IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

SUBMISSIONS OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 27 November 2017

D No: **55/2017**

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Introduction

1. These reply submissions are filed in accordance with the directions of the Full Bench dated 4 October 2017 and later amended on 21 November 2017.

2. The following parties have filed submissions in opposition to the Family Friendly Working Hours draft determination sought by the ACTU (**the proposed clause**):

   (a) The Australian Industry Group (**AIG**), along with five witness statements;

   (b) The Australian Chamber of Commerce and Industry (**ACCI**), along with four witness statements;

   (c) The National Farmer's Federation (**NFF**) along with four witness statements;

   (d) The National Retail Association (**NRA**);

   (e) The Private Hospital Industry Employer Associations (**PHIEA**);

   (f) The Coal Mining Industry Employer Group (**CMIEG**); and

   (g) A group of motor trades associations including the Victorian Automobile Chamber of Commerce (**VACC**), along with one witness statement.

3. The submissions of AIG, ACCI, the NFF and the NRA are together referred to in these reply submissions as the **employer submissions**. The submissions of CMIEG and PHIEA deal with award or industry-specific matters. Consistent with the approach to common issues in the four yearly review, common issue proceedings, including this proceeding, concern matters of general principle; the application of any draft determination to individual awards will be the subject of hearings after the determination of the common issue.[1] Accordingly, these submissions do not address matters raised in the CMIEG and the PHIEA submissions.

4. The position of VACC with respect to the hearing in December 2017 is not clear. VACC is a member of ACCI, and has filed a statement of Kevin Hoang, attaching a survey and related material of VACC members. By letter to the Commission dated 24 November 2017, VACC explained that its survey was at least in part different to the joint employer survey proposed to be tendered by AIG (but see paragraph 59 and following below). VACC also stated that it and

[1] See *4 Yearly Review of Modern Awards – Common Issues – Statement and Directions* [2014] FWC 1790, [6] and *4 Yearly Review of Modern Awards – Common Issues – Statement* [2014] FWC 8583, [15].

its associated organisations would not be filing submissions in this matter and would rely on the submissions of ACCI.

5. Should VACC wish to tender the survey attached to the statement of Mr Hoang at the hearing in December 2017, then the ACTU requires Mr Hoang to be available for cross-examination. If, however, the survey is intended to be adduced at the award-specific stage of this proceeding, then the ACTU reserves its rights to cross-examine Mr Hoang at that stage, and does not otherwise require his appearance in the December hearings.

6. Subject to the qualifications above, these reply submissions are directed to matters raised in the employer submissions which are not already dealt with in the ACTU's submissions dated 9 May 2017. Where matters in the employers' submissions are not addressed here, the ACTU joins issue with the employers, with the exception of matters relevant to the evidence proposed to be called by the employer parties. The ACTU will seek to file written submissions addressing the findings that the Commission should make on the basis of the evidence following the cross-examination of witnesses.[2]

1 The jurisdictional basis for the claim

7. In the four yearly review of modern awards, the FWC can make one or more determinations varying modern awards, per s 156(2)(b)(i) of the FW Act, subject to the requirement in Subdivision A of Division 3 of Part 2-3 of the FW Act, which concerns terms which must, may, or may not, be included in modern awards.

8. ACCI complain that the ACTU has not expressly disclosed the jurisdictional basis on which it says the Commission may vary modern awards to include the clause proposed by the ACTU.[3] In submissions to the Full Bench dated 15 June 2015, the ACTU stated that the proposed parental leave clause is permitted according to, relevantly, s 136(1)(a) of the FW Act,[4] or in the alternative, s 136(1)(c) of the FW Act.[5]

<u>The proposed clause is a permitted term within the meaning of s 136(1)(a) of the *Fair Work Act*</u>

9. Section 136(1)(a) provides that a modern award may include terms about any of the matters in s 139(1) of the Act. Sections 139(1)(b) and (c) provide:

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2 Consistent with the approach taken in AM2015/1 – Family and Domestic Violence Leave.

3 ACCI submissions, [7.8].

4 The submissions of the ACTU dated 15 June 2015 were directed to an earlier version of the proposed determination, which included a right to take antenatal leave in prescribed circumstances. The ACTU has since removed the antenatal leave claim from the draft determination; accordingly, no reliance is placed on s 139(1)(h) of the FW Act as stated in the 15 June 2015 submissions: see [23].

