DECISION

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

Family Friendly Working Arrangements
(AM2015/2)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

MELBOURNE, 26 MARCH 2018

4 yearly review – Family friendly working arrangements – claim by ACTU – s.65 Fair Work Act 2009 – right to request – ACTU claim rejected – provisional model term proposed.

ABBREVIATIONS

Act	*Fair Work Act 2009* (Cth)
ABI	Australian Business Industrial and the New South Wales Business Chamber
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFPCS	Australian Fair Pay and Conditions Standard
AHRC	Australian Human Rights Commission
AI Act	*Acts Interpretation Act 1901* (Cth)
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
Austen Report	Expert report of Professor Siobhan Austen
AWALI	Australian Work and Life Index
AWRS	Australian Workplace Relations Study
Claim	The award term sought by the ACTU reproduced at paragraph [10] of this decision
CMIEG	Coal Mining Industry Employer Group
Commission	Fair Work Commission
EM	Explanatory Memorandum to the *Fair Work Bill 2008*
FFWH	Family Friendly Working Hours, as defined in the Claim
General Manager's 2015 Report	General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009 (Cth)
HILDA	Household, Income and Labour Dynamics in Australia
IFA	Individual flexibility arrangement
Murray Report	Expert report of Dr Jill Murray
NatRoad	National Road Transport Association
NES	National Employment Standards
NFF	National Farmers' Federation
NRA	National Retail Association
Panel	Expert Review Panel
PHIEA	Private Hospital Industry Employer Associations
Review	4 yearly review of modern awards
Stanford Report	Expert report of Dr James Stanford
Supplementary EM	Supplementary Explanatory Memorandum to the *Fair Work Bill 2008*

Toth Report	Expert report of Ms Julie Toth
VACC	Victorian Automobile Chamber of Commerce
Watson Report	Expert report of Dr Ian Watson
WR Act	*Workplace Relations Act 1996* (Cth)

List of charts

List of tables

1. Introduction

1.1 Background to the Claim

[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). We deal with the legislative framework pertaining to the Review in Chapter 2.

[2] As part of the Review, the Australian Council of Trade Unions (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 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) raised a number of 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. The National Farmers' Federation (NFF) objected to an aspect of the claim on the ground 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] and observed 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]

[6] The Full Bench held that 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. The Full Bench confirmed that the matter would continue to a final hearing.

[7] In relation to the ACTU's proposed clause, 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*".
>
> 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).
>
> 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]

[8] Following the 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]

[9] 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]

[10] The claim lodged by the ACTU has been revised on a number of occasions. The final version of the award term sought by the ACTU is set out below (the Claim):

'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.'

[11] A list of Statements relating to the proceedings is at **Attachment A**. A list of submissions filed is at **Attachment B**.

[12] The Research Reference List[11] at **Attachment C** was produced by staff of the Commission. The Research Reference List includes research materials and data sources that parties referred to in their submissions and in the expert reports filed by the parties. It also lists additional material identified by staff of the Commission as relevant to the proceedings

and includes reviews of flexible working arrangements and economic outcomes. Interested persons were given an opportunity to comment on the List.

[13] 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.

1.2 The Process

[14] The matter was listed for Mention before Deputy President Gooley on 28 November 2017. Following the Mention, Directions were issued confirming that the matter would be listed on 12, 13 and 14 December in Sydney and 21 and 22 December 2017 in Melbourne. Parties were also directed to file closing written submissions by noon on 19 December 2017.

[15] The evidence was heard over three days from 12 to 14 December 2017. Closing submissions and the further cross-examination of Ms Toth occurred on 21 December 2017. Transcript is available via the following links to the Commission's website:

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

[16] Final written 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
- National Retail Association (NRA).

[17] On 12 January 2018, we issued a Statement[12] together with the following three background papers:

- Background paper 1: identifying the uncontested and contested issues in the proceedings and seeking to summarise the parties' submissions;

- Background paper 2: outlining the statutory provisions in respect of flexible working arrangements in OECD countries; and

- Background paper 3: outlining the United Kingdom (UK) system concerning flexible working arrangements.

[18] Interested parties were given the opportunity to make submissions in relation to Background paper 1, addressing the following matters:

(i) the draft summary of the Commission's approach to the Review (see Attachment C to Background paper 1);

(ii) the accuracy of the summaries of the parties' submissions on jurisdiction and merit;

(iii) the list of witnesses (see Attachment D to Background paper 1) and the references to the parties' submissions on the evidence; and

(iv) any other corrections or additions to Background paper 1.

[19] Submissions were received from the following parties:

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

[20] Submissions in reply were received from ACCI.

Background paper 1

[21] As mentioned above, Background paper 1 outlined the process of the proceedings and summarised the submissions of the parties in relation to both jurisdiction and the merits of the Claim. The paper also included a list of witnesses who gave evidence in the proceedings.

[22] In relation to Background paper 1, Ai Group submitted that it did not have any concerns with its contents[13] and the NRA confirmed that the paper accurately reflected its position.[14]

[23] The ACTU confirmed that the paper accurately summarised its position, but noted that the witness statement of Ms Julia Johnson (which appeared in the list of witnesses) was withdrawn on 13 December 2017.[15] ACCI did not make any comment on the summary of submissions but noted that Mr Jae Fraser, a witness for ACCI, had been incorrectly listed as an ACTU lay witness, Ms Lauren Cleaver's first name was incorrectly recorded and Mr Mark Rizzardo's statement had been omitted from the summary.[16] All of the suggested corrections have been made. The parties' submissions in relation to jurisdiction and the merits are set out in Chapters 3 and 4 respectively of this decision. The list of witness statements is at **Attachment D**.

Background paper 2

[24] Background paper 2 provided information on statutory rights and rights to request reduced hours arrangements and flexibility in scheduling work hours in OECD countries. It focused on provisions for parents and other carers, but also discussed general flexibility entitlements (i.e. it was not confined to persons with caring responsibilities).

[25] The NRA submitted that the Commission should not place much weight on the statutory or regulatory regimes in other countries and that the Commission's task is to determine whether the ACTU's proposed clause, if inserted into modern awards, would allow those awards to better meet the modern awards objective.[17]

[26] ACCI submitted that there is a wide divergence of economic, industrial, social and legislative conditions pertaining to the countries discussed in the paper and Australia, which relate directly to the issue of flexibility in employment for parents and carers.[18] ACCI also submitted that the most obvious variable is the statutory scheme under which industrial laws can be developed and noted that many of the flexible work systems examined in Background paper 2 would not be permissible under the Act.[19]

[27] Ai Group submitted that the consideration of access to flexible working arrangements in other countries is of limited relevance to the task before the Commission, which is to determine whether the provision proposed by the ACTU is necessary to ensure that each of the modern awards it seeks to have varied provides a fair and relevant minimum safety net.[20] Ai Group submitted that it would be misplaced to rely on international material because there is no evidence before the Commission about the broader context in which the statutory frameworks summarised in the paper operate, including: the framework within which employment relationships are regulated; the definitions of 'full-time' and 'part-time' employment; other forms of flexibility available to employees; protections against unfair dismissal and discrimination; restrictions on an employer's ability to change an employee's hours of work; costs associated with engaging new employees, and the practical operation of the schemes.[21]

[28] The ACTU submitted that two conclusions could be drawn from Background paper 2. First, that s.65 of the Act is arguably one of the weaker provisions when compared to the provisions in place in a number of the other jurisdictions considered. Second, that the position taken by the ACTU in this application is consistent with frameworks already operating in other jurisdictions and therefore is not 'unique', as had been suggested by ACCI in its closing submission of 19 December 2017.[22] The ACTU acknowledged that there is some variation in the frameworks considered in the paper, but noted that there are some core features common to a number of the frameworks considered which closely reflect the ACTU's position in the present matter. These include: a *right* to reduced hours rather than a *right to request* reduced hours; access to dispute settlement; a right to revert to former hours, and a qualifying period of less than 12 months' service.[23] The ACTU also noted that where refusal is permitted, many of the countries considered in the paper adopt a stricter formulation than the reasonable business grounds test in s.65 of the Act, including: 'serious operational reasons'; 'harmful

consequences for the company's operation', and 'urgent operational reasons', amongst others.[24]

[29] In response to the ACTU's submissions, ACCI submitted that a finding relating to a comparison of the provisions of the Act and other jurisdictions appears to have a very limited bearing to the question of whether the ACTU has made out its case under the relevant principles of the Review.[25] ACCI rejected the ACTU's submission that the schemes examined in Background paper 2 show that the Claim is not unique. ACCI submitted that the ability of an employee to unilaterally determine their hours as under the Claim does appear to be unique in the industrial world.[26] ACCI submitted further that the comparisons made by the ACTU do not demonstrate any insufficiency in the Australian safety net.[27]

Background paper 3

[30] Background paper 3 considered the framework for flexible working arrangements currently in place in the UK.

[31] The NRA repeated the submissions it made in relation to Background paper 2.[28]

[32] Ai Group submitted that the observations made in respect of Background paper 2 are also relevant in relation to Background paper 3[29], and also submitted that the UK system influenced the establishment of the right to request in s.65 of the Act. The success of the UK system was expressly noted in the 2008 National Employment Standards (NES) Exposure Draft Discussion Paper as a reason for adopting the Australian system. Ai Group submitted that the Claim would represent a marked departure from the approach intended by the legislature.[30]

[33] ACCI repeated the submissions made in relation to Background paper 2.[31] ACCI noted that, in contrast to the position in the UK, the provisions of the Act mean that the Commission is not permitted to introduce a right to review a decision to refuse a s.65 request.[32]

[34] The ACTU noted that in the UK, all employees have a right to request flexibility if they have completed at least 26 weeks of service and that the request can only be rejected on one or more specified grounds. An employee may then appeal if they believe that an employer's decision was based on incorrect facts or that the notification did not meet requirements. The ACTU submitted that it is clear from the decisions considered in the paper that the UK tribunal lacks the power to consider whether an employer has acted fairly and reasonably in refusing an employee's request for flexible working arrangements. [33]

[35] We released Background papers 2 and 3 to illustrate the range of schemes in place to address requests for flexible working arrangements. However, we accept the criticism advanced by the Employer parties that there is no evidence before us about the social and legal context in which the various schemes operate in other countries. Accordingly, the material in Background paper 2 and 3 is of limited relevance to our consideration of the Claim, but it is of greater relevance to the general issues associated with facilitating family friendly working arrangements.

2. Legislative Framework

2.1 The Review

[36] Section 156 of the Act requires the Commission to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014.

[37] 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'.[34]

[38] 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 this 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.

[39] 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.[35] 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.

[40] A range of other provisions of the Act are relevant to the Review: s.3 (object 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 etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[41] 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).[36]

[42] 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)).

[43] 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).'

[44] 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.'

[45] 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.’

[46] 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)).

[47] 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’.[37] 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.[38] 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.

[48] While s.156(5) does not confine the review of a modern award to a *single* holistic assessment of all of its terms, we accept ACCI’s submission[39] that such a single holistic

assessment of each modern award will be required prior to the conclusion of the Review. Such an assessment will be necessary so that each modern award is reviewed, in its own right, to ensure that it achieves the modern awards objective and only includes terms to the extent necessary to achieve that objective.

[49] In *CFMEU v Anglo American Metallurgical Coal Pty Ltd* (*Anglo American*)[40] 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.'[41]

[50] 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.[42] 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.

[51] In *4 Yearly Review of Modern Awards – Penalty Rates – Hospitality and Retail Sectors*[43] 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. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, 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.' [44]

[References omitted]

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

[53] 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).'

[54] 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 ss.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.[45] No particular primacy is attached to any of the s.134 considerations[46] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[55] 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.'

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

[57] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*[47] 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.'[48]

[58] 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.[49]

[59] If a modern award is not achieving the modern awards objective then it is to be varied so 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.

[60] 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.[50] In *4 Yearly Review of Modern Awards -Preliminary Jurisdictional Issues*[51] 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.'[52]

[61] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations.[53] 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*:[54]

> '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.'[55]

[62] 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'.[56]

[63] The modern awards objective is very broadly expressed[57] 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*[58] (*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).'[59]

[64] 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.[60] 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.'[61]

[65] 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 ss.134(1)(a)-(h).[62] 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'.[63]

[66] 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.'[64]

[67] 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.'[65]

[68] 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.[66] 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 which 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.

[69] 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).

[70] 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 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.[67]

2.2 Existing provisions relevant to family friendly working arrangements

2.2.1 Section 65

[71] Section 65 of the Act provides employees with a right to request flexible working arrangements:

> **'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.'

[72] Employees may request flexible working arrangements relating to the circumstances set out in s.65(1A).

[73] Employees, other than casual employees, are eligible to make a request once they have completed at least 12 months of continuous service with the employer immediately before making the request.[68] Casual employees who are long term casual employees of the employer immediately before making the request,[69] and who have a reasonable expectation of continuing employment by the employer on a regular and systematic basis,[70] are also eligible to make a request.

[74] Requests must be in writing[71] and set out details of the change sought and of the reasons for the change.[72]

[75] The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.[73] If the employer refuses the request, the written response must include details of the reasons for the refusal.[74]

[76] The employer may refuse the request only on reasonable business grounds.[75]

[77] The Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s.65(5), unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.[76]

[78] The right to request flexible working arrangements was first introduced in 2009 as part of the NES. The Explanatory Memorandum to the *Fair Work Bill 2008* (EM) noted that the intention of the provisions was 'to promote discussion between employers and employees about the issue of flexible working arrangements.'[77]

[79] On commencement, the Act only entitled an employee to request flexible working arrangements to assist the employee with caring responsibilities where the employee was a parent, or had responsibility for the care, of a child under school age or a child under the age of 18 who has a disability.[78]

[80] The Act was amended by the *Fair Work Amendment Act 2013* (Cth) to provide a right to request flexible working arrangements on the grounds that the employee: is a carer (within the meaning of the *Carer Recognition Act 2010* (Cth)); has a disability; is 55 or older, or is

experiencing domestic violence or is caring for someone experiencing domestic violence. The amendments commenced on 1 July 2013.[79]

[81] The amendment to s.65 to include a wider range of circumstances where flexible working arrangements could be requested, was recommended in the post-implementation review of the Act by an Expert Review Panel (Panel).[80] The Panel noted:

> 'The Panel has formed the view that, while the introduction of the right to request flexible working arrangements represented an important development in providing additional rights to certain types of working carers, the scope of the caring arrangements under the current provisions should be expanded to reflect a wider range of caring responsibilities. Given that an object of the FW Act is to help employees balance their work and family responsibilities by providing flexible working arrangements, and the importance of maintaining a skilled workforce who may have caring responsibilities, the Panel recommends extending the right to request.'[81]

2.2.2 Other statutory provisions relevant to family friendly working arrangements

[82] This section briefly discusses some of the other provisions of the Act which may assist employees in balancing their work and parental or carer responsibilities. It is not intended to be comprehensive and does not address protections in other legislation such as State and Territory anti-discrimination laws.

(a) Individual Flexibility Arrangements

[83] Modern awards and enterprise agreements must include flexibility terms enabling an employee and their employer to agree on an individual flexibility arrangement (IFA) in order to meet the genuine needs of the employee and employer.[82] Where an IFA is made, the modern award or enterprise agreement has effect in relation to the employee and their employer as if it were varied by the IFA,[83] and the IFA is taken, for the purposes of the Act, to be a term of the award or enterprise agreement.[84]

[84] The model flexibility term in a modern award specifies the terms of the award that an employee and their employer 'may agree to vary the application of' in an IFA. These include terms relating to 'arrangements for when work is performed'.

[85] An IFA made under an enterprise agreement can only vary those terms of the agreement specified in the agreement's flexibility term. If an enterprise agreement does not include a flexibility term or the flexibility term does not meet the requirements of the Act, the model flexibility term prescribed in Schedule 2.2 to the *Fair Work Regulations 2009* (Cth) is taken to be a term of the enterprise agreement.[85]

[86] Section 203(2)(b) of the Act provides, amongst other things, that the flexibility term in an enterprise agreement must require the employer to ensure that any IFA agreed to is about matters that that would be 'permitted matters' if the IFA were an enterprise agreement. This would include, for example, an IFA dealing with the span of hours to be worked by an employee.

[87] Section 144(4) of the Act provides, amongst other things, that the flexibility term in modern awards must require that the employee and their employer genuinely agree to any IFA, and require that the employer must ensure that any IFA results in the employee being better off overall than the employee would have been if no IFA were agreed to. Section 203 of the Act makes equivalent provision in respect of the flexibility term in an enterprise agreement.

(b) Maximum weekly hours

[88] Under the NES, an employer must not request or require an employee to work more than the following hours in a week, unless the additional hours are reasonable:

- 38 hours for a full-time employee; or
- for other employees, the lesser of 38 hours and the employee's ordinary hours of work in a week.[86]

[89] As a part of the NES, s.62 is a civil remedy provision.[87]

[90] An employee may refuse to work unreasonable additional hours.[88] In determining whether additional hours are reasonable or unreasonable, matters including the employee's family responsibilities must be taken into account.[89]

(c) General Protections

[91] An employee also has protections under the general protections provisions in Part 3-1 of the Act against adverse action taken by their employer.

[92] Section 340(1) of the Act prohibits an employer taking adverse action against an employee for reasons including that the employee has a workplace right, has exercised a workplace right, proposes to exercise a workplace right, or to prevent the employee's exercise of a workplace right.[90]

[93] Adverse action is taken by an employer against an employee if the employer dismisses the employee, injures the employee in their employment, alters the position of the employee to their prejudice, or discriminates between the employee and other employees of the employer.[91]

[94] Pursuant to s.341(1) of the Act, an employee has a workplace right if the employee is: entitled to the benefit of a workplace law or workplace instrument; is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or is able to make a complaint or inquiry in relation to their employment, or to a body with capacity to seek compliance with the workplace law or workplace instrument.[92] This would include an eligible employee making a request for flexible working arrangements under s.65 of the Act,[93] making or terminating an IFA,[94] or refusing to work unreasonable additional hours.

[95] Section 351(1) of the Act also provides that employers must not take adverse action against a person who is an employee or prospective employee because of, amongst other matters, the person's sex, family or carer's responsibilities or pregnancy.[95] Section 351(1)

does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken,[96] or that is taken because of the inherent requirements of the particular position concerned.[97]

[96] The general protections are also civil penalty provisions.[98] Subject to the requirements of the Act, an employee may apply to the Federal Circuit Court or the Federal Court for orders relating to a contravention of the general protections provisions. If a contravention is made out, the Court may make orders including orders imposing a pecuniary penalty, and orders for compensation or reinstatement.[99]

3. Jurisdictional Objections

3.1 Introduction

[97] ACCI and Ai Group submit that the Claim cannot be included in a modern award as it excludes part of the NES, contrary to s.55(1). ACCI and Ai Group also oppose the ACTU's contention that the Claim is a term that supplements the NES within the meaning of s.55(4)(b).

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

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

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

[100] No party contends that the Claim is a term that contravenes Subdivision D of Division 3 of Part 2-3 (see s.136(2)(a)). The various jurisdictional objections centre on the interaction between the NES and the Claim (see s.136(2)(b)). Section 55 deals with that interaction. It provides:

‘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).'

[101] As discussed in *Canavan Building Pty Ltd*,[100] 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 (clause 56)."'[101]

[Endnote omitted]

[102] For the purposes of these proceedings the relevant provisions of the NES are those in s.65, which is set out earlier (at [71]).

3.2 The Submissions

3.2.1 ACTU submissions

[103] The ACTU contends[102] 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 ss.139(1)(b) and (c)).

[104] 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)).

[105] 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)).

[106] 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'.[103] The ACTU also observes that ACCI's suggestion that the concept of 'supplementing' the NES 'connotes the notion of building upon, increasing or extending'[104] is not inconsistent with the Macquarie Dictionary definition.[105]

[107] 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'.[106]

[108] 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 Claim 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 X.4.1 or X.4.2.
>
> (b) Section 65 does not provide or make allowances for the duration of a flexible working arrangement or the employee's right to return to her or his previous position when or if circumstances change, whereas proposed clause cl X.2 grants employees the right to revert to their former working hours up until the child is school aged (for parents), or for a period not exceeding two years from the commencement of FFWH (for carers). Employees are required to give notice of their intention to revert at the time that they notify their employer of their intention to access FFWH, per cl X.3.1(c).
>
> (c) In the alternative to (b), cl X.2 is supplementary to s 84 of the … [Act], 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.
>
> (d) Proposed cl X.4.3 and X.6.1(a) provide that the proposed clause applies to casual employees, and if required by the employer, to employees who have completed at least six months continuous service with their employer. These provisions are more favourable to employees 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 citation of 'reasonable business grounds' as a basis to refuse the request. For the reasons already set out in the ACTU's submissions dated 9 May 2017, 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]. By contrast, the proposed clause does not permit employers to refuse a request on reasonable business grounds or at all.'[107]
>
> [Footnotes omitted]

[109] 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). 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.[108] 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.[109]

[110] 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.

> 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 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.
>
> …
>
> 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, and said:
>
> > 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.
>
> 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. 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. Accordingly, the 'practical operation' of s 65 is unlikely to be disturbed by the proposed clause.'[110]
> [Footnotes omitted]

[111] In the course of closing oral submissions,[111] 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'.[112]

3.2.2 ACCI submissions

[112] ACCI does not contest the ACTU's contention that the Claim is a term 'about' the matters in ss.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.'[113]

[113] 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).'[114]

[114] In the course of closing oral submissions,[115] 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.
>
> 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.'[116]

[115] 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.
>
> Had the Parliament intended to adopt one of these latter phrases it could have done so.'[117]

[116] 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.'[118]

[117] In support of its argument, ACCI relies on the NES Exposure Draft Discussion Paper,[119] 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.'[120]

[118] 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 … 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.'[121]

[119] 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);[122] and
- when an employer is considering the request, putting some additional conditions on the employer, for instance that they must meet face to face with the employee and must genuinely consider what the employee is putting to them.[123]

[120] As to s.55(7), ACCI submits that the section is confirmatory not curative in its terms and may be contrasted with the clearly curative language in s.624. Section 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).[124]

[121] 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.[125]

[122] ACCI also advances an alternate submission[126] 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.[127] 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.[128]

3.2.3 Ai Group submissions

[123] 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.[129]

[124] 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).

[125] 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'.[130]

[126] 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*[131], 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).'[132]

[127] Ai Group also submits that the operation of the proposed clause would 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.'[133]

[128] 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 … 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.'[134]

[129] 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.'[135]

[130] 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.'[136]

[131] 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'.[137]

3.3 Consideration

[132] It is not seriously in dispute that the Claim is an award term 'about' the matters in ss.139(1)(b) and (c). The central jurisdictional issue is whether the Claim seeks to include a term in a modern award which is prohibited by s.136(2)(b), as contravening s.55. This is a question of some complexity.

[133] Given our decision on the merits of the Claim, we have not found it necessary to express a concluded view on the jurisdictional objections. However, we make some observations below in response to the submissions.

[134] The submissions on jurisdiction raise various issues as to the operation of s.55 of the Act. Section 55 is set out in full at [100] above.

[135] The task of statutory construction must begin and end with the statutory text. The statutory text must be considered in its context, which includes the legislative history and extrinsic materials, but legislative history and extrinsic materials cannot displace the meaning of the statutory text.[138] The text of s.55 is to be construed so that it is consistent with the language and purpose of the Act as a whole.[139] The ability to construe s.55 in a manner that departs from the natural and ordinary meaning of its terms in the context in which they appear, is limited to construing the provision according to the meaning which, despite its terms, it was plain the Parliament intended it to have.[140]

[136] The EM states the purpose of s.55:

> '206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.'[141]

[137] The nature of the NES is central to the context in which s.55 is to be read. Section 61 introduces the NES. Subsection 61(1) provides:

> '**61 The National Employment Standards are minimum standards applying to employment of employees**
>
> (1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).
>
> Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.'

[138] Importantly, the 'minimum standards' in the NES comprise minimum employment entitlements *of employees*.[142] Any obligations of an employee or 'rights' of an employer under the terms of the NES constitute qualifications to the employee receiving a benefit, not substantive employer benefits or rights. Accordingly, the NES only binds employers:

> '**44 Contravening the National Employment Standards**
>
> (1) An employer must not contravene a provision of the National Employment Standards.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).'

[139] In contrast, modern awards and enterprise agreements bind employers, employees and other persons to whom they apply (ss.45 and 50).

[140] Section 55(4) (see [151] below) provides that a modern award or enterprise agreement may include terms 'ancillary or incidental to the operation of an entitlement of an employee under' the NES and terms that 'supplement' the NES, 'but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to' the NES.

[141] Sections 55(5)-(7) (and s.61(1)) were introduced by Senate amendments to the *Fair Work Bill 2008*. The Supplementary Explanatory Memorandum to the *Fair Work Bill 2008* (Supplementary EM) states that ss.55(5)-(7) 'explain the interaction of enterprise agreements and modern awards with the NES.'[143]

[142] Section 55(5) provides that an enterprise agreement may include terms that 'have the same (or substantially the same) effect as provisions of' the NES. The Supplementary EM states:

> '24. The amendments make clear that an enterprise agreement can include terms that are the same (or substantially the same) as an NES entitlement. These could be terms which simply replicate the NES or terms that make ancillary or supplementary provision in relation to the NES and subsume the NES entitlement'.[144]

[143] Section 55(6) explains how the NES interact with award and agreement terms that 'subsume' an NES entitlement:

> *'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.'
> [Emphasis added]

[144] Two aspects of s.55(6) may be noted. First, s.55(6) makes clear that the NES and the relevant award or agreement terms operate in parallel, but not so as to provide employees with a double benefit. The Supplementary EM explains this as follows:

> '25. … [Agreement terms as provided for in ss.55(4) and (5)] operate in parallel with the NES entitlement, and do not confer a double entitlement. The same applies to terms of modern awards that are ancillary or supplementary to a NES entitlement. This means that a NES entitlement can be sourced both in the NES and in an enterprise agreement or modern award and can be enforced as an entitlement under either. Also, the mechanisms contained in the agreement are available to resolve any dispute about the entitlement.
>
> 26. This means, for example, that an enterprise agreement could include provisions about requests for flexible work arrangements (as provided for by Division 4 of the NES), and disputes about whether or not an employer had reasonable business grounds for refusing an application could be dealt with by FWA (or an alternative dispute resolution provider) under the dispute procedure in the agreement, even though dispute resolution about this issue is generally not available (see clauses 739 and 740 of the Bill).'[145]

[145] Second, s.55(6) does not provide that the terms of the NES relating to the NES entitlement apply to the corresponding award or agreement entitlement; rather, it provides that the terms of the NES relating to the NES entitlement apply to the corresponding award or agreement entitlement *as a minimum standard*. As observed earlier, the NES 'minimum standards' comprise minimum entitlements of employees, not minimum entitlements of employers and employees.

[146] Section 55(1) provides:

> *'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.' [Emphasis added]

[147] The EM states in relation to s.55(1):

> '208. The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.
>
> 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 (clause 56).'[146]
> [Emphasis added]

[148] The term 'exclude' is used elsewhere in the Act in specifying how the Act, and modern awards and enterprise agreements, interact with State and Territory laws (see ss.26-28).

[149] Section 56 provides for severance:

> '**56 Terms of a modern award or enterprise agreement contravening section 55 have no effect**
>
> A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.'[147]

[150] It follows that if an award or agreement term can operate so as to exclude the NES or a provision of the NES, this must be permitted by other provisions of s.55 or of the Act more broadly.

[151] As related above, s.55(4) provides that a modern award or enterprise agreement may also include certain 'ancillary or incidental' and 'supplementary' terms:

> '*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.'

[152] Section 55(7) provides that ancillary, incidental and supplementary terms permitted by s.55(4) (and terms permitted by s.55(5)), do not contravene the prohibition in s.55(1) of terms that exclude the NES or any provision of the NES:

> '*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).'

[153] As noted earlier, in a preliminary jurisdictional decision in this matter[148], the Full Bench of the Commission declined to strike out elements of the then ACTU claim, finding that:

> '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).'[149]

[154] The EM describes s.55(4) as follows:

> '214. This provision allows modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made). It also allows awards to provide more beneficial entitlements than the minimum standards provided by the NES. For example, an award or agreement could provide for more beneficial payment arrangements for periods of leave, or provide redundancy entitlements to employees of small business employers. Similarly, an agreement could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right.'[150]

[155] It has been suggested that a modern award or enterprise agreement term might be considered to 'practically exclude' a provision of the NES, if it would result in employees utilising the award or agreement term rather than the provision of the NES. We note that any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have that result. Examples would include where a term provides a higher rate of pay for periods of annual leave or personal/carer's leave than the base rate provided for under the NES, and where a term provides for additional paid personal/carer's leave which may be taken instead of unpaid carer's leave provided for under the NES.

[156] Turning to the meaning of 'supplement' in s.55(4), on its ordinary meaning a supplementary term provides a supplement or something additional to the substantive provision – in this case the 'right to request' in s.65.

