BACKGROUND PAPER 1:
Uncontested/contested issues and summary of submissions

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Family friendly work arrangements
(AM2015/2)

MELBOURNE, 12 JANUARY 2018

Note: This is a background document only and does not represent the concluded view of the Commission on any issue.

1. Background

[1] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) provides that the Fair Work Commission (the Commission) must conduct a review of all modern awards every four years (the Review).

[2] As part of the Review, the ACTU made an initial claim to vary modern awards to provide for the following:

- requests for family friendly work arrangements during pregnancy or upon return to work from parental or adoption leave;
- a right for an employee who to return to their substantive position and work arrangements held prior to returning to work from parental or adoption leave; and
- access to personal leave to attend pregnancy, ante-natal and/or adoption related appointments and extension of unpaid parental or adoption leave.

[3] The Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group) made jurisdictional objections to the ACTU's proposed clause. ACCI's submissions were supported by the Housing Industry Association[1] and the Australian Federation of Employers and Industries (AFEI). The National Farmers' Federation (NFF)

objected to that aspect of the claim on the grounds that it was directly inconsistent with s.65(5) of the Act.[2]

[4] On 1 December 2014, the Commission published a Statement confirming that jurisdictional objections advanced by the Employer parties would be dealt with as a threshold issue.[3] Directions issued on 23 February 2015 set out the following four preliminary jurisdictional issues identified by Ai Group and ACCI:

> '(i) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 2-1 or Part 2-2 of the *Fair Work Act 2009*?
> (ii) Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the *Fair Work Act 2009*?
> (iii) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 6-2 of the *Fair Work Act 2009*?
> (iv) Do any elements of the claims of the ACTU or individual unions purport to give the Commission powers which it does not have under the *Fair Work Act 2009*?'[4]

[5] The Full Bench constituted to deal with the jurisdictional objections issued a decision on 22 October 2015[5] dealing with these issues. The Full Bench held that '[w]here a claim is sought to be struck out on jurisdictional grounds, it must be demonstrated that the existence of jurisdiction to grant the claim is inarguable and that there is no order that could be made in favour of the applicant which would be within jurisdiction'.[6] As the Employer parties did not object to the whole of the amended ACTU claim, nor contend that there was no modern award term that the Commission could make dealing with the subject of the claim, the Full Bench was not satisfied that they had discharged the 'heavy burden' of demonstrating that the ACTU's claim was without legal foundation and confirmed that the matter would continue to a final hearing. In relation to the clause itself, the Full Bench made the following observations:

> 'The employer parties' challenge to the jurisdictional foundation for clause X.1 of the ACTU's proposed Parental Leave clause was, we acknowledge, a substantial one. However we are likewise not satisfied at this preliminary juncture, without having heard any evidence, that clause X.1 is clearly beyond power. Firstly, we consider that it is well arguable that the clause is authorised by s.139(1)(b) as a term which is about "*regular part-time employment ... and the facilitation of flexible working arrangements, particularly for employees with family responsibilities*".
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> Secondly, we consider that it is reasonably arguable that clause X.1 is supplementary to the right in s.84, in that it builds upon the employee's right to return to work after taking parental leave to the employee's pre-parental leave position or another available position for which the employee is qualified and suited and which is nearest in status and pay to the pre-parental leave position by adding a right to return to such a position on part-time hours or reduced hours. We are not persuaded at this point that the proposed clause would be detrimental to employees when compared with the NES in any respect, with the result that we consider that it is reasonably arguable that the clause is authorised by s.55(4).
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> Thirdly, we consider that it is reasonably arguable that the effect of s.55(7) is that a modern award term which, under s.55(4), is supplementary to a NES provision and does not result in

> any detriment to an employee when compared to the NES as a whole, does not contravene s.55(1) even if it excludes some other provision of the NES. If so, clause X.1 would be a permissible modern award term even if it excludes s.65(5).
>
> Finally and in any event, we consider that the evidence may potentially bear upon the question of whether clause X.1 would, in practical terms, operate to exclude s.65(5). For example, the evidence may demonstrate the extent to which employees returning from parental leave, who would be in a position to take advantage of the proposed right in clause X.1, currently make requests for alternative working arrangements of the type contemplated by clause X.1 and thus are subject to the employer's right to refuse the request on reasonable business grounds. Arguably, any such evidence might go to whether clause X.1 in its operation would result in an outcome whereby s.65(5) was negated.'[7]

[6] After the Full Bench jurisdictional decision, the ACTU, ACCI and Ai Group agreed on proposed directions which delayed the hearing of the substantive claim until the second half of 2017.[8]

[7] On 29 May 2017, a Statement was issued reconstituting the Full Bench following the resignation of former Vice President Watson.[9] Amended directions were issued on 3 August 2017 extending the timeframe for parties opposing the ACTU's claim to file submissions in reply and listing the matter for hearing in December 2017.[10]

[8] The claim lodged by the ACTU has been revised on a number of occasions. The final version of the claim is set out at **Attachment A** (the Claim).

[9] A list of submissions filed to date is at **Attachment B**.

[10] The purpose of this background paper is to identify the uncontested and contested issues identified by the parties and to summarise the parties' submissions.

2. The issues

2.1 General

[11] The parties generally agree that the Commission's task in the Review involves considering whether the Claim:

(a) is prohibited by s.55(1) of the Act;

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

(c) will result in modern awards that include terms only to the extent necessary to achieve the modern awards objective (s.138); and

(d) is supported by probative evidence such as to warrant the Full Bench exercising its discretion to vary the relevant modern awards.

[12] A draft summary of the Commission's approach to the Review is set out at **Attachment C**. Parties are invited to comment on the draft summary.

[13] The Claim is opposed by the Employer parties on both jurisdictional and merits grounds.

[14] It is convenient to deal first with the parties' submissions on jurisdiction.

2.2 Jurisdiction

[15] Modern awards are dealt with in Pt 2-3 of the Act. The content of modern awards is dealt with in s.136, which states:

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

[16] The central jurisdictional issue is whether the Claim seeks to include a term in modern awards which is prohibited by s.136(2).

[17] No party contends that the Claim is an 'objectionable term' which must not be included in a modern award (see s.136(2)(a) and Subdivision D of Part 2-3). The various jurisdictional objections centre on the interaction between the National Employment Standards (the NES) and the proposed term (see s.136(2)(b)). Section 55 is relevant in this regard, it states:

> '**55 Interaction between the National Employment Standards and a modern award or enterprise agreement**

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
  (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
  (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:
  (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
  (b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
  (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
  (b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
  (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
  (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent

that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

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

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

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

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).'

[18] As discussed in *Canavan Building Pty Ltd*,[11] it is not necessary that an exclusion for the purpose of s.55(1) be in express terms:

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

> "209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative ..."'[12]

[19] For the purposes of these proceedings the relevant provision of the NES is s.65, which states:

'**65 Requests for flexible working arrangements**

Employee may request change in working arrangements

(1) If:

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

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

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

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

(1A) The following are the circumstances:

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

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

(c) the employee has a disability;

(d) the employee is 55 or older;

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

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

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

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

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

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

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

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

(b) for a casual employee—the employee:

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

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

Formal requirements

(3) The request must:

(a) be in writing; and

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

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

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

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

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

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

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

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

2.2.1 ACTU submissions

[20] The ACTU filed final submissions on 19 December 2017. The ACTU continues to rely on its primary submissions dated 9 May 2017 and submissions in reply filed on 28 November 2017. The ACTU contends[13] that the Claim is about 'the facilitation of flexible working arrangements' (s.139(1)(b)) and 'arrangements for when work is performed, including … variations to working hours' (s.139(1)(c)). On this basis, it is submitted that it is a *permitted term* within the meaning of s.136(1)(a) (being a term 'about' the matters in s.139(1)(b) and (c)).

[21] Further, the ACTU contends that the Claim is not a *prohibited term* for the purposes of s.136(2) because it is a term that supplements the NES (within the meaning of s.55(4)(b)) and is not detrimental to an employee in any respect, when compared to the NES. It is submitted that because the Claim is a term permitted by s.55(4) it does not contravene the prohibition in s.55(1) of excluding the NES or any provision of the NES (see s.55(7)).

[22] The ACTU does not contend that the Claim is ancillary or incidental to the operation of an entitlement of an employee under the NES (within the meaning of s.55(4)(a)).

