

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

**Submission in Reply: ACTU Objections
to the Joint Employer Survey
Family Friendly Work Arrangements
(AM2015/2)**

11 December 2017



4 YEARLY REVIEW OF MODERN AWARDS
AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. This submission is filed by the Australian Industry Group (**Ai Group**) in response to that which was filed by the Australian Council of Trade Unions (**ACTU**) on 8 December 2017, in which it raises objections to the tender of the witness statement of Jeremy Lappin (dated 26 September 2017). Mr Lappin's statement goes to a survey of employers (**Joint Employer Survey**) that is relied upon by employer representatives including Ai Group, the Australian Chamber of Commerce and Industries (**ACCI**) and the National Farmers' Federation.

2. The ACTU's objection is grounded on what it deems a "failure to identify crucial matters relevant to the design and conduct of the survey, and to call evidence establishing these matters"¹. It contends that accordingly, the Joint Employer Survey should be rendered inadmissible² because:
 - a) The Joint Employer Survey has "low or nil" probative value³; and

 - b) The ACTU is not able to test the reliability of the survey results and therefore, the tender of the Joint Employer Survey would "constitute a denial of natural justice and procedural fairness to the ACTU"⁴.

3. We note that the ACTU first raised its concerns in relation to the tender of the Joint Employer Survey in its written reply submissions of 27 November 2017, having been granted a weeks' extension to file those submissions. The submissions argued that Ai Group should "either file proper evidence about the survey, or not be permitted to rely upon it"⁵ (emphasis added) and set out

¹ ACTU submission dated 8 December 2017 at paragraph 8.

² ACTU submission dated 8 December 2017 at paragraph 8.

³ ACTU submission dated 8 December 2017 at paragraph 8(a).

⁴ ACTU submission dated 8 December 2017 at paragraph 8(b).

⁵ ACTU submission dated 27 November 2017 at paragraph 60.

brief reasons for its contention⁶. It also submitted that if the tender of the Joint Employer Survey is permitted by the Fair Work Commission (**Commission**), the ACTU “reserves its rights”⁷ to seek to rely on a survey concerning flexible working arrangements “which was sent to members of affiliates, Carers Australia, and Parenthood on 4 August 2017”⁸. Although it was open to the ACTU, it elected not to file any submissions or evidence dealing with the substance of the Joint Employer Survey (including its conduct or results) at that time.

4. During proceedings on 28 November 2017, whilst counsel for the ACTU canvassed her client’s objections to the Joint Employer Survey, the rationale put for those objections did not extend beyond that which was filed in writing on the previous evening.
5. Directions issued by the Commission on 30 November 2017 required the relevant parties to exchange any objections to the evidence proposed to be called by 6 December 2017. At 6.47pm that day, Ai Group received correspondence confirming that the ACTU continued to object to the Joint Employer Survey. The correspondence identified alleged “deficiencies” in the evidence filed by Ai Group in relation to the Joint Employer Survey, articulated what it said were the relevant principles that apply to an assessment of the probative value of survey evidence (citing the Commission’s Annual Wage Review decisions and a decision of the Commission issued in February 2017 regarding the review of penalty rates in various awards (**Penalty Rates Decision**)). The correspondence did not set out any other bases or reasons for its objections.
6. The correspondence went on to seek confirmation from Ai Group as to whether the Joint Employer Survey would continue to be relied upon. It stated that despite the position articulated in its submission of 27 November 2017,

⁶ ACTU submission dated 27 November 2017 at paragraphs 59 – 67.

⁷ ACTU submission dated 27 November 2017 at paragraph 67.

⁸ ACTU submission dated 27 November 2017 at paragraph 67.

“any attempt to now tender evidence from the survey authors would severely prejudice the ACTU and would be resisted”.

7. On the afternoon of 6 December 2017, Ai Group was verbally advised that no objections would be raised by the ACTU to any elements of the witness statements filed by Ai Group other than that of Mr Lappin. Similarly, the correspondence sent to Ai Group on the evening of 6 December 2017 did not identify any such objections in accordance with the directions of 30 November 2017. This coloured Ai Group’s decision not to raise any objections to the ACTU’s lay witness statements.
8. Notwithstanding, on 8 December 2017, Ai Group was advised for the first time that the ACTU does in fact object to parts of the witness statements of Janet O’Brien, Peter Ross and Benjamin Norman, which are relied upon by Ai Group. The objections were confirmed in the submission filed after 6pm on that same day.
9. In that ACTU’s submission of 8 December 2017, it also expanded upon its opposition towards the tender of the Joint Employer Survey. It is the first instance in which the ACTU has:
 - a) Sought to rely on the Survey Evidence Practice Note issued by the Federal Court of Australia⁹;
 - b) Made submissions regarding issues of procedural fairness by reference to a range of authorities¹⁰; and
 - c) Pointed to and relied upon specific provisions of the *Evidence Act 1995* (Cth)¹¹.
10. In light of the truncated timetable set for the hearing of this matter and the piecemeal manner in which the ACTU has proceeded to articulate the bases upon which it objects to the tender of the Joint Employer Survey, Ai Group has

⁹ ACTU submission dated 8 December 2017 at paragraph 16.

