Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Submission

Family Friendly Work Arrangements
(AM2015/2)

19 December 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. On 12 – 14 December 2017, a Full Bench of the Fair Work Commission (**Commission**) heard evidence called by the Australian Council of Trade Unions (**ACTU**), the Australian Industry Group (**Ai Group**) and other interested parties in relation to the ACTU's claim for a new modern award term that purports to provide for 'family friendly work arrangements'.

2. This submission is filed by Ai Group in accordance with the directions issued by Deputy President Gooley on 4 December 2017. It deals with:

    a) the evidence called by the ACTU and Ai Group, having regard to any cross-examination that was undertaken during the aforementioned hearing; and

    b) responds to the ACTU's reply submissions of 27 November 2017 (**ACTU Submission**).

3. This submission should be read in conjunction with the detailed submission previously filed by Ai Group, dated 31 October 2017 (**October Submission**), which we continue to rely on.

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

4. In Chapter 6 of our October Submission, Ai Group argued that the ACTU's proposed clause would exclude the NES and hence the Commission does not have the jurisdiction to grant the ACTU's claim. We maintain this position.

5. In this submission, we respond to the arguments in the ACTU's submission of 27 November 2017 (**ACTU Submission**) that its proposed clause would not exclude the NES.

6. In short, we contend that the proposed clause would be contrary to s.55(1) because it excludes a provision of the NES. In this regard, we say that it excludes the scheme in s.65 as a whole and/or the right of an employer under s.65(5) to refuse an employee's request.

7. We further contend that the provision is not permitted under s.55(4) and thus is not saved by s.55(7). That is, we say that it is not a supplementary term, as contemplated by s.55(4).

The ACTU's Arguments about the Jurisdictional Decision

8. The ACTU Submission attempts to place substantial weight on the Commission's Decision of 22 October 2015[1] relating to the Family Friendly Work Arrangements Case and the Domestic Violence Leave Case (**Jurisdictional Decision**).

9. In the Jurisdictional Decision, a differently constituted Full Bench declined to strike out a very different clause to the one that the ACTU is now proposing. The clause was entitled 'Parental Leave' and, if adopted by the Commission, would have given certain employees the following two rights:

    a) A right for primary carers to return to work after parental leave on a part-time basis or on reduced hours in the employee's pre-parental leave position or, if such position no longer exists, an available position

[1] [2015] FWCFB 5585.

nearest in status and pay to the pre-parental leave position (subclause X.1); and

b) A right to antenatal leave (subclause X.2).

10. The 'Parental Leave' clause that the ACTU previously proposed is reproduced at paragraph [5] of the Jurisdictional Decision.

11. In its Jurisdictional Decision, the Full Bench declined to strike out the ACTU's claim at the preliminary stage of the proceedings given the very high bar that applies when claims are struck out before a matter is heard. The following extract from the decision is relevant: (emphasis added)

> **[17]** There are circumstances where it may be convenient for a court or statutory tribunal to consider applications to strike out claims prior to the final hearing of the matter and before any evidence is received. However the power to do so will only be employed where it is clear that the claim is manifestly groundless and incapable of success. In *General Steel Industries Inc v Commissioner for Railways (NSW)* Barwick CJ considered the test to be applied in determining whether to exercise powers of summary dismissal:
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> > "The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject, to some of which I was referred in argument and to which I append a list of references. There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r. 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".
> >
> > At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".

> **[18]** Where 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. In the NSW Court of Appeal decision in *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* Kirby P (as he then was) said:
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> > "When the claimants' objections of principle to the jurisdiction of the Commission were raised before a single member (Hungerford J) they were referred to, and determined by, the Court Session… Such a course is often a sensible one where a party has a substantial threshold argument which, if it succeeds, will knock out the claim and save the costs and inconvenience that attend a protracted hearing of proceedings on the merits. But, as with any threshold relief of this kind, it must be conserved to a clear case where it is plain that the invocation of the jurisdiction impugned is wholly misconceived or, upon analysis, lacks an arguable legal foundation. Necessarily, refusal of relief at the threshold will not finally determine that jurisdiction exists for any order which the Commission might make between the parties. This is because, to secure relief, the claimants must demonstrate that no order could be made which would be within jurisdiction. This burden, which is a heavy one, was accepted by the claimants."[2]

12. The fact that the Full Bench failed to strike out the claim at the preliminary stage on the basis of the above authorities does not, of course, imply that the Full Bench rejected Ai Group's jurisdictional arguments that the ACTU's proposed clause excluded the NES.

13. In the jurisdictional proceedings, Ai Group argued that the element of the 'Parental Leave' clause that gave primary carer's a right to return to work part-time or on reduced hours, with employers having no right to reasonably refuse (subclause X.1) excluded the NES. Ai Group did not argue that subclause X.2 excluded the NES, as noted by the Full Bench: (emphasis added)

> **[19]** As earlier stated, the employer parties do not contend that the whole of the amended ACTU claim should be struck out. Nor do they contend that there is no modern award provision which the Commission can make dealing with the subject matters of the ACTU claim, namely domestic violence leave, antenatal leave and a return to work from parental leave of part-time or reduced hours. Accordingly the determination of the employer parties' jurisdictional objections to discrete aspects of the amended ACTU will not avoid the need to conduct a final hearing in respect of the ACTU claim. There is no suggestion here of the Commission proceeding to a hearing which it has no authority to conduct. The ACTU would not be prevented by any decision we might make at this juncture from further amending its claim to overcome any jurisdictional difficulties which might be identified by us in a preliminary decision. Nor would the Commission be prevented, after hearing the evidence and submissions at the final hearing of the matter, from granting modern award provisions different in form to those claimed by the ACTU if it is considered such provisions are

[2] [2015] FWCFB 5585 at [17] – [18].

consistent with the modern awards objective in s.134 of the FW Act and the Commission has the requisite power under the FW Act (subject, of course, to the parties being afforded procedural fairness). That is because the Commission, in the exercise of its modern award-making functions, is obliged to act within the scope of its statutory powers and to discharge its statutory obligations but is not confined by the terms of an application made by a particular party as if it were a pleading before a court.[3]

14. In the context of the Full Bench's reference to the authorities which only enable a claim to be summarily dismissed on jurisdictional grounds if "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", the Full Bench said: (emphasis added)

> **[26]** Because we are not satisfied that the impugned aspects of the ACTU's amended claim lack an arguable legal foundation, we are not prepared at this stage of the proceedings and without having heard any evidence to strike out those parts of the ACTU's amended claim. The matter will proceed to a final hearing before a Full Bench of this Commission. We emphasise that in reaching this conclusion we have not formed any final view about the employer parties' jurisdictional objections. Nor of course is anything we have stated in the decision to be taken as indicating any view about the merits of the ACTU's amended claim - in particular whether it would meet the modern awards objective in s.134(1).[4]

15. It can be seen from paragraph [26] above that the Full Bench concluded that the ACTU had a "reasonably arguable" case that subclause X.1 in the 'Parental Leave' clause did not exclude the NES, but the Bench stressed that it had not reached any final view on the matter.

16. The ACTU Submission argues that its proposed clause does not offend s.55(1) of the *Fair Work Act 2009* (**Act**) for the following reasons:

    a) Primarily, due to the effect of s.55(7) of the Act.[5]

    b) In the alternative because the proposed clause does not exclude s.65 of the Act.[6]

[3] [2015] FWCFB 5585 at [19].

[4] [2015] FWCFB 5585 at [26].

[5] ACTU submission dated 27 November 3017 at paragraph 17.

[6] ACTU submission dated 27 November 2017 at paragraphs 20 – 28.

17. The ACTU Submission argues that its proposed clause is supplementary to s.65 of the Act.[7] In the alternative, the ACTU argues that its proposed clause is supplementary to the return to work rights under s.84 for employees who have taken parental leave.[8]

18. The ACTU's arguments are addressed below.

Does the ACTU's Proposed Clause Exclude the NES?

19. The ACTU's arguments that its proposed clause does not exclude the NES squarely conflict with the decision of the Full Bench of the Commission in *4 yearly review of modern awards—Alleged NES Inconsistencies*.[9] In this decision, the Full Bench reached the following relevant conclusions in respect of a number of award clauses that excluded the NES right of the 'second employer', in a transfer of business scenario, to not recognise an employee's service with the 'first employer': (emphasis added)

> **[32]** The effect of s.91(1) is that, upon a transfer of employment (as defined in s.22(7)) of a national system employee between two non-associated entities occurring, the employee's period of service with the first employer will not count as part of the employee's period of service with the second employer for the purpose of ascertaining annual leave entitlements <u>if the second employer decides not to recognise the employee's service with the first employer</u>.
>
> **[33]** Notwithstanding this, a number of modern award provisions applicable to the situation just described deem the employee's service with the first employer to be service with the second employer for annual leave purposes. For example, clause 34.10 of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides:
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> > "**34.10 Transfer of business**
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> > Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for."
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> …

[7] ACTU submission dated 27 November 2017 at paragraph 15.

[8] ACTU submission dated 27 November 2017 at paragraph 15(c).

[9] [2015] FWCFB 3023.

> **[37]** We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award "*not exclude the National Employment Standards or any provision of the National Employment Standards*". Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable. [10]

20. As held by the Full Bench in the above decision, a provision of the NES is excluded if award terms "in their operation … negate the effect of" an NES provision.[11]

21. In *Canavan Building Pty Ltd*[12], the Full Bench said as follows in relation to s.55(1): (emphasis added)

> **[36]** 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:
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> > "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)."[13]

22. Even though the above comments were made in the context of NES provisions which provided an employee entitlement (i.e. annual leave), similar principles apply to NES provisions which provide rights or benefits to employers, as was

[10] [2015] FWCFB 3023 at [32] – [37].

[11] [2015] FWCFB 3023 at [37].

[12] [2014] FWCFB 3202.

[13] [2014] FWCFB 3202 at [36].

made clear by the Commission's decision in *4 yearly review of modern awards—Alleged NES Inconsistencies*[14] (see above).

23. 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.

24. 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.

25. 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.

26. 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. We here note the observation of the Full Bench in the Jurisdictional

[14] [2015] FWCFB 3023.

Decision regarding the possibility that a previously proposed version of the ACTU claim may operate to exclude s.65(5): (emphasis added)

> **[25]** 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.[15]

27. The evidence establishes that a small proportion of employers do reject 'formal requests' for flexible working arrangements that are made pursuant to s.65.[16] The lay evidence similarly suggests that this occurs.[17] 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.

28. At paragraph 28 of its submission, the ACTU argues that the "take up rates of the 'right' under s.65 are low". 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).

29. As identified in the Explanatory Memorandum for the *Fair Work Bill 2008* (at paragraph 258), the intention of s.65 of the Act is "to promote discussion between employers and employees about the issue of flexible working arrangements". The right of an employee to request flexible work arrangements and the right of an employer to refuse a request on reasonable business grounds are the key aspects of the scheme which promote discussions between employers and employees. In many cases, the statutory provisions will have the effect of promoting discussions between an employer

[15] [2015] FWCFB 5585 at [25].

[16] Exhibit ACTU 5, Attachment JM-3 at paragraphs 45 and 46.

[17] See for example the evidence of Andrea Sinclair.

and an employee about flexible work arrangements, without the need to invoke the formal procedure in s.65 of the Act. The mere fact that *most* employees do not ultimately need to utilise the provisions of s.65 does not detract from our contention that the proposed clause would negate the effect of s.65.

30. Applying the logic of the Full Bench in Canavan, but adapting it to the circumstances of the present matter, we contend that the operation of the proposed clause would exclude the NES because it would, in its operation, deny employers the benefit of s.65(5). We contend that the proposed provision would exclude a benefit afforded to employers under s.65. In this regard the proposed clause would, in its operation, remove a right afforded to employers under s.65(5). To the extent that the matter of whether s.65(5) establishes an employer right may be contentious, we note that the Full Bench in the Jurisdictional Decision has described it in such terms[18]. In any event, the real issue is whether the clause would negate the operation of s.65 or any element of it and whether it would remove a benefit afforded by the NES. We contend that it would do both.

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

[18] [2015] FWCFB 5585 at [25].

32. In Canavan, the concept that the Full Bench focussed on was one of "excluding the benefit of". In *4 yearly review of modern awards—Alleged NES Inconsistencies*, the Full Bench referred to "negating the effect of". Regardless of which formulation is adopted, the effect is the same; that is, the NES is excluded.

Is the Proposed Clause a Supplementary Term?

33. 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.

34. 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.

35. In the *4 yearly review of modern awards—Alleged NES Inconsistencies*, a Full Bench held that an award term that has the effect of excluding a provision of the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4).[19] Adopting such reasoning, the proposed clause could not be a supplementary term.

36. Even without placing reliance upon the reasoning of the Bench in the *4 yearly review of modern awards—Alleged NES Inconsistencies Decision* cited in the preceding paragraph, Ai Group disagrees with the ACTU contention that the proposed clause is a supplementary term as contemplated by s.55(4). It does not "supplement" the NES, as relevantly contemplated.