5 See ACTU submissions dated 15 June 2015, [28].

139 Terms that may be included in modern awards--general

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

…

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

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

10. The proposed clause deals with flexible working arrangements and arrangements about when work is performed including variations to working hours, and accordingly is a permitted term within the meaning of s 136(1)(a) of the FW Act.[6]

<u>The proposed clause is a permitted term within the meaning of s 136(1)(c) of the *Fair Work Act*</u>

11. Further or in the alternative to s 136(1)(a) of the FW Act, the ACTU contends that the proposed clause is a permitted term within the meaning of s 136(1)(c) of the FW Act.

12. Section 136(1)(c) provides that a modern award must only include terms that are permitted or required by s 55 of the FW Act. Section 55 of the FW Act deals with the interaction between the National Employment Standards (**NES**) and a modern award. Section 55(4)(b) provides that a modern award may include terms that supplement the NES to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES.

The proposed clause supplements the NES

13. The term "supplemental" is not defined terms in the FW Act. Consistent with the principles of statutory interpretation, it is appropriate that the words of the statute be given their ordinary or natural meaning.[7] The *Macquarie* dictionary defines 'supplement' as "*something added to complete a thing, supply a deficiency, or complete a whole*".[8] This definition appears to have been followed in *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, where the Full Bench held that a proposed clause could properly be characterised as a term which supplemented the NES entitlement to annual leave, because it "*extended the circumstances in which an employer must comply with an employee's request to take paid annual leave*".[9] The ACCI submissions suggest that the concept of 'supplementing' the NES

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6 In the *Jurisdictional Decision* (see paragraph 18 below), the Full Bench considered that it was "well arguable" that the proposed clause was authorised by s 139(1)(b) of the FW Act: at [22], and see further, ACTU submissions dated 15 June 2015 at [23]–[24].

7 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [45]–[51]; see also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78].

8 The *Macquarie Dictionary* (5th ed, 2009).

9 [2015] FWCFB 5771, [129]. Emphasis added.

"*connotes the notion of building upon, increasing or extending*".[10] These concepts are not inconsistent with the Macquarie definition.

14. 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; because 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; because the right to refuse a request on 'reasonable business grounds' cannot be reviewed or enforced; and because the qualifying period of 12 months is too onerous.[11]

15. The proposed clause supplements the NES because it seeks to complete, and/or remedy the deficiencies in s 65 of the FW Act in the following ways:

    (a) Section 65(1) of the FW 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)). Proposed 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 the flexible working arrangement or the employee's right to return to her or his previous position when or if circumstances change, whereas proposed 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 FW Act, because the right of employees to return to their pre-parental leave position is extended to permit

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10 ACCI submissions, [8.5].

11 See further, ACTU submissions dated 9 May 2017 at [111]–[139].

employees to maintain that position but on reduced hours to accommodate their parenting or caring responsibilities.[12]

(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.[13]

(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,[14] 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 FW Act.[15] By contrast, the proposed clause does not permit employers to refuse a request on reasonable business grounds or at all.

The proposed clause is not detrimental to an employee when compared to the NES

16. As set out above, s 55(4)(b) of the FW Act provides that a modern award may include terms that supplement the NES to the extent that the effect of those terms is *not detrimental to an employee* in any respect when compared to the NES. The proposed clause does not contain any provision for an employer to refuse an employee FFWH, by contrast to s 65(5) of the FW Act. However, s 65(5) is not a provision which is beneficial to an employee. The exclusion of an employer's right to refuse FFWH, either in the terms of s 65(5) or in equivalent terms from the proposed clause cannot be 'detrimental' to a employee within the meaning of s 55(4)(b) of the FW Act.

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12 In the *Jurisdictional Decision*, the Full Bench considered that it was reasonably arguable that the right to revert was supplementary to the right in s 84: see [23].

13 See FW Act s 65(2).

14 See ACTU submissions dated 9 May 2017 at [11]–[115].

15 See FW Act s 3(b) and ACTU submissions dated 9 May 2017 at [17] and [19].

The proposed clause does not offend s 55(1) of the FW Act

17. Several of the employer parties object to the proposed clause on the basis that it offends s 55(1) of the FW Act, which provides that a modern award must not exclude the NES or any provision of the NES.[16]