[157] Although notes do not form part of the Act,[151] they may be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision.[152]

[158] Note 2 under s.55(4) (above) is expressed to provide examples of supplementary terms permitted by s.55(4). The examples respectively increase the quantum of leave an employee is entitled to in comparison to the NES, and increase the rate at which an employee is paid whilst on leave in comparison to the NES. These examples would seem to fall within the ordinary meaning of terms that 'supplement' the NES.

[159] In relation to some classes of employees, the practical effect of the Claim is to exclude the capacity of an employer to refuse an employee's request for flexible working arrangements 'on reasonable business grounds' under s.65(5). That capacity would seem a central element of the scheme established by s.65. Seen in this way, there is considerable

force in the view that the Claim does not 'supplement' s.65, but rather replaces it with something else entirely.

[160] We note, however, that the EM at paragraph 214 (reproduced at [154] above) states as an example of an ancillary, incidental or supplementary agreement term, a term in an enterprise agreement that would 'provide a right to flexible working arrangements'.

[161] It is not necessary for us to express a concluded view on the jurisdictional objections to the Claim, as we have decided to reject the Claim on its merits.

4. Merit Submissions

[162] The ACTU seeks an award variation to include an entitlement (i.e. an enforceable right) to part-time work or 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.

[163] The Employer parties oppose the Claim and say that s.65 of the Act provides a suitable framework. The Employer parties 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 Employer parties also submit that the award variations proposed are not 'necessary to achieve the modern awards objective' within the meaning of s.138.

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

4.1 ACTU submissions

[165] 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.[153] 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.[154]

- 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.[155] 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.[156]

- In making the Claim, the ACTU is seeking to build on and advance the progress made in the *Parental Leave Test Case 2005*.[157] At the time that the *Parental Leave Test Case* was determined, there was a dispute resolution mechanism that provided access to arbitration.[158]

- There is a gender gap in employment which is most pronounced in the 30 to 39 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.[159]

- 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.[160]

- Parents and carers experience lower labour force participation and economic power.[161] Parents, mostly women, seek part-time work to manage parenting and caring responsibilities. Almost half (47.4 per cent) of employed Australian women work part-time, compared to 18.7 per cent of men.[162] Parenthood has a negative impact on women's economic status.[163]

- Occupational downgrading is relatively high for women who move from full-time to part-time work and is highest for women who change employers.[164]

- 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.[165] 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.[166]

- 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.[167]

- While employers may incur costs associated with flexible working arrangements, these costs would not be onerous or a significant burden.[168]

- Increased flexible working arrangements would have a positive impact on the national economy, including increased GDP as result of increased labour force participation.[169]

- Family friendly working arrangements reflect the preferences of employers and employees.[170]

4.2 ACCI submissions

[166] ACCI 'unreservedly opposes the Claim'[171] and submits that the Commission is being asked to 'cross the "Rubicon"'[172] 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.'[173]

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

[168] 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 working arrangements;[174]
- 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;[175]
- particular factors may affect an employer's ability to grant requests for flexible working arrangements, such as 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);[176]
- employees are not always easily substitutable (for reasons such as the employee's specialist skill set, or regional labour shortages);[177]
- 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);[178]
- the Claim extends beyond what is necessary to achieve a fair and reasonable minimum safety net;[179] and
- the current flexibility regime under the Act appears to be effective in accommodating employees.[180]

4.3 Ai Group submissions

[169] 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.[181]

- The proposed clause on its terms would afford employees an 'unreasonable and broad ranging right to dictate their hours',[182] including by nominating hours of work that fall after the business has closed or only hours that attract penalties.[183]

- 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, its submissions are 'wholly inadequate'[184] and fail to recognise that an employee may not work fixed hours prior to nominating FFWH.[185]

- 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.[186] 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.[187]

- 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 two years.[188]

- 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.[189]

- 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.[190]

- 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.[191]

- The extent to which an employer should bear the costs of such matters must also be subject to some reasonable limitation.[192]

4.4 Other Employer party submissions

[170] The 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,[193] and also relied on its previous submissions filed on 30 October 2017.

[171] 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.[194]

[172] 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.[195] The NRA also examined the s.134 considerations.[196] The NRA concluded that for these reasons, the Claim should not be granted.[197] 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.[198]

[173] 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*.[199]

[174] The Coal Mining Industry Employer Group (CMIEG) filed a submission in reply on 30 October 2017 supporting the Ai Group's submissions. The 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.[200] The 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.[201]

[175] 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.[202]

5. The Evidence

5.1 Overview of labour force data

[176] This section focuses on the evidence regarding trends in the labour market – particularly in relation to female labour force participation, including comparing the outcomes for those with and without children. The data and evidence in this Chapter is drawn from documents including:

- Expert report of Professor Siobhan Austen (Austen Report);[203]
- Expert report of Dr Ian Watson (Watson Report);[204]
- Expert report of Dr James Stanford (Stanford Report);[205]
- Expert report of Ms Julie Toth (Toth Report);[206]
- Abhayaratna J, Andrews L, Nuch H & Podbury T (2008), *Part time employment: the Australian experience*, Staff Working Paper, Productivity Commission, June (Abhayaratna et al Productivity Commission working paper);
- Cassidy N & Parsons S (2017), *The rising share of part-time employment*, Bulletin, September Quarter, Reserve Bank of Australia (Cassidy and Parsons paper);
- O'Neill B (2015), *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009 (Cth): 2012–2015*, Fair Work Commission, November (General Manager's 2015 Report); and
- Skinner N & Pocock B (2014), *The Australian Work Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work + Life, University of South Australia, Adelaide (Skinner and Pocock 2014 paper);
- Skinner N, Cathcart A & Pocock B (2016), 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters', *Labour and Industry*, Vol. 26, No. 2, pp. 103–119 (Skinner et al 2016 study);
- Australian Bureau of Statistics (ABS), *Labour Force, Australia, Detailed – Electronic Delivery*, Catalogue No. 6291.0.55;
- ABS, *Labour Force, Australia, Feb 2017*, Catalogue No. 6202.0;
- ABS, *Employee Earnings and Hours, Australia*, May 2014, Catalogue No. 6306.0.

[177] The expert witness reports rely on data from the ABS and the Household, Income and Labour Dynamics in Australia (HILDA) Survey to present information on trends in the labour market.

[178] The HILDA Survey is a longitudinal household-based panel study that collects information on economic and subjective well-being, labour market dynamics and family

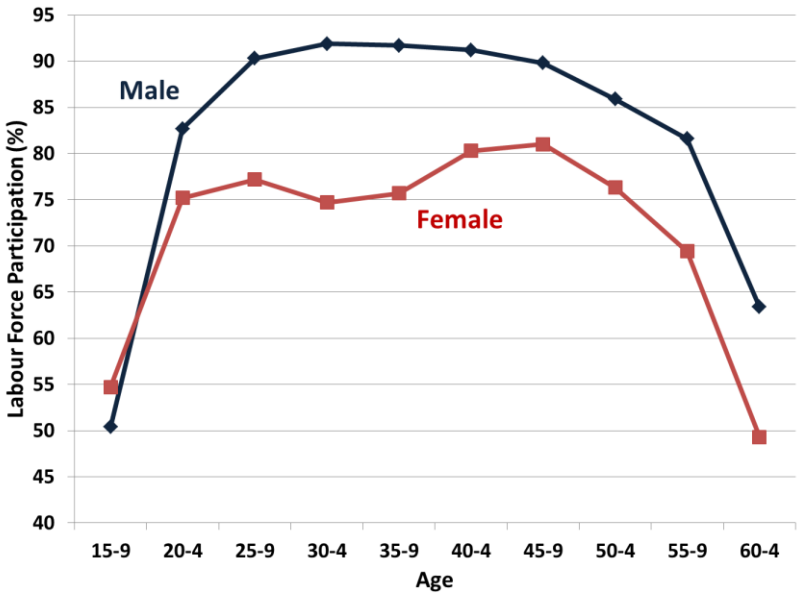
dynamics. The Survey began in 2001 and interviews are conducted annually with all adult members of each surveyed household, who are followed over time.

Female labour force participation

[179] The labour force participation rate for women aged 25 years and over increased between 2000 and 2017, while it decreased for women aged 15 to 24 years.[207] In August 2017 the female labour force participation rate for women aged 15 to 64 years was at a record high of 71.9 per cent.[208]

[180] Chart 1, provided in the Stanford Report, compares labour force participation by age group between males and females. It shows that the female labour force participation rate is below that of males across all age groups, except teenagers.

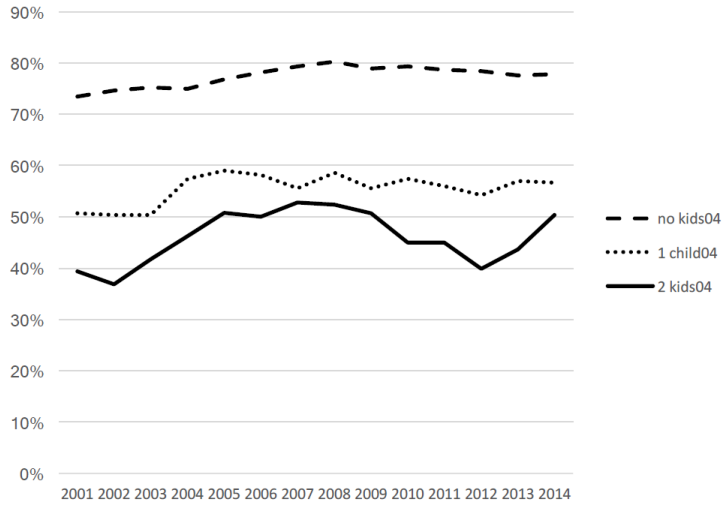
Chart 1[209]
Labour force participation by gender by age



Note: No time period was provided in the Stanford Report.

[181] The Austen Report presented data from the HILDA Survey which showed that the employment rate of women with a child aged under 5 years increased from 47.3 per cent in 2001 to 54 per cent in 2014.[210] Chart 2 compares trends over this period for women with one or two children aged under 5 years and women with no children aged under 5 years. It shows that the employment rate was highest for women without children and was lowest for women with two children.

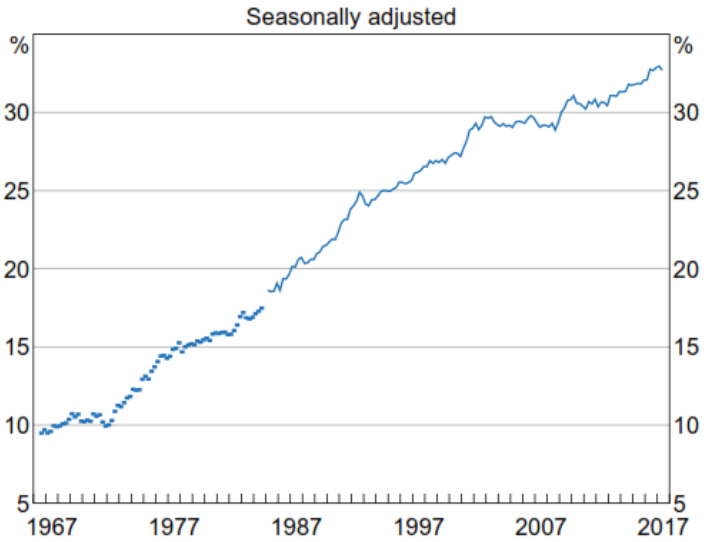
Chart 2[211]
Female employment rates by number of children under the age of 5 years, 2001–2014



Part-time employment

[182] Ms Toth provided the following chart, produced in the Cassidy and Parsons paper, to show the increase in the share of part-time employment over the last five decades. Chart 3 shows that the part-time share in 2017 is at or near its highest rate over this period. Similar data were also presented in the Stanford Report.[212]

Chart 3[213]
Part-time employment share

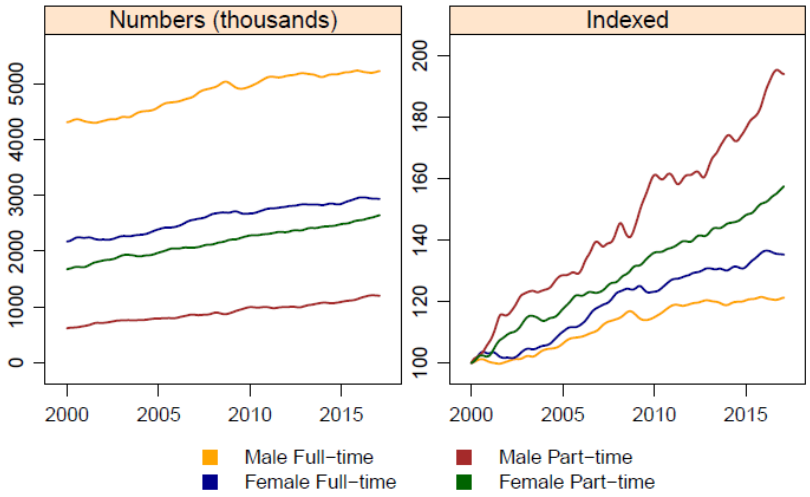


Note: Series break in 1984 due to change in Labour Force Survey; post 1984 series excludes Agriculture, forestry and fishing and Public administration and safety.

[183] In August 2016, some 68.1 per cent of part-time workers were women[214] and 47 per cent of female employment was in part-time work, compared with 18 per cent of males.[215]

[184] The Watson Report noted that between 2000 and 2017, the growth in part-time employment (94 per cent for males and 57 per cent for females) was higher than the growth in full-time employment (21 per cent for males and 35 per cent for females) (see Chart 4).[216]

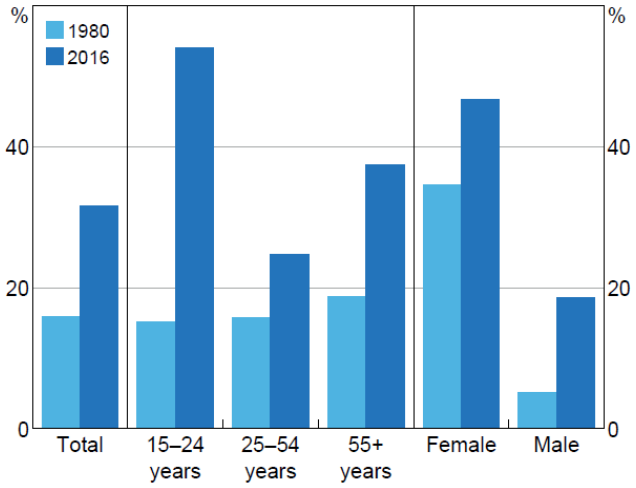
Chart 4[217]
Employment by gender and employment status, Australia, 2000–2017



Note: The figure uses trend data.

[185] Presenting a chart from the Cassidy and Parsons paper, Ms Toth explained that the part-time employment share increased between 1980 and 2016 for both males and females and across all ages 15 years and above (Chart 5).

Chart 5[218]
Part-time employment share by age and gender



[186] Using data from the HILDA Survey from 2001 to 2015, the Cassidy and Parsons paper found that the most common reasons for working part-time are to accommodate study, a preference for part-time hours, and caring for children (Charts 6 and 7).[219] These reasons account for around two-thirds of the reasons given by part-time employees.[220] Ms Toth

highlighted that Chart 7 shows that caring for children was the dominant reason for females aged 25 to 44 years working part-time.[221]

Chart 6[222]
Reasons why people work part-time

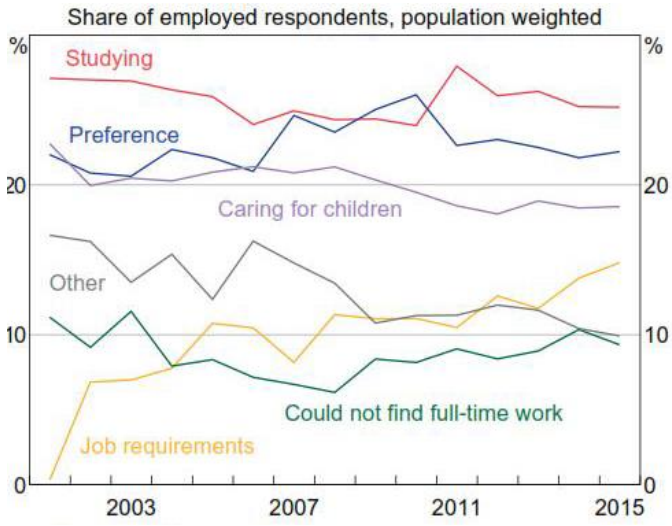
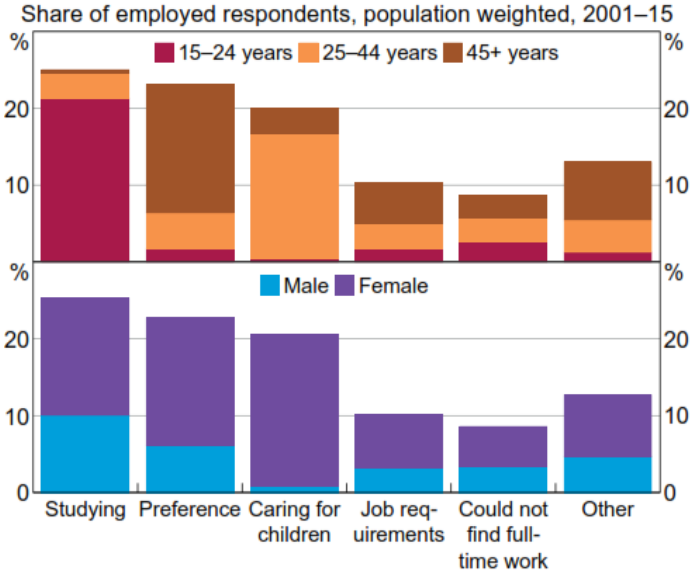


Chart 7[223]
Reasons why people work part-time by age and gender



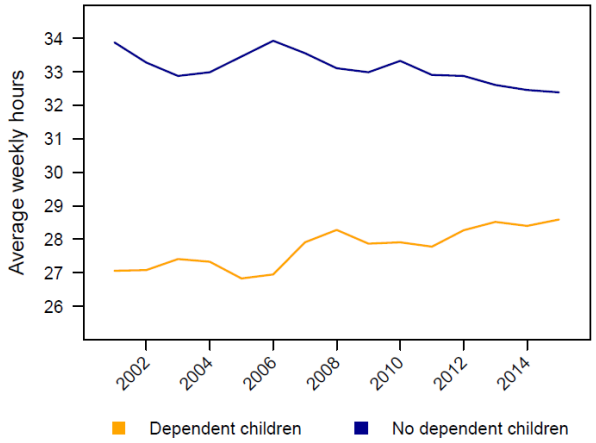
[187] The Cassidy and Parsons paper concluded that part-time employment 'has allowed employees to combine paid work with other activities such as education, caring for family members and leisure' and also allow firms 'to respond to fluctuations in demand for their output and to manage labour costs more effectively'.[224]

Hours worked by females with and without children

[188] The Watson Report also presented data from 2001 to 2015 of the HILDA Survey to show the average hours worked by females with and without dependent children (Chart 8).

Dr Watson concluded that 'women with dependent children worked fewer hours than those without dependent children, though over the last fifteen years this difference has been shrinking'.[225]

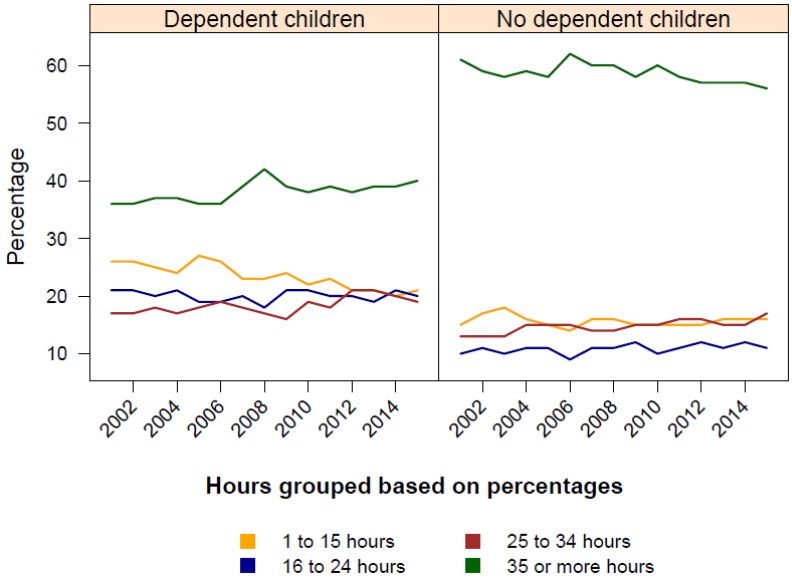
Chart 8[226]
Average hours worked by women by presence of dependent children, Australia, 2001–2015, percentages



Note: Average hours are average hours in all jobs worked.

[189] The Watson Report also provided this data by the number of hours worked for females with and without dependent children (Chart 9). It showed that working full-time hours (35 or more hours) was the most common group, particularly for women without dependent children.

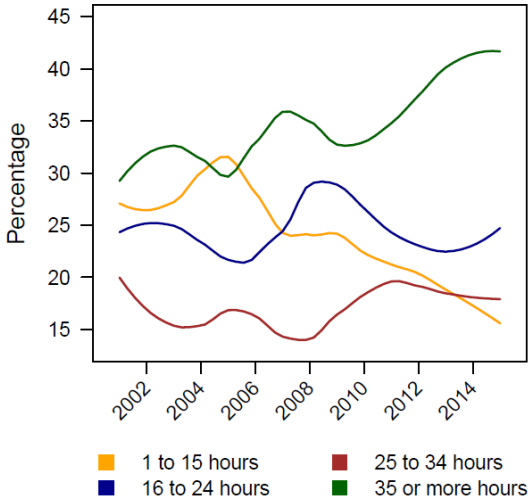
Chart 9[227]
Grouped hours worked by women by presence of dependent children, Australia, 2001–2015



Note: Groups hours in all jobs worked.

[190] The Watson Report also provided data on the hours worked by females with children under the age of 5 years (Chart 10), showing that the proportion working full-time increased between 2001 and 2015 while the proportion working one to 15 hours decreased.

Chart 10[228]
Grouped hours worked by women by presence of children aged 0 to 4 years, Australia, 2001–2015



Note: Grouped hours in all jobs worked.

Shifts between full-time and part-time employment

[191] The Austen Report referred to a 2005 study by Venn and Wakefield (Venn and Wakefield Study)[229] which used the first three waves of the HILDA Survey (2001 to 2003) to examine shifts between full-time and part-time employment between one year and the next. The Study made the following general points:

- 17 per cent of those who were employed part-time in any year moved to full-time employment in the following period;
- 7 per cent of those who were employed full-time in any year moved to part-time employment in the following period;
- 60 per cent of those who moved between full-time and part-time employment (in either direction) were female;[230]
- females were four times as likely as males to move from full-time to part-time employment, and were most likely to move from full-time to part-time employment with children aged under 5 years;
- males were more likely to move from part-time employment to full-time employment.[231]

[192] Other aspects that were examined when shifting between full-time and part-time employment included changing employers and moving to jobs with higher or lower skill levels. For example, the results showed that:

- males were slightly more likely to change employers when moving from full-time to part-time employment;
- mothers with children under 13 years were less likely to change employers when moving in either direction than all females;
- mothers with children under 13 years were more likely to be in an occupation with the same skill level when moving from full-time to part-time employment and less likely to be in a job with a lower skill level;[232] and
- mothers who moved from full-time to part-time employment were generally satisfied with their hours, with 17.5 per cent wanting fewer hours and 22.5 per cent wanting more hours.[233]

[193] On the basis of the Venn and Wakefield Study Ms Toth concluded that there are few barriers to moving between full-time and part-time employment and noted that this is consistent with the 2008 Abhayaratna et al Productivity Commission working paper.[234]

[194] Professor Austen also analysed the Venn and Wakefield Study and commented that the results show that 'for women in full-time work, the likelihood that they will make a transition to part-time work is highest when their children are aged under five years'[235] and that the 'transition to part-time work was found to be often associated with a change in employer. This was especially the case for mothers of older children'.[236] Professor Austen also noted that '[t]he majority of mothers who moved from full-time to part-time work reported increased satisfaction with their work hours'.[237]

[195] The Austen Report concluded from the Venn and Wakefield Study that skill downgrading is 'consistent with the presence of barriers to moves between full-time and part-time work [and] if an individual experiences difficulty in securing part-time work within her current skill group she may move to a lower skill group in order to secure part-time hours'.[238]

[196] Professor Austen also concluded that the 'findings understate the prevalence of skill downgrading and the extent of barriers to moves from full-time to part-time work' as it did not consider transitions out of paid work.[239] Professor Austen further noted that:

> '[i]ndividuals who experience difficulties in finding part-time work may opt to leave or remain out of the labour market. The high prevalence of transitions from full-time employment to non-employment … is consistent with the presence of barriers to moves between full-time and part-time work'.[240]

[197] The Austen Report extended the analysis by Venn and Wakefield to include waves one to 15 (2001 to 2015) of the HILDA Survey and limited the sample to women aged 24 to 60 years. The following Charts (provided in the Austen Report) compare all women in this age group with new mothers – defined as those who had a newborn child in between two survey periods. Charts 11 and 12 show that:

- around one-third of all women stay in full-time employment between periods, however, this falls to 13.8 per cent for new mothers;
- 4.5 per cent of all women moved from full-time to part-time employment while 9.2 per cent of new mothers moved from full-time to part-time employment; and

- 2.2 per cent of women moved from full-time employment to out of paid work, while this was the case for 15.2 per cent of new mothers.