37. The concept of 'supplementing' means adding to or building on, not taking away or detracting from, as identified at paragraph 13 of the ACTU Submission: (emphasis added)

> 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

[19] [2015] FWCFB 3023 at [37].

> the statute be given their ordinary or natural meaning. The *Macquarie* dictionary defines 'supplement' as "*something added to complete a thing, supply a deficiency, or complete a whole"*. 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".* The ACCI submissions suggest that the concept of 'supplementing' the NES *"connotes the notion of building upon, increasing or extending"*. These concepts are not inconsistent with the Macquarie definition.

38. An essential element of s.65 is that an employer may refuse a request on reasonable business grounds. A term which, for all practical purposes, removes this important employer right could not be said to "supplement" the NES. The proposal does not build upon or extend the scheme. It removes the need for s.65 in certain circumstances. Indeed, it would prohibit an employer from refusing a request for modified hours if the request also meets the notification requirements of the proposed award clause.

39. Moreover, Ai Group 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. This is consistent with the above cited definitions of the word "supplement" and the approach reflected in the Note 2 set out below s.55(4);

> Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
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> (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).

40. 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.

41. 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).

42. 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.

43. 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.

The ACTU's Argument that Section 65 is Incomplete or Deficient

44. At paragraphs 14 and 15, the ACTU Submission argues that the entitlement in s.65 of the Act is incomplete or deficient. The proposed clause is therefore, in effect, argued to supplement the NES because it rectifies such matters.

45. 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.

46. 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. Although this proposition answers the various submissions raised by the ACTU in paragraph 15(a) to 15(e) of the ACTU Submission, we nonetheless respond to each of these paragraphs in the section that follows.

47. In response to paragraph 15(a), we simply observe that this paragraph highlights why the proposed clause does not supplement s.65 but instead creates a different system that would operate in substitution to the NES. As observed by the ACTU, s.65(1) grants an employee a right *to request* a flexible working arrangement while the proposed clause provides that an employee is *entitled to* "family friendly working hours".

48. In response to paragraph 15(b), we note that to the extent that the clause provides a right to return to an employee's previous position, it provides an different entitlement to that which is afforded under s.65.

49. Our response to the ACTU's contention that the proposed clause X.2 is supplementary to s.84 is dealt with shortly below.

50. In response to paragraph 15(d), we content that the mere fact that the proposed clause would create an entitlement for employees who do not have an entitlement under the NES, does not mean that it supplements the NES. It simply creates a new entitlement or term and condition to that established by the NES. This is especially so given that the entitlement afforded by the proposed clause is different to that provided by the NES.

51. In response to paragraph 15(e), we note that an award clause that is directed to overcoming the operation of s.44(2), which prevents a relevant order being made in relation to a contravention (or alleged contravention) of s. 65(5), or the effective prohibition under ss.739(2) or 740 on the Commission or other

persons dealing with disputes about whether an employer had reasonable business grounds under s.65(5), cannot be said to supplement the NES by reason of this effect alone. These sections of the Act do not form part of the NES and they do not change the nature of the 'term or condition' that s.65 provides for. Rather, these sections relate to enforcement. We accordingly assert that there is no deficiency in the provisions of s.65. Nor are they 'incomplete' in any sense. It is merely that the ACTU disagrees with the approach that the legislature has taken in relation to the establishment of mechanisms for enforcement of such provisions and the dispute resolution regime established by the Act.

52. For all of the abovementioned reasons, the proposed clause does not constitute "…something added to complete a thing, supply a deficiency, or complete a whole". It simply represents an alternate scheme to that established under s.65. The provision does not supplement the NES as contemplated by s.55(4) and consequently s.55(7) is of no relevance. The proposed clause would therefore exclude the NES in the sense contemplated by s.55(1).

The ACTU's Argument that its Proposed Clause Supplements s.84

53. A fall-back argument of the ACTU is that its proposed clause is supplementary to the return to work rights of employees who have taken parental leave, under s.84 of the Act.[20]

54. This argument was referred to in the Jurisdictional Decision. However, the clause that the ACTU is now pursuing is very different to the clause that the ACTU was pursuing over two years ago when the jurisdictional proceedings took place. Subclause X.1 of the ACTU's previous 'Parental Leave' clause provided a right for primary carers to return to work after parental leave on a part-time basis or on reduced hours in the employee's pre-parental leave position or, if such position no longer exists, an available position nearest in

[20] ACTU submission dated 27 November 2017 at paragraph 15(c).

status and pay to the pre-parental leave position. The clause was limited to primary carers who were returning from parental leave.

55. The clause that the ACTU is now proposing applies to a much wider group of employees than the 'Parental Leave' clause that it previously proposed. Accordingly, the ACTU's currently proposed clause cannot legitimately be characterised as a clause pertaining to the subject matter of 'Parental Leave' – the subject matter of the part of the NES that s.84 falls within.

56. Even if the exclusion of a provision of the NES in one part of the Act occurs as a result of an award provision that relates to subject matter in a different part of the Act, this does not impact upon the prohibition in s.55(1). It is well-established that what cannot be done directly cannot be done indirectly.[21]

Does s.65(5) Establish a 'Workplace Right' for Employers and What Flows from That?

57. Section 65(5) includes an important 'workplace right' of employers.

58. Both employees and employers have 'workplace rights'. This is made clear by s.336 of the Act which states: (emphasis added)

> **336 Objects of this Part**
>
> (1) The objects of this Part are as follows:
>
> (a) to protect workplace rights
>
> …
>
> (2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer, or otherwise).

59. Section 336(2) was inserted into the Act during the term of the former Federal Labor Government via the *Fair Work Amendment Act 2012*. The amendment was made in response to representations made by Ai Group that the Act should clarify that employers have workplace rights, given union arguments to the contrary that were being made at the time.

[21] [2017] FWCFB 5258 at [237].

60. The above amendment to s.336(2) (to clarify that employers have workplace rights) did no more than to clarify what should have been clear from other relevant provisions of the Act.

61. Section 12 of the Act defines 'workplace right' in the following manner:

> ***Workplace right***: see subsection 341(1)

62. Subsections 341(1) and (2) relevantly state:

> **341(1)** A person has a ***workplace right*** if the person:
>
> (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body;
>
> (b) is able to initiate, or a participate in, a process or proceedings under a workplace law or workplace instrument;
>
> …
>
> **Meaning of *process or proceedings under a workplace law or workplace instrument***
>
> **341(2)** Each of the following is a ***process or proceedings under a workplace law or workplace instrument:***
>
> (k) any other process or proceedings under a workplace law or workplace instrument.

63. Section 65(5) constitutes a 'workplace right' of an employer because:

- The provision provides a 'benefit' to an employer, as contemplated by s.341(1)(a);
- The provision gives an employer a 'responsibility', as contemplated by s.341(1)(a);
- Subsection 65(5), in conjunction with the other provisions of s.65, enables the employer to "participate in…a process…under a workplace law", as contemplated by ss.341(1)(b) and 341(2)(k).

64. In addition, as mentioned earlier, the Full Bench in the Jurisdictional Decision described s.65(5) as comprising an employer right.[22]

65. The ACTU's proposed clause in its operation would negate the effect of the important employer right in s.65(5) of the FW Act for award covered employees. It removes a benefit afforded to employers under the NES. Accordingly, the ACTU's proposed award clause excludes a provision of the NES, as contemplated by s.55(1).

66. Even if the ACTU could sustain the argument that s.65(5) does not constitute a 'workplace right' of an employer, nothing much turns on this. Regardless of how s.65(5) is characterised, the ACTU's proposed clause would *'negate the effect of'* the NES provision[23] and would hence exclude a provision of the NES.

Conclusion

67. For the above reasons, the ACTU's proposed clause excludes a provision of the NES and the Commission does not have the jurisdiction to grant the ACTU's claim.

[22] [2015] FWCFB 5585 at [25].

[23] See [2015] FWCFB 3023 at [37].

3. THE ACTU'S EXPERT WITNESSES

68. The submissions that follow relate to the four expert witnesses called by the ACTU. In each instance we identify any findings that we say should be made in relation to the evidence given and in addition, deal with other aspects of their evidence.

3.1 Professor Siobhan Austen

69. Professor Siobhan Austen gave evidence that focussed primarily on the labour force participation of women and men, with and without caring responsibilities, and the potential causal factors underpinning those participation rates.

70. Ai Group contends that, based on the Professor's evidence, the following findings can and should be made, some of which are dealt with in greater detail thereafter:

a) The female labour force participation rate has increased significantly from 50.3% in February 1978 to 72.1% in February 2017.[24] Ai Group explained the significance of this increase to these proceedings in its October Submission.[25]

b) There are a complex range of considerations that impact on the extent to which women participate in the workforce.[26]

c) To the extent that some females do not participate in the labour force after the birth of a child, the reasons for this can vary.[27] They include an employee exercising their choice not to work[28], cultural pressure[29],

[24] Exhibit ACTU1, Attachment SA-3 at paragraphs 5 – 6.

[25] Ai Group submission dated 31 October 2017 at paragraphs 156 – 160 and 169.

[26] Transcript of proceedings on 12 December 2017 at PN405.

[27] Transcript of proceedings on 12 December 2017 at PN260.

[28] Transcript of proceedings on 12 December 2017 at PN260.

[29] Transcript of proceedings on 12 December 2017 at PN261.

availability and cost of childcare[30], and their "subjective assessment of the standard of quality of child care"[31].

d) As at February 2017, almost 50% of Australian women were working in part-time jobs[32], which demonstrates that part-time jobs are available and being accepted by the female workforce.

e) A female employee's decision to work part-time forms part of a complex set of other decisions that might involve availability or affordability of childcare[33], the employee's career aspirations[34], cultural expectations[35], personal experiences and preferences associated with caring for their own child[36], and personal financial considerations[37] including their partners' income[38].

f) Paid parental leave has enhanced labour force participation of mothers, increased employer and job retention and increased the probability that mothers return to the same conditions they had prior to the birth of their child.[39] We refer to paragraphs 179 – 189 of our October Submission in this regard.

g) The evidence of "occupational downgrading" in Australia is insubstantial and falls well short of establishing that award covered employees are systematically suffering from such downgrading as a result of their caring responsibilities and an inability to access flexible working arrangements to accommodate those responsibilities.

[30] Transcript of proceedings on 12 December 2017 at PN262.
[31] Transcript of proceedings on 12 December 2017 at PN356 – PN357.
[32] Exhibit ACTU1, Attachment SA-3 at paragraph 7.
[33] Transcript of proceedings on 12 December 2017 at PN195.
[34] Transcript of proceedings on 12 December 2017 at PN196.
[35] Transcript of proceedings on 12 December 2017 at PN197.
[36] Transcript of proceedings on 12 December 2017 at PN198.
[37] Transcript of proceedings on 12 December 2017 at PN199.
[38] Transcript of proceedings on 12 December 2017 at PN200.
[39] Exhibit ACTU1, Attachment SA-3 at paragraphs 26 – 28.

h) To the extent that any female employees, after the birth of a child, are "downgraded", this may be because they elect to work in such a role.[40]

i) There is no evidence of a causal link between access to (or an inability to access) flexible working arrangements and:

i. labour force participation of men or women with caring responsibilities;

ii. the extent to which participating men and women with caring responsibilities are engaged on a casual basis;

iii. the extent to which participating men and women with caring responsibilities transition to a job in which they are employed by a different employer; and

iv. the extent to which participating men and women with caring responsibilities transition to a "downgraded" job.

71. We also propose to here deal with various other aspects of Professor Austen's report.

72. **First**, in relation to Professor's Austen's evidence regarding the gender pay gap, we refer to our October Submission.[41] Further:

a) Such evidence is of little relevance to the current proceedings given that modern awards do not ascribe any difference in the minimum rates of pay between men and women.

b) To the extent that it is argued that occupational segregation nonetheless contributes to a gender pay gap amongst award-dependent employees:

i. There are other mechanisms under the Act, including the ability to seek a variation to modern award minimum wage rates if

[40] Transcript of proceedings on 12 December 2017 at PN419 – PN420.

[41] Ai Group submission dated 31 October 2017 at paragraphs 217 – 220.

justified by work value reasons[42] or an equal remuneration order[43].

ii. There is no evidence or other material before the Commission that might satisfy it that the grant of the claim will address any alleged occupational segregation. Indeed it might be argued that the proposed clause will have the effect of exacerbating gender segregation along pre-existing industry and occupational lines.[44]

c) Where the gender pay gap is expressed by reference to weekly earnings, regard must be had to the simple fact that, consistent with Professor Austen's evidence, a significant proportion of female employees work less than full-time hours which necessarily has a bearing on their earnings.[45]

73. **Second,** the short point earlier made regarding the impact that child care *quality* has on female labour force participation bears further consideration. In an Australian study cited by Professor Austen[46], the authors relevantly said as follows: (emphasis added)

> Clearly, the availability and quality of care, in addition to price, could affect parental decision-making about labour supply, particularly in the highly subsidised and regulated child care market. On the one hand, child care is a cost of working. However, parents rarely approach the problem of finding child care as a simple cost-minimisation exercise. Rather, child care is viewed as an important input to child development. Parents who might want to work will be unwilling to leave their child in a poor child care environment. Furthermore, parents who have decided to work and to place their child in care might be willing to spend more than the minimum to place their child in high-quality care, available at a convenient location.[47]

[42] See ss.156(2) – 156(4) of the Act.

