to be performed. In a significant number of industries, the latter fluctuates week to week, day to day, hour by hour.

545. The effect of the ACTU's proposed clause would be to enable an employee to dictate their hours of work such that they determine that they will work at particular times and/or on particular days at which the business does not in fact require their labour. This may be because there is a sufficient number of employees rostered at that time and the rostering of an additional employee would result in excess employment costs with little if any productive value. The above responses to demonstrate that such considerations have led businesses to refuse requests previously received for changes to hours of work.

546. The corollary also appears to be true. Some respondents stated that the employee's absence at certain times as a result of their proposed flexible working arrangements would have resulted in **insufficient staffing levels** at certain times:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
362	If staff were on leave during period requested. Staffing shortages.
407	Granting the request would have created impossible rostering issues given the small staffing levels and the increasing demand for services.
486	Would not have been practical for the business needs to do - as it would have created shortfalls in service levels at critical times.
776	There is a time requested which clashes with a very important job once per week and it would be impossible to get the job done with out employees.
3610	Start and finish times did not meet operational needs and/or total hours did not meet operational needs. This is not an issue where backfill is able to be arranged but there are some instances where backfill was not able to be implemented due to availability of staff and/or cost of providing staff for the backfill. This issue is staff coverage in some roles.
4339	It would have left the work area short of staff and would have only been to the benefit of the staff member.
4478	It would have put us short during some hours of operation, and left us short some days.
4935	Not enough staff numbers to roster throughout the salon week. Short in human resources.

547. As the survey responses that follow will demonstrate, a shortfall in staffing levels cannot necessarily be readily addressed by an employer.

548. Many responses stated that the business' **inability to source other employees to work whilst the requestor would have be absent** resulted in the refusal of requests made to change hours of work. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
428	No replacements were available and the business would either have had to close or cancel appointments
1128	no one person was able to cover requested time
1866	The work could not all be done from home as the employee requested. The start time was an hour or 2 after reception needed to be attended to and we had no one else who could cover that nor could we employ anyone for 2 hours a day.
4005	There was no other individual suited to take on that role.

4761	When it was not agreed it was because we could not find other people to cover the time off.
5280	The business was able to accommodate a parents request to return to work in a part-time capacity from maternity leave; 1- The unavailability of suitably qualified relief staff available to work under a job share arrangement; 2- The workflow of the department, higher work load at the months end; 3- The small number of staff within that department.
5469	In one instance the full time sales employee asked to move their hours from MON - FRI to TUES - SAT on a permanent basis. This would not suit the business as the clients do not work on Saturdays so this shift is not required. On another occasion, the employee requested a small reduction in hours that could not be filled by another employee (only a few hours per week so it did not justify an additional employee)
5804	Employee needed to work as part of a team and/ or needed to be supervised Other staff were not available to cover those times Sequencing of work would not happen with those modified hours

549. It is important to remember that many award-covered employees possess skills and experience that they have acquired through their qualifications and/or time spent working in a particular industry or, more specifically, their employer. The difficulties associated with replacing an employee requesting a change to their hours at those times that the employee would not be working should not be overstated. Those difficulties arise in circumstances where the employer requires an employee with a specific skill set as well as by virtue of the fact that the replacement employee is required to work only at times left vacant by the employee seeking alterations to their hours of work. This can be seen in the responses above.

550. A number of respondents identified the grant of the request would have **adversely affected other employees of the business**. For example:

Response ID	**Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.**
54	because we operate on shifts and all staff have agreed to work shifts at the time they were employed. When some members decide that they are unable to work these shifts, the entire burden of shift work then falls unfairly on a few willing workers

538	Where changes were not immediately agreed to it was because losing that employee on those days or times left us short handed to be able to operate our business properly eg not having enough senior hairdressers to cope with demand or assistance for senior hairdressers. In some cases alternative arrangements were made that meant impacting/changing rostering of other staff members to accommodate the request.
687	The person's role required their attendance in the office during the full office opening hours to respond to queries raised by both staff on sites and suppliers and clients of the business. Numerous queries that arise cannot be left until the next time the person is in and putting the responsibility onto another person that does not hold that role is unfair to the other staff members. The items not being dealt with forthwith is not in the best interest of the business and therefore the other staff it employs.
951	The employee is part of a team that works 3 days per week (25 - 30 hours). This employee does have a child with a disability however her husband is the child's full time carer. The employee only requested this because anything over 25 hours per week affects the families centrelink payments. There was no legitimate reason to grant the request as this would have been unfair on other team members.
1465	Changes to the hours had an impact on the business and adversley effected the other members of the team
2126	Example was when we were shearing and we couldn't manage the workload without the employee because it would put too much pressure on the other employees.
2734	The employees role and responsibilities were reviewed and it was determined that these modifications would have a detrimental impact on the business. In considering the requests a number of factors were taken into consideration including other employees absorbing additional duties.
2918	The business still operates full business hours, and when one person in a small customer service team works shorter hours, it puts undue pressure on the other staff performing the same role, who would be required to pick up the extra workload. It is not practical, in this role, to work significantly reduced hours.
3425	Some requests were denied as it would have impacted on other employee's having to cover work hours not being attended to by the employee, or at least the working conditions would have been impacted.
3442	This employee was already part time and we had accommodated her days already. To then request specific shifts would of impacted too much on the other team members in that room, who some have children of their own.
3611	Would have meant additional cost and hardship for the business and other employees
3698	we run a service that requires staff to be in the building and have service contracts to provide hte service during particualr hours. it places pressure on other staff to meet demand during hours where staff want to leave earlier or start later.
3708	Unreasonable request imposing undue impost on other staff and the business, or unable to find a replacement staff for the shift in the short time.

3851	We identified that there would be operational detriment to the business and other employees
3959	It would not allow us to serve our clients in the manner they would expect. It would impose an unreasonable load on the person's colleagues in having to ensure the business could still provide the level of service and spread of hours our clients expect
4350	Too much disruption to the business and other team members who would need to carry the workload.
4461	The requests were too restrictive to allow the business to work effectively and were going to impact adversely on other employees
5096	Due to operational needs of the business...the request would have had an impact on customers and other team members
5368	the request would interrupt production out come and or effect other employees greatly

551. The responses above clearly establish the unfairness that would have been visited upon colleagues of the employee requesting different hours of work, if the request was granted. The responses also the important proposition that where an employee is granted the flexibility sought, it cannot reasonably be assumed that the employer can or will necessarily require another employee to work during the hours left vacant by the requestor. Instead, the responses demonstrate that in many cases the work that would otherwise have been performed by the requestor will simply fall to other employees, which would necessarily have a bearing on their workload and potentially require the performance of overtime.

552. Some respondents stated that the **time and expense associated with the recruitment of new employees to work whilst the requesting employee would be absent, training such new employees and the overall increase to the regulatory burden associated with greater employee numbers** led the business to refuse requests. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
5223	Operation issues such as too many mixed shifts causes increases in administration to allocate labour each day for rosters and absences, payroll complexity and recruiting new employees for specific days narrows the availability of high calibre applicants, arranging training times to cover all employees adds to labour cost due to the complexities and extra training sessions.

5625	If we were not able to accommodate, it was either because we did not have the proper resourcing to do so or business required some time to train or look at other options in able to accommodate the change.
5707	We have only ever not agreed to change days of work and starting/finish times based on reasonable business grounds on a case-by-case basis, taking into account the context of the request and also based on investigation and evidence. Sometimes the other employees would not change their working arrangements to suit the request, despite consultation and negotiation with them, because they would not work job share and shift to part-time hours, due to their own lifestyle choices or financial status or personal and/or health condition. There were occasions when the employee's request would make a significant impact to productivity and overall business efficiency, such that it would negatively impact the business and not be sustainable. On occasions the proposal would negatively impact on the company's customer service, impacting on current and future business and even brand health due to disgruntled customers. On other occasions the other employees had worked their days and hours for many years, so the business felt it would be impractical to modify their employment agreement to suit the request. Finally, at times the new arrangements were at times too costly for the business to implement, due to recruitment costs, more record keeping, administrative costs, the cost of the handover for a compressed work week, new training required, the cost of arranging separate employee meetings and the cost of managing performance across jobs.
5709	Insufficient resources to cover the change in hours and days - too costly to employ further resource

553. These responses, coupled with the evidence of Ai Group's lay witnesses, demonstrates that the time and expense associated with recruitment and training are not insignificant and can be prohibitive.

554. Concerns associated with **workplace health and safety** were also cited by a number of respondents. For example:

Response ID	**Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.**
1564	We need to ensure the safety of our employees and that they have adequate supervision, we cannot have someone working alone
3804	May leave employee unsupervised and/or may present a WH&S risk. Has a detrimental impact on the business ie hours no longer worked would be

	required to be picked up by other employee therefore adding costs to the business
4092	1) We have time restraints for despatching orders. 2) For OH&S issues, we cannot have staff working without other people in the warehouse
5700	1. Sales/Service roles: we have declined requests to work outside normal client hours, too early or staying back too late ineffective 2. Workshop roles: WHS issues if working alone in workshop so need to be within normal work hours, plus difficult to track who's where and when started, when finished.....etc

555. As can be seen, the need to ensure that employees are appropriately supervised and not left to work alone has resulted in employers not granting requests for changes to working hours.

556. The particular **difficulties faced by small businesses** are highlighted in the following survey responses. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
111	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.
2003	we are small business and work as a team, it would not be possible to have individual hours for each staff member we could not run our business and all staff would be out of a job for the sake of 1 staff member
3274	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.
3597	Being an SME we need to cater to our customers during normal business hours. As we have a small team, we cannot accommodate all requests for changing of start/finish times.
3974	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.
4215	as above, we are a small business and could not get the coverage we needed to cover opening hours

557. The impact of the ACTU's claim is likely to be particularly pronounced in relation to small businesses, given such businesses' smaller employee numbers and their more limited to capacity to manage the absences of their staff at particular times, as evidenced in the responses above.

558. As the Full Bench is of course aware, the Act states as one of its objects the provision of a balanced framework for cooperative and productive workplace

relations that promotes national economic prosperity and social inclusion for all Australians by acknowledging the special circumstances of small and medium-sized businesses. The adverse impacts of the ACTU's claim on small and medium-sized business should be given special consideration by the Commission in its deliberations.

12.1.6 The Survey Results – Qualitative Results – Requests for Changes to Hours of Work – Not Granted – By Modern Award

559. An examination of the survey responses explaining the reasons why requests for changes to hours of work have been refused by reference to specific modern awards reveals certain issues that consistently arise in the context of particular industries or occupations. At **Attachments JES4 – JES31** to our submissions, all survey responses provided by respondents covered by the 28 modern awards identified above have been set out. For convenience, we here point to specific examples.

560. For instance, many respondents covered by the ***Manufacturing and Associated Industries and Occupations Award 2010*** refer to the concepts of **fixed production times and shiftwork arrangements** that are implemented accordingly. Many also refer to the **impact that the absence of the relevant employee would have had on the production line**. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
54	because we operate on shifts and all staff have agreed to work shifts at the time they were employed. When some members decide that they are unable to work these shifts, the entire burden of shift work then falls unfairly on a few willing workers
266	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. The person also wanted a full time income. The person understood that if they required a full time hours with the company, in a job that was available, they would need to work normal production hours.
515	It could not fit into the company's production schedule. The worker requested to change from full time to part-time position but the company needed a full time worker to perform the work.

532	The requests would have been difficult to maintain or were moving from 5 days to 2 days per week. If we could not organise a job share than we could not accept the change. Flexibility on production lines is also complicated.
2160	It usually depends on the area of the business that the person works in. In the office environment the request is often approved but if the person works in the factory which has fixed starting times very often modified start and finish times do not work so in those cases the change of work times was not approved.
2733	For the majority of our work, the crews travel from head office to various locations, routinley requiring to overnight stay. They travel in work teams including shared vehicles. Locations are not routine. The work crew can not operate with one person short (eg someone starting g later than the others) due to production nature of the works and plant operated.
3317	It is a production environment and the machines need two operators present during each shift.
4549	later starting times and later finishing times does not suit our business - we work as a team and can not have someone staying back later just to clock up their hours - also can not run plant the extra hour a day for no reason
4652	Some factory workers where a group of 25 employees all work in the one area and flexible start times result in people standing waiting.
4679	As we have a production line process, having a person out of the system will bring our production to a halt.
4705	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.
4740	Manufacturing work cells and other customer / project driven timelines determine the days and hours required to be worked to honour contracted commitments.
4809	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
5393	It was necessary for the person to be here during those times so that their role could be fulfilled. They were an installer and sites are only open during certain hours for our trade plus they rely on our production team for product and the requested start time was before they started - which would not have worked for the greater employees.
5479	WE COULD NOT GRANT MODIFIED HOURS TO OUR EMPLOYEES ON OUR PRODUCTION FLOOR AS IT TOTALLY MUCKS UP THE MANUFACTURING PROCESS WHEN EMPLOYEES ARE NOT AT THERE WORK PLACES THROUGHOUT THE WHOLE FACTORY WORKING DAY.

561. Similar considerations were mentioned by some respondents covered by the ***Food, Beverage and Tobacco Manufacturing Award 2010***:. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
256	The proposed changes to hours was rejected because a random work pattern was requested.
515	It could not fit into the company's production schedule. The worker requested to change from full time to part-time position but the company needed a full time worker to perform the work.
5813	We could not alter our production times

562. Respondents covered by the ***Building and Construction General On-Site Award 2010*** commonly referred to issues such as **the need for certain work to be performed within limited timeframes**, **the interdependency of one employee's role with work performed by other employees, client requirements** and **noise restrictions**. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
173	Production role - commercial need to maximise utilisation of plant and production during available work time Interdependency with other tasks/roles on site Client requirements Impracticality of deferring work tasks - limited time/space window in which on site work must be performed lack of technological alternatives to allow work to be performed / monitored away from the work site - you can't build civil infrastructure, operate a quarry, drive a truck, or batch concrete from home
1697	Particular patterns of work, critical stages of a project (eg a concrete pour) may have prevented the employee from being able to determine their own hours of work - they are not individual free agents, they are part of a team.
1699	Working in Construction, sites are closed at times set by the responsible builder. Anything outside these times was not acceptable.
1740	Because our work hours are set. We work inside peoples homes at times and are subject to noise restrictions. The team needs to all be at work for the same time periods. There is also a WHS issue. That employee ultimatly left our employ and is now a subcontractor for another business....Full time. So now we compete with a builder who isn't paying super or long service. Hardly fair
1926	hours suggested were unworkable for the works that need completing due to urgency of the work particularly around shift work and completing tasks during

	acceptable office hours where our clients expect to be able to get answers and resolve issues
1928	Person worked in a crew and the crew would stop with out them
2431	Normal work hours are from 7 - 4.30. The business can't afford to work hours that require someone to be paid overtime rates
2733	For the majority of our work, the crews travel from head office to various locations, routinley requiring to overnight stay. They travel in work teams including shared vehicles. Locations are not routine. The work crew can not operate with one person short (eg someone starting g later than the others) due to production nature of the works and plant operated.

563. The demands associated with **customer contact** for employees covered by the ***Commercial Sales Award 2010*** was raised by multiple respondents. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
119	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 customer's 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 but can't.
2693	The day the employee wanted off work was the day that all the weekly reporting had to be done and send to the executive management at corporate head quarters. This was a core part of their job and the due date could not be changed as these reports are due from all over the world on this day.
3771	Did not meet the business requirements of the role. Eg: customers must be able to contact the employee in that role 5 days a week during normal business hours
4638	It would be too difficult to perform the duties of the role, ie attend meetings, be available for work when it was required
5469	In one instance the full time sales employee asked to move their hours from MON - FRI to TUES - SAT on a permanent basis. This would not suit the business as the clients do not work on Saturdays so this shift is not required. On another occasion, the employee requested a small reduction in hours that could not be filled by another employee (only a few hours per week so it did not justify an additional employee)

564. The role of a **receptionist** was cited by some respondents covered by the ***Clerks – Private Sector Award 2010*** as being one where they refused a request for flexible working arrangements. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
1866	The work could not all be done from home as the employee requested. The start time was an hour or 2 after reception needed to be attended to and we had no one else who could cover that nor could we employ anyone for 2 hours a day.
4316	The employee requested to change staring & finishing times to allow her flexibility in dropping off and picking up children from outside of school activities. We agreed to trial the change for a 6 week period to asses how it would impact our operations. As her position was reception and a primary part of her role was to man the front office and phones the change in working hours did not work for our business as it left us without a receptionist during our busy late afternoon period. We also look at other options such as job sharing but no feasible option were able to be found so the employee returned to her original working hours.
4488	The changes did not allow the business to function and for the job requirements to be fulfilled. (Eg a receptionist requested to work from home, this mean't that the person would not be able to greet visitors or receive deliveries)

565. Respondents covered by the ***Hair and Beauty Industry Award 2010*** mentioned the **need to roster employees at certain times in order to meet customer demand**. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
428	No replacements were available and the business would either have had to close or cancel appointments
480	The member of staff was hired purely to work on particular days, other days did not have enough work to accommodate this staff members request.
538	Where changes were not immediately agreed to it was because losing that employee on those days or times left us short handed to be able to operate our business properly eg not having enough senior hairdressers to cope with demand or assistance for senior hairdressers. In some cases alternative arrangements were made that meant impacting/changing rostering of other staff members to accommodate the request.
1582	As said above for the Saturday request (we have had to close on Sundays which she preferred and use to work because of penalty rates, funnily enough clients don't want to pay double or a $150 surcharge fee for a Sunday appointment) with a part time perm employee we have to provide contracted hours same for the full timers and we simply do not have enough bookings in their preferred prime hours of weekdays 10-2 to accommodate their request

	and still provide them legally with their contacted hours. How would could we adhere to the request and yet still comply with the current regulation, it would be impossible. To force us to would be to force the business to close. contributing to unemployment levels or break the anti-discrimination law by not hiring employees with families. It is illegal but if you put already struggling employers in this situation when our mortgage is on the line then what do you expect.

566. Similar issues were raised by employers covered by the ***General Retail Industry Award 2010***. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
3114	As per above, the ability to manage the Base Roster customer service needs of the businesses operations. 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.
3737	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.
3889	Where we couldn't meet the request to change it was not possible due to the need to cover trading hours and times of high demand.
3904	at the end of the day the customer pays the wages so you need the employee's there at the right times

567. Respondents covered by the ***Social, Community, Home Care and Disability Services Award 2010*** stated that the grant of the relevant requests would have **adversely impacted upon their ability to satisfy their obligations under service contracts and/or for government funding**. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
3109	The requested changes would have impact on our ability to deliver required services and meet our obligations under service agreements.
3698	we run a service that requires staff to be in the building and have service contracts to provide hte service during particualr hours. it places pressure on other staff to meet demand during hours where staff want to leave earlier or start later.
3793	To ensure that the business met the terms of its government funding requirements for service provision.
4351	Business requirements to run a program or service delivery at a certain time.
5739	The business did not agree due to the following reasons:

	- Impact on team objectives, delivery of services and client outcomes; - Availability of suitable alternative arrangements to ensure continuity of services; - Benefits for the employee and the organisation; - Reasons for making the request; - Potential impact on other semployees within the team or work area; and/or - Financial and cost implications.

568. Some of the special considerations that must be taken into account by employers covered by the ***Children's Services Award 2010*** are demonstrated by the following responses. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
1329	School operating hours, business needs and teaching timetables often dictated the hours and days an employee can be offered.
1693	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
2562	If the business has too many modifications from the original hours agreed to be worked we will not be able to meet the required ratio of educators to children. We made allowances in emergency or short-term situations but also require staff to be mindful of hours needed on the roster to ensure the service runs smoothly.

569. Some employers covered by the ***Airline Operations – Ground Staff Award 2010*** made specific mention of the extent to which their ability to grant requests for changes to working hours is impacted by **airline schedules**; an factor clearly beyond their control. For example:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
2027	Due to operational requirements. We have fixed times where work is operationally required to be done and this work cant be changed to a different time as the aircraft wont wait!!!!
2235	not suitable given airline schedule
2250	The staff's availability and skill set did not marry up with airline schedules and they were not flexible in their request for days/hours.

570. Employers covered by the ***Horticulture Award 2010*** referred to the **demands faced by the business during the harvest** and their inability to grant requests for changed working hours as a result. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
1325	At times the demands of the crop cycle and harvesting/packing work flow do not allow much flexibility of staffing arrangements.
2042	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.

571. The **time critical nature of certain tasks** required to be undertaken by employees covered by the ***Pastoral Award 2010***, such as the milking of cows appears multiple times in the relevant group of responses. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
738	Because a change of work hours would have meant we did not have the staff to complete the essential tasks at the time that was critical to running our farm
776	There is a time requested which clashes with a very important job once per week and it would be impossible to get the job done with out employees.
1311	Certain tasks need to be completed at specific times ie milking cows and it is essential to have staff available at those times
2020	Once again with working with weather does not allow a pause button, if an employee can not work when the weather conditions suit there is no use in employing them in the first place.
2165	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
2437	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. It's not workable for the business to change the milking times when some staff have changes in their life that makes it more difficult to get to work or stay at work. Staff are given the option of input into the roster every fortnight. They have the option of picking which days they work and which milkings they work. Hours of work for permanent staff are set around the farm systems but a bit flexible, with the emphasis being on that specific jobs are done properly, not necessarily at a specific time every time. Many jobs require doing at specific times, for example cows have to be fed the right amount at the right time.

2725	We are a dairy farm milking times make changing work times much more difficult

572. Respondent 1450 highlighted the special circumstances associated with driving **school buses** under the ***Passenger Vehicle Transportation Award 2010***. For instance:

> 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.

573. Employers covered by the ***Live Performance Award 2010*** stated that **fixed rehearsal and performance times** and led to employees requests for flexible working arrangements being refused. For instance:

Response ID	Thinking about the instances in which the business did not agree to change the employee(s) hours of work (including days of work and starting/finishing times), please explain why the business did not agree.
471	Rehearsal hours were fixed
600	During performance seasons and/or touring, flexibility to working hours are not possible due to the fixed nature of performance times.
1206	Negative impact on critical business activity, i.e. performances, events or workshops.
1261	When the request didn't fit with the inherent requirements of being an orchestra for performances

12.1.7 The Survey Results – Qualitative Results – Requests for Changes to Hours of Work – Modified

574. The Joint Employer Survey also provides a valuable insight into the reasons why businesses have not granted requests received from their employees to change their hours of work in the form sought, but have instead granted it with some modification.

575. Respondents who indicated that their business had granted some or all requests received from their employees for a change to their working hours with some modification were asked: *Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work*

that they had originally requested, please explain why those modifications were made.

576. All responses received to this question are set out at **Attachment JES32** to our submission.

577. Amongst the responses received to this question from award-covered businesses, various common themes emerge. We here provide examples of responses that relate to each of those themes, again noting that the lists of responses provided is by no means exhaustive. We observe that many of these themes are common to those identified above as having arisen from responses as to why requests had been refused.

578. Many survey respondents again cited **higher employment costs, inefficiency and productivity losses**. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
386	The modifications were changed as the request from the employees was not practical and resulted in higher cost and impacts to productivity.
2165	The employee did not plan ahead The employee discussed these matters too late The employee already knew of the work program a week or two out Considerable cost and effort required if no modification
2399	It becomes difficult or near impossible to optimise our staff rosters if the employer does not have some control over the hours of work . Our business struggles to manage the wages costs and we still regularly operate with sub-optimal staff levels because we do our best to accommodate roster preferences and often have staff on sick leave ,maternity leave or away for other reasons.
2412	The employee was choosing to work the more expensive penalty hours and days, which was unsustainable for the business
2765	The business declined most requests due to the changes would have caused an negative impact on our service levels to our customers and reduced our efficiency to function effectively. We agreed in a limited number of cases.....we agreed to requests from our art department and sourcing department as it had limited impact.

4343	The modifications were made so our business could still run efficiently during office hours.
5707	Modifications were made to suit the business overall, to request was modified in context in order to suit the worksite in question, to be able to accommodate the employee yet also have a sustainable agreement, because there would be a significant impact on productivity if we did not make an amendment, because if we didn't modify the hours, we would have added costs, sometimes the proposed hours were inappropriate for the work location and so that staffing levels were appropriate.

579. The particular difficulties faced by **small businesses** are exhibited in the responses that follow. For instance:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
2523	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.
2810	Being a small business it is more difficult to vary hours as someone else has to be with that person for OHS.
3424	We are a small to medium organisation with small work teams that rely on each of its members to be on site at the same time. Our small work teams are required to work on boats to maintain navigation aids on the Gippsland Lakes and for safety reasons they need to work together at the same time. If one person is not able to work the usual hours, those tasks cannot be undertaken with the consequences being unsafe navigation for recreational and commercial users of the Gippsland Lakes which could be catastrophic. Due to the nature of the work, for safety reasons, our staff are not to work alone but in teams of 3 - 4.

580. A significant number of respondents again indicated that if the request were granted in the terms sought, this would have had a bearing on their **ability to service their customers** and that **customer-facing roles** present particular complexities. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
93	The modification were made because the initial request didn't fully consider the impact on other workers and customers. In all cases the members were part of a team which required regular communication, especially where they supervise a team or where there are shared activities. We also have peak times during the day where as many people as possible are required to be

	present. It doesn't help us or our customers if they are available when not required and not available when required. The employees generally understood and were grateful for the flexibility.
107	To suit the needs of the business eg provide coverage for customer service, provide services atg the times our customers need them.
171	These decisions were made based on the needs of the business eg on time delivery expectations of customers, the skills of that particular person, the ability for that role to be done by someone else, the ability for that role to be carried out remotely etc.
180	modifications were made based on suitability of changes to give the employees what they wanted without affecting the companies ability to meet customer demands.
218	To suit business and customer requirements
326	We have an engineer who moved to Newcastle from Sydney with his partner. He had several years experience and we did not want to lose him. We agreed that he could work from home part of the time however would need to be available in Sydney approx 2-3 days per week and also for required travel to client sites. He now has one child and we are mindful of his parenting responsibilities. He is aware of his work responsibilities so we can generally be flexible with his work hours, in particular when he will be in Sydney or on site.
1408	Modifications were made to suit the needs of our patrons and ensure effective service could be maintained.
1423	Business requirements - scheduled customer meetings.
1898	To ensure the business operated in an efficient manner and continued to service our customers.
2358	To balance customer and employee needs.
2443	We manage a call centre, so we have to keep coverage on the phones
2693	The employee request a late start time. This would have impacted on the service we could provide to our customers and the ability for the business to hold meetings. The business agreed to a later start time than their contracted start time however not as late as the employee had requested.
2776	In order to best serve our customers needs the hours needed adjustment
2803	To ensure that the schools duty of care toward children was maintained at all times and to support the achievement of educational outcomes for all students.
2813	We offer flexibility but it MUST be on both sides. It can not be all one way. The hours originally offered was 8.30 to 4.30pm 3 days per week. They said we have school children and wanted to work school hours. At the end of the day the paying client wants there work done, they don't care. So it was very challenging. We agreed with 9.00am to 2.30pm 3 days per week. However this now impacts on how the work gets out to our clients. I am now required to employee a casual to make up the short fall in working being performed. This impacts on the bottom line of the business. This in turn impacts on who you employ as the paying client wants their work and they don't care how we deliver. If we don't deliver we lose a client. Very hard to manage.
3173	To better align our staffing to meet the demands of our customers
3226	Too suit cliental. without them we have no work.