¹⁰ ACTU submission dated 8 December 2017 at paragraphs 17 – 37.

¹¹ ACTU submission dated 8 December 2017 at paragraphs 17 – 37.

had limited opportunity to grapple with the issues raised, to confer with other employer organisations relying upon the Joint Employer Survey and to make an assessment as to how it seeks to respond to the criticisms made by the ACTU. Nonetheless, this submission seeks to set out reasons why, contrary to the ACTU's position, the Joint Employer Survey is admissible and should be tendered into evidence.

2. THE MATERIAL BEFORE THE COMMISSION AND THE SPECIFIC CRITICISMS MADE BY THE ACTU

The Evidence

11. Ai Group has filed a witness statement of Jeremy Lappin, dated 26 September 2017, which deals with the Joint Employer Survey. The statement establishes the following facts.
12. **Firstly**, that the Joint Employer Survey was in fact conducted.¹² The ACTU does not appear to contest that fact.
13. **Secondly**, that the survey instrument was 'LimeSurvey'.¹³ The ACTU does not appear to contest that fact, but confusingly argues that "no information is provided about the survey instrument".¹⁴
14. The evidence of Mr Lappin provides a description of LimeSurvey and to the extent that the ACTU seeks additional information in this regard, it would be open to it to seek such information from Mr Lappin, to the extent that he is able to assist, whilst he is under cross-examination. The ACTU has instead made this criticism without first availing itself of that opportunity.
15. **Thirdly**, the questions that were asked of respondents to the Joint Employer Survey and the survey logic underpinning those questions.¹⁵

¹² Witness statement of Jeremy Lappin dated 26 September 2017 at paragraph 3.

¹³ Witness statement of Jeremy Lappin dated 26 September 2017 at paragraphs 4 – 5.

¹⁴ ACTU submission dated 8 December 2017 at paragraph 10(h).

¹⁵ Witness statement of Jeremy Lappin dated 26 September 2017 at paragraph 6 and Attachment A.

16. The ACTU does not appear to contest the veracity of the evidence given by Mr Lappin in this regard. It does, however, argue that evidence ought to have been led from the person or persons who drafted the survey and the reasons for including particular questions or forms of questions.¹⁶
17. We do not consider that any material prejudice flows from the absence of evidence led from the drafters of the survey questions. Indeed in our view, such evidence would be of little probative value to the Commission. As stated in our submission of 31 October 2017, the questions were drafted by Ai Group and ACCI¹⁷. This involved a consultative process between various personnel of both organisations and the legal representatives of the latter (i.e. Australian Business Lawyers and Advisers). No single drafter or decision-maker can practicably be identified from that process.
18. Regardless of whether evidence is led regarding the “reasons for including particular questions or forms of questions”¹⁸, it is open to the ACTU to make submissions regarding the questions ultimately put to the survey respondents, if it considers that those questions were flawed and/or that the phraseology of the questions might have had some bearing on the survey results. Its election not to do so cannot be attributed to the absence of evidence from persons involved in drafting the survey questions.
19. The ACTU also submits that “there is no evidence about what [‘survey logic’] means, whether it constitutes some or all of the survey methodology, or how it is relevant to this survey”¹⁹. The fact that the ACTU is not aware of the meaning of the phrase “survey logic” does not render this a matter for evidence, nor does it mean that Ai Group should be prohibited from tendering the Joint Employer Survey absent evidence about its meaning.
20. If it assists the ACTU; “survey logic” is a phrase commonly used to describe the “branching” of survey questions, which is contingent upon prior responses

¹⁶ Submission dated 8 December 2017 at paragraphs 10(b).

¹⁷ Ai Group submission dated 31 October 2017 at paragraphs 507.

¹⁸ Submission dated 8 December 2017 at paragraphs 10(b).

¹⁹ ACTU submission dated 8 December 2017 at paragraph 10(c).

of the survey respondent. The survey logic determines which survey questions are available to a particular respondent to respond to, depending on the responses they provided to earlier survey questions.

21. As we have already explained in our submission of 31 October 2017, the survey logic of the Joint Employer Survey was determined to ensure that survey respondents were only asked questions that were relevant to them based on their previous responses.²⁰ Examples of the survey logic were provided in that submission²¹ and all of the logic underpinning the Joint Employer Survey can be identified from Attachment A to Mr Lappin's statement²².
22. **Fourthly**, the results of the Joint Employer Survey²³. Again, we note that the ACTU does not appear to contest the authenticity of the results attached to the statement of Jeremy Lappin.
23. **Fifthly**, how those results were obtained²⁴. We do not understand that the ACTU is quibbling with the veracity of this evidence.

The Submissions

24. Ai Group also filed submissions dated 31 October 2017, which provide various details regarding the conduct of the Joint Employer Survey including the following.
25. **Firstly**, various employer associations (many of whom are affiliates of ACCI) participated in the Joint Employer Survey²⁵. The ACTU argues that evidence

²⁰ Ai Group submission dated 31 October 2017 at paragraph 510.

²¹ Ai Group submission dated 31 October 2017 at paragraph 509.