Chart 11[241]
Women's employment transitions, 2001–2015, per cent of all transitions

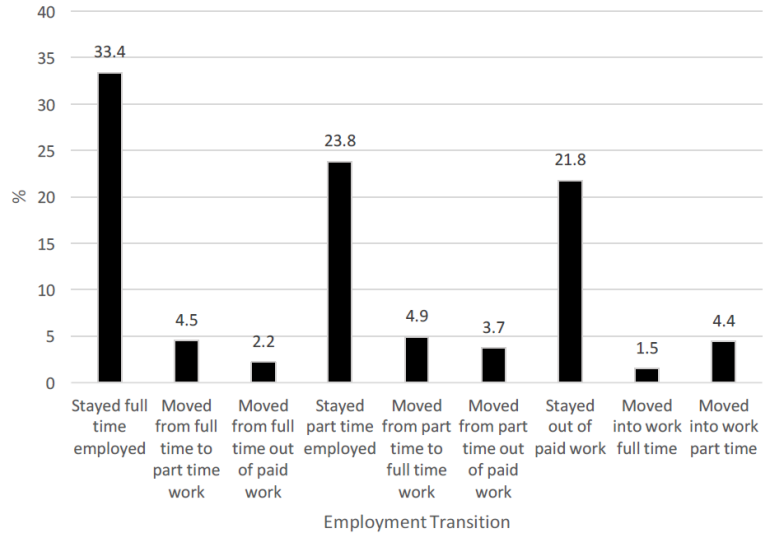
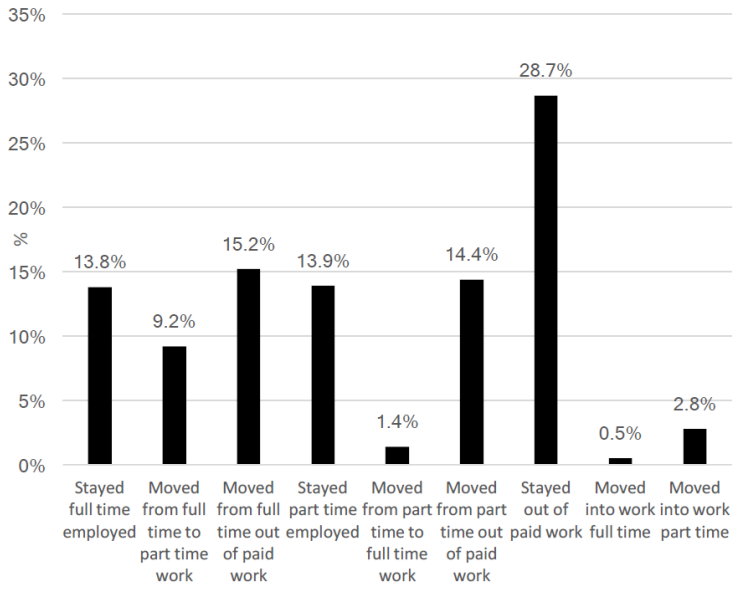


Chart 12[242]
Employment transitions by new mothers, 2001–2015, per cent of all transitions



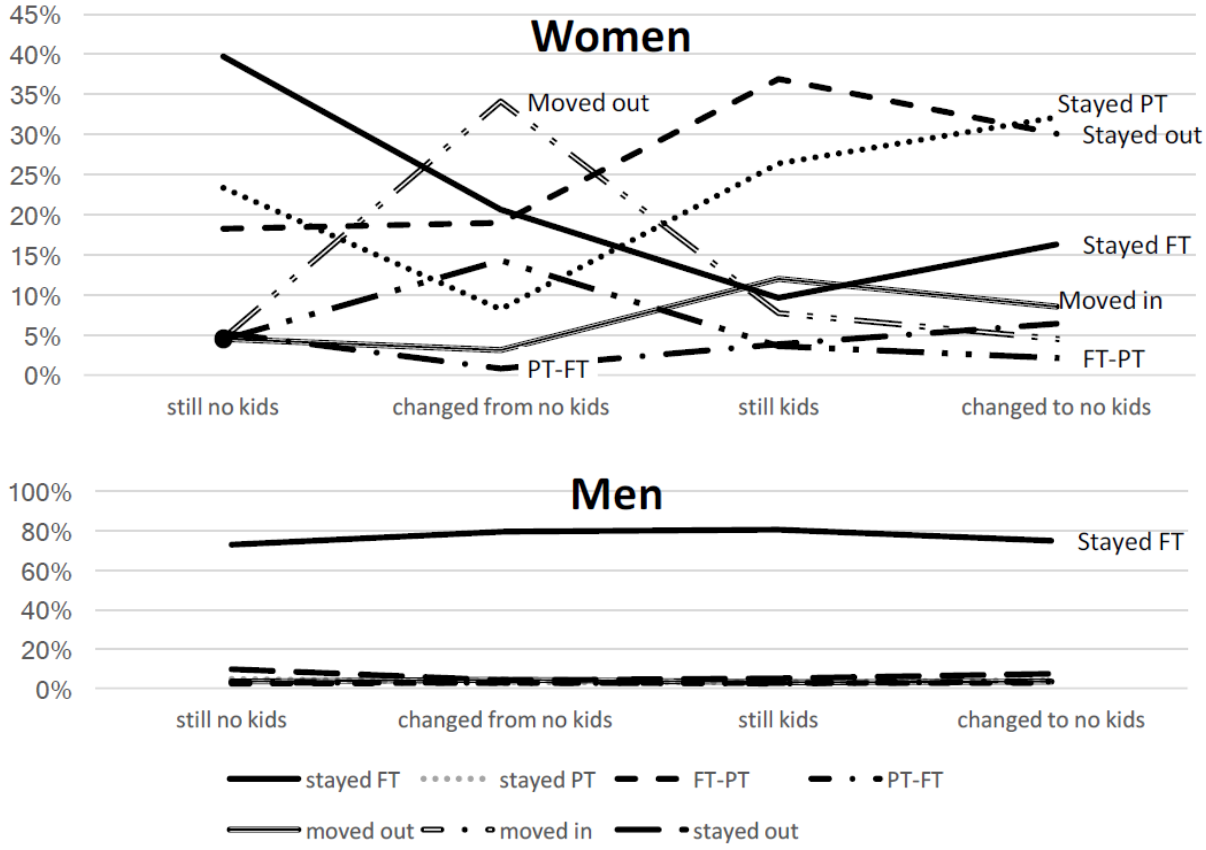
[198] The Austen Report also provided the following Chart comparing the employment transitions across household situations (with or without children) between women and men based on an analysis of HILDA data on employment transitions for employees aged 24 to 60 years during the period 2001-2015. Professor Austen observed that Chart 13 below 'demonstrates that parenthood is a source of instability in the engagement of women with paid work'[243] and that 'parenthood has long-term effects on women's engagement in paid work

[and] that a large proportion of mothers remain out of paid work or continue in a part-time job over the longer term'.[244]

[199] Chart 13 shows a stark contrast between male and female employment transitions over their life cycle. As Professor Austen observes:

> 'The stability of men's engagement in full-time work in the wake of parenthood is clearly evident in this data; as is the disruptive effect that parenthood has on women's involvement in paid work. For women, parenthood is commonly associated with a movement out of paid work, or into part-time work. In contrast, men tend to remain in full-time work (or increase their attachment to full-time work) when they become fathers. As a result, women are more exposed to the risk of occupational downgrading and increased job insecurity following parenthood than men.'[245]

Chart 13[246]
Employment transitions across household situations associated with parenthood, 2001–2015, per cent of all transitions, by gender



[200] Based on this data, Professor Austen concluded that the 'employment and occupational impacts of parenthood are less severe for men than women'.[247]

[201] The Austen Report also presented analysis of whether females who changed or remained with the same employer also changed the skill level of their job (both for those who

did and for those who did not shift between full-time and part-time employment) for waves one to 15 (2001 to 2015) of the HILDA Survey (Chart 14).

Chart 14[248]
Occupational transitions, full-time and part-time employment, women, 2001–2015

Note: Missing category is no change in occupational skill/status.

[202] Professor Austen concluded that:

> 'A key finding is that the prevalence of occupational downgrading is relatively high for women who move from full-time to part-time work, and highest for women who change employers when they shift from full-time to part-time work. Almost one in four women who changed employers as part of a shift from full-time to part-time work moved into a lower skill or status occupation.
>
> …
>
> In contrast, as shown by the data in the figures, occupational upgrading is most commonly associated with a move from part-time to full-time work, with this pattern strongest in the

> group of women who changed employer. Close to one in three women who moved employer and shifted from part-time to full-time work also changed into a higher skill or status occupation.'[249]

Shifts between permanent and casual employment

[203] Ms Toth observed that, as the proportion of employees without paid leave entitlements has remained relatively stable since the 1990s, the growth in part-time employment has been stronger among permanent part-time employment than casual part-time employment.[250]

[204] Ms Toth highlighted that of the 3.9 million part-time workers in August 2016:

- 38.4 per cent were employees with paid leave entitlements;
- 45.1 per cent of female part-time employees had paid leave entitlements;
- 24.1 per cent of male part-time employees had paid leave entitlements;
- 44.2 per cent were employees without paid leave entitlements;
- 39.8 per cent of female part-time employees did not have paid leave entitlements; and
- 53.4 per cent of male part-time employees did not have paid leave entitlements.[251]

[205] The Watson Report noted that, for males aged 30 to 59 years, permanent full-time employment was still the 'norm', and that while it is also dominant for females in this age group, permanent and casual part-time employment feature 'significantly'.[252] Dr Watson also highlighted that casual employment has increased for some subgroups, such as persons aged under 25 years and females aged 30 to 49 years.[253]

[206] The Watson Report compared the shifts in employment type of employees with and without dependent children and suggested that 'parenting can be costly in terms of job security'.[254] Dr Watson noted that 82 per cent of employees who worked permanent full-time jobs remained permanent after becoming parents compared with 87 per cent who did not become parents (Table 1).

Table 1[255]
Previous and current employment situation, employees with and without dependent children, Australia, between 2005 and 2015, percentages

	Current situation				
Previous situation	Perm FT	Perm PT	Not Perm FT	Not Perm PT	Total
With children					
Permanent FT	82	7	6	4	100
Permanent PT	18	55	5	23	100
Not permanent FT	49	5	35	11	100
Not permanent PT	12	10	14	63	100
Total	65	10	12	13	100
Without children					
Permanent FT	87	3	8	2	100
Permanent PT	16	64	4	15	100
Not permanent FT	42	3	46	10	100
Not permanent PT	11	12	11	65	100
Total	60	11	13	15	100

[207] The Austen Report presented data on women who changed or remained with the same employer and whether they shifted between permanent and casual employment (both for those who did or did not shift between full-time and part-time employment). This is reproduced in Charts 15 and 16.

[208] Professor Austen highlighted that 18.2 per cent of women who move from full-time to part-time employment with the same employer changed from permanent to casual compared with 22 per cent who changed employers.[256] However, the Charts also show that 58 per cent of women who move from full-time to part-time employment with the same employer remain permanent compared with only 32 per cent who change employers.

Chart 15[257]
Contract type changes, full and part-time employment by women, 2001–2015, remained with the same employer

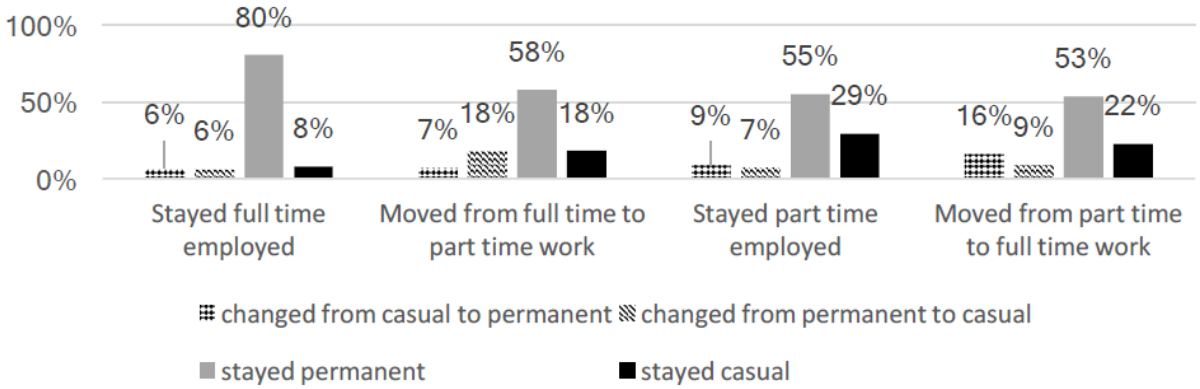
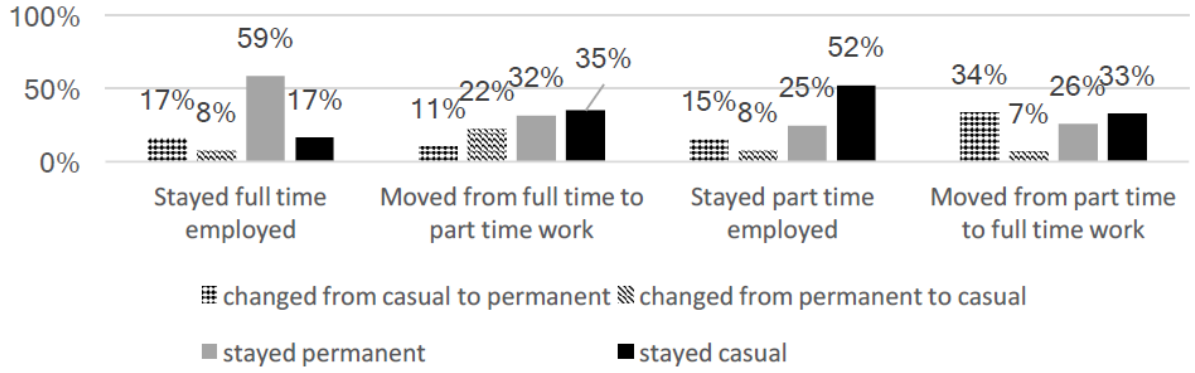


Chart 16[258]
Contract type changes, full and part-time employment by women, 2001–2015, changed employers

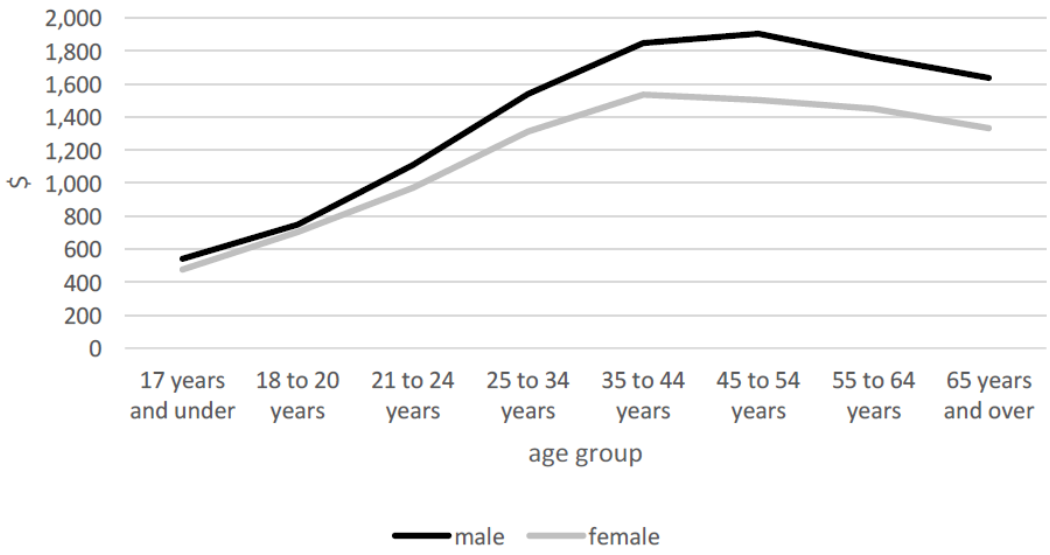


Lifetime earnings

[209] The Austen Report made reference to gender differences in lifetime earnings, with 'the impact of parenthood on labour force participation, work hours, occupation retention and employment security, and the large share of informal care roles that women undertake' contributing to differences in long-term wage and career outcomes.[259]

[210] Chart 17 presents data on average weekly total cash earnings of full-time employees by gender and age group showing that the earnings profile of women is lower than men, contributing to the gender pay gap.[260]

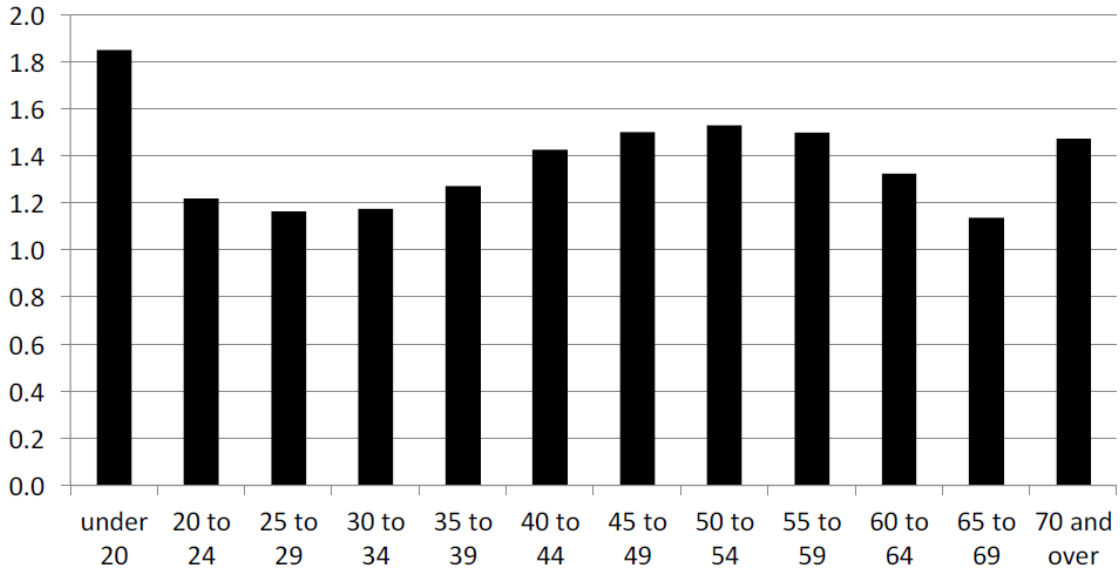
Chart 17[261]
Average weekly total cash earnings by age group and gender, full-time employees, May 2014



[211] The Austen Report contended that '[p]arenting and other care roles affect age-earning profiles by disrupting work experience and job tenure and by inhibiting parents' and carers' ability to maintain a job that adequately matches their qualifications'.[262]

[212] Professor Austen also suggested that superannuation account balances can be used to gauge differences in lifetime earnings. Chart 18, also from the Austen Report, shows the ratio of male to female average superannuation account balances. Men have an average account balance that is 53 per cent larger than women.[263]

Chart 18[264]
Ratio of male to female average superannuation account balances, as measured in member contribution statements, 2013–14



General propositions from the data

[213] A number of general propositions may be drawn from the data set out above.

[214] Female labour force participation is generally lower than males and this is the case across the working age population.

[215] The data show a clear increase in the share of part-time employment over the last few decades. This has also occurred across the working age population. Part-time employment is more common among females, however, growth in part-time employment has been stronger among males since at least the beginning of this century.

[216] Caring for children is one of the most common reasons for working part-time, together with studying and a preference for part-time work. Caring for children is the most common reason for females aged 25 to 44 years (in contrast to studying among younger people (15 to 24 years) and that part-time hours are preferred, for people aged 45 years and above).

[217] The HILDA Survey shows that employment rates and the average number of hours worked are higher among females without dependent children, but the differences between the average hours worked by females with and without dependent children has narrowed over time.

[218] New mothers are more likely to remain out of paid work than all women and are more likely to move from full-time work to either part-time work or out of paid work. Part-time employment becomes more common among women once their children become older, however, so does staying out of employment. In contrast, men are more likely to remain employed full-time whether or not they have children.

[219] Women who transition from full-time to part-time work are also more likely to move to an occupation with a lower skill level than a higher skill level, particularly if they change employers. However, it is most common to have no change in occupational skill status.

[220] Casual employment has remained relatively stable since the beginning of this century but is more common among part-time workers, particularly male part-time workers. Females who moved from full-time to part-time work were more likely to change from permanent to casual employment, however, it was most common to stay permanent for those who remained with the same employer and to stay casual for those who changed employers.

[221] The data also showed that females, on average, tend to have lower lifetime earnings, with some of the above general propositions likely to contribute to this outcome.

5.2 Survey Evidence

5.2.1 Joint Employer Survey

[222] Ai Group, ACCI and the NFF sought to tender the results of a survey described as the Joint Employer Survey (as an attachment to Mr Jeremy Lappin's witness statement).[265] The Victorian Automobile Chamber of Commerce (VACC) sought to tender a separate survey (as

an attachment to Mr Kevin Hoang's witness statement) which we refer to as the VACC Survey.[266] We deal with the VACC Survey later. The ACTU objected to the tender of both of the employer surveys.

[223] During the hearing of the ACTU objection, Ai Group and ACCI conceded that the Joint Employer Survey was advanced by way of descriptive or anecdotal evidence, rather than as being representative of employers generally or of members of the employer associations to whom the surveys were sent.[267] On that basis the employer survey material was admitted.[268]

[224] The Joint Employer Survey plainly suffers from a range of methodological problems which preclude it from being regarded as representative of the survey population. Further, the Employer parties did not lead evidence from the person who was responsible for the design and conduct of the Survey, thus preventing the ACTU from being able to test the reliability of the Survey results through cross-examination.

[225] A similar situation arose in the *Penalty Rates Case* in relation to a survey undertaken by ABI. The background to that matter is set out in the following extracts from the *Penalty Rates Decision:*[269]

> '[1563] ABI called Ms Emily Baxter, a lawyer for the Australian Business Lawyers Advisors (ABLA) who presented an analysis of a survey undertaken by ABLA of employers.
>
> [1564] ABLA developed a survey in July 2015 using the Survey Monkey program for the purpose of collecting evidence from employers in the retail industry on their trading and rostering practices (the 'Retail survey'). Ms Baxter was not involved in developing the survey.
>
> [1565] The survey was sent to a number of employer organisations who then sent it to their members. Baxter's evidence was that 8700 members were sent the survey and 690 responses were received. The survey analysis was based on the responses of the 485 businesses who confirmed that the *Retail Award* applied to their business and that they were not covered by an enterprise agreement.
>
> [1566] The survey results may be shortly summarised:
>
> - 88.3 per cent of respondents indicated that Sunday trading hours are lower than weekdays;
> - the majority of respondents indicated that public holiday trading hours were lower than weekday trading hours (ranging from 83.4 per cent on Melbourne Cup/Show Day, to 98.1 per cent on Christmas Day);
> - 88.9 per cent rostered fewer employees on a Sunday than a weekday; and
> - 90.5 per cent rostered fewer employees on a public holiday than a weekday.
>
> [1567] Answers could be provided to survey questions by either multiple choice or 'free text' where businesses could provide more than one answer. The free text responses were grouped into seven categories, including 'wages/costs'. The responses are summarised below:

(i) For those whose trading hours were lower on a Sunday, the main reason was wages/costs (53.18 per cent).

(ii) For those whose trading hours were lower on a public holiday, the main reason was also wages/costs (62.55 per cent).

(iii) For those who responded that rostering of employees differed on a Sunday to weekdays or Saturdays, 80.77 per cent responded wages/costs as the reason.

(iv) For those who responded that rostering of employees differed on public holidays to weekends or weekdays, 75.68 per cent responded wages/costs as the reason.

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

[1569] The Retail Employers submit that the survey provides evidence that:

- the current Sunday penalty rate (200 per cent) limits and reduces trading hours on Sundays;
- the current Sunday penalty rate offers fewer hours of work to employees than other days; and
- overall labour hours in retail stores will increase after a reduction in the penalty rate.

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

- Ms Baxter had no direct knowledge of the terms upon which the employer organisation distributed the survey or the proportion of the total membership who were sent the survey;
- a response rate of 7.9 per cent was "extremely low";
- the conduct of surveys as discussed in the Annual Wage Review 2012–13 decision on representativeness of surveys, particularly of membership bases;
- there is no way of ascertaining whether the sample is representative of employer organisations' membership or employers more broadly;
- many respondents did not answer all of the questions, and only four questions were completed by all respondents;
- based on the grouping of answers to why trading hours differed on Sundays, such as wages/costs, "very little" can be concluded on the role of wages, including penalty rates; and
- the survey results reflect perceived rather than actual effects.'

[226] The Full Bench rejected the proposition that the Retail survey could be regarded as representative of all retail businesses and treated the Retail survey results as suggestive or anecdotal rather than definitive:

> '[1572] We are not satisfied that the Retail survey can properly be said to be representative of all retail businesses. While providing the survey to all members of employer groups would maximise the total number of responses, the number of businesses that responded to the survey is relatively low. This could lead to biased results as the sample may not represent the retail business population.
>
> [1573] Further, although a breakdown of businesses by State and Territory is provided, we have no information about the breakdown by business size which would be beneficial in determining the representativeness of the survey.
>
> [1574] For the reasons given we reject the proposition that the results of the Retail survey can be extrapolated to all businesses covered by the *Retail Award*. However, we also reject the SDA's submissions that we give no weight to the survey. As mentioned earlier, the assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. The central issue is the extent to which a survey's limitations impact on the reliability of the results and the weight to be attributed to those results. Given the limitations of the Retail survey we propose to treat the survey results as suggestive or anecdotal, rather than definitive.'[270]

[227] We propose to adopt the same approach to the Joint Employer Survey, accordingly the survey results will be treated as suggestive or anecdotal, rather than definitive.

[228] The Joint Employer Survey was conducted using LimeSurvey, an online survey application, between 3 August 2017 and 8 September 2017. Analysis of the 2616 completed survey responses was undertaken by Mr Lappin, a Law Clerk at Ai Group. The survey invited members of Ai Group and other employer associations to respond to the questions relating to the Claim.[271]

[229] The analysis by Mr Lappin focused on businesses covered by one or more modern awards, which amounted to some 2032 employer responses.[272] Results were presented across all award-covered respondents and separately for 28 modern awards where at least 20 businesses responded that they are covered by one of those modern awards.

[230] The survey questions canvass three issues of relevance to these proceedings:

(i) The extent to which the respondent business has received employee requests to change their hours of work (including days of work and start/finish times) due to parenting and/or other caring responsibilities, since the beginning of 2010;

(ii) The treatment of any such requests by the businesses; and

(iii) The potential impact of the Claim on the respondent businesses.

[231] As to (i) and (ii) above, about half (48.9 per cent) of the respondents had received an employee request for a change in their hours of work. Of those respondents who had received

such a request, 48.6 per cent agreed to each request, 48.2 per cent agreed to *some* of the requests and 2.6 per cent did not agree to any request. Ai Group noted that the questions were not limited to requests made under s.65.[273]

[232] The Joint Employer Survey results provide some insight into the reasons why requests were refused, citing operational reasons and cost implications.

[233] As to (iii), the respondents were asked to describe the impact on their businesses if employees with parenting or caring responsibilities were given the right to decide their hours of work (including days or the week and starting/finishing times) without the business having the right to refuse or modify the employee's decision. In response, the survey respondents identified a broad range of adverse consequences for their businesses, and their employees, customers and other stakeholders.[274]

5.2.2 VACC Survey

[234] As mentioned above, the VACC filed the results of a national survey of its members (noting that the Motor Trades Organisations, including the VACC, were not filing submissions in this matter and would rely on the submissions of ACCI).

[235] The VACC Survey was sent to a total of 13,398 members of the Motor Trades Organisations, with 955 completed responses received between 15 August 2017 and 11 September 2017. The final sample on which the analysis was undertaken contained 748 responses from businesses that reported they were covered by one or more modern award.

[236] The VACC Survey suffers from a substantial number of methodological problems, as canvassed in the ACTU submissions.[275]

[237] Ultimately, the VACC Survey was not relied on by any of the Employer parties in the proceedings (including ACCI, of which the VACC is a member). In these circumstances we do not propose to place any weight on the VACC Survey results.

5.3 Witness Evidence

[238] A list of the witnesses in the proceedings is at **Attachment D**.

[239] The evidence was heard over four days from 12 to 14 December 2017 and on 21 December 2017.

[240] It is convenient to first deal with the expert evidence before turning to the evidence of the lay witnesses.

5.3.1 Expert evidence

[241] The ACTU relied on the evidence of four expert witnesses in support of its claim:

- Dr Ian Watson

- Professor Siobhan Austen
- Dr Jill Murray
- Dr James Stanford.

[242] Ai Group called one expert, Ms Julie Toth.

[243] We turn first to the evidence of the experts called by the ACTU.

Dr Ian Watson

[244] Dr Watson provided an expert report for the ACTU addressing the demographic profile of the Australia workforce over time, with particular focus on: paid work and the paid workforce; families, households and parenting/caring responsibilities, and combining paid work and parenting/caring responsibilities. The report used data from the ABS, the HILDA Survey and the Australian Workplace Relations Study (AWRS).

[245] Dr Watson's evidence was largely uncontentious and various aspects of his evidence have been incorporated into Chapter 5.1.

[246] Dr Watson's main findings were that the ageing population and recent trends in the labour market present a number of challenges for workplaces and families. Over the last decade, part-time work and underemployment have increased, and labour market insecurity has become entrenched, which has 'profound' implications for family friendly working arrangements.[276]

[247] Dr Watson concluded that the employment outcomes for carers or parents in both the labour market and the workplace are less favourable:

> 'This report finds that taking on the roles of carers or parents sees people penalised by both the labour market and the workplace. Their employment outcomes are less favourable than those without such responsibilities, and for those in employment, taking on such roles imposes personal and family costs, particularly in terms of job security.'[277]

[248] The ageing population, described by a decline in younger age groups and increase in older age groups, affects workers in two ways: caring responsibilities for ageing parents or disabled relatives, and fewer persons of working-age available to provide for an increasingly dependent population.[278]

[249] Dr Watson noted that there was an important gender dimension to parenting and caring, as it is primarily undertaken by women. Focusing on families with working parents, the most common arrangements used by working mothers to care for their children was part-time employment and flexible working hours (both at around 40 per cent). In contrast, only 5 per cent of working fathers used part-time employment to care for their children. These findings led Dr Watson to conclude 'the prospects of Australian society developing more gender-neutral parenting and caring responsibilities within families in the 21st century appear limited'.[279]

[250] Data from the HILDA Survey showed that there was a smaller proportion of working-age couples with dependent children who were in full-time work and a larger proportion in part-time work, compared with those without dependent children. Further, there was a lower proportion of wives/partners working full-time and a higher proportion of wives/partners with dependent children not in the labour force.[280] For couple families with dependent children, the husband/partner was more likely to be working longer hours (more than 40 hours) and the wife/partner more likely to be working shorter hours (fewer than 25 hours).[281] Among one-parent families, just over half were employed and nearly 40 per cent were not in the labour force.[282]

[251] The data also showed that, among wives/partners who were employed and had dependent children, the largest proportion (43 per cent) had children aged 0 to 4 years. Having children in this age group was more common for part-time (47 per cent) than full-time workers (39 per cent).[283]

[252] Women with dependent children worked fewer hours than those without dependent children, although this difference reduced over the 15 years to 2015, according to data from the HILDA Survey.[284]

[253] The most commonly used working arrangement by both males and females to allow them to care for children was flexible working hours – 30 per cent of fathers and 40 per cent of mothers – with 39 per cent of females using part-time employment compared with 5 per cent of males.[285] The use of flexible working hours has remained stable since 2008 after increasing during the late 1990s and early 2000s.

[254] Based on his analysis of the HILDA data Dr Watson observed that, between 2005 and 2015, 82 per cent of employees in permanent full-time jobs who became parents remained in that situation, compared with 87 per cent of those employees who did not become parents. For those who worked permanent part-time jobs, 55 per cent of those who became parents remained in this situation while 23 per cent moved into non-permanent part-time jobs.[286]

[255] Dr Watson found that carers were far less likely to stay in employment, or gain employment, than non-carers.[287] Carers who were employed were more likely to work in large, public sector workplaces with enterprise agreements and were less likely to be in small and medium private sector workplaces, where union membership is lower and there are higher instances of individual arrangements.[288]

Professor Austen

[256] Professor Austen provided an expert report for the ACTU assessing whether there is an impact of being a parent and/or carer on female and male employees and the difference in any impact between male and female employees. Various aspects of Professor Austen's evidence have been incorporated into Chapter 5.1.