3322	As we are a service industry and we advertise opening and closing times there is a requirement to have the reception, sales and show room staffed during these times. Modifications were required to ensure that the company/business did not suffer.
3401	The original request didn't suit the business requirements for the role they were completing. eg Customer facing staff not wanting to be available during std business hours. After conversations a better fitting solution was found.
3421	A modification was made where that could be done without any adverse impact on the duties that are a part of the job role. In our industry, many positions' hours are dictated by resident requirements and are not very flexible. Some of the administrative and training roles do have some flexibility.
3592	to suit customer requirements and workloads
3641	Modifications were made depending upon the client requests for services to be delivered
3661	It was a negotiated discussion as some of the work had to be performed during weekday business times due to being a sales related position. Pointless agreeing to work weekends when you need to call people during weekdays.
3718	To meet customer and business requirements and to ensure the role would still contribute effectively to the business.
3737	Modifications were made to ensure the business could continue to operate and provide services according to its customer promise.
3840	To suit business needs and particularly for customer focused roles and to accommodate existing flexibility arrangements that may have already been in place so that there was suitable coverage of roles at all times the business was open.
3886	To come to an arrangement that still suits the employee, but also retains the ability of the business to provide an expected level of service to clients.
3889	The modifications were made to ensure the business could still meet it's needs for customer service when demand required it in respect to retail employees and to ensure the work could be completed in a timely manner for other work areas.
3890	To cover other employee beaks and for peak period of customer traffic, to be more suitable for operational requirements and opening times of offices.
4060	To accommodate business requirements and customer demands.
4071	The Employees were Consulting Employees, engaged to work on client sites, client consultation was required and their input was also considered, to ensure that the inherent requirements of the role were met.
4689	To fit with customer demands and business needs
4750	To meet customer requirements.
5192	Due to client demand at different times of the day.
5224	We have had to negotiate a solution that enabled sufficient coverage for when the employee was not there. Otherwise, we may have had gaps in the delivery of our customer service or it would have impacted on other employees who would have had to do more to cover the absence of the employee.
5241	The hours also need to suit our clients (aged care residents). so it was a combination of reasons to end up with a schedule that worked for all parties impacted by the potential change in employees hours.
5282	Employee required to be on the premises to serve customers and do the office work required.
5475	To be able to meet customer demands

5567	The Company agreed together with the employee which would able the Company to reach its daily quota and to meet the Company customer requirements
5682	To minimise the impact of change in hours to our customers.

581. The implementation of **shiftwork arrangements** and in particular, specific starting and finishing times, were referenced as reasons why requests made could not be accommodated without modification. In particular, respondents refer to the need to "swap" employees on different shifts. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
256	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 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.
2360	We operate on a rotating shift roster which is determined by work booked. We need people when the work is happening not when they feel like coming in! When we can accommodate the request we will, but not at a cost to the business or disruption to our work programs
5223	For office monthly paid employees the change of hours was easier eg Payroll change of hours due to mental illness, working from home. For manufacturing/factory floor having many different shifts causes issues so swapping a shift when a vacancy occurred.

582. Respondents referred to the **business' opening or trading hours** as causing a modification to the request made by their employee(s). In some cases external restrictions are also mentioned, such as restrictions on starting times in the construction industry. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
202	so that employees could attend during opening and closing times of the establishment
958	to align with trading hours and available hours
1587	Modifications were made due to the operating hours and associated required staff resources
2820	Starting and finishing times proposed by the employee would not have worked in with restrictions on starting times in place on building sites in residential areas.

	Secondly, the proposed times would have meant that the employee would need to have their own set of keys to our business premises which we were not comfortable with.
2909	Hours worked need to be within the core hours for classes at school. Days requested were amended.
3593	so that they could still finish at the same time as all the other employees. our business empties out at 4:30, so employees cant be left there alone unsupervised after that time.
3649	These were made beacuase it is not feasible for everyone to work "school hours" when a business is open from 7am to 5.30pm
3959	To meet business needs - opening hours, client requirements, sharing responsibilities across the team
4210	we only trade dinner
4474	We are appointment and retail sales based. The business needs (i.e. hours of operation) couldn't accommodate the original hours requested. i.e. if they asked to start at 9.30am instead of 9 and they were supposed to open the shop at 9am, that isn't flexible with only them starting at that time! Same for after school hours, if the majority of our business is done after school hours we need staff to work those hours.
5700	Modifications were negotiated and tailored to suit a couple of different purposes: 1. in Sales/Service situations to ensure the business continued to be responsive to client times and expectations, and 2. in workshop situations to ensure consistency with workshop opening and closing times, and WH&S concerns, eg. safer to not left alone to work in the workshop

583. The sample below demonstrates that a number of requests were modified in order **to ensure that there was sufficient labour** available to the business at certain times, **that the business was not left with unnecessary labour** at other times, **that the labour rostered to work at a particular time was proportionate to the workflow** and that it **possessed the skills necessary** to perform the required work. For example:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
125	To better fit in with other employee working hours - so that there was no gaps in production.
418	The modifications were made as: the employee's original request would have created resource gaps for the teamthee employee was requesting to work changed hours which did not align with the workflow of the area (the employee would not be available during the busy period when customer documentation needed to be processed in preparation for the next day)
471	The day of the week was not needing another senior on that day.

713	The employee did not want to work at a time when they were at their most profitable and wanted to work at a time when there was no work available for them
932	To obtain an "even cover" in the office, there was give and take and we swapped their days and others' days to accommodate people's 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 form home of in the office. With Performers and creatives its different as we need everyone there at certain times. The thing that crops up is school holidays and school afternoon pick ups, which whenever possible we schedule around.
1323	To fit in with "team" work. i.e. there was a need to have a certain minimum number of workers on site at a common time.
2036	Needs of the business and ability to respond to Clients needs. Too short a day just isn't appropriate for most of our roles and the split of days is important so any correspondence from clienst etc is not left too long
2072	discussed best outcome for both employee to get enough hours and to ensure the work was completed at the business at the time it was most required as some tasks are done at given times and cannot be altered.
2321	An example being to address a gap in staffing arrangements on a particular day of the week.
2372	To enable the business to be adequately staffed
3250	Original request would have left business resource inadequate on certain days so modifications agreed to ensure that business operations were not impacted e cessively whilst still supporting part time requests
3275	The employee wanted more hours than we were prepared to give
3574	To ensure the business outcomes where achieved, the work could not physically be complete in the reduced hours originally requested by the employee
3623	Needed to ensure coverage for department/windfarm
3792	To ensure adequate staff coverage in each practice.
3809	Mainly to ensure that the business had continuous representation of particular tasks. That is, the negotiation included multiple employees arranging times to ensure continuous coverage.
3811	negotiation around consistency of job coverage and maintenance of hours
4031	Due to the nature of the work. Being a 7-day a week operation with Saturday and Sunday the busiest days.
4150	Sometimes we are too busy and need all hands on deck.
4390	Hours reflected the needs of the business. We have fixed service periods where staff are rostered. If someone is unavailable for that shift a replacement would have to be found.
4454	The business needed to make sure sufficient workers were present when required
4581	Original days requested did not work in with weekly production demand - a compromise reached with a less demanding day. The hours were agreed as per the original request.
4672	To align their time with other jobs that are carried out regularly. When employee unavailable the flow within the business is slowed or lost

5031	the hours initially requested didn't fit in with the genuine requirements of the business, for example during hours of peak production in a meat processing facility.
5118	Need to offset against busy periods and critical times that the particular staff member was required.
5183	The modifications were made to ensure we had coverage of an important task required for us to operate our business.
5368	modification made because the tasks or jobs still have to be completed
5380	The employee's original request did not fit with the trading patterns of the business and would have required the engagement of additional employees to cover the shortfall in shift coverage, or the unreasonable adjustment of rosters for existing staff.
5400	In our workplace, staff are rostered in accordance with airline schedules. In some cases, the hours/days requested by the staff members were unachievable as they did not have the skills to perform duties on certain airlines. This required us to look at the skillset of the employee and find days/times which suited both their skill set and their availability.
5480	Due to business requirements, unavailability of supervision, unworkable hours from the business structure point of view, lack of resources
5797	To meet business requirements such as high peak work loads.

584. Concerns associated with **the safety of employees** again featured in some responses. For example:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
380	Can only agree for such flexibility with office staff, but needed to keep hours of work inline with supervisors hours and other staff in the office (for both safety and performance management reasons).
401	The need to fit the times that the employee wanted to work into the standard hours that other employees are on site and working. We can't have employees working on their own for OHS reasons.
933	We have never had a request for a change in work days only small variations to starting/finishing times. There has only been one employee (warehouse staff) who requested to start at 6am and to leave early at 2.30pm to look after his child and this did not suit as it meant he was working on his own and we require 2 staff to be present for safety reasons. It also impacted his work collegues by leaving early and his not being there to help in busy afternoon work loads. We asked him to submit a revised schedule for his preference times and he submitted a request to start at 8am 2days a week rather than the standard 7am start and finish an hour later. There are extra staff in the warehouse until 5.30pm so the safety aspect was covered and everyone was in agreement.
1564	We need to ensure the safety of our employees and that they have adequate supervision, we cannot have someone working alone

1714	to ensure there was adequate personnel in the office at all times during opening hours and to ensure there were enough people on site for safety of all staff, supervision of apprentices and sub contractors etc
2075	1. Safety requirements - the business needs to ensure that enough staff are present at all times and that no staff member is working around equipment alone at any time; 2. Operational requirements - reducing staff at crucial times could cause difficulties in meeting timelines for delivery of product; 3. Workflow planning issues - different components are manufactured by different departments within the business. Workflow is determined by strict timelines set by clients. We cannot always guarantee sufficient and timely workflow for an employee that wants to work outside normal business hours.
3858	Due to business operating requirements. Due to Rostering and workflow issues. Due to Health & Safety issues including avoiding sole worker on site situations
4092	1) We have time restraints for despatching orders. 2) For OH&S issues, we cannot have staff working without other people in the warehouse
4511	To ensure another employee was working/present at same time due to workplace health and safety issues.
4646	The modifications were to ensure we still had adequate numbers of staff to be able to manufacture. Most arrangements have been temporary. One existing arrangement is for 1 day / week, early leaving to pick up children from school. We need to be strict on manufacturing start times to be able to function safely and with the best out put results.

585. Many respondents stated that the requests made were modified to moderate or alleviate the potentially **adverse impact that they would have had on other employees**. Some respondents also stated that requests were modified in light of the **working hours of other employees**, particularly other part-time employees. For example:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
160	To suit the business requirements. Not all requests were appropriate or added value to our business. Some requests would have lead to managers have to work longer days in order to be able to fulfil the request for modified hours.
167	Modifications to suit availability of other staff and to make sure correct coverage was provided for.

467	To meet business requirements to ensure other employees were not negatively impacted
541	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.
665	To allow for the other employees needs.
875	Made to accommodate the overall operation of the business including how changes would affect other staff
1087	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 other staff who were then expected to cover the times this employee would be out of the office. It is still not an ideal situation as the employee starts an hour later than the normal office hours leaving only one other in the office for the first hour of business when phones, enquiries etc are very busy. Other numerous instances when staff working on the chain have wanted to modify hours for personal reasons have been refused as it is unfair to disrupt the whole chain for the need of 1 or 2 staff and the chain cannot operate productively without all stands being operational.
1293	The change in hours required the cooperation from two other employees to modify their hours to ensure trading hours cover for the business. the one employee changed her hours 3 times within the one year. without the cooperation of the other employees it would have been highly disruptive.
1496	They had to be to fit in with other staff's availability. It was a damn nuisance!
2300	to fit with the hours worked by my other employees
2536	so as not to disadvantage other staff that required hours. eg: if needing to finish at 2.30 to collect kids from school but can start early to keep the hours this has two impacts... one on someone else shift (they could lose an hour or so) or two unnecessary staff required during a quiet time.
2721	Depended on the availability of other staff to cover the hours in question.
2775	To meet the needs of the school, the students and other staff members who would be impacted by the change. Parent expectations are also a concern e.g teacher availability and consistency.
2918	The business still operates full business hours, and when one person in a small customer service team works shorter hours, it puts undue pressure on the other staff performing the same role, who would be required to pick up the extra workload. It is not practical, in this role, to work significantly reduced hours. It was instead negotiated to modify the employee's role to suit the hours.
3263	Hours of operation had to be covered and moderated between other employees to be fair to everyone
3407	The employee and business needed to come to an agreement as to the part time days as we run on a ratio to child basis and need to ensure we meet our legal requirements throughout the entire week. The part time employees need to accomodate slightly to match that of another part time employee.
3477	To accomodate other flexible arrangements and request by more than one staff member in the same department.
3576	Too many teachers were working part time and wanted to have the same day(s) off which did not allow for scheduled timetables. Therefore teachers were required to alter their chosen day off.

3734	To keep the hours in line with business hours, to allow for equal roster coverage to minimise the impact on other employees or to ensure that the employee could effectively complete work in their modified hours of work.
3961	We could not provide the same no. of hours in the modified shift. Other staff's hours were also impacted by agreeing to the change.
4365	While considering the needs of the employee we also needed to take into account the needs of the business and other employees.
4457	Where possible the business takes into account the employees request. Sometimes this is possible and sometimes the request is discussed with changes that work for both the employee and employer. Considerations like the day of the week, fairness to other employees and seasonal changes are taken into account.
4488	The changes were made to the requests in order to minimize the negative impacts on other employees and to ensure there was time to complete the employees workload
5059	Operational requirements Impact on other employees Rostering capability
5067	To fit in with the rest of the employees as they work in teams on each machine
5096	Due to operational needs of the business...the proposed changes would have become a burden on other team members
5790	to suit the operational demands of the business and to balance the workload amonst fellow employees

586. Finally, many respondents cited **the inherent requirements of the relevant employee's role** or **the very nature of the work they performed** as a basis for an employee's hours of work being altered in a manner that differed from the original request. For instance:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
294	The employees have to coordinate their activities with other employees, so in some case compromises had to be reached to best satisfy the requirements of both the business and the employee.
388	To ensure that there is a person minding the reception/front desk function
403	Employee requested reduction to 3 days per week from fulltime and company agreed to a reduction to 4 days per week until the end of 2017 and the completion of the new ERP system implementation and go live. this agreement will be reviewed at the end of 2017.
428	Due to the requirements of opening, closing and the needs of the business.
776	So they could get their children to the school bus and pick them up again even though the bus stop is within 150 metres of their house but did not allow

	it the once per week when we out load live stock as the job could not be done with out staff.
823	Some activities undertaken on the farm are VERY time constrained, in those situations if the employee is not available at those times (e.g. shearing support has set hours) then another employee will be required. Sharing between employees was possible in some situations.
1062	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.
1145	Starting times or finishing times were not conducive to work committments on the farm. eg Milking times for dairy cows, Starting times for shearing shed operations.
1201	Where a role was fundamentally required to work at specific times or day, due to interaction with other colleagues, or peaks times of day for workload volumes, the arrangements have been made to be mutually acceptable
1212	We came to an agreement that work hours could be shortened to allow pickup of kids from school on a a few specified days of the week, but at particularly busy periods of the year, like harvest or shearing, they would make other arrangements for their kids.
1284	In an industry such as live performance our working week/month varies from time to time depending on whether we are making a new work, presenting a new work, or touring. This variance requires flexibility from employees and the company.
2020	The seasonal nature of farm work means that you can not delay operations due to weather, if you can't get the job done on time there is no use it doing it at all because we loose production and hence viability especially when we are being asked to work with tighter margins.
2248	As the individual's work required co-ordination with other staff, some variation was required to accommodate the needs of all staffmembers.
2682	The request came from a member of our orchestra and modifications had to be made based on the yearly performance schedule - for example the person had to be excluded completely from some opera or ballet seasons as they could not undertakes all the rehearsal and performance requirements. The person also had to accept that part time employment was the only option based on their personal circumstances and the requirements of the orchestra.
2699	some work has to be completed at specific times of day so the employee was required at work at those times
2855	In some cases there were elements of face-to-face requirements that still needed to be met otherwise it would be of detriment to the students (hence modified). In other areas adjustments could be made and a compromise reached (hence some agreed to).
2930	It has only been possible alter the days of work not the start/finish times. The days are modified in an attempt to achieve a balance between the flexible arrangements requested by the employee and minimising disruption to the students learning. Alterations to the start/finish times would require a completely integrated conversation with families, bus services and the entire staff.
2974	To fit in with the teaching timetable

2982	School operating hours, business needs and teaching timetables often dictated the hours and days an employee can be offered.
3177	To meet the need for other staff to have correct contact with them, and to attend key meetings
3180	need to work as a team
3356	In depended on the nature of their work, most jobs have specific needs that need to be completed within a specific timeframe. If they request to change meant the role could not meet the business needs we worked with the staff member to see what worked best.
3425	Modifications were made as to better suit the working parameters of the site. The employee's were not fully aware of all site conditions when making their request.
3622	Work is undertaken in teams offsite which requires all team members to meet in the morning and travel to site together. The areas that they are travelling into are restricted in terms of which vehicles can enter sites and movement around site which would make it impractical for an employee to meet at the site or arrive at a later time.
3771	To meet the business requirements of the applicable roles eg: reporting deadlines
3793	To ensure that the business met the terms of its government funding requirements for service provision.
4234	The business needs of our organisation and requirement for meeting funding contracts had to be taken into account. On principle we support our employees to achieve a satisfactory work/life balance. We try to be as flexible as possible. Each request is treated on its merit, with the aim of meeting the needs of both parties where possible.
4384	To meet the needs of the employee's position, other positions that interact with them and needs of the business, particularly when involving customers.
4440	The modifications were made to minimise disruption to the education of our students. Our students have Autism and other moderate to severe disabilities. It is critical for the student's wellbeing and learning that they have consistency in their allocated Teacher and Teacher's Aide. As such while the school tries to accommodate part-time requests for work this needs to be considered in conjunction with the negative impact to our students.
4547	The role(s) could not be performed adequately in the altered hours - the proposed hours did not match the operational requirements of the business.
4962	due to airline schedule requirements
5016	the work needed to be done due to cropping and weather requirements and the employee agreed
5154	Modifications were made due to business needs, for example requirement to have phones attended to, the ability to take a trainer out of the calendar, trying to provide students with consistency throughout their course and ensuring administrative departments could be covered and the progress of workloads continued in the employee's absence.

12.1.8 The Survey Results – Qualitative Results – Requests for Changes to Hours of Work – Modified – By Modern Award

587. Where responses to the survey question concerning the modification of requests are considered by reference to specific modern awards, certain issues consistently emerge. All responses provided by employers covered by the 28 modern awards identified above can be found at **Attachments JES33 – JES60.**

588. For instance, multiple responses from employers covered by the ***Commercial Sales Award 2010*** refer to **customer contact** and the need to meet **internal deadlines**. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
2693	The employee request a late start time. This would have impacted on the service we could provide to our customers and the ability for the business to hold meetings. The business agreed to a later start time than their contracted start time however not as late as the employee had requested.
3771	To meet the business requirements of the applicable roles eg: reporting deadlines
4521	Suit the needs of the business. Deadlines, covering for other part timers who were away on certain days etc

589. Employers covered by the ***Building and Construction General On-Site Award 2010*** referred to various issues including **restrictions on the hours at which work can be undertaken on construction sites** as well as the **performance of certain critical tasks**. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
1927	the quantity of work at the time (number of construction projects, or the phase the projects were at). the admin laid is busier at the start and end of our construction jobs.
2820	Starting and finishing times proposed by the employee would not have worked in with restrictions on starting times in place on building sites in residential areas. Secondly, the proposed times would have meant that the employee would

	need to have their own set of keys to our business premises which we were not comfortable with.
3322	As we are a service industry and we advertise opening and closing times there is a requirement to have the reception, sales and show room staffed during these times. Modifications were required to ensure that the company/business did not suffer.
4316	The employees request was reasonable as it involved altering starting & finishing times to allow him to collect his children, we approved the request subject to there being no critical requirement for him to remain on site such as completing a concrete pour, etc.. in instances where he could not get away early he was able to make other arrangements.

590. A respondent covered by the ***Joinery and Building Trades Award 2010*** provided a similar response:

> We agreed to allow the people working here to start their working day an hour earlier so that they could work 8 hours and then go and collect their children from school. Starting at 6am not 7am.
>
> The employees took a vote and all agreed to start at the earlier time because even if they did not have children by starting earlier they could avoid some of the congestion on the roads.
>
> However any earlier does not work. Building sites have noise restrictions laws they have to abide by. Often you are not allowed onto a building site until 7am. If you allowed people to start at 3:00am what are they going to do ? They can't go out on site. No one in the domestic sphere wants their builders/cabinet makers to turn up at 3am.[409]

591. Respondents covered by the ***Manufacturing and Associated Industries and Occupations Award 2010*** referred to various matters including **fixed shiftwork arrangements**, the need to maintain **production levels** and **safety concerns**. For instance:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
125	To better fit in with other employee working hours - so that there was no gaps in production.
266	Agreed for person to work part time for 4 days per week for a short time, with a view to eventually work 5 days per week. The person now will not work 5 days a week - wants to continue to child mind grandchild one day a week. As person works in a production team which requires a full crew to operate the production line it has made the situation difficult.

[409] Response ID 2044.

401	The need to fit the times that the employee wanted to work into the standard hours that other employees are on site and working. We can't have employees working on their own for OHS reasons.
1219	1. [redacted] has in the past approved employee requested changes to their work hours that are required for a limited timeframe. This is where there is no threat to the Health & Safety of a worker, there is work available and there is a Team Leader or other workers in the same section
1564	We need to ensure the safety of our employees and that they have adequate supervision, we cannot have someone working alone
2075	1. Safety requirements - the business needs to ensure that enough staff are present at all times and that no staff member is working around equipment alone at any time; 2. Operational requirements - reducing staff at crucial times could cause difficulties in meeting timelines for delivery of product; 3. Workflow planning issues - different components are manufactured by different departments within the business. Workflow is determined by strict timelines set by clients. We cannot always guarantee sufficient and timely workflow for an employee that wants to work outside normal business hours.
2450	We have a few employees that wanted to only work 4 days. In this case we were able to extend plant hours on the 4 days to cover the lost production on the 5th day. We are open to suggestions but it needs to have a neutral or maybe even a positive impact for the business as well as the employee.
2565	TO ALLOW FOR USUAL WEEKLY BUSINESS CYCLE AND DAYS / TIMES OF PEAK ACTIVITY, IN EACH CASE INVOLVING RTW POST PARENTAL LEAVE OF A PREVIOUSLY FULL-TIME PERMANENT EMPLOYEE, BUSINESS NEEDS WERE BALANCED AGAINST CONSIDERATION OF CHILD CARE DAYS AVAILABLE AND/OR SPOUSE USUAL HOURS OF WORK TO ACHIEVE A WIN-WIN OUTCOME NOTE - IN THE CASE(S) OF OUR ON-HIRE CASUAL EMPLOYEES (78 x FEMALE AND 119 x MALE AS SUB TOTAL OF ABOVE EMPLOYEE ##'s), FLEXIBILITY OF AVAILABILITY TO WORK CHOSEN DAYS & HOURS IS A BASIC FEATURE OF THE TYPE OF EMPLOYMENT. THIS INCLUDES THE ABILITY FOR THESE EMPLOYEES TO NOTIFY "NOT AVAILABLE NEXT WEEK" FOR EXAMPLE, OR SPECIFY A PARTICULAR SHIFT TYPE (eg A/NOON or NIGHT) THAT GENERATES ADDITIONAL FAMILY INCOME WHILST PARTNER IS AT HOME
3425	Modifications were made as to better suit the working parameters of the site. The employee's were not fully aware of all site conditions when making their request.
4536	We are a small business and do not have the flexibility in the workplace for people to change their days and hours without it becoming an increased responsibility on other staff members. And it is not practicable to employ further staff as we do not have the time to train new people plus it is also very difficult to find qualified trades people.
4581	Original days requested did not work in with weekly production demand - a compromise reached with a less demanding day. The hours were agreed as per the original request.
4646	The modifications were to ensure we still had adequate numbers of staff to be able to manufacture. Most arrangements have been temporary. One existing arrangement is for 1 day / week, early leaving to pick up children from school.

	We need to be strict on manufacturing start times to be able to function safely and with the best out put results.
4666	to fit in with work requirements. E.g. needing all 5 days covered by 1 or more member of the team.
4675	The modifications were made to the start / finish times. The times needed to ensure work could be done by the employee during the course of normal business hours al be it with different start-finish times on different days.
5223	For office monthly paid employees the change of hours was easier eg Payroll change of hours due to mental illness, working from home. For manufacturing/factory floor having many different shifts causes issues so swapping a shift when a vacancy occurred.
5380	The employee's original request did not fit with the trading patterns of the business and would have required the engagement of additional employees to cover the shortfall in shift coverage, or the unreasonable adjustment of rosters for existing staff.
5700	Modifications were negotiated and tailored to suit a couple of different purposes: 1. in Sales/Service situations to ensure the business continued to be responsive to client times and expectations, and 2. in workshop situations to ensure consistency with workshop opening and closing times, and WH&S concerns, eg. safer to not left alone to work in the workshop

592. An employer covered by the ***Food, Beverage and Tobacco Manufacturing Award 2010*** identified similar reasons for having modified a request:

> 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 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.[410]

593. Certain respondents covered by the ***Meat Industry Award 2010*** also referred to the nature of a **production environment**. For instance:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
1087	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 other staff who were then expected to cover the times this employee would be out of the office. It

[410] Response ID 256.

	is still not an ideal situation as the employee starts an hour later than the normal office hours leaving only one other in the office for the first hour of business when phones, enquiries etc are very busy. Other numerous instances when staff working on the chain have wanted to modify hours for personal reasons have been refused as it is unfair to disrupt the whole chain for the need of 1 or 2 staff and the chain cannot operate productively without all stands being operational.
4484	To drop child at grandparents, but still to meet production requirements
5031	the hours initially requested didn't fit in with the genuine requirements of the business, for example during hours of peak production in a meat processing facility.

594. The **operating hours** of businesses and the need to satisfy **client demands** formed the basis, amongst other reasons, for employers covered by the ***Hair and Beauty Industry Award 2010***. For instance:

Response ID	**Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.**
361	The modifications were made on a wholistic basis to suit, the business's clients, the other employees and the person requesting the changes. This generally keeps all concerned happy.
471	The day of the week was not needing another senior on that day.
713	The employee did not want to work at a time when they were at their most profitable and wanted to work at a time when there was no work available for them
2536	so as not to disadvantage other staff that required hours. eg: if needing to finish at 2.30 to collect kids from school but can start early to keep the hours this has two impacts... one on someone else shift (they could lose an hour or so) or two unnecessary staff required during a quiet time.
4457	Where possible the business takes into account the employees request. Sometimes this is possible and sometimes the request is discussed with changes that work for both the employee and employer. Considerations like the day of the week, fairness to other employees and seasonal changes are taken into account.
4474	We are appointment and retail sales based. The business needs (i.e. hours of operation) couldn't accommodate the original hours requested. i.e. if they asked to start at 9.30am instead of 9 and they were supposed to open the shop at 9am, that isn't flexible with only them starting at that time! Same for after school hours, if the majority of our business is done after school hours we need staff to work those hours.

595. Employers covered by the ***General Retail Industry Award 2010*** cited similar reasons. For instance:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
2412	The employee was choosing to work the more expensive penalty hours and days, which was unsustainable for the business
3114	We had to cover the service needs of our Base Roster, being Retail customer service. This was the Main focus for discussion, some alterations of the request were manageable to cover others were not with the existing employment team & the alterations were not practical / substantial enough to employee an additional employee & retain such an employee.
3244	To cover peak times of day and seasonal variances.
3707	To meet business needs to cover the roster and wages budgets
3889	The modifications were made to ensure the business could still meet it's needs for customer service when demand required it in respect to retail employees and to ensure the work could be completed in a timely manner for other work areas.
5282	Employee required to be on the premises to serve customers and do the office work required.
5707	Modifications were made to suit the business overall, to request was modified in context in order to suit the worksite in question, to be able to accommodate the employee yet also have a sustainable agreement, because there would be a significant impact on productivity if we did not make an amendment, because if we didn't modify the hours, we would have added costs, sometimes the proposed hours were inappropriate for the work location and so that staffing levels were appropriate.

596. Respondents covered by the ***Social, Community, Home Care and Disability Services Award 2010*** referred to **service delivery** and **government funding**. For example:

Response ID	Thinking about the instances in which the business agreed to change the employee(s) hours of work, (including days of work and starting/finishing times) with some modifications to the hours of work that they had originally requested, please explain why those modifications were made.
3010	The modifications were made due to business requires for direct service delivery. There was only limited options to meet both business need and workers request.
3793	To ensure that the business met the terms of its government funding requirements for service provision.

4325	Work hours were dictated by the busiest times, which other staff could cover shifts and to ensure a degree of consistency with whom the staff were dealing with
4403	If it didn't fit in with business needs, shift coverage etc, but could fit in if some modifications were made
5739	Modifications were made depending on: - Impact on team objectives, delivery of services and client outcomes; - Availability of suitable alternative arrangements to ensure continuity of services; - Benefits for the employee and the organisation; - Reasons for making the request; - Potential impact on other semployees within the team or work area; and/or - Financial and cost implications.