²² Witness statement of Jeremy Lappin dated 26 September 2017.

²³ Witness statement of Jeremy Lappin dated 26 September 2017 at paragraphs 7 – 20 and Attachments B – ZF.

²⁴ Witness statement of Jeremy Lappin dated 26 September 2017 at paragraphs 7 – 20.

²⁵ Ai Group submission dated 31 October 2017 at paragraph 500.

ought to have been led identifying the employer associations that participated.²⁶

26. It might be put that in circumstances where a party seeks to argue that specific survey evidence is representative of employers generally or in a particular industry, information regarding the survey population (and therefore, in this circumstance, the employer associations who participated), is necessary in order to assess whether or not that is so. The Commission will note that neither Ai Group nor ACCI have sought to rely on the quantitative results of the Joint Employer Survey as being representative of employers generally or of employers in any particular industry. In such circumstances, we cannot identify any material consequence that flows from the absence of evidence identifying each of the employer associations who participated in the Joint Employer Survey. We note that this is consistent with the approach adopted by Ai Group, ACCI and other employer associations in respect of joint employer surveys conducted in other proceedings such as the annual leave common issues (AM2014/47) and the casual and part-time common issues (AM2014/196 & AM2014/197), which we shortly come to.
27. **Secondly**, the survey was sent via email to members of participating employer organisations on 3 August 2017 with a subsequent email reminding them to participate if they had not already done so on 28 August 2017.²⁷ The ACTU complains that evidence ought to have been led regarding the number of members of the participating employer organisations, the qualifications for membership of the employer organisations, whether the survey was sent to all or some members and the representativeness of the membership group or survey population compared with employers more broadly.²⁸
28. For the reasons articulated directly above, the absence of evidence regarding the number of members of participating employer organisations or their representativeness should not preclude the Joint Employer Survey's tender

²⁶ ACTU submission dated 8 December 2017 at paragraphs 10(a) and 10(d).

²⁷ Ai Group submission dated 31 October 2017 at paragraph 503 and 505.

²⁸ ACTU submission dated 8 December 2017 at paragraph 10(e).

into evidence. For the purposes of clarifying our earlier submissions; we confirm that Ai Group sent the Joint Employer Survey to all of its members and it is our understanding that all other participating employer associations did the same.

29. **Thirdly**, LimeSurvey is regularly used by Ai Group to conduct surveys.²⁹ This includes the surveys relied upon by Ai Group and other employer associations in the annual leave common issues proceedings (AM2014/47) and the casual and part-time employment common issues proceedings (AM2014/196 & AM2014/197), which were heard at an earlier stage of the current 4 yearly review of modern awards. In both instances, the relevant surveys were tendered into evidence and relied upon in the Commission's decisions³⁰. No criticism or adverse finding was made about the survey instrument.
30. **Fourthly**, 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.³¹ Despite this, the ACTU states that evidence should be led of "any quality control measures designed or applied to the collection of data"³². We trust that this the ACTU is not questioning the truthfulness of Ai Group's submission.
31. **Fifthly**, the text of the email drafted by Ai Group and ACCI.³³ The ACTU does not appear to contest the veracity of Ai Group's submissions in this regard.
32. **Sixthly**, the text of the email was drafted so as 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.³⁴ The ACTU

²⁹ Ai Group submission dated 31 October 2017 at paragraph 503.

³⁰ *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 and *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541.

³¹ Ai Group submission dated 31 October 2017 at paragraph 504.

³² ACTU submission dated 8 December 2017 at paragraph 10(g).

³³ Attachments JES1 and JES2 to Ai Group's submission of 31 October 2017.

³⁴ Ai Group submission dated 31 October 2017 at paragraph 505.

complains that that the person or persons who drafted the text of the email are not identified.³⁵

33. For the reasons earlier set out in relation to the drafting of the survey questions, we cannot conceive of the how such evidence is of any probative value. Consistent with our earlier submissions, the email was drafted by representatives of Ai Group, ACCI their legal representatives in these proceedings.

Conclusion

34. As can be seen, contrary to the ACTU's submissions, the material filed regarding the Joint Employer Survey establishes the necessary facts regarding the survey results and provides the requisite information regarding its conduct and methodology.

3. THE COMMISSION'S GENERAL APPROACH TO THE ADMISSION OF SURVEY EVIDENCE

35. The ruling here sought by the ACTU is inconsistent with the approach generally adopted by the Commission regarding the receipt of survey evidence (from unions and employer organisations), particularly in the current 4 yearly review of modern awards; that being that the Commission will consider any limitations on the relevant survey and make an assessment as to the extent to which it can nonetheless be relied upon and for what purpose(s). The Commission has not adopted the approach of simply accepting or rejecting survey evidence.

36. We provide the following examples.

AM2014/305 Penalty Rates – Employer Survey (Retail Sector)

37. Australian Business Industrial and the New South Wales Business Chamber (**ABI**) filed a statement of Ms Emily Baxter in the above proceedings.³⁶ The

³⁵ ACTU submission dated 8 December 2017 at paragraph 10(f).