[23] As to the meaning of the word 'supplement' in s.55(4)(b), the ACTU submits that it should be given its ordinary and natural meaning and that the Macquarie Dictionary defines 'supplement' as 'something added to complete a thing, supply a deficiency, or complete a whole'.[14] The ACTU also observes that ACCI's suggestion that the concept of 'supplementing' the NES 'connotes the notion of building upon, increasing or extending'[15] is not inconsistent with the Macquarie Dictionary definition.[16]

[24] The starting point for the ACTU's contention that the Claim supplements the NES is the proposition that the entitlement in s.65 to request a flexible working arrangement is 'incomplete' or 'deficient' because:

- it does not provide the employee with any guarantee that her or his request will be granted;
- the right of an employer to refuse a request on 'reasonable business grounds' is too broad and does not require the employer to balance the employee's interests or the business benefits of flexible working arrangements;
- the right to refuse a request on 'reasonable business grounds' cannot be reviewed or enforced; and
- the qualifying period of 12 months is too onerous.[17]

[25] The ACTU submits that the Claim supplements the NES because it seeks to 'complete and/or remedy the deficiencies' in s.65 in the following ways:

(a) Section 65(1) of the Act grants an employee a right *to request* a flexible working arrangement if the request relates to any of the circumstances prescribed by s.65(1A). Those circumstances include, relevantly, if the employee is the parent or responsible for the care of a child of school age or younger (s.65(1A)(a)) (including where the parent is returning to work following a period of parental leave (s.65(1B))), or if the employee is a carer within the meaning of the *Carer Recognition Act 2010* (Cth) (s.65(1A)(b)). The ACTU's proposed clause (at cl.X.1) provides that an employee *is entitled* to Family Friendly Working Hours (FFWH) if the employee has parenting or caring responsibilities (as defined in cl.X.4.1 and X.4.2).

(b) Section 65 does not provide for the duration of a flexible working arrangement or the employee's right to return to her or his previous position at a later time, whereas the proposed clause (at cl.X.2) grants employees the right to revert to their former working hours up until the child is school aged (for employees with parenting responsibilities), or for a period not exceeding two years from the commencement of FFWH (for employees with caring responsibilities). Employees are required to give notice of the date on which they wish to revert to their former working hours, at the time that they notify their employer of their intention to access FFWH (cl.X.3.1(c)).

(c) In the alternative to (b) above, proposed cl.X.2 is supplementary to s.84 because the right of employees to return to their pre-parental leave position is extended to permit employees to maintain that position but on reduced hours to accommodate their parenting or caring responsibilities.[18]

(d) The proposed clause applies to full-time, part-time and casual employees who have completed at least six months' continuous service with their employer (cll.X.4.3 and X.6.1(a)). This is more favourable than the NES entitlement, which only applies to long-term casuals with a reasonable expectation of continuing employment on a regular and systemic basis, and to permanent employees who have completed at least 12 months of continuous service.

(e) Section 65 does not currently provide for any check on an employer's assertion of 'reasonable business grounds' as a basis to refuse a request. The lack of enforceability of s.65(5) means that the right in s.65(1) is not properly an enforceable minimum term and condition of employment as contemplated by the modern awards objective and the objects of the Act.[19] By contrast, the proposed clause does not permit employers to refuse a request made in accordance with the clause on reasonable business grounds or in any other circumstances.[20]

[26] As mentioned above, the ACTU contends that the Claim does not exclude the NES or any provision of the NES (within the meaning of s.55(1)) because it is a term permitted by s.55(4) (see s.55(7)). In the alternative, in the event the Commission was not persuaded that the Claim was a term permitted by s.55(4)(b), the ACTU submits that the Claim does *not* exclude s.65 or a provision of s.65.[21] This is said to be because s.65 is broader in scope than the proposed clause. In particular, s.65 is available in a wider range of circumstances, including where employees are over 55 or have a disability, and relates to a wider range of flexible working arrangements, including changes in work location and patterns of work. The Claim relates to parents and carers, and hours of work only.[22]

[27] On this basis the ACTU advances the following submission:

> 'Because s 65 is broader in scope than the proposed clause, the employers' argument can only relate to the entitlement in s 65 of the FW Act insofar as it applies to parents and/or carers seeking reduced hours, and specifically, the obligation on employers in s 65(5) of the Act not to refuse a request under s 65 for reasons other than reasonable business grounds.
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> The proposed clause does not exclude s 65 of the FW Act for parents and/or carers, either expressly or by negating the effect of s 65, because (a) employees who are parents or carers can still make a request for a flexible working arrangement, including for reduced hours, under s 65 of the FW Act[23] and (b) while the proposed clause undoubtedly offers improved rights to employees than those in s 65 of the Act, it cannot be the case that any award or enterprise agreement which contains entitlements that are better than those in the NES are prohibited by s 55(1). The prohibition in s 55(1) is on award terms which *exclude* – not improve, modify, or alter – the NES or a provision of the NES. This interpretation is expressly supported by the words of s 55(4) of the FW Act, which provides that awards can contain terms supplementing NES provisions, as long as they are not detrimental to employees.
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> …
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> The relationship between the proposed clause and s 55(1) of the FW Act was considered by the Full Bench in the *Jurisdictional Decision*. The Full Bench declined to strike out the proposed clause on the basis that it excluded s 65 of the FW Act,[24] and said:
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> > Finally and in any event, we consider that the evidence may potentially bear upon the question of whether clause X.1 would, in practical terms, operate to exclude s.65(5). For example, the evidence may demonstrate the extent to which employees returning from parental leave, who would be in a position to take advantage of the proposed right in clause X.1, currently make requests for alternative working arrangements of the type contemplated by clause X.1 and thus are subject to the employer's right to refuse the request on reasonable business grounds. Arguably, any such evidence might go to whether clause X.1 in its operation would result in an outcome whereby s.65(5) was negated.[25]
>
> The evidence before the Commission reveals that the take-up rates of the 'right' under s 65 are low. The 2014 AWALI study found that about 20 per cent of all employees make a request for flexible working arrangements, but that figure covers requests made informally and under s 65.[26] Moreover, according to the Fair Work Commission General Manager's Report, relying on AWRS data, of the 40 per cent of employer respondents who reported that they had received a request for flexible working arrangements from their employees between 1 July 2012 and 2014, only one per cent was formally made under s 65 of the FW Act.[27] Accordingly, the 'practical operation' of s 65 is unlikely to be disturbed by the proposed clause.'[28]

[28] In the course of closing oral submissions,[29] the ACTU submitted that the Claim does not exclude part of the NES 'because employees can still make a request under s.65' and:

> 'The ACTU's proposed clause offered better rights to employees than under section 65, but offering better rights is not equivalent to excluding existing rights and it can't be the case that you can't improve on the rights that are in the NES and that would have the effect of excluding them. In any event, and bearing in mind what was said in the jurisdictional decision section 65 is little used … The evidence of the low utilisation suggests that the practical operation of section 65 would not be altered ...'[30]

2.2.2 ACCI submissions

[29] ACCI filed final submissions on 19 December 2017, which replaced in their entirety its Primary Submissions dated 30 October 2017.[31]

[30] ACCI does not contest the ACTU's contention that the Claim is an award term 'about' the matters in s.139(1)(b) and (c), noting that:

> 'Section 139(1)(b) and (c) appear on an ordinary reading of their language to be able to include clauses related to hours of work, types of employment and in this context family friendly arrangements.'[32]

[31] ACCI submits that the Claim *excludes* part of the NES (within the meaning of s.55(1)):

> 'It is acknowledged that the scope of the Claim does not exactly correspond with the scope of s 65. For example, the service requirements for eligibility under the Claim is six months in comparison to 12 months under s 65 while the scope of the Claim only applies to family friendly working hours for parents and carers while the s 65 scope is broader.
>
> Notwithstanding these differences, it appears to be common ground that the practical effect of the introduction of the Claim would be to exclude the operation of s 65(5) in relation to some classes of employees. This means that, where employee had an ability under both s 65 and the Claim to make a flexibility request, the limitation imposed by s 65(5) of the Act would be rendered completely ineffective as, in practical terms, an employee would always elect to use the 'absolute' right under the Claim instead of the limited right under s 65(5).'[33]

[32] In the course of closing oral submissions,[34] ACCI submitted that the NES establishes rights and obligations for *both* parties to the employment relationship:

> 'If you take section 65 as the example the right it establishes for the employee is the right to request, and it creates a class of employees who have that right. The obligations it places on the employer is then to receive that request and to consider it and to respond to it, and the obligation it places on the employer conditions how it's allowed to actually answer the request, that is, it can only do so on reasonable business grounds.
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> So when we say, as we have in our written submissions, I don't take you to them, that the claim negates parts of section 65, we would say it practically negates 65(1), (3), (4), (5) (5)(a) and (6) in that practically speaking if you can demand what hours you work then the very scheme of 65 is negated starting from "I have a right to request. I no longer need to bother with my right to request. Why do so?". So I just wanted to be clear that our anxiety around the notion of negation is not purely about 65(5); it's a broader concept than that.'[35]

[33] ACCI also rejects the ACTU's contention that the proposed clause 'supplements' the NES (within the meaning of s.55(4)(b)):