12.1.9 The Survey Results – Qualitative Results – The Potential Impact of the ACTU's Claim

597. The final survey question asked employers to describe the impact on their business if employees with parenting and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without the business having the right to refuse or modify their decision.

598. All responses received to this survey question are extracted at **Attachment JES61** to our submissions. Responses received from employers covered the 28 relevant modern awards are extracted at **Attachments JES62 – JES89.**

599. A large number of survey respondents forecasted **disruption, an adverse impact to their productivity, an inability for the businesses to effectively continue production or provide their services**. Many respondents refer to the need for certain employees to be at work at the same time as other employees because the work they perform complements one another or because it must be performed together. For instance:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
54	being a manufacturing business, it is important that the manufacturing lines start at the same time. it would be impossible to start production if all staff were not in their designated positions.
61	Significant impact, as we work as a team, and if one or more team members are absent there is a flow on effect in production. As we are a small operation, we rely on all employees working together at the same time, and do not have the luxury of having enough employees to plug any gaps.
104	We are a manufacturer of concrete agitators. We need all/most staff here at the same time to be productive. A lot of the work is done by multiple staff; ie 1 driving the crane while another is dogging the load, or 1 may be in a man-cage at heights with another person as safety look out/standby in the forklift holding the man-cage in place. Some of the parts being assembled need to be handled by 2 people at once. Our manufacturing process is run on a just-in-time basis. In the concrete industry we have very tight deadlines and we believe we need set hours of work. At the moment we allow 1 staff member to start 1/2 hour later than the others (to reduce his daycare costs). This has not been without problems. With currently only 4 assembly staff any other changes would be unrealistic and detrimental to production.
118	Massive. We require teams of people to work in unison in order to achieve maximum operational efficiency. There is a small degree of flexibility that will support maybe 5% of the workforce being shown that flexibility. Anything beyond that and the efficiencies that drive the number of jobs and the rates paid will not be achievable, leading to either decreased employment numbers or minimal scope for increased salaries and rewards.
163	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.
201	It would be catastrophic. Everyday we manufacture goods that require a certain number of people on every line. We can't even have someone say they want to work only a part of the day. The office continually receives calls from around Australia for invoices, orders, purchases & so forth - they all want answers now not tomorrow. Deliveries have to go out prior to the weekend & runs are organised so that certain parts of our designated area are covered to make sure that this happens. We supply cinemas with popcorn & nobody will

	want to come back on Monday for their popcorn if they miss out on Saturday night.
266	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. 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.
495	We run equipment that needs to run 2 shifts x 2 employees at all times.. Having employees decide their own hours of work would not be attainable. We need to cover all hours. Doubling up on labour would causes holes where we would be unstaffed or understaffed, machines would stop, and other times where we have to many people standing around doing nothing. Some areas may be of less concern but then we cannot discriminate, so this would cause serious inefficiencies that would result in less jobs being available. Would cause job losses and uncertainty in the future of the business.
933	What a completely ludicrous attempt at a ruling! It would severely impact our work as we have very seasonal highs and lows work periods where all employees are needed consistantly in the busy times. If one employee requested times that had them working on their own in our warehouse it would be too risky for any workplace injury as they may not be found for some time. Alot of our manual handling in the warehouse requires 2 people lifting procedures. If employees dictated their own hours we would have no way of establishing a consistant work flow with people just coming and going whenever they wanted that would put them at odds with other staff hours. Certain staff with specific skills ie forklift drivers, truck drivers, cabinet makers need to be around on consistant shifts to get the job done as a team. If a forklift driver didnt start until 10am the whole morning would be lost if the other forklifty driver was having his day off, how do we manage this with no say in the hours to be worked?
1201	This would be unfeasible. For example, all payroll payments go on Wednesdays following 3 busy days of processing. A recent request was for part-time hours upon return from maternity leave. As the request was for Mon-Wed, this worked for us. Had the employee stipulated that they wanted to work Wed-Fri this would not have been possible for the organisation to accommodate such a request without major disruption to business process and contractual obligations.
1292	In this industry, a business must have the right to refuse or modify. While desk jobs can be flexible, there are certain roles in the theatre that must be set by management who have the ability to see all the pieces of a puzzle fit together. There are situations (such as production weeks) where individual specialised skills need to be coordinated to a larger timeframe and ties in to other people being able to complete their roles; changing that would be a major financial and resourcing issue. Likewise, public facing roles are almost impossible to adjust - for example there's no point having a Front of House manager working when there are no shows on, even if it is more convenient for their personal life. I am all for flexibility, and as a company we already strive to accommodate our employees and contractors (we're very child friendly, with kids hanging out in our office at least once a fortnight so their parents can work) but not having the right to refuse or modify is impossible.

1787	Due to safety requirements on site and most building duties requiring 2-3 workers performing as a team, having a member that could not work in with structured start / finish times would massively hamper the coordination of day to day logistics. It may be different in white collar industries where employees can even work from home, but would be extremely impractical for the building industry. I am strongly apposed to this new proposed legislation!
1802	For on-site construction work, this could not work at all. Construction sites are only open for a limited time each day, approx 9 hours, for a number of reasons: 1. Setup and pack up of equipment 2. Council regulations on work hours. 3. Supervision of trades. 4. OH&S requires more than one person to be on site. 5. Coordination with other trades on site. Off site admin work could be more flexible, but would still require some hours to be worked while other businesses are open ie 9-5 Monday to Friday. Hours should be negotiable at best, but having workers set their own hours would not work in most instances.
1907	Being a small business (7 in total) if the employee concerned was one of our trade people currently working in the factory are of which there are 2 persons only. Then this would impact on the work flow and productivity as often 2 x are required for assembly purposes and other duties. We have 1 x only licensed truck driver and if this person was to decide their hours this also would impact on us I am strongly against an employee given the right to decide their hours of work. This must be done in consultation with the employer and mutually agreed upon.
1964	My crew depends on all employees beign present as I have machine operators and spotters as well as labourer. If one is not there then the others will not be able to operate. If this was forced then all employees will be forced to work the same hours as the one who decides on the days he is going to work. If that was the case then I would be forced to put that employee on casual and call him in only if I needed him but would not rely on him/her. Basically depending on how disruptive it was I it would not work. I already have an employee that likes to finish earlier than normal friday the weekends he has the kids, so I finish everyone at the same time.
2160	In the factory environment where there is a fixed start time it would have a huge impact. If for example a packing line requires 25 people to operate and it starts at 7.00am and finishes at 4.00pm the line can't start until all 25 people are there. If one or two employees don't start until 10.00am where can we find two people to work on the line for 3 hours. The same would apply for the end of the day. If people needed to leave at 3.00pm where would we find people to work for 1 hour. It would be totally unworkable.
2794	For an orchestra, musicians having a right to decide individual working hours including start and finish times wouldn't work. This is based upon, planning and scheduling of concerts/performances occurring 18 months ahead, which includes locking in venues and artists et. for each performance. Each musician generally has to be available for every scheduled rehearsal relevant to the concert performance, otherwise they are unable to play the actual concert.
2830	This would massively impact our business. We are in the Commercial Building Industry , as we are set to strict time lines to finish projects. If our

	staff could not work normal hours and sometimes overtime this would create a very difficult working project. We are often restricted by noise and trading hours so our projects must be finished between certain times. As we require deliveries of materials to site and some of our staff are required to go and purchase products in normal retail trading hours. This would restrict material being brought to site. If we had to price work for out of hours times we would not be competitive. This would not work in our business. We have to be able to talk to other building suppliers, project managers Building managers and our customers in normal trading hours. As we are a small team we have to be able to communicate between the office and site constantly .If some people were not available until later on in the day this would be very detrimental to the project. We have enough restrictions on us now in the Building Industry. This would be a massive distribution to our business. How far do you think we would get in a project if we had a jack hammer starting up at 11 pm at night? There would also be safety concerns working on some of our sites due to poor light and general well being.
3792	As a business with multiple small practices in different country towns within Central Victoria we usually have less than 4 staff per practice which does not give great flexibility. We accommodate requests where possible but if we have more than 1 staff member with parenting responsibilities it can be very difficult to accommodate subsequent requests without modification for the business to be able to continue to operate efficiently.
4246	Would be a major impact. We have to work as a team with progressive manufacturing processes. Any disruption to our schedule impacts getting products on time out the door to avoid contract penalties. We do not allow any one person to work alone now for safety reasons. When an employee is on sick leave we often have to take others from their job to complete the process which leads up the next stage.
4476	As we only operate the packing shed a few days a week, it would be quite difficult to operate our business if key staff members (or any staff members for that matter) were unavailable on our operational days - would be the same problem if they had to start later or leave early. This would mean we wouldn't be able to pack on those days, or we would need to find someone else who could work on the days we require.
4563	We are a small family owned manufacturing company that operates one shift per day, five days per week (Mon-Fri). We work very much in a small team environment and do not have more staff than we need. In order to be efficient, our lean manufacturing process requires all members of the team to be present at the same time as one process relies on the timely completion of the process before it. It would be very difficult for us to manage our scheduling if employees were starting and finishing at different times, Furthermore, our small but effective management team uses the time after normal time working hours of factory employees to do other work that is not possible to be completed during the work day when supervision of employees is required. We also believe the team spirit and camaraderie may be lost if people are starting and finishing at different times. For smaller businesses such as our's, this is not a practical proposal.
4711	Our production is geared to everyone having a job for the full 7.6 hours. They start together because they are part of a team as the product is made - we cannot have someone starting at a different time unless we replace that person with someone else on the line. There is no point in having someone turn up half way through a production run. It is not a matter of us shuffling around someone who is not working to accommodate a late start or early

	finish. Our factory works 24 hours a day. The office has to be manned for the full day as we receive phone calls & requests for information all day long. Many of these employees also do Invoicing & these are sent to all of the other states plus NZ via e-mail. We have drivers in every state plus NZ - deliveries have to be done within a certain period as all of our customers order weekly & if stock is not delivered by the end of the week then they basically don't want it - we supply popcorn & packaging to all cinemas in Australia & NZ. Nobody comes back on Monday to get a back order of popcorn after having been to the cinema on the weekend.
5508	Our business is customer focussed. We are a small machine shop with machinery and equipment that is set and operated by skilled and semi-skilled staff over two shifts. All decisions made with respect to working hours are based on Machine and Operator loading schedules that have been established to meet customer delivery demands - usually a fine balancing act. If employees were to decide their own working hours there would be a great probability that this balance would be thrown into caos - with the possibility of machines standing idle or having too many employees on hand at the one time. The timely delivery needs of customers would not be met - we may loose the customers who would take their business elsewhere (even offshore in our case) - the employees ultimately loosing their jobs due to the downturn in work. Also, in our business, staff need to be on-hand when needed to ineract with others. We have very little flexibility in most cases. e.g. when seeking the immediate attention to quality or maintenance issues.

600. Unsurprisingly, a number of respondents stated that such an entitlement would result in **increased costs for the business in various forms including wages, training, recruitment and so on**. For example:

Response ID	**If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.**
109	Increased costs as factory operating hours would have to be expanded. Staffing would need to increase if specialist staff were not available at particular times.
111	A lot of our tasks are very specific and require extensive training to perform them, it is not possible to get someone in for short periods and expect them to take up the slack. There would be unnecessary training costs, disruption in customer service etc. We are a small company just keeping our head above water after some serious loss years, someone filling in for a day would spend most of it asking questions and consuming time of other employees because they are not here for the whole time and know whats going on. Also if they have short days it would put strain on other employees to take up the slack when they were not here, and trying to get someone for the odd hours would be impossible.

	I don't mind negotiating something with an individual, we can work out a plan for both parties, but to lose control of deciding on the hours people want to work is insane.
413	It is important businesses are allowed to respond to these requests after careful consideration of both employee and business needs. This should not be mandated as there are many variables to consider. From a business perspective it only exists based on their ability to deliver product or service in a timely manner. Changes in available work hours can reduce the ability to meet the deadlines and outputs required to achieve customer deadlines. In our business this is critical as many of the items are exported to specific timeframes. Also has potential to reduce people's availability for overtime which is used as a backup to ensure deadlines are achieved. Businesses base their employment numbers on average amount of work throughout the year. At low periods it can be very easy to respond to employee requests for reduced hours but alternatively in busy periods it may be impossible to allow a person to reduce hours as other employees are unable to pick up the extra workload. In addition it may force workplaces to increase their workforce at considerable extra cost as it is very difficult to quickly find another person with the same skills to cover the full-time tasks required eg job share. I fully support an employees right to request flexibility of hours but an automatic right places too many constraints on a matter that should be negotiable to find a workable solution.
923	The nature of employment in this organisation is, for many employees, that flexible and irregular hours are the norm. Several key positions are structured around the requirements of live performance e.g. evening or weekend shifts. In these instances, it is essential that staff are available to work as per production schedules and this, along with allowances for overtime, or negotiated lieu time, is specified in the position descriptions. In the event of parenting/caring responsibilities occurring, it would be of utmost importance for this business to be able to negotiate work hours. 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. With such a small team of full-time and part-time staff, it would be highly likely that additional staff expenses (i.e. casual wages) would be incurred to cover any parental/caring absences during standard business hours.
2827	It would be difficult to manage our manufacturing if employees started at different times. Our employees usually have to work in teams of 2 or 3 or 4. This would affect our business' ability to be competitive, as we would need to either employ more staff, which we can't afford. We are already flexible with our staff should they want to see their child at a special event at school or similar, for an hour. But to start every day at a different hour to the rest of the staff would cause us problems.

2875	We would not be able to use them for installations or work where a production line is in place, major problems as very often we need more than on person to do a job at the same time. The workshop has to stay open longer and supervisors have to be paid overtime, Electricity and other cost will increase due to longer working hours. It doesn't work for manufacturing. There are many more problems associated with this proposal.
3404	In some instances we would need to employ more people to cover the absences which leads to additional costs to deliver the same service. Service delivery may be reduced if cost prohibitive Employees requests are often unrealistic to sustain ie compressing long working hours into lesser days to attain the same salary
3588	We have two shifts and any variation from the set rostered staffing arrangements would create problems for maintenance of production volumes as well as the scheduled meal and break times for staff. It would also lead to overtime being worked by some staff and/or the recruitment of agency casuals, which would increase the cost of production.
3185	This would have significant impact our operations as we're an emergency and maintenance plumbing business and we require our employees to be available so we can meet our customers needs and respond to real emergencies. Any employee on specific start/finish times would make scheduling extremely difficult and we would have to employ extra staff to cover for the times when the employee/s is not available. There is a real risk of having more than one employee with these responsibilities. There would be significantly more costs to the business in administration, management of employee and scheduling. Small business likes ours are already under pressure to keep our costs down and this would force us to reassess the profitability of business. Further it's impossible to get skilled and qualified staff such as plumbers anyway. We value our current staff and we do our best to meet their individual requests for time off, but not having the right to refuse their requests or to modify their decision makes it an impossible operating environment for a small business like ours to be successful as well as meet the current market/service requirements.
3761	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 productivity, or we may have to make the position redundant, or we may need to unreasonably change the roster for other employees.

4593	It would have a direct impact on headcount and the ratio of staff costs to revenue. For every employee that decides to work reduced hours at their own discretion, we will need to backfill the remaining parts of the role. This means recruitment costs, additional payroll costs, and additional insurance costs, and also the cost in setting a new person up to work, for example IT, real estate (desk), and tools/materials to perform their job. We operate on tight margins and our cost model does allow for much variation to indirect costs outside of our control.
5223	For a family owned manufacturing business (50 years) for medium sized organisation there would be increase in overheads eg additional administration time to allocate labour for shifts and to cover for unplanned and planned absences, complexity of weekly payroll systems with different payroll lines for different shifts, extra training costs for adding additional training sessions, additional supervisor hours to cover different shifts, meeting customer demands may be affected eg loading and unloading trucks at specific times and requiring to pay for labour hire to cover the times that permanent employees are not working, increase in overtime costs. These are only a few.
5707	We have often made agreements with employees which suited both parties by negotiating sensibly over a period of time so that days and hours were reviewed properly, so to have this removed from the business will not take business needs into account. The employment contract, which includes working hours and days, is unable to be breached by the employer, so effectively the employee could then breach the contract without any negotiation, creating what was once a harmonious relationship into a negative relationship due to the potential negative impact of the changes. Most employees are parents and many have elderly parents, so this potentially could be utilised for the majority of the workforce creating major disruption and we would have to make every role replaceable, which could create job insecurity, high levels of staff turnover and added recruitment costs, it could significantly impact workflows, the business could see a loss of productivity, it would affect customer service and it would impact manufacturing output. Positions sometimes can't be run on a part-time basis because they are critical roles which are impossible to job-share given the high output and because they are highly skilled positions, it would increase cost and reduce profitability and the company would need to undertake a significant amount of new training, thus impacting output. It could create disharmony within teams given that other staff would have to wear the slack, more resources would be required to manage this, there would be constant job hand overs which would impinge upon output and there could be communication challenges due to lack of cohesiveness in teams and inability to communicate on projects, meetings and phone calls. Time and attendance and payroll would be significantly impacted not knowing who would be where and when and it could create OH&S risks if absences were not prepared for and we would have to transfer employees to new worksites to suit the request and they may not be happy about the relocation and thus resign.

	Fixed working hours are required for ongoing business functionality and there could be increased payroll costs given other employees will have to cover shifts, work extended hours to cover the work location's opening hours, they might need overtime, meal and driving allowances and the like. It may significantly impact the other affected employees, as they may be away from their families for longer, creating a demotivated and unproductive workforce and also other employees who are not parents or carers could become disgruntled and feel discriminated against due to their own personal lifestyle choices and situation. We may be unable to cover absenteeism, given we would require job share roles and the other worker may be unable to cover for absences. The business has a duty of care for its employees and takes its people responsibilities very seriously, however we would be unable to verify an employee's parenting responsibilities and demands to change employment agreements could be exploited for the purposes of gaining a second job which might, due to fatigue levels, create OH&S risks whilst employees are driving company vehicles, operating forklifts or using machinery. Last but not least, the business could be constantly changing staff rosters and staffing levels for every worksite location, which could be a logistical nightmare.

601. Other respondents said that an ability for employees to decide their hours in the manner sought by the ACTU would result in a **loss of revenue** for the business. Many characterised it as loss of significant magnitude. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
538	Honestly this would be bloody ridiculous and unions coming up with these stupid ideas need to be made to run their own businesses to see what kind of impact their constant changes to employers rights to run their businesses have on them. We are a small family run business that employs 7 out of our 20 staff who are parents and we pride ourselves on being caring and accommodating employers. Taking away our ability to roster those 7 staff as needed for our business to operate would be very damaging to our business. For instance two of those staff already do not work on Saturdays (the busiest day in our industry) if the other five were allowed to set their own hours and not work Saturdays that could potentially cost us about $600 per hairdresser in lost revenue. That's $600 x 5 = $3000 a week or about $150 000 per year, this is more money than the business makes in profit. So yes these changes would have a huge impact and could potentially see businesses close. Its time Unions started thinking about how they can create more opportunities for employees instead of seeing all businesses (most who do the right thing and have their employees best interests at heart) as some kind of evil that must

	be punished. I will also note we are business that is constantly hiring and training the next generation of Apprentice Hairdressers (currently 7) in a trade there is currently a huge shortage of, something many salons have given up on completely. So we are trying our best to make a living, offer opportunities to aspiring young hairdressers and wow our clients, but it is becoming increasingly more difficult and expensive to do so with constant regulation and intervention from people with little understanding of what we are going through.
1062	It would have a significant impact on our business. If for example our crops are not seeded early enough, we will miss the rain and their yield will in reduced. If the crop is not sprayed at the right time, the pest will not be controlled and the yield will be reduced. If the crop is not harvested quickly it will be exposed to the weather and the yield and quality will be reduced. If the sheep are not drenched or crutched in a timely manner they will get worms or fly blown and this impacts severely on both their welfare and our ability to produce wool and meat. All of these factors add up to a financial deficit for our business which would reduce our ability to employ staff in the first place. There are also environmental (soil erosion, herbicide resistance) and animal welfare considerations of not farming in a timely manner.
1130	Our business operates in the agriculture sector. Tasks are often defined by a window of opportunity to actually perform them. Therefore there are occasions where work must be performed at a certain time of day. If it is not performed at that time then the business can suffer a significant loss of income. For example, there are situations where crops need to be sprayed for a fungal outbreak. There is typically only a small window of time during the day that this task can be actually performed due to weather conditions. If this window of opportunity is missed, the crop could attract a significant yield penalty or complete loss.
1843	It would cause serious disruption to our administration of construction schedules, leading to potential delays/liquidated damages, including a negative impact on our customer service/communication - our home building business relies on timely processing of our clients' pre-construction processes, and then on the timely completion of construction, including dealing with clients' queries/variations during the construction process. This lack of secure administrative resource (due to modified work times) would cause financial & reputational damage to our business.
2020	If we employees choose to work only hours that suit them it would not only decrease our capability to maximise our productivity it would make us financially unviable due to the loss of income yet still paying for labour which is not effective. There needs to be a clear choice to either have the capacity to work within the needs of the employer or not. I do believe we are flexible in down times but during peak times there is no room to pick and choose.
5104	As a small medical practice we would be unable to open extended hours as we currently do (8am-8pm and weekends) as most of our staff are females and given the choice would most likely want to work school hours. It could have a significant impact on our services and financial viability.
5263	It could potentially render us unable to trade. Even though we have a flexible workplace, the contracts that we work under with our major clients dictate that we must service them during particular hours of the day, so should over half my workforce that have parenting responsibilities be able to dictate their own days and hours would jeopardize our companies ability to service the contract that supports the majority of our income. It would be completely unacceptable.

5509	The business is contracted to provide passenger transport services within a designated timetable. The business does not have flexibility in adjusting the services and could be found to be in breach of the contract with the possibility of losing the contract.
5634	We have only had 1 request to change the hours of an employee and were able to accommodate that request as that employee was not client facing so there was minimal disruption to the business. For this employee, they had certain tasks to complete each week & provided the tasks were completed it didn't matter what time/day they were done. For client facing & operational staff (sales counter, warehouse, truck drivers), it would be completely unworkable for them to have the ability to decide their own hours. During our opening hours, we need to have employees for the business to function! Employing & retaining quality staff, in addition to all the other aspects of running a small business, is challenging enough already - if employees were given the ultimate power to dictate their hours of work, we would seriously consider closing our business. As is stands, we don't set our opening hours to suit ourselves, we open the same hours as other businesses within our industry. If we were to alter these hours to suit our personal preferences or due to staff choosing not to work the hours we are currently open, we would definitely lose a large portion of our sales that would impact the viability of our business.
5790	Massive Impact as we would have to employ more full time and casual employees. We CANNOT recoup or offset this cost due to the restrictive government contracts that only pay us for the number of employees required to provide services without any provision for contingencies. These costs come straight off our bottom line which is already extremely slim due to erroneous contract KPI's etc.

602. An alarming number of respondents stated that a **disastrous impact** would be felt by their business and/or that they would **close their business or, at the very least, consider closing their business**. Some examples include:

Response ID	**If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.**
122	We would simply go out of business. We supply equipment to retailers and in most cases the work needs to be done outside of store trading hours, in order to reduce safety risks and to minimize down time for our customers. If we were not able to perform the work when it suited the customer, they would take their business elsewhere.
480	We would probably close the doors, there is no way we could run the business that way. We have days and times that are busier than others, clients would get upset and we would take huge losses. Very few businesses could do this without it having a significant loss. Times are hard enough in WA now so when the work is there we need our team to work as a team together to keep the clients happy. We already find it hard to compete with many competitors in this industry who pay & hire their staff illegally. Telling clients we are understaffed due to this reason will cause them to go to

	competitors that pay their staff illegally. This course of action would be immensely unfair to small businesses.
713	It would have a huge impact; our income is directly linked to out employees producing. It is pointless if they choose to be in the salon at a time when the salon is not busy (eg Monday) and not be in the salon when it is very busy (Saturday) It would actually be catastrophic for a very small business
776	This could make it imposssible to care for our livestock and to operate a profitable business. It would impact both animal welfare outcomes and the day to day running of the business. It would be the last straw for me and I would exit the agriculture industry so our employees would no longer be required.
2682	As a live performance company in both ballet and music we would be unable to meet the requirements of our performance schedule and artistic standards if our dancers or musicians were able to decide/modify their hours. If our support staff were able to do the same, we would be unable to support the staging of our performances. This change would have a devastating and unsustainable impact on our business.
4716	The need for longer opening times. the cost of supervision of same. we manufacture daily and distribute daily what we manufactured today to the JIT production method .This is one of the main reasons how our business is still manufacturing in this country. our trucks leave daily for interstate. We do not have the financial capacity to have large warehouse's full of stock we would have to pay for If we have to allow flexible hours. we start at 7.30 am manufacture and load product by 3.30 am every day.to allow some of our operators flexible hours say i.e. 10am to 6 pm we will not be able to make the goods same day as shipping them ,therefore enforced flexible hours will shut the doors of this business 110 staff over 13 sites all over Australia
5385	that would add a level of uncertainty around the work to be performed being fulfilled. if we couldn't ask about the expected working hours at the interview stage i think it would burden the business. i feel that businesses need to have high expectations on staff to fulfill the duties. if giving the employee the right to choose their own working hours meant that we were uncertain then i would not employ anyone. i would rather outsource to overseas
5598	Being a small/medium housing construction company where most sites require a team of two working together and on-site supervision of other trades is required to be conducted by these employee's it would be extremely difficult to staff and manage our projects if the working hours were so flexible and determined by the employee'sand i would suggest that we would more than likely be forced to close our business. Our office also requires full time staff working regular hours.
5830	We would not be able to operate under these conditions and remain competitive. We would cease manufacturing and become a importer with loss of 39 jobs. As a manufacturing company we can accommodate altering starting and finishing times but we need to work 5 days per week for 38 hours minimum with some sections working an additional 5hours overtime.

603. Numerous respondents stated that an employee right of the sort described would **impact upon the business' service delivery** and **inhibit their ability to meet customer demand**. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
93	The impact would differ depending on their role. Where they work in isolation or a large part of their role is a task drive process, there would be minimal impact. There are a few, but not many roles like this. Where their role is in a supervisory capacity or where they are a part of a sequential process this would be very difficult to manage. There are peak times when we need everyone together to meet customers needs and we can't afford to wait for a part to be done. This would result in reduced customer service or more likely increased costs to meet the customer service.
97	Would not be able to meet customer service needs. e.g. customer wants supply at 4 pm when worker had left before that time - we need staff present between normal business hours 8 am to 5 pm to meet customer demand or the customer will go elsewhere, the business will lose sales, lose profit and shut down - employees lose jobs
107	Complete chaos and without exaggeration it could be the end of the organisation. Most of our staff are in customer contact roles which can only be worked during office hours ie the same hours that our customers are working. If we have staff dictating their own hours it is likely we would finish up with small gaps during the week where we wouldn't have enought staff available to meet customer demand and for which we could not reasonably hire another employee to cover it ie the number of hours would be too small and the times at which they were needed would be unattrattive to be able to attract the calibre of staff we need. We have tried part time hours ins some of our account management roles before and it just didn't work; customers complained that the continuity of cusotmer care suffered.
122	We would simply go out of business. We supply equipment to retailers and in most cases the work needs to be done outside of store trading hours, in order to reduce safety risks and to minimize down time for our customers. If we were not able to perform the work when it suited the customer, they would take their business elsewhere.
144	We are fully dependent on our clients requirements, which includes very short notice for shutdowns and equipment repaints and repairs which go through our workshop. We rely heavily on people being available at all times, so if employees had the right to refuse duties when required, then this would be extremely detrimental to our companies survival.
191	As a business who needs to be available when our clients are available, having hours of work which were too flexible would mean our teams would not be working together, our consultants would not be available when our clients needed them to be and they would not be able to respond to issues inside the work hours of our clients. For those in support roles, they would not be available at the times our team needed their support.