³⁶ Further and final consolidated sworn statement of Emily Baxter dated 17 December 2016.

witness statement related to a survey conducted on Survey Monkey, which was distributed to employers in the retail industry. Ms Baxter was not involved in the conduct of the survey however gave some hearsay evidence in relation to its conduct and annexed the results of the survey to her statement.

38. The Full Bench (Ross J, Catanzariti VP, Asbury DP, Hampton C and Lee C) dealt with the evidence as follows, including some observations that responded directly to criticisms made by the relevant union: (emphasis added)

[1563] ABI called Ms Emily Baxter, a lawyer for the Australian Business Lawyers Advisors (ABLA) who presented an analysis of a survey undertaken by ABLA of employers.

[1564] ABLA developed a survey in July 2015 using the Survey Monkey program for the purpose of collecting evidence from employers in the retail industry on their trading and rostering practices (the 'Retail survey'). Ms Baxter was not involved in developing the survey.

[1565] The survey was sent to a number of employer organisations who then sent it to their members. Baxter's evidence was that 8700 members were sent the survey and 690 responses were received. The survey analysis was based on the responses of the 485 businesses who confirmed that the *Retail Award* applied to their business and that they were not covered by an enterprise agreement.

...

[1568] ABI submits that the survey is broadly representative of employment across Australia based on responses from employers in each State and Territory and is a 'reliable source of information' for employers in the industry.

...

[1570] The SDA contends that no weight should be given to the survey results, for the following reasons:

Ms Baxter had no direct knowledge of the terms upon which the employer organisation distributed the survey or the proportion of the total membership who were sent the survey;

- a response rate of 7.9 per cent was "extremely low";
- the conduct of surveys as discussed in the *Annual Wage Review 2012–13* decision on representativeness of surveys, particularly of membership bases;
- there is no way of ascertaining whether the sample is representative of employer organisations' membership or employers more broadly;
- many respondents did not answer all of the questions, and only four questions were completed by all respondents;

- based on the grouping of answers to why trading hours differed on Sundays, such as wages/costs, “very little” can be concluded on the role of wages, including penalty rates; and
- the survey results reflect perceived rather than actual effects.

...

[1572] We are not satisfied that the Retail survey can properly be said to be representative of all retail businesses. While providing the survey to all members of employer groups would maximise the total number of responses, the number of businesses that responded to the survey is relatively low. This could lead to biased results as the sample may not represent the retail business population.

[1573] Further, although a breakdown of businesses by State and Territory is provided, we have no information about the breakdown by business size which would be beneficial in determining the representativeness of the survey.

[1574] For the reasons given we reject the proposition that the results of the Retail survey can be extrapolated to all businesses covered by the *Retail Award*. However, we also reject the SDA’s submissions that we give no weight to the survey. As mentioned earlier, the assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. The central issue is the extent to which a survey’s limitations impact on the reliability of the results and the weight to be attributed to those results. Given the limitations of the Retail survey we propose to treat the survey results as suggestive or anecdotal, rather than definitive.³⁷

39. As can be seen, the Commission made clear that the assessment of survey evidence “is not a binary task”³⁸. Rather, the task before the Commission involves an assessment of the extent to which any limitations of the survey evidence before it impacts upon the reliability of the survey and by extension, the *weight* that can be attributed to it.
40. Further, despite the SDA’s assertion that no weight ought to have been attributed to the survey evidence, the Commission proceeded to treat the survey results (which included open-text responses) as “suggestive or anecdotal, rather than definitive”³⁹.

³⁷ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [1563] – [1574].

³⁸ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [1574].

³⁹ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [1574].

AM2014/47 Annual Leave – Employer Survey

41. In the annual leave common issues proceedings, Ai Group filed a witness statement of Mr Ben Waugh⁴⁰, a then employee of Ai Group, which went to a similar survey that was conducted by Ai Group and other employer associations affiliated with ACCI.
42. Much like the current circumstances, Mr Waugh’s evidence related primarily to the results of the survey. Further, Mr Waugh:
- Was a member of Ai Group’s workplace relations department and was not (and did not purport to be) an ‘expert’ of sorts in the conduct of surveys. Rather, his role in relation to the survey was virtually an administrative one.
 - Was not involved in the drafting of the survey questions.⁴¹ No other witness was called by Ai Group or any other employer organisation regarding the process involved in the drafting of those questions.
 - Did not give evidence about the specific employer associations that participated in the survey; nor was any other witness called to give such evidence. There was, as a result, no evidence about the “identity, number, or representativeness of the respondents”⁴².
 - Was not involved in the drafting of the emails inviting survey respondents to participate.
43. Despite the ACTU’s submission that the survey ought to have been given no weight⁴³, the Full Bench (Ross J, Harrison SDP and Hampton C) determined that the survey evidence provided a “valuable insight into practical issues facing employers” and determined that it would take the survey into

⁴⁰ Witness statement of Ben Waugh dated 20 June 2014.

⁴¹ Witness statement of Ben Waugh dated 20 June 2014 at paragraph 8.

⁴² ACTU submission dated 8 December 2017 at paragraph 10(e).