18. The ACTU's primary response to this argument is that s 55(7) of the FW Act provides that a term does not contravene s 55(1) where it is permitted by s 55(4) or (5) of the Act. For the reasons set out at paragraphs 11 to 16 above, the ACTU contends that the proposed clause is permitted by s 55(4) of the Act, and accordingly, s 55(1) is not offended. This issue was ventilated in the preliminary jurisdictional hearing in this matter. In *4 Yearly Review of Modern Awards – Family and Domestic Violence Clause & Family Friendly Work Arrangements Clause* [2015] FWCFB 5585 (***Jurisdictional Decision***), the Full Bench (Hatcher VP, Acton SDP and Spencer C) declined to strike out the ACTU's proposed clause on a preliminary jurisdictional basis.[17] On the issue of s 55(7), the Full Bench said:

> … 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).[18]

19. This aspect of the *Jurisdictional Decision* has not been challenged by any of the employer parties.

20. In the alternative, the ACTU submits that the proposed clause does not exclude s 65 or a provision of s 65 of the NES.

21. The meaning of "exclude" in s 55(1) of the FW Act was considered by a five-member Full Bench in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (***Canavan***). The Full Bench considered whether an enterprise agreement contravened s 55(4) of the FW Act by including a clause providing for annual leave to be paid "progressively in advance" and "incorporated into the [hourly] wage rate" prescribed by the agreement.[19]

22. The Full Bench held that an offending term need not expressly exclude the NES in order to fall foul of s 55(1). The ordinary meaning of the language used in s 55(1) of the FW Act meant that if the provisions of an agreement "*would in their operation result in an outcome*

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16 See, eg, AIG submissions, [29]–[39]; ACCI submissions, [8.12]–[8.15]; CMIEG submissions, [12].

17 See [22].

18 *Jurisdictional Decision*, [24].

19 Clause 41 of the agreement is set out in full in *Re Canavan Buiding Pty Ltd* [2014] FWCFB 3202, [6].

whereby employees do not receive (in full or at all) a benefit provided for by the NES", then the provision would constitute a prohibited exclusion of the NES.[20] The Full Bench found that the specific clause proposed by Canavan Pty Ltd contravened s 55(1) of the FW Act because it excluded the entitlement to 'paid annual leave' in s 87, and the requirement in s 90(1) that payment be made at the base rate of pay for the employee's ordinary hours of work 'in the period' at which the employee takes annual leave.[21] In subsequent applications of *Canavan*, the test has been described as an assessment of whether the proposed term will "*negate the effect*" of the NES entitlement.[22]

23. The starting point is that the proposed clause does not exclude the whole of s 65 because that section is broader in scope than the proposed clause. It is available in a wider range of circumstances including where employees are over 55 or have a disability, and relates to wider range of flexible working arrangements, including changes in work location and patterns of work. The ACTU's claim relates to parents and carers, and hours of work only.

24. 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.

25. The proposed clause does not exclude s 65 of the FW Act for parents and/or carers, either expressly or by negating the effect of s 65, because (a) employees who are parents or carers can still make a request for a flexible working arrangement, including for reduced hours, under s 65 of the FW Act[23] and (b) while the proposed clause undoubtedly offers improved rights to employees than those in s 65 of the Act, it cannot be the case that any award or enterprise agreement which contains entitlements that are better than those in the NES are prohibited by s 55(1). The prohibition in s 55(1) is on award terms which *exclude* – not improve, modify, or alter – the NES or a provision of the NES. This interpretation is expressly

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20 *Canavan*, [36].

21 Although the decision in *Canavan* concerned a proposed term in an enterprise agreement, the principles are equally applicable to a term proposed in modern awards, because ss 55(1) and 55(4) of the FW Act apply to both enterprise agreements and modern awards. See also *4 Yearly Review of Modern Awards – Real Estate Industry Award 2010* [2017] FWCFB 3543, where the Full Bench stated that *Canavan* was also applicable to the terms of modern awards: at [118].

22 Per *Re 4 Yearly Review of Modern Awards – Alleged NES Inconsistencies* (2015) 249 IR 358, [37].

23 ACCI distinguish the decision in *4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* [2015] FWCFB 4466 from this case: see ACCI submissions at [8.20]–[8.25]. For the reasons set out, the ACTU contends that the proposed clause does not exclude s 65(5) because employees can still make a request under the NES for a flexible work arrangement, and the scope of the two entitlements is different.

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.