583	Our business is reliant on patients and we have a certain window of times each day in which to provide that service. Should staff with parenting responsibilities choose not work some or all shift offered and if they are able to predict there own hours would mean that we would financially suffer due to not being able to service our patients and this would place a greater workload on to those staff who have no entitlements to choose their own hours.
800	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
2803	Being a school, we must provide appropriate supervision and direction to students at all times during the school day. For the school to function and fulfill its duty of care this means that teachers are to be on site from 8:15 am to 3:45 pm each day. A full time teacher could not ask to modify their starting and finishing times without impacting the schools ability to fulfill its duty of care. If a teacher was to request that they work 2 days a week instead of 5 days a week, this modification would impact the educational outcomes of the students they teach. The introduction of a different teacher for 3 days, especially in years Kindergarten to Year 6, creates a disjoint in the curriculum and therefore student learning. Whilst this request may service the needs of the staff member, it will impact the learning of the students in their care.
2930	It is highly likely that there will be significant additional staffing costs to alleviate the following problems: Class coverage of morning and afternoon lessons when it would be expected that most flexibility would be expected; Timetabling for the entire school would become problematic, particularly should someone request a change of hours mid year/term; Timetabling would also be impacted due to the restrictions of having to lock out certain times for certain staff thus reducing the scope for a suitable timetable for all staff/students across the school. For example, certain priorities are given at times to allow for double periods for practical lessons and certain assessment tasks. From a staff cohesion point of view, there is likely to be a fragmentation where staff disaffected by an unfair/unsuitable timetable may be unsympathetic towards the individuals that have influence their timetable outcome. Ultimately, the secondary students will suffer at an important time in their learning due to having multiple teachers for each subject. The quality of learning is likely to decline with further pressure added to those involved in the sector from stakeholders expecting better educational outcomes.
2982	Due to the operational needs of a school (teaching timetables and school hours), this situation would likely be untenable to manage in relation to teaching staff and extremely difficult in respect to support staff (particularly classroom assistants). It would almost certainly be seriously detrimental to the quality and consistency of the education and care our students

	experience. For instance, this proposal could result in multiple teachers teaching a single class of primary school aged students or a particular subject over a fortnightly timetable in a secondary school or college setting. Consistency in staffing is critical to academic success and in our experience multi teacher situations have rarely produced positive experiences for our students. Along with the academic achievement of children, we also have a strong focus on the pastoral care of each of our students. This proposal also has the potential to have a very negative effect on our students if staff are constantly changing. It is our aim for every child to be well known by their classroom teacher (primary) or pastoral care tutor (secondary) and this proposal has the potential to severely limit our effectiveness in this area. While there may be some students who cope well with changes in staff, the vast majority (particularly those students with disability or special needs) have a more positive experience, both academically and pastorally, in situations where there is consistency. Parents of our students (particularly in primary school years) also regularly express their desire for their children to have consistency in teaching and support staff. While we do currently attempt to accommodate staff who wish to change their arrangements due to caring or other responsibilities, the practicality of every staff member having the right to alter their hours and days as they wish would present a particularly challenging situation for us.
4440	We need to ensure staff are onsite when students are also here. Our students have Autism and other moderate to severe disabilities. It is critical for the student's well being and learning that they have consistency in their allocated Teacher and Teacher's Aide. As such, if the school was unable to refuse or modify the request this would be detrimental to the education of the students and their emotional well being.
4604	1. For non-customer facing employees the impact would be negligible. 2. For customer facing employees the impact would be significant. Especially sales staff who need to attend customers premises. Competition is intense and not attending at a time to suit the customer leads to lost sales. 3. Warehouse staff and production staff would have a significant impact on getting goods to the customer in a timely manner.
4821	We are funeral directors, funeral crews and catering staff are scheduled around funeral times. To confirm a funeral time we have to co-ordinate with clergy / celebrant, Church / venue availability, cemetery arrival times available (they have a set time between one funeral arriving and the next). The arrival time at the cemetery can dictate the time of the funeral service / crematorium arrival times available which may include a Chapel. We also have to roster crews for afterhours arrangements / transfers, nursing homes and private hospitals do not have to provide mortuary / holding facilities, we also may be required to attend to a house transfer. Catering has to be ready to serve when the funeral service is over, and

	families are ready to join family and friends for refreshments. Cleaning and grounds need to be organised not to clash with a funeral service, but be ready for a funeral service and cleaned when the service has finished. IF STAFF WERE TO CHOOSE THEIR HOURS OF WORK, WE WOULD NOT BE ABLE TO OPERATE OUR BUSINESS.
5247	Essentially, it would have an impact on the bottom line. We would not be able to provide the same level of service to our customers. One example is we have a team of data reporting analysts in Victoria who analyse data sent from remote customers' sites around Australia. There is a very tight turnaround for the results to be sent to the customers. If employees had the final say in the hours of work, it would be very difficult resourcing to cover different time zones (WA & VIC for example). To date we have been able to accommodate all requests to changes of hours and we will continue to do everything possible to accommodate future requests. However, as a business, there are a number of aspects we need to take into consideration before agreeing to the request. If employees are able to dictate their hours without agreement by the employer, I believe it will have a negative impact to other team members, customers and the business.
5378	We are a restaurant serving dinner only. Our customers are served between 5:00 pm and close at aprox 11:00 pm Flexible working hours would be impossible for our business to provide

604. A significant proportion of survey respondents provided examples of certain **tasks that are required to be performed by their employees at specific times** and the possible consequences if an employee decided that they would not work at such times. For instance:

Response ID	**If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.**
194	For employees under the clerks award - this would have minimal affect. For employees under the pastoral award - this would have significant affect at various times of the year due to weather conditions and strict timeframes that shearers work under.
541	The organising of the daily activities for those personal would be more difficult. Currently all the days activities are allocated at the beginning of the day and staff then go the there specific roles, some of these at different locations. This being the case travel issues come into play (extra vehicles; due to biosecurity restictions private cares can't be used for work) or a team leader has to be located, etc. Working outside of the ordinary hours also has OH&S conitations. Staff much of the time work in pairs or at least in a position

	where they can communicate with others on the job. If a person choses to work out of ordinary hours we need to have another person do the same. We currently do a minor amount of allowing staff to start later or finish earlier. If this was to be an obligation there would need to be a limit set on the number (10% maximum) that could be on this arrangement. The times would also need to be within their employment agreement, not just ad hoc. We need to care for animials and also the welfare of the other staff so to do both we need good consistent staffing at all times. Most tasks can't be put off until tomorrow.
718	Might as well close up shop. Our business requires timely and precise actions dictated by weather and crop conditions. Employees are requested to work when the work needs to be done
957	Dairy farm, cows need to be milked each day 7 days a week, at a regular time, and all other duties need to be done through out the day as well. Could accommodate one or two shifts per week, but could easily get out of hand and make the other workers bitter. Pay would have to be adjusted accordingly so impact on business is minimal. For agriculture would not work long term.
1409	This business grows cut flowers which have to be picked early in the morning before the temperature rises, exactly when the flowers are ready to be picked and when they are needed eg we do a big pick for the Melbourne cut flower market that operates on Tuesday, Thursday and Saturday so flowers need to be ready to be picked up on Monday, Wednesday and Friday. We also need to start as early as possible in summer because it is not possible to work in the polyhouses when the temperature rises. It would not be possible to operate this business if employees couldn't start early in the morning and couldn't work on the required day/s. I employ only people who can start early in the morning and would not employ someone who couldn't. It is not possible to delay the picking of the flowers if they are at the stage where they need to be picked. (Maybe next thing might be that employees will have the right to tell me what colour flowers they would like to pick each day!!!!!!) I have accommodated employee's requests for different hours because of caring responsibilities when they have been able to be fitted around the business requirements eg leaving early to take an elderly parent to a doctor's appointment.
2105	We are milking 800 cows at present and if people are not there to milk, then the cows could potentially suffer. Cows require milking twice daily and if they are not milked they can easily develop mastitis which severely impacts on thier health, often resulting in death. As mastitis in the herd increases so does the Bulk Milk Cell Count (BMCC) which is a bacterial count of Somatic cells in a bulk milk sample. Milk precessors use this count as milk qaulity determinant and penalise farmers financially if this count exceeds a limit of 250 units. If cows are not milked just once this can have a significant impact on a cows Somatic Cell Count as bacteria multiply extremely quickly in the udder environment. Having staff decide when and where they want to work would create havoc if they decided to choose not to come to work. We work together with staff to understand their personal committments and to ensure their roster accomodates that. Giving the decision making over to employees is open to problems I believe.
2755	It may hinder the way we work as we often go to multiple sites each week as we work mostly on small domestic jobs. However if communication between employers and employees is open and regular I don't think it would have that big of an impact. Being landscapers we crucially need to work in with weather

	patterns and this can change our plans daily! Flexibility is key to the success of our business - this means our employees need to be flexible and in return we offer flexibility to them so that can manage their parenting responsibilities on their terms and we can all develop the best possible work/life balance.
4933	Our farm business is predominantly Dairying - The main job every day is to herd cows to the milking area and the milking process itself, this takes up to 8 hours per day in 2 shifts. It is essential that all employees arrive at work at specified times, thereby allowing the whole team to work together to complete the task. It is impossible for us to cater for an employee that chooses to work at a time that does not suit our business - this would be totally unsuitable
4989	Our workloads are dictated by seasonal demands that at times require full time attendance seven days per week. We have responsibilities to care for and maintain the welfare of livestock, including duties like milk harvesting that have to be carried out twice a day, at the same time of day everyday seven days per week. Having no say in an employees hours of work would seriously compromise our business to the point that an arrangement such as this would be unworkable and untenable. We have always been willing to work with an employees needs and have always strived to provide them with a workplace that is flexible and understanding. To have an arrangement whereby an employee dictates to us what their hours of work would be would have a number of effects, including us seriously reconsidering reducing our operation so we didn't need to employ any labour at all. If someone wasn't able to milk cows twice a day at the necessary times then they would have to reconsider the industry they are in. This isn't just about our business but the welfare of our animals and to have another restriction imposed upon us when we are already struggling with conditions out of our control like climate and global prices would put us out of the industry.
5497	We operate a dairy farm business and employ casual staff to milk in the afternoons. We have fairly definite milking times dictated by cow grazing and day light hours. The dairy shed must be operated by two people, so if start times were altered it has to be for two employees. We have always been flexible and endeavour to accommodate their preferences, believing that casual employees (who are students starting on their careers) are empowered to choose their own schedule to meet their personal commitments.

605. Several survey respondents stated that, as a means of managing the potential impact of the employee right described in the survey question, they would **employ casual employees, employees through a labour hire agency or implement subcontracting arrangements in preference for the engagement of permanent employees**. For instance:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
173	We would stop investing in our business because it would not be possible to achieve a reasonable return on our capital outlay for machinery, etc. We would be less inclined to invest in training and development of our workforce, for the same reason - the return on investment would not be feasible. We would change our workforce mix to increase utilisation of subcontractors, resulting in a reduction of opportunities within our business for secure, long-term employment for unskilled and semi-skilled employees.
300	We would have to revert to a greater level of casualisation of our workforce.
567	I might as well shut up shop, stop employing people and find a job for someone else myself. It's already a nightmare balancing everyone's lives and trying to serve my customers. At the moment I can employ people and work with them through their employment to find the best way forward for everyone. I am looking at making more of my Team permanent however If this came into effect I would have to keep them casual as I believe I would have more leeway for my business.
746	It would drive to to employ more casual staff and less permanent staff as the permanent employee becomes less reliable.
2566	Too inflexible as it would mean that we might not be in a position to meet the needs of a 7 day rotating roster to work in retail making it difficult to continue to offer full-time and part time employment. Would force a move to more casual employment
3317	It would just be the next step towards manufacturing offshore. If this was forced on our business we would be more selective of who we employ. We would probably use a larger pool of casuals for shorter duration periods. We would ensure our business stayed under 15 employees in order to have some control over our labour requirements
3475	It would make scheduling of hours more difficult. The end result being the employment of more casuals over full time or part time workers. With casuals you can be ultimately flexible with hours. With full time / part time you cant (a weeks notice for change of hours for part timers).
5604	This could have the potential to have a large impact on our ability to operate. We have a large amount of manufacturing equipment that needs to be operated by people that can work on a fixed roster. If all individuals could make changes to this roster we may end up in a situation of having no assurance of when expensive equipment could operate. I think this would force employers to move to a work force based on casual labour. Or companies will be encouraged to outsource their manufacturing and other tasks that require constant manning to other countries or regions.

606. Some survey respondents expressed concern about the **increased regulatory burden and administrative costs** that they would face. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
152	At best if would make scheduling of our complicated production processes a management nightmare, reducing efficiency and lengthen production times. At worst the impact could be catastrophic as our business. We already operates with very tight customer driver timelines and very small profit margins. Even a small reduction in labour efficiency would be terminal.
2151	There are already so many complexities in managing staff/people that trying to manage employees working different times and days would be an admin nightmare. We are a small business and don't have the resources to monitor this. The external on-flow effect of this is also then having to make sure that other contractors know that a particular site opens at a different time to our other sites because the employee managing that site works different hours, and then getting those trades to be able to work in with that. The industry operates generally between 7am and 3.30pm and if the request was made to start later and finish later or vice versa, we then need to make sure our contractors can change their work hours for that project etc. Most will likely not be able to do that.
2775	We would potentially be unable to viably operate as a school. Management of timetables, class combinations and relief could become very costly and complex. Parent satisfaction with the care and educational arrangements for their children may be compromised - we have seen this in the past when teaching arrangements change due to personal circumstances. Relief teachers can be very difficult to organise. The daily routine may be impacted as early, middle and afternoon lessons are quite different in nature, with specialists more often used in middle and post lunch lessons. Staff disputes can arise if one is seen as taking a lesser load e.g. lessons requiring less preparation and / or marking.
3521	this is a very complicated issue, we as a business would look at all option to try to meet every bodies needs, being a manufacturing industry rosters and shift are crucial to maintain production. to change 1 or 2 employees days and hours to suit there needs would affect the times and hours of up to 40% of the remaining work force. To some degree I can understand why manufacturing has gone off shore, as a business that employ's around 120 employee's on site to individualise days and hours for individuals is very complex and would lead to the situation if not managed correct where all employee's would like the needs met for hours and days of work.

607. Concerningly, a number of respondents stated that they would thereafter be **reluctant to employ employees with caring responsibilities, or in fact would not do so**. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
290	It would have a huge impact and I would need to employ more childless staff to cover more hours... it's a ridiculous proposal...
399	I would more than likely not employ them if I had a choice to choose between other good candidates. I have a business to run and clients to service, so having no right in choosing their hours wouldn't work. Being a parent myself of three children. I do understand the impact children have on your life, but, business and parenting are two separate issues that shouldn't impact a business without the owner of the business being able to negotiate.
832	I require staff to be working when I'm working as most work requires two people working together. It would be absolutely IMPOSSIBLE to employ staff working different days or hours to me. I would definitely not employ anyone under those conditions. We give staff time off to attend their kids sporting events and give them flexibility when kids are sick. If employees were allowed to choose their hours or days then a lot of people will be unemployed. We would look for machinery to reduce the need for as much labour and reduce employment to a minimal casual labour.
867	Basically operations would cease. Operating a commercial beef enterprise, in most circumstances, employees all need to be at work at the set times required together to ensure that the work gets completed. i.e. Trying to muster cattle without full number of staff on hand, to meet not only workload, but to meet truck deadlines, customer orders, etc... If this was the case, it could be possible that we would not look employment to anyone who had any caring responsibilities. We would possibly not consider employing some with a family, which we currently do, and believe that it is great to have as not only part of our business but community.
2430	We are dairy farmers and as such we CAN'T change the times the cows are milked to suit staff. Full timers would be difficult to manage. The business having no say, would make it extremely difficult/untenable. Part timers/casuals could choose the days/milkings that suited them. However if there were several employees not able to milk mornings through the week, then we would have to employ others to cover the short fall. And we can't have excess staff at other times of the week, so some staff would have to reduce hours/milkings. After all, the main aim on our farm is to MILK THE COWS. If this proposal was passed, we would have to consider the type of person we employ. ie, possibly less females as they are often the ones left to take on the type of responsibilities you are suggesting. Small farming businesses STILL NEED TO HAVE THE RIGHT to

	discuss/modify/or refuse employees demanding what they will work. A blanket ruling across ALL awards is not an intelligent solution.
3492	This would be hugely detrimental to our business. We operate stores and need them open and closed at certain times. If staff were to choose their start/finish times, this could impact our trading/earning abilities. We also think this would impact the culture at our work if staff could 'do what they want' so to speak. We try to get a good 'team' together and if some staff are choosing their hours without any consultation to the impact it will have on the workload of others, it will create an unpleasant environment. We would probably also consider whether or not to employ a person with parenting or caring responsibilities into certain roles. We believe to allow this would create a wedge between employers and employees, rather than assisting employees to support staff, which we think we do already, as a collective team. The Government should support employers, through funding incentives or the like, if they want to ensure employers are as flexible as possible with employees
4091	It would cause an immense burden on the business. You would end up having to employee multiple employees, all part time, to ensure the gaps in the day would be filled. Ultimately there would be a temptation to only employ people who were less likely to utilise the provisions.
4434	We do offer our employees flexibility wherever possible, however we would be concerned if we did not have the right to say no based on operational or business reasons. A lot of our employees request short term changes eg in the school holidays or if their partner has short term work committments and we usually can allow this. But our business does function better if everyone is working the same hours and this is our preference in the longer term. We already use labour hire companies for most of our new staffing requirements as in the current business climate we are scared of committing to the long term and fear unfair dismissal claims. These changes would make us even less likely to take on new staff as employees, and management would be less inclined to employ women with caring responsibilities.
5643	If it was known that this may arise on a regular basis prior to employment then they would be passed over for the position. If it occurred whilst under employment and depending upon the circumstances then they may find that the business would be forced to change their employment schedule. Our business depends upon everyone working together and if one person is not able to pull their weight then the business starts to struggle and if not addressed then everyone suffers.

608. Other respondents say that they would **terminate the employment of employees** who sought to work hours pursuant to such an entitlement that could not be accommodated and/or that it would result in a **loss of employment opportunities more generally**. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
105	Vey destructive, unworkable untenable ridiculous and we would find a way to sack them
307	I would only employ casuals and if they tried to work the hours they wanted to I would find someone that would. I would never employ someone full time again.
540	We would not be in a position to support that worker and would find someone else more suitable for the role. If an employee cannot meet the expectations of their role and in effect, are telling management what they can and cannot do, we've got no control over our business.
705	We are a grazing property so and it would affect our management greatly. We generally work as a team and at times we all need to travel to different areas of the property together to perform duties, sometimes an hour or more away, and we would have to arrange more vehicles. it would be very difficult to work around staggered hours or days. eg mustering cattle or yarding and processing cattle to change days or starting times. very inefficient and it just wouldn't work. we would not employ someone who needed these hours
2166	We would have to replace that person. The business needs to open, regardless of the desires of individuals, including the owners
2605	We have to work to fill orders by supermarkets when they need the produce. our customers are not flexible in this regard and that's understandable as we are dealing with perishables. If our workforce demanded that we work around the times it's convenient for them, it would not be possible to fill orders on time and therefore we would lose business and people would have to be laid off. If this condition was to go through it would also put anyone with caring responsibilities who want to work at a massive disadvantage. We all need to work when the work is there. How can we be expected to compete internationally. I do believe workers need protection and rights respected, but the pendulum has swung too far in favor of the employee. There is no incentive to increase our number of workers, in fact in our business we are taking many steps to reduce the number of people we have on the payroll.
3424	Being a small organisation with limited funding, it would not be able to undertake its chore responsibilities if we don't have all staff working the same hours and so would probably end up having to contract out those functions, making our employees redundant.
3620	This would have a major impact on day - to - day production scheduling and planning and would probably lead initially to further casualization of the work force to provide a bigger pool of employees to meet production commitments. This would also probably bring forward further capital investment in more

	automated manufacturing and processing equipment which is currently under investigation for implementation in the medium term. By way of illustration we are already investing in new machinery which will have the effect of reducing our workforce by 2-4 employees and as said before this proposal by the ACTU will only hasten the trend to reduce our exposure to this possible development.

609. Many employers expressed concerns regarding their ability to recruit employees who could perform work at times left vacant by an employee who has decided not to work at those times. The concerns related specifically to **whether they would be able to find suitably qualified employees, employees willing to work at the specific times that the other employee is not working and the complications associated with minimum engagement periods**. For instance:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
111	A lot of our tasks are very specific and require extensive training to perform them, it is not possible to get someone in for short periods and expect them to take up the slack. There would be unnecessary training costs, disruption in customer service etc. We are a small company just keeping our head above water after some serious loss years, someone filling in for a day would spend most of it asking questions and consuming time of other employees because they are not here for the whole time and know whats going on. Also if they have short days it would put strain on other employees to take up the slack when they were not here, and trying to get someone for the odd hours would be impossible. I don't mind negotiating something with an individual, we can work out a plan for both parties, but to lose control of deciding on the hours people want to work is insane.
951	If a casual staff member had to be called in we are required to pay a minimum of 3 hours then more often than not, the causal would not be required for the whole 3 hours, resulting in a loss for the employer. If a worker can decide their own hours of work, and specific tasks can only be undertaken during specific hours on specific days, then an additional casual worker may only be required for 1 - 2 hours at a time. Our award does not allow for this.
1075	Our business has days of operation that are busy than others due to production/packing for orders. We need a core amount of staff for that day. If someone decides they want that day of permanently, we need to see if there is another staff member who can cover that day. These situations do cause problems amongst staff members, when we require staff members to change

	working days to suit someone with the need to have a certain day off work. It is not feasible to employ a staff member for one day a week to cover someone who is requesting to work one less day a week or shorten their hours of work. We do try and have working mother job share, where they can work in with each other to cover a certain amount of hours per week. If employees are choosing their own work days and hours, you are taking the employers rights away to choose when they require employees days/hours.
3875	In some instances we may have trouble hiring a person to cover the needs of the business. For example is an employee requests a compressed 4 day working week, we would still be paying the employee the same salary, however, if we need the job to be done on the 5th day, we would incur costs in paying a person to do this role and may struggle to get a person to do the role 1 day a week. Continuity would also be an issue. Similarly if we get too many requests for people to have a change in hours (eg all wanting to start and finish early) we would struggle to provide the level of service to our customers during their normal business hours i.e. in the later part of the day. Also, as most of our employees are tradesmen, many of our customers are large supermarkets who only permit us access to work in their stores between 10pm and 6 am when there are no customers and staff in the stores. For a tradesman who for example only wants to work daytime hours, we would potentially have no work to give him/her.
4349	We currently run 1 & 1/2 to 2 shifts from 5am - 11pm 5 days per week. If a large percentage of staff wanted to change their working hours it would make it difficult to schedule production. Finding suitable additional staff to cover the hours that we did not have the numbers on the factory floor would also be difficult given the restrictions that are in place for casuals in particular. The requirement to be employ a casual staff member for a minimum of 4 hours could cause staffing issues.
5156	Potentially this could mean that we breach not only our duty of care to our students, but also potentially some regulatory requirements. It would be impossible for us to fill short gaps (say 8:30-9:30) if an employee demanded to start at a later time. It is difficult enough for a small school to find reliable casual staff, and this kind of thing could also result in additional costs (e.g. minimum hours). It would also result in timetabling and scheduling difficulties with the potential for staff to be unavailable for certain duties which would then fall to others to fill. We have been flexible with requests for varied working arrangements on a case by case basis and i don't think that needs to change.

610. Other respondents expressed a concern that if given the right to decide their hours, **employees would typically choose not to work at particular times which might be considered 'unsociable'** or, as a corollary, that employees will typically seek to work at particular times. For instance:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
1162	The 2 employees who currently have their working hours modified work in an office at a Cinema. It would be very difficult to work around modified hours for an employee who was working at front of house in customer service. I think if staff were given the right to decide hours in a business that is at its busiest @ night and on the weekends, we would struggle to find staff to work for our busiest times of trade
1502	We try our very best to be flexible around our staff commitments, but they also understand that we are conducting a business that operates 7 days a week, from early morning until late afternoon. To a certain extent, our staff do already have flexibility in their choice of days & hours that they work as they are mostly casual. We have set shifts which they can choose from & they can swap between themselves if need be. However, if staff were able to dictate how many hours they wanted each week, but only worked when it suited them, then we would quite simply go out of business!! In an ideal world, no one wants to work nights or weekends but it comes with the territory in the hospitality industry & if you choose to work in this field, then you have to accept this fact.
2538	disastrous. we need people to work certain hours,so we would have to find extra people to work hours these people didn't want to work & be overstaffed at other times. everybody will want the good hours. we are an after hours chemist so we need to set our own hours not the staff telling us when they want to work.plus people would abuse the system as well. it is bad enough now with sickies etc.
4979	If could mean they would working at times that I didn't need them (eg quieter times) and then they may also choose not to be available to work during busier periods. Our paying clients are the ones that dictate when we are busy and as a business we need to respect that & be able to provide the services they want WHEN THEY want - not when my staff want.
5616	As most of our cleaning work is rostered work it would be difficult to please everyone's demand as to when they wish to work. Rosters also need to be rotated to allow for cleaners to share weekend work. We'd probably have no one wanting to work on a weekend!