⁴³ *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 at [42].

consideration, noting though that it was not representative of all employers:
(emphasis added)

[39] Ai Group, ACCI and other employer bodies conducted a joint employer survey in May 2014 about matters relating to annual leave (the Employer Survey).

[40] The Ai Group's submission notes that the scope of the Employer Survey was limited to Ai Group, ACCI and affiliate organisation members. The survey instrument was distributed by the employer organisations to their membership lists together with a covering email which, in neutral terms, requested employers to complete the survey. Some 4137 employers responded to the survey, consisting of 3713 full responses and 424 incomplete responses. Responses varied according to the survey question, with partial responses for certain questions. The number of responses to the Employer Survey was significantly larger than other employer surveys, such as the ACCI Small Business Survey, which only had around 1500 responses.

...

[47] Taking account of all these issues we are satisfied that the Employer Survey provides a valuable insight into the practical issues facing employers in the management of the existing annual leave arrangements and we will take the Employer Survey responses into account. The Employer Survey utilised the available databases in order to maximise the number of responses. A substantial number of responses were received (relative to other employment surveys) and the respondents were reasonably representative of the population of employers in each state and territory. The methodological limitations with the survey (i.e. it was not a random stratified sample) mean that the results cannot be extrapolated such that they can be said to be representative of all employers.⁴⁴

44. The survey evidence was subsequently referenced and relied upon by the Full Bench in its decision.⁴⁵

AM2014/196 and AM2914/197 Casual and Part-time Employment – Employer Survey

45. Ai Group filed similar survey evidence in the casual and part-time common issues proceedings. Mr Waugh again gave evidence⁴⁶ that related primarily to the results of the survey and brief hearsay evidence regarding its development and conduct. Paragraph 42 of this submission is also true of Mr Waugh's

⁴⁴ *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 at [39] – [47].

⁴⁵ *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 at [104], [114] – [115], [126] – [132], [268] – [278], [361] – [362], [377] – [379], [396] – [398], [410], [438] – [439].

⁴⁶ Witness statement of Benjamin Waugh dated 22 February 2016.

evidence in the casual and part-time employment common issues proceedings.

46. Notwithstanding the nature of Mr Waugh's evidence, it was tendered into evidence and relied upon by the Commission in its reasons.⁴⁷

AM2014/196 and AM2914/197 Casual and Part-time Employment – ACTU Survey

47. It is perhaps somewhat ironic that the ACTU has adopted the position stated in its submission of 8 December 2017 when regard is had to the manner in which it has previously sought to rely on survey evidence.

48. In the casual and part-time common issues proceedings, the ACTU sought to rely on a survey of employees regarding casual and part-time employment. The survey was said to have been administered by an independent commercial entity, however it was not called to give evidence regarding the design, conduct or results of the survey. Indeed the accuracy of the complete set of results was never attested to by any witness called in those proceedings. Rather, all that was before the Commission by way of witness evidence was the hearsay testimony of Professor Markey, an expert witness called by the ACTU, who stated that he participated in some discussions with the company contracted to conduct the survey and with the ACTU about the survey design and conduct.

49. The paucity of material before the Commission was compounded by a complete absence of any explanation provided in the ACTU's written submissions regarding various important aspects of the survey.

50. Ai Group made detailed submissions about the deficiencies in the ACTU's approach⁴⁸. Understanding the Commission's general attitude towards the receipt of survey material in the current award review, Ai Group argued that

⁴⁷ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [205] and [385 – [386].

⁴⁸ Ai Group submission dated 26 February 2017 at pages 73 – 93 and Ai Group submission dated 9 August 2017 at pages 115 – 125.

little if any confidence could be placed by the Commission in the survey results.

51. The Full Bench (Hatcher VP, Hamberger SDP, Kovacic DP, Bull DP and Roe C) acknowledged that the survey had limitations but, citing the aforementioned Penalty Rates Decision, went on to rely upon certain aspects of the survey results: (emphasis added)

[354] Third, the reasons why, from their perspective, employees become engaged as casuals, and their levels of satisfaction with their casual status, vary greatly. The ACTU survey, although not necessarily quantitatively reliable, gave a sound qualitative guide to the range of reasons as to why persons become engaged in casual employment. As was discussed in the Penalty Rates decision, “the assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected”. In this respect and as with the discussion of survey work in the Penalty Rates decision “given the limitations ... we propose to treat the survey results as suggestive or anecdotal, rather than definitive”. It identified that, overwhelmingly, the 2 most common reasons (selected from a range of options given) were “*It was the only work available, I had no choice*” and “*I freely choose to work casual because it is more flexible/convenient for me*”. These are plainly diametrically opposite reasons for engaging in casual employment. A small proportion identified the higher income produced by being paid with a casual loading as a relevant reason. Different measures of casual employee satisfaction were referred to in the expert evidence: ...⁴⁹

AM2014/196 and AM2914/197 Casual and Part-time Employment – AMWU Survey

52. The AMWU also relied on survey evidence in the above proceedings, however failed to file evidence regarding any aspect of that survey: its conduct, methodology or results. Ai Group argued that its approach cast serious doubt over the reliability of the survey⁵⁰, however the union was nonetheless permitted to rely on its results. No ruling was made to not read the relevant parts of the AMWU's submissions.