> 'The concept of 'supplementing' the NES in the second limb of s 55(4) connotes the notion of building upon, increasing or extending rather than detracting, substitution, changing or replacing.
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> Had the Parliament intended to adopt one of these latter phrases it could have done so.'[36]

[34] In reply to the ACTU's submission that s.65 was 'deficient' in a number of respects ACCI submits:

> '… the notion of there being a gap is a construct of argument developed by the ACTU. There is no gap in terms of how section 65 was intended to operate from inception to enactment …
>
> Now section 65 is relatively new. It is, in our submission, a contemporary formulation. It was reconsidered by the parliament in 2013 and it was amended. It must therefore be seen as a proper contemporary expression of what the parliament believe is appropriate and by definition what the community believe is appropriate. An employer who takes liberties with section 65 has a raft of anti-discrimination laws sitting on their head like a Sword of Damocles, and very little seems to have been mentioned of that legislation but we have gone to it at length. It is very clear to us that the parliament would have had that in their mind when they structured section 65. They would have known of it and there is a very fine margin of error between an employer doing what they're meant to under section 65 and crossing that line into an act of discrimination.'[37]

[35] In support of its argument, ACCI relies on the 2008 National Employment Standards Exposure Draft Discussion Paper[38], which provides:

> 'The Government is committed to effective measures that will help all working families balance their work and family responsibilities. The Government is also committed to helping businesses to manage their workforce to encourage greater workforce participation.
>
> The Government recognises that working families can find it particularly difficult to balance work and family responsibilities when a child is not old enough to attend school. It is for this reason that the proposed NES will include a right for certain employees to request flexible work arrangements from their employer until their child reaches school age. An employer can only refuse a request on reasonable business grounds.
>
> The Government considers that implementing family friendly arrangements is best dealt with at the workplace level. Whether a particular flexible working arrangement requested by an employee can be accommodated by an employer will vary depending on the circumstances of the particular business.
>
> Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES. The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.'[39]

[36] In its closing oral submissions, ACCI draws a distinction between the type of supplementation permitted by s.55(4)(b) and what the ACTU is seeking (which ACCI characterises as an act of abrogation):

> 'Supplementation in our character, leaves 65 intact and builds upon it. Everything in 65 still operates, it still has work to do. What they effectively want to do is they want to throw 65 in the bin and say we're going to use this instead. As a matter of practicality, if I could walk into my employer and say I'm working Monday for three hours, I'm working Tuesday for two, cop it, then the whole of 65 becomes a nullity for that class of person.
>
> We say that if you're going to negate part of the NES in that way, it clearly can't be an act of supplementation. In fact, it's the opposite.'[40]

[37] ACCI also provided some examples of what it submits would supplement s.65 and not negate s.65:

- adding to the classes of employees referred to in s.65(1A);[41] and
- when the employer is considering the request, adding some additional conditions on the employers, for instance that they must meet face to face with the employee and must genuinely consider what the employee is putting to them.[42]

[38] As to s.55(7), ACCI submits that the subsection is confirmatory not curative in its terms and may be contrasted with the clearly curative language in s.624. Subsection 55(7) simply stands for the self-evident proposition that to the extent that a term of a modern award is permitted by s.55(4), the term does not contravene s.55(1).[43]

[39] ACCI further submits that the effect of s.55(6) is to not only ensure that an employee cannot 'double dip' and access both the NES and duplicative award entitlements, but also to ensure that the rules applicable to the NES entitlement also apply to the award entitlement, given the entitlements are the same.[44]

[40] ACCI also advances an alternate submission[45] in the event that the Commission considers that the Claim is not prohibited by s.55(1), that the statutory framework gives rise to 'an incredibly clear statutory presumption against the granting of the claim'. ACCI submits that the Act makes it clear that the legislature intended that flexibility requests should be subject to a regulatory regime that allows an employer some say in the granting of the request, takes into account the employer's position (specifically through the ability to refuse a request on reasonable business grounds), and does not provide for dispute or review of such a decision under a modern award.[46] ACCI submits that implicit in this regulatory framework is an understanding that it is ultimately for an employer to determine how to deploy its labour and that it would be a 'step too far' to allow such decisions to be contestable in the Commission.[47]

2.2.3 Ai Group submissions

[41] Ai Group filed final submissions on 19 December 2017 and continues to rely on its submission in reply dated 31 October 2017. Ai Group's submissions in respect of the jurisdictional issue are set out in Chapter 6 of its submissions in reply and Chapter 2 of its final submissions.[48]

[42] Ai Group contends that the Claim is contrary to s.55(1) as it excludes the scheme of s.65 as a whole, including the right of an employer under s.65(5) to refuse an employee's request. Further, it submits that the Claim is not a supplementary term within the meaning of s.55(4) and hence is not saved by s.55(7).

[43] Ai Group also rejects the ACTU's contention that s.65 is 'incomplete or deficient' in a number of respects:

> 'Ai Group strongly disagrees with such value judgements regarding the nature of s.65. However, regardless of any value judgements made about s.65 by any party, the fact is that

> Parliament has decided that s.65 strikes an appropriate balance between the interests of employees and employers. This balance has been struck in respect of, firstly, the types of employees who are included and excluded from s.65, secondly, the rights of employees and employers under s.65, and, thirdly, the manner and extent to which a refusal pursuant to s.65(5) can be reviewed. Regardless, value judgements are irrelevant to the issue of whether the ACTU's proposed clause supplements the NES.
>
> It cannot be that a term can be said to "supplement" the NES because it addresses a perceived lack of merit associated with the fundamental nature of an NES provision and/or the broader scheme of the Act ...'[49]

[44] Ai Group submits that the right of an employee to request flexible working arrangements and the right of an employer to refuse a request on reasonable business grounds are the key aspects of the scheme in s.65. Relying on the *4 yearly review alleged NES inconsistencies decision*[50], Ai Group submits that award terms exclude the NES if 'in their operation they negate the effect' of a provision of the NES. Ai Group contends that the Claim would operate to exclude a benefit afforded to employers under s.65(5):

> 'The starting point for considering whether the proposed award clause would exclude s.65, or any a part of it, is a consideration of the nature of s.65 and the entitlements or benefits that it establishes. Section 65 provides a legislative scheme which regulates the making of requests and the handling of such requests by employers. It creates a right for certain employees, in certain specified circumstances, to make a request to their employer for a change in working arrangements relating to those circumstances. It also creates an obligation on an employer to respond within a certain time frame and in a certain manner. Crucially, s.65(5) permits the employer to refuse the request only on reasonable business grounds.
>
> The intended objective of s.65 is to create a process whereby an employee may request a change and an employer is afforded a limited right to refuse it. It is designed to facilitate discussion and compromise between the parties. It is not intended to enable an employee to dictate the hours of work that they will perform, without any regard being had to the impact on the business.
>
> Ai Group contends that the proposed clause will negate the effect of s.65 because it will provide a mechanism by which certain employees seeking a certain type of change to their working arrangements can circumvent the operation of s.65. Put simply, it will provide an alternate means by which they can access changed hours of work which does not incorporate the key elements of the scheme prescribed in ss.65(2), 65(3) or 65(5). In its operation the award clause will, at least in some circumstances, negate the effect of s.65 by undermining the extent to which the scheme that it establishes will be utilised.
>
> Ai Group also contends, more specifically, that the proposed clause excludes the operation of s.65(5) because it would negate the effect of this specific provision ...
>
> … If the proposed award clause was granted it would not be possible for an employer to decline to accommodate an employee proposal to change their working arrangements to access family friendly working hours. Accordingly, in its operation, the proposed clause would result in an outcome whereby s.65(5) was negated ...
>
> … The fact that a large proportion of employers may decide to grant an employee's request for flexible work arrangements, either informally or in response to a formal request under s.65, does not detract from the importance of the employer right under s.65(5).' [51]

[45] Ai Group also submits that the operation of the Claim would mean that an employer would not receive the benefit of a written request setting out the reasons for the change sought, as is currently required by s.65(3):

> 'The operation of the proposed clause would also mean that an employer would not receive the benefit of a written request setting out the reasons for the change sought, as currently required by s.65(3). This element of s.65 is not a trivial provision. The reasons identified by an employee can act as a catalyst for the identification of alternate arrangements that may suit the circumstances of both the employer and employee. The requirements of s.65(3)(b) are not replicated in the proposed clause. All that the clause requires in is that, upon request, an employee provide evidence that they have caring responsibilities or parenting responsibilities. In practice, the proposed terms would negate the operation of s.65(3) and deny employees the benefit of receiving this additional information.'[52]

[46] It is convenient to note here the ACTU's response to this point in closing oral submissions, as follows:

> 'An issue was raised in the Ai Group's submissions about whether the clause negates the effect of section 65(3) with regard to the requirement to put the need for the request in writing, and that's at paragraph 31 of the Ai Group's submissions. My understanding is that the clause would not negate the requirement for the employee to put their request in writing or specifically the reasons for the request because employees are still required to set out in writing their request in considerable detail, including without any limitation, information about the proposed days and hours of work, the period of time of the arrangement and the date on which the employee wishes to revert, if she does.
>
> There's nothing to stop the employer for asking for that information, why are you seeking this arrangement. In my respectful submission, it will be obvious from the nature of the request. In any event, if this is the only jurisdictional barrier to the ACTU's claim, then it is easily remedied.'[53]

[47] Ai Group also rejects the ACTU's contention that the Claim 'supplements' the NES within the meaning of s.55(4)(b). It submits that 'supplementing' means adding to or building on, not taking away or detracting from. In essence, Ai Group submits that the Claim does not supplement s.65 but instead creates a different system that would operate in substitution to the NES:

> 'Ai Group contends that the proposed clause does not supplement the NES. That is, it does not supplement s.65, as asserted by the ACTU. Nor could the term be taken to supplement s.84, at least not in its entirety.
>
> Instead, the clause provides employees an alternate scheme for accessing a particular type of change to their working arrangements. In so doing it creates a fundamentally different benefit to employees and a fundamentally different obligation on employers to that which flows from s.65.'[54]

[48] Ai Group also contends that for a term to supplement the NES as contemplated by s.55(4), there must be a connection between the term and the NES:

> 'There is no apparent connection between the proposed clause and s.65. It does not operate in a manner that is analogous to the examples provides by the statute. The statutory note provides

> some contextual support for the proposition that the purpose of s.55(4) is only to enable the inclusion of terms in awards that are in some way connected to the operation of the NES.
>
> The proposed clause does not add to the entitlement under s.65, it simply provides for a different entitlement. The proposed clause is not in any way connected with the operation of the "right to request" established under the Act, but rather provides for a fundamentally different scheme pursuant to which an employee can alter their hours. The mere fact that employees utilising either scheme may be able to access a particular type of change in their working arrangements is not a sufficient connection to the NES so as to render the term one which supplements the NES, as contemplated by s.55(4).
>
> The proposed clause creates an entitlement for an employee to change their working hours. In contrast, s.65 creates a right to request a change in working arrangements and imposes an obligation upon an employer to deal with the request in a certain way. Whilst there is undoubtedly a degree of overlap in the circumstances in which either scheme may apply, they are fundamentally different in nature.
>
> The proposed clause does not directly interact with the legislative scheme. It is drafted so as to operate entirely of its own force and independently of s.65. The proposed clause does not build upon, increase or extend the statutory scheme. It simply establishes a different scheme for delivering a change that is more beneficial to employees.'[55]

[49] The ACTU also addressed this point in its closing oral submissions, arguing that there is an overlap between the claim and s.65 and 'that overlap is sufficient to demonstrate a connection'.[56]

[50] The parties' submissions on the merits of the ACTU's claim are set out below.

2.3 Merits

[51] The ACTU seeks an award variation to include an entitlement (ie an enforceable right) to reduced hours for employees with parenting or caring responsibilities. The ACTU contends that the existing regulation regarding family friendly working arrangements is inadequate and is failing to assist employees to balance their work and family responsibilities. It submits that access to flexible working arrangements that meet the needs of employees will improve the nature and quality of labour force participation for parents and carers.

[52] The Employer parties oppose the Claim and say that the current s.65 provides a suitable framework. The Employers contend that the Claim is fundamentally unfair and unworkable in that it does not provide employers with a capacity to refuse to grant flexible working hours. It is submitted that the Claim represents a fundamental shift in the way work is currently structured and has the very significant potential to disrupt businesses. The Employers also submit that the award variations proposed are not 'necessary' to achieve the modern awards objective within the meaning of s.138.

[53] The central merits issue in contest is the framework within which discussions about flexible working arrangements take place.

2.3.1 ACTU submissions

[54] A summary of the ACTU's submissions on the merits of the claim is set out below:

- The 'right to request' under s.65 does not provide employees with an enforceable right. As a result there is a gap in the safety net regarding flexible working arrangements.[57] The deficiency in s.65 is that the employer's decision to refuse a request is not reviewable and this is inconsistent with the underlying purpose of the NES and the safety net.[58]
- The majority of requests for flexible working arrangements made under s.65 or informally are granted, however a significant number of employees do not ask for changes to working arrangements although they are unhappy with their current arrangements.[59] The fact that a significant number of people have their requests accommodated by their workplace does not mean that the safety net is adequate and should avoid scrutiny.[60]
- In making the Claim, the ACTU is seeking to build on and advance the progress made in the *Parental Leave Test Case 2005* (2005) 143 IR 245.[61] At the time that the *Parental Leave Test Case* was determined, there was a dispute resolution mechanism that provided access to arbitration.[62]
- There is a gender gap in employment which is most pronounced in the 30 to39 age range. The fact that women drop out of the workforce or take on lesser work because that is all that is available on a part-time basis contributes to this gender pay gap.[63]
- The absence of a clear path to reduced hours and then back to full-time work is relevant to the consideration of structural discrimination faced by women in the workforce.[64]
- Parents and carers experience lower labour force participation and economic power.[65] Parents, mostly women, seek part-time work to manage parenting and caring responsibilities. Almost half (47.4%) of employed Australian women work part-time, compared to 18.7% of men.[66] Parenthood has a negative impact on women's economic status.[67]
- Occupational downgrading is relatively high for women who move from full-time to part-time work and is highest for women who change employers.[68]
- The evidence shows that the weak labour force participation rates for women during their prime parenting years is linked to a lack of access to flexible working arrangements.[69] Parents and carers need access to flexible working arrangements if they are to maintain labour force participation.
- Lack of access to good quality, affordable childcare is another barrier to labour force participation for women which cannot be overcome without a corresponding increase in flexible working arrangements.[70]
- Flexible working arrangements benefit employees, firms and the national economy. Benefits to firms include increased staff retention, improved staff morale, a reduction in absenteeism, greater success in recruiting new workers and increased productivity.[71]
- While employers may incur costs associated with flexible work arrangements, these costs would not be onerous or a significant burden.[72]
- Increased flexible working arrangements would have a positive impact on the national economy, including increased GDP as result of increased labour force participation.[73]
- Family friendly working arrangements reflect the preferences of employers and employees.[74]

2.3.2 ACCI submissions

[55] ACCI 'unreservedly opposes the Claim'[75] and submits that the Commission is being asked to 'cross the "Rubicon"'[76] and fundamentally alter the paradigm under which an employer operates a business:

> 'No coherent understanding of a fair and relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer.'[77]

[56] ACCI submits that, should the Claim be granted, it would usurp the existing regime for requesting flexible working arrangements.

[57] ACCI further submits that the Claim should be refused, as:

- it is either beyond the Commission's jurisdiction or contradicts the intended operation of the Act in a fundamental way;
- it cannot operate practically (particularly for small businesses) as it seeks to remove the ability of an employer to refuse a flexible work request;
- it removes the ability of businesses to determine how to roster their labour;
- the current provisions of the Act (and informal arrangements) operate effectively in facilitating flexible work arrangements;[78]
- employers take flexibility requests seriously, and there is no evidence to support the proposition that employers are irrationally or arbitrarily refusing requests for flexible working arrangements in situations where those requests could be reasonably accommodated;[79]
- particular factors may affect an employer's ability to grant requests for flexible working arrangements, such customer/client demand, regulatory requirements (such as childcare ratios and WHS compliance), requirements for work in teams, and external limitations particular to the industry (such as weather patterns or animal behaviour);[80]
- employees are not always easily substitutable (for reasons such as the employee's specialist skill set, or regional labour shortages);[81]
- the claim could not be said to reflect the 'minimum' nature that the safety net is intended to hold as it 'is radically at the other end of the extreme' and does not even appear to be a feature of enterprise agreements (that sit above the safety net);[82]
- the claim extends beyond what is necessary to achieve a fair and reasonable minimum safety net[83]; and
- the current flexibility regime under the Act appears to be effective in accommodating employees.[84]

2.3.3 Ai Group submissions

[58] A summary of the Ai Group's submissions on the merits of the Claim is set out below:

- The introduction of an award clause that allows employees the capacity to pick the hours they work is a radical departure from the way awards currently regulate hours of work and this has the potential to disrupt employers.[85]
- The proposed clause on its terms would afford employees an 'unreasonable and broad ranging right to dictate their hours'[86], including by nominating hours of work that fall after the business has closed or only hours that attract penalties.[87]
- To the extent that the ACTU relies on its proposed definition of 'existing position' to place some parameters around the hours that an employee may elect to work, their submissions are 'wholly inadequate'[88] and fail to recognise that an employee may not work fixed hours prior to nominating FFWH.[89]
- The ACTU envisages that an employee may have a right to return to their previous working hours whenever the need to accommodate such responsibilities ends[90]. It would be unfair for an employer to be required to accommodate an employee's reversion at any point that suits the individual, especially at short notice, and in many circumstances it may make it very difficult to recruit a replacement employee if the employer cannot guarantee the tenure of the position.[91]
- The proposed clause effectively provides an absolute right for an employee to access reduced hours for an unlimited period of time, provided that the administrative process of complying with the requirements of cl.X.3 is undertaken every 2 years.[92]
- It cannot be the case that a necessary element of a minimum safety net of terms and conditions of employment is a mechanism that affords employees an absolute right to modify their working hours so that they can take their children to any of the raft of activities in which a parent may choose to involve their child.[93]
- The proposal is not limited to circumstances where an individual is the primary carer for a relevant individual; nor is it limited to circumstances where an employee needs modified hours in order to attend to unavoidable responsibilities associated with being a parent or carer.[94]
- The prevalence of part-time work within the Australian economy does not, in and of itself, establish that all jobs undertaken by award-covered employees can be undertaken on a part-time or reduced hours basis.[95]
- The extent to which an employer should bear the costs of such matters must also be subject to some reasonable limitation.[96]

2.3.4 Other Employer party submissions

[59] The National Retail Association (NRA) filed submissions on evidence on 18 December 2017 concerning the evidence put by parties and the conclusions that the Full Bench ought to draw from the evidence,[97] and also relied on its previous submissions filed on 30 October 2017.

[60] In its submissions of 30 October 2017, the NRA submitted that further guidance for employers and employees in the administration of various rights and entitlements around parenting and caring responsibilities would be beneficial, however modern awards are not the appropriate avenue for this.[98]

[61] The NRA submitted that the Claim is not necessary as s.65 is enforceable through the dispute resolution clause in modern awards; employees are protected by various state and federal anti-discrimination laws; and the evidence showed that the majority of s.65 requests are granted.[99] The NRA also examined the considerations identified in ss.134(1)(a) to (h).[100] The NRA concluded that for these reasons, the Claim should not be granted.[101] In its submissions on evidence, the NRA submitted that the ACTU has failed to lead any evidence to support the substance of the Claim and it must be dismissed.[102]

[62] The Private Hospital Industry Employer Associations (PHIEA) filed a submission in reply on 27 October 2017 opposing the Claim on the basis that it is not necessary to meet the modern awards objective. The PHIEA submitted that the generalised evidence advanced by the ACTU failed to provide a merit-based argument for the inclusion of the proposed clause in the *Health Professionals and Support Services Award 2010,* the *Medical Practitioners Award 2010* and the *Nurses Award 2010*.[103]

[63] The Coal Mining Industry Employer Group (CMIEG) filed a submission in reply on 30 October 2017 supporting the Ai Group's submissions. CMIEG also made award-specific submissions in relation to the *Black Coal Mining Industry Award 2010.* The submission states that the company groups which form the CMIEG use policies to supplement s.65, and these together adequately deal with family friendly working arrangements.[104] CMIEG submits further that there is nothing in the evidence filed by the ACTU that demonstrates that the proposed clause is necessary in the black coal mining industry.[105]

[64] The NFF filed a submission in reply on 30 October 2017 opposing the claim on the basis that the clause is inconsistent with the modern awards objective and the ACTU has not demonstrated that the clause is necessary. The NFF submits that the proposed clause is also unworkable and commercially unrealistic in its industry.[106]

3. The Evidence

3.1 General – uncontested matters

[65] A Research Reference List was produced by Commission staff and includes:

- research materials, data sources and expert reports that the parties have referred to in their submissions; and
- additional material identified by Commission staff as relevant to this matter, including reviews of flexible working arrangements and economic outcomes.

[66] A list of the witnesses in the proceedings is set out at **Attachment D**.

[67] The evidence was heard over 4 days from 12 to 14 December 2017 and closing submissions and a witness cross-examination were heard on 21 December 2017. Transcript is available at the following links to the Commission's website:

- 12 December 2017;
- 13 December 2017;
- 14 December 2017; and
- 21 December 2017.

[68] The following matters are generally agreed by the parties:

(i) Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care.

(ii) Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities, but preferred hours of work to combine work and caring responsibilities are not always available.

(iii) There are economic and social benefits associated with increased female workforce participation.

(iv) Many employees are able to negotiate family friendly work arrangements with their employers – largely through informal arrangements, but a proportion of employees are not able to negotiate suitable flexible working arrangements, for various reasons. The utilisation of s.65 is very low.

(v) The desirability of employers and employees reaching agreement on flexible working arrangements is generally accepted. However, the framework within which those matters are discussed is contested.

3.2 Submissions on the evidence

[69] Submissions were filed on 19 December 2017 in relation to the evidence in the proceedings and the findings to be drawn from the evidence, by:

- ACTU;
- Ai Group;
- ACCI; and
- NRA.

[70] Relevant references to the written and oral submissions are set out below:

3.2.1 ACTU Expert Witnesses

General

- NRA submissions on evidence [11] and [72]-[75]

Professor Austen

- ACTU closing submissions [15](b) and (c) and oral submissions (Transcript PN2737-PN2741)
- Ai Group final submission [69]-[83]
- ACCI final submissions [9.12]-[9.13], Transcript PN3055
- NRA submissions on evidence [12]-[27]

Dr Ian Watson

- ACTU closing submissions [15](b), (d), (e) and (f), [18]-[19], [21], [26], [28]-[30] and oral submissions (Transcript PN2742)
- Ai Group final submission [84]
- ACCI final submissions [9.2]-[9.5] and oral submissions (Transcript PN3084-PN3086)
- NRA submissions on evidence [28]-[50]

Dr Jill Murray

- ACTU closing submissions [21], [40], [49], [53]-[63] and oral submissions (Transcript PN2734-PN2736)
- Ai Group reply submission, 31 October 2017 at [490]-[496], final submission [85]-[98] and oral submissions (Transcript PN2914-PN2915)
- ACCI final submissions [9.6]-[9.11], [9.105]-[9.115] and oral submissions (Transcript PN3088)
- NRA submissions on evidence [51]-[60]

Dr James Stanford

- ACTU closing submissions [22], [31], [35], [63], [64]-[69], [78]-[87] and oral submissions (Transcript PN2743-PN2777)
- Ai Group final submission at [99]-[127] and oral submissions (Transcript PN2928-PN2929, PN2951 and PN2956)
- ACCI final submissions [9.14]-[9.23]
- NRA submissions on evidence [61]-[71]

3.2.2 ACTU Lay Witnesses

General

- ACTU closing submissions [23], [38] [41] and [50] and oral submissions (Transcript PN2727-PN2729)
- Ai Group final submission [128]-[132]
- ACCI final submissions [9.29]-[9.33]
- NRA submissions on evidence [76]-[83]

Ashlee Czerkesow

- ACTU closing submissions [38](b), [50](b)
- ACCI final submissions [9.34]
- NRA submissions on evidence [126]-[129]

Katie Routley

- ACTU closing submissions [23] and oral submissions (Transcript PN2726)
- ACCI final submissions [9.35] and oral submissions (Transcript PN3081)
- NRA submissions on evidence [111]-[114]

Sherryn Jones-Vadala

- ACTU closing submissions [23] and [38](d), [50](c)
- ACCI final submissions [9.36]
- NRA submissions on evidence [115]-[119]

Sacha Hammersley

- ACCI final submissions [9.37]
- NRA submissions on evidence [120]-[122]

Jessica Van der Hilst

- ACTU closing submissions [38](c)
- ACCI final submissions [9.38]-[9.42]
- NRA submissions on evidence [123]-[125]

Michelle Ogulin

- ACCI final submissions [9.43]-[9.50]
- NRA submissions on evidence [85]-[89]

Monica Bowler

- ACCI final submissions [9.51]-[9.56]
- NRA submissions on evidence [90]-[94]

Nicole Mullan

- ACCI final submissions [9.57]-[9.60]
- NRA submissions on evidence [95]-[98]

Andrea Sinclair

- ACTU closing submissions [38](a), [50](a)
- ACCI final submissions [9.61]-[9.69] and oral submissions (Transcript PN3082)
- NRA submissions on evidence [102]-[106]

Perry Anderson

- ACCI final submissions [9.70]-[9.75]
- NRA submissions on evidence [99]-[101]

Witness 1

- ACCI final submissions [9.76]-[9.80]
- NRA submissions on evidence [107]-[108]

Jae Fraser

- ACTU closing submissions [50](d)