26. Although the ACTU does not necessarily agree with AIG's interpretation of the terms in the proposed clause, it is notable that AIG has submitted that in addition to the circumstances 'caught' by the proposed clause, s 65 "*would also give employees with parenting and caring responsibilities a right to request reductions in hours or changed hours of work which they would not be eligible to obtain under cl X.1.1 of the ACTU's proposal*".[24] It is difficult to reconcile this submission with AIG's subsequent contention that the proposed clause would "*remove the operation of s 65 of the FW Act*."[25]

27. 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,[26] 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.[27]

28. 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.[28] 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.[29] Accordingly, the 'practical operation' of s 65 is unlikely to be disturbed by the proposed clause.

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24 AIG submissions, [257].

25 AIG submissions, [284].

26 *Jurisdictional Decision*, [22].

27 *Jurisdictional Decision*, [25].

28 Cited in the expert report of Dr Jill Murray dated 4 May 2017 at [23].

29 Cited in the expert report of Dr Jill Murray dated 4 May 2017 at [100].

2 The adequacy of existing regulation

29. The AIG submissions contain a fulsome discussion of a number of mechanisms by which working hours can be arranged and determined.[30] For the purposes of these reply submissions, it is only necessary to address the relevance of anti-discrimination laws, and unfair dismissal and general protections under the FW Act.

Remedial legislation

30. In the performance of the four yearly review of modern awards, the Commission must take into account the need to promote flexible modern work practices,[31] assist employees to balance their family and work responsibilities by providing for flexible working arrangements,[32] and prevent and eliminate discrimination on the basis of sex, pregnancy and family or carer's responsibilities.[33]

31. The employer parties contend that the existence of laws preventing discrimination against parents and carers and other remedial legislation, including general protections and unfair dismissal laws, ameliorates the need for the Commission to include a family friendly working arrangements clause in modern awards. This argument misunderstands the purpose and effect of such laws, the intended purpose and effect of the ACTU's claim and the Commission's statutory task in the four yearly review.

Remedial not preventative

32. AIG submits that unfair dismissal, general protections, and anti-discrimination laws (both in the FW Act and in discrimination legislation) have a deterrent effect.[34] No evidence is cited in support of this proposition. The ACTU accepts that the existence of the relevant legislation *may* have a deterrent effect on employers. However, the purpose of such legislation is remedial, and operates ex-post, not ex-ante. The fact that claims are regularly brought under unfair dismissal, general protections, and anti-discrimination laws is prima facie evidence that any deterrent effect is limited and difficult to measure.

33. The authorities cited by AIG and ACCI in their submissions all involved situations where the employee was dismissed or resigned from their employment, and undertook the stress,

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30 At Chapters 10 and 11 of the AIG submissions.

31 Per FW Act ss 134(1)(d) and 156.

32 Per FW Act s 3 which applies to the exercise of the Commission's powers by virtue of s 578(a).

33 Per FW Act s 578.

34 AIG submissions, [450], [473], [489].

inconvenience, expense and risk of legal action by an individual against their employers.[35] The cases are not compelling examples of the deterrent effect of unfair dismissal or general protections laws.

Anti-discrimination laws

34. Federal anti-discrimination law makes it unlawful for an employer to discriminate against an employee or prospective employee because of their family responsibilities, sex and/or pregnancy (*Sex Discrimination Act 1982* (Cth), ss 5, 7 and 7A),[36] or because they are an associate or carer of a person with a disability *(Disability Discrimination Act 1992* (Cth), s 7). While anti-discrimination provisions differ under various state and territory laws, all jurisdictions protect employees with caring or parenting responsibilities from both direct and indirect discrimination. Most jurisdictions simply require an employer not to discriminate; they do not place a positive duty on employers to accommodate the needs of workers who are pregnant and/or have family or caring responsibilities.[37]

35. In a number of indirect sex discrimination cases, courts have held that a requirement that employees be available to work full-time has the effect of disadvantaging women, because women are more likely to require reduced hours to meet their family responsibilities. This proposition was succinctly expressed in *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209 at [70], where Driver FM stated that he needed "*no evidence to establish that women per se are disadvantaged by a requirement that they work full-time*." Nevertheless, decisions regarding individual complaints under discrimination law are made by courts and tribunals on a case-by-case basis and the findings in one case are not equivalent to a general principle that will be applicable to other cases.