AM2016/13 Annualised Salaries – ASU Survey

53. A Full Bench of the Commission (Hatcher VP, Dean DP and Saunders C) has been constituted to deal with various claims to amend annualised salary

⁴⁹ 4 yearly review of modern awards – Casual employment and Part-time employment [2017] FWCFB 3541 at [354].

⁵⁰ Ai Group submission dated 9 August 2017 at paragraphs 468 – 471.

provisions in a range of awards. This includes variations sought by the Australian Services Union (**ASU**) to the *Clerks – Private Sector Award 2010* amongst others.

54. During the hearing, the ASU sought and was permitted to tender, the results of a survey it purportedly conducted of its members regarding the payment of annualised salaries. There was no witness evidence before the Commission regarding the conduct of the survey, the methodology, the survey instrument or the manner in which the survey results had been derived.
55. Despite Ai Group's opposition to the tender of the survey results, they were marked with the exception of the results of one survey question and Ai Group was given a short period of time to make written submissions about the survey.⁵¹

AM2014/301 Public Holidays – AMWU Survey

56. In a similar vein, in the public holidays common issues proceedings, the AMWU relied on a survey it purportedly conducted of its members. No evidence was called regarding any aspect of the survey nor were its results put in evidence. Ai Group made detailed submissions about the appropriate weight that should (or should not) be placed on the survey.⁵² The Commission has reserved its decision.

Conclusion

57. The Commission has consistently adopted the approach of evaluating the limitations that present themselves in relation to survey material sought to be relied upon in award review proceedings and has determined the weight that can properly be attributed to it, having regard to such limitations. The Commission has *not* approached its task as one that involves a determination

⁵¹ Transcript of proceedings on 7 December 2016 at PN1020 – PN1058.

⁵² Ai Group submission dated 26 March 2017 at pages 86 – 95.

of whether a survey should or should not be received in toto, as the ACTU here proposes.

58. The ruling sought by the ACTU is inconsistent with prior decisions made by the Commission in other proceedings regarding survey material sought to be relied upon by both unions and employer organisations.

4. THE PROBATIVE VALUE OF THE JOINT EMPLOYER SURVEY

59. The probative value of the Joint Employer Survey is self-evident.

60. **Firstly**, the Joint Employer Survey was completed by some 2032 small, medium and large award-covered businesses who employ 177,479 employees, covered by 99 of the 122 modern awards.⁵³ Whilst we do not contend that the survey respondents are representative of employers generally or to extrapolate the survey results to represent a broader group of employers, the results represent the circumstances and views of a significant number of award-covered employers. The number is clearly far greater than, for instance, the number of employers (i.e. 25) interviewed for the purposes of the qualitative research conducted for the Commission by the Centre for Work + Life at the University of South Australia, which is here relied upon by the ACTU.⁵⁴

61. **Secondly**, the subject matter of the survey relates to three issues that are central to these proceedings:

- a) 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;

⁵³ Ai Group submission dated 31 October 2017 at paragraphs 511 – 517.

⁵⁴ 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).

- b) Where such requests were received, their treatment by the business;
and
- c) The potential impact of the ACTU's claim on the survey respondents' businesses.

62. In relation to the third matter above; countless responses have been provided by employers regarding the operational consequences that they consider would eventuate if the claim were granted. The responses reveal, in part, the perceptions of the survey respondents which, while subjective in nature, are also of relevance to the Commission's determination of the ACTU's claim. This is because the responses reflect the attitudes of employers towards a proposed change to the modern awards system of the nature sought and how they may respond. For instance, a number of respondents indicate that they would employ casual employees, employees through a labour hire agency or implement subcontracting arrangements in preference for the engagement of permanent employees.⁵⁵ Others state that they would be reluctant to employ employees with caring responsibilities, or in fact would not do so.⁵⁶ Some say that they would terminate the employment of employees who sought to work hours pursuant to the proposed clause that could not be accommodated and/or that it would result in a loss of employment opportunities more generally.⁵⁷ Such matters are, in our submission, relevant to the Full Bench's assessment of the claim when having regard to the factors listed at s.134(1) as well as broader discretionary considerations.

63. **Thirdly**, the open-text responses are illustrative of the various operational factors and consequences relevant to employers covered by certain modern awards in respect of which there is no other employer evidence before the Commission. This includes, for instance, the following industry sectors and occupations:

⁵⁵ Ai Group submission dated 31 October 2017 at paragraph 605.

⁵⁶ Ai Group submission dated 31 October 2017 at paragraph 607.

⁵⁷ Ai Group submission dated 31 October 2017 at paragraph 608.

- a) The building and construction sector;
- b) Commercial sales persons;
- c) The food manufacturing industry;
- d) The hair and beauty industry;
- e) The meat industry;
- f) The retail industry;
- g) The social, community, home care and disability sectors;
- h) The aviation industry; and
- i) The live performance industry.