611. A number of respondents stated that they anticipated that the grant of such a right to employees would result in an **increased workload for other employees and/or would cause dissatisfaction amongst their staff**. For instance:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
160	Supervision hours would need to increase. This would not suit the current standard hours of work. Some supervisors start at 7am and finish at 5pm. If we had a request to modify hours to start earlier or finish later how is that fair on the supervisors that are already doing 9.5 hour shifts. the other point is Business owners don't want to work longer hours to be supervising people wanting to modify their hours. Administering all these different hours is an added expense and labour element.
193	Yes it would greatly impact on our business. We have always tried to accommodate our employees in their right to chose their work hours around their parenting and caring responsibilities. We are a very give and take, family friendly work environment. However, I believe if it was mandatory for an employee to decide their work hours without the employer having the right to modify or refuse the decision, a change in this mindset would result. It would potentially narrow the field on prospective new employees and could create resentment and unrest within our work force. It is particularly relevant to small business to have the ability to refuse an employee modified work hours if it is going to impact on the productivity of the overall team.
210	We have to employ more unskilled people to do the work in the person's absence. Our packing wouldn't be completed on time we would all have to stay to finish on overtime, this would make the transport late for their designated time for delivery of our fresh produce, this would create danger on the roads. Also creating staff exhaustion for next days work creating under performance in all areas plus tiredness and lack in concentration tends to create accidents in the workplace. We have a good team and management understand the needs of our staff and we are already shuffling work hours for those that can only work during school hours and don't come to work when their child is sick, so we know the danger signs and how this puts pressure on all our team.
293	Our business specifically operates to serve private sector as well as government contracts in electronic security monitoring via a call centre environment on a rolling 24/7 basis. It would therefore be onerous and unsustainable for the company to roster such employees according to their own choice of days/hours/shifts and likely fail to meet the operational requirements and customer standards that the business offers under its service contracts. Such a position would also pose significant issues of unfairness amongst

	other employees with no caring or parental responsibilities who would then be required to carry a potentially disproportionate load of shifts should the employees with parental/carer responsibilities be permitted to choose their own hours, days or start/finish times without the business having any right to decline or modify their request. This position would not be reasonable for the company given that the inherent requirements of roles in this business area are to inevitably work shift work (in security monitoring call centres) and are known to the employee at the time of their commencing employment with the company.
316	We operate in large shopping centres and all of our rostering is established to have more employees rostered when we are busy and less people rostered when we are not busy. We operate in a seven day environment with a rotating roster to ensure all employees get equity in days off on weekends. If employees were given this right it would severely impact on our ability to ensure equity across all employees as well as impact on the flexibility to effectively operate our business.
562	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. This would obviously have a huge impact on the financial viability of our business. Allowing employees to determine their hours would also impact the working lives of the two family members who run the business as we would be required to work extended hours to cover the missing labour and/or cover the working hours demanded by our staff. We also currently close our business for three weeks a year to ensure that the family members who run the business get a break. Should our staff determine hours and days it may mean these family member either do not get time off during the year or alternatively cannot holiday together as a family. Allowing staff to unilaterally determine their hours would be untenable for both our business and our clients.
687	It would put undue pressure on staff members who do not have parenting or caring responsibilities as our business runs multiple work sites which have set hours and our clients and suppliers work set days and hours and as such matters must be dealt with at those times. We have minimal people in each department and differing authority levels which means others cannot complete certain tasks in the absence of certain employees. Either our employees would be unfairly put into pressure situations by their colleagues altered work input or our business would suffer which in time would mean the employees would no longer have employment. Each role has certain days and hours required. People apply for that role. They are aware of the expectations coming into the role and the idea that they could then alter their roster and adversely affect their colleagues and the business is unfair.
1219	3. Uncontrolled changes to employees hours result in chaos for the workplace. Businesses are required to meet many legal, social and moral obligations but they also have a responsibility to all stakeholders by making a profit to ensure that the “doors remain open”. Therefore we are able to provide employment for many workers. [redacted] values the welfare of all of their employees. Where an employee requests a different working arrangement, it can be accommodated as long as there are several obligations met. The most important is to ensure that they are not left working alone in any section without support, leadership or guidance. If an employee requests to start and finish later then we would need to alter another

	employee's hours to work alongside them. This can often be against what that other employee wants. If the business is unable to designate start times then we are unable to manager our resources to best use them when we have the work that needs doing. Unmanned equipment does not keep a business ticking over. Additionally our environmental footprint would also be difficult to manager as we would be in effect extending the daily hours by having varied start & finish times as well as increasing the need for Supervisory staff to work longer hours in their attempt to manage it.
1247	We run a manufacturing business with production runs. If some staff were not in attendance this would create upheaval to the production runs and scheduling would need to be adjusted accordingly. Also meeting customer needs regarding delivery could be problematic. Sometimes these issues can cause resentment within the working culture.
1422	It would impact adversely on our ability to plan work programs, assign tasks and affect the attitude and morale of the rest of the team. We believe firmly in building flexibility and fairness into our workplace arrangements and are committed to a collaborative approach to balancing work and time-off requirements. Any legislative change would place this approach at risk and could undermine the productive, open and honest relationship that we work hard to nurture with our employees.
2899	Timetabling and scheduling of teachers has to meet pedagogical, educational and operational requirements and is highly complex, especially in areas where composite groups are involved. Allowing teachers to decide on their hours of work would mean that timetabling becomes a lot more complex and may result in conflicting constraints which cannot be resolved. It would also mean that the pedagogical and educational needs of students don't have the highest priority any more. The impact on teachers making such a request may mean that they won't be able to teach subjects such as English, Maths, or Science which have several teaching periods per week; they may be restricted to subjects with 1-2 teaching periods per week only. Looking at the composition of our teaching staff, 50% of our teachers would be able to make such calls on their working hours. Internally that would mean that half the teachers would be able to "dictate" their times, while the other half would then have to deal with the "left-overs" during timetabling and scheduling. We believe that would create an imbalance between the different groups and would be counter-productive to creating a positive work environment for all teachers.
3442	The business operates for 12 hours a day, which means that we work on a roster system. Rostering is difficult enough under 'normal' circumstances. Once you start having employees making special requests, we do try to accommodate requests but the issue is that other people have to suffer the consequences of this. For instance when you have a rotating roster that the shifts are shared over a 4 or 6 week period, allowing one or two staff members to not do an open or closing shift then impacts on all the other staff. Why is that fair to other staff members, who may have children but just juggle their life, because they have accepted a job where shift work is a requirement. Why is it fair that a staff member who doesn't have children has to do more open and close shifts just because they are single. The issue is trying to be fair across the board and not discriminate against an employee, just because they don't have children.
3708	It would increase the cost of doing business, reduce the company profitability due to reduced customer service levels and thus reduce all employee work

	hours in the medium to long term. It would also cause disruption to other management and sales staff by having to make last minute changes to rosters etc. So it may assist one staff, but it would cause grief and stress to many other staff members. Having no control over when an employee works would cause chaos in the workplace as everyone would want to work similar hours and there would be no one left to work the less popular hours. Ultimately this would cause the business to stop or reduce employing staff whom fall under the class of employees who are able to dictate working hours.
5018	If employees are given the right to decide their hours of work without business input we see a significant risk to the successful operation of our business. We operate a small business in a competitive market and we employ a specific number of staff to cover the hours of the business operation and specific roles required. These hours and roles as designed to best suit our customers needs. We lose certainty over our staff roster. We may see higher employment costs and increased pressure on other staff to cover workload, both these have detrimental impact on other existing staff. The business is happy to discuss modification to working hours, but the decision needs to be at the discretion of the business and strongly oppose the employee having the right to determine their own hours of work.
5066	This would impact our business significantly as it would mean that for some positions here we would either need to find a casual who would step into the position for the hours that the normal employee would not be at work (which would be difficult as the hours would be few and irregular). If this was not possible, we would then have to push further responsibility onto our staff who are not parents/carers, which is extremely unfair.
5224	This would be detrimental to our business. We would not be able to accommodate all requests without it having substantial impact on other employees and our customers. We do our best to accommodate the needs of employees but it would make it very difficult if we didn't have the right to refuse or negotiate. I think it would also cause resentment from other employees if they needed to work harder to cover the absence of an employee. We will always attempt to negotiate a good solution with our employees that enables us to manage their reduced hours within the business, and to minimise the impact of these reduced hours. Having no ability to refuse or modify would take away our capacity to do what works for both parties.

612. Some respondents specifically stated that if employees were to dictate their hours of work, it would place a **greater burden on the owner of the business**. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
2609	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 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.
2717	This would be very difficult within a small business and it would result in me as the owner having to cover the gaps myself.
2863	They wouldn't be able to complete a full weeks work without me working more overtime. Small business employers already work around the clock we don't need to make it more difficult. It would reduce productivity and cost us more, not to mention having to give up my family time.
5249	We would seriously have to consider not employing staff and strictly contract out specific tasks which would obviously incur a higher expense to the business, reduce the number of permanent workers (therefore families and the underlying fabric of our community) in our area and impact on the overall family time of both the contract worker and us as business owners. It would increase the workload of the business owner/s as they would then need to carry out a greater number of tasks and undoubtably reduce their quality of life, family time and capacity to take any kind of leave. Most employers are open to helping families should they require some flexibility in regards to hours/pay structure. This kind of draconian approach will be counter productive to agricultural enterprises and impact the overall growth of the industry should individuals make unreasonable and unworkable demands. Everyone deserves a right to negotiate or refuse untenable situations and give both parties the opportunity to find employment/employees that are best suited to the individual needs/enterprises.

613. Many respondents raised concerns associated with **workplace health and safety**. For example:

Response ID	If your employees with parenting responsibilities and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (including days of work and starting/finishing times) without your business having the right to refuse or modify their decision, please describe the impact this would have on your business.
70	We would need to be involved with any decision on working hours to ensure that all employees are adequately supervised, provided with a safe working environment and work can be undertaken in a productive/cost effective manner.
82	This would be unworkable. Our operations involve teams and crews. There are very few tasks that can be undertaken by single individuals. Generally our work methods stipulate minimum crew size of 2 persons because the are generally high risk tasks, such as hot works and site and a degree of manual handling. It would be very difficult to plan operations around a person or persons who have arrangements like this in place. Our productivity would plummet and our cost of goods sold would increase and our efficiencies would be jeopardise.
163	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.
169	As a sole owner operator of a small manufacturing business I would have no capacity to open or conduct operations outside of our normal trading hours, Monday-Friday 7.30am-5pm and some Saturday mornings from 7.00am until 12 noon. Our safe work practices ensure that no employee is left working alone in the factory without either supervision or a co worker being present.
172	There is scope for very minor changes to start/finish times. In one particular instance, management here agreed to temporarily accommodate a later start and finish time, but only up one hour. Any changes outside this example would cause major issues for management in regard to OH&S, energy costs, supervison and security.
204	Our production team needs to work set hours because of supervision needs. For Heath & Safety and Quality Control reasons we can not have production staff working outside set, supervised hours. Our Company has always been flexible with our staff to help with family and personal needs and that has worked well since 1970. Running a Lean Manufacturing business in Australia and coordinating a tight team production is hard enough without having this extra burden.
1697	A significant operational and cost burden. In some work site situations, it is simply not safe for certain personnel (eg site supervisor, first aid rep, dogman) to be absent from the workplace when work must continue. Overlap of other legislation such as council by laws may prevent the modification of

	work patterns to allow for flexible work hours we may be prepared to offer our employees.
2023	If not given to opportunity to at least be able to modify or discuss starting and finishing times I think eventually these people will become unemployable in the pastoral field. The biggest impact on our business would be if a scenario was to occur as follows. Can only start work at 10am everyday, in Summer time this would have the whole team working in the heat of the day including animals. WHS and Animal Welfare would be a major concern to our business. Our business would have no concern if it was a one off or for a week/month and there was flexibility - for example I can't start until 10am but I can go through until 6pm or similar. Or making themselves available on weekends. In our type of occupation you cannot work at night or safely in summer during the middle of the day. If they state they wish to work weekends, does that mean we are required to pay extra wages? Impacts to our business WHS Animal Welfare Extra employees required More expense
2075	This may have a significant impact on being able to ensure a safe workplace for staff as we cannot allow employees to work on their own around manufacturing equipment, nor can we allow them to work alone when installing on site. We need to maintain a minimum number of staff to meet our safety obligations. This may well affect our ability to meet required timelines and has the potential to add operating costs to the business through the need to employ more staff (probably sub contracted staff on an "as needed" basis) to meet set timelines. There may well be major issues with workflow for affected staff members that could lead to excessive "down time" for those staff members.
2693	This could severely impact customer service - if all employees in a small department wanted to start and finish early then we would not have anyone to answer customer calls later in the day. For our engineering teams our customers set the work hours for engineers on-site. If an engineer decided to change their hours it would negatively impact the customer service we provide. Safety could be compromised - an employee may want to work their 38 hours in 3 or 4 days. The work may not be conducive to long work days and therefore increase the risk of the employee harming themselves or another employee. in our business this could be fatal. Could impact business costs - if an employee chooses to do their full-time

	hours in 3 or 4 days, however it is a role that needs someone to man the phones or the reception desk at all times we are open, then we would need to hire someone on the days the employee does not work, thereby increasing costs significantly. We would also not need any employee working before 8.30am or after 5.00pm in these areas and the phones are on night shift, so essentially there would be minimal work for the employee to do. Could impact productivity - we have core hours that everyone needs to be at work so we can have business meetings. This could make it near impossible to get all employees at important meetings. Also some jobs require a group of staff to work together. If everyone in the team had different hours it would be extremely inefficient and affect business productivity which would also impact customer service.
2820	As we are a manufacturing workshop, to have one team member here running machinery could be an issue from a workplace health and safety point of view. We feel it is safer to have more than one person in the workshop when machinery is running, so if someone wanted a very early start or a late finish it would mean that a co-worker would need to work the same hours from a safety point of view. We would also potentially have more team members with their own sets of keys OR as the owners of the business we would need to alter our working hours so we can open the workshop and lock up at hours outside what we currently do. I find that most of our team that want to alter their hours don't wish to work less hours, they want to condense their 38 hours into 4 days, so this generally makes for a longer day all round. if this then become their standard working hours, a personal leave day would then be paid at a higher number of hours eg 10 hours instead of 8.
4500	We have a general engineering business that operates Mon - Fri with overtime as required for breakdowns, we could not guarantee work outside of these conditions as this would require extra staff so that not one individual works alone for safety reasons, our business hours could not be structured without us having the right to refuse or modify without a financial impact.
4538	Employees within the factory must work with our person in the factory area for safety reason. This would mean that another person would also have to change their hours if the request was to work outside our normal working hours with in the factory. We are always willing to negotiate with each employee as long as safety issues are covered first.
4619	The company has 28 to 30 employees including casuals and has worked to accommodate employees with child-care needs. However the company has generally requested certain days and hours worked to fit in with the requirements of the position and the duties of other employees. If the employee had the right to decide days worked, and the starting and finishing times outside of our current hours of work it would be extremely detrimental to the company's economic well-being, and difficult to provide supervision for safety reasons.

12.1.10 The Survey Results – Conclusions

614. The results of the Joint Employer Survey can be summarised as follows:

- Since the start of 2010, almost 50% of respondents had received a request from one or more employees to change their hours of work (including days of work and starting/finishing times) due to parenting and/or caring responsibilities.

- Of those respondents, over 48% of respondents stated that their business had agreed to all such requests. Over 96% said that they had agreed to some or all of such requests made.

- Over two-thirds of the respondents who had agreed to one or more requests had made some modification to the original request in some or all instances. Only 22.9% of requests were granted without any modification.

- Requests were refused by the survey respondents' businesses for a wide range of reasons including but not limited to the following:

    - The grant of the request would have resulted in increased costs and/or adversely impacted upon efficiency and productivity.

    - The grant of the request would have resulted in an inability to respond to customer demands or requirements. This was said to be so particularly in relation to employees employed in customer-facing roles.

    - Specific elements or features of the employee's role or the inherent nature of the work they performed. In some cases this was said to render a job-share arrangement impractical.

    - The opening or trading hours of the business.

    - Fixed shiftwork arrangements or production hours.

- The employee had requested to work at a time where there would have been little or no work for them to perform.
- The grant of the request would have resulted in insufficient staffing levels at certain times.
- The business was unable to source other employees to work whilst the requestor would have been absent.
- The grant of the request would have adversely impacted other employees.
- The time and expense associated with the recruitment of new employees to work whilst the requesting employee would be absent, training such new employees and the overall increase to the regulatory burden associated with greater employee numbers.
- Concerns associated with the workplace health and safety of the requesting employee.

- Requests were modified by the survey respondents' businesses for a wide range of reasons including but not limited to the following:
  - The request, if granted in the form sought, would have resulted in higher employment costs, inefficiency and/or productivity losses.
  - The request, if granted in the terms sought, would have impacted on the business' ability to service their customers. Customer-facing roles were said to present particular complexities.
  - Fixed shiftwork arrangements.
  - The business' opening or trading hours.

- To ensure that the supply of labour at a particular time met the labour demand; that the business was not left with unnecessary labour; and that the labour rostered to work at a particular time possessed the necessary skills.
- Concerns associated with the safety of the business' employees.
- To moderate or alleviate the potentially adverse impact that the proposed change would have had on other employees.
- To align with the working hours of other employees.
- The inherent requirements of the relevant employee's role or the very nature of the work they performed.

- The survey respondents considered that there would be a range of consequences for their business if employees with parenting and/or caring responsibilities (e.g. for a person with a medical condition) were given the right to decide their hours of work (days of work and starting/finishing times) without any ability for the employer to refuse or modify their decision; including but not limited to:
  - Disruption, an adverse impact on productivity, an inability for the business to effectively continue production or provide their services.
  - Increased costs for the business in various forms including wages, training, recruitment and so on.
  - Loss of revenue.
  - It would have a disastrous impact and/or they would close their business or consider closing their business.
  - It would impact on the business' service delivery and/or inhibit their ability to meet customer demand.

- Tasks that need to be performed by employees at a specific time might not be able to be performed because of the absence of the relevant employee.
- The business would employ casual employees, employees through a labour hire agency or implement subcontracting arrangements in preference for the engagement of permanent employees.
- Increased regulatory burden and administrative costs.
- A reluctance to or decision made against employing employees with caring responsibilities.
- The termination of employees who decide to work hours that cannot be accommodated.
- A loss of employment opportunities more generally.
- An inability to find suitably qualified employees, employees willing to work at the specific times that the other employee is not working and the complications associated with minimum engagement periods.
- That employees would typically choose to not work at particular times that might be considered ‘unsociable’.
- An increased workload for other employees and/or a cause for dissatisfaction amongst other staff.
- An increased burden on the owner of the business.
- Concerns associated with workplace health and safety.

615. The survey results should be taken to be demonstrative of the following propositions:

- The ACTU's claim would potentially impact a significant proportion of employers.

- The vast majority of employers who receive requests for changes to hours of work from employees with parenting and/or caring responsibilities grant those requests. Only a slight proportion of employers have never granted such a request. Accordingly, employers overwhelmingly generally take a flexible and accommodating approach to their consideration of requests family friendly work arrangements

- The majority of employers who have received such requests since the commencement of 2010 have granted those requests with some modification. The ability to engage in discussions with a requesting employee is effecting in enabling an employer to ultimately grant a significant proportion of all requests.

- Employers generally refuse requests for changes to hours of work for a broad range of reasons, many of which are listed above.

- Employers generally seek to modify requests for changes to hours of work for a broad range of reasons, many of which are listed above.

- The ACTU's claim will have a broad range of negative implications for businesses, their employees, their customers and other stakeholders; many of which are listed above.

12.2 The Evidence of Ai Group's Witnesses

616. We here provide a brief summary of the evidence given by Ai Group's witnesses.

12.2.1 Julie Toth

617. Julie Toth is Ai Group's chief economist of five years.[411] Her qualifications and experience [412] provide a sound basis for her evidence, which can be summarised as establishing the following propositions.

618. **Firstly,** female labour force participation reached a record high in August 2017[413] and participation by women aged 25 and over has increased markedly since 2000[414]. Further, in 2014, most employed mothers with a child under 15 years worked part-time[415]. The evidence demonstrates a promising trend in female participation.

619. **Secondly,** part-time employment as a share of all employment has grown significantly over the past five decades and the growth in permanent part-time employment has been stronger than the growth in casual part-time employment.[416] Indeed the share of casual employees in the workforce has remained relatively stable since the 1990s at around 20%.[417] Ms Toth also states that, in her opinion, the evidence of Professor Austen suggests that there are "currently few barriers" to moving from full-time to part-time employment. [418] This is consistent with a Productivity Commission Staff Working Paper which noted that in 2008 there was a "relatively high degree of mobility between part-time and full-time work".[419] In her witness statement Ms

[411] Witness statement of Julie Toth dated 26 October 2017 at paragraph 1.
[412] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 5 – 6.
[413] Witness statement of Julie Toth dated 26 October 2017 at paragraph 9.
[414] Witness statement of Julie Toth dated 26 October 2017 at paragraph 10.
[415] Witness statement of Julie Toth dated 26 October 2017 at paragraph 11.
[416] Witness statement of Julie Toth dated 26 October 2017 at paragraph 16.
[417] Witness statement of Julie Toth dated 26 October 2017 at paragraph 16.
[418] Witness statement of Julie Toth dated 26 October 2017 at paragraph 54.
[419] Witness statement of Julie Toth dated 26 October 2017 at paragraph 54.

Toth explains why she considers that that paper remains relevant to the issues here before the Commission, despite the passage of almost a decade.[420]

620. **Thirdly**, employees seek to work part-time for various reasons including, in order of magnitude, studying, preference for part-time hours and caring for children.[421] Caring for children is, however, cited as the dominant reason for working part-time amongst women aged 25 – 44 years.[422]

621. The evidence suggests that permanent part-time employment, which as we have earlier submitted provides a considerable degree of certainty and control to employees regarding their hours of work, is readily available and being accepted by employees including those with parenting and caring responsibilities.

622. **Fourthly**, the ACTU's claim would reduce allocative efficiency of labour hours between firms and within a firm as follows:

- It would reduce allocative efficiency of labour hours between firms because the proposed clause would enable an employee to reduce their own allocation of labour within their current firm in their current role, even though it may be more efficient for them to work those reduced hours in another firm in which the demand for labour is a better match for the supply of labour that the employee is willing to provide.[423]

- It would impede the efficient allocation of labour hours within a firm because labour would be allocated as dictated by the employee and the employer's ability to allocate labour in the most efficient way would be restricted.[424]

[420] Witness statement of Julie Toth dated 26 October 2017 at paragraph 24.
[421] Witness statement of Julie Toth dated 26 October 2017 at paragraph 18.
[422] Witness statement of Julie Toth dated 26 October 2017 at paragraph 20.
[423] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41.
[424] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41.

623. It is Ms Toth's evidence that any interference with the labour market that has the effect of restricting the efficiency of labour allocation, including the ACTU's proposed clause, will have the effect of restricting the ability to achieve maximum efficiency and production across the economy.[425]

624. **Fifthly,** labour (or labour hours) are not perfectly substitutable. This part of Ms Toth's evidence is relevant for the purposes of the Commission's assessment of the extent to which an employer would be able to replace the labour hours of an employee with caring responsibilities who has reduced their hours pursuant to the ACTU's clause with the labour hours of another employee.

625. Ms Toth explains that labour hours are not perfectly substitutable because of various factors including:

- The precise **timing of the labour hours** demanded by an employer may not match the precise timing of labour hours available. Ms Toth explains that this is likely to be the case even in firms that employ large numbers of part-time and casual employees because their availability will likely be restricted due to factors such as study commitments, caring responsibilities or other personal commitments. Ms Toth testified that in her view, the issue of availability is even more likely to arise where the 'gap' (i.e. the number of hours) to be filled by an employer due to the absence of an employee with parenting and/or caring responsibilities is small.[426]

- The **skills** demanded by an employer may not match the skills of the available labour. Skills mismatches render substitution of labour between industries particularly difficult, however that difficulty can also arise within a firm. Whilst retraining available labour can resolve certain skills mismatches, this comes at a cost to the employer and the redeployed employee in the form of time and money.[427]

[425] Witness statement of Julie Toth dated 26 October 2017 at paragraph 43.

[426] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41(i).

[427] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41(ii).

- The **location** of the available labour is an obvious barrier to substitution of labour hours. This issue is particularly acute for firms in regional or remote areas and those that require their employees to be physically present to perform the requisite work.[428] This would of course be the case in relation to a substantial proportion of award covered roles in a very broad range of industries including manufacturing, construction, retail, fast food, health, aviation, transport and so on. As one respondent to the Joint Employer Survey put it, "you can't build civil infrastructure, operate a quarry, drive a truck, or batch concrete from home".[429]

- **Regulatory barriers** such as minimum engagement periods prescribed by modern awards and mandatory staff ratios that apply in certain industries such as child care.[430]

626. **Sixthly**, and as a result, it cannot be assumed that an employer's demand for labour that would result from certain employees dictating their hours of work pursuant to the ACTU's clause would be met by other employees increasing their hours of work or moving their work hours in a way that is a perfect substitute.[431] This includes employees who are underemployed.[432] Further, it cannot be assumed that even if that were to occur, there would be no additional cost to the employer.[433]

[428] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41(iii).

[429] Response ID 173.

[430] Witness statement of Julie Toth dated 26 October 2017 at paragraph 41(iv).

[431] Witness statement of Julie Toth dated 26 October 2017 at paragraph 44.

[432] Witness statement of Julie Toth dated 26 October 2017 at paragraph 47.

[433] Witness statement of Julie Toth dated 26 October 2017 at paragraph 44.

627. **Seventhly,** as a result of these difficulties, firms may react in one of the following ways and suffer the consequences described:

- A firm might decide to leave the resulting gap in hours unfilled. Controlling for all other variables, this would result in reduced outputs as a result of reduced inputs (i.e. labour hours).[434]

- A firm might decide to fill the resulting gap with an employee who is not a "perfect match" in terms of availability, skills and/or location. Controlling for all other variables, this would restrict the productivity and efficiency of the firm and as a consequence, reduce the firm's output volumes and/or competitiveness and/or profitability.[435]

- A firm might decide to fill the resulting gap with an employee who is a "perfect match". This would result in increased employment costs associated with recruitment and training,[436] and a potential fall in productivity[437].

628. In relation to the final point, Ms Toth gives evidence that firms incur the same fixed costs when employing full-time employees and part-time employees. Further, firms may be faced with lower relative productivity from part-time employees when compared to full-time employees.[438] This issue arises because an employer may ultimately employ a greater number of part-time employees (permanent or casual) if one or more of its employees sought to access the clause proposed by the ACTU. This would include existing full-time employees who seek to reduce their hours to part-time as well as additional employees employed by an employer in order to replace the former category of employees during the hours that they no longer work.

[434] Witness statement of Julie Toth dated 26 October 2017 at paragraph 48(i).

[435] Witness statement of Julie Toth dated 26 October 2017 at paragraph 48(ii).

[436] Witness statement of Julie Toth dated 26 October 2017 at paragraph 48(iii).

[437] Witness statement of Julie Toth dated 26 October 2017 at paragraph 23 and 28 – 29.

[438] Witness statement of Julie Toth dated 26 October 2017 at paragraph 23.

629. Ms Toth cites a 2008 Productivity Commission Staff Working Paper which explains this in greater detail: (emphasis added)

> … part-time workers can have the same fixed costs as full time workers (for example, recruitment and training costs and staff administrative costs) but fewer hours to enable the employer to recover these fixed costs. They may also require more supervision than full time workers given their less intensive contact with the businesses operations.
>
> …
>
> However, the wage rate is not the only cost of employing labour and changing the number of hours worked per person may have implications for productivity. That is, changing the number of hours worked per person or the number of workers are not perfectly substitutable strategies for the employer.
>
> …
>
> There may also be productivity differences between full and part time workers. … a reduction in hours may lower productivity as non-productive activities such as meal breaks, setting up and shutting down times will represent a larger proportion of the overall working day. Also, part-time employees may be subject to the same cost overheads, such as staff administration and ongoing training, as full time employees but with fewer hours to spread those costs.[439]

630. **Eighthly,** as a result of all of the above, the ACTU's claim would have the effect of reducing the productivity and efficiency with which labour is utilised across the national economy.[440]

12.2.2 Benjamin Norman

631. The evidence of Benjamin Norman regarding the operations of Viterra Operations Pty Limited (**Viterra**) and Glencore Agriculture Pty Ltd (**Glencore Agriculture**) provides a stark example of a business that requires considerable flexibility given various operational realities that would be seriously compromised if the ACTU's claim were granted. The following elements of Mr Norman's evidence are particularly telling.

632. **Firstly**, the timing of the work performed by Viterra's employees is dependent to a very significant degree on seasonal factors, which impact upon the volume of commodity it receives from its customers and when such commodity

[439] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 28 – 29.

[440] Witness statement of Julie Toth dated 26 October 2017 at paragraph 51.

is delivered.[441] This is a matter over which Viterra does not have any control and requires it (and its workforce) to be agile.

633. **Secondly**, the timing of the work performed by many other employees of Viterra is dependent on decisions made by grain exporters as to when grain is to be exported, the operation of shipping vessels and rail transport providers[442]. These too are matters over which Viterra does not have any control.

634. **Thirdly**, Viterra relies very heavily on casual labour, particularly during the harvest. The hours worked by such employees varies considerably day-to-day, week-to-week due to the inherent nature of the work they perform.[443] The number of casual employees required on a given day also varies considerably and on some days or weeks there is no work to perform.[444] This uncertainty results in Viterra being unable to publish a roster even a week in advance.[445] The evidence establishes that the grant of a right to certain casual employees to determine their days and/or hours of work could create entirely unworkable situations for Viterra and would remove the flexibility that is clearly necessary in order for it to respond to its operational needs.

635. **Fourthly**, Viterra's part-time employees are engaged on a particularly flexible basis under some of its enterprise agreements due to its operational needs.[446] The agreements allow Viterra to change their part-time employees' hours of work day by day, week by week, however the employee is guaranteed a minimum annual income.[447] Mr Norman explains that where such flexibility is not available to Viterra, it does not employ part-time employees and instead achieves the necessary flexibility by engaging casual employees.[448] A

[441] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 7 – 9.
[442] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 10 – 12 and 35.
[443] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 32.
[444] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 34 – 35.
[445] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 35.
[446] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 47.
[447] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 43 – 46.
[448] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 51 – 53.

proposal that grants part-time employees the right to determine the numbers of hours they work, the days they work and/or their starting/finishing times is self-evidently incompatible with Viterra's operations.

636. **Fifthly,** Glencore Agriculture and Viterra take a careful and considered approach to requests received for flexible working arrangements and endeavour to grant such requests wherever possible, save for circumstances in which there are operational requirements that prevent it from doing so.[449] Nonetheless, there are circumstances in which it has been unable to grant requests from employees who sought to work specific hours because, for instance, the proposed starting/finishing times were inconsistent with the opening hours of the worksite. In each of the examples provided however, an agreement was ultimately reached between the relevant employees and Viterra as to alternate hours of work that could be accommodated.[450]

637. **Sixthly,** Mr Norman anticipates that the grant of the ACTU's claim could result in circumstances in which there is insufficient labour available at specific times, which would adversely impact productivity and efficiency.[451] As a corollary, it may also result in circumstances whereby employees seek to work at times where there is no work to perform, which creates additional employment costs and gives rise to safety-related concerns.[452]

638. **Seventhly**, Mr Norman's evidence establishes the significant difficulties, time and expense associated with recruiting and training new employees, as well as the resulting loss of productivity.[453]

[449] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 58 – 60.
[450] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 64 – 68.
[451] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 74 – 78.
[452] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 70.
[453] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 79 – 87.