[43] See s.302 of the Act.

[44] Ai Group submission dated 31 October 2017 at paragraph 218.

[45] Exhibit ACTU1, Attachment SA-3 at paragraph 17.

[46] Exhibit ACTU1, Attachment SA-3 at paragraph 24.

[47] Breunig, R., Gong, X., Mercante, J., Weiss, A., and Yamauchi, C. (2011). "Child Care Availability, Quality and Affordability: Are Local Problems Related to Labour Supply?" *The Economic Record* 87(276):109–124 at 110.

74. Ms Austen's evidence and this article establish that the decision-making process of a parent as to whether to utilise child care and if so, the relevant child care provider, is contingent upon factors not limited to cost and availability. Rather, there is also a broad subjective assessment regarding the quality of the available child care that might colour whether the parent participates in the labour force. For instance, it may be that although specific child care is available and affordable, it does not meet the parent's expectations as to quality, as a result of which a parent prefers to look after their child instead of placing them in child care and therefore, does not participate in the labour force. A more incremental consequence might be that child care that is deemed of sufficient quality might only be available at certain times and this has the effect of limiting the employee's availability to work.

75. That these scenarios are not merely hypothetical was demonstrated by the evidence of Ms Jones-Vadala whilst she was under cross-examination:

> Right, and is child care hard to find where you live?---Good child care is hard to find.
>
> So what do you mean by good child care; people with good reputations, or?---People with good reputations, a good service, clean, the children are well looked after.
>
> …
>
> I take it that you would have accepted that if you had been able to organise childcare?---Yes.
>
> Was it just too late in the day to organise child care?---I had lost my place. I couldn't organise it. They gave it to someone else.
>
> Did you look at other childcare centres?---I looked - had already prior, had looked and I wasn't happy with most of them in the area, and the ones - most of them had said you had to have put your name down at birth. So any of the reasonable ones I couldn't get in. They said maybe in two years time.
>
> So the ones you were comfortable sending your children to, they were full?---That's correct.[48]

76. As canvassed in our October Submission, the Commission's task is to ascertain whether the proposed provision is *necessary* in order to ensure a fair and relevant *minimum* safety net. A provision that enables an employee

[48] Transcript of proceedings on 13 December 2017 at PN1107 – PN1108 and PN1142 – PN1145.

to dictate their hours of work, absent any consideration of the operational consequences this might have, because although child care is available to the employee at certain times, it is not of the *quality* desired by the employee, cannot be said to constitute a necessary part of a minimum safety net. The evidence makes clear that an employee's consideration as to their availability to work will not be limited to factors associated with the availability of *any* child care, but will involve a subjective assessment that is far broader in nature.

77. **Third,** Ai Group gave detailed consideration to Professor Austen's evidence[49] regarding the notion of occupational downgrading in its October Submission[50]. In addition to those submissions and the relevant findings listed above, we note that:

a) The data relied upon in support of the proposition is not limited to award-covered employees and therefore, it is difficult to discern its application to the group of employees relevant to the ACTU's claim.

b) Figure 11 in Dr Austen's report must be treated with caution because it:

i. Does not establish any causal factors underpinning the documented transitions, including any requests for flexible working arrangements[51].

ii. Is not confined to award-covered employees.

iii. Is confined to mothers of newborn babies (i.e. a child of less than one year of age[52]) and is therefore limited in scope.

iv. Does not make apparent how paid or unpaid parental leave is treated for the purposes of measuring the various transitions[53]

[49] Exhibit ACTU1, Attachment SA-3 at paragraphs 28 – 40.

[50] Ai Group submission dated 31 October 2017 at paragraphs 208 – 209 and 772.

[51] Transcript of proceedings on 12 December 2017 at PN243.

[52] Transcript of proceedings on 12 December 2017 at PN230 – PN234.

[53] Transcript of proceedings on 12 December 2017 at PN238 – PN239.

despite the obvious relevance of such information to the employment transitions of a mother of a newborn baby[54].

c) Figure 14 in Dr Austen's report must be treated with caution because it:

   i. Does not establish any causal factors underpinning the documented transitions, including:

      - The reason(s) for which any of the transitions resulted in an employee retaining employment as a full-time/part-time employee or transitioning from full-time to part-time employee, or vice versa.

      - The reason(s) for which any of the transitions resulted in an employee being "downgraded" or "upgraded".

   ii. Is not confined to award-covered employees.

   iii. Is confined to mothers of newborn babies (i.e. a child of less than one year of age[55]) and is therefore limited in scope.

   iv. The number of transitions represented in the data is relatively small[56].

d) Figure 16 in Dr Austen's report must be treated with caution because of the reasons articulated above at paragraph (c), however to the extent that it is relied upon, we note that it demonstrates that the majority of transitions of mothers of newborn children result in the employee remaining engaged in permanent employment.

78. **Fourth,** Professor Austen does not point to any robust, reliable evidence that establishes that greater access to flexible working arrangements substantially

[54] Transcript of proceedings on 12 December 2017 at PN237.

[55] Transcript of proceedings on 12 December 2017 at PN230 – PN234.

[56] Exhibit ACTU1, Attachment SA-3 at paragraph 54.

impacts on labour force participation by employees with caring responsibilities. Notably an article co-authored by Professor Austen in 2009 found as follows: (emphasis added)

> Flexible working hours, i.e. the ability to vary start and finish times, are often cited as enabling women to fulfil their paid and unpaid roles (see Lewis 1997), but our analysis of the HILDA data did not find the attribute to be a statistically significant influence on the probability that a mid-life woman remained in employment; nor was working days as opposed to at night a significant determinant. This finding is consistent with Scharlach, Sobel and Roberts's (1991) findings that the personal circumstances of care-givers are more important determinants of continued employment than their work arrangements. …[57]

79. This finding was not disturbed by subsequent research undertaken by Professor Austen in 2013.[58]

80. The notion of statistical significance was explained by Professor Austen under cross-examination as follows:

> … we didn't identify a statistically significant effect which means that we can't attribute the observation that women who were - these midlife women who were working in an environment where they had flexible start or finish times, and we observed that they had a higher probability of remaining in paid work. But because of the sample size, which is quite small, we couldn't be confident that that observation was not due to chance factors. …[59]

81. The same publication of 2009 also identified various other factors that influence whether a woman aged 40 – 64 years gains or retains employment, including:

    a) Her own health;[60]

    b) Her age;[61]

[57] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 220.

[58] Austen, S. E., and R. Ong. 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 55 (5): 663-680 at 676.

[59] Transcript of proceedings on 12 December 2017 at PN382.

[60] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 213.

[61] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 215.

c) Her proficiency in English;[62]

d) Her education;[63]

e) Her prior experience in the labour market;[64]

f) Whether or not she is partnered;[65]

g) If partnered, her partner's employment;[66] and

h) The general availability of economic opportunities.[67]

82. In this context, it would be simplistic to assert that female labour force participation after the birth of a child or in circumstances where she has other caring responsibilities is squarely attributable to the employee's access to flexible working arrangements or even to the fact that the employee is a parent or carer.

83. **Fifth,** just as the Professor's evidence does not establish any causal link between an employee's access to flexible working arrangements and their labour force participation, the nature of that participation, their conditions of employment and so on, the evidence also does not establish a causal link between employees' access to flexible working arrangements and the alleged disparity between the impact that caring responsibilities have on men and women[68]. At the very least, it can be deduced from the evidence that the disparity might be at least in part due to a range of factors including the

[62] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 215 and 220.

[63] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 215 and 220.

[64] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 217 and 220.

[65] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 219.

[66] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 218 – 219.

[67] Austen, S. E., and R. Ong. 2009. "The Employment Transitions of Mid-Life Women: Health and Care Effects." *Ageing and Society* 30 (2): 207-227 at 221.

[68] Exhibit ACTU1, Attachment SA-3 at pages 40 – 49.

personal preferences of individuals and families as to how caring responsibilities are undertaken and/or shared; and the consequential decisions made as to working hours and arrangements of those who undertake those caring responsibilities as well as those who do not.

3.2 Dr Ian Watson

84. Ai Group contends that, based on Dr Watson's evidence, the following findings can and should be made:

a) The majority of male and female employees have access to permanent part-time employment and flexible start/finish times.[69]

b) The above proposition is true regarding access to part-time employment regardless of the employees' earnings.[70]

c) Access to flexible start/finish times does not appear to vary greatly between permanent, casual and fixed-term employees.[71]

d) A substantial proportion of employed fathers and employed mothers utilise some specific work arrangement in order to care for their child.[72]

e) There has been a significant increase in the proportion of employed fathers utilising a specific work arrangement in order to care for their child over the past two decades.[73] Ai Group dealt with this aspect of Dr Watson's evidence in detail at paragraph 167 of our October Submission.

f) Employees who lived in families with dependent children:

i. Are more likely than other employees to be tertiary educated;

[69] Exhibit ACTU3, Attachment IW-1 at Table 3.9.
[70] Exhibit ACTU3, Attachment IW-1 at Figure 3.8.
[71] Exhibit ACTU3, Attachment IW-1 at Figure 3.11.
[72] Exhibit ACTU3, Attachment IW-1 at Table 3.8.
[73] Exhibit ACTU3, Attachment IW-1 at Table 3.8.

ii. Are more likely to work as managers and professionals and less likely to work in lower skilled occupations;

iii. Have higher hourly earnings than other employees; and

iv. Are more likely to be on individual agreements than enterprise agreements or awards.[74]

3.3 Dr Jill Murray

85. Dr Jill Murray is an Associate Professor in the College of Arts, Social Sciences and Commerce in the La Trobe Law School. The report she has prepared for the purposes of these proceedings deals with employees' access to flexible working arrangements.

86. Dr Murray's report relies, in large part on various relevant publications, which Ai Group has dealt with in great detail in its October Submissions[75], including the weight that should be attributed to some of the material cited, which we continue to rely on.

The Right to Request under s.65 of the Act

87. Ai Group contends that, based on Dr Murray's evidence, the following findings can and should be made regarding the right to request under s.65 of the Act:

a) The reason most commonly given by employees when making a request pursuant to s.65 of the Act is to care for a child or children. The second most frequently cited reason is care for a family member other than a child.[76] The same can be said of reasons most commonly given by employees making any form of request for flexible working arrangements (i.e. inclusive of requests that were not made pursuant to s.65 of the Act).[77] This demonstrates that a proportion of employees

[74] Exhibit ACTU3, Attachment IW-1 at paragraph 135.

[75] See in particular Ai Group Submission dated 31 October 2017 at chapter 10 and paragraphs 490 – 496.

[76] Exhibit ACTU5, Attachment JM-3 at paragraphs 38 – 39.

[77] Exhibit ACTU5, Attachment JM-3 at paragraph 40.

who would be covered by the ACTU's proposed clause are utilising current mechanisms available to them for the purposes of seeking flexible working arrangements.

b) The nature of the changes most commonly sought by employees making a request pursuant to s.65 of the Act are a reduction in hours of work, a change to start/finish times, and changes to the days worked.[78] This demonstrates that a proportion of employees who would be covered by the ACTU's proposed clause are utilising current mechanisms available to them for the purposes of seeking the very types of flexible working arrangements that would be available to them under the proposed clause.

c) The vast majority of requests made pursuant to s.65 of the Act are granted. According to the employer survey that forms part of the Australian Workplace Relations Study (**AWRS**), less than 1% of employers who received a request had refused all such requests. 90% of employers granted all requests received in full. According to the employee survey that forms part of AWRS, only 2% of employees who had made a s.65 request had their request refused.[79] The vast majority of all requests made for flexible working arrangements (i.e. inclusive of requests that were not made pursuant to s.65 of the Act) are also granted.[80] We have set out the reasons why this finding does not lend support to the grant of the ACTU's claim in our October Submission.[81]

d) Employers take a careful, considered, flexible and accommodating approach to their consideration of requests made pursuant to s.65 of the Act. Employers usually endeavour to find an alternative arrangement where the changes to hours sought cannot be made due

[78] Exhibit ACTU5, Attachment JM-3 at paragraph 43.

[79] Exhibit ACTU5, Attachment JM-3 at paragraphs 45 – 46.

[80] Exhibit ACTU5, Attachment JM-3 at paragraph 47.