64. As we argued in our submission of 31 October 2017, respondent parties do not bear any onus in these proceedings.⁵⁸ Notwithstanding, the Joint Employer Survey has been conducted and filed for the purposes of assisting the Commission with its assessment of the claim, including its potential impact, in a broad range of industries. The survey is illustrative of many of the types of practical consequences that might flow if the claim were granted. It is also demonstrative of the manner in which employers presently deal with requests for flexible working arrangements, including the circumstances in which requests are not granted or are granted with modification.

65. In “common issues” proceedings such as these, where an organisation seeks a variation to virtually all modern awards, respondent parties such as Ai Group with an interest in a large number of those awards, are unable to present a case that demonstrates relevant industry-specific factors across such a broad range of industries through witness evidence from individual employers. This is primarily because of the limited resources available to us, particularly in the context of the current award review. A survey such as the one here presented

⁵⁸ Ai Group submission dated 31 October 2017 at paragraphs 763 – 766.

allows a respondent party such as Ai Group to provide evidence to the Commission through a different medium from a large number of respondents in a way that is efficient, relevant and of probative value.

66. A summary of the Joint Employer Survey results and the findings that we say the Commission should make from those results are set out in our submission of 31 October 2017.⁵⁹ The Commission will note that Ai Group contends that the Joint Employer Survey is “demonstrative” of the propositions there listed; the submission is not put any higher.

67. **Fourthly**, in discharging the Commission’s statutory task in these proceedings, it must take into account the various factors listed at s.134(1). The Joint Employer Survey is relevant to and will, in our respectful submission, assist the Commission in its consideration of:

- The need to promote social inclusion through increased workforce participation⁶⁰;
- The need to promote flexible modern work practices and the efficient and productive performance of work⁶¹; and
- The likely impact on business, including on productivity, employment costs and the regulatory burden⁶².

5. THE ALLEGED PREJUDICE TO THE ACTU

68. The ACTU alleges that it would be prejudiced if the Joint Employer Survey were tendered into evidence.

69. In so submitting it relies in part on a practice note of the Federal Court of Australia⁶³, which self-evidently does not apply to these proceedings; nor has it, to our knowledge, been applied to earlier Commission proceedings in which

⁵⁹ Ai Group submission dated 31 October 2017 at paragraphs 614 – 615.

⁶⁰ See s.134(1)(c) of the *Fair Work Act 2009*.

⁶¹ See s.134(1)(d) of the *Fair Work Act 2009*.

⁶² See s.134(1)(g) of the *Fair Work Act 2009*.

⁶³ ACTU submission dated 8 December 2017 at paragraph 16.

survey material has been received. Indeed we contend that if the Commission were to now rule that practice note is to be applied to the Joint Employer Survey, Ai Group and other interested parties relying upon it would be prejudiced, by virtue of the fact that whilst creating and conducting the survey, they were not aware (nor could they reasonably have been aware in the circumstances) that they would be held to the standard articulated by the practice note.

70. At section 2 of this submission, we have set out the material filed by Ai Group regarding the Joint Employer Survey and the matters that are established by virtue of it. When considered in the context of the criticisms made by the ACTU, it becomes apparent that the its complaints regarding its inability to cross-examine “the authors” of the Joint Employer Survey does not in fact result in any material prejudice to the ACTU. Further, it was open to the ACTU to make submissions about any bearing that the absence of any such evidence might have on the weight to be attributed to the Joint Employer Survey results or to make submissions regarding the material that *has* been filed. It has elected to do neither.

71. No material procedural unfairness or prejudice has been identified by the ACTU in the event that the Joint Employer Survey is tendered into evidence.

6. THE MATERIAL FILED BY THE ACTU

72. The logical extension of the approach that the ACTU urges the Commission to here take would, if adopted, have a potentially profound impact on the extent to which material relied upon by the ACTU could properly be put before the Commission.

73. For example, various aspects of the case mounted by the ACTU rely on the Australian Work and Life Index (**AWALI**) surveys⁶⁴. However, there is no evidence (or indeed even submissions) before the Commission regarding a

⁶⁴ See for example: ACTU submission dated 9 May 2017 at paragraphs 107, 132, 134 – 135 and statement of Jill Murray dated 6 May 2017 at Annexure JM-3, paragraphs 23 – 24, 26 – 27, 29, 34, 36 – 37, 40, 42, 47, 68, 105 – 106.

raft matters associated with the conduct of the AWALI surveys. This includes information about (using the ACTU's own words) "the person or persons who designed the survey, including drafting the questions, and the reasons for including the particular questions or forms of questions is not identified"⁶⁵. Indeed the questions that were in fact asked of survey respondents, and to the extent relevant, any suggested answers (e.g. by way of a multiple choice response) are not before the Commission in any form.