3.2.3 Employer Expert Witnesses

Ms Toth

- Ai Group final submission [142]-[155] and oral submissions (Transcript PN2963-PN2969) and PN2931-2932
- ACTU closing submissions [17], [27]-[28], [36], [37], [70]-[77] and oral submissions (Transcript PN2785-PN2786 and PN2793)
- ACCI final submissions [9.25]-[9.28]

3.2.4 Employer Lay Witnesses

General

- ACTU closing submissions [50] and [89]

Benjamin Norman

- Ai Group final submission [156]-[165]
- ACTU closing submissions [92]

Janet O'Brien

- Ai Group final submissions [166]-[172]
- ACTU closing submissions [93]

Peter Ross

- Ai Group final submissions [173]-[185]
- ACTU closing submissions [90]-[91]

Paula Baylis

- ACCI final submissions [9.81]-[9.86]
- ACTU closing submissions [94]

Laura Cleaver

- ACCI final submissions [9.81]-[9.86]
- ACTU closing submissions [95]

3.2.5 The joint employer survey and the Victorian Automobile Chamber of Commerce (VACC) survey

- Ai Group final submissions [134]-[141] and oral submissions (Transcript PN2934-PN2957
- ACTU closing submissions [96]-[108]
- ACCI final submissions [9.87]-[9.101] and oral submissions (Transcript PN2988-PN2997)

Note: No party seeks to rely on the VACC survey (see Transcript PN2935-PN2994 and VACC correspondence dated 24 November 2017).

3.2.6 Evidence – Generally

General

- ACCI final submissions [9.102]-[9.103]
- NRA submissions on evidence [130]-[136]

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[1] HIA submission, 20 April 2015

[2] NFF submission, 20 April 2015

[3] Statement [2014] FWC 8583, 1 December 2014.

[4] Directions, 23 February 2015 and see also Amended Directions, 10 June 2015.

[5] [2015] FWCFB 5585.

[6] Ibid at [18].

[7] Ibid at [22]–[25].

[8] Directions, 30 November 2015.

[9] [2017] FWC 2928.

[10] Statement and Directions [2017] FWCFB 4047, 3 August 2017, Attachment D.

[11] [2014] FWCFB 3202.

[12] Ibid at [36]. Applied in [2015] FWCFB 3023 at [37].

[13] See ACTU submissions, 27 November 2017 at [7]–[28] and ACTU closing submissions, 19 December 2017 at [14].

[14] ACTU submissions, 27 November 2017 at [13].

[15] ACCI final submissions, 19 December 2017 at [8.29].

[16] ACTU submissions, 27 November 2017 at [13].

[17] ACTU submissions, 9 May 2017 at [111]–[139]; ACTU submissions, 27 November 2017 at [14].

[18] In the *Jurisdictional Decision* [2015] FWCFB 5585, the Full Bench considered that it was reasonably arguable that the right to revert was supplementary to the right in s.84: see paragraph 5 of this Background Paper.

[19] ACTU submissions, 9 May 2017 at [17] and [19].

[20] ACTU submissions, 27 November 2017 at [15].

[21] ACTU submissions, 27 November 2017 at [20].

[22] ACTU submissions, 27 November 2017 at [23].

[23] ACCI distinguishes the decision in *4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* [2015] FWCFB 4466 from this case: see ACCI submissions at [8.20]–[8.26]. For the reasons set out, the ACTU contends that the proposed clause does not exclude s.65(5) because employees can still make a request under the NES for a flexible working arrangement, and the scope of the two entitlements is different.

[24] [2015] FWCFB 5585 at [26].

[25] Ibid at [25].

[26] Cited in the Expert Report of Dr Jill Murray, 4 May 2017 at [23].

[27] Cited in the Expert Report of Dr Jill Murray, 4 May 2017 at [100].

[28] ACTU submissions, 27 November 2017 at [24]-[25] and [27]-[28].

[29] See Transcript PN2706.

[30] Transcript PN2707–PN2710.

[31] ACCI final submissions, 19 December 2017 at p3.

[32] ACCI final submissions, 19 December 2017 at [8.4].

[33] ACCI final submissions,19 December 2017 at [8.15]–[8.16].

[34] See Transcript PN3023-PN3047.

[35] Transcript PN3025-PN3026.

[36] ACCI final submissions, 19 December 2017 at [8.29]–[8.30].

[37] Transcript PN3067 and PN3077.

[38] ACCI final submissions, 19 December 2017 at [6.17].

[39] Department of Education, Employment and Workplace Relations, *National Employment Standards Exposure Draft – Discussion Paper* at [58]-[61].

[40] Transcript PN3045-PN3046.

[41] Transcript PN3030.

[42] Transcript PN3032-PN3036.

[43] ACCI final submissions, 19 December 2017 at [8.34] – [8.35].

[44] ACCI final submissions, 19 December 2017 at [8.32].

[45] ACCI final submissions, 19 December 2017 at [8.37]–[8.42].

[46] ACCI final submissions, 19 December 2017 at [8.37]-[8.38].

[47] ACCI final submissions, 19 December 2017 at [8.39].

[48] Also see Transcript PN2877-PN2911.

[49] Ai Group final submission, 19 December 2017 at [45]-[46].

[50] [2015] FWCFB 3023at [37].

[51] Ai Group final submission, 19 December 2017 at [23]-[28].

[52] Ai Group final submission, 19 December 2017 at [31].

[53] Transcript PN2712–PN2713.

[54] Ai Group final submission, 19 December 2017 at [33]-[34].

[55] Ai Group final submission, 19 December 2017 at [40]-[43].

[56] Transcript PN2720.

[57] ACTU closing submissions, 19 December 2017 at [3] and [44]-[52].

[58] Transcript PN2718.

[59] Evidence of Dr Murray, ACTU closing submissions, 19 December 2017 at [57]-[63].

[60] Transcript PN2724.

[61] ACTU closing submissions, 19 December 2017 at [11].

[62] Transcript PN2669-PN2677.

[63] Transcript PN2663.

[64] Transcript PN2663.

[65] ACTU closing submissions, 19 December 2017 at [15].

[66] ACTU closing submissions, 19 December 2017 at [19].

[67] ACTU closing submissions, 19 December 2017 at [42]-[43].

[68] ACTU closing submissions, 19 December 2017 at [32].

[69] ACTU closing submissions, 19 December 2017 at [35].

[70] ACTU closing submissions, 19 December 2017 at [37]-[38].

[71] ACTU closing submissions, 19 December 2017 at [66].

[72] ACTU closing submissions, 19 December 2017 at [78].

[73] ACTU closing submissions, 19 December 2017 at [86]-[87].

[74] ACTU closing submissions, 19 December 2017 at [89]-[95].

[75] ACCI final submissions, 19 December 2017 at [1.10].

[76] ACCI final submissions, 19 December 2017 at [1.5].

[77] ACCI final submissions, 19 December 2017 at [1.11].

[78] ACCI final submissions, 19 December 2017 at [12.12].

[79] ACCI final submissions, 19 December 2017 at [9.1(a)]-[9.1(b)].

[80] ACCI final submissions, 19 December 2017 at [9.1(f)].

[81] ACCI final submissions, 19 December 2017 at [9.1(g)].

[82] ACCI final submissions, 19 December 2017 at [12.6].

[83] ACCI final submissions, 19 December 2017 at [12.7].

[84] ACCI final submissions, 19 December 2017 at [12.11].

[85] Transcript PN2846.

[86] Ai Group final submission, 19 December 2017 at [193].

[87] Ai Group final submission, 19 December 2017 at [188].

[88] Ai Group final submission, 19 December 2017 at [191].

[89] Ai Group final submission, 19 December 2017 at [191]-[193].

[90] Ai Group final submission, 19 December 2017 at [201].

[91] Ai Group final submission, 19 December 2017 at [202].

[92] Ai Group final submission, 19 December 2017 at [205].

[93] Ai Group final submission, 19 December 2017 at [209].

[94] Ai Group final submission, 19 December 2017 at [213].

[95] Ai Group final submission, 19 December 2017 at [219].

[96] Ai Group final submission, 19 December 2017 at [225].

[97] NRA submissions on evidence, 18 December 2017 at [3].

[98] NRA submissions, 30 October 2017 at [10]-[12].

[99] NRA submissions, 30 October 2017 at [101]

[100] NRA submissions, 30 October 2017 at [25]-[101].

[101] NRA submissions, 30 October 2017 at [102].

[102] NRA submissions on evidence, 18 December 2017 at [132].

[103] PHIEA submission, 27 October 2017 at [40].

[104] CMIEG submission, 30 October 2017 at [4].

[105] CMIEG submission, 30 October 2017 at [5].

[106] NFF submission, 30 October 2017 at [14].

ATTACHMENT A

ACTU REVISED FAMILY FRIENDLY WORKING HOURS CLAUSE

X.1 Family Friendly Working Hours for Parents and Carers

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.