[81] Ai Group submission dated 31 October 2017 at paragraphs 311 – 313.

to business reasons such as staff shortages.[82] We refer to our October 2017 Submission in this regard.[83]

e) Employers are unable to grant a request for flexible working arrangements for a range of reasons including but not limited to:

   i. The change sought is not operationally viable;[84]

   ii. The change sought would have a negative impact on productivity / efficiency or customer service;[85]

   iii. Unpredictable and immediate clients demands;[86]

   iv. Shiftwork, specific rosters and particular patterns of work such as fly-in-fly-out;[87]

   v. Staff shortages, which may be due to factors such as organisational downsizing or a lack of employees available to fill particular shifts;[88] and

   vi. Specific difficulties associated with granting requests in small units within larger enterprises.[89]

88. To this end Dr Murray's report demonstrates the potential difficulties that might be faced by an employer if it were made to accommodate all requests for flexible working arrangements as sought by an employee.

89. We also make the following submissions regarding other aspects of Dr Murray's report regarding the utilisation of s.65 of the Act.

[82] Exhibit ACTU5, Attachment JM-3 at paragraphs 48 – 50.

[83] Ai Group submission dated 31 October 2017 at paragraph 300, fourth bullet point.

[84] Exhibit ACTU5, Attachment JM-3 at paragraph 56.

[85] Exhibit ACTU5, Attachment JM-3 at paragraph 56.

[86] Exhibit ACTU5, Attachment JM-3 at paragraph 60.

[87] Exhibit ACTU5, Attachment JM-3 at paragraph 60.

[88] Exhibit ACTU5, Attachment JM-3 at paragraph 56.

[89] Exhibit ACTU5, Attachment JM-3 at paragraph 57.

90. **First,** Dr Murray gives evidence regarding the relative stability of the rate of requests made pursuant to s.65 of the Act or otherwise from 2009 – 2014.[90] The evidence does not establish any causal factors of this trend. The evidence certainly does not establish that the rate of requests has remained stable due to any deficiency in the efficacy of s.65 of the Act.

91. **Second**, the same can be said of Dr Murray's evidence regarding the low proportion of all requests for flexibility that are made pursuant to s.65 of the Act.[91] To the extent that this is attributed to a lack of awareness of the statutory right to request, we refer to our October Submission where we have addressed this contention.[92]

92. **Third**, it is Dr Murray's evidence that requests for flexibility are more prevalent amongst female employees than male employees, notwithstanding the existence of s.65 of the Act.[93] As submitted in our October Submission[94], this demonstrates that the ACTU's "hope" that the implementation of its proposed clause would encourage male employees to seek greater flexibility, thus resulting in a redistribution of unpaid household work is plainly optimistic and without any evidentiary basis.

93. **Fourth**, Dr Murray states in her report that "reasons for acceptance or refusal of a request for flexible work may be influenced by the personal views and values of the 'gate-keeper' manager who makes the decision"[95]. Ai Group has dealt with the ACTU's contentions based on this aspect of Dr Murray's evidence at paragraphs 314 – 316 of our October Submission.

94. **Fifth,** Dr Murray's report also states that decisions made by employers vary "according to issues not mentioned in the legislation" including a desire to

[90] Exhibit ACTU5, Attachment JM-3 at paragraph 23.

[91] Exhibit ACTU5, Attachment JM-3 at paragraphs 24 – 28.

[92] Ai Group submission dated 31 October 2017 at paragraphs 322 – 326.

[93] Exhibit ACTU5, Attachment JM-3 at paragraph 29 – 31.

[94] Ai Group submission dated 31 October 2017 at paragraphs 213 – 216 and 727.

[95] Exhibit ACTU5, Attachment JM-3 at paragraph 52. See also paragraphs 53 – 55 and 63 – 66.

retain employees who are "highly valued".[96] Our October Submission also deals with this issue.[97]

95. **Sixth,** part of the report prepared by Dr Murray's report deals with the notion of "discontented non-requesters"; that is, employees who are not content with their working arrangements but nonetheless do not request changes.[98] We have dealt with this issue comprehensively in our October Submission 2017.[99]

The Taking of and Returning from Parental Leave

96. Ai Group contends that, based on Dr Murray's evidence, the following findings can and should be made regarding the taking of and returning from parental leave:

a) A significant majority of mothers who take leave to give birth return to work within a period of 12 months.[100] This suggests that the majority of women are not precluded from participating in paid work after the birth of a child.

b) The federal paid parental leave scheme has increased the proportion of women returning to work after maternity leave and increased the proportion of women who return to the same job on the same conditions.[101] As we have earlier submitted, this is evidence of the positive impact that the paid parental leave has had on female labour force participation.[102]

c) Most women who have not returned from parental leave after the birth of a child state that they prefer to stay at home and were able to do so financially or had another child or were pregnant again.[103] Only 11%

[96] Exhibit ACTU5, Attachment JM-3 at paragraph 52.

[97] Ai Group submission dated 31 October 2017 at paragraphs 317 – 318.

[98] Exhibit ACTU5, Attachment JM-3 at paragraphs 67 – 68 and 105 – 107.

[99] Ai Group submission dated 31 October 2017 at paragraphs 320 – 346.

[100] Exhibit ACTU5, Attachment JM-3 at paragraph 71.

[101] Exhibit ACTU5, Attachment JM-3 at paragraph 72.

[102] Ai Group submission dated 31 October 2017 at paragraphs 179 – 189.

[103] Exhibit ACTU5, Attachment JM-3 at paragraph 73.

of such mothers stated that they could not find work or could not negotiate return to work arrangements.[104] The evidence demonstrates that the very vast majority of women who do not participate in the labour force after the birth of a child choose not to do so for a range of reasons that are not related to their employment.

d) The very vast majority (80%) of mothers returning to work after the birth of a child resumed employment with the same employer and only a fifth of those reported that their job tasks and/or responsibilities changed.[105] The evidence does not reveal the nature or cause of such changes and accordingly, this data cannot be said to support the notion of "occupational downgrading" advanced by the ACTU.

e) The remaining proportion of mothers (20%) returning to work after the birth of a child changed employer / business.[106] The evidence again does not reveal the nature or cause of such changes and accordingly, the data cannot be said to support the notion of "occupational downgrading" advanced by the ACTU.

f) Most women returning from parental leave requested adjustments to their working arrangements and most of those requests were granted. [107] Consistent with the evidence earlier cited, this lends support to the proposition that the ACTU's proposed clause is not *necessary* in the sense contemplated by s.138 of the Act.

[104] Exhibit ACTU5, Attachment JM-3 at paragraph 73.

[105] Exhibit ACTU5, Attachment JM-3 at paragraph 78.

[106] Exhibit ACTU5, Attachment JM-3 at paragraph 78

[107] Exhibit ACTU5, Attachment JM-3 at paragraph 79.

Individual Flexibility Arrangements

97. Ai Group contends that, based on Dr Murray's evidence, the following findings can and should be made regarding individual flexibility arrangements:

a) Employees with dependent children are twice as likely to make an IFA than employees without dependent children.[108] This means that a proportion of employees who would be covered by the ACTU's clause are already able to obtain flexibility through the implementation of an IFA.

b) Over three-quarters of employers who had made IFAs varied arrangements for when work is performed.[109] This means that a proportion of employees who would be covered by the ACTU's clause are already able obtain the relevant *type* of flexibility through the implementation of an IFA.

c) The majority of employees who had initiated IFAs reported that as a result, they enjoyed "flexibility to better manage non-work related commitments".[110] This means that a proportion of employees who would be covered by the ACTU's clause are already able to obtain the flexibility needed to better manage non-work related commitments such as caring responsibilities.

d) The vast majority of employees (75%) do not sacrifice pay or conditions in order to benefit from their IFA.[111]

98. At paragraphs 97 – 98 of her report, Dr Murray explains why, in her view, "the suitability of IFAs to meet the needs of employees seeking flexible working

[108] Exhibit ACTU5, Attachment JM-3 at paragraph 87.

[109] Exhibit ACTU5, Attachment JM-3 at paragraph 93.

[110] Exhibit ACTU5, Attachment JM-3 at paragraph 95.

[111] Exhibit ACTU5, Attachment JM-3 at paragraph 96.

arrangements is limited by several factors"[112]. We have previously responded to them in our October Submission.[113]

3.4 Dr James Stanford

99. Dr James Stanford's report was prepared in response to the following question posed to him by the ACTU:

> Please 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.[114]

100. In the submissions that follow, we deal with various aspects of Dr Stanford's report and ultimately conclude that, contrary to what we anticipate will be the ACTU's assertion, his report does *not* support the proposition that the benefits associated with family friendly working arrangements, as contemplated by the ACTU's claim, will outweigh the costs that will necessarily be incurred by employers as a result.

Part I of Dr Stanford's Report: Review of Extant Literature

101. Part 1 of Dr Stanford's report is largely based on a literature review by a Ms Alison Pennington, whom he describes as a graduate of political-economy.[115] To the extent that Dr Stanford's evidence relies on the research undertaken by Ms Pennington, it can be given little weight for various reasons that include the following:

a) The 'Summary of Surveyed Literature' at Table A1 and the annotated bibliography attached to Dr Stanford's report reveals that a very small proportion of the 55 pieces of literature reviewed relate specifically to the Australian context. In most instances, the relevant study relates to the industrial relations context prevailing in another country and the

[112] Exhibit ACTU5, Attachment JM-3 at paragraph 97.

[113] Ai Group submission dated 31 October 2017 at paragraphs 360 – 375.

[114] Exhibit ACTU6, Attachment JS-3 at paragraph 1.

[115] Exhibit ACTU6, Attachment JS-3 at paragraph 2.

basis upon which, for instance, 'part-time employees' are engaged or the manner in which their hours of work are set in that context is not clear. It appears that such literature potentially has little if any relevance to the proceedings here before the Commission.

b) The 'Summary of Surveyed Literature' at Table A1 and the annotated bibliography attached to Dr Stanford's report also reveals that none of the literature reviewed considers the specific mechanism contemplated by the ACTU's proposed clause. This too undermines the relevance of the evidence to these proceedings.

c) The evidence given by Dr Stanford based on the literature review does not rely on quantitative or qualitative research that he has conducted and the authors of the relevant studies have not been called to give evidence in these proceedings. This necessarily renders it difficult for respondent parties to test aspects of the evidence he has given.

102. An example of the issues identified above can be demonstrated by the following example.

103. At paragraph 29 of this report, Dr Stanford states that "the positive impacts of flexibility on firm performance … are contingent on workers having reliable input to how flexibility is implemented and managed"[116]. He identifies various publications that purportedly "highlight the importance of worker input and decision-making authority to the success for firms of flexible working arrangements"[117]. A consideration of each of the publications that he relies on in support of that assertion, however, reveals the following:

a) **Lee and DeVoe (2012)** relates to a study of *Canadian* organisations[118] and the implementation of "flexitime", which the authors of the article say is broadly defined as "the ability to schedule flexible starting and

[116] Exhibit ACTU6, Attachment JS-3 at paragraph 26.

[117] Exhibit ACTU6, Attachment JS-3 at paragraph 29.

[118] Lee, B. Y. and DeVoe, S. E. 2012. 'Flextime and Profitability'. Industrial Relations, 51(2): 298 – 316 at 303 – 304.

quitting times, sometimes with a core-hours requirement"[119]. The study, however, was based on the self-selection of employers who identified that they had adopted "flexible working hours"[120]. No further parameters appear to have been set around the use of this phrase and there is certainly no basis for assuming that the question contemplates an arrangement in which an employee is able to dictate their hours of work, absent any employer discretion. The conclusions of the study are accordingly of little relevance to this matter.

b) We can find no support for the proposition that worker input and decision-making authority contributes to the success of firms as a consequence of flexible working arrangements in **Kleinknech et al (2006)**. It is based on a case study of the Netherlands during the 1980s and 1990s.[121] Whilst it considers the impact of 'flexibility' on firms, we have been unable to identify any indication that the notion of flexibility for the purposes of this study is premised on employee influence or decision-making power over their hours of work.

c) We note that **Skinner and Chapman (2013),** firstly, identifies various methodological deficiencies that emerge from a consideration of the evidence relevant to its study. This includes, most relevantly, "that the participants in the majority of work-life studies are professionals in above-average income categories. Very few studies are conducted with diverse populations, particularly those in low paid occupations such as manual labour"[122]. This raises an obvious issue as to the

[119] Lee, B. Y. and DeVoe, S. E. 2012. 'Flextime and Profitability'. Industrial Relations, 51(2): 298 – 316 at 299.

[120] Lee, B. Y. and DeVoe, S. E. 2012. 'Flextime and Profitability'. Industrial Relations, 51(2): 298 – 316 at 305.

[121] Kleinknecht, A., Oostendorp, R. M., Pradhan, M. P. and Naastepad, C. W. M. 2006. 'Flexible Labour, Firm Performance and the Dutch Job Creation Miracle'. *International Review of Applied Economics*, 20(2): 171–187 at 172.