12.2.3 Janet O'Brien

639. Janet O'Brien is the National Manager – People and Performance of Conplant Pty Ltd (**Conplant**). Ai Group particularly relies upon the following elements of her evidence.

640. **Firstly**, the precise timing of the workflow through Conplant is contingent upon the needs and demands of its customers. There is little if any certainty as to precisely when Conplant's customers will place an order for equipment to be hired or purchased from Conplant, the specific type of equipment sought, when it is to be delivered or where it is to be delivered to. The very nature of the business is such that Conplant requires its employees to be ready, willing and able to perform the relevant work as and when required.[454] There are also certain times of the day (e.g. early in the morning) that Conplant requires its employees to work in order to meet the demands of customers in the construction industry who typically commence work at that time.[455] An employee right to determine hours of work is clearly incompatible with the needs of such a business and their ability to meet their customers' requirements.

641. **Secondly,** Conplant's ability to meet its customers' needs is central to maintaining its competitiveness.[456] Accordingly, to the extent that the ACTU's claim would have the effect of undermining its ability to satisfy those needs, this would undermine its brand, reputation and potentially its profitability.

642. **Thirdly,** Conplant takes a compassionate approach to its employees' personal circumstances and tries to accommodate them wherever possible. This can be seen from the evidence given by Ms O'Brien regarding an employee who was absent for 18 months due to a personal illness and was paid by Conplant throughout that period even though he was not accessing any of his statutory entitlements to be absent.[457] Additionally, Conplant has

[454] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 6 – 7 and 39.

[455] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 39.

[456] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 8.

[457] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 23 – 27.

recently granted a request made by an employee with parenting responsibilities to work part-time. The request was granted in the terms sought.[458]

643. **Fourthly**, Ms O'Brien gives evidence of the consequences and potential consequences for Conplant as a result of its decision to grant the latter request. This includes the following:

- Conplant now requires another employee to perform the work of the part-time employee whilst she is not working. This is because he is the only other employee of Conplant who works in the same office as her. Ms O'Brien explains that this has the effect of requiring him to perform work that does not properly utilise his skills and experience, which can have an adverse impact on his morale, attitude towards the work and workplace, his well-being, productivity, and efficiency.[459] It has also had the effect of increasing his workload, which means that he is unable to perform some of his duties.[460]

- The need for a handover process between the part-time employee and the other employee is inefficient and undermines Conplant's productivity.[461]

- There are difficulties associated with finding a suitably skilled employee who is available at the precise times that the part-time employee does not work (i.e. every Monday and every second Wednesday and Thursday afternoon for one hour).[462] In addition, Ms O'Brien explains that Conplant would be exposed to the time and

[458] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 28 – 32.

[459] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 33.

[460] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 33.

[461] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 33.

[462] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 35.

expense of training a new employee[463] and the productivity losses associated with engaging a new employee.[464]

644. **Fifthly,** Ms O'Brien expresses a concern at the prospect of needing to repeatedly re-negotiate the working arrangements of other employees if Conplant's part-time employee referred to above were able to change her hours from time to time pursuant to the ACTU's proposed clause.[465]

645. **Sixthly**, Ms O'Brien also expresses concern at the prospect of needing to make a replacement employee redundant in circumstances where an employee exercised their right to revert pursuant to the ACTU's proposed clause.[466]

12.2.4 Peter Ross

646. Mr Peter Ross is the General Manager – Human Resources of Rheem Australia Pty Ltd (**Rheem**). Ai Group relies on his evidence as follows.

647. **Firstly,** Mr Ross describes certain basic principles associated with the manner in which demand for labour is derived in a lean manufacturing environment such as that which Rheem operates in.[467] His evidence establishes that an inefficient allocation of labour (caused either by staff absences, due to an excess number of staff or a mismatch of skills) can lead to a fall in productivity and reduced efficiency. This can ultimately have the effect of undermining international competitiveness and result in a decision to offshore the relevant work.[468]

648. **Secondly**, the evidence establishes that a shift structure can create certain restrictions within which labour must be deployed to work. To the extent that an employee seeks to work part of a shift, this creates specific difficulties

[463] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 35 and 44.

[464] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 36 and 44.

[465] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 47.

[466] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 47.

[467] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 6 – 9.

[468] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 10 – 15, 71 – 72 and 74.

including an inability to find another employer to work the remaining part-shift and/or an adverse impact on productivity.[469] Such difficulties are not unique to Rheem and would likely be felt by any employer who operates a similar production facility.

649. **Thirdly**, the evidence establishes that requiring employees to work at certain times (either by pursuant to a request they have made or otherwise) can result in increased employment costs because, for example, the relevant industrial instrument requires the payment of a shift penalty.[470] In this case, the relevant enterprise agreements incorporate the *Manufacturing and Associated Industries and Occupations Award 2010*,[471] which prescribes an afternoon shift penalty.

650. **Fourthly**, the evidence establishes that Rheem requires a certain minimum number of employees to be present at work at a particular time in order for it to ensure quality service delivery to its customers. For instance, Rheem requires a minimum number of employees to work in its call centre, particularly during peak times, in order to ensure that customers do not face excessive waiting times.[472] Similarly, Rheem requires its field technicians to be ready, willing and able to work when required so that customers' hot water systems are promptly repaired.[473] Mr Ross states that undermining service delivery can impact on Rheem's brand and its revenue stream.[474] In some instances, staff absences may mean a complete inability to provide the relevant service. [475] Similar concerns regarding customer service and consumer demands are articulated by respondents to the Joint Employer Survey, which establishes that Mr Ross' concerns are not unique or peculiar to Rheem.

[469] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 12 and 73.
[470] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 19 – 20.
[471] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 39 – 41 and 43.
[472] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 26 – 27 and 57.
[473] Witness statement of Peter Ross dated 24 October 2017 at paragraph 30.
[474] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 27 and 31.
[475] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 28 – 29.

651. **Fifthly**, Rheem takes a flexible and accommodating approach to requests received for flexibility and when determining employees' hours of work.[476] This is demonstrated specifically by the approach it takes to moving employees between its day shift and afternoon shift, which involves the conduct of 'hardship interviews' as a product of which Rheem gives consideration to the consequences that would face employees if their working arrangements were altered before making its decision.[477]

652. **Sixthly**, where Rheem grants requests for flexible working arrangements, this is not without consequence to Rheem as it causes the business to implement measures to facilitate the changed working hours and can nonetheless cause a drop in efficiency.[478]

653. **Seventhly**, there are circumstances in which Rheem cannot accommodate requests for flexibility due to genuine operational reasons.[479] Such reasons include the inefficient allocation of labour that would result, which would adversely impact on service delivery and/or productivity and efficiency.[480] The dispute concerning Mr Shane O'Neill provides a very useful illustration of the consequences that can flow to a business if, despite the existence of reasonable business grounds, an employer is made accommodate an employee's requested hours of work.[481]

654. **Eighthly,** the effectiveness of a model that permits and promotes discussion between an employee and employer regarding changes sought by the employee to their working hours is borne out in Mr Ross' evidence regarding two employees employed in the call centre, with whom Rheem was able to

[476] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 48 – 49 and 61 – 67.

[477] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 50 – 52.

[478] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 53 and 71 72.

[479] Witness statement of Peter Ross dated 24 October 2017 at paragraph 56.

[480] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 58 – 59.

[481] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 71 – 72.

reach an agreement to work part-time after both employees returned from parental leave.[482]

655. **Ninthly**, the evidence speaks to the difficulties, costs and inefficiencies associated with recruiting and training new employees.[483]

656. **Tenthly**, the ACTU's claim would have a direct bearing on Rheem's business, given that some of its enterprise agreements incorporate the *Manufacturing and Associated Industries and Occupations Award 2010*.[484]

[482] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 58 – 59.

[483] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 74 – 75.

[484] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 39 – 41.

13. THE OPERATION OF THE PROPOSED CLAUSE

658. In this section, we deal with numerous practical difficulties that flow from the ACTU's proposed clause. This encompasses, but is not limited to, identifying a number of deficiencies in the manner in which the clause has been drafted. In this regard, we make the overarching observation that the clause is far from "simple and easy to understand".[485] Indeed, in various respects the operation of the clause is entirely unclear.

659. Beyond commenting on the wording of the clause, we also seek to highlight various ways in which the clause is either unworkable or unreasonable; or in which it has the potential to give rise to problematic consequences or outcomes.

660. Before proceeding into this treatment of the ACTU's proposal, we here make the observation that the proposed clause now before the Commission is the third iteration of the ACTU's claim. By any reasonable assessment, they have been afforded ample opportunity to amend and refine their claim. We make this observation out of a pre-emptive concern that the ACTU may seek to fundamentally amend the nature of the variation that they seek in response to employer submissions in opposition to it.

661. Although we accept that in the context of this Review, the Commission is not bound to grant a remedy in the terms claimed, these proceedings have been conducted through the prism of a specific claim. The proceedings do not represent a general inquiry into the adequacy or otherwise of the current regulatory response to the needs of parents or carers. While it may have been open to the Commission to undertake this Review through proceedings of that nature, it has not so elected. Accordingly, parties such as ourselves, have made decisions about how they seek to engage with the Review and respond to the case advanced by the ACTU based upon the nature of the specific claim

[485] As contemplated by s.134(1)(g).

advanced. This includes, for instance, the evidence adduced from Ai Group's witnesses and questions asked in the Joint Employer Survey.

662. If the ACTU is not able to satisfy the Full Bench of the merits of the specific clause they have proposed, the proper course of action ought to be rejection of the claim. Affording the ACTU further opportunities to alter their claim, in the face of opposition from other parties participating in the proceedings, would potentially visit an unfairness upon such other parties and be contrary to the requirements of s.577(a) of the Act.

663. By way of overview, this section of our submission deals with the following issues associated with the drafting and operation of the clause:

- The nature of the proposed entitlement and the proposition that it provides for an entitlement to reduced hours only;
- The obligation to maintain an employee's 'existing position';
- Issues associated with the 'remuneration' of an employee on family friendly working hours;
- The permissible duration of a family friendly working arrangement and the operation of the right to revert to former working hours;
- The absence of any restriction on repeated access to the proposed entitlement;
- The notion of parenting and caring responsibilities under the clause and the nexus with an entitlement;
- Issues associated with the breadth of the proposed clause X.4.1 and clause X.4.2
- Uncertainty regarding what constitutes the parenting or caring responsibilities to be accommodated;
- Use of the phrase 'of school age';

- The proposed eligibility requirements;
- Difficulties with the reference to 'continuous service';
- Difficulties with the application of the clause to casual employees; and
- The proposed evidentiary requirements.

The Nature of the Proposed Entitlement and the Proposition that it Provides for an Entitlement to Reduced Hours Only

664. The ACTU submissions portray the proposed clause as providing for a reduction in working hours and no other form of flexibility. However, when regard is had to the actual terms of the provision now sought, it is evident that it would afford employees a much greater level of control over their working hours than such submissions suggest.

665. The ACTU assertion regarding the limited operation of the clause is most clearly encapsulated in paragraphs 180 of its submissions, which forms part of the submission dealing with the operation of the proposed provision:

> 180. There are many types of flexible working arrangements, including working from home, changes in shifts or rosters, flexible start and finish times, changes in work location and access to part-time work or reduced hours.
>
> 181. The ACTU's clause provides access to a temporary reduction in working hours only, not any other form of flexible arrangement. This is narrower in scope than s.65, which does not place any limits on the types of changes to work arrangements that can be requested. 'Changes in working arrangements' are not defined in s.65, but include changes in hours, patterns and locations of work.[486]

666. There is a significant disconnect between this description of the clause's operation and what would be its actual effect. The short point is that the clause does not merely provide for a reduction in the quantum of hours of work that the employee performs. Instead, it enables an employee to nominate the specific days and times that the employee wishes to work "during the Family Friendly Working Hours period". It enables them to exercise absolute control

[486] ACTU submission dated 9 May 2017 at paragraphs 180 – 181.

over when they work. This can be demonstrated by stepping through the mechanics of the clause.

667. Clause X.1 creates an employee entitlement to 'Family Friendly Working Hours'. Relevantly, clause X.1.1 provides:

> X.1.1 An employee is entitled to Family Friendly Working Hours to accommodate their parenting responsibilities and/or caring responsibilities in accordance with this clause.

668. When regard is had to the definition of Family Friendly Working Hours contained at clause X.4.4, it may be accepted that the entitlement afforded under clause X.1 is to a reduction in hours. The definition is cast in the following terms:

> X.4.4 'Family Friendly Working Hours' means an employee's existing position:
>
> X.4.4(a) on a part-time basis if the employee's position is full-time; or
>
> X.4.4(b) on a reduced hours basis, if the employee's existing position is part-time or casual.

669. Clearly, the combined effect of clauses X.1 and X.4 is to enable an employee, depending on their circumstances, to transition to working on a "part-time basis" or a "reduced hours basis". That is, the employee is afforded a right to access a reduction in their hours of work.

670. It is however significant that the final words of clause X.1.1 provide, in effect, that the entitlement to 'Family Friendly Working Hours' operates "…in accordance with…" the clause as a whole. Consequently, to understand the entitlement, it is necessary to consider all elements of the clause. When viewed in this manner, it seems that the clause not only enables an employee to access "Family Friendly Working Hours", but also the implementation of a "Family Friendly Working Hours Arrangement"; a concept which, in effect, enables an employee to not only select the *quantum* of hours that they work but also the days and times at which they work.

671. Relevantly, clause X.3.1 provides:

> X.3.1 An employee shall give their employer reasonable notice in writing of their intention to access Family Friendly Working Hours under clause X.1.1, including at least the following matters:
>
> X.3.1(a) the period of time that the employee requires Family Friendly Working Hours;
>
> X.3.1(b) the specific days and hours of work that the employee wishes to work during the Family Friendly Working Hours period;
>
> X.3.1(c) the date on which the employee wishes to revert to their former working hours under clause X.2.

672. Clause X.3.2 provides:

> An employee will implement the Family Friendly Working Hours arrangement provided by the employee under X.3.1, or the arrangement agreeable to the employee.

673. The term "Family Friendly Working Hours arrangement" is in turn defined in clause X.4.5:

> X.4.5 'Family Friendly Working Hours arrangement' means either the written document provided by the employee under clause X.3.1, or an agreed variation of that arrangement recorded in writing and provided to the employee.

674. In essence, the combined effect of clause X.3.1 and clause X.3.2 is that an employee who intends to access family friendly working hours must give their employer notice of the period of time during which they require family friendly working hours arrangements and the specific days and times that they want to work as part of such family friendly working hours, and the employer is required to implement the particular arrangement specified in the notice.

675. Relevantly, clause X.3.1 requires an employee to provide notice of the "specific days and hours of work that the employee wishes to work during the Family Friendly Working Hours period". The clause allows the employee to simply pick both the number of days in any given week that they will work and which particular days. In this regard, we note that the clause does not require that the days must coincide with the days that the employee previously

worked. Instead, an employee is free to simply elect any day or days that they may wish to work in order to accommodate their parenting responsibilities.

676. The reference to "hours of work" in clause X.3.1(b) appears to be sufficiently broad so as to enable an employee to not just control the quantum of hours that they will work, but to nominate their actual starting and finishing times.

677. The clause does not provide any parameters or restrictions around the days and hours that an employee may identify pursuant to clause X.3.1. For example, it does not even specify that the days or hours must be consistent each week or month. Accordingly, it would be open to an employee to simply nominate all of the individual days or hours that they will work over the duration of the family friendly working hours period without there even being any pattern or regularity.

678. The clause does not compel regard to be had to the needs of the employer, the application of relevant award clauses (such as those dealing with ordinary hours of work, penalty rates or minimum engagement periods), or the hours or days that the employee was originally engaged to work. Indeed, an employee could give notice indicating that they want to work at times that fall;

- on days other than those that they have previously been engaged to work;
- outside the hours in which the business operates;
- at times that are entirely inappropriate for the operational requirements of the organisation (such as at times that do align with customer requirements or when specific activities need to be undertaken for some other reason);
- during a different shift to that which the employee previously worked;
- at times that do not even align with the shift arrangements that may be in place in a particular workplace;

- at times that do not accord with the employer's existing approach to rostering or the need to coordinate the work of different employees;

- during hours that are outside of the 'ordinary hours of work' as defined or otherwise provided for in the relevant award, thus attracting overtime payments;

- at times that would attract additional penalty payments, such as during the weekend or on an afternoon or night shift;

- at times that do not accord with the requirements of the relevant award (such as, for example, minimum engagement periods or requirements to work ordinary hours continuously, or to take breaks at a particular time);

- In a manner that is not in accordance with other regulation governing hours of work that may be applicable (for example, regulation governing retail trading hours or dealing with management of fatigue in the road transport, rail or aviation industries).

679. It seems trite to observe that there are a raft of problems that may flow from an employee simply selecting their own working hours, especially in circumstances where there is no compulsion on them to have regard to such matters as those identified above.

680. The proposition that an employee's hours of work are set entirely at their prerogative represents a radical departure from the general assumption within awards, or indeed the workplace relations system more broadly, that hours are either set by agreement or at an employer's prerogative. In chapter 8 of our submissions we have addressed the very good reasons why an employer should be able to exert a level of control over the working hours of their employees.

681. The survey responses to the Joint Employer Survey depict stark examples of the unworkable and frankly ludicrous consequences that would flow from the implementation of the ACTU's clause. Nonetheless, we also raise for the Full

Bench's consideration the following few obvious examples of circumstances where the ACTU proposal would be unworkable or unreasonable:

- Employees working as pilots or flight attendants on long haul flights;
- Employees working as truck drivers on long distance operations;
- Employees working on an offshore oil refinery;
- Employees working on a ship at sea;
- Employees working on a continuously operating production line;
- An employee driving a school bus; and
- An employee working as a live theatre performer.

682. These are but a few examples. It is likely that in every industry in Australia there are employers who could not, from a practical perspective, accommodate the requirements of the ACTU's proposal. The claim would likely to have a particularly adverse impact upon small employers who, by definition, will have a limited capacity to deploy other existing staff to cover for absence flowing from an employee's reduced hours of work. In this regard the ACTU's proposal is inconsistent with the element of the object of the Act that speaks to the special circumstances of small and medium-sized businesses.[487] We here repeat the observations of the Full Bench in 2005 in relation to a relevantly similar claim for an employee right to return from parental leave on a part-time basis:

> 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-sized 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...[488]

[487] See s.3(g) of the Act.

[488] *Parental Leave Test Case 2005* (2005) 143 IR 245 at 255.

683. The effect of the ACTU clause would be to impose a similar obligation upon employers to that which the Full Bench in the Parental Leave Test Case 2005 rejected, and the ACTU's latest claim should accordingly also be rejected.

The Obligation to Maintain an Employee's 'Existing Position' (Clause X.1.1 and Clause X.4.4)

684. Beyond affording employees an entitlement to reduced hours, the proposed clause also requires that an employee is able to maintain their existing position whilst performing such reduced hours. This element of the proposal has the potential to give rise to various problems.

685. Clause X.1.1 affords an employee an entitlement to 'Family Friendly Working Hours'. This term is defined to mean an: (Emphasis added)

> …employee's **existing position:**
>
> X.4.4(a) on a part-time basis if the employee's existing position is full-time; or
>
> X.4.4(b) on a reduced hours basis, if the employee's existing position is part-time or casual.

686. The term 'existing position' is defined in the following manner:

> X.4.6 **existing position** means the position, including status, location and remuneration, that the employee held immediately before the commencement of the Family Friendly Working Hours.

687. This definition is by no means simple or easy to understand. Firstly, the clause does not actually define what constitutes the employee's position other than to provide a non-exhaustive list of matters that will form part of their position. Even to the extent that it does, it provides limited assistance in clarifying precisely what the clause would require. For example, the term 'status' as included in the clause is not defined and is an inherently vague concept.

688. It is unclear whether, or to what extent, the clause would operate to prevent an employer from changing the particular tasks that an individual would perform once their hours of work were modified. For example, could an employee on a production line be directed to perform different tasks than that which they previously undertook in order to minimise disruption or inefficiency

that may flow from the altered hours of work? Could a truck driver be allocated different runs or to drive a different vehicle to that which they customarily undertook prior to the arrangement being implemented in order to address their changed availability (noting that this may also affect their remuneration)? Could a person covered by the *Commercial Sales Award 2010* be allocated responsibility for looking after different customers if their modified hours affected their ability to service their previous customers?

689. More broadly, it is entirely unclear how an employer could maintain the position or 'status' of an employee with supervisory or leading hand responsibilities if the relevant 'Family Friendly Working Hours arrangement' meant that they were not working at the same time as the employees that they may have previously supervised or led. We do not here simplistically assert that all supervisory or senior roles are incompatible with part-time work. This will undoubtedly depend upon variables such as the nature of the work and the manner in which it is arranged and the particular hours of work that the employee is available to perform. However, the absence of any capacity for an employer to refuse an employee's proposed arrangement means that there is no mechanism in the proposed clause capable of addressing such complexities. The proposal appears to be based upon an assumption that the complexities simply do not exist.

690. Ai Group recognises that the ACTU's proposal is likely intended to address what they have identified as 'occupational downgrading'. However, the approach that they have adopted operates on the assumption that all roles or jobs performed by award covered employees can be undertaken on a part-time basis. Indeed, it assumes that that such roles or jobs can be performed during whatever hours or days the employee nominates. This proposition has not been established in the evidentiary case advanced by the union and blatantly ignores the undeniable realities of business and work. We urge the Full Bench to consider how the clause could be sensibly applied in the context of the scenarios identified above.

691. The Commission cannot regulate a role into existence, and, for the various reasons that we have identified in chapter 8, should generally refrain from interfering with the exercise of managerial prerogative as to how work is structured or undertaken.

692. Turning to the specific considerations arising under the modern awards objective, to the extent that the proposed clause would interfere with the manner in which an employer structures the performance of work, the structure of its workforce or the allocation of work, it weighs against the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)). It would also have an adverse impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(g)).

Issues Associated with the 'Remuneration' of an Employee who Accesses Family Friendly Working Hours (Clause X.4.6)

693. The definition of 'Family Friendly Working Hours' encompasses an entitlement for an employee to work reduced hours whist receiving the same remuneration that they received prior to the implementation of such an arrangement. Such an obligation potentially gives rise to a raft of problems.

694. Before identifying these difficulties, we observe that the clause does not define or specify what constitutes 'remuneration'. Adopting the plain and ordinary meaning of the word, we assume that it is intended to mean the pay, recompense or reward for work that the employee receives, however that may be constituted. It does not appear that the reference to remuneration is intended to be limited to the amount of payment that an employee receives pursuant to the award.

695. To the extent that the clause would operate to require maintenance of over-award payments we contend that it is incompatible with the very nature of a minimum safety net of terms and conditions and would not be *necessary* as contemplated by s.138.

696. A literal reading of the proposed provision suggests that an employee would be required to receive the same *quantum* of payment as they would have been paid had they not reduced their hours of work. That is, it does not appear to contemplate that an employee will incur any reduction in the overall amount that they are paid as a product of their change in working hours. Instead, it seems intended that an employee will be able to work less and maintain their level of pay. Suffice to say, it would be profoundly unfair for an award clause to operate to enable an employee to reduce their hours of work and still receive the same level of pay.

697. Even if it is intended that an employee's remuneration will be calculated on a pro-rata basis, the clause does not provide any guidance as to the manner in which the remuneration should be reduced to account for the fact that an employee would be performing less work as a consequence of their working family friendly working hours. This is a major deficiency in the proposed clause.

698. It may well be that the clause reflects an assumption that an employee will be paid an hourly rate and that, consequently, any reduction in the amount of work performed will result in a reduction in the amount that they are paid. However, such an outcome does not seem permissible given the manner in which the provision has been drafted. Clause X.1.1 entitles an employee to 'Family Friendly Working Hours'. This is defined, in effect, as the employee's position on a part-time or reduced hours basis and an 'employee's position' is defined as the position "…including status, location and remuneration that the employee held immediately before the commencement of the Family Friendly Working Hours." There appears to be little scope to cavil with the proposition that the clause would not permit a reduction in remuneration.

699. Regardless, the clause fails to deal with circumstances where an employee is paid by some means other than an hourly rate. Take, for example, circumstances where an employee is paid an annualised salary (either pursuant to an award clause or through a contractual arrangement that is not inconsistent with award requirements) or some form of over-award payment

that is not precisely referable to the actual hours of work performed. In such circumstances, the clause would appear to provide an employee with an entitlement to work fewer hours but would not enable an employer to reduce the quantum paid to the individual. Accordingly, even if the clause did not, by its own force, require maintenance of overall remuneration at the same level as the employee received prior to the application of the provision notwithstanding the reduction in work performed, this may be its practical effect.

700. In considering the merits of the claim the Full Bench must bear in mind the manner in which the proposed clause may interact with contractual arrangements between an employer and employee that have been struck prior to its application and the extent to which the clause may operate to deliver employees an unjustifiable an unreasonable windfall gain of having reduced hours of work, but no associated reduction in their remuneration.

701. The proposition that many award covered employees are paid remuneration that is calculated other than by reference to the precise hours worked should not be contentious. The adoption of annualised salary arrangements incorporating over-award payments (whether or not acknowledged within the applicable award) is common in a range of industries. Consequently, the failure of the proposal to address such matters would, in and of itself, warrant the rejection of the claim. The potential for it to operate in a profoundly unfair manner is obvious.

702. Further difficulties arise when one considers how the proposed clause might operate in the context of atypical remuneration structures. This would include, for example, performance bonuses, piece rates and commission-based payments that are typically structured in such manner that an individual's working hours may impact upon the individual's earnings. The extent to which an employer may be required to maintain the level of such earnings notwithstanding the reduction in the employee's hours is far from clear.

703. We are also concerned that the clause may require the payment of allowances, loadings or other amounts that an employee may been eligible to

receive pursuant to the relevant award based upon their hours of work that they had previously performed, even if they would not be eligible based upon the hours or days of work that the employee would perform pursuant to the family friendly working hours arrangement. For example, it is unclear whether an employee who had previously performed an afternoon shift as recognised under an award and received an associated shift allowance would be entitled to continue to receive such an allowance if their modified hours of work no longer triggered such payment.

704. In advancing these submissions we note that there is no need for issues associated with remuneration to be dealt with under the legislative scheme constituted by s.65. This is because the scheme stops short of giving employees an absolute and unilateral right to modify their hours. In such a context, these matters may be the subject of discussion and ultimately agreement between an employer and employee. There is, in such a context, less need for prescription as to how an employee's remuneration may be affected by a reduction in their hours of work. However, under the ACTU's proposal there is no necessity or even incentive for an employee to compromise in any reasonable way in order to secure flexible work arrangements. They could, for example, simply demand to work only a few hours of work a week but insist upon maintenance of their current annual salary. In such circumstances, the employer would need to engage, and pay, another employee for the shortfall in hours.

705. The clause also does not address circumstances where an employee may choose to take on a role as a paid carer for most of the hours that they previously worked for the original employer, and draw two incomes for the same hours each week – one from the original employer due to the obligation not to reduce remuneration, and the other as a paid carer.

706. To the extent that the clause may require maintenance of an employee's remuneration in circumstances where a reduction in remuneration may otherwise be justifiable in light of the reduction in their working hours, it will

contrary to the considerations in s.134(1)(f), given it would have an adverse impact upon employment costs.

The Permissible Duration of a Family Friendly Working Arrangement and the Operation of the Right to Revert to Former Working Hours (Clause X.2 and Clause X.3.1(c))

707. The drafting of the clause gives rise to an ambiguity or uncertainty as to what constitutes the period during which an employee is entitled to 'Family Friendly Working Hours'. The maximum duration of a 'Family Friendly Working Hours arrangement' is also unclear.

708. When regard is had to the ACTU's submissions, and to the wording of the clause as a whole, it appears to us that the clause may be intended to afford employees a right to access a Family Friendly Work arrangements during the period referred to in clause X.2. That is, it seems that under the proposal an employee may access family friendly working hours either *until* a child reaches school age or for a period not exceeding two years from the date of the commencement of the family friendly working hours. It appears that any extension of the entitlement beyond those periods must be by agreement.