36. While the ACTU agrees with the employer parties that anti-discrimination legislation provides important protections and redress mechanisms for employees who have been discriminated against by their employer, the assertion that anti-discrimination laws act as a

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35 See AIG submissions, [451]–[456]; [475]–[481]; [486]–[487]; ACCI Submissions, [6.34]

36 Under the *Sex Discrimination Act*, the definition of 'family responsibilities' is restricted to *direct* discrimination only. There is no provision for *indirect* discrimination based on the imposition of a 'condition, requirement or practice' that disadvantages people with family responsibilities. It is legally complex to make out the causation and comparator elements of a direct family responsibilities discrimination claim. For this reason, a number of disputes regarding requests for reduced hours have been commenced as indirect discrimination claims under the SDA on the grounds of sex, rather than family responsibilities, or under applicable state or territory laws.

37 The only exception is Victoria's *Equal Opportunity Act 2010*, which provides at s 19 that an employer must not unreasonably refuse to accommodate a person's parenting or caring responsibilities in relation to their work arrangements.

deterrent and a preventative measure such as to negate the need for improved family-friendly work arrangements, is misconceived for the reasons set out at paragraph 32 above.

37. Further, the ACTU's claim is not aimed at deterring employers who might otherwise discriminate; providing a mechanism through which employees may seek redress if they have been discriminated against; or protecting employees who contend that they have been discriminated against, as suggested in the AIG submission.[38] As the employer parties acknowledge, these purposes are already fulfilled by anti-discrimination law. The purpose of the ACTU's claim is to redress the inadequacy in the safety net of minimum terms and conditions of employment by enabling employees with parenting and caring responsibilities to access family friendly working hours when necessary. Such a provision would promote flexible modern work practices and assist employees to balance their family and work responsibilities. While the provision would also promote the objects of the FW Act by contributing, in a significant way, to the prevention and elimination of discrimination on the grounds of family responsibilities, sex and pregnancy by complementing – not duplicating – the work of existing anti-discrimination laws, the ACTU's application is designed to meet the requirement in s 134(1) of the FW Act that modern awards provide a fair and relevant minimum safety net of terms and conditions of employment.

38. In 2004, the Human Rights and Equal Opportunity Commission (as it then was) stated in its submission to the *Parental Leave Test Case*:

> Anti-discrimination legislation has limited potential to bring about workplace change in Australia. While the legislation may be seen by many employers as setting a standard to be complied with, breaches are generally not amenable to public prosecution and are only pursued through individuals bringing claims for their own redress, at their own cost. In any event … many claims settle at conciliation. Litigating in the Federal Court or Federal Magistrates Court also exposes the individual to the potential liability for a costs order being made against them if they are unsuccessful."[39]

39. This remains the case in 2017. Anti-discrimination laws and other statutory protections including general protections and unfair dismissal rights, are by their nature remedial, not preventative. In many cases, such claims are brought long after the employment relationship has ended. Discrimination claims determined by courts and tribunals can occasionally set a precedent, raise awareness and encourage employers to adopt flexible modern work practices. However, discrimination law is limited in its capacity to achieve systemic or structural workplace change.

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38 AIG submissions, [489].

39 Contentions of the Human Rights and Equal Opportunity Commission Intervening, 14 May 2004, at [22].

40. It is the statutory task of this Commission to ensure that the safety net of minimum terms and conditions of employment is fair and relevant, taking into account the need to promote flexible modern work practices and assist employees to balance their family and work responsibilities. The existence of anti-discrimination laws and other remedial statutory provisions are not sufficient to meet the need for a fair and relevant minimum safety net.[40]

3 The operation of the proposed clause

41. The employer parties have raised a number of concerns about the operation of the ACTU's proposed clause. These concerns are overstated. The ACTU's proposed clause is neither unworkable nor unreasonable. It sets out a simple entitlement to reduced working hours for a designated period for employees who have either parenting responsibilities (defined as responsibility for the care of a child of school age or younger) or caring responsibilities (defined as ongoing responsibility for the care of a frail/aged person or a person with an illness or disability), with a right to revert to the employee's former working hours at the end of the period.

The purpose of the four yearly review

42. AIG asserts that these proceedings "*do not represent a general inquiry into the adequacy or otherwise of the current regulatory response to the needs of parents or carers*".[41] This statement potentially misunderstands the function of the four yearly review.

43. The four yearly review is a mandatory regulatory function performed by the Commission.[42] As stated in *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (***Penalty Rates Decision***) at [110], "*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*…". The modern awards objective is central to the Review, and the Commission is required to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions of employment.[43] Accordingly, in conducting the review, the Commission must form a value judgement about what terms are necessary in modern awards, taking into account matters including the considerations in s 134(1) of the FW Act, and the existing terms and conditions of employment contained in the NES and modern awards. It is a necessary implication of the

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40 See *4 Yearly Review of Modern Awards – Family & Domestic Violence Leave Clause* [2017] FWCFB 3494, [45].