[122] Skinner, N. and Chapman. J. 2013. 'Work-life Balance and Family Friendly Policies'. *Evidence Base*, 4: 1–25 at 5.

relevance of any such studies to these proceedings, which relate to award-covered employees.

Further, Skinner and Chapman identify five studies of relevance to Dr Stanford's above proposition, however;

i. The first is the Brough and Driscoll literature review we deal with below.[123]

ii. The second relates to employees working in the healthcare sector only and it is not clear whether the "benefits" that it identifies as flowing from increased worker control over hours of work were experienced by the employer or only the employee.[124] It is also not clear that the "worker control" contemplated permitted an employee to dictate their hours absent any employer influence or discretion.

iii. The third, fourth and fifth relate to a U.S. organisation and, again, it is also not clear that the "schedule control" contemplated[125] permitted an employee to dictate their hours absent any employer influence or discretion

d) **Brough and Driscoll (2010)** is a literature review of 13 articles.[126] It is not clear that any of them relate to the Australian workplace relations system nor has sufficient information been provided in order for the Commission to confidently draw any analogy from them.[127] Most of those articles relate to other forms of "intervention"; only five deal with

[123] Skinner, N. and Chapman. J. 2013. 'Work-life Balance and Family Friendly Policies'. *Evidence Base*, 4: 1–25 at 6.

[124] Skinner, N. and Chapman. J. 2013. 'Work-life Balance and Family Friendly Policies'. *Evidence Base*, 4: 1–25 at 6.

[125] Skinner, N. and Chapman. J. 2013. 'Work-life Balance and Family Friendly Policies'. *Evidence Base*, 4: 1–25 at 6.

[126] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. *Work and Stress*, 24(3): 280–297 at 282.

[127] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. *Work and Stress*, 24(3): 280–297 at 284 – 285.

concepts of any potential relevance to the ACTU's claim[128], which the authors refer to as "self-directed rota systems"[129] and state that such systems have been implemented with "mixed results"[130]. Little specific information is given about the bases underpinning those five articles however where it is (e.g. that one of the studies was based on a trial of an open rota-system by eight Danish nursing teams[131]), it becomes apparent that the literature review cannot confidently be relied upon in support of Dr Stanford's proposition.

104. For the reasons here stated, Part 1 of Dr Stanford's report can be given little weight.

Part II of Dr Stanford's Report: Economic and Labour Market Context

105. Dr Stanford seeks to argue that, because various forms of "non-standard employment have become very common in Australia"[132], including casual employment, fixed-term employment, the use of labour hire arrangements, contractors etc, "the request by workers to be employed on something other than a "standard" full-time schedule cannot be seen as unusual or onerous"[133].

106. It is trite to observe that the ACTU's claim extends well beyond granting employees a right to "request" to be employed on a basis other than full-time employment. The proposed clause would grant an employee the right to determine that they will reduce their hours of work and dictate what those hours of work are, absent any employer discretion. The proposition that the

[128] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. *Work and Stress*, 24(3): 280–297 284 – 285.

[129] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. *Work and Stress*, 24(3): 280–297 at 287.

[130] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. *Work and Stress*, 24(3): 280–297 at 287.

[131] Brough, P. and O'Driscoll, M. P. 2010. 'Organizational Interventions for Balancing Work and Home Demands: An Overview'. Work and Stress, 24(3): 280–297 at 287.

[132] Exhibit ACTU6, Attachment JS-3 at paragraph 40.

[133] Exhibit ACTU6, Attachment JS-3 at paragraph 41.

alleged use of “non-standard employment” will not render the impact of the ACTU’s proposed clause “unusual or onerous”[134] is unsustainable.

107. Further, under cross-examination, Dr Stanford conceded that part-time employment (including both permanent and casual part-time employment) might be more feasible in some industries than others based on industry specific considerations. [135] Examples of sectors in which part-time employment may be problematic, particularly in circumstances in which the employee dictates their hours of work, are listed in our October Submission at paragraph 681.

108. At paragraph 43 of his report, Dr Stanford states that the female labour force participation rate in Australia has stagnated since 2007.[136] It is relevant to note that during that same period, the male labour force participation rate in fact fell[137] and that Dr Stanford does not appear to attribute these trends to factors associated with the availability of or access to flexible working arrangements.

109. In his report Dr Stanford asserted that:

> If women’s labour force participation over the last decade had continued to grow at the same rate it achieved in the previous decade (that is, from 1997 through to 2007) … that would represent an increment to the female labour force of some 285,000 people compared to actual recorded levels; at normal employment rates and productivity levels, the paid work effort of those additional women workers would add an estimated $40 billion per year to Australian GDP.[138]

110. The meaning of “normal employment rates and productivity levels” is obscure and it is unclear whether Dr Stanford considers that all 285,000 employees would, for the purposes of his calculation, in fact be engaged in paid employment[139]. In any event, under cross-examination it became apparent that the predicted increase to GDP is clearly exaggerated and based on a

[134] Exhibit ACTU6, Attachment JS-3 at paragraph 29.

[135] Transcript of proceedings on 12 December 2017 at PN841.

[136] Exhibit ACTU6, Attachment JS-3 at paragraph 43.

[137] Transcript of proceedings on 12 December 2017 at PN820.

[138] Exhibit ACTU6, Attachment JS-3 at paragraph 44.

[139] Transcript of proceedings on 12 December 2017 at PN823.

series of assumptions as to which there is no certainty. This includes an assumption that:

a) There would be either a corresponding number of additional jobs created or vacant jobs currently; and

b) Those vacant jobs would be suitable employment opportunities for each of the additional female employees.[140]

111. It was also accepted that the if the first assumption did not hold true, there may in fact be an increase in unemployment.[141]

112. Dr Stanford, by reference to three publications, seeks to link "weak" participation of women during the ages of 25 – 40 years, to the "lack of flexible work arrangements, the lack of affordable childcare, and related factors"[142]. We note the following in relation to each of those publications:

a) **Breunig et al (2011)** deals with the cost, availability and quality of childcare. It does not seek to draw any direct correlation between the female labour force participation rate and an alleged lack of flexible work arrangements.[143]

b) **Austen and Ong (2009)** as explained by Professor Austen whilst she was under cross-examination (cited above), this article does *not* stand for the proposition that a "lack of flexible work arrangements" precludes women from participating in the labour force. At its highest, the article establishes that there may be some correlation between access to flexible start and finish times and female labour force participation, however the sample size was insufficient to be able to conclude that this was not due to chance factors.

[140] Transcript of proceedings on 12 December 2017 at PN826 – PN823.

[141] Transcript of proceedings on 12 December 2017 at PN832.

[142] Exhibit ACTU6, Attachment JS-3 at paragraph 45.

[143] Breunig, R., Gong, X., Mercante, J., Weiss, A., and Yamauchi, C. 2011. "Child Care Availability, Quality and Affordability: Are Local Problems Related to Labour Supply?" The Economic Record, 87(276):109–124.

c) **Connolly and Gregory (2008)** relates exclusively to Britain and does not deal with the Australian workplace relations system in any way.[144]

113. By virtue of the high incidence of casual and part-time employment[145] in certain industries, which are also characterised by a high incidence of small and medium enterprises[146], Dr Stanford argues that such businesses are "already disproportionately likely to rely on" part-time and casual employees[147] and that therefore:

> … it is unlikely that providing some reciprocity in decision-making power over flexible work practices could somehow impose a major economic administrative burden; to a large extent, they are already utilising [part-time and other non-standard employment].[148]

114. We note firstly that Dr Stanford has not cited any quantitative data that demonstrates that small and medium sized businesses are in fact utilising "part-time and other non-standard employment" disproportionately or otherwise.

115. In any event, under cross-examination, Dr Stanford agreed that:

a) He is not familiar with the manner in which part-time employment is regulated under the modern awards system; that being that in the majority of cases, awards require agreement between an employer and employee upon engagement and that the majority of those require agreement to vary that arrangement.[149] Accordingly, the basis upon which Dr Stanford reaches his conclusion regarding the potential impact of granting employees "some reciprocity in decision-making power" is unclear.

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[144] Connolly, S. and Gregory, M. 2008. 'Moving Down: Women's Part-Time Work and Occupational Change in Britain 1991–2001'. Economic Journal, 118: F52–F76.

[145] Transcript of proceedings on 12 December 2017 at PN837.

[146] Exhibit ACTU6, Attachment JS-3 at paragraph 49.

[147] Exhibit ACTU6, Attachment JS-3 at paragraph 50.

[148] Exhibit ACTU6, Attachment JS-3 at paragraph 49 and transcript of proceedings on 12 December 2017 at PN845.

[149] Transcript of proceedings on 12 December 2017 at PN838 – PN839.

b) For the purposes of his report, Dr Stanford has not undertaken any analysis of the extent to which arrangements that mirror that which the ACTU is seeking are actually being implemented by small and medium-sized enterprises in Australia across any or all industries.[150]

c) Industry specific considerations might make the use of part-time work more feasible in some sectors than others.[151]

d) The prevalence of part-time work in some industries that happen to be comprised of a large proportion of small to medium enterprises does not necessarily mean that part-time employment can be accommodated by small employers in all industries.[152]

116. Dr Stanford's conclusion regarding small to medium sized enterprises, cited above, does not bear scrutiny.

Part III of Dr Stanford's Report: Economic Costs and Benefits of Family Friendly Working Arrangements

117. Part III of Dr Stanford's report purports to evaluate the economic costs and benefits of family friendly work arrangements, noting that he does not define the nature of the arrangements being contemplated for present purposes. This poses an obvious question as to the relevance of his conclusions to the ACTU's claim.

Firm-Level Benefits

118. Dr Stanford contends that the provision of family friendly work arrangements may "[enhance] the prospects for the firm to recruit other employees"[153]. We note however that any competitive advantage that might be enjoyed by employers presently where they elect to offer greater flexibility to their employees will not prevail in circumstances where all employers applying

[150] Transcript of proceedings on 12 December 2017 at PN847,

[151] Transcript of proceedings on 12 December 2017 at PN841.

[152] Transcript of proceedings on 12 December 2017 at PN842.

[153] Exhibit ACTU6, Attachment JS-3 at paragraph 51(c).

modern awards to their employees are compelled to offer the same form of flexibility to their employees by force of the minimum safety net. The same can be said of the proposition that employees who can access family friendly work arrangements mandated by the award "will tend to exhibit a greater level of loyalty, commitment, and reciprocity to the firm's goals and interests"[154].

119. Any assertion about "higher attendance" or, put another way, less absenteeism, of employees who have access to flexible working arrangements[155] should not be overstated. At its highest, this may be relevant to the taking of unplanned leave (although we remain unconvinced that this will necessarily be so under the ACTU's clause for reasons explained in our October Submission[156]); however an employee who reduces their hours of work pursuant to the ACTU's clause is necessarily absent from work to a greater degree on a weekly basis and this may of course have various consequences for their employer, regardless of whether or not they are replaced at such times.

120. Dr Stanford also asserts that "research cited in Part I and the Appendix [to his report] provide evidence that hourly productivity in part-time jobs is actually higher than in full-time jobs – all the more so if the part-time arrangements is consistent with a strategy to achieve a sustainable balance with home and caring responsibilities"[157]. Table A1 identifies three pieces of research that deal with "part-time work and productivity". One relates to Belgian private sector firms[158], another relates to the Dutch pharmacy sector[159] and the third considers 15 EU countries[160]. It is not apparent that any of these publications

[154] Exhibit ACTU6, Attachment JS-3 at paragraph 51(h).

[155] Exhibit ACTU6, Attachment JS-3 at paragraph 51(d).

[156] Ai Group submission dated 31 October 2017 at paragraph 441 and 719 – 736.

[157] Exhibit ACTU6, Attachment JS-3 at paragraph 51(g).

[158] Garnero, A., Kampelmann, S. and Rycx, F. 2013. *Part-time Work, Wages and Productivity: Evidence from Belgian Matched Panel Data*. Discussion Paper No. 7789.

[159] Kunn-Nelen, A., De Grip, A. and Fourage, D. 2013. *'Is Part-Time Employment Beneficial for Firm Productivity'*. Industrial and Labour Relations Review, 66(5): 1172–1191.

[160] Buddelmeyer, H., Mourre, G. and Ward, M. 2008. *Why Do Europeans Work Part-time? A Crosscountry Panel Analysis.* Working Paper No. 872. Frankfurt: European Central Bank.

can be said to be relevant to part-time employment as it is conceived of in the context of modern awards in Australia and therefore, to these proceedings.

Firm-Level Costs

121. The first firm-level cost Dr Stanford considers is the cost of recruiting, training and placing workers who are hired to replace those employees who decide to reduce their hours due to their parenting and/or other caring responsibilities.

122. Dr Stanford concedes at the outset that "employers might need to recruit new employees"[161] if an employee utilises the ACTU's proposed clause and he accepts that recruitment can be costly[162].