[257] The Austen Report concludes that parenthood has an 'extensive' impact on female employees. It disrupts their involvement in paid work causing many to leave employment and others to move to part-time employment,[289] leading to a penalty of lower lifetime earnings, wealth and superannuation.[290] Conversely, parenthood tends to strengthen men's attachment

to full-time work, which has a positive effect on their lifetime earnings, superannuation and wealth.[291] It was concluded that these differences between men and women are an important aspect of gender inequality, and that women 'pay a heavy price' for the care roles they perform:[292]

> 'The negative impact that parenthood has on women's employment, job and occupation continuity implies that the availability of family friendly work hours is an important factor influencing women's decisions about returning to work after childbirth. In the absence of family friendly hours, a parent with a primary childcare role might 'decide' to leave paid work. Alternatively, he/she might change jobs and/or occupations in order to secure part-time work. Such moves are likely to have a detrimental effect on the parent's long-term wage and career outcomes, and this will be especially the case if the parent is unable to move into full-time work when the time-demands of his/her parenting tasks lessen.'[293]

[258] Using ABS data, Professor Austen found that, despite female labour force participation increasing from the 1970s through to 2008, a gap remains between the male and female participation rates.[294] Almost half of employed women work in part-time jobs, compared with fewer than one in five men, although this has increased since 1978.[295] Differences in participation rates and part-time work were evident across all age groups, particularly for 35 to 44 year olds, where the male participation rate is above 90 per cent while for females it is close to 77 per cent.[296] Further differences were found in contract type, with around one-quarter of female employees employed on a casual basis compared with one in five males.[297]

[259] Differences between male and female employment were also found in the occupations and industries in which they work. Almost three-quarters of 'Clerical and administrative workers' were women, while over 90 per cent of 'Machinery operators and drivers' were men.[298] Women also account for a large majority of employees in 'Health care and social assistance', while men are more likely to work in Construction, Manufacturing, Mining and 'Agriculture, forestry and fishing'.[299] These patterns in occupation and industry employment have changed little in recent times,[300] despite the fact that there has been a large increase in the level of educational qualifications among women, with a larger proportion of women than men now having a Bachelor level qualification or higher.[301]

[260] The Austen Report referred to data from the HILDA Survey to show that the employment rate of women with a child under 5 years is just over 50 per cent[302] and that 'the presence of young children remains a significant factor in determining the participation of women in paid work'.[303]

[261] The Report also considered the transitions between full-time and part-time work, and occupations, of women and men. Professor Austen provided an updated analysis of a previous report[304] on the employment transitions of women aged 24 to 60 years between 2001 and 2015, using the HILDA Survey. The data showed that around one-third of year-on-year employment transitions of women were associated with remaining in full-time work, with almost one-quarter remaining in part-time work and over one-fifth remaining out of paid work.[305] Professor Austen also observed that women are characterised by a relatively high transition to part-time work, with up to 10 per cent of women transitioning into part-time work from either full-time work or non-participation.[306] The proportion of women who remained in full-time work declined to 13.8 per cent with the presence of a new child.[307]

[262] Analysis was also undertaken on the employment transitions of women across different household situations, with and without children. The data showed that while around 40 per cent of women without children were in full-time work, the presence of new children reduces that proportion to around 20 per cent, further reducing to around 10 per cent in households with young children.[308] Professor Austen commented that the patterns in transitions suggest long-term effects on women's engagement in paid work, with a large proportion of mothers remaining out of paid work or continuing in part-time work over the longer term.[309]

[263] Professor Austen also considered the issue of 'occupational downgrading' (moving to a lower-skilled job) among women and found that this was relatively high among women shifting from full-time to part-time work, particularly for those who also change employers, with almost one-quarter of these women moving into a lower skill or status occupation.[310] The opposite was also the case, with 'occupational upgrading' most common among those shifting from part-time to full-time work, again strongest for women who change employers.[311] Women who shift from full-time to part-time work were also more likely to experience a change in employment status from permanent to casual, again particularly for those who also change employers.[312]

[264] The data on employment transitions showed that, compared with one-third of women, around three-quarters of men remained in full-time work year-on-year,[313] with relatively stable employment transitions across different household situations.[314] Occupational downgrading and moving to casual employment was also more common among fathers of newborns who shift from full-time to part-time work.[315]

[265] Professor Austen summarised her findings as follows:

> 'The stability of men's engagement in full-time work in the wake of parenthood is clearly evident in this data; as is the disruptive effect that parenthood has on women's involvement in paid work. For women, parenthood is commonly associated with a movement out of paid work, or into part-time work. In contrast, men tend to remain in full-time work (or increase their attachment to full-time work) when they become fathers. As a result, women are more exposed to the risk of occupational downgrading and increased job insecurity following parenthood than men.'[316]

[266] While acknowledging that there are no 'direct measures' of lifetime earnings of women and men,[317] Professor Austen observed that the gender pay gap, together with differences in hours worked and labour participation rate, produces a gap in lifetime earnings and superannuation.[318]

Dr Murray

[267] Dr Murray provided a report that responded to a series of questions put by the ACTU about employees' access to flexible working arrangements (defined as an arrangement between an employer and employee that permits the employee to meet their parenting or caring obligations while also participating in paid work), including the operation of the right to request flexible work pursuant to s.65 of the Act; the right to return to work after parental

leave pursuant to s.84; the use of IFAs, and other approaches adopted by employees for this purpose.[319]

[268] The Murray Report relies on three main information sources:

(i) the Australian Work and Life Index (AWALI) undertaken by the Centre for Work + Life at the University of South Australia;

(ii) the AWRS undertaken by the Commission, which is a principal data source of the General Manager's 2015 Report (discussed later at [282]); and

(iii) a survey by the Australian Human Rights Commission (AHRC) on mothers' and fathers' experience of taking or requesting leave following parental leave.

[269] The AWALI is an annual survey that began in 2007 to provide a 'snapshot' of the major influences and consequences of work-life interaction. The survey is a nationally random stratified sample of Australian households for persons aged 18 years or older. Respondents to the AWALI survey are different each year. In 2014, the AWALI sample comprised 2690 workers, of whom 2279 were employees and 411 self-employed persons, surveyed over four weekends in March. The survey was conducted using a computer-assisted telephone interview in which household telephone numbers were selected using random digit dialling and then a random selection of individuals in each household were chosen to participate in the survey.[320] The 2014 AWALI survey results are the subject of the Skinner and Pocock 2014 paper.[321]

[270] The AWRS is a dataset that links employee and employer information. The AWRS was undertaken between February 2014 and July 2014 and collected data from over 3050 employers and over 7800 employees. The AWRS was carried out using a multi-mode approach to data collection that included computer-assisted telephone interviewing and self-administered online and paper-based surveys.

[271] The AHRC survey included 2000 mothers and 1000 fathers as well as a qualitative survey component.[322]

[272] It is convenient to summarise Dr Murray's findings by reference to the questions put to her by the ACTU (see [267]).

Section 65 requests

[273] The following findings are made by Dr Murray in relation to the operation of the right to request flexible working arrangements in s.65 of the Act:

1. Approximately one in five Australian workers request flexible working arrangements each year, a rate that has not changed markedly since the introduction of s.65:

> 'AWALI 2014 found that the rate of requesting flexible work, whether pursuant to the Fair Work Act or through some other process, had remained relatively stable across its 2009, 2012 and 2014 surveys, at around 20 per cent of workers making a request for

> flexible work arrangements in the period under examination. The evidence of AWALI 2014 is that 20 per cent of employees made a request for flexible working arrangements, but it was "rare that the actual provisions of s 65 are invoked".'[323]

2. Only 'a small proportion' of all requests for flexible working arrangements are made pursuant to s.65 of the Act, with the AWRS finding that just over one per cent of employers received a request pursuant to s.65 and 4 per cent of employees reported making a request pursuant to s.65. The AWALI 2014 survey found that 2.8 per cent of requests used the s.65 provisions.[324] The Murray Report concluded that:

> 'employees are seeking to adapt their working times in order to meet their domestic care responsibilities in significant numbers. The statutory schema of s 65 of the Fair Work Act plays only a marginal role in shaping the processes of request and employer response.'[325]

3. In terms of the types of working arrangements requested, the AWRS found that the most common were a reduction in work hours, a change to start/finish times and a change in the days worked.[326]

4. The most common reason for seeking flexible work is to care for children, with another significant group seeking to care for disabled family members or elders. Citing the General Manager's 2015 Report into requests made under s.65, the Murray Report highlighted that: 83 per cent of employees who requested flexible working arrangements had dependent children under the age of 15 years; the most common reason was to care for a child or children; women were three times as likely as men to make a request; a higher proportion of part-time employees made requests than full-time employees, and the majority of requests came from permanent employees.[327] More requests were also received by medium and large firms than by small firms[328] and the AWALI survey found that requests were more prevalent in female-dominated industries and occupations[329] and among mothers who wished to care for pre-school children.[330]

5. Around one-quarter of employees are not happy with their working arrangements but did not make a request for change (a group referred to as 'discontented non-requestors'; we deal with this issue in more detail later).

6. There are strong gendered patterns around the rate of requesting and the kinds of alterations to working arrangements sought. Women make most of the requests for flexible work. Women do most of the unpaid care work in Australia, and they seek to adapt their paid work primarily by working part-time, and by other means. Men, including fathers, are much more likely than women to continue working full-time, and are more likely than women to seek flexibility measures such as variations to starting and finishing times and the like.

7. Large and medium employers are more likely to receive requests than small employers. Requests are most likely in female-dominated industries and permanent workers are more likely to make a request than those employed as casuals or on a fixed term contracts.

8. The vast majority of requests (both informal and those made pursuant to s.65 of the Act) are approved in full, some requests are approved with amendments and a proportion are rejected outright.

9. The most common reason for granting a request was associated with a 'win win' approach of many businesses and employees: the employer was able to retain valued staff and acknowledge that caring for family was important and a respected choice, while the employee could continue their engagement with the firm with time to care.

10. The main reason given for refusal was operational grounds, including the difficulty of finding another person to take up the time vacated by a worker going part-time.

11. Workplace culture and norms also play an important role, especially where informal, undocumented processes are utilised to make and respond to requests for flexible working arrangements.

[274] The Murray Report observed that 'applications for flexible work arrangements made pursuant to the *Fair Work Act* form a small minority of the total number of requests for flexible working arrangements'.[331]

Return to Work after Parental Leave – s.84 of the Act

[275] The following findings are made by Dr Murray about the operation of the right to return to work after parental leave pursuant to s.84 of the Act:

1. Eighty-nine per cent of women in Australia take maternity leave around the birth of their child. Within one year of birth, 79 per cent of mothers have returned to work and 'most mothers who are not already working flexibly are likely to seek flexible working conditions on their return to work'.[332]

2. Seventy-one per cent of women returned to the jobs they had while pregnant, with a third returning to the same job with the same conditions.

3. One in five women returned to work with changes in job tasks or responsibilities and one in five changed employer when they returned after maternity leave.

4. Nearly one in four women were made redundant while on maternity leave or dismissed or their contract was not renewed by the employer.

5. Around one in 10 workers (11 per cent) who had not returned to work after one year said they could not find work or negotiate a return to work.

6. The characteristics of women not returning to work after maternity leave include: those working short hours prior to the birth; those in lower status jobs; those in casual jobs; younger women; those with lower educational levels; those with health problems or disabilities, and those with poor English skills.

Individual Flexibility Arrangements

[276] The following findings are made by Dr Murray in relation to the use of IFAs:

1. The utilisation of IFAs has been low: approximately 2 per cent of Australian workers report having an IFA with their employer. IFAs were also more likely to be made by women[333] and the majority varied arrangements for when work is performed.[334]

2. Sixty-one per cent of employees who had initiated an IFA said the outcome was flexibility to better manage non-work commitments.

3. Fourteen per cent of employees reported that they had had to trade-off conditions in order to obtain a benefit from their IFA. Nineteen per cent of these were women and 12 per cent were men. Dr Murray concluded that IFAs are of limited suitability for employees seeking flexible working arrangements as they involve trading off conditions for flexibility and 'they can be terminated by either party in a relatively short period'.[335]

Other techniques to balance work and family life

[277] The literature review undertaken in preparing the Murray Report identified four methods of adaptation to the balancing of work and family other than the statutory provisions identified above): informal requests outside the statutory system; not asking for a change in working conditions; 'buying' flexibility by trading off conditions and/or benefits of a job either formally or informally, and exiting employment.

[278] ACCI was critical of Dr Murray's evidence and submitted that 'caution should be exercised in relying on Dr Murray's Report' on the basis that:

> 'Dr Murray failed to demonstrate a sound understanding of two key pieces of literature upon which she based her report, AWALI Report and the General Manager's Report under cross examination.'[336]

[279] We note that despite the above critique, ACCI relied on aspects of the Murray Report.[337]

[280] In our view, the criticism of Dr Murray's evidence is not soundly based and we are not persuaded that it undermines the cogency of her evidence. While Dr Murray was unable to respond to a number of questions about the AWALI survey the questions put were directed at a part of the report which was not relied on by Dr Murray in her evidence.[338]

[281] The Murray Report is based upon, and largely reflects, the three primary sources referred to earlier (at [268] above). We now turn to consider two of those sources in more detail.

The General Manager's 2015 Report

[282] Section 653(1) of the Act relevantly requires the General Manager of the Commission to:

- conduct research into the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the NES provisions relating to employee requests made under ss.65(1) and 76(1).

[283] This research is to be conducted every three years and a report provided to the Minister. The General Manager's 2015 Report covers the period May 2012 to May 2015. As noted in the Report, there is no administrative data on NES requests as they are not lodged with the Commission or any other agency.

[284] We note that Ai Group submits that the General Manager's 2015 Report provides 'the most recent, reliable and comprehensive research that is currently available regarding the utilisation of the right to request flexible working arrangements under the NES since 2012 and the manner in which such requests are treated by employers'.[339]

[285] The findings in the General Manager's 2015 Report are drawn from two principal data sources:

- the AWRS data; and
- qualitative research conducted by the Centre for Work + Life at the University of South Australia,[340] supplemented by quantitative data from the AWALI.

[286] The General Manager's 2015 Report found that flexible working arrangements are being utilised but that the majority of such arrangements are not made pursuant to s.65 of the Act and therefore did not fall within the scope of the Report.[341]

[287] Data on both employers and employees was obtained from the AWRS, and the analysis was undertaken in respect of the 84 employers who had received a s.65 request and the 345 employees who had made a s.65 request.[342] Analysis of the AWRS data found that while around 40 per cent of employers had received such a request for flexible working arrangements, only just over one per cent of employers had received a request consistent with the terms of s.65.[343] Large enterprises (200 or more employees) received a higher number of requests than small or medium enterprises, and public sector enterprises were more likely to have received a request than private sector enterprises.[344]

[288] The AWRS survey of employers found that the main reason for requesting a flexible working arrangement was to care for a child or children.[345] The most common change was a reduction in hours worked, followed by a change in start/finish times and a change in days worked.[346] Some 90.2 per cent of employers who had received a s.65 request, granted the request. As to the requests which were *not* granted, the General Manager's 2015 Report states:

> 'Obviously, given that only 9 percent of employers refused a request for flexible working conditions at first instance, there is a very limited amount of data available to be analysed with respect to refusals. Nonetheless, enterprises that rejected some of the requests were also asked whether subsequent discussions led to the request being accepted on a different basis; 40 percent of those who rejected the request at first instance also rejected it after further discussions. Putting this another way, 60 percent of enterprises that had rejected at least one request initially, had accepted a variation of the request after discussions.'[347]

[289] The analysis of employee respondents to the AWRS survey found that since July 2012, over one-quarter indicated they had requested flexible working arrangements, while around 4 per cent had made a request in accordance with s.65. The main reason for making a request was to provide care to a child or children.[348] According to the AWRS, the vast majority of employees (85.8 per cent) who made a request pursuant to s.65 had the request approved, with a further 12 per cent of requests granted with amendments. Two per cent of employees had their request for flexible working arrangements refused by their employer.[349] The majority of requests that were granted were to change start/finish times (61 per cent) followed by a change in days worked (35 per cent). Around one-fifth of these employees requested a reduction in the hours or days worked or an ability to work from home.[350]

[290] The General Manager's 2015 Report finds that females were three times more likely to make a request pursuant to s.65 than males,[351] while part-time employees were relatively more likely to make requests than full-time employees (although working part-time may have been as a result of the request).[352]

[291] Ai Group accurately summarises the quantitative results from the General Manager's 2015 Report in the table below:[353]

Table 2
Quantitative results from General Manager's 2015 Report

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

The AWALI data

[292] As mentioned earlier, the AWALI survey is a nationally random stratified sample of Australian households which seeks to provide a 'snapshot' of the major influencers and consequences of work-life interaction.

[293] At the outset, we note that we accept that the AWALI survey has its limitations, in particular: it is not limited to employees covered by modern awards; the survey permits multiple responses to some questions, making the results difficult to interpret,[354] and persons with post-secondary qualifications may be over-represented in the respondent cohort.[355]

Despite these limitations, the AWALI data is relevant to the issues in these proceedings and we have taken it into account.

[294] Results from the AWALI 2014 survey were presented in the Skinner and Pocock 2014 paper.[356] The paper includes a section on requests for flexible working arrangements which compares the results for 2014 with results from the 2009 and 2012 AWALI surveys, including: patterns of requesting flexibility; the outcomes of requests, and the association with work-life interference.

[295] The 2009 AWALI survey found that over one-fifth of employees had made a request for flexible working arrangements prior to the right to request provisions in s.65 coming into effect, with most requests fully granted by employers. Similar patterns were observed in 2012, leading Skinner and Pocock to observe that the introduction of the right to request had not made a substantive impact.[357]

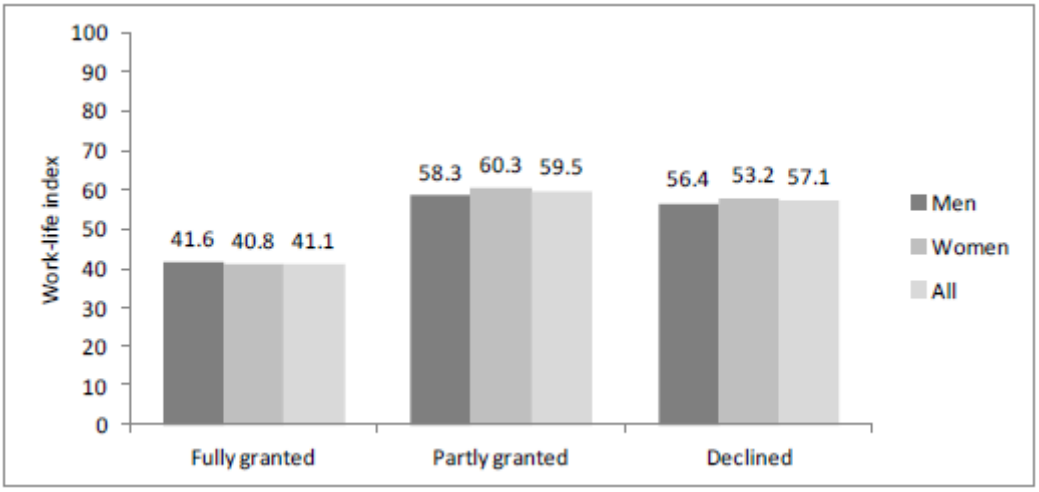
[296] The AWALI 2014 survey found an increase in awareness of the s.65 right to request, from 30 per cent in 2012 to over 40 per cent in 2014, with a similar rate of awareness between men and women.[358] Despite this, there was little change in the proportion of survey respondents who had made a request. In 2014, around 20 per cent had made a request for flexible working arrangements in the previous 12 months, which was similar to the proportion in 2012.[359]

[297] The 2014 AWALI survey found that 2.8 per cent of employees used the right to request under s.65 of the Act. Over half (57.3 per cent) of survey respondents 'just asked' their supervisor or manager, while around 40 per cent applied under their organisation's policy or enterprise/collective agreement.[360]

[298] The majority of requests (64.3 per cent) were granted in full, and a further 16.9 per cent were partly granted. Some 10.8 per cent of flexibility requests were declined. These results are comparable with the 2009 and 2012 AWALI surveys.[361] Requests were more likely to be fully granted for part-time workers (70.6 per cent) than full-time workers (57.1 per cent).[362]

[299] Skinner and Pocock also examined the association between the outcome of an employee flexibility request and work-life outcomes. As shown in Chart 19, having a request fully granted is associated with the best work-life outcomes. Skinner and Pocock observed that there is no statistically significant difference in work-life index scores between those who had their request partially granted or declined, and that this pattern has been consistently observed across AWALI surveys.[363] (However, we note the AWALI 2012 work-life index scores by request outcome, recorded at [318]).

Chart 19[364]
Work-life index scores by request outcome, 2014



Note: The minimum score on the work-life index is 0 (indicating the lowest level of work-life interference) and the maximum score is 100 (the highest work-life interference). In the 2014 AWALI survey, the average score on the index for the whole sample was 42.1. Hence scores *above* the average indicate a work-life interference that is worse than average, scores below this level indicate a better than average work-life relationship.[365]

[300] Skinner and Pocock summarise the position as follows:

> 'Access to flexible work arrangements supports employee health, well being and work-life outcomes, as well as positively affecting workforce participation.'[366]

[301] In 2014, the majority of survey respondents (79.9 per cent) had not made a request for flexibility. Of these 'non-requestors', the majority (60.8 per cent) said they were content with their current working arrangements, with no significant difference between men and women.[367] This is lower than in 2012, when 70.5 per cent of employees were content with their current working arrangements.

[302] A further 15.1 per cent of survey respondents reported that flexibility was 'not possible or available' in their job (this was collated from response options 'not convinced employer would allow it', 'job does not allow it', and 'flexibility not possible or available'). The remaining portion of 'non-requestors' (24.1 per cent) gave various reasons for not making a request, but the sample sizes for each of these groups were too small to permit reliable reporting.[368]

[303] Of the total sample of 2014 survey respondents, Skinner and Pocock estimate that 31.3 per cent are not content with their current working arrangements but have not requested a change. Women are more likely to have made a request, and men are more likely to be 'content non-requestors' (there is no significant gender difference in the proportion of 'discontented non-requestors').

[304] The Skinner and Pocock observations relating to non-requestors are conveniently summarised in Table 14 of their paper, which is reproduced below as Table 3.

Table 3
Proportion requesting flexibility by gender and whether content with current arrangements (percentage of all employees) 2009, 2012 and 2014

	2009			2012			2014		
	Men	Women	All	Men	Women	All	Men	Women	All
Requested flexibility	16.3	29.1	22.4	17.3	24.2	20.6	15.4	25.1	20.1
No request – content with current arrangements	46.9	43.8	45.4	57.9	53.6	55.9	51.7	45.3	48.6
No request – not content with current arrangements	37.0	27.1	32.2	24.8	21.9	23.4	32.9	29.6	31.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

[305] In her evidence, Dr Murray noted that the AWALI 2014 survey identified a 'sizeable group' of 'discontented non-requesters'.[369] Of the 80 per cent of workers who had not made a request, 31 per cent (or 23 per cent of the total sample) were in this category. Men were more likely to be discontented non-requestors than women.

[306] Dr Murray referred to a qualitative study by Skinner, Cathcart and Pocock (the Skinner et al 2016 study) that examined the reasons for a small sample of these workers from the AWALI 2012 survey not making a request.[370]

[307] In that study, a randomised subset of the AWALI 2012 survey respondents considered to be 'discontented non-requesters' were invited to participate in an interview, conducted in October 2012. A total of 29 interviews were conducted with 17 women and 12 men drawn from a range of occupations and industries, with 26 interviewees having children aged under 18 years. Interviewees were asked why they did not request flexible working arrangements and any consequences.[371] Around one-quarter of the interviewees had changed jobs between the AWALI survey and the interview, with many doing so to pursue flexible working arrangements and/or more reasonable hours. The authors suggested that these observations supported the link between work-life conflict and turnover.[372] The authors concluded that many discontented employees lack labour market mobility or have caring obligations that lead them to remain in their jobs.[373]

[308] The Skinner et al 2016 study reported that many of those interviewed had actually made an informal approach as it was 'perceived to be lower risk', while in a number of cases interviewees anticipated that the request would be rejected and/or not well received and did not make a request at all.[374] For many, a work environment that was hostile to flexibility lay behind their decision not to make a request, as well as a concern about 'reprisals'. Some casuals feared their hours would be cut or they would not be offered further work. For some,

requesting flexibility may have signalled to their employers that they were not willing to be available when needed.[375] Unreasonable expectations around workload and long hours were also noted by some interviewees 'as factors undermining access to flexibility per se'.[376]

[309] One factor that was emphasised by interviewees was the importance of local supervisors and, specifically, changes in supervisor and their attitudes towards flexibility. Individual supervisor attitudes were found to be 'powerful barriers and enablers of flexibility', even with enterprise agreements that supported flexibility.[377]

[310] Skinner et al made the following observations about the reasons the 'discontented non-requestors' had not requested a change in their working arrangements:

> 'Interviewees had finely tuned perceptions about the flexibility climate in their workplace. They were very conscious of how a request for change might be received, how their fellow workers' or their own past requests had been received, and the possible consequences of requesting …
>
> Interviewees from a wide range of industries commented on the policy-practice gap as an expression of the powerful influence of prevailing cultures around flexibility. Attitudes of co-workers and some managers were very important in creating a climate that made the use of flexible arrangements uncomfortable in many workplaces …
>
> For many interviewees, their decision not to request was framed by a work environment which was openly hostile to flexibility … In our analysis, decisions not to request flexibility were made in order to protect against reprisals that employees had observed based on past experience or their observation of others' experience …
>
> Closely related to the theme of organisational culture was the emphasis interviewees placed on the attitudes of local supervisors as well as the role of senior management … Individual managers' attitudes were powerful barriers to and enablers of flexibility even where legal instruments like enterprise agreements supported flexibility.'[378]

[311] The ACTU argued that the findings from this study supported its assertion that a 'significant proportion' of employees do not make requests for flexibility even though they are unhappy with their working arrangements.[379]

[312] Ai Group submitted that 'a small proportion of respondents did not request changes to their working hours despite being dissatisfied with them' and state:

> 'the authors were unable to reliably report on the extent to which this was due to specific reasons other than a perceived lack of availability of flexibility, due to the very small sample sizes. As a result, the 2014 AWALI survey does not enable an assessment as to the other reasons for which non-requesters did not seek changes to their working arrangements or the prevalence of non-requesters refraining from making a request due to any such reasons.'[380]

[313] In relation to the AWALI 2012 survey, Ai Group noted that the Skinner et al 2016 study found that '[v]ery few respondents (3.0 per cent or less) provided other reasons, such as not feeling confident to ask, unable to afford a reduction in income, or concerns about negative impact on work colleagues'.[381] Ai Group concluded from this that '. . . overall, the proportion of discontented non-requesters is small'.[382]

[314] We do not find the submissions advanced by Ai Group in respect of this issue to be persuasive.

[315] The data from the AWALI 2012 survey shows that almost one-quarter of all respondents could be classified as 'discontented non-requesters'. Contrary to Ai Group's submission, this is a significant proportion of employees.

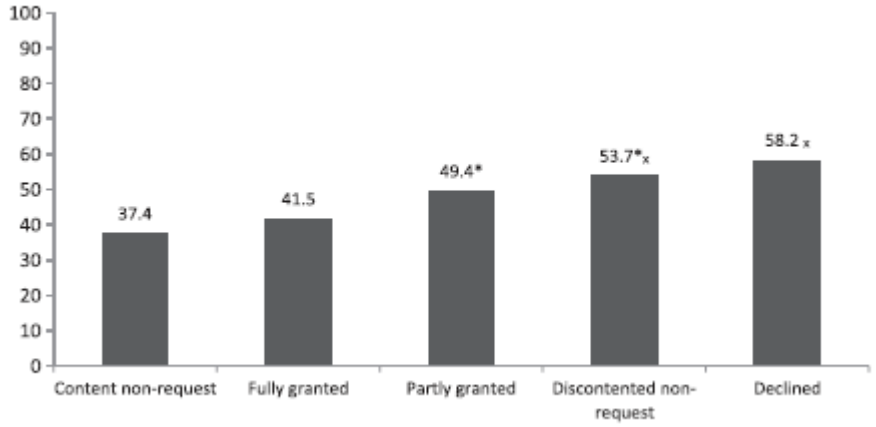
[316] The Skinner et al 2016 study provided an in-depth analysis of the reasons behind why these employees had not requested flexible working arrangements. One of the findings from the interviews was that workplace culture and supervisor attitudes were significant factors in determining whether employees requested flexible working arrangements. These factors are specific to the firm and, in particular, the more immediate working environment, implying that there is an inconsistent approach to flexible working arrangements.

[317] Skinner et al also found that around one in four of the 'discontented non-requestors' had changed jobs in the 7-8 months since their AWALI interview, many because they sought flexible working arrangements or more reasonable hours.[383]

[318] As shown in Chart 20 below, Skinner et al found that a lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference. This is so whether a request is refused or the employee would like a change but has not asked ('discontented non-requestors'). As observed by Skinner at al:

> 'These findings highlight the importance of addressing the circumstances of non-requesters, whose need for flexibility is made invisible by their decision not to request.'[384]

Chart 20[385]
Work-life index scores by request outcome, 2012



Note: Variable scores with the same symbol indicate non-significant difference

[319] We acknowledge, as submitted by Ai Group, that some of the concerns expressed may simply reflect the individual employee's perception (rather than the reality) and, further, it is

not known whether those interviewed were covered by modern awards. Despite these limitations, the Skinner et al 2016 study provides some useful insights into the significant proportion of employees who may be characterised as 'discontented non-requestors'.