X.2 Right to Revert to Former Working Hours

X.2.1 An employee with parenting responsibilities on Family Friendly Working Hours has a right to revert to their former working hours up until the child is school aged; or at a later time by agreement.

X.2.2 An employee with caring responsibilities on Family Friendly Working Hours has a right to revert to their former working hours for a period not exceeding two years from the date of the commencement of the Family Friendly Working Hours; or at a later time by agreement.

X.3 Family Friendly Working Hours arrangement

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, including at least the following matters:

(a) the period of time that the employee requires Family Friendly Working Hours;

(b) the specific days and hours of work that the employee wishes to work during the Family Friendly Working Hours period;

(c) the date on which the employee wishes to revert to their former working hours under clause X.2.

X.3.2 An employer will implement the Family Friendly Working Hours arrangement provided by the employee under X.3.1, or a variation of the arrangement agreeable to the employee.

X.4 Definitions

X.4.1 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.

X.4.2 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.

X.4.3 'Employee' means a full-time, part-time or casual employee.

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 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.

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.

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.

X.4.7 'Former working hours' in clauses X.2.1, X.2.2 and X.3.1(c) means the number of hours that the employee worked immediately before the commencement of the Family Friendly Working Hours.

X.5 Replacement Employees

X.5.1 An employee engaged to replace an employee on Family Friendly Working Hours under this clause must be informed of the temporary nature of their engagement.

X.6 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, provide 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.

X.6.2 An employee is not required to exhaust any existing leave entitlements before being entitled to Family Friendly Working Hours under this clause

ATTACHMENT B – Submissions filed

ACTU claim - Submissions in support		
1.	ACTU – Submission – Objection to Evidence	8 December 2017
2.	ACTU - Submissions	27 November 2017
3.	ACTU – Expert Report – Dr James Stanford (Submission)	6 September 2017
4.	ACTU – Submission – Proposed Variation to Draft Determination	18 May 2017
5.	ACTU – Submission and Witness Statements	9 May 2017
6.	ACTU – Draft determination	2 March 2015
7.	ACTU – Submission – Draft Family and Domestic Violence and Family Friendly Work Arrangements clauses	13 February 2015
8.	ACTU – Outline of Claim – Family Friendly Work Arrangements	28 October 2014
9.	UFUA – Outline of Claim – Family Friendly Work Arrangements	28 October 2014
Submissions in reply		
10.	ACCI – Submissions in Response (Submissions in Reply – Amended – Witness Statements)	30 October 2017
11.	Ai Group - Submission	11 December 2017
12.	Ai Group – List of Authorities	3 November 2017
13.	Ai Group – Reply Submission	31 October 2017
14.	CMIEG – Submission (Submissions in Reply)	30 October 2017
15.	VACC/MTA – Submission in Reply	24 November 2017
16.	NFF – Submission in Reply	30 October 2017
17.	NRA – Submissions (Submission in Reply)	30 October 2017

18.	PHIEA – Submission in Reply	27 October 2017
19.	NatRoad – Preliminary Views	1 September 2017
Final submissions		
20.	ACTU –Final Submission	19 December 2017
21.	Ai Group –Final Submission	19 December 2017
22.	ACCI –Final Submission	19 December 2017
23.	NRA - Final Submission	18 December 2017
Submissions in relation to preliminary jurisdictional hearing		
24.	ACTU – Further Submission - Alleged NES Inconsistencies Decision	18 August 2015
25.	ACTU - Submission	15 June 2015
26.	Ai Group – Further Reply Submission	21 August 2015
27.	Ai Group – Further Submission	11 August 2015
28.	Ai Group - Submission	20 April 2015
29.	ACCI – Submission in Reply	21 August 2015
30.	ACCI – Outline of Submission – Legislative Framework	20 April 2015
31.	NFF - Submission	20 April 2015
32.	HIA - Submission	20 April 2015

ATTACHMENT C

The 4 Yearly Review – draft Summary

[1] Section 156 of the Act provides that the Commission must conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014 (the Review).

[2] Subsection 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'.[107]

[3] Section 156 clearly delineates what must be done in a Review, what must not be done and what may be done. Further, where the legislative intent of the section is to qualify a discretion it is done expressly, as in s.156(3). The Commission *may* vary modern award minimum wages 'only if' it is satisfied that the variation is justified by work value reasons. This may be contrasted with the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a review, which is expressed in general, unqualified, terms.

[4] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the scope and purposes of the legislation will ordinarily be implied.[108] However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review. Section 138 ('achieving the modern awards objective') also applies.

[5] A range of other provisions of the Act are relevant to the Review: s.3 (objects of the Act); s.55 (interaction with the NES); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Divisions 3 (terms of modern awards) and 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions and exercise of powers of the Commission); s.578 (matters the Commission must take into account in performing functions and exercising powers), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[6] Any variation of a modern award arising from the Review must comply with the requirements of the Act relating to the content of modern awards. Division 3 of Part 2-3 deals with the terms of modern awards, in particular terms that *may* or *must* be included in modern awards, and terms that *must not* be included in modern awards. Division 3 includes s.138. This Division also prohibits award terms that contravene s.55 (which deals with the interaction between the NES and modern awards). These provisions, in an appropriate case, may operate to constrain the discretion in s.156(2)(b)(i).[109]

[7] Division 6 of Part 2-3 also contains specific provisions relevant to the exercise of modern award powers which apply to the Review. If the Commission were to make a modern

award, or change the coverage of an existing modern award in the Review, then the requirements in s.163 would need to be satisfied. Sections 165 and 166 deal with when variation determinations come into operation. Variation determinations arising from the Review will generally operate prospectively, unless the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors: see ss.165(2)(a) and 166(3)(a)) and the Commission is satisfied that there are exceptional circumstances that justify retrospectivity (ss.165(2)(b) and 166(3)(b)).

[8] The general provisions relating to the performance of the Commission's functions in Division 2 of Part 5-1 of the Act also apply to the Review. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:

> '**577 Performance of functions etc by the FWC**
>
> The FWC must perform its functions and exercise its powers in a manner that:
>
> (a) is fair and just; and
>
> (b) is quick, informal and avoids unnecessary technicalities; and
>
> (c) is open and transparent; and
>
> (d) promotes harmonious and cooperative workplace relations.
>
> Note: The President also is responsible for ensuring that FWC performs its functions and exercises its powers efficiently etc. (see section 581).'

[9] Section 578 states:

> '**578 Matters the FWC must take into account in performing functions etc**
>
> In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:
>
> (a) the objects of this Act, and any objects of the part of this Act; and
>
> (b) equity, good conscience and the merits of the matter; and
>
> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of 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.'

[10] As stated in s.578(a), in performing functions and exercising powers under a part of the Act (including the review function under Part 2-3) the Commission must take into account the objects of the Act and any particular objects of the relevant part. The object of Part 2-3 is expressed in s.134 (the modern awards objective). The object of the Act is set out in s.3, as follows:

> **'3 Object of this Act**
>
> The object of this 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:
>
> (a) 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; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses.'

[11] In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Importantly, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).

[12] Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The requirement in s.156(5) to review each modern award 'in its own right', is intended to ensure that the Review is conducted 'by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations'.[110] However, while the review of each modern award must focus on the particular terms and operation of the particular award, this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms.[111] Further, s.156(5) provides that the requirement that each modern award be reviewed in its own right does not prevent the Commission from reviewing two or more modern awards at the same time.

[13] In *CFMEU v Anglo American Metallurgical Coal Pty Ltd* (*Anglo American*)[112] the Full Court of the Federal Court discussed the nature of the Commission's task in conducting the Review:

> 'The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
>
> Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award [sic] objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'[113]

[14] The Review is to be distinguished from *inter partes* proceedings. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.[114] The Commission is not required to make a decision in the terms applied for (s.599) and, in the Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions as outlined above.

[15] In the *Penalty Rates – Hospitality and Retail Sectors decision*[115] the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

> '1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
>
> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.[116] Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible,[117] probative evidence.

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

4. 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 bear on 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.' [118]

[16] We now turn to the relevance of the 'modern awards objective' to the Review.

[17] The modern awards objective is set out in s.134 of the Act:

'**134 The modern awards objective**

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

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

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[18] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. [119] No particular primacy is attached to any of the s.134 considerations[120] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[19] Section 138 of the Act emphasises the importance of the modern awards objective:

'**138 Achieving the modern awards objective**

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

[20] To comply with s.138, the terms included in modern awards must be 'necessary to achieve the modern awards objective'.