709. Our contention is this regard is based partly upon the requirement under clause X.3.1 that an employee provide notice of "the date on which the employee wishes to revert to their former working hours under clause X.2". Further, the ACTU's submissions explaining the proposed "right to revert" also appear to proceed on the assumption that access to family friendly working hours will be limited to the duration of the periods specified in clause X.2, unless a longer period is agreed. This is reinforced by the emphasis placed by the ACTU's submissions on evidence indicating that the need for reduced hours is greater before a child starts school.

710. The assumption within clause X.5 that a replacement employee will be of a temporary nature is also consistent with there being an intended cap on the duration of an individual's entitlement to Family Friendly Working Hours.

711. We nonetheless note that the clause could be read so as to provide for an entitlement to a Family Friendly Working Hours arrangement that is *not* limited by the parameters identified in clause X.2. The following factors support such a proposition:

a. Clause X.1.1 does not contain any limitations on the application of the entitlement, other than that it be to accommodate the relevant responsibilities and that it operates "in accordance with the clause".

b. Clause X.3.1(a) requires that the employee give notice of the period of time that the employee requires Family Friendly Working Hours but does not place any restriction on the length of the period.

c. Clause X.2 only provides for an employee "right" to revert to their former working hours (emphasis added). It does not provide that an employee must return to such former hours unless otherwise agreed by the employer.

d. No element of the clause clearly specifies that an employee's entitlement to working hours is limited to the periods identified in clause X.2.

712. Moreover, there is a disconnect between the definition of an employee who has 'parenting responsibilities' in clause X.4.1 and the provisions of clause X.2.1. Clause X.4.1 is drafted so as to include a person who has responsibility for the care of a child *of* school age or younger. However, this is squarely inconsistent with the operation of clause X.2.1, which affords a right to revert *up until* a child is school aged. Accordingly, the requirements of clause X.3.1(c) and the content of clause X.2.1 simply cannot be reconciled. On one view, the clause may provide an employee with eligibility to the flexibility afforded under clause X.1.1 but no right to revert to their former hours. An alternate explanation may be that there is simply an error in the drafting. We can only speculate as to such matters.

713. Further, while clause X.2.2 limits the right of an employee with caring responsibilities to 'Family Friendly Working Hours' for a period of two years, it is entirely foreseeable that in some instances such employees will still have

caring responsibilities, as contemplated in clause X.4. In such circumstances, it appears that an employee will be able to simply give further notice in accordance with clause X.3.1 and access Family Friendly Working Hours for a further period. Nothing in the clause limits the number of times an employee can access Family Friendly Working Hours. Accordingly, an employee could access such flexibility for an unlimited period of time.

714. Suffice to say, the clause is by no means simple and easy to understand. Indeed, we contend that the major deficiencies in the drafting of the proposed clause warrants the rejection of the claim. The level of uncertainty around key aspects of the claim means that it is simply impossible for the Full Bench to properly assess the impact of the claim.

715. For the purposes of completeness, we submit that a clause which provided an obligation for an employer to afford an employee Family Friendly Work Hours for an indefinite period (or over a very lengthy period) would be exceptionally unfair in circumstances where there is no capacity for the employer to refuse the request on reasonable business grounds. For example, it would be unreasonable for an award clause to require an employee to provide Family Friendly Work Hours for the duration of a child's schooling. Similarly, it cannot be accepted that it would be fair to an employer to provide an employee with such flexibilities for the entire duration of time that they may have caring responsibilities, without any qualification. In either instance, the clause may cause an employer to be required to provide the contemplated form of flexibility to an employee for many years (possibly even decades). On any reasonable assessment, this fails to strike a reasonable balance between the interest of employers and employees, as mandated by the modern awards objective.

The Absence of any Restriction on Repeated Access to the Proposed Entitlement

716. The proposed clause does not limit the number of times that an employee may access Family Friendly Working Hours or require the implementation of a 'Family Friendly Working Hours arrangement'. Consequently, an employee

may seek to frequently alter the times and days upon which they work, and their employer would be obliged to simply accommodate such changes. The resulting difficulties for an employer in such circumstances are obvious.

717. The ACTU's submissions state that the clause envisages that there will be one Family Friendly Working Hours arrangement per child[489]. However, the wording of the clause does not actually reflect this. The clause contains no such limitation.

718. This aspect of the clause's drafting gives rise to the plainly unreasonable possibility that an employer may be required to accommodate repeated short-term changes in an employee's working hours. This has the potential to magnify the potential disruption to an employee's business that may flow from and the associated administrative burden and cost of engaging and training replacement staff.[490]

The Notion of Parenting and Caring Responsibilities under the Clause and the Nexus with the Proposed Entitlement (Clauses X.1.1, X.4.1 and X.4.2)

719. The notion of parenting responsibilities and caring responsibilities is key to understanding the nature of the entitlement that is contemplated under the proposed clause.

720. Subclause X.1.1 entitles an employee to Family Friendly Working Hours to accommodate their parenting responsibilities and/or caring responsibilities. (emphasis added)

721. Relevantly, clause X.4.1 states:

> An employee has 'parenting responsibilities' if the employee has responsibility (whether solely or jointly) for the care of a child of school age or younger.

[489] ACTU submission dated 9 May 2017 at paragraph 183.

[490] This is contrary to considerations arsing under s.134(1)(d) and s.134(1)(f).

722. Clause X.4.2 states:

> An employee has 'caring responsibilities' if the employee is responsible for providing personal care, support and assistance to another individual who needs it on an ongoing or indefinite basis because that other individual:
>
> (a) has a disability; or
>
> (b) has a medical condition (including a terminal or chronic illness); or
>
> (c) has a mental illness; or
>
> (d) is frail and aged.

723. As a starting point, the proposition that an employee should be entitled to reduce their hours to '*accommodate*' parenting and/or caring responsibilities warrants detailed consideration as this represents the extent and nature of any nexus between an employee having parenting responsibilities and their qualification for an entitlement under the clause. The Macquarie Dictionary defines the word 'accommodate' in the following manner:

> … 4. to bring into harmony; adjust; reconcile; to accommodate differences. 5. To find or provide space for (something).

724. Having regard to this definition, and the ACTU's submissions, it appears that the clause is intended to enable an employee to *align* or *reconcile* their working hours with their parental or caring responsibilities. However, it does not go so far as to mandate that the Family Friendly Working Hours are *necessary* or *required* to enable an employee to undertake or meet their parental or caring responsibilities. Nor does it require that the *employee* is actually required to undertake such activities, in the sense that no other solution is available. Nor does the clause require that the employee is seeking to reduce their hours because they are attending to an activity associated with parental or caring responsibilities during the hours that they would otherwise be working under their existing arrangements. The nexus between having parental responsibilities and the entitlement to unilaterally reduce and select one's hours is unreasonably broad and affords an individual a greater level of flexibility than can be said to be necessary in the context of the Act's contemplation of a minimum safety net.

725. Put simply, it cannot be said that the clause only applies in circumstances where it is essential that an employee have Family Friendly Working Hours in order to be able to both work and meet their parental or caring responsibilities. Instead, the clause may operate to afford employees a right to reduce their hours simply because they would prefer such an outcome to maintaining their current hours, and given that they have a broad responsibility to care for an individual.

726. In the context of parenting responsibilities, the ACTU's acknowledges that it made a deliberate decision to specify that an employee has 'parenting responsibilities' even if the employee has sole or joint responsibility for the care of the care. The ACTU's justification for this approach is as follows:

> 176. The ACTU's claim filed on 15 June 2015 related solely to 'primary carers' returning form parental leave. It is envisaged that this category of employees will certainly be covered by the ACTU's current clause, and in fact is the group most likely to access reduced hours under the clause. However, the amended clause would apply to a broader range of employees, because it does not make the entitlement to FFWH conditional on having taken or returned from parental leave. The decision was taken to remove these terms because the vast majority of people who take parental leave and who hold 'primary' caring roles (at this point in time) are women, which would have had the undesirable outcome of effectively excluding men's access to the clause.
>
> 177. By contrast, the ACTU's current clause will entitle men and women with parenting responsibilities (whether or not they have taken parental leave, and whether or not they are 'primarily' responsible for caring for the child in question) to reduce their hours to accommodate their parenting responsibilities. It is hoped that this will encourage men and women to share caring roles more equitably (generating benefits for both men and women, as will as families and communities) and help reduce any stigma and other barriers associated with men utilising family friendly working hours in order to undertake caring responsibilities.[491]

727. The ACTU's hope on societal trends is merely a hope. It cannot be assumed that the proposed award clause will result in any fundamental shift in societal trends. The evidence does not establish that the reason why women shoulder a disproportionate burden of caring duties is an inability of men to access reduced working hours; and it is wildly optimistic to assume that the proposed

[491] ACTU submission dated 9 May 2017 at paragraphs 176 – 177.

change to modern awards will alter such matters. The causes of such a phenomenon are of course far more complex.

728. An unjustifiable consequence of the approach adopted by the ACTU is that the clause would operate to oblige an employer to accommodate an employee's preferred working hours, regardless of the impact that this may have on their organisation or operation, even in circumstances where another person has joint responsibility for the care of the child, but is also available to meet the child's need for care during the hours that the parent may have worked but for the implementation of the 'Family Friendly Working Hours arrangement'. Indeed, we understand that this is the intended effect of the clause. The approach imposes an unreasonable and unfair responsibility upon employers. It does not strike a proper balance between the interests of employers and employees.

729. We acknowledge that it is, for various reasons, desirable that caring responsibilities be shared more equitably between sexes than the evidence suggests occurs in many circumstances. Section 65 does not preclude an employee from making a request for flexible working arrangements in circumstances where there may be other persons who could undertake the various activities that may constitute a person's parenting responsibilities. This is an arguably justifiable approach in circumstances where an employer is able to refuse such a request on reasonable business grounds. However, fairness[492] necessitates a different approach absent such a right. There are limits to the extent to which employers can, as part of a fair and relevant minimum safety net of terms and conditions, be expected to shoulder responsibility for addressing community and societal issues.

730. In support of our position we note that the FW Act already reflects the Legislature's implicit acknowledgment of the reality that in some instances the care of a child will be shared by a couple and that there should be limitations on the extent to which the safety net should compel an employer to

[492] As contemplated by s.134(1).

accommodate an absence in circumstances where an employee's partner may be available to provide such care. Relevantly, subject to certain limited exceptions, an entitlement to unpaid parental leave under the NES can only be taken by one member of an employee couple at a particular time.[493]

The Breadth of the Definitions of Parenting and Caring Responsibilities (Clauses X.4.1 and X.4.2)

731. It seems somewhat unclear what is precisely meant by the phrase "responsibility (whether solely or jointly) for the care of a child of school age or younger" as referred to in clause X.4.1. We presume that what is intended is that parents of a child of school age or younger will be caught within the scope of the clause. What seems less clear, is the extent to which this phrase may also capture employees other than a parent of the child (or legal guardian) who may voluntarily elect to take on responsibility for the care of a child. It is accordingly unclear whether it would, for example, apply to an aunt, uncle, grandparent or some other person who simply chooses to care for a child on either a temporary or regular basis. To the extent that it may apply to such persons we contend that it is of unreasonably broad application.

732. Similarly, in relation to clause X.4.2, we observe that there appears to be no limitation on who an employee may be said to have caring responsibilities for, apart from the requirement that the person meets the criteria identified in X.4.2. For example, there is no requirement that the person be an immediate family member of the employee or indeed that there be any particular form of relationship between the parties. The clause appears to apply in any circumstance where an individual may choose to take on caring responsibilities for another. While the role of carers in our community is undeniably important, there are limits to the extent to which the employer of a person who voluntarily takes on such responsibilities can be expected to accommodate such a decision.

[493] See s.72 of the Act.

Uncertainty Regarding what Constitutes the Parenting or Caring Responsibilities to be Accommodated

733. The proposed clause does not clearly define what activities may fall within the scope of parenting and caring responsibilities. Instead, it defines *when* an employee has parenting responsibilities or caring responsibilities. This is a significant deficiency given the clause provides an absolute right for employees to alter their hours of work to accommodate such responsibilities.

734. In many instances, reasonable minds may differ on whether a particular activity constitutes or forms part of a person's 'parenting responsibilities' or 'caring responsibilities'. For example, would attendance at a child's co-curricular activities that a parent may elect to enroll them in constitute a parenting responsibility so as to give rise to an entitlement? Would picking up a teenage child from school be covered, even if other transport arrangement could be made? Similar uncertainties arise in relation to what activities may fall within the ambit of caring responsibilities.

735. The short point here is that the definitions in clause X.4 do not provide sufficiently robust or clear guidance as to when or in what circumstances an individual may seek 'Family Friendly Working Hours'. Consequently, it is open to being applied in a manner that is unreasonable to employers or, at the very least, inconsistent.

736. It may be put, in response to this concern, that there is a similar lack of clarity in the operation of s.65 or even that s.65 provides less prescription regarding the connection between the request for a change in working arrangements and the employee's reason for seeking it. However, a lack of precision in the identification of circumstances when an employee may be eligible to request flexible working arrangements under the statute is markedly more tolerable in the context of an entitlement that operates subject to the right of reasonable refusal than in the context of the very significant new entitlement proposed by the ACTU.

A Child 'of School Age' (Clause X.4.1)

737. In relation to the definition for when an employee has parenting responsibilities we note that while it refers to "responsibility (whether solely or jointly) for the care of a child of school age or younger", there is no definition for what constitutes "school age". In this regard, the clause is far from simple or easy to understand.

738. It may be that the ACTU intends the phrase has the same meaning as it does in the context of the FW Act. Section 12 of the Act provides that "school age" for a child, means "the age at which the child is required by a law of the State or Territory in which the child lives to attend school". Nonetheless, this is not apparent on the face of the clause.

The Eligibility Requirements – Length of Service (Clause X.6.1(a))

739. Clause X.6.1 makes the proposed entitlement to a 'Family Friendly Work arrangement' dependent upon the following specified eligibility requirements:

> X.6.1 To be entitled to Family Friendly Working Hours under this clause, an employee must:
>
> X.6.1(a) Have completed at least six months continuous service with the employer; and
>
> X.6.1(b) If required by the employer, provided evidence that would satisfy a reasonable person that the employee has parenting responsibilities and/or caring responsibilities that meet the relevant definition in clause x.4. Such evidence may include a document or certificate from a health professional/practitioner or relevant services provider, or a statutory declaration.

740. This aspect of the clause is out of step with the approach adopted in s.65 of the FW Act which provides a right to request after 12 months of continuous service and requires that additional criteria be met by a casual employee. Relevantly, s.65(2) provides:

> (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.

741. Section 12 of the ACT defines a 'long term casual employee' in the following manner:

"long term casual employee": a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months

742. Under the ACTU's proposal, employees would be able to access 'Family Friendly Working Hours' after only 6 months of continuous service, while the more limited statutory entitlement would only become available after 12 months. Further, unlike s.65, the ACTU proposal does not set separate eligibility criteria for casual and permanent employees. The adoption of such different thresholds for eligibility to what are clearly overlapping entitlements would be incongruous and is entirely unjustifiable.

743. In the context of considering what constitutes a 'fair' safety net, as contemplated by s.134(1), it is not unreasonable for an employer who engages an employee to work certain hours to expect that such an employee will, at least for a reasonable period of time, be able to perform such hours. Of course, an individual's circumstances may change over time. However, the selection of a six month qualification period does not strike a fair balance between the interests of employer and employees.

744. The ACTU's only argument in support of the selection of six months as the threshold for their proposed new entitlement is the assertion that employees are increasingly working shorter periods of time with their employer.[494]

[494] ACTU submission dated 9 May 2017 at paragraph 189.

However, it fails to establish that this is necessarily the case in all industries and occupations and makes no effort to grapple with the causes of such a trend. To the extent that the alleged trend may be a product of choices freely made by individual employees, rather the outcomes visited upon them, it can hardly constitute a proper basis for simply affording employees a more beneficial outcome than is available under the FW Act. In any event, the selection of a six month period is entirely arbitrary.

745. Putting aside the unfairness of a six month qualifying period, the adoption of a different test for eligibility to that adopted under s.65 is apt to confuse and is not consistent with the need to ensure a simple and easy to understand award system, as contemplated under s.134(1).

The Eligibility Requirements – Continuous Service (Clause X.6.1(a))

746. The use of the term 'continuous service' within the proposed clause, absent any definition, is also problematic. The term 'continuous service' is utilised in s.65. However, in this context it has a meaning affected by the operation of s.22, which clarifies the impact of various 'excluded periods' for the purposes of assessing 'continuous service' as contemplated under the statute. The ACTU clause does not address such matters.

747. It is also difficult, if not impossible, to assess how a notion of 'continuous service' under the clause will be applied to the context of casual employment. For example, to what extent would short term breaks or gaps in the engagement of a casual employee be taken to break the continuity of such service for the purposes of the clause?

748. At the very least, this aspect of the clause's operation is far from simple and easy to understand.

The Eligibility Requirements – Casual Employees (Clause X.6.1)

749. There are also difficulties that flow from the clause's application to casual employees.

750. **Firstly**, the proposition that an award clause would mandate that certain hours be provided to a casual employee, as appears to be the intended effect of the ACTU proposal, cannot be reconciled with the very nature of casual employment. No existing award clause mandates that a casual employee, regardless of how long and regular the tenure of their engagement, be afforded set hours of work. Such a proposition is an anathema to the very notion of casual employment which has, at its core, the concept that such employees will be engaged on an "as needed" basis. Moreover, it is unclear how the proposed clause would work in circumstances where there is no pattern or regularity to their hours of work and consequently no apparent basis for determining what would constitute a 'reduced hours basis'.

751. **Secondly**, it appears that the giving of notice under X.3.1 specifying the days and hours of work that the employee wishes to work during the "Family Friendly Working Hours period" (a concept that is not defined with the clause but which we assume means the period specified pursuant to X.3.1) would not require that a casual employee will be obliged to work such hours, if on a particular occasion they chose not to. It seems profoundly unfair for the clause to potentially operate to require an employer to offer "Family Friendly Working Hours" but for the clause not to compel a casual employee to actually work those hours. The clause only appears to oblige an employer to implement the family friendly working hours arrangement. There is no reciprocal requirement that an employee actually work such hours.

752. **Thirdly**, whilst the current workplace relations system affords various entitlements to certain casual employees, including various types of unpaid leave and various other additional protections (such as unfair dismissal rights) and entitlements under s.65, the ACTU proposal would represent a radical departure from the safety net's current regulation of casual employment.

753. Importantly, while s.65 does provide an entitlement for certain casual employees to request flexible working arrangements, any adverse impact of the provision on employers, is tempered by the limitation on the section's application to employees that have "a reasonable expectation of continuing employment by the employer on a regular and systematic basis." This recognises that some casual engagements will be inherently ad-hoc and not apt to be the subject of ongoing formalised arrangements such as is proposed by the ACTU.

754. We do not here suggest that the deficiencies in the application of the ACTU's proposed clause to casuals could be addressed by replicating elements of s.65 in the provision. The reality is that even in circumstances where a casual employee has been engaged on a long term and even regular basis there are entirely reasonable justifications for an employer refusing to agree to implement fixed arrangement regarding their hours of work. So much has, in effect, been acknowledged by the Full Bench in the casual employment common issues proceedings conducted as part of this Review, in rejecting union claims to remove employer rights to refuse casual conversion requests on reasonable grounds.[495]

755. **Finally**, we note that there is much less force to the proposition that an award clause affording an employee a unilateral right to reduce their hours of work is warranted in the context of casual employment as compared to permanent employment. A casual employee, by virtue of the very nature of their engagement, is not required to work any particular number of hours of work per week. In contrast, a part-time or full-time employee must perform the hours agreed with their employer or designated by the award. The flexibilities associated with casual employment mean that extending the entitlement to casual employees is not necessary as contemplated by s.138.

756. If a casual employee makes themselves unavailable for certain hours as a consequence of parenting or caring responsibilities, and they are

[495] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [380].

consequently dismissed or treated adversely, the proper remedy is the pursuit of an unfair dismissal or general protections application or such other cause of action as is available to them, depending on the circumstances.

Evidentiary Requirements (Clause X.6.1(b))

757. A major deficiency with the proposed clause is that it does not actually require the provision of evidence to establish that the 'Family Friendly Work Hours' or the proposed 'Family Friendly Working Hours arrangement' is actually necessary in order to enable the employee to undertake their caring responsibilities. All that the clause requires is that the employee has parenting responsibilities and/or caring responsibilities, and that they meet the definitions contained in clause X.4.

14. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

758. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

759. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

760. We also note that each modern award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether an additional mechanism for flexible working arrangements should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

761. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. <u>The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.</u>
>
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair

and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[496]

762. That the variations proposed by the ACTU may not adversely affect all employers in an industry is not the test to be applied in determining whether the variations should be made. By virtue of s.3(g), the object of the 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, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific types of businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

763. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine productivity in a certain industry (or industries). No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

764. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both

[496] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

765. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[497]

766. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.

767. For all the reasons we have set out in this submission, the ACTU has *not* overcome that threshold. It has failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the relevant modern awards meet the modern awards objective. To the extent that the ACTU has advanced certain contentions that purport to justify the necessity of the clause sought, we here propose to briefly respond to them before considering the various elements of s.134(1) of the Act.

768. **Firstly**, the ACTU relies on the AHRC Report in support of the proposition that "discrimination against mothers in the workplace is 'pervasive'"[498]. We have dealt with the report in detail at section 11.3 of our submission and for the reasons there articulated, submit that it cannot be relied upon to establish that mothers who seek flexibility in the workplace are in fact discriminated against in the sense understood at law. The AHRC's Report should, for the purposes of the present proceedings, be given little weight.

769. **Secondly,** the ACTU asserts that the proposed clause is necessary because "there are still a significant minority of workers who do not request family

[497] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[498] ACTU submission dated 9 May 2017 at paragraphs 42 – 45 and 47(f).

friendly work arrangements, including because they felt the workplace was openly hostile to flexible work and feared reprisals".[499] We have dealt with this notion of "discontented non-requesters" in detail at section 10.1.4 of our submission. For the reasons there stated, the material before the Commission cannot satisfy it that there is in fact a "significant minority" of such employees, that the ACTU's proposed clause will have the effect of leading any such employees to seek flexible working hours or that the existence of any such employees warrants the disproportionate response sought by the ACTU.

770. **Thirdly**, the ACTU asserts that "Dr Ian Watson found that family friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces"[500]. We note however that Dr Watson's report reveals that:

- Flexible start and finish times are most available to employees of small businesses;[501]
- Access to flexible start and finish times does not appear to correlate directly with earnings and there is little variance between employees in all but the top percentile;[502]
- Access to part-time employment is available to a significant majority of all employees, regardless of their earnings;[503] and
- Access to flexible start and finish times does not appear to vary greatly between permanent, casual and fixed term employees.[504]

771. **Fourthly,** the ACTU points to the inadequacy of the current safety net "to meet the needs of many employees who require reduced hours for a period, but who wish to retain their pre-parenthood occupation and method of

[499] ACTU submission dated 9 May 2017 at paragraph 45.
[500] ACTU submission dated 9 May 2017 at paragraph 45.
[501] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Figure 3.7.
[502] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Figure 3.8.
[503] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Figure 3.8.
[504] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Figure 3.11.

engagement"[505]. We have dealt with this contention and the reasons for which we do not accept it at chapter 10 of our submission. We rather submit that the safety net currently provides several means through which an employee can access flexibility, which are operating effectively and appropriately.

772. **Fifthly**, the ACTU argues that its proposed clause is necessary because family responsibilities have a negative effect on employment patterns and earning patterns of women who are mothers, and parenthood is associated with high rates of occupational downgrading.[506] We have dealt with these issues at chapter 9 of our submissions. For present purposes, we note that the evidence of "occupational downgrading" in Australia falls well short of being probative. The ACTU's own evidentiary case establishes that:

- 80% of people (men and women) who moved from full-time to part-time employment moved to a job with the same or higher skill level;[507] and
- only 13% of mothers who moved from full-time to part-time employment moved to a job with a lower skill level; almost the same percentage of mothers who moved from full-time to part-time employment moved to a job with a higher skill level (12%). The remaining three-quarters of mothers who moved from full-time to part-time employment moved to a job with the same skill level.[508]

773. Further, the case presented by the ACTU does not establish that the grant of its claim would have the effect of encouraging fathers or male carers to undertake a greater proportion of caring responsibilities such that any gender unbalance is countervailed.

774. **Sixthly**, the ACTU submits that the economic and productivity benefits that flow to employers and the national economy from increased labour force

[505] ACTU submission dated 9 May 2017 at paragraph 46.

[506] ACTU submission dated 9 May 2017 at paragraph 47(d).

[507] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 11.

[508] Venn, D and Wakefield, C, *Transitions between full-time and part-time employment across the life-cycle*, (2005) at page 11.

participation of parents and carers associated with family friendly working arrangements renders the proposed clause necessary.[509] There is no evidence before the Commission that might establish that the form of "flexibility" sought by the ACTU will result in economic and productivity benefits for employers or the national economy. Instead, for reasons we shortly come to, we consider that the proposed clause would have a very significant negative impact on productivity and efficiency for individual employers and the national economy.

14.1 A Fair Safety Net

775. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[510]

776. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the

[509] ACTU submission dated 9 May 2017 at paragraph 47(g).

[510] *4 yearly review of modern awards* [2015] FWCFB 3406 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[511]

777. There cannot be any sensible debate as to whether the creation of a right in the modern awards system that enables certain employees to unilaterally reduce their hours of work and dictate when they work them is a "fair" outcome from the perspective of an employer. The grant of the claim would make a mockery of the notion of managerial prerogative and would be entirely at odds with the remainder of the safety net which acknowledges the needs of business and preserves the ability for employers to exercise their discretion in relation to the working arrangements of its employees. The evidence before the Commission overwhelmingly suggests that there would be negative ramifications on productivity and efficiency; and employers would face increased costs if employees were granted a right to determine their hours of work. This necessarily renders the proposal here before the Commission inherently unfair and unjustifiable.

14.2 A Relevant Safety Net

778. In the recent Penalty Rates Decision, the Full Bench expressed the view that: (emphasis added)

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be <u>suited to contemporary circumstances</u>. …[512]

779. A modern award will suit contemporary circumstances if it reflects modern work practices, working arrangements and operational requirements. Further, it will be drafted having regard to other existing parts of the safety net.

780. The ACTU's claim is inimical with the concept of a relevant safety net. It displays a complete disregard for operational requirements and, as we shortly

[511] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

[512] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

turn to, the efficient and productive performance of work. Additionally, as we have already articulated, it ignores the existence of various other parts of the safety net (including the NES and modern awards), which already recognise the need and allow employees to balance work with their parenting and/or caring responsibilities.

781. The legislative context in which this case is to be considered and in particular, the existence of a statutory right to request flexible working arrangements, tells against the proposition that the clause proposed by the ACTU is *necessary* to ensure a relevant safety net.

14.3 A Minimum Safety Net

782. Modern awards are intended to afford employees with a minimum safety net, which includes the very basic entitlements to be provided to employees covered by modern awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)). The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the essential rights and protections that must be afforded to all employees and employers.

783. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ACTU. Matters such as these are more appropriately dealt with at the enterprise level, through a co-operative and flexible approach between employers and employees.

14.4 The National Employment Standards

784. The Commission's task is to ensure that modern awards, *together with the NES*, provide a fair and relevant minimum safety net. Accordingly, consideration must be given to the relevant sections of the Act, which we have dealt with extensively earlier in our submission, including:

- Section 62(2): the right to refuse to work unreasonable additional hours;

- Section 65: the right to request flexible working arrangements;
- Sections 87 – 88: annual leave;
- Sections 96 – 97: paid personal/carer's leave;
- Sections 102 – 103: unpaid carer's leave;
- Sections 104 – 105: compassionate leave; and
- Sections 113 – 113A: long service leave.

785. A consideration of these provisions lends support to the following two propositions:

- The existing safety net already acknowledges and provides numerous measures through which an employee is able to facilitate their parenting and/or caring responsibilities, whilst maintaining their connection with the workplace. This is especially true of s.65 of the Act. The evidence does not establish that these measures are inappropriate or inadequate in meeting the needs of employees with parenting and/or caring responsibilities.
- The approach taken by the legislature reflects a careful balance between an employee's right to seek flexibility and the operational realities facing a business. The case presented by the ACTU falls well short of establishing that the approach it has proposed, which would entirely undermine that balance, is appropriate or warranted.

786. The provisions of the NES form a central part of the Commission's consideration of this case and tell strongly against the grant of the claim.