Dr James Stanford

[320] The Stanford Report was prepared in response to a request by the ACTU to:

> 'provide a review and summary of the available research since 2004 about the nature and scope of the business benefits associated with family friendly work practices and, to the extent possible, the order of magnitude of such benefits relative to any costs that may be associated with family friendly work practices.'[386]

[321] The Stanford Report is in three parts. Part I provides a synopsis of published literature regarding the impact of family friendly work practices on business performance and other economic indicators. Part II discusses the economic context relevant to a consideration of policies to promote family friendly practices, including trends in labour force participation by parents and other carers, and the growth of part-time work and other forms of non-standard employment in the Australian context. Part III discusses the relative order of magnitude of the likely costs and benefits of implementing FFWH within work places.

[322] On the basis of a review of the relevant literature, Part I of the Stanford Report concludes:

> 'Overall, the extent research has shown that flexible work practices have a positive effect on firm performance, or at a minimum, a cost neutral impact.'[387]

[323] Ai Group submits that Part I of the Stanford Report can be given 'little weight' for various reasons including that:

(i) only a very small proportion of the literature reviewed relates to the Australian context;

(ii) none of the literature considers the specific mechanism contemplated by the ACTU's Claim; and

(iii) Dr Stanford's evidence based on the literature review does not rely on quantitative or qualitative research he has conducted and the authors of the relevant studies have not been called to give evidence in these proceedings.

[324] Ai Group also provides a critique of various publications Dr Stanford relies on in support of the views he expresses in Part I of his Report.[388] None of these criticisms were put to Dr Stanford in cross-examination.

[325] As to point (iii) above, evidence of a literature review is frequently tendered in Commission proceedings – by both unions and employer organisations – without the necessity of calling the authors of the papers cited. Such reviews provide a convenient means of summarising a considerable body of research. Indeed, it would be impractical to impose a requirement that the authors of each study referred to be called to give evidence. It is open for any party to cross-examine a witness who gives evidence regarding a review of the literature

on a specific topic. Such cross-examination can, of course, canvass any methodological limitations in the reviewed studies and can challenge any conclusions the witness makes based on the review of the literature. None of this was done in this case. Indeed, Dr Stanford was not cross-examined *at all* in respect of Part I of his Report.

[326] However, our review of the studies canvassed in Part I of the Stanford Report supports propositions (i) and (ii) advanced by Ai Group. It follows that Dr Stanford's evidence does not directly support the Claim. Rather, his evidence highlights the benefits of providing workplace flexibility by means of 'reciprocity in decision making power'. Dr Stanford explained this concept in the course of cross-examination:

> 'Mr Ward: So I'm trying to understand what you mean by reciprocity in decision making.
>
> Dr Stanford: By reciprocity. Reciprocity in decision making power would be the full phrase. And I'm not referring simply to the fact that the two parties come together and discuss and exchange views. I'm referring to which party among them has the actual power to impose their preferences on it. And right now there is tremendous flexibility in Australia's employment patterns. Australia's labour market is one of the most flexible in the world, judged by the preponderance of these non-standard forms of work as well as by the general minimalism of regulations regarding employment protection and other matters. But within that context of flexibility it's presently a very one-sided vision of how flexibility should occur and who gets to choose the flexibility. So the flexibility is largely reflecting the employer's choice that, "I want workers at a certain time but not at other times". It generally does not reflect the employee's choice that, "I would like to work these particular hours and not these particular hours" …
>
> Mr Ward: So if you believe in reciprocity of decision making power I take it you wouldn't want to see a world where the employer dictates, and you wouldn't want to see a world where the employee dictates. You'd want something in the middle?
>
> Dr Stanford: Reciprocity, in my judgment, would be one where employees have some meaningful power to ensure that their work arrangements are a good fit with their other responsibilities in life.
>
> . . .
>
> Mr Ward: given your concept of reciprocity of decision making power, you wouldn't agree to a system where the employer dictates? That's true isn't it?
>
> Dr Stanford: I'm not suggesting an arrangement where either side dictates.'[389]

[327] Drawing on the literature reviewed in Part I of his Report, Dr Stanford concludes that family friendly work flexibility has benefits for firm performance which are positive and significant. Such benefits are said to arise from:

(i) increased retention of existing workers;

(ii) corresponding savings in recruitment, training, and placement costs for replacement workers;

(iii) greater success in recruitment of new workers;

(iv) increased attendance of employees;

(v) reduced costs for sick leave and other absences;

(vi) reduced 'presenteeism', whereby workers are physically at work but unable to fully perform their duties;

(vii) increased productivity (measured in output per hour of work) demonstrated by part-time workers and by those with a more sustainable work-life balance; and

(viii) improved staff morale and loyalty to the enterprise.[390]

[328] ACCI accepts that the benefits outlined above are likely to arise in circumstances where an employer has some ability to first assess the business effect of granting a flexible working arrangement:

> 'The implementation of family friendly arrangements can result in benefits for some employers, or costs or disruption for some employers in a particular context … (so much is self evident from the limited refusal of requests).
>
> Given the current legislative paradigm allows an employer some ability to assess the business effect of granting flexible working arrangements before they do so, it follows that the benefits outlined at [6] of the Stanford Report are likely to arise in many cases.'[391]

[329] Ai Group also notes:

> 'There has been an abundance of research and academic literature reporting the benefits to organisations from flexible work arrangements, including family friendly working arrangements. Much of this is contained in the ACTU's material; specifically the witness statement of Dr John Stanford.'[392]

[330] While the literature review in the Stanford Report is of little relevance to the Claim, given the various contextual differences, it does provide cogent evidence of the benefits for businesses associated with the provision of flexible working arrangements, in particular benefits in increased staff retention and attendance.

[331] As to the impact on staff retention, the Stanford Report says:

> 'One of the clearest demonstrated benefits of family-friendly working hours arrangements is improving retention and reducing turnover of staff who might otherwise sever entirely from their positions due to the perceived impossibility of balancing their paid work and caring duties. Strong evidence of a positive impact on retention is reported in many studies, including Haar (2004), Donnely et al. (2012), Todd and Binns (2013), and the literature surveyed in Ireson et al. (2016). The Future of Work Institute (2012) reports a 10 percent increase in retention with the introduction of family-friendly hours flexibility. In Philmann and Dulopovici's (2004) research, 61 percent of SMEs reported higher retention. Surveying individual workers, Moen et al. (2011) found that 45 percent of workers under flexible hours systems reported a reduction in their intentions to sever.'[393]

[332] As to employee attendance, the Stanford Report says:

> 'The literature is also clear that family-flexible hours arrangements have positive and measurable impacts on employee attendance. This finding is reported consistently in numerous studies and surveys, including Ireson et al. (2016), Smeaton et al. (2014), and Heywood and Miller (2015). The Council of Economic Advisors (U.S., 2010) estimates a 20 percent reduction in absenteeism under family-friendly flexibility in working hours.'[394]

[333] Part I of the Stanford Report also highlights that the utilisation of greater flexibility in working hours is one way of boosting female labour force participation.[395]

[334] As we have mentioned, Part II of the Stanford Report discusses the relevant economic context, including trends in labour force participation and the growth in part-time work. Much of this material is uncontentious and has been included in Chapter 5.1.

[335] Part III of the Stanford Report is more contentious. In Part III, Dr Stanford discusses the relative orders of magnitude of the likely costs and benefits of implementing the ACTU's Claim for FFWH.

[336] At paragraph [54] of his Report, Dr Stanford advances the following conclusion in relation to the firm level benefits of the right to FFWH:

> 'In sum, my comparison of the broad order of magnitude of costs and benefits to firms of adopting family-friendly working hours flexibility, suggests that the benefits are potentially significant, while the costs are modest to negligible. In my judgment, it is quite probable that the introduction of these policies will provide a net benefit to firms, experienced especially through increased staff retention and attendance, and higher realised productivity.'[396]

[337] It seems to us that the proposition that there will be a net benefit to firms from the introduction of FFWH is highly speculative and will almost certainly depend on the circumstances. We note that Dr Stanford accepts that an employer would incur costs if an employee had to be recruited to meet an existing employee's request for flexible working arrangements.[397]

[338] Dr Stanford discusses the economy-wide benefits of FFWH at paragraphs [55]-[59] of his Report. He suggests that the aggregate macro-economic benefits of such policies '... would be measured in billions of dollars'[398] based on increased female participation in the labour market. At [59] Dr Stanford concludes as follows:

> 'the ACTU's proposal for a right to family-friendly hours for employees with documented caring responsibilities, would generate important benefits that would be shared, on a net basis, by employers. Moreover, that policy would also likely generate important economy-wide benefits: including improved labour force participation by carers, especially women; increased employment rates; higher aggregate GDP and incomes; and higher government tax revenues.'[399]

[339] It seems to us that Dr Stanford's assessment of the aggregate economic benefits of granting the Claim are also highly speculative, a point acknowledged in the Stanford Report:

> 'Once again, it should be recognised that precise quantitative simulations of the benefits and costs to firms of implementing family-friendly working hours policies would be highly speculative and unreliable, due to lack of data regarding the specific incidence of caring responsibilities among employees'.[400]

[340] The aggregate economic estimates that are provided are based on the assumption that in the event of an increase in labour force participation, there will be suitable employment available for all those seeking work.[401]

[341] For the reasons given, we reject Dr Stanford's evidence as to the aggregate economic benefits of granting the Claim.

Ms Julie Toth

[342] Ms Toth is the chief economist for Ai Group and in her statement she responds to a series of questions in relation to workforce participation and productivity that had been put to her by the Ai Group legal area. Those questions were not attached to the Toth Report.[402] During cross-examination, Ms Toth said that she had been given written instructions in relation to her Report in a letter,[403] but when called for the letter was not able to be produced from the bar table.[404] Ms Toth later conceded that she had not received a written letter of instructions.[405] It seems that the Toth Report was prepared by her in an iterative process with members of Ai Group's legal team. We also note that unlike the other expert witnesses in these proceedings, the Toth Report does not contain a declaration to the effect that she has read, understood and complied with the Federal Court's Expert Evidence Practice Note in the preparation of her Report.

[343] Ms Toth was initially proffered as an expert witness, but Ai Group's representative resiled somewhat from that position in his closing oral submissions:

> 'We haven't proffered her as an independent expert in the sense that might be required in say legal proceedings of the Federal Court and so forth, but obviously the Commission is given a wide discretion to receive information. Obviously Ms Toth has in our submission expertise and knowledge and experience that would assist the Commission and of course we've tried to proffer her as a witness in part, because we thought it would be greater assistance to the Commission than myself standing here speaking about economic principles. We say some weight can attach to these measures but no, I can't put it that she has the status of an independent expert witness.'[406]

[344] In a later exchange Ai Group's representative appeared to characterise the Toth Report as a submission:

> 'JUSTICE ROSS: … I understand the part of her evidence that you're particularly going to in relation to the allocated efficiency et cetera, is more in the way of general economic theory …
>
> MR FERGUSON: That's right and Ms Toth raises those in the sense that we might otherwise raise in our submissions for the person to have regard to.
>
> JUSTICE ROSS: Yes, yes.
>
> MR FERGUSON: And might not give them the weight - or the same weight as evidence. It is still a relevant consideration, the same way all these articles that aren't proffered in the same way are relevant considerations.'[407]

[345] It seems to us that Ms Toth's evidence is proffered on the basis that she has expertise in the field of economics, and labour market economics in particular, but it is conceded that

she is not an *independent* expert witness. This characterisation of Ms Toth's evidence is also consistent with the view put by ACCI:

> 'Ms Toth presented *a perspective from employers* in relation to broader economic theory and data aspects of these proceedings'[408] [Emphasis added]

[346] We were also invited to regard substantial parts of Ms Toth's evidence as being in the nature of submissions.

[347] It seems to us that this is a very unsatisfactory state of affairs. Expert evidence which is not independent, by definition lacks impartiality and should be treated with significant caution. Such evidence can be accorded little weight. Further, it is not appropriate to advance a submission in the guise of a witness statement. We do not intend our remarks to be taken as a criticism of Ms Toth; the fault lies with those who called her.

[348] We have incorporated some of the uncontentious material from the Toth Report in Chapter 5.1. We wish to make three observations about the balance of Ms Toth's evidence.

[349] First, to the extent that Ms Toth contends that the engagement of part-time employees results in a loss of productivity, we reject that proposition. Ms Toth relies on the 2008 Abhayaratna et al Productivity Commission working paper to support her contention.[409] The working paper says, relevantly:

> 'there may … be productivity differences between full and part time workers. A reduction in working hours may increase productivity due to a reduction in fatigue and boredom. Alternatively, a reduction in hours may lower productivity as non-productive activities such as meal breaks, setting up and shutting down times will represent a larger proportion of the overall working day.'[410]

[350] The Abhayaratna et al Productivity Commission working paper contemplates the prospect that employees who work less than full-time hours *may be* less productive. By contrast, Ms Toth appears to definitively state that 'productivity losses result from the engagement of part-time employees'.[411] It seems to us that Ms Toth's evidence substantially overstates the proposition advanced in the working paper. In any event, the working paper was simply surmising as to the potential productivity effects of part-time work, rather than expressing a statement of fact. Further, the views expressed were unsupported by any quantitative or qualitative research.

[351] The statement in the working paper regarding the potential differences in the productivity of full-time and part-time employees is, as the ACTU submitted, 'brief and speculative, and not a considered conclusion based on an assessment of the available literature'.[412] It is also inconsistent with other research referred to in the proceedings before us. For example, a 2013 Ernst & Young report found that 'women with a high level of job flexibility: waste less time, are more productive and have more clarity over their career direction'.[413]

[352] Second, Ms Toth's evidence about the lack of perfect substitution of labour was corroborated by Dr Stanford in cross-examination[414] and to that extent we accept it.

[353] Third, Ms Toth expressed the opinion that the likely impact of the Claim on national productivity would be negative:

> 'Although it is difficult to measure and quantify, I consider the likely impact of the ACTU's claim on national productivity to be negative because it would impede our collective ability to allocate resources (in this case labour) to their most productive and efficient use within firms or between firms. This would have the effect of reducing the productivity and efficiency with which labour is utilised across the national economy. The difficulties associated with quantifying the precise reduction in productivity and efficiency as a result of this claim does not mean that the reduction would be negligible. It simply means it would be exceedingly difficult to isolate the effects of this individual claim from all other contributing factors or variables that are occurring concurrently, and it would be difficult to quantify exactly how this individual claim would interact with all other contributing factors or variables that are occurring concurrently.'[415]

[354] We note that the opinion proffered was significantly qualified by the appropriate concession that the productivity impact of the Claim is 'difficult to measure and quantify'. We would also observe that the opinion proffered expresses a conclusion without adequately exposing the reasoning process by which it was arrived at. Taking these matters into account and the concessions made as to the characterisation of Ms Toth's evidence, we do not propose to give any weight to Ms Toth's opinion as to the likely impact of the Claim on national productivity.

5.3.2 Lay witness evidence

[355] The ACTU relied on the evidence from 10 lay witnesses[416], of whom only five were required for cross-examination (marked *):

- Monika Bowler[417]
- Ashlee Czerkesow*[418]
- Sasha Hammersley*[419]
- Sherryn Jones-Vadala*[420]
- Nicole Mullan[421]
- Michelle Ogulin[422]
- Katie Routley*[423]
- Andrea Sinclair[424]
- Jessica van der Hilst*[425]
- Witness 1.[426]

[356] The Employer parties made various general observations about the evidence of the ACTU's lay witnesses.

[357] The NRA noted that only two of the ACTU's lay witnesses are employed under the terms of a modern award; the remainder are employed under enterprise agreements. The NRA submitted that we should exercise 'extreme caution' when considering the probative value of the evidence of employees 'excluded from the Modern Award system' and that such evidence

is relevant 'only insofar as it goes towards their personal experience of flexible working arrangements under s.65 of the FW Act'.[427]

[358] Ai Group criticised the ACTU lay witness evidence on the basis that it was limited to witnesses from five industries, noting that '[t]he ACTU has not called *any* witness evidence regarding the operation of existing avenues for flexible working arrangements in relation to a very significant number of key industries and occupations relevant to Ai Group's members'.[428]

[359] ACCI contended that '[t]he ACTU's relative focus on the education sector complicates matters, given the particular characteristics of that sector (including the availability of part time work in different 'systems') which make the accommodation of flexibility requests more complex'.[429]

[360] In our view these criticisms are misplaced. The NRA's submission is misconceived; while enterprise agreements apply to 8 of the 10 lay witnesses (and hence the relevant modern awards do not apply to them, see s.57(1)), they are still *covered* by modern awards and those awards underpin the enterprise agreements.

[361] As to Ai Group's submissions, the same criticism may be made of the Employer parties' lay witness evidence. But, importantly, lay witness evidence – whether led by the ACTU or the Employers – is *not* intended to be representative of the experience of *all* employees or employers covered by modern awards and it is not put forward on that basis.

[362] The lay witness evidence puts a human face on the data and provides an individual perspective on the issues before us. It reflects the experience of the particular employees in seeking flexible working arrangements and of the particular employers in dealing with such requests. Such evidence is qualitative in character and is illustrative of the experience of employees and employers. By its nature, the evidence is *not* amenable to extrapolation and hence it cannot be said to be representative of the experience of all national system employees and employers.

[363] In relation to ACCI's criticism of the ACTU's lay witness evidence, we note that only three of the ACTU's 10 lay witnesses were from the education sector.[430] We would also observe that ACCI led no evidence regarding what it asserts are the 'particular characteristics' of the education sector.

[364] Before turning to what we draw from the ACTU's lay witness evidence, it is convenient to deal with the following submissions from Ai Group:

> 'There is no probative evidence that establishes that the personal views or attitudes of individual managers are resulting in requests for flexibility being refused in circumstances where there is otherwise an absence of reasonable business grounds.'[431]

[365] It is not entirely clear what is being put in the above submission as it relies on a value judgment about whether there is 'an absence of reasonable business grounds' in a particular case. But, to the extent it is suggested that there is no probative evidence of individual managers showing a negative attitude towards requests for flexible working arrangements, we

reject that proposition. The evidence of Ms Jones-Vadala, Ms Routley and Ms Ogulin is relevant in this regard. In her statement Ms Jones-Vadala records the attitude towards such requests of the Principal of the school at which she worked:

> 'My application was followed up with a letter of acknowledgement, which I did not keep a copy of, from the Principal. A few weeks later, in July 2011, I had an interview with the Principal. In my written application and the interview I advised that I wished to return part-time from the commencement of the 2012 school year in order to care for my two young children. I did not specify whether my request for part-time work was for a temporary period or ongoing.
>
> At the meeting with the Principal I advised that I was flexible as to what subjects I could teach and what year levels. I indicated I was willing to teach any subject that would fit with the timetabling. I am able to teach a broad range of subjects including Year 7-10 Maths, Year 7-10 Science, VCE Biology, VCE Environmental Science, VCE Psychology, VCAL Personal Development Skills and Work Related Skills, Year 7-12 Health and Physical Education and year 7-10 Dance. I said I was willing to work 2-3 days a week.
>
> I was advised by the Principal that she doesn't allow job share and there was no guarantee that part-time work of the same two or three days each week was available as it was too hard to accommodate in the timetable. She advised that if you want to do part-time it is more than likely to be spread out.
>
> During the negotiations, the Principal told me that she had managed to return to work full time when her children were 6 weeks old, and she asked why my family was not able to care for my children. For the reasons explained above, this was not a possibility for me.'[432]

[366] At the time she was seeking flexible working arrangements Ms Jones-Vadala was experiencing some difficulties in obtaining suitable childcare arrangements for her children. During cross-examination, Ms Jones-Vadala was asked about these difficulties and the response of the school's Principal:

> 'Counsel: And I think you say here that you managed to secure some Monday and Friday child care?
>
> Ms Jones-Vadala: It was getting really difficult because I couldn't give then anything concrete and they said the only two days they could guarantee were Monday and Friday but they could only hold it for a period of time.
>
> Counsel: And I take it that period was the month you've said in your statement?
>
> Ms Jones-Vadala: That's right. They had other people on the waitlist.
>
> Counsel: And can I just understand did the school understand what you were doing with your child care arrangements at this time?
>
> Ms Jones-Vadala: Very clearly and she was not compassionate about it at all.
>
> Counsel: And so she being who?
>
> Ms Jones-Vadala: The principal.'[433]

[367] Similarly, Ms Routley records her view that the Principal of her school 'was not a fan of part time work' and that: '[m]y colleagues told me that numerous staff before me had been forced to resign once their parental leave entitlements were exhausted because of this policy'.[434] Ms Ogulin also comments on her manager's antipathy towards part-time work.[435]

[368] We now turn to make some general observations about the ACTU lay witness evidence.

[369] First, the evidence reveals a preference for part-time work by working parents, particularly mothers, and also illustrates the interrelationship between requests for reduced hours and the availability of suitable child care.

[370] For instance, Ms Jones-Vadala's evidence was that the limited availability of child care impacted on her ability to accept flexible work proposals.[436] Similarly, Ms van der Hilst gave evidence about the effect of the limited availability of child care on her requests for reduced hours:

> 'I started maternity leave on June 2015. I took 13 months off. Shortly before I was due to return to work (the first week of May 2016), I contacted my manager to work out exactly what my days and hours of work would be. My team was happy to have me back in any capacity and so my requests were approved. I returned to work in July 2016 working 3 days per week, while my child was in daycare 2 days per week. I worked from home on one of these days. A copy of the emails between my manager and I following our initial conversation are Attachment B. At this stage my family travelled from Berrara to look after my child on my third work day.
>
> In October 2016, I increased to 4 days a week at the request of my manager. I needed to find additional daycare because my family had to travel three hours to come and look after our child and it was not workable twice a week. I managed to organise child care for an additional day, but needed to work at least 2 days from home so that I could drop my child off and pick him up. I didn't have a direct line manager at the time, and my two-up manager pushed to have me in the office for the additional day. My request for 2 days working from home was eventually agreed to, in part because I got a new line manager who had kids of her own and who was supportive of my request to work 2 days from home. In February 2017, I returned to full-time hours as I was able to get a fifth day of day care. I have continued working from home 2 days per week.'[437]

[371] Ms Czerkesow's evidence also illustrates the impact of the availability of child care:

> 'On 26 June 2012, my direct manager emailed me advising that One Path could either offer me full-time work, or part-time work starting in mid-July for five hours a day, five days a week, on a rotating weekly roster of different starting and finishing times to be determined according to business needs, with the arrangement to be reviewed on my original maternity leave end date. I was told that if I didn't want to accept the offer of part-time, I could finish my full period of maternity leave and return to work on the return date I had originally nominated, in January 2013. I was asked to advise of my choice by close of business the following day.
>
> The next day, I emailed my manager to advise that I would have difficulty arranging care for my daughter at such short notice, and that I needed certainty around my start and finish times in order to book a family carer. I said I had managed to arrange care for Monday to

> Wednesday, but not for Thursday or Friday. I asked whether the business would consider letting me work fewer days after the end of financial year rush was over in September. Later that day, my manager emailed back confirming that I was being offered temporary part-time work up until my original maternity leave end date, and my shift times would be 9:00am-2:00pm Monday to Friday. I was advised that no other flexible arrangements could be guaranteed at that point and I was asked for my decision by the end of that day.
>
> We ended up finding family day care for three days a week and asking my mum and a family friend to help on the other two days. Family day care has set hours and required payment for a full seven hour day, so we had to pay for seven hours on those three days even though we only needed five hours of care.'[438]

[372] Some of the ACTU's lay witnesses reported that their requests for flexible working arrangements had been met.[439] A number of those witnesses spoke eloquently of the benefits they experienced from being able to secure suitable part-time working arrangements. For instance, Ms Hammersley said:

> 'Having the ability to work part-time after childbirth has been tremendously important for my work/life balance and I believe it has been essential for my mental health. Going back part-time has meant that on days I do not work I am able to spend quality time with my young children getting to know them and seeing their milestones happen as they occur. I have time to take them to sporting lessons and other extra-curricular activities that are important for their development, as well as attending to household chores like going to the bank. When returning to work the impact for my children has also been lessened and I have not suffered the guilt which can be associated with going back to work, as I know I am able to spend the majority of my time with them. It has also helped me keep up with the house work during the day, meaning that I am able to spend the evenings relatively stress free from those duties and have good quality family time with my husband and kids.'[440]

[373] Witness 1 also gave evidence of the benefits associated with flexible working arrangements:

> 'It's only been three months since I commenced my FWA, but there have already been some promising improvements in my son's mental health and also in our general family dynamic, and I'm hopeful that this will continue in the months ahead. My FWA has significantly helped to ease the burden on my partner, who up until then had been taking on most of the caring work due to my long hours and fixed shifts.'[441]

[374] However, four of the ACTU's 10 lay witnesses gave evidence that they were unsuccessful in their attempts to secure flexible working hours and in some cases were left with no practical option but to leave their position to obtain other (flexible but less secure) work. Ms Jones-Vadala left her position as a secondary school teacher and, after unsuccessfully applying for part-time teaching positions, became a sessional swimming teacher. She made the following observation about her experience:

> 'I feel that I have been disadvantaged on many levels because I could not return to my ongoing employment in a part-time capacity. I believe my employer was actively opposed to providing part-time employment and there was nothing I could do about it.'[442]

[375] Ms Routley also speaks of the adverse consequences of her employer's refusal to accede to her request for flexible working hours:

> 'I now refer to that year as one of the most difficult of my life. Working full-time in the classroom along with doing all of the extra-curricular commitments required by the school (for example, sport supervision after school and on the weekends) had a significant detrimental impact on my family life and my health, including my mental health. I took approximately double the amount of sick leave I was entitled to, hence half the sick days I took were unpaid. My daughter had to go into childcare 4 days per week, because neither my husband nor my mum could care for her five days per week. My husband was working part-time and did not have job security and my mother also had to care for my father. My daughter caught various illnesses in child care and was sick often. I felt I missed out on her growing up between the ages of one and two. I cannot recapture this time.
>
> I believe everything in my life suffered at that time - my family life as well as my teaching life. I certainly didn't teach to the best of my ability because I was run down by trying to do too many things well. It was not possible; I did many things only half as well as I felt I should. I felt constantly exhausted and drained and was not as healthy as I used to be.
>
> Had I been able to return to work part-time there would have been much greater balance in my life. I believe I would have been a better teacher and parent. Sharing the teaching load with another teacher would have added balance that was missing in my life that year. I believe professionally I would have been able to give much more to my class, been more organised and would have benefitted from working alongside another teacher so that we could not only share the load but would be able to learn from each other.'[443]

[376] We now turn to the evidence of the Employer parties' lay witnesses.

[377] Ai Group relied on the evidence of four lay witnesses:

- Jeremy Lappin[444]
- Benjamin Norman[445]
- Janet O'Brien[446]
- Peter Ross.[447]

[378] The NFF relied on the evidence of four lay witnesses:

- Edwina Beveridge[448]
- Lucinda Corrigan[449]
- Chris Kemp[450]
- Deborah Platts[451]

[379] ACCI relied on the evidence of four lay witnesses:

- Paula Bayliss[452]
- Lauren Cleaver[453]
- Jae Fraser[454]
- Mark Rizzardo.[455]

[380] None of the ACCI lay witnesses were required for cross-examination. ACCI submitted that the lay witness evidence was advanced for the purpose of illustrating the particular practical considerations and problems that individual employers have encountered in responding to claims for flexible working arrangements.[456] In doing so the evidence provides some insight into the human dimension of the issue before us, from the perspective of managers.

[381] The Employer parties' lay evidence concerned businesses employing 9150 employees in total, ranging from one employee[457] to 5178 employees.[458] The lay evidence related to businesses in diverse fields, such as:

- manufacturing;[459]
- education;[460]
- farming;[461]
- child care and early childhood education;[462]
- passenger transport;[463]
- agribusiness;[464] and
- construction – equipment hire and sales.[465]

[382] The Employer parties' lay witnesses generally indicated that they sought to accommodate employee requests for flexibility, subject to operational constraints,[466] acknowledging the mutual benefits which such flexibility can generate. As Mr Norman put it:

> 'Glencore Agriculture/Viterra endeavours to accommodate requests for flexible working arrangements wherever possible. This is because the companies understand that these arrangements can benefit both the individual and the business. There are limited employees/potential employees who are skilled and available to perform the requisite roles in some areas in which we operate (especially in regional areas), so it is in our best interests to retain employees '.[467]

[383] Three of the Employer lay witnesses detailed the number of flexibility requests they received and the business' response. Most requests were granted. In total, of the 11 requests received eight were granted and three refused.[468]

[384] In one instance where a flexibility request had been refused the employee 'decided to resign and move to another centre in a different position where she could work the hours that she chose'.[469]

[385] The Employer parties' lay witnesses illustrated some of the operational considerations which constrain a business' capacity to grant employee requests for flexible working arrangements.