41 AIG submissions, [661].

42 Per FW Act s 156.

43 See *Penalty Rates Decision*, [37].

Commission's task in reviewing modern awards that the adequacy of existing 'regulatory responses', or statutory safety net terms and conditions of employment, must be considered.

44. The ACTU is seeking the variation of modern awards in the four yearly review to provide for family-friendly work arrangements because it has identified a gap in the safety net related to access to flexible working arrangements. As outlined in the ACTU's primary submissions,[44] current regulatory mechanisms – most notably s 65 of the FW Act – are failing to meet the objective of assisting employees to balance their work and family responsibilities by providing for flexible working arrangements. In their current form, the provisions in s 65 of the FW Act are neither guaranteed nor enforceable. They do not provide a fair or relevant safety net for employees who need flexible working arrangements. The ACTU has proposed a clause focusing on the rights of parents and carers to reduced hours, because the evidence suggests that this is where the need for flexible working arrangements is particularly pressing and widely experienced.

<u>The operation of the proposed clause</u>

45. The submissions which follow address five matters about the operation of the proposed clause raised in the AIG submissions.

46. First, AIG asserts that the ACTU's draft determination would allow an employee to nominate hours after the business is closed, or only hours which attract penalties, or hours which breach the terms of applicable legislation.[45] This is not the case.

47. The ACTU's proposed clause defines Family Friendly Working Hours at X.4.4 as an employee's *existing position* on a part-time or reduced hours basis. 'Existing position' is defined as *the position, including status, location and remuneration, that the employee held immediately before the commencement of the Family Friendly Working Hours.* Other than by agreement, an employee could not use the proposed clause to commence working in a completely new position or one which seeks to alter the opening hours, rostering or shift arrangements in place in the organisation at large. There is nothing in the ACTU's proposed clause which would exempt a workplace from a requirement to comply with any applicable piece of legislation or award, contract or enterprise agreement terms regulating hours of work.

48. Second, AIG submits that the ACTU's clause would require an employer to pay the same remuneration for fewer hours of work.[46] This is not the intention or function of the proposed

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44 See ACTU Submissions dated 10 May 2017 at [108] and following.

45 AIG submissions, [678].

46 AIG submissions, [693]–[706].

clause. The proposed clause states that Family Friendly Working Hours means an employee's existing position on a part-time or reduced hours basis (per cl X.4.4). 'Existing position' includes the remuneration that the employee held *immediately before* the commencement of the Family Friendly Working Hours (per cl X.4.6). The temporal distinction in the definition of 'existing position', read together with the definition of 'Family Friendly Working Hours', clearly contemplates a change in remuneration. Any reduction in hours of work by an employee accessing Family Friendly Working Hours would result in a pro-rata decrease in remuneration in the usual way. AIG's assertion that such arrangements would be unworkable is overstated. There is no basis to assert that employers will not be able to manage payroll changes as a result of an employee's change of hours under the proposed clause.

49. Employees do not lightly choose to reduce their incomes, particularly award-dependent employees. Such decisions are made out of necessity when no other option is feasible.[47] In light of Australia's highly gender-segregated workforce, the unequal division of paid and unpaid work between men and women, the continued existence of stereotypes and assumptions about the roles of men and women at home and at work, the persistence of the gender pay gap and other factors, it is likely that it will – for the foreseeable future – continue to be mostly women who forgo their paid working hours in order to undertake unpaid caring work. Contrary to AIG's submission,[48] the ACTU does not claim that the inclusion of its proposed clause will resolve all of the structural issues which contribute to gender inequality. The ACTU's proposed clause is aimed simply at providing employees who need to reduce their paid working hours to accommodate parenting and caring responsibilities with job security and a right to revert to their former working hours so as to avoid the occupational downgrading associated with reduced hours. The ACTU's clause is aimed at ensuring that the employment safety net promotes flexible modern work practices, and meaningfully assists employees to balance their family and work responsibilities by providing for flexible working arrangements.

50. Third, AIG wrongly submits that an employee undertaking paid caring work would be able to access reduced hours absent employer agreement.[49] The definition of carer in the *Carer Recognition Act 2010*, on which the ACTU's definition is based, expressly excludes paid care work from the definition of carer. The proposed clause is not intended to apply to an employee who wishes to access FFWH to accommodate their paid caring responsibilities.