123. He then proceeds to hypothesise that given the large number of existing workers, particularly part-time employees, who would prefer to work more hours, "it is possible … that the vacancy left by a carer-employee shifting to fewer hours, could be easily and costlessly offset by increased working hours on the part of other existing employees". [163] Under cross-examination however, Dr Stanford accepted that the relevant part of his report is based on various assumptions regarding the substitutability of labour which will not always hold true: (emphasis added)

> … I take it that you truly accept that the labour of one employee of a business cannot always be substituted for the labour of another existing employee?---I accept that.
>
> And I take it you accept that there could be a whole range of reasons why the labour of different employees can't readily be substituted?---Yes.
>
> Take you through all of those reasons, but I take it you accept one of those might be skills matches, skills mix matches between the respective employees?---Certainly.
>
> And another might be that the potential substitute employee is simply unwilling to perform work at the particular hours that the care employees vacant (indistinct)?---Yes.
>
> It might be that substitute employees in a different geographical location to the vacant employee and as such can't perform the vacant employee's role?---Yes.

[161] Exhibit ACTU6, Attachment JS-3 at paragraph 52(a).

[162] Exhibit ACTU6, Attachment JS-3 at paragraph 51(b) and transcript of proceedings on 12 December 2017 at PN849 – PN843.

[163] Exhibit ACTU6, Attachment JS-3 at paragraph 52(a).

> And you accept that in some very small firms there may be particularly limited opportunities to substitute other employees for vacant individuals?---Potentially, although some of the evidence that we reviewed indicated that smaller firms, because of their less bureaucratic and flatter organisational structure are actually better able to reallocate (indistinct).
>
> But it depends on the circumstances?---Certainly.
>
> And if you, for example, just don't have sufficient employees to enable someone to step into that extra role then it would be the case that they couldn't?---It's certainly possible.
>
> And that situation could potentially happen more often by the simple virtue of the fact that there is a smaller pool of potential substitute employees?---The problem could arise in a small firm, but I wouldn't accept that it necessarily arises more often than in a large firm.
>
> You just can't be certain of that?---Yes.
>
> But in short, it can't be assumed that even if there is a high level on underemployment within the economy, that within the context of a particular firm there will necessarily be an underemployed employee who is willing and able to fill in for a particular vacant employee?---In the context of a particular firm and a particular opening, it cannot be assumed, you're right.[164]

124. We note that the evidence given by Dr Stanford under cross-examination, regarding the complexities associated with substituting labour is consistent with that of Ms Toth[165].

125. Dr Stanford also seeks to assert that "it is quite possible" that an employer would incur costs associated with recruitment and training even if the ACTU's claim were not granted because there would otherwise be "employees who are forced to quit their existing roles (due to the lack of flexibility to balance caring responsibilities and paid work)".[166] We note that his cost-benefit analysis is not based on any quantitative data as to the extent or frequency with which employees in fact leave their employment due to a lack of flexibility to balance their caring responsibilities and paid work. Accordingly, his evidence is merely speculative and can be given little weight.

[164] Transcript of proceedings on 12 December 2017 at PN863 – PN874.

[165] Exhibit Ai Group 4 at paragraphs 41 – 48.

[166] Exhibit ACTU6, Attachment JS-3 at paragraph 52(a).

126. The second limb of Dr Stanford's analysis of firm-level costs relates to those associated with what he calls the "disemployment of incremental employees" who are hired to fill in vacancies left by reductions in working hours by carer employees.[167] He contends that the "order of magnitude of these expenses … will be small, for several reasons"[168] including:

a) "There is a significant possibility that job vacancies created by carer-employees exercising their right to family-friendly hours could be filled without new hiring".[169] This proposition, however, is undermined by Dr Stanford's cross-examination reproduced above.

b) "An employee who proved themselves on temporary assignment filling in for the reduced hours of a carer-employee could potentially be reallocated to a different role within the firm".[170] This proposition proceeds on the simplistic assumption that there will be demand for labour elsewhere in the firm and that the employee's skills, availability and location will match that demand.

Comparison of Firm Level Costs and Benefits

127. It is clear from the submissions above that Dr Stanford's evidence regarding the potential costs and benefits of 'family friendly work arrangements' (however contemplated for the purposes of his report) cannot be relied upon and therefore, by extension, his conclusion (tentative though it may be) that "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"[171], can be attributed little if any weight in the context of the current proceedings.

[167] Exhibit ACTU6, Attachment JS-3 at paragraph 52(b).
[168] Exhibit ACTU6, Attachment JS-3 at paragraph 52(b).
[169] Exhibit ACTU6, Attachment JS-3 at paragraph 52(b).
[170] Exhibit ACTU6, Attachment JS-3 at paragraph 52(b).
[171] Exhibit ACTU6, Attachment JS-3 at paragraph 54.

4. THE ACTU'S LAY WITNESSES

128. The ACTU relies on the evidence of 11 lay witnesses, whose evidence can broadly be summarised as follows:

	Name	Industry / Sector	Industrial Instrument	Request Granted?
1	Van der Hilst	Banking & Finance	IAG Enterprise Agreement 2016[172]	Yes
2	Ogulin	Local Government	Launceston City Council Enterprise Agreement 2013 – 2016[173]	Yes
3	Bowler	Retail	Target Australia Retail Agreement 2012[174]	Yes
4	Mullan	Retail	General Retail Industry Award 2010[175]	Yes
5	Anderson	Education	Teaching in State Education Award – State 2016[176]	Yes
6	Hammersley	Banking & Finance	Westpac Group Enterprise Agreement 2016[177]	Yes
7	Witness 1	Ambulance & Patient Transport	Ambulance Victoria Enterprise Agreement 2015[178]	Yes
8	Sinclair	Retail	General Retail Industry Award 2010[179]	No
9	Czerkesow	Banking & Finance	Clerks – Private Sector Award 2010[180]	No
10	Routley	Education	St John's Grammar School Inc Enterprise Agreement 2005[181]	No
11	Jones – Vadala	Education	Victorian Catholic Education Multi-Employer Agreement 2008[182]	No

129. We note at the outset that, upon review, it appears that Mr Anderson is not a national system employee as he is employed by Education Queensland, which we do not understand to be a 'national system employer' as defined by the Act. We hereafter do not propose to deal with his evidence because, in

[172] Exhibit ACTU10 at paragraph 2.
[173] Exhibit ACTU11 at paragraph 2.
[174] Exhibit ACTU12 at paragraph 2.
[175] Exhibit ACTU13 at paragraph 2.
[176] Exhibit ACTU15 at paragraph 9.
[177] Exhibit ACTU9 at paragraph 2.
[178] Exhibit ACTU16 at paragraph 6.
[179] Exhibit ACTU14 at paragraph 14.
[180] Exhibit ACTU17 at paragraph 2.
[181] Exhibit ACTU7 at paragraph 1.
[182] Exhibit ACTU8 at paragraph 2.

our submission, it is not of any relevance to these proceedings, leaving 10 lay witnesses called in support of the ACTU's case.

130. Before dealing with the evidence in greater detail, we also note that it relates only to 5 industries. The 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 including but not limited to:

a) The aviation industry (including pilots, cabin crew and ground staff);

b) The construction industry (including on-site building and construction, joinery and building trades, plumbing, electronical contracting, the concrete products industry, mobile crane hiring etc);

c) The black coal mining industry;

d) The business equipment industry;

e) The contract cleaning industry;

f) Commercial sales persons;

g) The contract call centre industry;

h) The fast food industry;

i) The graphic arts industry;

j) The hair and beauty industry;

k) The horticulture industry;

l) The manufacturing and associated industries, including food manufacturing, pharmaceutical manufacturing and textile, clothing and footwear manufacturing;

m) The meat industry;

n) Professional employees;

o) The road transport industry;

p) Security services;

q) The social, community, home care and disability services sectors;

r) The stevedoring industry;

s) The storage services industry;

t) The telecommunications industry;

u) Vehicle repair, services and retail;

v) The waste management industry; and

w) The wine industry.

131. As a result of this very significant deficiency in the ACTU's case, it does not enable the Commission to assess the extent to which requests currently being made are or are not being granted in specific industries and if not, the operational reasons why those requests cannot be accommodated, which is of course relevant to the Commission's assessment of the potential impact of a proposed award term that would give employees an absolute right to choose their hours of work. As a result, the only material that might assist the Commission in this regard is that which has been presented by employer representatives, including the witnesses called by Ai Group and the Joint Employer Survey.

The Propositions Demonstrated by the Evidence

132. The evidence of the 10 witnesses identified above (excluding Mr Anderson), demonstrates the following propositions:

a) Decisions associated with labour force participation as well as the nature and extent of that participation is influenced by various factors

including the personal preferences of employees as to how their children are cared for[183], the availability of formal and informal child care[184], child care quality[185], extra-curricular activities undertaken by their children[186], their partners' employment status and/or income[187] and their families' financial situation[188]. This demonstrates that such decisions made by employees are based on a complex web of factors and are not based purely (if at all) on their access to flexible working arrangements.

b) Despite the existence of a statutory right to request flexible working arrangements and various other forms of flexibility, in many cases, mothers remain primarily responsible for the care of their children[189], even where their partner does not work a greater number of hours[190]. There is no evidence that fathers seek to access flexible working arrangements in order to more evenly distribute those caring responsibilities[191] or that the ACTU's clause will have the effect of inducing fathers to seek such flexibility.

c) Requests for flexible working arrangements are, in some instances, granted in full.[192]

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[183] **Bowler**; Exhibit ACTU12 at paragraphs 12 and 18. **Mullan**; Exhibit ACTU13 at paragraph 3. **Czerkesow**; Exhibit ACTU17 at paragraphs 21, 28 – 29. **Routley;** Exhibit ACTU7 at paragraph 15.

[184] **Jones-Vadala;** Exhibit ACTU8 at paragraphs 4 and 15. **Sinclair**; Exhibit ACTU14 at paragraph 13.

[185] **Jones-Vadala;** Transcript of proceedings on 13 December 2017 at PN1107 – PN1108 and PN1142 – PN1145.

[186] **Jones-Vadala;** Exhibit ACTU8 at paragraph 4. **Hammersley**; Exhibit ACTU9 at paragraph 15. **Sinclair;** Exhibit ACTU14 at paragraph 19.

[187] **Bowler**; Exhibit ACTU12 at paragraph 14. **Jones-Vadala;** Exhibit ACTU8 at paragraphs 3 – 4. **Routley**; Exhibit ACTU7 at paragraph 2 and transcript of proceedings on 13 December 2017 at PN1044 – PN1046.

[188] **Sinclair**; Exhibit ACTU14 at paragraph 6. **Mullan**; Exhibit ACTU13 at paragraph 6. **Bowler**; Exhibit ACTU12 at paragraph 6.

[189] **Ogulin**; Exhibit ACTU11 at paragraph 2. **Mullan**; Exhibit ACTU13 at paragraph 3. **Jones-Vadala**; Exhibit ACTU8 at paragraph 3. **Czerkesow;** Exhibit ACTU17 at paragraph 3.

[190] **Van der Hilst**; Exhibit ACTU10 at paragraph 3.

[191] See in particular **Hammersley**; Exhibit ACTU9 at paragraph 3 and transcript of proceedings on 13 December 2017 at PN1206.

[192] **Van der Hilst**; Exhibit ACTU10. **Bowler;** Exhibit ACTU12. **Ogulin;** Exhibit ACTU11. **Witness 1;** Exhibit ACTU16.

d) An employer may not be able to grant a request for flexible working arrangements in the terms sought[193] or at all[194]. In some instances, a need may arise to alter that arrangement after the passage of time due to a change in operational circumstances[195]. Examples of the operational reasons giving rise to the above include:

   i. The hours of work of other employees who may also be seeking flexibility due to their caring responsibilities.[196]

   ii. The expectations or demands of clients and customers.[197]

   iii. The manner in which work is timetabled or scheduled, which can involve considerations associated with fatigue management.[198]

   iv. The nature of the work performed by employees in certain roles or positions, such as a supervisory role.[199]

e) 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.[200]

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[193] **Mullan;** Exhibit ACTU13. **Hammersley**; Exhibit ACTU9. **Jones-Vadala**; Exhibit ACTU8. **Sinclair;** Exhibit ACTU14.

[194] **Routley**; Exhibit ACTU7. **Czerkesow**; Exhibit ACTU17.

[195] **Hammersley**; Exhibit ACTU9.

[196] **Van der Hilst;** transcript of proceedings on 13 December 2017 at PN1282 – PN1284.

[197] **Routley**; Exhibit ACTU7 at Attachments C and D and transcript of proceedings on 13 December 2017 at PN1036. **Czerkesow**; Exhibit ACTU17 at paragraph 4 and transcript of proceedings on 13 December 2017 at PN1345 – PN1348.

[198] **Jones – Vadala**; transcript of proceedings on 13 December 2017 at PN1112 – PN1117. **Czerkesow**; Exhibit ACTU17 at paragraph 4 and transcript of proceedings on 13 December 2017 at PN1345 – PN1348. **Witness 1;** Exhibit ACTU16 at paragraph 8.