[386] For example, Mr Fraser's evidence extensively canvassed the regulatory environment in which child care centres operate and the impact it has on rostering in terms of minimum staff numbers and the qualifications required of staff rostered in particular areas.[470] Mr Mark Rizzardo gave evidence of the impact of service requirements on rostering. Mr Rizzardo is the

Group Operations Manager of Busways Group Pty Ltd, which operates a bus passenger network employing 1400 employees. During his evidence, Mr Rizzardo canvassed the limitation service requirements place on the business' capacity to meet employee requests for flexibility:

> 'For obvious reasons, buses are scheduled at a specific time to meet a specific need. In Busways' case, this is tied to the provision of school bus services and to facilitate commuter needs.
>
> These service requirements mean that Busways is required to deploy its staff at particular times which are not flexible in respect of employee preference and availability.
>
> As a general proposition, Busways can only provide work to employees when buses are required to run, and cannot provide work to employees during periods when buses do not run.
>
> Importantly, where school bus services are run, these services run during school 'pick-up' and 'drop-off' times. These services operate on a time specific schedule as set out by schools and the department of education in accordance with contractual requirements determined by the regulator … For obvious reasons, these services cannot be rescheduled to other times during the day.
>
> Such times are also commonly the subject of employee flexibility requests so as to allow employees to attend to their personal responsibilities in picking up or dropping off their own children.
>
> This leads to a direct conflict in staffing requirements and employee preference/ availability.'[471]

[387] The Employer parties' lay witnesses from the agriculture sector spoke of the impact of seasonal factors and animal husbandry on their capacity to meet employee requests for flexibility. For example, Ms Beveridge said:

> 'Many of the tasks in the piggeries operation are performed on a daily basis and intertwine or require multiple staff to be completed safely and efficiently.
>
> For example after weaning, sows are moved from the farrowing house to the dry sow shed, this task normally requires three people. Once the sows have been removed from the farrowing house, the farrowing crate must be pressure washed, disinfected and given time to dry before the next sows are placed into the farrowing house. If moving sows is delayed the whole cycle is disrupted, if pens are not adequately cleaned and dried animal welfare of new born piglets may be threatened.
>
> Staff working with pigs are required to work on weekends. It can be challenging to ensure we have enough people rostered on every weekend to provide adequate care for our pigs, particularly given that, although it is not always possible, we try to minimise the times staff work alone in pig sheds. We are flexible where we can be with staff swapping weekends and accommodating leave and weekend requirements, however this is not always possible.'[472]

[388] Ms Platt, who operates a dairy farm, spoke of the demands of the milking schedule and how this determined staffing requirements.[473]

[389] A number of the Employer parties' lay witnesses spoke of the adverse consequences which would follow in the event the Claim was granted. For example, Mr Norman said:

> 'If an employee is able to dictate their days and hours of work, this can result in circumstances where the employee wants to work at a time that there is in fact no work for them to perform. I understand that Glencore Agriculture / Viterra would have an obligation to pay the employee for that time, even though there is no work for them to undertake. It also gives rise to safety concerns. This is because, for example, that employee could be the only employee at the jetty or on site that day, resulting in a safety risk.'[474]

[390] Mr Ross, from Rheem Australia, spoke of the difficulty of finding skilled labour to work only part of a day or shift.[475] A number of the Employer parties' lay witnesses spoke of the costs associated with employing additional employees to meet flexibility requests.[476]

5.4 Findings

[391] During the course of the proceedings on 21 December 2017, the parties confirmed their general agreement to a range of contextual matters which have informed our findings. A copy of the agreed matters is at Attachment F. We note here that the desirability of employers and employees reaching agreement on flexible working arrangements is generally accepted, although the framework within which such matters are discussed is contested.

[392] We have already set out a number of general propositions which may be drawn from the data discussed in Chapter 5.1 (see [213]-[221]). We now make the following further findings based on the evidence and material before us:

1. The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers.

2. Access to flexible working arrangements enhances employee well-being and work-life balance, as well as positively assisting in reducing labour turnover and absenteeism.

3. 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.

4. Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.

5. The most common reason for requesting flexible working arrangements is to care for a child or children; another significant group seek flexible working arrangements to care for disabled family members or elders.

6. The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities. The next most common type of flexibility sought is a change in start/finish times and a change in days worked.

7. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible working arrangements. Women do most of the unpaid care work and seek to adapt their paid work primarily by working part-time.

8. About one in five Australian workers requests flexible working arrangements each year. Only a small proportion of all such requests are made pursuant to s.65 of the Act (about 3 to 4 per cent of employees have made a s.65 request).

9. There has been an increase in awareness of the s.65 right to request over time, from 30 per cent in 2012 to over 40 per cent in 2014, with a similar rate of awareness between men and women. Despite this, there has been little change in the proportion of employees who request flexible working arrangements since the introduction of s.65.

10. The utilisation of IFAs for family friendly working arrangements is very low. Only about 2 per cent of employees report having an IFA with their employer. About 60 per cent of employees who have initiated an IFA did so in order to seek flexibility to better manage non-work commitments.

11. The vast majority of requests for flexible working arrangements (both informal and those made pursuant to s.65) are approved in full, some requests are approved with amendments and small a proportion (about 10 per cent) are rejected outright.

12. Workplace culture and norms can play an important role in the treatment of requests for flexible working arrangements. Individual supervisor attitudes can be powerful barriers and enablers of flexibility.

13. Some employees change jobs or exit the labour force because they are unable to obtain suitable flexibility in their working arrangements.

14. A significant proportion of employees are not happy with their working arrangements but do not make a request for change (a group referred to as 'discontented non-requestors'), for various reasons including that their work environment is openly hostile to flexibility. Men are more likely to be discontented non-requestors than women.

15. A lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference (as measured by the AWALI work-life index). This is so whether a request is made and refused, or whether the employee is a 'discontented non-requestor'.

16. The fact that a significant proportion of employees are 'discontented non-requestors' suggests that there is a significant *unmet* employee need for flexible working arrangements.

17. The granting (in whole or in part) or refusal of employee requests for flexible working arrangements largely depends on the context in which the request is made, including the nature and size of the business and the role of the employee.

18. The main reasons given for refusing an employee's flexibility request are operational grounds, including the difficulty of finding another person to take up the time vacated by an employee moving to part-time work.

19. Employee requests for flexible working arrangements, specifically those seeking a reduction in hours, may require substitution of that employee. Depending on the nature of the business and the employee's role, the accommodation of flexible working requests which require the substitution of an employee may be difficult or impractical for a variety of reasons.

20. A modern award term which provides employees with parenting or caring responsibilities with the right to work on a part-time or reduced hours basis without their employer having the right to refuse or modify the employee's decision, would be likely to have adverse consequences for a significant proportion of businesses.

6. Conclusion and Next Steps

[393] Flexible working arrangements have been the subject of increasing attention in Australia and many other countries in recent years. A number of countries, including Australia, have introduced statutory rights for employees to request flexibility at work in an effort to assist employees to better accommodate their work and parenting/caring responsibilities.

[394] As noted by Skinner et al, flexibility in this context 'refers to arrangements in which employees have some say or influence over where work is conducted (for example, telecommuting) and/or when it is conducted (for example, flexi-time) and for how long (for example, working reduced hours or part-time).[477]

[395] As we have mentioned, the desirability of employers and employees reaching agreement on flexible working arrangements is generally accepted. It is the framework within which such matters are discussed which is contested. At the heart of this contest (and these proceedings) is the question of how much 'say or influence' employees should have in the determination of their working arrangements.

[396] If granted, the Claim would create a new set of employee entitlements, in particular:

- an employee with parenting or caring responsibilities will have a *right to access* FFWH upon giving their employer 'reasonable notice'; and

- an employee with parenting responsibilities who is on FFWH will have *a right to revert* to their former working hours up until their child is school aged (or later by agreement); and

- an employee with caring responsibilities who is on FFWH will have a right to revert to their former working hours for a period of two years from the date they commence their FFWH (or later by agreement).

[397] The Claim defines FFWH as an employee's existing position:

(a) on a part-time basis if the employee's existing position is full-time; or
(b) on a reduced hours basis, if the employee's existing position is part-time or casual.

[398] In short, the Claim would provide an employee with parenting or caring responsibilities the right to work on a part-time or reduced hours basis, subject only to giving their employer 'reasonable notice'. Importantly, unlike the right to request under s.65 of the Act, an employer would not be able to refuse an employee's proposed FFWH on reasonable business grounds (or indeed on any grounds at all).

[399] Further, the Claim also appears to permit the unilateral variation of working hours on an unlimited number of occasions, subject only to the giving of 'reasonable notice'.

[400] We have set out the submissions for and against the Claim in Chapter 4.

[401] In essence, 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.

[402] As to the existing regulatory arrangements, the ACTU submits that there is a 'gap' in the safety net regarding flexible working arrangements because the 'right to request' in s.65 does not provide employees with an enforceable right. An employer's decision to refuse a s.65 request is not subject to review or appeal.

[403] The Employer parties oppose the Claim and contend that s.65 provides a suitable framework for dealing with requests for flexible working arrangements. They submit that the Claim is fundamentally unfair and unworkable in that it does not provide employers with a capacity to refuse a request for flexible working hours. As ACCI puts it, to grant the Claim would be to 'fundamentally alter the paradigm under which an employer operates a business'.[478]

[404] The Employer parties contend that the current provisions of the Act (and informal arrangements) operate effectively to facilitate flexible working arrangements.

[405] There is considerable merit in each of the respective positions.

[406] We accept, as the ACTU contends, that s.65 lacks an effective enforcement or appeal mechanism. The right to request in s.65 has been characterised as a 'soft' regulatory approach, insofar as the employee is denied any effective means of challenging the employer's refusal to grant their request.[479] The Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s.65(5) unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.[480]

[407] Both s.65 and the Claim lack what Dr Stanford referred to as 'reciprocity in decision making power' (see [326]). Dr Stanford favoured a mechanism in which employees 'have some meaningful power to ensure that their work arrangements are a good fit with their other responsibilities in life', but did not advocate 'an arrangement where either side dictates'.

[408] However, it seems to us that granting the ACTU's Claim would amount to replacing one flawed mechanism for facilitating workplace flexibility with another flawed mechanism. To grant the Claim would simply replace the 'side' that determines the outcome.

[409] There is also considerable merit in the Employer parties' submissions in opposition to the Claim. If granted, the Claim would fundamentally alter the employment relationship. In effectively removing the ability of businesses to determine how to roster labour, the Claim plainly has the potential to have a substantial adverse impact on businesses.

[410] The Joint Employer Survey responses and the Employer parties' lay witness evidence speak to the potential adverse impact on businesses were the Claim to be granted. For example, if employees were able to determine when and for how long they worked, how would an employer efficiently manage a dairy farm – such as that operated by Ms Platt – where the demand for labour is determined by when the cows have to be milked?

[411] As ACCI submitted:

> '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.'[481]

[412] We agree, and have decided to reject the Claim. We are not satisfied that the variation to modern awards in the terms sought is necessary to achieve the modern awards objective.

[413] However, the rejection of the Claim does not conclude the matter.

[414] The Claim has been made in the context of the 4 yearly review of modern awards and, as we have mentioned, the Review is distinguishable from *inter partes* proceedings. Section 156 imposes an obligation on the Commission to review all modern awards. 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.[482] The Commission is not required to make a decision in the terms applied for (s.599) and, in a 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, such as ss.134, 138 and 578 of the Act.

[415] There is general acknowledgment of the benefits to the Australian economy of increased labour force participation by parents and carers (predominately women). As Ai Group puts it:

> 'The participation of parents and carers in the workforce creates a larger tax base from which the community more broadly benefits, as it contributes to Government revenue for the provision and investment in services and support to the community. Further, increased participation economically empowers women and families; and provides a greater return on Government investment in education.
>
> Employers also benefit from increased labour force participation by parents and carers; many of whom offer skill, experience and qualifications that contribute to business performance and competitiveness. Further, increased participation benefits business by creating a larger pool of workers from which to employ skill and talent.'[483]

[416] One way of increasing labour force participation is to facilitate family friendly working arrangements, as noted by the Productivity Commission:

> 'Under the National Reform Agenda, Australian and state/territory governments have identified increased workforce participation, particularly among those groups that currently have low participation rates such as the mature aged, women with child raising responsibilities and people on welfare, as one strategy to help meet the challenges of an ageing population

> (COAG 2006). Flexible working time arrangements, particularly access to part time employment, is one approach to lifting workforce participation levels.'[484]

[417] On the material before us we have reached a *provisional* view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements.

[418] The variation of modern awards to incorporate such a model term is likely to increase awareness of the right to request flexible working arrangements. As noted earlier, in 2014 only about 40 per cent of employees were aware of the s.65 right to request. Increasing awareness and expanding the range of employees who have a right to make such requests will facilitate access to flexible working arrangements. As we have found (see Chapter 5.4), access to flexible working arrangements which enable employees to accommodate their work and family responsibilities can provide benefits to both employees and employers, and is likely to increase workforce participation, particularly among women. As mentioned earlier, there are economic and social benefits associated with increased female participation in the workforce. Supporting and enabling women to increase their employment participation is a significant public policy issue in Australia, given the aging of our population.

[419] The fact that the majority of employees with parental or carer responsibilities who make a request are able to negotiate changes in working arrangements, does not negate the need to give further consideration to measures to facilitate the adoption of family friendly working arrangements.

[420] As we have found, the fact that a significant proportion of employees are 'discontented non-requestors' suggests that there is a significant *unmet* employee need for flexible working arrangements. A lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference (as measured by the AWALI work-life index). This is so whether a request is made and refused or whether the employee is a 'discontented non-requestor'.

[421] The evidence also shows that individual supervisor attitudes can be powerful barriers to flexibility (at [309]).

[422] The proposed model term seeks to respond to these issues by setting out a *process* which an employer must follow if it is proposing to refuse a request – the employer must confer with the employee and genuinely try to agree on changes in working arrangements. It is anticipated that making this process subject to a degree of Commission supervision may facilitate agreement on changes in working arrangements that are tailored and reasonable having regard to the needs of the employee and the impact on the business.

[423] Consistent with the Claim and the scope of the evidence presently before us in this matter, the proposed model term will be confined to requests for changes in working arrangements relating to parental or caring responsibilities.

[424] The proposed 'requests for flexible working arrangements' model term would supplement the NES in the following ways:

- The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, will be expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service.

- Before refusing an employee's request, the employer will be required to seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances.

- If the employer refuses the request, the employer's written response to the request will be required to include a more comprehensive explanation of the reasons for the refusal. The written response will also be required to include the details of any change in working arrangements that was agreed when the employer and employee conferred, or, if no change was agreed, the details of any changes in working arrangements that the employer can offer to the employee.

- A note will draw attention to the Commission's (limited) capacity to deal with disputes.

[425] The *provisional* model term we propose is set out below.

Provisional Model Term

X Requests for flexible working arrangements

NOTE: Clause X provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.

Employee may request change in working arrangements

X.1 An employee may request the employer for a change in working arrangements relating to the employee's circumstances as a parent or carer if:

(a) any of the circumstances referred to in clause X.2 apply to the employee; and

(b) the employee would like to change their working arrangements because of those circumstances; and

(c) the employee has completed the minimum employment period referred to in clause X.3.

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

X.2 For the purposes of clause X.1 the circumstances are:

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

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

X.3 For the purposes of clause X.1 the minimum employment period is:

(a) for an employee other than a casual employee—the employee has completed at least 6 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months immediately before making the request; and

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

X.4 To avoid doubt, and without limiting clause X.1, an employee may request to work part-time to assist the employee to care for a child if the employee:

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

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

Formal requirements for the request

X.5 The request must:

(a) be in writing; and

(b) state that the request is made under this award; and

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

Responding to the request

X.6 The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

X.7 The employer may refuse the request only on reasonable business grounds.

X.8 Without limiting what are reasonable business grounds for the purposes of clause X.7, 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.

X.9 Before refusing a request, the employer must seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

(a) the nature of the employee's responsibilities as a parent or carer; and

(b) the consequences for the employee if changes in working arrangements are not made; and

(c) any reasonable business grounds for refusing the request.

What the written response must include if the employer refuses the request

X.10 Clause X.10 applies if the employer refuses the request.

(a) The written response under clause X.6 must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.

(b) If the employer and employee agreed on a change in working arrangements under clause X.9, the written response under clause X.6 must set out the agreed change in working arrangements.

(c) If the employer and employee could not agree on a change in working arrangements under clause X.9, the written response under clause X.6 must:

(i) state whether or not there are there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's responsibilities as a parent or carer; and

(ii) if the employer can offer the employee such changes in working arrangements, set out those changes to working arrangements.

Dispute resolution

X.11 The Commission cannot deal with a dispute to the extent that it is about whether the employer had reasonable business grounds to refuse a request under clause X, unless the employer and employee have agreed in writing to the Commission dealing with the matter.

NOTE: Disputes about whether the employer has conferred with the employee and responded to the request in the way required by clause X, can be dealt with under clause Y—Consultation and Dispute Resolution.

[426] The features of the provisional model term are described in more detail below:

- The drafting of the provisional model term is based on s.65 of the Act, but departs from the arrangement of s.65 in some respects.

- The first note alerts the reader that the model term operates in addition to s.65. An employee wishing to change his or her working arrangements because of circumstances not covered by cl.X.2, but covered by s.65(1A) (such as the employee having a disability, being 55 or older, or experiencing family violence), could request a change in working arrangements under s.65.

- Clause X.1 combines in one subclause the three requirements in s.65 for eligibility to request a change in working arrangements (cf ss.65(1) and (2)).

- The note under cl.X.1 reproduces the note under s.65(1).

- Clause X.2 confines requests under the model term to requests relating to an employee's circumstances as a parent or carer (ie the circumstances in ss.65(1A)(a) and (b)).

  As in s.65(1A)(b), cl.X.2 relies upon the definition of 'carer' in the *Carer Recognition Act 2010* (Cth). This is similar to the definition in the Claim.

- Clause X.3 expands the group of employees eligible to request a change in working arrangements in comparison to s.65, by including non-casual and casual employees with at least six months' service but less than 12 months' service (cf s.65(2) and the definition of 'long term casual employee' in s.12 of the Act). This is consistent with the minimum service requirement in the Claim.

- Clause X.4 rearranges s.65(1B) without altering its effect.

- Clause X.5 adds to the formal requirements for the employee's written request in s.65(3), that the request must state that it is made under the award. This is intended to alert the employer that the employer's obligations in responding to the request are those under the award term, not the (lesser) obligations under s.65.

- Clause X.6 reproduces s.65(4).

- Clause X.7 reproduces s.65(5).

- Clause X.8 essentially reproduces s.65(5A).

- Clause X.9 introduces a new requirement for an employer, before refusing an employee's request for a change in working arrangements, to seek to confer with the employee and 'genuinely try to reach agreement on a change in working arrangements

that will reasonably accommodate the employee's circumstances'. In doing so the employer is to have regard to the matters specified in cl.X.9(a)-(c). While employers and employees may commonly confer by meeting face-to-face, cl.X.9 accommodates other means of communication.

- Clause X.10 introduces additional content requirements for the written response to a request that an employer must provide under cl.X.6, if the employer refuses the request.

  Clause X.10(a) requires the employer's written response to provide a more comprehensive explanation of the reasons for the refusal than that required under s.65(6).

  Clause X.10(b) applies if the employer and employee reached agreement on a change in working arrangements when they conferred in accordance with cl.X.9. In this case, the employer's written response must set out the agreed change in working arrangements. This is intended to promote clarity as to what was agreed.

  Clause X.10(c) applies if the employer and employee could not reach agreement on a change in working arrangements when they conferred in accordance with cl.X.9. In this case, the employer's written response must 'state whether or not there are any changes in working arrangements that the employer can offer the employee so to better accommodate the employee's responsibilities as a parent or carer'. If the employer can offer any such changes in working arrangements, the employer's written response must also set out those changes.

- Clause X.11 picks up the limitation on the Commission's dispute resolution jurisdiction in s.739(2) of the Act. Clause X.11 also draws to the attention of the reader that the Commission can deal with a dispute (under the dispute resolution provisions of the award) as to whether an employer has 'reasonable business grounds' to refuse a request for the purposes of cl.X.7, if the employer and employee have agreed in writing to the Commission doing so. It is intended that this would include an employer and employee agreeing in writing to seek the assistance of the Commission on an ad hoc basis when a dispute has arisen.

  In the interests of simplicity, cl.X.11 does not include the qualification relating to determinations under the *Public Service Act 1999* in s.739(2)(b). This might be included if the model term is inserted into an Australian Public Service modern award.

- The note under cl.X.11 draws to the attention of the reader that disputes as to whether the employer has conferred with an employee and responded to a request as required under the model term, can be brought under the dispute resolution provisions of the award.

[427] It is our provisional view that the provisional model term is a term about 'the facilitation of flexible working arrangements, particularly for employees with family responsibilities' within the meaning of s.139(1)(b). It is also our provisional view that the provisional model term does not contravene s.55 and consequently that it is a term permitted under s.136. Of course, any such term may only be included in a modern award to the extent necessary to achieve the modern awards objective.

[428] We emphasise that these views are provisional only. We propose to provide interested parties with an opportunity to make submissions on the following issues:

(i) The terms of the provisional model term.

(ii) Whether the provisional model term is permitted under s.136 and, in particular, whether it contravenes s.55.

(iii) Whether the inclusion of the provisional model term in modern awards will result in modern awards that only include terms to the extent necessary to achieve the modern awards objective.

[429] Any submissions on issue (iii) should include a discussion of the matters in ss.134(1)(a)-(h).

Next Steps

[430] This matter will be listed for mention at **10:00am** on **Tuesday 1 May 2018** in **Sydney.** The purpose of the mention is to provide interested parties with an opportunity to make submissions about the directions to be made for the filing of further submissions and the further hearing of this matter.

PRESIDENT

Appearances:

K Burke (of counsel) and *S Ismail* for Australian Council of Trade Unions.

N Ward and *J Ardnt* for Australian Chamber of Commerce and Industry, Australian Business Industrial and the New South Wales Business Chamber.

B Ferguson and *R Bhatt* for the Australian Industry Group.

B Rogers for the National Farmers Federation.

S Harris for the Pharmacy Guild of Australia.

A Millman for the National Retail Association.

Hearing details:

Sydney.
2017.
12, 13, 14 December.

Melbourne.
2017.
21 December.

Final written submissions:

Australian Chamber of Commerce and Industry, 12 February 2018

Australian Industry Group, 5 February 2018

Australian Chamber of Commerce and Industry, 2 February 2018

Australian Council of Trade Unions, 2 February 2018

National Retail Association, 2 February 2018

Printed by authority of the Commonwealth Government Printer

<PR601396 >

[1] HIA submission 20 April 2014

[2] NFF submission 20 April 2015

[3] [2014] FWC 8583

[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] [2017] FWCFB 4047, Attachment D

[11] Republished 15 December 2017

[12] [2018] FWCFB 99

[13] Ai Group submission, 5 February 2018 at 2

[14] NRA submission, 2 February 2018 at page 1

[15] ACTU submission, 2 February 2018 at 2-3

[16] ACCI submission, 2 February 2018 at 2.5

[17] NRA submission, 2 February 2018 at page 1

[18] ACCI submission, 2 February 2018 at 3.3

[19] ACCI submission, 2 February 2018 at 3.4

[20] Ai Group submission, 5 February 2018 at 4

[21] Ai Group submission, 5 February 2018 at 9

[22] ACTU submission, 2 February 2018 at 4

[23] ACTU submission, 2 February 2018 at 6

[24] ACTU submission, 2 February 2018 at 8

[25] ACCI submissions in reply, 12 February 2018

[26] ACCI submissions in reply, 12 February 2018 at 2.7

[27] ACCI submissions in reply, 12 February 2018 at 2.24

[28] NRA submission, 2 February 2018 at page 2

[29] Ai Group submission, 5 February 2018 at 12

[30] Ai Group submission, 5 February 2018 at 14

[31] ACCI submission, 2 February 2018 at 4.2

[32] ACCI submission, 2 February 2018 at 4.5

[33] ACTU submission, 2 February 2018 at 12

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

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

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

[37] *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)

[38] Ibid at [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.

[39] ACCI submission, 2 February 2018 at 2.3

[40] [2017] FCAFC 123

[41] Ibid at [28]–[29]

[42] *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140] and [2017] FWCFB 1001 at [110]

[43] [2017] FWCFB 1001

[44] [2017] FWCFB 1001 at [269]

[45] *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

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

[47] (2012) 205 FCR 227

[48] Ibid at [35]–[37] and [46]

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

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

[51] [2014] FWCFB 1788

[52] Ibid at [36]

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

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

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

[56] [2017] FCAFC 123 at [23]

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

[58] [2017] FCAFC 161

[59] Ibid at [48]

[60] [2017] FWCFB 1001 at [230]-[268]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [23]

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

[62] [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[63] [2017] FCAFC 161 at [49] and [65]

[64] Ibid at [53]

[65] [2017] FWCFB 1001 at [128]

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

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

[68] s.65(2)(a) *Fair Work Act 2009* (Cth)

[69] s.65(2)(b)(i) *Fair Work Act 2009* (Cth)

[70] s.65(2)(b)(ii) *Fair Work Act 2009* (Cth)

[71] s.65(3)(a) *Fair Work Act 2009* (Cth)

[72] s.65(3)(b) *Fair Work Act 2009* (Cth)

[73] s.65(4) *Fair Work Act 2009* (Cth)

[74] s.65(6) *Fair Work Act 2009* (Cth)

[75] s.65(5) *Fair Work Act 2009* (Cth)

[76] s.739(1)(a) *Fair Work Act 2009* (Cth)

[77] Parliament of the Commonwealth of Australia, *Explanatory Memorandum to the Fair Work Bill 2008*. (2008) [258] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4016_ems_929eaf6c-f4aa-44dc-b9e1-e0a6786a7cff/upload_pdf/321247.pdf;fileType%3Dapplication%2Fpdf

[78] s.65 *Fair Work Act 2009* (Cth)

[79] *Fair Work Amendment Act* 2013 (Cth) s.2

[80] Australian Government, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, p.99. <https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf>

[81] Australian Government, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, p.98 <https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf>

[82] ss.144(1) and 202(1)(a) *Fair Work Act 2009* (Cth)

[83] s.144(2)(a); 202(2)(a) *Fair Work Act 2009* (Cth)

[84] ss.144(2)(b); 202(2)(b) *Fair Work Act 2009* (Cth)

[85] s.202(4) *Fair Work Act 2009* (Cth)

[86] s.62(1) *Fair Work Act 2009* (Cth)

[87] S.539(1) table item 1 *Fair Work Act 2009* (Cth)

[88] s.62(2) *Fair Work Act 2009* (Cth)

[89] s.62(3)(b) *Fair Work Act 2009* (Cth)

[90] s.340(1) *Fair Work Act 2009* (Cth)

[91] s.342(1) item 1 *Fair Work Act 2009* (Cth)

[92] s.341(1)(a)-(c) *Fair Work Act 2009* (Cth)

[93] s.341(2)(i) *Fair Work Act 2009* (Cth)

[94] s.341(2)(g) *Fair Work Act 2009* (Cth)

[95] s.351(1) *Fair Work Act 2009* (Cth)

[96] s.351(2)(a) *Fair Work Act 2009* (Cth)

[97] s.351(2)(b) *Fair Work Act 2009* (Cth)

[98] s.539(1) table item 11 *Fair Work Act 2009*

[99] s.539(2) and s.545(2) *Fair Work Act 2009* (Cth)

[100] [2014] FWCFB 3202

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

[102] ACTU submission, 27 November 2017 at [7]–[28] and ACTU closing submission, 19 December 2017 at [14]

[103] ACTU submission, 27 November 2017 at [13]

[104] ACCI closing submission, 19 December 2017 at [8.29]

[105] ACTU submission, 27 November 2017 at [13]

[106] ACTU submission, 9 May 2017 at [111]–[139]; ACTU submission, 27 November 2017 at [14]

[107] ACTU submission, 27 November 2017 at [15]

[108] Ibid at [20]

[109] Ibid at [23]

[110] ACTU submission, 27 November 2017 at [24]-[25] and [27]-[28]

[111] See Transcript, 21 December 2017 at [2706]

[112]Ibid at [2707]–[2710]

[113] ACCI final submission, 19 December 2017 at [8.4]

[114] Ibid at [8.15]–[8.16]

[115] Transcript, 21 December 2017 at [3023]-[3047]

[116] Ibid [3025]-[3026]

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

[118] Transcript, 21 December 2017 at [3067] and [3077]

[119] ACCI final submissions, 19 December 2017 at [6.17]

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

[121] Transcript, 21 December 2017 at [3045]-[3046]

[122] Ibid at [3030]

[123] Ibid at [3032]-[3036]

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

[125] Ibid at [8.32]

[126] Ibid at [8.37]–[8.42]

[127] Ibid at [8.37]-[8.38]

[128] Ibid at [8.39]

[129] Also see Transcript, 21 December 2017 at PN [2877]-[2911]

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

[131] [2015] FWCFB 3023at [37]

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

[133] Ibid 2017 at [31]

[134] Transcript, 21 December 2017 at [2712]–[2713]

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

[136] Ibid at [40]-[43]

[137] Transcript, 21 December 2017 at [2720]

[138] *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]

[139] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]

[140] *Esso Australia Pty Ltd v The Australian Workers' Union* (2017) 350 ALR 404 at [52]

[141] EM at [206]

[142] The one qualification to this is that s.118 provides that an award or agreement may specify the notice of termination that an employee is required to provide in order to terminate his or her employment

[143] Supplementary EM at 23

[144] Ibid at [24]

[145] Ibid at [25]-[26]

[146] EM at 208-209

[147] Note that if s.55 is a code as to the manner in which award and agreement terms may deal with the subject matter of the NES, an award or agreement term could 'contravene' s.55 either by contravening s.55(1) or because it is a type of term not provided for in s.55.