74. Similarly, the complete survey results are not in evidence; nor is there any evidence about or from the persons involved in conducting the telephone interviews of the respondents or the persons involved in analysing the survey data. The basis or manner in which the results were analysed is similarly not in evidence.
75. The ACTU seeks to rely on the results of the AWALI surveys, which are reported and analysed in various publications by persons including Natalie Skinner and Barbara Pocock (none of whom have been called to give evidence), which are in turn cited by it in its written submissions and by one of its witnesses⁶⁶. The various "glaring omissions" that are said to appear in relation to the Joint Employer Survey could also be said to exist in relation to the AWALI surveys sought to be relied upon by the ACTU and potentially with even greater force, given that respondent parties are entirely unable to test any matters associated with those surveys, including their *results*.
76. The same could be said of the qualitative study undertaken by the Centre for Work + Life regarding s.65 of the *Fair Work Act 2009*. A report⁶⁷ was prepared by Natalie Skinner, Barbara Pocock and Claire Hutchinson, none of whom have been called to give evidence in these proceedings even though the

⁶⁵ ACTU submission dated 8 December 2017 at paragraph 10(b).

⁶⁶ Statement of Jill Murray dated 6 May 2017 at Annexure JM-3, paragraphs 23 – 24, 26 – 27, 29, 34, 36 – 37, 40, 42, 47, 68, 105 – 106.

⁶⁷ 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).

report is relied upon by the ACTU⁶⁸. The report is based on telephone interviews conducted during 2012 – 2013⁶⁹ of 25 employees who had made a formal written request under the NES for flexible working arrangements⁷⁰ and 14 employers who had received such requests (albeit not necessarily from any of those 25 employees).⁷¹

77. There is absolutely *no* evidence that goes to:

- “The person or persons who designed the survey, including drafting the questions, and reasons for including particular questions or forms of questions”⁷². Again, even the questions themselves that were asked are not before the Commission.
- The “basis for selecting the participants”⁷³.
- “Any quality control measures designed or applied to the collection of data, the analysis of responses, or any other relevant matter”⁷⁴.
- The raw survey results and the manner in which they were then analysed.

78. Further, as we observed in our submissions of 31 October 2017⁷⁵, the employees and employers interviewed are not identified in the report and accordingly, their responses to the survey cannot be tested.

⁶⁸ See for example statement of Jill Murray dated 6 May 2017 at Annexure JM-3, paragraphs 27, 43, 49 – 52 and 56 – 57.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ 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.

⁷² ACTU submission dated 8 December 2017 at paragraph 10(b).

⁷³ ACTU submission dated 8 December 2017 at paragraph 10(d).

⁷⁴ ACTU submission dated 8 December 2017 at paragraph 10(g).

⁷⁵ Ai Group submission dated 31 October 2017 at paragraph 302.

79. If the ACTU's contention that the Joint Employer Survey should not be received in evidence were accepted on the grounds articulated in its written submission of 8 December 2017, in our view, analogously, the same could be said for the aforementioned report.
80. Questions might also arise as to the extent to which interested parties might be permitted to rely upon AWRS, which is based on a survey of employers and employees, in circumstances where evidence going to the conduct, methodology and survey results is not called. It is of course AWRS that forms the basis of the report prepared by the General Manager of the Commission regarding s.65 of the *Fair Work Act 2009*⁷⁶, which is extensively relied upon by the ACTU, Ai Group and other interested parties in these proceedings.
81. The nature of an award review differs from inter-party litigation before the Commission or the Courts. The review is a regulatory function mandated by the legislature. It is conducted, at least in part, through the prism of specific claims that are advanced by interested parties. Material is put before the Commission by those seeking variations to the award system as well as those that oppose them for the purposes of assisting the Commission in its deliberation. That material is typically mounted by industrial organisations many of whom, in the context of the current award review, have faced (and continue to face) serious resource constraints that undoubtedly impede upon the nature and extent of the material that they are capable of filing.
82. The Commission of course has an overarching obligation to ensure that it performs its functions in a manner that is fair and just.⁷⁷ Respectfully, it consistently seeks to fulfil this obligation in the face of arguments made by various organisations regarding the potential unfairness or prejudice they might suffer is specific material is or is not permitted to be tendered or otherwise relied up through the exercise of its discretion as to:

⁷⁶ 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.

⁷⁷ Section 577(a) of the *Fair Work Act 2009*.

- The purposes for which the material can or cannot be relied upon;
- The extent to which the material can or cannot be relied upon; and/or
- The provision of an opportunity to opposing parties to be heard and respond to the relevant material.

83. The Commission has not, to our knowledge, at any stage during the current or former award reviews adopted the approach of disallowing an interested party from relying upon survey material for reasons such as those articulated by the ACTU. A consideration of how such a ruling might extend to other material filed in these proceedings reveals why such an approach would be extremely problematic. It would effectively result in circumstances where material of obvious relevance to the issues at hand would not be before the Commission and consequently it would be precluded from being at all informed by such material, notwithstanding any limitations it might have. In proceedings such as these, where there are a range of considerations to which the Commission must have a regard and a raft of issues for interested parties to grapple with, an inability to rely on material such as the Joint Employer Survey is self-evidently problematic and, in our respectful view, it would not assist the Commission in discharging its statutory function prescribed by s.138 of the *Fair Work Act 2009*.

7. CONCLUSION

84. For the reasons here set out, the Joint Employer Survey is of obvious relevance to the current proceedings, it carries significant probative value, it is reliable and its tender into evidence will not unfairly prejudice the ACTU.