[199] **Sinclair;** Exhibit ACTU14 at paragraph 15. **Bowler**; Exhibit ACTU12 at paragraph 11. See also evidence of the corollary: **Van der Hilst;** Exhibit ACTU10 at paragraph 7 and transcript of proceedings on 13 December 2017 at PN1276.

[200] **Routley**; Exhibit ACTU7 at paragraphs 12 – 13 and transcript of proceedings on 13 December 2017 at PN1036 reveals that although the witness appears to consider that her request was refused because of the school's principal's personal views, Attachment D to her statement represents the school's position on the issue of job-sharing. **Van der Hilst**; Exhibit ACTU10 at paragraphs 11 does not establish that the relevant line-manager refused the witness' request to work from home due to

f) Employers typically take a flexible, accommodating and compassionate approach when faced with requests for flexible working arrangements.[201]

g) The evidence of "occupational downgrading" in Australia is insubstantial and falls well short of establishing that award covered employees are systematically suffering from such downgrading as a result of their caring responsibilities and an inability to access flexible working arrangements to accommodate those responsibilities.[202]

h) To the extent that any female employees after the birth of a child are "downgraded", this may be because they *elect* to be.[203]

their personal views or preferences. **Ogulin**; Exhibit ACTU11 at paragraphs 5 – 7. We note that despite the hearsay evidence given by the witness, her request for flexible working arrangements was granted.

[201] **Van der Hilst;** Exhibit ACTU10 at paragraph 9. **Hammersley;** Exhibit ACTU9 at paragraphs 12 and 14. **Mullan;** Exhibit ACTU13 at paragraphs 10 – 13. **Bowler;** Exhibit ACTU12 at paragraphs 15 – 16 and 22.

[202] For instance, Van der Hilst, Mullan, Hammersley, Routley and Czerkesow were not "occupationally downgraded". **Ogulin**; Exhibit ACTU11 at paragraph 11, the witness gives hearsay evidence that the Director decided that she would have one less staff member reporting to her because "he did not believe [she] could manage the workload". The evidence does not establish that that was in fact the reason that the change was made, that it had the effect of actually "downgrading" her in the sense contemplated by Professor Austen's evidence, or that any of her remaining evidence regarding the consequences flowing from the internal restructure (see especially paragraph 14) were as a result of her caring responsibilities or the flexible working arrangement. The evidence goes only to her *perception*.

[203] **Bowler**; Exhibit ACTU12 at paragraph 11.

5. AI GROUP'S EVIDENCE

133. The submissions that follow relate to the evidence advanced by Ai Group. In each instance, we identify the findings that we say should be made in relation to the evidence given.

5.1 The Joint Employer Survey

134. Ai Group has made detailed submissions in relation to the Joint Employer Survey in our October Submission[204] as well as in our submission of 11 December 2017. Specifically, at page 270 of the former submissions, we set out the propositions that, we say, the responses to the Joint Employer Survey demonstrate.

135. For the purposes of this submission, we seek to simply deal with three matters that arose during the cross-examination of Mr Jeremy Lappin.

136. **First,** Mr Lappin was asked whether the "response IDs" identified in Attachments B and C to his statement were allocated by Lime Survey (the platform on which the survey was conducted), or by Ai Group. Mr Lappin stated that he did not know how the response ID had been allocated.[205]

137. We note however that it is Mr Lappin's evidence that he exported Attachment B to his statement directly from Lime Survey and that it reflects "a full record of the responses that were collected during the survey period from the 2616 survey respondents that submitted a complete response"[206]. The evidence is consistent with our understanding; that Lime Survey automatically assigns a "response ID" to each complete survey response. The response IDs were not assigned by Ai Group.

138. **Second**, Mr Lappin was asked how he derived the number of complete and incomplete responses at paragraph 8 of his statement however he was unable

[204] Ai Group submission dated 31 October 2017 at pages 178 – 270.

[205] Transcript of proceedings on 13 December 2017 at PN1553.

[206] Exhibit Ai Group 3 at paragraph 10.

to recall how he derived those figures.[207] It was later put to him that, having regard to those numbers and the response IDs appearing in Attachment B to his statement, there appeared to be a discrepancy of some 229 responses, which he was also unable to explain.[208]

139. Notwithstanding, we note the following elements of the witness' evidence establish that no responses other than those of non-award-covered respondents were deleted by him from the data ultimately put before the Commission:

a) That Mr Lappin exported Attachment B to his statement directly from Lime Survey and that it reflects "a full record of the responses that were collected during the survey period from the 2616 survey respondents that submitted a complete response".[209]

b) That on the instructions of the Ai Group Workplace Relations Policy Team, he removed the responses of non-award-covered respondents for the purposes of the calculations he performed in Attachment C (noting that those responses remain available at Attachment B).[210]

c) That Mr Lappin was not asked to delete any other responses[211] and there is no evidence that he did in fact delete any other responses.

140. **Third,** during cross-examination, counsel for the ACTU established that 43 respondents stated that they did not employ any employees. This was a matter that had not previously come to our attention and we accept that as a consequence, paragraph 516 of our October Submission inaccurate. We accordingly here seek to amend it (changes marked in red):

[207] Transcript of proceedings on 13 December 2017 at PN1559.

[208] Transcript of proceedings on 13 December 2017 at PN1629 – PN1630.

[209] Exhibit Ai Group 3 at paragraph 10.

[210] Exhibit Ai Group 3 at paragraph 11(b).

[211] Transcript of proceedings on 13 December 2017 at PN1597.

Number of Employees[212]	Number of Respondents	% of Respondents
1 – 19	~~1,108~~ 1065	~~54.5%~~ 53.5%
20 – 199	762	~~37.5%~~ 38.3%
200 or more	162	~~7.97%~~ 8.1%

141. We note that the responses represent a very small proportion of all award-covered respondents to the survey (2.1%), and as a result, we do not anticipate that the responses provided by such respondents have had a significant bearing on the survey results when considered in toto.

5.2 Julie Toth

142. The evidence as advanced through the statement of Julie Toth was addressed in Ai Group's October Submission.[213] Notwithstanding cross examination, the evidence of Ms Toth supports the following key findings regarding the Australian Labour Market and labour force participation rates.

143. **First**, the female labour force participation rate of women aged 15 – 64 years has recently reached a record high of 71.9%.[214]

144. **Second**, the labour force participation of women with children under 15 years of age has also grown substantially; from 57% of women with children under 15 years of age in 1994 to 67% in 2004.[215]

145. **Third**, in the period between 2000 and 2017 there has been an upward trend in labour force participation rates of women aged 25 years and over and while, in the same period, there has been a decline in participation for women aged 15-24 year, this is related to rising levels of participation in education.[216]

[212] The increments selected for present purposes align with those that were used in the AWRS First Findings Report.

[213] Ai Group submission dated 31 October 2017 at paragraphs 617 – 630.

[214] Exhibit Ai Group 4 at paragraph 9.

[215] Exhibit Ai Group 4 at paragraph 11.

[216] Exhibit Ai Group 4 at paragraph 10.

146. **Fourth**, there has also been a major rise in the levels of part-time employment (as defined by the ABS) in the Australian labour market over recent decades[217] and Australia has one of the highest rate of part-time employment in the OECD (as defined as working less than 30 hours per week)[218].

147. **Fifth**, levels of 'casual' employment have remained relatively stable for the last 20 years.[219] This, combined with the third finding identified above, suggests that the growth in permanent part-employment has been stronger than casual part-time employment arrangements.[220]

148. Clearly, more women are now participating in the labour force than ever before. This is despite the reality that women, as a cohort, continue to perform a disproportionate amount of caring responsibilities undertaken within Australian society. The extent to which the cited labour market trends reflect a much increased level of participation by women, and indeed by women in prime caring years in the labour force, they undermine the force with which it can be reasonably argued that a radical reassessment of the manner in which hours of work are determined, as proposed by the ACTU, is now warranted.

149. In relation to matters of relevance to the impact of the ACTU's proposed claim, we note that the evidence of Ms Toth is consistent with the following key findings.

150. **First**, the ACTU's claim could impede the achievement the allocative efficiency of labour hours between firms and within firms.[221]

[217] Exhibit Ai Group 4 at paragraph 16.

[218] Exhibit Ai Group 4 at paragraph 17.

[219] Exhibit Ai Group 4 at paragraph 16.

[220] Exhibit Ai Group 4 at paragraph 16.

[221] Exhibit Ai Group 4 at paragraphs 30 – 41.

151. **Second**, labour (or labour hours) are not always perfectly substitutable. The evidence of Ms Toth identifies various reasons for this.[222] The proposition was also broadly accepted by Professor Stanford.[223]

152. **Third**, it cannot be assumed that an employer's demand for labour which may result from an employee reducing their hours of work pursuant to the ACTU's proposed clause would be met by another underemployed employee.[224]

153. **Fourth**, the ACTU's claim would have an adverse effect on the efficiency with which labour is utilised across the economy. That is, both between and within firms. This would in turn have a negative effect on national productivity.[225]

154. **Fifth,** there are various costs and negative outcomes that can flow from the need to replace existing staff as a result of a reduction in their hours of work.[226]

155. Such evidence suggests that a consideration of the following matters identified in s.134(1) would weigh against granting the claim:

- The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d);
- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden(s.134(1)(f); and
- The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

[222] Exhibit Ai Group 4 at paragraphs 45 and 46.

[223] Transcript of proceedings on 12 December 2017 at PN863 – PN874.

[224] Exhibit Ai Group 4.

[225] Exhibit Ai Group 4 at paragraph 51.

[226] See, for example, Exhibit Ai Group 4 at paragraphs 44 and 48.

5.3 Benjamin Norman

156. The uncontested evidence of Benjamin Norman regarding the operations of Viterra Operations Pty Ltd (**Viterra**) and Glencore Agriculture Pty Ltd (**Glencore Agriculture**) was summarised in Ai Group's October Submission[227]. We here identify the relevant findings that we say should be made by the Commission in light of that evidence.

157. **First,** the grant of the ACTU's claim could impact businesses even if they have an enterprise agreements in place if those agreements that agreement do not apply to all award covered employees employed by the employer[228].

158. **Second,** the timing of the work required to be performed may be dependent upon a range of factors that are beyond an employer's control (including, for example, seasonal factors, the weather, the operation of shipping vessels and transport providers, customer demand etc).[229]

159. **Third**, in light of such conditions, employees' hours of work can vary significantly week-to-week and day-to-day. Indeed there may be circumstances in which an employer does not does not require any work to be performed on certain days or during certain weeks, giving rise to additional employment costs and safety concerns.[230]

160. **Fourth,** where an employer is unable to employ employees on a basis that enables the employer to set their hours of work in accordance with their operational needs, an employer may respond by instead relying on casual employment.[231]

[227] Ai Group submission dated 31 October 2017 at paragraphs 631 – 638.

[228] Exhibit Ai Group 6.

[229] Exhibit Ai Group 5 at paragraphs 7 – 9, 10 – 12 and 35.

[230] Exhibit Ai Group 5 at paragraphs 32, 34 – 35, 43 – 47, 51 – 53 and 70.

[231] Exhibit Ai Group 5 at paragraph 52.

161. **Fifth**, by virtue of the nature of work performed by employees in certain roles, a 'job sharing' arrangement may be unworkable and could give rise to inefficiencies.[232]

162. **Sixth**, employers typically take a careful, considered, flexible and accommodating approach when faced with requests from their employees for various forms of flexibility, including changes to their hours of work.[233]

163. **Seventh,** despite adopting such an approach, there are circumstances in which requests cannot be granted due to reasonable business grounds.[234]

164. **Eighth**, a model such as that which is contemplated by s.65 of the Act, which encourages discussion between an employer and employee about any request for flexible working arrangements, is working effectively and allows an employer and employee to put in place an arrangement that can be accommodated by both parties, having regard to a range of factors including the desire of other employees to work flexibly.[235]

165. **Ninth,** substituting an employee who no longer works at specific times can have a range of adverse consequences for an employer including:

a) An inability to find an employee who is skilled to perform the requite work;[236]

b) Reduced efficiency and productivity;[237]

c) The time and expenses associated with recruiting and training new employees.[238]

[232] Exhibit Ai Group 5 at paragraphs 76 – 77.
[233] Exhibit Ai Group 5 at paragraphs 58 – 60.
[234] Exhibit Ai Group 5 at paragraphs 62 – 68.
[235] Exhibit Ai Group 5 at paragraphs 64 – 68.
[236] Exhibit Ai Group 5 at paragraph 79.
[237] Exhibit Ai Group 5 at paragraphs 79.
[238] Exhibit Ai Group 5 at paragraphs 80 – 82.

5.4 Janet O'Brien

166. The evidence of Janet O'Brien, National Manager – People and Performance of Conplant Pty Ltd (**Conplant**) was summarised in our October Submission[239]. We here identify the relevant findings that we say should be made by the Commission in light of that evidence.