[148] [2015] FWCFB 5585

[149] Ibid at [24]

[150] EM at [214]

[151] Section 13(3) of the AI Act as it applies to the Act, provides: '[n]o marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act.'

[152] *CFMEU v Glendell Mining Pty Limited* [2017] FCAFC 35 at para 118

[153] ACTU closing submission, 19 December 2017 at [3] and [44]-[52]

[154] Transcript, 21 December 2017 at [2718]

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

[156] Transcript, 21 December 2017 at [2724]

[157] *Parental Leave Test Case 2005* (2005) 143 IR 245; ACTU closing submissions, 19 December 2017 at [11]

[158] Transcript, 21 December 2017 at [2669]-[2677]

[159] Ibid at [2663]

[160] Ibid at [2663]
[161] ACTU closing submissions, 19 December 2017 at [15]
[162] Ibid at [19]
[163] Ibid at [42]-[43]
[164] Ibid at [32]
[165] Ibid at [35]
[166] Ibid at [37]-[38]
[167] Ibid at [66]
[168] Ibid at [78]
[169] Ibid at [86]-[87]
[170] Ibid at [89]-[95]
[171] ACCI final submissions, 19 December 2017 at [1.10]
[172] Ibid at [1.5]
[173] Ibid at [1.11]
[174] Ibid at [12.12]
[175] Ibid at [9.1(a)]-[9.1(b)]
[176] Ibid at [9.1(f)]
[177] Ibid at [9.1(g)]
[178] Ibid at [12.6]
[179] Ibid at [12.7]
[180] Ibid at [12.11]
[181] Transcript, 21 December 2017 at PN [2846]
[182] Ai Group final submission, 19 December 2017 at [193]
[183] Ibid at [188]
[184] Ibid at [191]
[185] Ibid at [191]-[193]
[186] Ibid at [201]
[187] Ibid at [202]
[188] Ibid at [205]
[189] ibid at [209]
[190] Ibid at [213]
[191] Ibid at [219]
[192] Ibid at [225]
[193] NRA submission, 18 December 2017 at [3]
[194] NRA submission, 30 October 2017 at [10]-[12]
[195] Ibid at [101]
[196] Ibid at [25]-[101]
[197] Ibid at [102]
[198] NRA submission, 18 December 2017 at [132]
[199] PHIEA submission, 27 October 2017 at [40]
[200] CMIEG submission, 30 October 2017 at [4]
[201] Ibid at [5]
[202] NFF submission, 30 October 2017 at [14]
[203] Exhibit ACTU 1
[204] Exhibits ACTU 3 and 4

[205] Exhibit ACTU 6

[206] Exhibit Ai Group 4

[207] Ibid at [10]

[208] Ibid at [9]

[209] Exhibit ACTU 6 at [45], Figure 6

[210] Exhibit ACTU 1 at [21]

[211] Exhibit ACTU 1 at p. 13, Figure 9

[212] Exhibit ACTU 6 at para. 37, Figure 1

[213] Graph 1; Cassidy N & Parsons S (2017), *The rising share of part-time employment*, Bulletin, September Quarter, Reserve Bank of Australia, p. 19

[214] Exhibit Ai Group 4 at [13]

[215] Exhibit ACTU 6 at [37]

[216] Exhibit ACTU 3 at [44]

[217] Exhibit ACTU 3 at [44], Figure 1.7; ABS, *Labour Force, Australia, Feb 2017*, Catalogue No. 6202.0.

[218] Exhibit Ai Group 4 at [19], Graph 2; Cassidy N & Parsons S (2017), *The rising share of part-time employment*, Bulletin, September Quarter, Reserve Bank of Australia, p. 21

[219] Exhibit Ai Group 4 at [18]

[220] Cassidy & Parsons (2017) at p. 20

[221] Exhibit Ai Group 4 at [20]

[222] Ibid at [18], Graph 3

[223] Ibid at [20], Graph 5

[224] Cassidy & Parsons (2017) at p. 19

[225] Exhibit ACTU 3 at [109]

[226] Ibid at [110] Figure 3.2

[227] Ibid at [110], Figure 3.3

[228] Ibid at [110], Figure 3.4

[229] Venn D & Wakefield C (2005), *Transitions between full-time and part-time employment across the life-cycle*, Department of Employment and Workplace Relations, paper presented at the HILDA Research Conference, Melbourne, 29 September

[230] Ibid at p. 3

[231] Ibid at p. 4

[232] Ibid at p. 15

[233] Ibid at pp. 13–14

[234] Exhibit Ai Group 4 at [54]

[235] Exhibit ACTU 1 at [36]

[236] Ibid at [38]

[237] Ibid at para [40]

[238] Exhibit ACTU 2 at p. 1

[239] Ibid at p. 2

[240] Ibid at p. 2

[241] Exhibit ACTU 1 at [43], Figure 10

[242] Ibid at [46], Figure 11

[243] Ibid at [48]

[244] Ibid at [49]

[245] Exhibit ACTU 1 at [83]

[246] Ibid at [83], Figure 25

[247] Ibid at [69]

[248]Ibid at [52], Figure 13

[249] Ibid at [52]-[53]

[250] Exhibit Ai Group 4 at at [16]

[251] Ibid at [13]. The remaining part-time workers were self-employed and not considered to be employees. See Transcript, 14 December 2017 at [1784]

[252] Exhibit ACTU 3at [64]

[253] Exhibit ACTU 4 at [17]

[254] Exhibit ACTU 3at [139]

[255] Ibid at Table 3.10

[256] Exhibit ACTU 1 at [56]

[257]Ibid at Figure 15

[258]Ibid at Figure 15

[259] Ibid at[84]

[260] Ibid at [85], Figure 26

[261] Ibid

[262] Ibid at [87]

[263] Ibid at [19]

[264] Ibid at [19], Figure 8

[265] Exhibit Ai Group 3

[266] Exhibit MTO 1

[267] Transcript, 12 December 2017 at PN65-68, 70, 75-83 and 111-113; Ai Group Submissions in reply: ACTU Objections to the Joint Employer Survey, 11 December 2017 at [26]

[268] Transcript, 12 December 2017 at [153]

[269] [2017] FWCFB 1001 at [1563]-[1570]

[270] Ibid at [1572]-[1574]

[271] Ai Group reply submission, 31 October 2017 at [503]

[272] Exhibit Ai Group 3 at 11

[273] Ai Group reply submission, 31 October 2017 at [519]

[274] Ibid at [597]-[613]

[275] ACTU Submission – objection to evidence, 8 December 2017 at [11]-[12]

[276] Exhibit ACTU 3 at [4]

[277] Ibid at [14]

[278] Ibid at [5]

[279] Ibid at [8]

[280] Ibid at [99]

[281] Ibid at [100]

[282] Ibid at [101]

[283] Ibid at [106]

[284] Ibid at [109]

[285] Ibid at [115]

[286] Ibid at [139]

[287] Ibid at [150]–[152]

[288] Ibid at [158]–[159]

[289] Exhibit ACTU 1 at [109]

[290] Ibid at [110]

[291] Ibid at [112]; [114]

[292] Ibid at [115]

[293] Ibid at [29]

[294] Ibid at [5]–[6]

[295] Ibid at [7]–[8]

[296] Ibid at [9]

[297] Ibid at [11]

[298] Ibid at 12,Table 1

[299] Ibid at [14]

[300] Ibid at [13]–[14]

[301] Ibid at [15]

[302] Ibid at [21]

[303] Ibid at [22]

[304] Venn D & Wakefield C (2005), *Transitions between full-time and part-time employment across the life-cycle*, Department of Employment and Workplace Relations, paper presented at the HILDA Research Conference, Melbourne, 29 September

[305] Exhibit ACTU 1 at [43]–[44]

[306] Ibid at [45]

[307] Ibid at [46]

[308] Ibid at [48]

[309] Ibid at [49]

[310] Ibid at [52]

[311] Ibid at [53]

[312] Ibid at [56]

[313] Ibid at [73]

[314] Ibid at [75]

[315] Ibid at [79]; [82]

[316] Ibid at [83]

[317] Ibid at [94]

[318] Ibid at [18]–[19]

[319] Exhibit ACTU 5 at[1]

[320] As described in [2017] FWCFB 1001 at [566]–[567]

[321] Skinner N & Pocock B (2014), *The persistent challenge: Living, working and caring in Australia in 2014 - The Australian work life index 2014*, Centre for Work + Life, University of South Australia.

[322] Exhibit ACTU 5 at Appendix 1, p.36

[323] Exhibit ACTU 5 at [23]; Skinner N & Pocock B (2014), *The Australian Work Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work + Life, University of South Australia

[324] Exhibit ACTU 5 [24]

[325] Ibid at [116]

[326] Ibid at [43]

[327] Ibid at [32]; O'Neill B (2015), *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009* (Cth)*: 2012–2015*, Fair Work Commission, November

[328] Exhibit ACTU 5 at [35]

[329] Ibid at [36]

[330] Ibid at [40]

[331] Ibid at [100]

[332] Ibid at [76]

[333] Ibid at [92]

[334] Ibid at [93]

[335] Ibid at [97]–[98]

[336] ACCI Final Submissions, 19 December 2017 at [9.9]-[9.10]

[337] Ibid at [9.11]

[338] Transcript, 12 December 2017 at PN [716]-[718], [723]-[724] and [731]-[732]. We would also observe that Ms Toth (Ai Group's expert witness) was similarly unable to answer specific questions regarding the HILA methodology: Transcript, 13 December 2017 at [1819]-[1820]

[339] Ai Group Reply Submission, 31 October 2017 at [296]

[340] Skinner N, Pocock B & Hutchinson C (2015), *A qualitative study of the circumstances and outcomes of the national employment standards right to request provisions*, a report to Fair Work Australia, Centre for Work + Life, University of South Australia.

[341] O'Neill, B (2015), *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the* Fair Work Act 2009 *(Cth): 2012–2015*, Fair Work Commission, November, at [4.2.4]

[342] Ibid at [5.1.2], p. 17

[343] Ibid at [5.2.1], p. 18

[344] Ibid at [5.2.2], p. 21

[345] Ibid at [5.2.3], p. 22

[346] Ibid at Table 5.5, p. 23

[347] Ibid at [5.2.4], p.25

[348] Ibid at p. 27

[349] Ibid at [5.3.4], p. 31

[350] Ibid at table 5.12, p. 32

[351] Ibid at [5.3.2], p. 26

[352] Ibid at p. 27

[353] Ai Group Reply Submission, 31 October 2017 at [297]

[354] Ai Group Reply Submission 31 October 2017 at [342]-[344]

[355] ACCI Final Submissions 19 December 2017 at [9.11(3)]; Ai Group Reply Submissions 31 October 2017 at [340]

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

[357] Ibid at p. 38

[358] Ibid at p. 39, Table 8

[359] Ibid at p. 40, Table 9

[360] Ibid at p. 41

[361] Ibid at p. 43, Figure 18. The remainder were 'waiting on decision'

[362] Ibid at p. 42

[363] Ibid at p.45

[364] Ibid, Figure 19 at p.45

[365] Ibid at p.8

[366] Ibid at p.45

[367] Ibid Table 12 p.43

[368] Ibid at p. 43

[369] Exhibit ACTU 5 at [105].

[370] Skinner N, Cathcart A & Pocock B (2016), 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters', *Labour and Industry*, Vol. 26, No. 2, pp. 103–119.

[371] Skinner et al., p. 107

[372] Ibid pp. 110–111

[373] Ibid p. 116

[374] Ibid p. 111

[375] Ibid p. 112

[376] Ibid p. 113

[377] Ibid p. 114

[378] Ibid at pp. 111-114

[379] ACTU final submission, 19 December 2017 at [61]

[380] Ai Group reply submission, 31 October 2017 at [330]

[381] Ibid at [331]; Skinner et al., p. 109

[382] Ibid at [332]

[383] Skinner N, Cathcart A & Pocock B (2016) at pp.110-111

[384] Ibid at p.110

[385] Ibid, Figure 1 on p.110

[386] Exhibit ACTU 6, Expert report of Dr. Stanford, 4 September 2017 at Annexure JS2

[387] Exhibit ACTU 6 at [16]

[388] Ai Group final submission, 19 December 2017 at [103]

[389] Transcript, 12 December 2017 at [908] and [913]-[914]

[390] Exhibit ACTU 6 at [6]

[391] ACCI final submissions, 19 December 2017 at [9.19] – [9.20]

[392] Ai Group Reply Submissions, 31 October 2017 at [173]

[393] Exhibit ACTU 6 at [21]

[394] Ibid at [22]

[395] Ibid at [25]

[396] Ibid at [54]

[397] Transcript , 12 December 2017 at [849] – [862]

[398] Exhibit ACTU 6 at [58]

[399] Ibid at [59]

[400] Ibid at [12]

[401] Transcript, 12 December 2017 at [826] – [834]

[402] Transcript , 14 December 2017 at [1730]-[1736]

[403] Ibid at [1735]-[1737]

[404] Ibid at [1735]-[1741]

[405] Transcript, 21 December 2017 at [2465]-[2466]

[406] Ibid at [2963]

[407] Ibid at [2966]-[2969]

[408] ACCI Final Submissions, 19 December 2017 at [9.24]

[409] Exhibit Ai Group 4, witness statement of Julie Toth at [29]

[410] Abhayaratna, J., Andrews, L., Nuch, H. and Podbury, T. 2008, *Part Time Employment: the Australian Experience*, Staff Working Paper, Productivity Commission, p.54

[411] Exhibit Ai Group 4 at [29]

[412] ACTU Closing Submissions 19 December 2017 at [77]

[413] Exhibit ACTU 18, Ernst & Young (2013) 'Untapped opportunity: The role of women in unlocking Australia's productivity potential', p.4, 11see ACTU Closing Submissions 19 December 2017 at [68]; Also, the paper was put to Ms Toth in cross examination, Transcript at [1903]-[1911]

[414] Transcript, 12 December 2017 at [863]-[874]

[415] Exhibit Ai Group 4 at [51]

[416] The witness statement of Perry Anderson dated 27 April 2017 was withdrawn (see Transcript, 21 December 2017 at [2442])

[417] Exhibit ACTU 12

[418] Exhibit ACTU 17

[419] Exhibit ACTU 9

[420] Exhibit ACTU 8

[421] Exhibit ACTU 13

[422] Exhibit ACTU 11

[423] Exhibit ACTU 7

[424] Exhibit ACTU 14

[425] Exhibit ACTU 10

[426] Exhibit ACTU 16

[427] NRA Submissions on Evidence, 19 December 2017 at [79], [82]-[83]

[428] Ai Group Final submissions, 19 December 2017 at [130]

[429] ACCI Final submissions, 19 December 2017 at [9.32]

[430] Ai Group's Final Submissions, 19 December 2017, table at [128]

[431] Ai Group Final Submissions, 19 December 2017 at [132(e)]

[432] Exhibit ACTU 8 at [10]-[12] and [17]

[433] Transcript, 13 December 2017 at [1133]-[1136]

[434] Exhibit ACTU 7 at [8] - [9]

[435] Ibid at [12]

[436] Exhibit ACTU 8 at [15]

[437] Exhibit ACTU 10 at [10]-[11]; Also see ACTU 14 at [13]; Ms Czerkesow's evidence, ACTU 16 at [15]-[16], [19], [21]-[22], [25] and [27]; and Ms Hammersley's evidence, ACTU 9 at [9]

[438] Exhibit ACTU 16 at [9]-[10]

[439] Ms van del Hilst; Ms Bowler; Witness 1; Ms Hammersley; Ms Mullan and Ms Ogulin

[440] Exhibit ACTU 9 at [15]. Also see Exhibit ACTU 10 at [12]-[14] and Exhibit ACTU 12 at [20]-[22]

[441] Exhibit ACTU 16 at [18]

[442] Exhibit ACTU 8 at [26]

[443] Exhibit ACTU 7 at [16]-[18]

[444] Exhibit Ai Group 3

[445] Exhibits Ai Group 5 and 6

[446] Exhibits Ai Group 1 and 2

[447] Exhibits Ai Group 7 and 8

[448] Exhibits NFF 1 and 2

[449] Exhibits NFF 3 and 4

[450] Exhibits NFF 5 and 6

[451] Exhibits NFF 7 and 8

[452] Exhibits ACCI 1 and 2

[453] Exhibits ACCI 3 and 4

[454] Exhibit ACCI 5

[455] Exhibit ACCI 6

[456] ACCI Final Submissions 19 December 2017 at [9.83]

[457] Exhibit NFF 5

[458] Exhibit ACCI 1 at [5]

[459] Lauren Cleaver – Norske Skog – Exhibits ACCI 3 and 4; Peter Ross – Rheem Australia – Exhibits Ai Group 7 and 8

[460] Paula Bayliss – Navitas Australia – Exhibit ACCI 1 and 2

[461] Chris Kemp – cattle, sheep and broadacre crop producer – Exhibits NFF 5 and 6; Edwina Beveridge – Exhibits NFF 1 and 2; Lucinda Corrigan – Angus stud – Exhibits NFF 3 and 4; Deborah Platts – dairy farmer – Exhibits NFF 7

[462] Jae Fraser – Edge Child Care – Exhibit ACCI 5

[463] Mark Rizzardo – bus operator – Exhibit ACCI 6

[464] Benjamin Norman – grain storage and handling – Exhibit Ai Group 5

[465] Janet O'Brien – Conplant – Exhibits Ai Group 1 and 2

[466] For example, Exhibit Ai Group 1 at [24]; Exhibit ACCI 3 at [4]; Exhibit Ai Group 7 at [48]

[467] Exhibit Ai Group 5 at [60]

[468] See Exhibit ACCI 5 at [71] and [77];, Exhibit ACCI 3 at [39] and Exhibit Ai Group 5 at [62] and [64]-[68]

[469] Exhibit ACCI 5 at [89]

[470] Exhibit ACCI 5 at [20]-[42], [47]-[50]

[471] Exhibit ACCI 6 at [12]-[17]

[472] Exhibit NFF 1 at [8]-[10]

[473] Exhibit NFF 7 at [7]; Also see Exhibit Ai Group 5 at [14]

[474] Exhibit Ai Group 5 at [70]

[475] Exhibit Ai Group 7 at [73]

[476] See Exhibit Ai Group 1 at [44]

[477] Skinner et al at p.103

[478] ACCI final submissions, 19 December 2017 at [1.11]

[479] Skinner at al at p.104

[480] s.739(1)(a) *Fair Work Act 2009* (Cth)

[481] ACCI final submissions, 19 December 2017 at [1.11]

[482] *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140]

[483] Ai Group Reply Submissions, 31 October 2017 at [171]-[172]

[484] Abhayaratna J, Andrews L, Nuch H & Podbury T (2008), *Part time employment: the Australian experience*, Staff Working Paper, Productivity Commission, June at xxviii

ATTACHMENT A – LIST OF STATEMENTS ISSUED

Document title	Document date
Statement – [2014] FWC 8583	1 December 2014
Statement – [2017] FWC 2928	29 May 2017
Statement – [2017] FWC 3696	14 July 2017
Statement – [2017] FWCFB 3865	24 July 2017
Statement and directions – [2017] FWCFB 4047	3 August 2017
Statement – [2017] FWCFB 4729	15 September 2017
Statement – [2017] FWCFB 5138	4 October 2017
Statement - [2018] FWCFB 99	12 January 2018

ATTACHMENT B – Submissions filed

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

19.	Ai Group - Submission	11 December 2017
Final submissions		
20.	NRA - Final Submission	18 December 2017
21.	ACTU –Final Submission	19 December 2017
22.	Ai Group –Final Submission	19 December 2017
23.	ACCI –Final Submission	19 December 2017
Submissions on background papers		
24.	NRA – Submission – background papers	2 February 2018
25.	ACTU – Submission – background papers	2 February 2018
26.	ACCI – Submission – background papers	2 February 2018
27.	Ai Group – Submissions – background papers	5 February 2018
28.	ACCI – Submission in reply – background papers	12 February 2018
Submissions in relation to preliminary jurisdictional hearing		
29.	ACCI – Outline of Submission – Legislative Framework	20 April 2015
30.	Ai Group - Submission	20 April 2015
31.	HIA - Submission	20 April 2015
32.	NFF - Submission	20 April 2015
33.	ACTU - Submission	15 June 2015
34.	Ai Group – Further Submission	11 August 2015
35.	ACTU – Further Submission - Alleged NES Inconsistencies Decision	18 August 2015
36.	Ai Group – Further Reply Submission	21 August 2015
37.	ACCI – Submission in Reply	21 August 2015

ATTACHMENT C – RESEARCH REFERENCE LIST

1.1 Published research articles and books

1. Ala-Mursula L, Vahtera J, Kouvonen A, Väänänen A, Linna A, Pentti J & Kivimäki M (2006), 'Long hours in paid and domestic work and subsequent sickness absence: does control over daily working hours matter?', *Occupational and Environmental Medicine*, Vol. 63, No. 9, pp. 608–616.

2. Amstad FT, Meier LL, Fasel U, Elfering A & Semmer NK (2011), 'A meta-analysis of work-family conflict and various outcomes with a special emphasis on cross-domain versus matching-domain relations', *Journal of Occupational Health Psychology*, Vol. 16, No. 2, pp. 151–169.

3. Argyrous G, Craig L & Rahman S (2017), 'The effect of a first-born child on work and childcare time allocation: Pre–post analysis of Australian couples', *Social Indicators Research*, Vol. 131, No. 2, pp. 831–851.

4. Austen S, Jefferson T & Ong R (2014), 'The gender gap in financial security: What we know and don't know about Australian households', *Feminist Economics*, Vol. 20, No. 3, pp. 25–52.

5. Austen SE & Ong R (2013), 'The effects of ill health and informal care roles on the employment retention of mid-life women: does the workplace matter?', *Journal of Industrial Relations*, Vol. 55, No. 5, pp. 663–680.

6. Austen SE & Ong R (2009), 'The employment transitions of mid-life women: health and care effects', *Ageing and Society*, Vol. 30, No. 2, pp. 207–227.

7. Baines, D (2011), '"It was just too hard to come back": unintended policy impacts on work–family balance in the Australian and Canadian non-profit social services', *Community, Work and Family*, Vol. 14, No. 2, pp. 233–248.

8. Baird M & Heron A (2013), 'Women, work and elder care: New policies required for inclusive growth', in Smyth P & Buchanan J (eds), *Inclusive growth in Australia: social policy as economic investment*, Allen & Unwin, pp. 242–257.

9. Beauregard TA & Henry LC (2009), 'Making the link between work-life balance practices and organizational performance', *Human Resource Management Review*, Vol. 19, No. 1, pp. 9–22.

10. Bloom N, Kretschmer T & van Reenen J (2011), 'Are family-friendly workplace practices a valuable firm resource?', *Strategic Management Journal*, Vol. 32, No. 4, pp. 343–367.

11. Bloom N & van Reenen J (2006), 'Management practices, work-life balance and productivity: a review of some recent evidence', *Oxford Review of Economic Policy*, Vol. 22, No. 4, pp. 457–482.

12. Breunig R, Gong X, Mercante J, Weiss A & Yamauchi C (2011), 'Child care availability, quality and affordability: are local problems related to labour supply?', *The Economic Record*, Vol. 87, No. 276, pp.109–124.

13. Brough P & O'Driscoll MP (2010), 'Organizational interventions for balancing work and home demands: an overview', *Work and Stress*, Vol. 24, No. 3, pp. 280–297.

14. Charlesworth S, Strazdins L, O'Brien L & Sims S (2011), 'Parents' jobs in Australia: Work hours polarisation and the consequences for job quality and gender equality', *Australian Journal of Labour Economics*, Vol. 14, No. 1, pp. 35–57.

15. Connolly S & Gregory M (2008), 'Moving down: women's part-time work and occupational change in Britain 1991–2001', *The Economic Journal*, Vol. 118, No. 526, pp. F52–F76.

16. Cooper R & Baird M (2015), 'Bringing the "right to request" flexible working arrangements to life: from policies to practices', *Employee Relations*, Vol. 37, No. 5, pp. 568–581.

17. Crettenden A, Wright A & Skinner N (2014), 'Mothers caring for children and young people with developmental disabilities: intent to work, patterns of participation in paid employment and the experience of workplace flexibility', *Community, Work and Family*, Vol. 17, No. 3, pp. 244–267.

18. Dembe AE & Partridge JS (2011), 'The benefits of employer-sponsored elder care programs: case studies and policy recommendations', *Journal of Workplace Behavioral Health*, Vol. 26, No. 3, pp. 252–270.

19. Dex S & Scheibl F (2002), *SMEs and flexible working arrangements*, Policy Press, Bristol.

20. Dex S & Scheibl F (1999), 'Business performance and family-friendly policies', *Journal of General Management*, Vol. 24, No. 4, pp. 22–37.

21. Donnelly N, Proctor-Thomson S & Plimmer G (2012), 'The role of "voice" in matters of "choice": flexible work outcomes for women in the New Zealand public services', *Journal of Industrial Relations*, Vol. 54, No. 2, pp. 182–203.

22. Golden L (2005), 'The flexibility gap: employee access to flexibility in work schedules', in Zeytinoglu IU (eds), *Flexibility in workplaces: Effects on workers, work environment and the unions*, McMaster University, Hamilton, pp. 38–56.

23. Gordon CE (2014), 'Flexible workplace practices: employees' experiences in small IT firms', *Industrial Relations*, Vol. 69, No. 4, pp. 766–784.

24. Haar JM (2004), 'Work-family conflict and turnover intention: exploring the moderation effects of perceived work-family support', *New Zealand Journal of Psychology*, Vol. 33, No. 1, pp. 35–39.

25. Haar JM & Bardoel EA (2008), 'Positive spillover from the work-family interface: a study of Australian employees', *Asia Pacific Journal of Human Resources*, Vol. 46, No. 3, pp. 275–287.

26. Heywood JS & Miller LA (2015), 'Schedule flexibility, family friendly policies and absence', *The Manchester School*, Vol. 83, No. 6, pp. 652–675.

27. Heywood JS, Siebert WS & Wei X (2011), 'Estimating the use of agency workers: can family friendly practices reduce their use?', *Industrial Relations*, Vol. 50, No. 3, pp. 535–564.

28. Hill T, Thomson C, Bittman M & Griffiths M (2008), 'What kind of jobs help carers combine care and employment?', *Family Matters*, No. 80, pp. 27–32.

29. Hoobler JM, Hu J & Wilson M (2010), 'Do workers who experience conflict between the work and family domains hit a "glass ceiling?": a meta-analytic examination', *Journal of Vocational Behavior*, Vol. 77, No. 3, pp. 481–494.

30. Ibanez Z (2011), 'Part-time in skilled jobs: the case of teachers in the UK, Spain and the Netherlands', in Drobnic S and Guillen AM (eds), *Work–life balance in Europe: The role of job quality*, Palgrave Macmillan, New York, pp. 149–173.

31. Ireson R, Sethi B & Williams A (2016), 'Availability of caregiver-friendly workplace policies (CFWPs): an international scoping review', *Health and Social Care in the Community*, doi:10.1111/hsc.12347.

32. Kelliher C & Anderson D (2010), 'Doing more with less? Flexible working practices and the intensification of work', *Human Relations*, Vol. 63, No. 1, pp. 83–106.

33. Kossek EE, Pichler S, Bodner T & Hammer LB (2011), 'Workplace social support and work-family conflict: a meta-analysis clarifying the influence of general and work-family-specific supervisor and organisational support', *Personnel Psychology*, Vol. 64, No. 2, pp. 289–313.

34. Lee BY & DeVoe SE (2012), 'Flextime and profitability', *Industrial Relations*, Vol. 51, No. 2, pp. 298–316.

35. McDonald P, Townsend K & Wharton A (2013), 'The legitimation and reproduction of discourse-practice gaps in work-life balance', *Personnel Review*, Vol. 42, No. 2, pp. 205–222.

36. McNall LA, Masuda AD & Nicklin JM (2009), 'Flexible work arrangements, job satisfaction, and turnover intentions: The mediating role of work-to-family enrichment', *The Journal of Psychology*, Vol. 144, No. 1, pp. 61–81.

37. Moen P, Kelly EL & Hill R (2011), 'Does enhancing work-time control and flexibility reduce turnover? A naturally occurring experiment', *Social Problems*, Vol. 58, No. 1, pp. 69–98.

38. Murray J (2005), 'The AIRC's test case on work and family provisions: The end of dynamic regulatory change at the federal level?', *Australian Journal of Labour Law*, Vol. 18, No. 3, pp. 325–343.