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47 See, eg, the evidence of ACTU witnesses Ashlee Czerkesow at [7] and [8]; Nicole Mullen at [3]–[6] and Witness 1 at [9].

48 AIG submissions, [727].

49 AIG submissions, [705].

51. Fourth, AIG submits that the period during which an employee is entitled to Family Friendly Working Hours is ambiguous and uncertain.[50] The ACTU's proposed clause is drafted to ensure that access to reduced hours is limited in duration to the period of accommodation. It is intended that a parent will have access to reduced hours (with a right to revert to their former hours) only up until their dependent child is of school age. A parent with more than one child could access more than one Family Friendly Working Arrangement, in the same way that a parent with more than one child is entitled to take more than one period of parental leave.

52. The proposed clause limits the duration of a Family Friendly Working Arrangement to accommodate caring responsibilities to a period of up to two years. An employee's entitlement to Family Friendly Working Hours (and their right to revert to their former hours) ceases at the end of this two year period, or when their caring responsibilities cease. It is correct that an employee with caring responsibilities which continue beyond a two year period could seek to access a further period or periods of Family Friendly Working Hours.

53. Fifth, regarding AIG's concerns about what constitutes parenting and/or caring responsibilities,[51] the ACTU does not agree that reasonable minds may differ on this point. These terms are clear and well-understood. In relation to the examples nominated by AIG, dropping a child at extra-curricular activities is clearly a parenting responsibility which would be covered by the clause. Picking a child up from school would also be included. However, the ACTU's proposed clause only provides access to Family Friendly Working Hours for parents of children of school age or younger. Picking a teenage child up from school would only be covered if the child had a disability, a medical condition or a mental illness, and the employee was responsible for caring for the child on an ongoing or indefinite basis. Further, contrary to AIG's submission,[52] under the ACTU's proposed clause, an employee must provide proof that they have caring or parenting responsibilities if required by the employer.

A 'right to refuse'?

54. The employer parties submit that it is not reasonable for the Commission to assume that all roles or jobs performed by award-covered employees can be undertaken on a part-time or reduced hours basis. However, the prevalence of part-time and casual employment across the Australian workforce indicates that working less than full-time hours are already the norm. Reduced hours working arrangements are already in place and operational in large numbers of

50 AIG submissions, [707] and following.

51 AIG submissions, [734]. This point is also raised in the NFF submissions at [47]–[48].

52 AIG submissions, [757].

Australian workplaces across a range of jobs and roles. The ACTU's clause does not contain an exemption for this reason.

55. It is not disputed that the implementation of a flexible working arrangement may cause some inconvenience or cost to a business. However, it should not be the case (as it currently is) that any level of cost or inconvenience – no matter how small – entitles an employer to refuse a request for flexible working arrangements. While the current test on its face requires a business ground to be 'reasonable', the lack of an enforcement mechanism means that in practice, any ground for rejection must be accepted by an employee. Currently, the vast share of the cost and inconvenience of caring for children and others is being borne by employees (most of whom are women) who are attempting to balance their work and family commitments in an unsupportive regulatory environment. The significant cost to employees, as well as the national economy, of this disproportionate burden is addressed in the ACTU's primary submissions.[53]

56. The Commission will ultimately form its own judgment and is not bound by the terms of the application. In the event that the Commission considers that an employer should have a 'right to refuse' to implement a Family Friendly Working Arrangement, the ACTU submits that (a) any exemption from the requirement to implement a Family Friendly Working Arrangement should be clear and limited in its scope; and (b) the 'reasonable business grounds' test in s 65 of the FW Act is vague, unclear and inadequate to either protect employees or encourage employers to implement flexible working arrangements.

57. Should the Commission determine that it is necessary to include an exemption provision in the proposed clause, the ACTU reserves its rights to make further submissions on the form and content of any such provision.

4 Evidence called by the employer parties

58. As set out above at paragraph 6, the ACTU will seek orders for the exchange of written submissions following the hearing that address the findings that the Commission should make on the basis of the evidence following the cross-examination of witnesses. For that reason, these reply submissions do not address the evidence of Janet Toth, Benjamin Norman, Janet O'Brien, Peter Ross (for AIG), Paula Bayliss, Jae Fraser, Lauren Cleaver, Mark Rizzardo (for ACCI), Chris Kemp, Deborah Platts, Edwina Beveridge, or Lucinda Corrigan (for the NFF).