[21] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*[121] Tracey J considered what it meant for the Commission to be satisfied that making a determination varying a modern award (outside a 4 yearly review) was 'necessary to achieve the modern awards objective' for the purposes of s.157(1). His Honour held:

> 'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> …
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
>
> …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention 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. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[122]

[22] The above observation – in particular the distinction between that which is 'necessary' and that which is merely 'desirable' – is apposite to s.138, including the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary, as opposed to merely desirable. What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[123]

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

[24] The terms of s.138 do not require that the Commission be satisfied that a particular *variation proposed* by a party is *necessary* to achieve the modern awards objective. Such an approach would inappropriately focus attention on the particular variation proposed, rather than on the terms of the modern award as proposed to be varied.[124] In the *Preliminary Jurisdictional Issues decision*[125] the Full Bench considered what had to be demonstrated by the proponent of an award variation and concluded that:

> '… To comply with s.138 the formulation of terms which must be included in modern award[s] or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'… 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.'[126]

[25] In order for the Commission to be satisfied that a modern award is *not* achieving the modern awards objective, it is *not* necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations.[127] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*[128]:

> 'It is apparent from the terms of s 134(1) that the factors listed in (a) to (h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor ("relative living standards and the needs of the low paid")? Furthermore, it was common ground that some of the factors were inapplicable to the SDA's claim.
>
> The relevant finding the FWC is called upon to make is that the modern award either achieves or does not achieve the modern awards objective. The NRA's contention that it was necessary for the FWC to have made a finding that the Retail Award failed to satisfy at least one of the s 134(1) factors must be rejected.'[129]

[26] In *Anglo American* the Court also considered the expression 'only to the extent necessary to achieve the modern awards objective' in s.138:

> '… The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4 ...'[130]

[27] The modern awards objective is very broadly expressed[131] and the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court of the Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[132] (*Penalty Rates Review*):

> '… What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[133]

[28] In the context of the Review, variation of a modern award may be warranted if it is established that there has been a material change in circumstances since the making of the award, but the Commission's power to vary the award is not conditional on it being satisfied that there has been such a change in circumstances.[134] For example, a modern award might be found not to comply with the modern awards objective 'where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.'[135]

[29] The modern awards objective is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in s.134(1)(a)-(h).[136] As the Full Court observed in the *Penalty Rates Review*:

> '… It is apparent that "a fair and relevant minimum safety net of terms and conditions" is itself a composite phrase within which "fair and relevant" are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC's duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act.
>
> …
>
> … As discussed "fair and relevant", which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances ...'[137]

[30] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. As the Full Court observed in the *Penalty Rates Review*:

> '… it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a "fair and relevant" safety net taking into account the s.134(1)(a)-(h) matters.'[138]

[31] Finally, the expression 'minimum safety net of terms and conditions' in s.134(1) was considered in the *Penalty Rates – Hospitality and Retail Sectors decision,* in which the Full Bench rejected the proposition that the reference to a 'minimum safety net' in s.134(1) means the 'least … possible' to create a 'minimum floor':

> '… the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions'. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be

> 'fair and relevant'. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is 'relative living standards and the needs of the low paid' (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.'[139]

[32] We conclude our general observations about the modern awards objective by noting that the nature of modern awards under the Act is quite different from the awards made under previous legislative regimes.[140] In times past awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and legislative limits of the tribunal's jurisdiction; the matters put in issue by the parties (i.e. the 'ambit' of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. An award generally only bound the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents. Modern awards are very different to awards of the past.

[33] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

[34] Nor are there named respondents to modern awards. Modern awards apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for the making of a determination making, varying or revoking a modern award. Under previous legislative regimes the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.[141]

ATTACHMENT D – Witness Statements

Professor Siobhan Austen	Expert Statement of Professor Siobhan Austen-5 May 2017, Transcript PN168 and Statement of Siobhan Austen, Transcript PN176
Dr Jill Murray	Expert Statement of Dr Jill Murray-6 May 2017, Transcript PN 679
Dr James Stanford	Expert Report of Dr James Stanford-4 September 2017, Transcript PN805
Dr Ian Watson	Expert Statement of Dr Ian Watson-4 May 2017, Transcript PN467 and Supplementary Statement of Dr Ian Watson-27 November 2017, Transcript PN474
Perry Anderson (withdrawn)	Witness Statement of Perry Anderson-27 April 2017, Transcript PN 1302
Monika Bowler	Witness Statement of Monika Bowler-21 April 2017, Transcript PN1296
Ashlee Czerkesow	Witness Statement of Ashlee Czerkesow-8 May 2017, Transcript PN 1326
Sacha Hammersley	Witness Statement of Sacha Hammersley-1 May 2017, Transcript PN1201
Sherryn Jones-Vadala	Witness Statement of Sherryn Jones-Vadala-6 May 2017, Transcript PN 1079
Nicole Mullan	Witness Statement of Nicole Mullan-3 May 2017, Transcript PN1298
Michelle Ogulin	Witness Statement of Michelle Ogulin-1 May 2017, Transcript PN1294
Katie Routley	Witness Statement of Katie Routley-6 May 2017, Transcript PN 991
Andrea Sinclair	Witness Statement of Andrea Sinclair-8 May 2017, Transcript PN1300
Jessica van der Hilst	Witness Statement of Jessica van der Hilst-6 May 2017, Transcript PN1260
Witness 1	Transcript PN1307
Paula Bayliss	Statement of Paula Bayliss-31 October 2017, Transcript PN2115

Lauren Cleaver	Statement of Lauren Cleaver-31 October 2017, Transcript PN 2115
Jae Fraser	Statement of Jae Fraser-31 October 2017, Transcript PN 2115
Mark Rizzardo	Statement of Mark Rizzardo-31 October 2017, Transcript PN 2115
Jeremy Lappin	Witness Statement of Jeremy Lappin-26 September 2017, Transcript PN1543
Benjamin Norman	Witness Statement of Benjamin Norman-24 October 2017, Transcript PN2108 and Supplementary Witness Statement of Benjamin Norman-8 December 2017, Transcript PN2108
Janet O'Brien	Witness Statement of Janet O'Brien-4 July 2017, Transcript PN1391 and Supplementary Witness Statement of Janet O'Brien-11 December 2017, Transcript PN1397
Peter Ross	Witness Statement of Peter Ross-24 October 2017, Transcript PN2108 and Supplementary statement of Peter Ross – unsigned, Transcript PN2108
Julie Toth	Witness Statement of Julie Toth-26 October 2017, Transcript PN1711
Kevin Hoang	Statement of Kevin Hoang-3 November 2017, Transcript PN 2130
Edwina Beveridge	Statement of Edwina Beveridge-29 September 2017, Transcript PN2081 and Statement of Edwina Beveridge-8 December 2017, Transcript PN2081
Lucinda Corrigan	Statement of Lucinda Corrigan-1 November 2017, Transcript PN 2082 and Statement of Lucinda Corrigan-7 December 2017, Transcript PN2083
Chris Kemp	Statement of Chris Kemp-30 October 2017, Transcript PN 2087 and Statement of Chris Kemp-undated, Transcript PN2087
Deborah Platts	Statement of Deborah Platts-27 October 2017, Transcript PN2089 and Statement of Deborah Platts-11 December 2017, Transcript PN2089
Julia Johnson	Witness Statement of Julia Johnson-5 May 2017

[107] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para. 38.

[108] *O'Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

[109] See *Preliminary Jurisdictional Issues* decision [2014] FWCFB 1788 at [40]–[48].

[110] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at para 85. Although the Court's observations were directed at the expression 'in its own right' in Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) they are apposite to s.156(5).

[111] Ibid at para. 86. While the Full Federal Court was considering the meaning of the Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) the observations are also apposite to s.156(5) of the FW Act, which is in substantially the same terms.

[112] [2017] FCAFC 123.

[113] Ibid at [28]–[29].

[114] *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140].

[115] [2017] FWCFB 1001.

[116] *4 yearly review of modern awards – Award Flexibility* [2016] FWCFB 6178 at [60]–[61].

[117] See *Re Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C.

[118] [2017] FWCFB 1001 at [269].

[119] *Edwards v Giudice* (1999) 94 FCR 561 at para 5; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at para 56.

[120] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para. 33.

[121] (2012) 205 FCR 227.

[122] Ibid at [35]–[37] and [46].

[123] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[124] *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at para 37.

[125] [2014] FWCFB 1788.

[126] Ibid at [36].

[127] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at paras 105–106.

[128] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154.

[129] Ibid at paras 109-110; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[130] [2017] FCAFC 123 at para 23.

[131] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at para. 35.

[132] [2017] FCAFC 161.

[133] Ibid at para. 48.

[134] [2017] FWCFB 1001 at [230]-[268]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para. 23.

[135] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at para. 34.

[136] [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at paras 41–44.

[137] [2017] FCAFC 161 at paras 49 and 65.

[138] Ibid at para 53.

[139] [2017] FWCFB 1001 at [128].

[140] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at para. 18.

[141] See, for example, *The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012* [2012] FWA 2556.