39. Pocock B (2016) 'Holding up half the sky? Women and work in the 21st century', *The Economics and Labour Relations Review*, Vol. 27, No. 2, pp. 147–163.

40. Pocock B, Charlesworth S & Chapman J (2013), 'Work-family and work-life pressures in Australia: advancing gender equality in "good times"?', *International Journal of Sociology*, Vol. 33, No. 9/10, pp. 594–612.

41. Reeve BH, Broom DH, Strazdins L & Shipley M (2012), 'Regulation, managerial discretion and family-friendliness in Australia's changing industrial relations environment', *Journal of Industrial Relations*, Vol. 54, No. 1, pp. 57–74.

42. Skinner N, Cathcart A & Pocock B (2016), 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters', *Labour and Industry*, Vol. 26, No. 2, pp. 103–119.

43. Skinner N & Chapman J (2013), 'Work-life balance and family friendly policies', *Evidence Base*, No. 4, pp. 1–25.

44. Skinner N & Pocock B (2011), 'Flexibility and work-life interference in Australia', *Journal of Industrial Relations*, Vol. 53, No. 1, pp. 65–82.

45. Strazdins L, Shipley M & Broom DH (2007), 'What does family friendly really mean? Wellbeing, time and the quality of parents' jobs', *Australian Bulletin of Labour*, Vol. 33, No. 2, pp. 202–225.

46. Sweet S, Pitt-Catsouphes M & James JB (2017), 'Manager attitudes concerning flexible work arrangements: fixed or changeable?', *Community, Work and Family*, Vol. 20, No. 1, pp. 50–71.

47. Todd P & Binns J (2013), 'Work–life balance: is it now a problem for management?', *Gender, Work and Organization*, Vol. 20, No. 3, pp. 219–231.

48. Ulker A & Guven C (2011), 'Determinants of maternity leave duration in Australia: evidence from the HILDA survey', *The Economic Record*, Vol. 87, No. 278, pp. 399–413.

49. van Wanrooy B (2013), 'Couple strategies: negotiating working time over the life course', in Evans A and Baxter J (eds), *Negotiating the life course: stability and change in life pathways*, Springer, Netherlands.

50. Vuksan M, Williams A & Crooks V (2012), 'Family friendly policies: accommodating end-of-life caregivers in workplaces', *International Journal of Workplace Health Management*, Vol. 5, No. 1, pp. 4–14.

51. Waldfogel J (1998), 'Understanding the "family gap" in pay for women with children', *The Journal of Economic Perspectives*, Vol. 12, No. 1, pp. 137–156.

52. Walters P & Whitehouse G (2015), 'Mothers' perceptions of support in the workplace: a sense of entitlement or resignation?', *Journal of Sociology*, Vol. 51, No. 3, pp. 769–782.

53. Watson I, Buchanan J, Campbell I & Briggs C (2003), *Fragmented futures: new challenges in working life*, Federation Press, Sydney.

54. Whyman PB & Petrescu AI (2014), 'Partnership, flexible workplace practices and the realisation of mutual gains: evidence from the British WERS 2004 dataset', *The International Journal of Human Resource Management*, Vol. 25, No. 6, pp. 829–851.

55. Williams P, McDonald P & Cathcart A (2017), 'Executive-level support for flexible work arrangements in a large insurance organization', *Asia Pacific Journal of Human Resources*, Vol. 55, No. 3, pp. 337–355.

56. Williamson S & Baird M (2007), 'Family provisions and Workchoices: testing times', *Australian Journal of Labour Law*, Vol. 20, No. 1, pp. 53–74.

57. Wright A, Crettenden A & Skinner N (2016), 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities', *Community, Work and Family*, Vol. 19, No. 3, pp. 340–361.

1.2 Working papers and reports

1.2.1 Australia

58. Abhayaratna J, Andrews L, Nuch H & Podbury T (2008), *Part time employment: the Australian experience*, Staff Working Paper, Productivity Commission, June.

59. AMP.NATSEM (2009), *She works hard for the money: Australian women and the gender divide*, Income and wealth report, Issue 22, University of Canberra, April.

60. AMP.NATSEM (2013), *Modern family: The changing shape of Australian families*, Income and wealth report, Issue 34, University of Canberra, October.

61. Australian Industry Group (2016), *Absenteeism and presenteeism survey report 2015*.

62. Baxter J (2013), *Employment characteristics and transitions of mothers in the longitudinal study of Australian children*, Occasional Paper No. 50, Department of Social Services, Canberra.

63. Baxter JA, Hand K & Sweid R (2016), *Flexible child care and Australian parents' work and care decision-making*, Australian Institute of Family Studies, Research Report No. 37.

64. Baxter J & Renda J (2015), *Review of government initiatives for reconciling work and family life*, Australian Institute of Family Studies, Research Report No. 34, August.

65. Bishop J & Cassidy N (2017), *Insights into low wage growth in Australia*, Reserve Bank of Australia Bulletin, March Quarter, pp. 13–20.

66. Broadway B and Wilkins R (2015), *Low-paid women's workforce participation decisions and pay equity*, Melbourne Institute of Applied Economic and Social Research, a report for the Pay Equity Unit of the Fair Work Commission, December.

67. Campbell I & Charlesworth S (2004), *Background report: Key work and family trends in Australia*, Centre for Applied Social Research, RMIT University, April.

68. Cassells R, Vidyattama Y, Miranti R & McNamara J (2009), *The impact of a sustained gender wage gap on the Australian economy*, Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, University of Canberra, November.

69. Cassidy N & Parsons S (2017), *The rising share of part-time employment*, Reserve Bank of Australia Bulletin, September Quarter, pp. 19–26.

70. Cooper R, Foley M & Baird M (2016), *Women at work: Australia and the United States*, United States Studies Centre, University of Sydney, October.

71. Daley J, McGannon C & Ginnivan L (2012), *Game-changers: economic reform priorities for Australia*, Grattan Institute, June.

72. Direct Health Solutions (2016), *2016 Absence management survey report*.

73. Ernst & Young (2013), *Untapped opportunity: the role of women in unlocking Australia's productivity potential*, July.

74. Fair Work Commission (2015), *Australian Workplace Relations First findings report: consolidated content from online publication*, Pay Equity Unit, January.

75. Gilfillan G (2015), *Statistical snapshot: small business employment contribution and workplace arrangements.* Department of Parliamentary Services, Research paper series, 2015–16.

76. Holmes B (2011), *Results of flexible work in 2010 – a pulse survey*, Managing Work-Life Balance International.

77. KPMG (2016), *She's price(d)less: the economics of the gender pay gap*, report prepared for Diversity Council Australia and the Workplace Gender Equality Agency, October.

78. Martin B, Baird M, Brady M, Broadway B, Hewitt B, Kalb G, Strazdins L, Tomaszewski W, Zadoroznyj M, Baxter J, Chen R, Foley M, McVicar D, Whitehouse G & Xiang N (2014), *Paid parental leave evaluation: final report*, Institute for Social Science Research, The University of Queensland, November.

79. Medibank (2011), *Sick at work: the cost of presenteeism to your business and the economy*, part of the Medibank research series, July.

80. Nguyen T & Hansell D (2014), *Firm dynamics and productivity growth in Australian manufacturing and business services*, Australian Bureau of Statistics, Catalogue No. 1351.0.55.052, October.

81. O'Neill B (2015), *General Manager's report into the operation of the provisions of the National Employment Standards to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009 (Cth) 2012–2015,* Fair Work Commission, November.

82. Parham D (2012), *Australia's productivity growth slump: signs of crisis, adjustment or both?*, Visiting Researcher Paper, Productivity Commission, Canberra, April.

83. PwC (2017), *Understanding the unpaid economy*, March.

84. Productivity Commission (2015), *Workplace Relations Framework*, Final Report, Canberra.

85. Productivity Commission (2014), *Childcare and Early Childhood Learning*, Inquiry Report No. *73*, Canberra.

86. Productivity Commission (2013), *PC productivity update*, May.

87. Productivity Commission (2009) *Paid Parental Leave: Support for Parents with Newborn Children*, Report No. 47, Canberra.

88. Skinner N & Pocock B (2014), *The persistent challenge: Living, working and caring in Australia in 2014 - The Australian work life index 2014*, Centre for Work + Life, University of South Australia.

89. Skinner N, Pocock B & Hutchinson C (2015), *A qualitative study of the circumstances and outcomes of the national employment standards right to request provisions*, a report to Fair Work Australia, Centre for Work + Life, University of South Australia.

90. Toohey T, Colosimo D & Boak A (2009), *Australia's hidden resource: the economic case for increasing female participation*, Goldman Sachs JBWere Investment Research, November.

91. Venn D & Wakefield C (2005), *Transitions between full-time and part-time employment across the life-cycle*, Department of Employment and Workplace Relations, paper presented at the HILDA Research Conference, Melbourne, 29 September.

92. Workplace Gender Equality Agency (2016), *Australia's gender equality scorecard: key findings from the Workplace Gender Equality Agency's 2015–16 reporting data*, November

1.2.2 International

93. Arrowsmith J (2000), *The Impact of the 1998 Working Time Regulations*, EurWork, European Foundation for the Improvement of Living and Working Conditions, January.

94. Barroso M (2011), *Case study: work adjustments – Axa, Portugal*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

95. Bond JT & Galinsky E (2006), *How can employers increase the productivity and retention of entry-level, hourly employees?*, Families and Work Institute, Research Brief No. 2, New York, November.

96. Buddelmeyer H, Mourre G & Ward M (2008), *Why do Europeans work part-time? A cross-country panel analysis*, European Central Bank, Working Paper Series No. 872, February.

97. Byrne P (2011), *Case study: care-related supports – BT, UK*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

98. Devlin C & Shirvani A (2014), *The impact of the working time regulations on the UK labour market: a review of evidence*, United Kingdom Department for Business, Innovation and Skills, Analysis Paper No. 5.

99. Employer Panel for Caregivers (2015), *When work and caregiving collide: how employers can support their employees who are caregivers'*, Government of Canada, Report from the Employer Panel for Caregivers.

100. Forth J, Lissenburgh S, Callender C & Millward N (1997), *Family-friendly working arrangements in Britain: Research Report No. 16*, Department of Education and Employment, United Kingdom, July.

101. Fortin P, Godbout L & St-Cerny S (2012), *Impact of Quebec's universal low-free childcare program on female labour force participation, domestic income, and government budgets*, Atkinson Centre for Society and Child Development.

102. Future of Work Institute (2012), *The benefits of flexible working arrangements: a future of work report*, August.

103. Gareis K (2011), *Case study: leave-related measures, T-Mobile, Austria*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

104. Garnero A, Kampelmann S & Rycx F (2013), *Part-time work, wages and productivity: evidence from Belgian matched panel data*, Institute for the Study of Labor, Discussion Paper No. 7789, November.

105. Hegewisch A (2009), *Flexible working policies: a comparative review*, United Kingdom Equality and Human Rights Commission, Research Report 16, Manchester.

106. Hegewisch A (2004), *Individual working time rights in Germany and the UK: How a little law can go a long way*, paper presented at Working Time for Working Families: Europe and the United States Conference, Washington Collage of Law, Washington DC, 7–8 June.

107. Humer Z (2011), *Case study: awareness raising – Mercator, Slovenia*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

108. International Labour Organization (ILO) (2003), *Time for equality at work*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 91st Session, Geneva, Report I (B).

109. ILO (1993), *Workers with family responsibilities*, International Labour Conference, 80th Session, Geneva, Report III (Part 4B).

110. Lambourne E, Brown S, Hawkins J & Allen D (2008), *Employment Law Admin Burdens Survey 2008*, prepared for the United Kingdom Department of Business, Enterprise and Regulatory Reform, Manchester, December.

111. Lero D, Richardson J & Korabik K (2009), *Cost-benefit review of work-life balance practices – 2009*, Canadian Association of Administrators of Labour Legislation, Ottowa.

112. Organization for Economic Cooperation and Development (OECD) (2017), *Connecting people with jobs: key issues for raising labour market participation in Australia*, OECD Publishing, Paris.

113. OECD (2017), *In pursuit of gender equality: an uphill battle*, OECD Publishing, Paris.

114. OECD (2014), *How's life in Australia?*, OECD Better Life Index.

115. OECD (2011), *Doing better for families*, OECD Publishing, Paris.

116. Peters P (2011a), *Case study: awareness raising – Menzis, the Netherlands*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

117. Peters P (2011b), *Case study: awareness raising – Novel Zorg and Women, the Netherlands*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

118. Peters P (2011c), *Case study: work adjustments – Connexxion, the Netherlands*, EurWORK, European Foundation for the Improvement of Living and Working Conditions, December.

119. Schwab K (ed) (2016), *The Global Competitiveness Report 2016–2017*, World Economic Forum, Geneva.

120. Smeaton D, Ray K & Knight G (2014), *Costs and benefits to business of adopting work life balance working practices: a literature review*, United Kingdom Department for Business Innovation and Skills.

121. Sung J & Ashton D (2005), *High performance work practices: linking strategy and skills to performance outcomes*, United Kingdom Department of Trade and Industry, London.

122. Yasbek P (2004) *The business case for firm-level work-life balance policies: a review of the literature*, Labour Market Policy Group, New Zealand Department of Labour, January.

1.3 Government reports and reviews

1.3.1 Australia

123. Australian Government (2008), *National Employment Standards Exposure Draft – Discussion Paper*, Department of Education, Employment and Workplace Relations, February.

124. Australian Human Rights Commission (2014), *Supporting working parents: pregnancy and return to work national review – report*, Australian Human Rights Commission.

125. Fair Work Act Review Panel (2012), *Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation*, Australian Government.

1.3.2 International

126. Department for Business, Innovation and Skills (2014), *The fourth work-life balance employer survey (2013)*, United Kingdom Government, BIS Research Paper No. 184, December.

127. Department of Employment and Learning (Northern Ireland) (2010), *Flexible Working and Time to Train Response to Public Consultation*, United Kingdom Government.

128. Executive Office of the President of the United States (2010), *Work–life balance and the economics of workplace flexibility*, United States of America Council of Economic Advisers, March.

1.4 Data sources

129. ABS (2017a), *Australian Demographic Statistics, Sep 2016*, Catalogue No. 3101.0.

130. ABS (2017b), *Australian Industry, 2015–16*, Catalogue No. 8155.0.

131. ABS (2017c), *Australian National Accounts: National Income, Expenditure and Product, Jun 2017*, Catalogue No. 5206.0.

132. ABS (2017d), *Australian National Accounts: National Income, Expenditure and Product, Mar 2017*, Catalogue 5206.0.

133. ABS (2017e), *Australian Social Trends, Dec 2011*, Catalogue No. 4102.0: 'Fifty Years of labour Force: Now and Then'.

134. ABS (2017f), *Average Weekly Earnings, Australia, May 2017*, Catalogue 6302.0.

135. ABS (2017g), *Characteristics of Employment, Australia, August 2016*, Catalogue No. 6333.0.

136. ABS (2017h), *Labour Force, Australia, Feb 2017*, Catalogue No. 6202.0.

137. ABS (2017i), *Labour Force, Australia, Detailed - Electronic Delivery, Aug 2017*, Catalogue No. 6291.0.55.001.

138. ABS (2017j), *Labour Force, Australia, Detailed - Electronic Delivery, Jul 2017*, Catalogue No. 6291.0.55.001.

139. ABS (2017k), *Labour Force, Australia, Detailed, Quarterly, Aug 2017*, Catalogue No. 6202.0.

140. ABS (2017l), *Labour Force, Australia, Detailed, Quarterly, May 2017*, Catalogue No. 6202.0.

141. ABS (2017m), *Labour Force, Australia: Labour Force Status and Other Characteristics of Families, June 2016*, Catalogue No. 6224.0.55.001.

142. ABS (2016a), *Births, Australia, 2015*, Catalogue No. 3301.0.

143. ABS (2016b), *Estimates of Industry Multifactor Productivity, 2015–16*, Catalogue No. 5260.0.55.002.

144. ABS (2016c), *Gender Indicators, Australia, August 2016*, Catalogue No. 4125.0.

145. ABS (2015a), *Childhood Education and Care, Australia, June 2014*, Catalogue No. 4402.0.

146. ABS (2015b), *Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, Catalogue No. 4430.0.

147. ABS (2015), *Family Characteristics and Transitions, Australia, 2012–13*, Catalogue No. 4442.0.

148. ABS (2015c), *General Social Survey: Summary Results, Australia 2014*, Catalogue No. 4159.0.

149. ABS (2015d), *Household and Family Projections, Australia, 2011 to 2036*, Catalogue No. 3236.0.

150. ABS (2015e), *Labour Mobility, Australia, February 2013*, Catalogue No. 6209.0.

151. ABS (2014a), *Forms of Employment, Australia, November 2013*, Catalogue No. 6359.0.

152. ABS (2014b), *Measures of Australia's Progress, 2013*, Catalogue No. 1370.0.

153. ABS (2012), *Pregnancy and Employment Transitions, Australia, Nov 2011*, Catalogue No. 4913.0.

154. ABS (2011a), *Caring in the Community, Australia, 2009*, Catalogue No. 4436.0.

155. ABS (2011b), *Workforce Participation and Workplace Flexibility, Victoria, Dec 2010*, Catalogue No. 6210.2.

156. ABS (1999), *Disability, Ageing and Carers, Australia: Summary of Findings, 1998*, Catalogue No. 4430.0.

157. Department of Social Services and Melbourne of Applied Economic and Social Research, *Household, Income and Labour Dynamics in Australia (HILDA) Survey*, Release 15.

158. Department of Social Services and Melbourne of Applied Economic and Social Research, *Household, Income and Labour Dynamics in Australia (HILDA) Survey*, Release 14.

159. Fair Work Commission, *Australian Workplace Relations Study*, 2014.

160. Workplace Gender Equality Agency (WGEA) (2016), *Gender Composition of the Workplace: by occupation.*

2 Additional articles

1. Bittman M, Hoffmann S & Thompson D (1998) 'The "family friendly" workplace: origins, meaning and application at Australian workplaces', *International Journal of Manpower*, Vol. 19, No. 4, pp. 250–265.

2. Blackham A (2015) 'Rethinking working time to support older workers,' *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 31, No. 2, pp. 119–140.

3. Budd JW & Mumford KA (2006), 'Family-friendly work practices in Britain: Availability and perceived accessibility', *Human Resource Management*, Vol. 45, No. 1, pp. 23–42.

4. Burri SD, Opitz H & Veldman A (2003), 'Work-family policies on working time in practice. A Comparison of Dutch and German case law on working-time adjustment,' *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 19, No. 3, pp. 321–346.

5. Carney T & Junor A (2014) 'How do occupational norms shape mothers' career and caring options?', *Journal of Industrial Relations*, Vol. 56, No. 4, pp. 465–487.

6. Chapman A (2010) 'Industrial law, working hours, and work, care and family', *Monash University Law Review*, Vol. 36, No. 3, pp. 190–216.

7. Chen Y & Fulmer IS (2017), 'Fine-tuning what we know about employees' experience with flexible work arrangements and their job attitudes', *Human Resource Management*, doi: 10.1002/hrm.21849.

8. Croucher R & Kelliher C (2005) 'The right to request flexible working in Britain: the law and organisational realities', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 21, No. 3, pp. 503–520.

9. Gaze B (2005) 'Quality part-time work: can law provide a framework?' *Labour & Industry: a journal of the social and economic relations of work*, Vol. 15, No. 3 pp. 89–111.

10. Golynker O (2015) 'Family-friendly reform of employment law in the UK: an overstretched flexibility', *Journal of Social Welfare and Family Law*, Vol. 37, No. 3, pp. 378–392.

11. Hegewisch A, Williams-Baron E (2017) 'The gender wage gap and work-family supports: women's choices or policy choices', *St. Louis University Public Law Review*, Vol. 36, No. 5, p. 18.

12. Kunn-Nelen A, de Grip A & Fouarge D (2013), 'Is part-time employment beneficial for firm productivity?', *Industrial & Labor Relations Review*, Vol. 65, No. 5, pp. 1172–1191.

13. Lee B-H & Kim J-S (2010), 'Is family-friendly management good for firms? The diffusion and performance of family-friendly workplaces in South Korea', *Journal of Industrial Relations*, Vol. 52, No. 4, pp. 459–475.

14. Munsch C (2016) 'Flexible work, flexible penalties: the effect of gender, childcare, and type of request on the flexibility bias', *Social Forces*, Vol. 94, No. 4.

15. Russell H, O'Connell PJ & McGinnity F (2009), 'The impact of flexible working arrangements on work–life conflict and work pressure in Ireland', *Gender, Work & Organization*, Vol. 16, No. 1, pp. 73–97.

16. Smith B & Riley J (2004), 'Family-friendly work practices and the law', *Sydney Law Review* Vol. 26, No. 3. pp. 395–426.

17. Townsend K, McDonald P & Cathcart A (2017), 'Managing flexible work arrangements in small not-for-profit firms: the influence of organisational size, financial constraints and workforce characteristics', *The International Journal of Human Resource Management*, Vol. 28, No. 14, pp. 2085–2107.

2.1 Working papers and reports

2.1.1 Australia

18. Baxter J (2013), *Parents working out work*, *Australian Family Trends* No. 1, Australian Institute of Family Studies.

19. Bittman M, Hoffman, S & Thompson D (2004), *Men's uptake of family-friendly employment provisions,* Policy Research Paper No. 22, Department of Family and Community Services.

20. Hewitt B, Baird M, Baxter J, Brady M, Coles L, Dickenson J, Strazdins L, Whitehouse G, Xiang N & Yerkes M (2017), *Millennium Mums Report, waves 1–5*, Institute for Social Science Research, University of Queensland.

2.1.2 International

21. Devicienti F, Grinza A & Vannoni D (2015), *The impact of part-time work on firm total factor productivity: evidence from Italy*, Institute for the Study of Labour, Discussion Paper No. 9463, October.

22. Garnero A (2016), *Are part-time workers less productive and underpaid?*, IZA World of Labour, No. 249, April.

23. Grimshaw G & Rubery J (2015), *The motherhood pay gap: a review of the issues, theory and international evidence*, International Labour Office, Geneva, Working paper No. 1/2015.

24. Tobin S, Kuhn S, Horne R & Yoon S (2017), *World employment social outlook: trends for women 2017*, International Labour Office, Geneva.

2.2 Government reports and reviews

25. Equality & Human Rights Commission (UK) (2009), *Working better: meeting the changing needs of families, workers and employers in the 21st century*, Equality and Human Rights Commission, March.[1]

ATTACHMENT D – Witness Statements

Professor Siobhan Austen	Expert Statement of Professor Siobhan Austen-5 May 2017, Transcript [168] and Statement of Siobhan Austen, Transcript [176]	Exhibit ACTU 1 and ACTU 2
Dr Jill Murray	Expert Statement of Dr Jill Murray-6 May 2017, Transcript [679]	Exhibit ACTU 5
Dr James Stanford	Expert Report of Dr James Stanford-4 September 2017, Transcript [805]	Exhibit ACTU 6
Dr Ian Watson	Expert Statement of Dr Ian Watson-4 May 2017, Transcript [467] and Supplementary Statement of Dr Ian Watson-27 November 2017, Transcript [474]	Exhibit ACTU 3 and ACTU 4
Monika Bowler	Witness Statement of Monika Bowler-21 April 2017, Transcript [1296]	Exhibit ACTU 12
Ashlee Czerkesow	Witness Statement of Ashlee Czerkesow-8 May 2017, Transcript [1326]	Exhibit ACTU 17
Sacha Hammersley	Witness Statement of Sacha Hammersley-1 May 2017, Transcript [1201]	Exhibit ACTU 9
Sherryn Jones-Vadala	Witness Statement of Sherryn Jones-Vadala-6 May 2017, Transcript [1079]	Exhibit ACTU 8
Nicole Mullan	Witness Statement of Nicole Mullan-3 May 2017, Transcript [1298]	Exhibit ACTU 13
Michelle Ogulin	Witness Statement of Michelle Ogulin-1 May 2017, Transcript [1294]	Exhibit ACTU 11
Katie Routley	Witness Statement of Katie Routley-6 May 2017, Transcript [991]	Exhibit ACTU 7
Andrea Sinclair	Witness Statement of Andrea Sinclair-8 May 2017, Transcript [1300]	Exhibit ACTU 14
Jessica van der Hilst	Witness Statement of Jessica van der Hilst-6 May 2017, Transcript [1260]	Exhibit ACTU 10
Witness 1	Transcript [1307]	Exhibit ACTU 16
Paula Bayliss	Statement of Paula Bayliss-31 October 2017, Transcript [2115] and Supplementary Statement of Paula Bayliss, 11 December 2017, Transcript [2115]	Exhibit ACCI 1 and ACCI 2
Lauren Cleaver	Statement of Lauren Cleaver-31 October 2017, Transcript [2115] and Supplementary Statement of Lauren Cleaver, 12 December 2017, Transcript [2115]	Exhibit ACCI 3 and ACCI 4

Jae Fraser	Statement of Jae Fraser-31 October 2017, Transcript [2115]	Exhibit ACCI 5
Mark Rizzardo	Statement of Mark Rizzardo-31 October 2017, Transcript [2115]	Exhibit ACCI 6
Jeremy Lappin	Witness Statement of Jeremy Lappin-26 September 2017, Transcript [1543]	Exhibit Ai Group 3
Benjamin Norman	Witness Statement of Benjamin Norman-24 October 2017, Transcript [2108] and Supplementary Witness Statement of Benjamin Norman-8 December 2017, Transcript [2108]	Exhibit Ai Group 5 and Ai Group 6
Janet O'Brien	Witness Statement of Janet O'Brien-4 July 2017, Transcript [1391] and Supplementary Witness Statement of Janet O'Brien-11 December 2017, Transcript [1397]	Exhibit Ai Group 1 and Ai Group 2
Peter Ross	Witness Statement of Peter Ross-24 October 2017, Transcript [2108] and Supplementary statement of Peter Ross – unsigned, Transcript [2108]	Exhibit Ai Group 7 and Ai Group 8
Julie Toth	Witness Statement of Julie Toth-26 October 2017, Transcript [1711]	Exhibit Ai Group 4
Kevin Hoang	Statement of Kevin Hoang-3 November 2017, Transcript [2130]	Exhibit MTO 1
Edwina Beveridge	Statement of Edwina Beveridge-29 September 2017, Transcript [2081] and Statement of Edwina Beveridge-8 December 2017, Transcript [2081]	Exhibit NFF 1 and NFF 2
Lucinda Corrigan	Statement of Lucinda Corrigan-1 November 2017, Transcript [2082] and Statement of Lucinda Corrigan-7 December 2017, Transcript [2083]	Exhibit NFF 3 and NFF 4
Chris Kemp	Statement of Chris Kemp-30 October 2017, Transcript [2087] and Statement of Chris Kemp-undated, Transcript [2087]	Exhibit NFF 5 and NFF 6
Deborah Platts	Statement of Deborah Platts-27 October 2017, Transcript [2089] and Statement of Deborah Platts-11 December 2017, Transcript [2089]	Exhibit NFF 7 and NFF 8

ATTACHMENT E – List of Cases

4 yearly review of modern awards – Alleged NES Inconsistencies [2015] FWCFB 3023, (2015 249 IR 358)

4 Yearly Review of Modern Awards – Annual Leave [2015] FWCFB 3406

4 Yearly Review of Modern Awards – Annual Leave [2016] FWCFB 3177

4 Yearly Review of Modern Awards – Common Issue – Award Flexibility [2015] FWCFB 4466

4 Yearly Review of Modern Awards – Common Issue – Award Flexibility [2016] FWCFB 6178

ARTBIU v ARTC [2013] FWC 6861

Australian Competition and Consumer Commission v Leelee Pty Ltd [1999] FCA 1121

Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503

Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd [2017] FCAFC 123

Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Limited [2017] FCAFC 35

Edwards v Giudice (1999) 94 FCR 561

Esso Australia Pty Ltd v The Australian Workers' Union (2017) 350 ALR 404

Jurisdictional Decision [2015] FWCFB 5585

National Retail Association v Fair Work Commission (2014) 225 FCR 154, [2014] FCAFC 118

O'Sullivan v Farrer (1989) 168 CLR 210

Preliminary Jurisdictional Issues decision [2014] FWCFB 1788

Parental Leave Test Case 2005 (2005) 143 IR 245

Penalty Rates – Hospitality and Retail Sectors decision [2017] FWCFB 1001

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Re Armacell Australia Pty Ltd (2010) 202 IR 38

Re Canavan Building Pty Ltd [2014] FWCFB 3202

Re Hull-Moody Finishes Pty Ltd [2011] FWAFB 6709

Re Shop, Distributive and Allied Employees Association [2011] FWAFB 6251; (2011) 211 IR 462

Request from the Minister for Employment and Workplace Relations [2008] AIRCFB 550

Shop, Distributive and Allied Employees Association v National Retail Association (No.2) (2012) 205 FCR 227

Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161

The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012 [2012] FWA 2556

Transitional Review Award Flexibility Decision [2013] FWCFB 2170

Victoria v Commonwealth (1937) 58 CLR 618

Attachment F – Agreed matters

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.