14.5 The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

787. The Penalty Rates Decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[165]** Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. This consideration incorporates two related, but different, concepts. As explained in the *2012–13 Annual Wage Review* decision:
>
> > 'The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of 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. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.'
>
> **[166]** In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a). …[513]

788. The material presented by the ACTU does not establish:

- That the relevant group of employees (i.e. award covered employees who have parenting and/or caring responsibilities as defined in the proposed clause) are low paid as defined in paragraph [166] of the Penalty Rates Decision cited above;
- That the absence of an entitlement akin to the ACTU's clause has a material impact on the needs of any such low paid employees;
- That the grant of the claim would address the needs of any such low paid employees;
- That the absence of the proposed clause in the minimum safety net has a material impact on the relative living standards of employees with parenting and/or caring responsibilities (for the purposes of the ACTU's

[513] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [165] – [166].

proposed clause) who are reliant on minimum wages prescribed by modern awards; or

- That the grant of the claim would improve the relative living standards of such employees.

789. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the claim. Indeed, the ACTU's evidence establishes that employees who lived in families with dependent children:

- Were more likely than other employees to be tertiary educated;
- Were more likely to work as managers and professionals and less likely to be working in lower skilled occupations;
- Had higher hourly earnings than other employees; and
- Were more likely to be on individual agreements than on enterprise agreements or awards.[514]

790. Further and in any event, even if the Commission were to conclude that s.134(1)(a) supports the grant of the claim, it is but one of many factors that must be taken into account, none of which are to be attributed any particular primacy[515]. As the submissions that follow will demonstrate, a consideration of those factors collectively tells overwhelmingly against the grant of the claim.

14.6 The Need to Encourage Collective Bargaining (s.134(1)(b))

791. Section 134(1)(b) requires that the Commission have regard to the need to encourage collective bargaining. Contrary to the ACTU's submission[516], there is no evidence that can credibly lead the Commission to conclude that the grant of the claim will encourage collective bargaining.

[514] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, paragraph 135.

[515] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

[516] ACTU submission dated 9 May 2017 at paragraph 223.

792. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

793. We make this submission in the context of the current Review, as a result of which a number of variations have been made, will be made or may be made to the modern awards system, which would/will have the effect of introducing additional costs and inflexibilities. This includes, for instance, new casual conversion provisions, new minimum engagement periods for casual employees, additional entitlements in relation to public holidays, unpaid family and domestic violence leave and more.

794. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing or have successfully pursued which will ultimately undermine the need to encourage collective bargaining.

14.7 The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

795. A Full Bench of the Commission, in the context of the award flexibility common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[517]

[517] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

796. These comments were echoed in the more recent Penalty Rates Decision: (emphasis added)

> **[179]** Section 134(1)(c) requires that we 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).[518]

797. For the reasons that follow, the grant of the claim will not promote social inclusion through increased employment.

798. **Firstly**, the ACTU's claim will not overcome the many fundamental reasons why parents or carers are not employed, which were canvassed in chapter 9 of our submission. This includes, for instance:

- A period of absence from work that is necessitated by the physical act of giving birth and, to some degree, breastfeeding.
- The unaffordability of child care and/or care for other persons such as those with a medical condition or disability, to the extent that it prevents parents from participating in the workforce.
- The personal decisions of parents and carers who elect not to work because they prefer to provide the relevant care themselves rather than access another form of care that would enable them to work.

799. The ACTU's case does not give any consideration to the extent to which persons who are not employed due to their parenting and/or caring responsibilities are so unemployed because they fall within any of the aforementioned categories. It instead boldly and simplistically proceeds on the false premise that all unemployed parents and carers are wanting to be employed; a fact that is not in fact made out in their evidentiary case. This is an issue that goes both to the necessity of the claim and also to the potential impact of the claim.

[518] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [179].

800. **Secondly,** and perhaps more fundamentally, the ACTU's case most certainly does not establish that, to the extent that there are any persons unemployed due to their parenting and/or caring responsibilities, this is due to the absence of flexible working arrangements. There is scant if any evidence that establishes a causal link between the absence of an entitlement of the nature proposed by the ACTU and the non-participation in the workforce by parents and carers. As a result, the Commission cannot reasonably be satisfied that the grant of the clause sought will have any positive bearing on the workforce participation of parents and carers.

801. **Thirdly**, there is no probative evidence that might establish that employees are systematically being forced to leave the workforce either by virtue of their resignation or because their employment is being brought to an end by their employer because of their caring responsibilities. To the extent that isolated instances of this nature have arisen, the material before the Commission establishes that there are appropriate and effective mechanisms in place that enable an employee to contest an employer's actions and seek a remedy. This includes the unfair dismissal regime, general protections provisions and anti-discrimination legislation; which we have earlier dealt with at chapter 11.

802. **Fourthly**, there is no evidence that the ACTU's notion of "discontented non-requesters" is resulting in employees not participating in the workforce or that, if it is (which we do not concede), it will be overcome by the proposed clause. We refer to section 10.1.4 of our submission in this regard.

803. **Fifthly**, we refer to the evidence of Ms Julie Toth, which establishes the complexities associated with matching the supply and demand of labour.[519] To the extent that the ACTU's proposed clause has the effect of creating part-time or casual vacancies, it can by no means be assumed that this will miraculously provide an avenue for unemployed parents and carers to join the workforce. This is because there are a complex mix of factors that would determine whether unemployed parents and carers who are in fact seeking to

[519] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 45 – 46.

work would meet the specific demand for labour created employees accessing the ACTU's proposed clause. Most fundamentally, it would require the prospective employee's availability and skills to match those required by the employer as a result of their existing employee's absence from work at certain times. The issue of availability is a particularly relevant in relation to unemployed parents and carers who, by virtue of those very caring responsibilities, may or not be available at the times required by an employer.

804. There is no evidence that might suggest that the ACTU's clause will have the effect of creating additional employment opportunities for unemployed parents and carers, such that it would encourage social inclusion.

805. **Sixthly**, at section 12.1.9 of our submission, we have set out the results to the Joint Employer Survey insofar as it asked respondents to describe the possible impact of an employee right for parents and carers to determine their hours of work. One of the responses commonly received was a potential reluctance to employ persons with parenting or caring responsibilities. Self-evidently, such an outcome would be entirely at odds with the ACTU's claim and would have the effect of undermining the social inclusion of persons with parenting and/or caring responsibilities.

806. **Seventhly**, there is no material before the Commission that might establish that the grant of the claim will "[reduce] stigma and other barriers to men's access to family friendly working hours"[520] and "[support] more men to participate in caring work"[521]. The evidence does not suggest that the employee right sought will have the effect of creating a more equitable division of unpaid household labour between two partners. The evidence relied upon by the ACTU instead establishes that the proportion of employed fathers accessing flexible working arrangements in order to care for their children has increased substantially over the past decade.[522] It can reasonably be expected that this trend will continue, particularly as a greater awareness and

[520] ACTU submission dated 9 May 2017 at paragraph 227.

[521] ACTU submission dated 9 May 2017 at paragraph 227.

[522] Statement of Dr Ian Watson dated 4 May 2017 at Annexure IW-1, Table 3.9.

understanding develops amongst employees generally of the right to request flexible working hours pursuant to s.65 of the Act, accompanied by changing societal norms and expectations.

14.8 The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

807. The provision proposed by the ACTU is contrary to the need to promote flexible modern work practices and the efficient and productive performance of work.

808. We consider it self-evident that the removal of employer discretion as to when work is performed is antithetical to the need to promote flexible modern work practices. It hands complete discretion as to when work is performed to an employee and entirely undermines the need for flexibility from the perspective of an employer. As explained by Julie Toth, the proposed clause would preclude an employer from allocating labour to its most efficient use, which sits directly at odds with the efficient and productive performance of work.[523]

809. We refer also to our submissions below in relation to s.134(1)(f) (the likely impact on business) where we have set out in greater detail the various ways in which the grant of the ACTU's claim would create inefficiencies and undermine productivity.

14.9 The Need to Provide Additional Remuneration for Employees Working in Certain Circumstances (s.134(1)(da))

810. We agree with the ACTU's submission that this consideration is a neutral one in the context of these proceedings.[524]

[523] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 41 – 43.

[524] ACTU submission dated 9 May 2017 at paragraph 230.

14.10 The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

811. In the Penalty Rates Decision, the Full Bench observed: (emphasis added)

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly:
>
> > 'In this Act:
> >
> > ***equal remuneration for work of equal of comparable value:*** see subsection 302(2).'
>
> **[206]** 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'.
>
> **[207]** 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'.[525]

812. As explained by the Commission in its 2016 Annual Wage Review decision, the gender pay gap "refers to the difference between the average wages earned by men and women. It may be expressed as a ratio that converts average female earnings into a proportion of average male earnings on either a weekly or hourly basis"[526].

813. Accordingly, the equal remuneration principle articulated in s.134(1)(e) and the gender pay gap are separate issues that involve different considerations; a matter that the ACTU's submissions appear to ignore.[527] The ACTU's material does not make out, or even attempt to make out, that its claim can be grounded by reference to the principle of equal remuneration for work of equal or comparable value.

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[525] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [204] – [207].

[526] *Annual Wage Review 2015 – 2016* [2016] FWCFB 3500 at [545].

[527] ACTU submission dated 9 May 2017 at paragraphs 231 – 232.

14.11 The Likely Impact of any Exercise of Modern Award Powers on Business including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

814. The clause sought by the ACTU would adversely impact business very significantly in numerous ways. We note that s.134(1)(f) involves microeconomic considerations in relation to individual businesses, as well as consideration of the likely impact of the claim on industry at large. This is relevant because if any one employee utilised the proposed clause, this of itself may have an adverse impact on their employer.

815. We propose to describe the potential implications for business if the claim were granted below.

816. **Firstly**, the proposed clause would have the effect of increasing employment costs if, as we have described at chapter 13, it was to have the effect of requiring that an employer maintain the remuneration of an employee notwithstanding a reduction to the employee's hours of work. This would be particularly so where an employer retains another employee to work during the hours that the employee with parenting and/or caring responsibilities is no longer working.

817. **Secondly**, it would have the effect of increasing the time and expense incurred by employers for the purposes of recruiting and training employees who are employed to replace the employee who has reduced their hours pursuant to the ACTU's proposed clause. Further, there may be productivity losses associated with hiring new employees when they first commence their employment with a business. In this regard, we rely on the evidence of Julie

Toth[528], Peter Ross[529], Benjamin Norman[530], Janet O'Brien[531] and the Joint Employer Survey.

818. **Thirdly**, businesses may face difficulties in finding appropriately skilled, qualified and available employees to perform the work.[532] It is important to note that the effect of the ACTU's proposed clause is such that it may result in a demand for labour at only very specific times or days. Ms O'Brien's evidence provides a practical example of this.[533] Where an employer determines that a 'gap' is to be filled by an employee who does not represent a "perfect match" (as described by Ms Toth), this too can result in productivity losses and ultimately, profitability.[534]

819. **Fourthly**, the absence of any employer discretion has the obvious effect of removing an employer's ability to allocate labour in the most efficient way. We have previously summarised Ms Toth's evidence in this regard and specifically, that the claim would have the effect of reducing a firm's output, competitiveness and/or profitability.[535]

820. **Fifthly**, the ACTU's claim may have the effect of seriously disrupting an employer's operations to the extent that the business is no longer able to continue production or provide its services because it requires certain employees to be available at specific times. At section 12.1.9 of our submission, we have set out various examples of responses from the Joint Employer Survey that support this proposition. Mr Ross' statement provides a very relevant illustration of the particular difficulties facing manufacturing businesses who require their employees to work in accordance with a specific shift structure and the negative impact on productivity that can result where

[528] Witness statement of Julie Toth dated 26 October 2017 at paragraphs 27 – 28, 45(ii), 48(ii) – 48(iii).

[529] Witness statement of Peter Ross dated 24 October 2017 at paragraph 74.

[530] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 80 – 82.

[531] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 44.

[532] See responses to Joint Employer Survey set out at section 12.1.9 of our submission.

[533] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 35.

[534] Witness statement of Julie Toth dated 26 October 2017 at paragraph 48(ii).

[535] Witness statement of Julie Toth dated 26 October 2017 at paragraph 48.

the production line is "unbalanced".[536] Ms O'Brien also describes the need for employees to be physically present and working at specific times in order to service Conplant's customers.[537]

821. **Sixthly,** the evidence makes clear that the clause could have the effect of undermining an employer's customer service. For example, it could have the effect of delaying service delivery, undermining relationships built by certain employees with the business' clients, creating inefficiencies which make for poor customer service, or in some cases a complete inability of an employer to provide a certain service or meet customer demand. Examples of such concerns can be found in responses to the Joint Employer Survey extracted at section 12.1.9 of our submission as well as the evidence of Peter Ross[538]. Mr Norman speaks of customers leaving Viterra's competitors because they experience delays in the provision of their services[539]. He also refers to the loss of revenue that Viterra suffers from where truck drivers employed/contracted by Viterra's customers face delays in delivering commodity from the customer and therefore will simply elect to drive to one of Viterra's customers' sites to deliver the goods there instead.[540]

822. It is trite to observe that a negative effect on customer service can ultimately impact upon a business' brand, perceived reliability and therefore profitability. Both Mr Ross[541] and Ms O'Brien[542] express this concern.

823. **Seventhly**, businesses may be faced with increased employment costs in the form of wages in various different scenarios. This includes:

- If an employee decided pursuant to the ACTU's clause to work at a time where there is in fact no work to perform. Mr Norman expresses

[536] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 6 – 21.
[537] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 38 – 39.
[538] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 22 – 31.
[539] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 49.
[540] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 75.
[541] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 22 – 31.
[542] Witness statement of Janet O'Brien dated 30 October 2017 at paragraph 8.

a concern about this very matter in his witness statement, as the nature of Viterra's operations are such that there may be times at which there is no work to perform.[543]

- If an employee decided pursuant to the ACTU's clause that they wanted to work at times where loadings or penalties are payable pursuant to the relevant modern award, which would not otherwise have been payable. Mr Ross gives evidence that the entitlement to a shift loading incentivises employees to specifically request to work on Rheem's afternoon shift.[544]

- If an employer requires other employees to work overtime in order to perform the work that the employee with reduced hours can no longer perform. The Commission will recall that many respondents to the Joint Employer Survey have raised a concern about the extent to which the ACTU's claim would impact on other employees who would be required to undertake the additional work that would result from an employee reducing their hours of work. This suggests that it may result in other employees working overtime.

- If an employee decided pursuant to the ACTU's clause that they would work at particular times such that an employer had an excessive or unproductive number of employees rostered at that time. We refer to the evidence of Peter Ross in this regard.[545]

824. **Eighthly,** in relation to the final point above, to the extent that the decision of an employee(s) to work at certain times resulted in excessive labour at those times, an employer may be put to the task of rearranging the working hours of other employees who work at those times. This would self-evidently increase the regulatory burden on an employer.

[543] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 35 and 70.

[544] Witness statement of Peter Ross dated 24 October 2017 at paragraph 20.

[545] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 11 and 57 – 59.

825. **Ninthly**, the "right to revert" proposed by the ACTU also has the obvious potential effect of causing significant disruption to an employer's business and requiring an employer to alter the hours of work of other employees in order to facilitate the reverting employee's hours of work, which would increase the regulatory burden on employers. It could also give rise to increased employment costs in circumstances where an employer consequently makes an employee redundant. Ms O'Brien expresses a concern about this in her witness statement.[546]

826. **Tenthly**, in chapter 13 of our submission we have set out our interpretation of the proposed provision, which does not appear to contain any limitation on the number of times an employee may seek to change their hours of work pursuant to the proposed clause. The grant of an ability to repeatedly change hours of work would cause considerable disruption to a business, thus increasing employment costs, impeding productivity and increasing the regulatory burden. Ms O'Brien also expresses a concern about this in her witness statement.[547]

827. **Eleventhly**, the clause may result in employers having a particular shortfall of employees who can be required to work at times that are typically considered 'unsociable' such as on weekends or at night. We refer to responses to the Joint Employer Survey at section 12.1.9 of our submissions where many respondents raised this concern.

828. **Twelfthly**, we have earlier dealt with the ambiguities associated with the proposed requirement to maintain an employee's position pursuant to clause X.4.6. To the extent that this requires that an employee's role, including specific tasks, must be maintained, this can create obvious difficulties for an employer's ability to operate productively. This is particularly so in circumstances where the role performed by that employee is necessarily one that requires, for instance, full-time hours and cannot sustainably be "job shared". Mr Norman's witness statement provides an example of

[546] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 45 – 47.

[547] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 45 – 47.

circumstances in which "job sharing" has resulted in various inefficiencies.[548] Examples of such evidence can also be found in the Joint Employer Survey and the evidence of Ms O'Brien[549].

829. **Thirteenthly,** in chapter 13 of the submission we have explained why we consider that the ACTU's proposed clause does not limit an employee's right to dictate their days and hours of work to that which is *necessary* by virtue of the parenting and/or caring responsibilities. The clause appears to permit circumstances in which an employee dictates their days and hours of work because they have such responsibilities but nonetheless also accesses some other form of flexibility or leave from work because they elect not to undertake the relevant activity during their time off work. We have set out our concerns in this regard at the conclusion of chapter 10. To the extent that this results in employees "double dipping" and increasing the duration of their absence from work, this would further undermine productivity and increase employment costs.

830. **Fourteenthly,** the ACTU's proposed clause may expose an employer to breaches of the relevant workplace health and safety legislation to the extent that it results in employees deciding that they will work in circumstances that would otherwise not be permitted or required by their employer. Mr Norman gives the example of an employee seeking to work on a day where there is no work to perform (and therefore no other employees engaged) on a jetty and the fact that this would give rise to safety concerns.[550] The corollary of this is that an employee who is in a supervisory role may seek to work at times that would result in employees who they would otherwise have supervised, being unsupervised.

831. **Fifteenthly**, to the extent that the ACTU relies on the report of Dr Stanford to assert that the proposed clause will have a positive impact on business, we have dealt with this proposition at chapter 9 of our submissions. The short

[548] Witness statement of Benjamin Norman dated 24 October 2017 at paragraphs 76 – 77.

[549] Witness statement of Janet O'Brien dated 30 October 2017 at paragraphs 40 – 42.

[550] Witness statement of Benjamin Norman dated 24 October 2017 at paragraph 70.

point is that the evidence there presented appears to largely deal with "flexibility" as the concept is currently conceived of in the safety net which involves employer agreement and discretion when implementing flexible working arrangements. The evidence of Dr Stanford does *not* establish that the form of "flexibility" sought by the ACTU would have the same effect.

832. **Finally,** the potential impact that this clause might have on a business or businesses generally should not be underestimated. Whilst the evidence before the Commission does not establish the precise proportion of employers who employ employees with parenting and/or caring responsibilities as defined in the ACTU's proposed clause, or the number of such employees employed by individual businesses, we consider that the Commission can take it on notice that a significant proportion of employers do or will employ employees who have parenting and/or caring responsibilities as contemplated by the ACTU's proposed clause (bearing in mind the potential breadth of the proposed definitions, as set out in chapter 13).

833. Accordingly, in our submission, a significant proportion of businesses would potentially be impacted by the claim and, we consider, this could arise in multiple instances because there may be numerous employees of an employer who are eligible to access the clause. In support of this contention we rely on the Joint Employer Survey which reveals that almost 50% of the employers surveyed had received one or more requests for changes to hours of work from an employee because of their parenting and/or caring responsibilities.[551]

834. To the extent that there is no evidence before the Commission that provides a detailed analysis of the potential "take up rate" of the proposed entitlement, this is a fundamental flaw in the case presented by the ACTU, which renders the task of assessing the precise impact of the claim a difficult one.

[551] Witness statement of Jeremy Lappin, dated 26 September 2017 at Attachment D, page 8.

14.12 The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System for Australia (s.134(1)(g))

835. The need to ensure a stable, simple and easy to understand modern awards system does not support the grant of the claim.

836. In chapter 13 of our submission, we have dealt with various aspects of the clause that are exceedingly complex and/or entirely unclear. This includes, for example the precise scope of the requisite "parenting responsibilities" or "caring responsibilities" and the duration for which a "Family Friendly Working Hours arrangement" can and/or must be implemented. We consider that the provision proposed is drafted in a manner that renders it extremely difficult to comprehend and understand, particularly by individual employees and employers.

837. Further, the ACTU has failed to mount probative evidence that establishes the many factual propositions upon which it seeks to rely, nor has it established any sound merit-based rationale for expanding the safety net in the manner sought. The need to ensure a stable system tells against granting the claim in the absence of a sound evidentiary and meritorious case.

14.13 The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

838. To the extent that the proposed clause is at odds with ss.134(1)(b), s.134(1)(c), 134(1)(d), 134(1)(f) and 134(1)(g), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

839. We rely specifically on the evidence of Ms Toth in this regard, which was earlier summarised at section 12.2.1 of our submission. In particular, Ms Toth states as follows:

> Although it is difficult to measure and quantify, I consider the likely impact of the ACTU's claim on national productivity to be negative because it would impede our collective ability to allocate resources (in this case labour) to their most productive and efficient use within firms or between firms. This would have the effect of reducing the productivity and efficiency with which labour is utilised across the national economy. The difficulties associated with quantifying the precise reduction in productivity and efficiency as a result of this claim does not mean that the reduction would be negligible. It simply means it would be exceedingly difficult to isolate the effects of this individual claim from all other contributing factors or variables that are occurring concurrently, and it would be difficult to quantify exactly how this individual claim would interact with all other contributing factors or variables that are occurring concurrently.[552]

840. The evidence of Mr Ross is also a useful illustration of the extent to which the ACTU's proposal could adversely impact upon employment growth and productivity at the firm level in a way that could ultimately undermine the international competitiveness of manufacturing operations in Australia:

> Increases to Rheem's cycle time can have a significant impact on the business. Manufacturing businesses such as Rheem are evaluated by reference to various KPIs including the ratio of man hours per unit (i.e. the input of labour directly relative to output). This is considered the chief measure of productivity and labour efficiency.
>
> This KPI is consistently used by Rheem to compare its Australian manufacturing facilities to those overseas and assess whether it is viable to continue its Australian operations or whether it is more economical to manufacture overseas. I am aware that when compared to manufacturing facilities in other countries, Rheem's Australian manufacturing processes are considered less efficient.
>
> If a decision is made to wholly or partly offshore Rheem's manufacturing operations, this will have an obvious impact on its ability to employ employees in Australia.[553]

[552] Witness statement of Julie Toth dated 26 October 2017 at paragraph 51.

[553] Witness statement of Peter Ross dated 24 October 2017 at paragraphs 13 – 15.

15. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Relevance to the Objects of the FW Act

842. The ACTU identifies a number of international obligations in relation the elimination of discrimination between men and women and alleges that its proposed clause will further the objects of the FW Act by reference to these international obligations.[554]

843. The requirement that the Commission take into account the objects of the FW Act in the performance of its functions is not disputed.[555] However the ACTU's submission that its proposed amendment will, on balance, further the objects of the Act does not bear scrutiny.

844. Section 3(a) of the FW Act provides that an object of the Act is:

> providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations.

845. Subsection 3(a) includes the object of providing laws that are "flexible for businesses". The clause proposed by the ACTU is inherently inflexible for businesses in its operation; the clause is itself contrary to s 3(a).

846. Similarly, subsection 3(b) provides that an object of the FW Act is (emphasis added):

> ensuring a guaranteed safety net of <u>fair, relevant</u> and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.

847. The reference to 'fair and relevant' minimum terms and conditions is echoed in the modern awards objective. Our submissions have already extensively addressed why the ACTU's claim is not 'fair and relevant' in this regard.

[554] ACTU submissions dated 9 May 2017 at paragraph [198].

[555] FW Act, s 578(a).

848. Subsection 3(d) identifies the object of:

> assisting employees to balance their work and family responsibilities by providing for flexible working arrangements.

849. Our submissions have already addressed a number of existing mechanisms which provide flexible working arrangements (such as requests for flexible working arrangements under s.65 of the FW Act and IFAs). These are suitable arrangements that already provide flexibility for employees and employers in keeping with the objects of the Act.

850. Subsection 3(d) includes the object of:

> acknowledging the special circumstances of small and medium-sized businesses.

851. The ACTU's clause gives no regard whatsoever to the needs of SMEs and would be very harmful for these businesses as is evident from the results of the Joint Employer Survey.

852. Overall, ACTU's reliance on the objects of the FW Act as supporting its claim carries no weight, as on balance the objects of the FW Act do not support the ACTU's claim.

Obligations in International Instruments

853. It is the role of the Australian Government to decide what international instruments the Australian State will become a signatory to.

854. It is the role of the Commonwealth Parliament to make laws that reflect the international instruments that Australia is a signatory to. However, the Australian Government has had a longstanding and sensible approach of not ratifying international instruments unless relevant Federal and State laws already comply with the obligations in the instrument.

855. The former Labor Government provided a number of detailed reports to the International Labour Office (ILO) setting out the reasons why the FW Act complies with relevant ILO conventions, including:

- The Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87),
- The Right to Organise and Collective Bargaining Convention, 1949 (Convention 98),
- The Equal Remuneration Convention, 1951 (Convention 100),
- The Discrimination (Employment and Occupation) Convention, 1958 (Convention 111),
- The Employment Policy Convention, 1964 (Convention 122), and
- The Tripartite Consultation (International Labour Standards) Convention, 1976 (Convention 144).

856. Ai Group, ACCI and the ACTU were consulted in the preparation of those detailed reports.

857. Ai Group agrees with the Australian Government's view that the FW Act complies with Australia's international labour obligations.

858. The unions often argue that the FW Act and other relevant laws do not reflect Australia's international obligations in various respects based in their own interpretations of international instruments. The Australian Government has a different view, as expressed in reports to the ILO during the periods when the Coalition and Labor have been in power.

859. The ACTU cites several international instruments:

- the International Labour Organisation *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (**ILO 156**);

- the International Labour Organisation *Convention Concerning Discrimination in Respect of Employment and Occupation* (**ILO 111**);

- the United Nations *Convention on the Elimination of all Forms of Discrimination Against Women* (**CEDAW**); and

- the United Nations *Convention on the Rights of the Child* (**CROC**).

860. These international instruments each oblige member states to take steps to prohibit various forms of discrimination in a range of circumstances, relevantly including employment. The particular formulation of this prohibition varies from instrument to instrument.

861. ILO 111 requires implementation of policy to promote "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[556] Discrimination for the purposes of ILO 111 is defined as:

> 1. For the purpose of this Convention the term discrimination includes—
>
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
>
> 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.[557]

862. ILO 156 relies on the definition of discrimination in ILO 111,[558] but extends to protection against discrimination to workers with family responsibilities.[559]

[556] ILO 111, art 2.

[557] ILO 111, art 1.

[558] ILO 156, art 3(2).

[559] ILO 156, art 3(1).

863. The CEDAW similarly prohibits discrimination against women in all its forms.[560] Discrimination for the purposes of the CEDEW is defined in fundamentally the same terms as in ILO 111, that is:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[561]

864. The obligations of the various international obligations cited by the ACTU are already comprehensively addressed in Australian legislation, both at the Commonwealth and State level. As an example, the *Sex Discrimination Act 1984* (Cth) expressly states that one of its objects is to "give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments."[562] We have previously dealt with the protections afforded by State and Territory anti-discrimination legislation.

865. The final instrument cited by the ACTU, CROC, and in particular article 18,[563] has no apparent relevance to this proceeding. Article 18.1 states that:

> 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
>
> 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

866. The CROC does have relevance in Australian family law, and specific reference to the obligations it contains was inserted into the *Family Law Act*

[560] CEDAW, art 2.

[561] CEDAW, art 1.

[562] *Sex Discrimination Act 1984* (Cth), s 3(a).

[563] ACTU submissions dated 9 May 2017 at paragraphs [209]-[210].

1975 (Cth) in 2012.[564] However it has no apparent relevance to employment and workplace relations, and the ACTU submissions do not evidence any relevant connection beyond the fact that parents should have care for their children.

867. Australia has already comprehensively fulfilled its relevant international obligations through the federal and State laws that are in place.

[564] *Family Law Act 1975* (Cth), s 60B; *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), sch 1, item 13.

16. CONCLUSION

868. For all of the reasons here stated, the ACTU's claim should be dismissed.