[53] ACTU Submissions, 9 May 2017, in particular at [49]-[107]

The joint employer survey and the evidence of Jeremy Lappin

59. AIG seeks to tender a survey described as the 'joint employer survey', and attached to the statement of Jeremy Lappin. The joint employer survey is addressed at pages 178–270 of AIG's submissions.

60. The ACTU contends that the evidence concerning the joint employer survey is insufficient to enable the Commission to draw any reliable conclusions from it, and that AIG should either file proper evidence about the survey, or not be permitted to rely upon it.

61. Mr Lappin is a law student who has been employed by AIG as a law clerk for approximately six months. His evidence explains that he arranged for the production of certain reports from the software used by AIG and others to conduct the survey, and describes some work with the data using Excel. He states that he was not involved in setting up or conducting the survey. His statement annexes the survey questions,[54] a full record of responses from those who completed the survey (2,616 out of 5,610 respondents),[55] some calculations performed by him in Excel,[56] and the reports referred to above.[57]

62. The statement of Mr Lappin is the only *evidence* before the Commission regarding the joint employer survey. Because AIG does not propose to call any evidence about the design and conduct of the survey, it is impossible for the ACTU to test these matters in cross-examination. The assertions that are made about the conduct of the survey – which are still deficient in a number of significant respects – are contained in the submissions, not in evidence, and for that reason are unable to be challenged through cross-examination.

63. The ACTU contends that in the event that AIG seeks to rely on the survey as evidence, then it should provide the Commission with evidence about the design and conduct of the survey. This would enable the ACTU to properly test the evidence sought to be used against it, as well as enlightening the Commission and all parties as to the reliability of the survey.

64. The Commission has regularly considered and ruled on the admissibility and weight of surveys. Recently in the *Penalty Rates Decision*, the Full Bench of the Commission considered a number of surveys tendered by employer parties in support of their applications for reductions in penalty rates. The Full Bench held that while most survey evidence has methodological limitations, "*the central issue is the extent to which the various limitations*

54 At Attachment A.
55 At Attachment B.
56 At Attachment C.
57 At Attachments D to ZF.

impact on the reliability of the results and the weight to be attributed to the survey data".[58] The difficulty in this case is that there is *no* evidence of the methodology deployed by the AIG and unidentified other parties in the design or conduct of the survey, and so it is not possible to assess the weight to be attributed to the survey data.

65. The following matters are examples of the most glaring omissions in the evidence before the Commission about the joint employer survey:

(a) Who conducted the survey. The AIG submissions state that AIG "*joined with various other employer associations (many of whom are affiliated with ACCI) to conduct a survey of their respective members…*".[59] The 'various other employer associations' are not identified.

(b) Who designed the survey, including drafting the questions, and the reasons for including particular formulations;

(c) Who decided the target population of the survey and determined the sample, if any, from which to draw respondents.

(d) Who the survey was distributed to, and the basis for selecting the participants. AIG submits that the survey was sent to members of AIG and "*various other employer associations*", but as stated above, the 'other employer associations' are not identified.[60]

(e) Who drafted the text of the email sending the survey to participants. AIG submit that the text of the emails was "*carefully crafted by AIG and ACCI to ensure that its recipients properly understood the context and purpose of the survey without expressing a view about the merits of the ACTU's case*", but the 'careful crafters' are not identified.[61]

66. AIG should file evidence, not submissions, addressing at least these matters and any other matters it considers relevant to its claims that the survey is reliable and representative. Further, AIG must make the witness or witnesses who provide this evidence available for cross-examination. Should AIG decline to adduce any evidence about the design and conduct of the survey, then the ACTU submits that the survey should not be admitted and those parts of the submissions dealing with the survey should be removed.

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58 *Penalty Rates Decision* [2017] FWCFB 1001, [1097].

59 AIG submissions, [500].

60 AIG submissions, [503].

61 AIG submissions, [505].

67. If the Commission is minded to allow AIG to rely on the survey, despite there being evidentiary basis to support the submissions made as to the reliability of its contents, then the ACTU reserves its rights to seek to rely on a survey on flexible working arrangements which was sent to members of affiliates, Carers Australia, and Parenthood on 4 August 2017.[62]

27 November 2017

K Burke

Counsel for the ACTU

[62] The survey is available at https://www.surveymonkey.com/r/modernworkplaces