167. **First,** the grant of the ACTU's claim could impact businesses even if they have an enterprise agreement in place if that agreement does not apply to all award covered employees employed by the employer[240].

168. **Second,** the operations of an employer may be such that it requires a certain employee to be present at work at a particular time in order for it to ensure service delivery to its customers and to maintain the quality of that service.[241] Where an employer is unable to do so, this can adversely impact the business' competitiveness.[242]

169. **Third**, the precise timing of the work that an employer requires an employee to perform may be entirely contingent upon factors beyond the employer's control, such as the needs and demands of customers, as to which there can be little certainty. As a result, an employer may require its employees to be ready, willing and able to respond to such demands immediately, with little if any notice or ability to plan.[243]

170. **Fourth**, employers typically take a flexible, compassionate and accommodating approach when faced with requests from their employees for various forms of flexibility, including changes to their hours of work.[244]

[239] Ai Group submission dated 31 October 2017 at paragraphs 639 – 645.

[240] Exhibit Ai Group 1 at paragraphs 12 – 13 and Exhibit Ai Group 2.

[241] Exhibit Ai Group 1 at paragraphs 7 and 38 – 39.

[242] Exhibit Ai Group 1 at paragraph 8.

[243] Exhibit Ai Group 1 at paragraphs 6 – 7 and 39.

[244] Exhibit Ai Group 1 at paragraphs 23 – 32.

171. **Fifth,** the grant of flexible working arrangements is not without consequence for a business. The potential consequences include:

a) Requiring another employee to perform additional tasks or functions that do not properly utilise their skills and experience and can therefore have an adverse impact on that employee's morale, attitude to work, well-being, productivity and efficiency.[245]

b) Requiring another employee to perform additional tasks or functions as a result of which they are unable to perform their usual duties.[246]

c) Inefficient handover processes that undermine productivity and efficiency.[247]

172. **Sixth,** substituting an employee who no longer works at specific times can have a range of adverse consequences for an employer including:

d) An inability to find an employee who is available to work at the specific times left vacant by the other employee;[248]

e) An inability to find an employee who is skilled to perform the requite work;[249]

f) Reduced efficiency and productivity where the requisite work is performed by an employee who does not possess the necessary skills;[250]

g) The time and expenses associated with recruiting and training new employees.[251]

[245] Exhibit Ai Group 1 at paragraphs 26 and 33.
[246] Exhibit Ai Group 1 at paragraph 33.
[247] Exhibit Ai Group 1 at paragraph 33.
[248] Exhibit Ai Group 1 at paragraph 35.
[249] Exhibit Ai Group 1 at paragraph 35.
[250] Exhibit Ai Group 1 at paragraphs 36 and 44.
[251] Exhibit Ai Group 1 at paragraphs 35 and 44.

5.5 Peter Ross

173. The uncontested evidence of Peter Ross, General Manager – Human Resources of Rheem Australia Pty Ltd (**Rheem**) was summarised in our October Submission[252]. We here identify the relevant findings that we say should be made by the Commission in light of that evidence.

174. **First,** the grant of the ACTU's claim could impact businesses even if they have an enterprise agreement (or enterprise agreements) in place where those enterprise agreements incorporate the relevant modern award(s)[253] and where those enterprise agreements do not apply to all award covered employees employed by the employer[254].

175. Accordingly, such businesses, including Rheem, are not immune from any variation made in respect of the ACTU's claim. Their operations and the potential consequences that might flow if the claim were granted are relevant to the Commission's consideration of the variation proposed.

176. **Second,** a business can experience fluctuations in production levels, at least in part due to fluctuations in customer demand.[255] This can also result in fluctuations in a business' demand for labour[256] and therefore:

a) an employer may not be able to guarantee an employee work at a particular time(s) or on a particular shift[257]; and

b) can create a need for an employer to change their employees' hours of work[258].

177. **Third,** the nature of a production line in a manufacturing environment may be such that it requires 'all hands on deck' simultaneously in order to operate at

[252] Ai Group submission dated 31 October 2017 at paragraphs 646 – 656.
[253] Exhibit Ai Group 7 at paragraphs 39 – 40.
[254] Exhibit Ai Group 7 at paragraph 45 and Exhibit Ai Group 8.
[255] Exhibit Ai Group 7 at paragraphs 7 – 8 and 18.
[256] Exhibit Ai Group 7 at paragraphs 6 and 17 – 18.
[257] Exhibit Ai Group 7 at paragraph 20.
[258] Exhibit Ai Group 7 at paragraphs 18, 21 and 50 – 52.

the optimum level of speed and efficiency.[259] An inefficient allocation of labour (caused either by staff absences, due to an excess number of staff employees, a mismatch of skills, employees starting/finishing work halfway through a shift or working hours that straddle two shifts) can cause a fall in productivity and reduce efficiency within a firm. This can ultimately have the effect of undermining international competitiveness and result in a decision to offshore the relevant work.[260]

178. **Fourth,** an employer may incur additional employment costs where an employee decides to work at a time (or times) during which there is in fact insufficient work for that employee to perform and therefore, it reflects an inefficient allocation of labour. This includes, as is the case at Rheem, the payment of an afternoon shift penalty in certain circumstances.[261]

179. **Fifth,** the existence of a shift structure can create certain restrictions within which labour must be rostered to work. To the extent that an employee seeks to work part of a shift, this can create specific difficulties including an inability to find another employee to work the remaining part-shift and/or an adverse impact on productivity.[262]

180. **Sixth,** the operations of an employer may be such that it requires a certain minimum number of employees to be present at work at a particular time in order for it to ensure service delivery to its customers and to maintain the quality of that service.[263] Where an employer is unable to do so, this can adversely impact the business' brand and its revenue.[264]

181. **Seventh,** employers typically take a flexible, compassionate and accommodating approach when faced with requests from their employees for

[259] Exhibit Ai Group 7 at paragraph 9.

[260] Exhibit Ai Group 7 at paragraphs 10 – 15, 71 – 72 and 74.

[261] Exhibit Ai Group 7 at paragraphs 19 – 20.

[262] Exhibit Ai Group 7 at paragraph 648.

[263] Exhibit Ai Group 7 at paragraphs 26 – 27 and 57.

[264] Exhibit Ai Group 7 at paragraphs 27 and 31.

various forms of flexibility, including changes to their hours of work.[265] This is demonstrated specifically by the approach Rheem takes to moving employees between its day shift and afternoon shift, which involves the conduct of "hardship interviews", as a product of which Rheem gives considerations to the consequences that would face employees if their working arrangements were altered before making its decision. In the course of that process, preference is typically given to employees with family responsibilities.[266]

182. **Eighth,** the grant of flexible working arrangements is not without consequence for a business. As a result of granting a request, an employer may need to implement measures to facilitate the relevant employee's changed working hours, but there may nonetheless be a reduction in efficiency.[267]

183. **Ninth,** there are circumstances in which an employer is not able to accommodate an employee's request for changed working hours due to reasonable business grounds.[268] The grant of multiple requests can also have a cumulative impact on the business.[269] The example provided by Mr Ross of the dispute concerning Shane O'Neill provides a very useful illustration of the consequences that can flow to a business if, despite the existence of reasonable business grounds, an employer is made accommodate an employee's requested hours of work.[270]

184. **Tenth,** a model such as that which is contemplated by s.65 of the Act, which encourages discussion between an employer and employee about any request for flexible working arrangements, is working effectively and allows an employer and employee to put in place an arrangement that can be

[265] Exhibit Ai Group 7 at paragraphs 48 – 72.

[266] Exhibit Ai Group 7 at paragraphs 70 – 72.

[267] Exhibit Ai Group 7 at paragraphs 53 and 71 – 72.

[268] Exhibit Ai Group 7 at paragraph 56.

[269] Exhibit Ai Group 7 at paragraph 54.

[270] Exhibit Ai Group 7 at paragraphs 71 – 72.

accommodated by both parties, having regard to a range of factors including the desire of other employees to work flexibly.[271]

185. **Eleventh,** substituting an employee who no longer works at specific times can have a range of adverse consequences for an employer including:

h) An inability to find an employee who is available to work at the specific times left vacant by the other employee;[272]

i) An inability to find an employee who is skilled to perform the requite work;[273]

j) Reduced efficiency and productivity where the requisite work is performed by an employee who does not possess the necessary skills;[274]

k) The time and expenses associated with training new employees.[275]

[271] Exhibit Ai Group 7 at paragraphs 57 – 59.

[272] Exhibit Ai Group 7 at paragraph 73.

[273] Exhibit Ai Group 7 at paragraphs 73 – 74.

[274] Exhibit Ai Group 7 at paragraph 74.

[275] Exhibit Ai Group 7 at paragraph 75.

6. THE OPERATION OF THE PROPOSED CLAUSE

186. Ai Group's October submission contains a detailed articulation of a raft of difficulties and problematic outcomes that would flow from the operation of proposed clause.[276] Paragraphs 41 - 53 of the ACTU Submission attempts to grapple with a number of concerns. However, their response is in many ways superficial and fails to address many of the matters that we have raised.

187. In this section, we respond to the ACTU Submission regarding five matters about the operation of the proposed clause that we had raised. In so doing we do not demur from the various elements of our October Submission, except where we expressly indicate otherwise.

Issue 1 - The Hours that may be Selected

188. The ACTU denies that the proposed draft determination would allow an employee to nominate hours of work that fall after the business is closed, or only hours that attract penalties, or hours that breach the terms of applicable legislation.[277] The ACTU's attempts to reassure the Commission that the clause does not operate in such a manner is understandable. Absent some fetter on an employee's ability to select what hours they work, the clause could operate in a blatantly ridiculous manner. Nonetheless, the explanation provided by the ACTU fails to provide a reasonable basis for their contention.

189. The ACTU Submission states:

> The ACTU's proposed clause defines Family Friendly Working Hours at paragraph 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.[278]

[276] Ai Group submission dated 31 October 2017 at paragraphs 658 – 757.

[277] ACTU submission dated 27 November 2017 at paragraph 46.

[278] ACTU Reply Submission at paragraph 47

190. We do not contend that the proposed clause would entitle an employee to commence working in a new position. However, no element of its terms appear to limit the hours that may be selected by an employee as asserted by the ACTU.

191. To the extent that the ACTU relies on its proposed definition of "Existing Position" to place some parameters around the hours that an employee may elect to work, their submissions are wholly inadequate. Their approach reflects a baseless assumption that an employee will work fixed hours prior to the employee nominating the hours that will constitute a "Family Friendly Hours Arrangement". This is not the reality of how work is necessarily arranged. While the hours of work of part-time employees are often required to be fixed under awards (as a product of the traditional rationale for the implementation of part-time employment within awards) the same approach is not generally adopted in relation to other types of employment.

192. Obviously, many casual employees will not have any established pattern of hours of work in place. However, it will also be the case for many full-time employees that there is a degree of fluidity to such matters. Awards often, if not typically, set or provide for the determination of the ordinary hours of work that may be performed by employees, but they do not generally specify the hours that will actually be worked or necessarily require that an employer set fixed hours of work. Instead, an employer will often retain the right to vary the particular hours performed by employees (subject to any contractual arrangement that may be in place).

193. The issue of what hours the employee is able to select to work under the proposed clause is not a minor matter that may be attended to in a settlement of orders process. It goes to a fundamental deficiency in the ACTU claim. There is simply no workable basis for establishing the parameters within which the employee's nominated hours of work must fall. Hence, we contend that the proposal affords employees an unreasonable and broad ranging right to dictate their hours.

194. The ACTU also notes that "there is nothing in the clause which would exempt a workplace from a requirement to comply with any applicable piece of legislation or award, contract of enterprise agreement terms regulating hours of work."[279] We do not contend that it would have this effect either. Our concern is that the clause operates without any regard for the impact of such regulatory regimes. There is nothing in the clause which requires that hours of work must be in accordance with such provisions. Accordingly, the provision removes an employer's ability to structure the hours performed by their workforce to accommodate such matters.

195. The ACTU Submission also highlights an uncertainty as to precisely how the proposed clause is intended to interact with existing award clauses. Most awards contain part-time employment provisions that either require or assume that the ordinary hours of work are agreed between an employer and employee. Work performed outside of such hours is typically either worked during overtime hours or is paid at overtime rates. In some awards, the distinction between a casual, part-time and full-time employee is also dependent upon the pattern of work performed. No attempt has been made to reconcile or explain how the proposed provision will interact with such terms.

Issue 2 - Remuneration related Matters

196. In response to Ai Group's October Submissions[280] addressing how an individual's remuneration will be impacted in circumstances where reduced hours are accessed pursuant to the clause the ACTU simplistically asserts that "any reduction in hours of work by an employee accessing Family Friendly Working Hours would result in a pro-rata reduction in the usual way". This assertion attempts to address our concern that the clause may have been intended to entitle an employee to the same quantum of remuneration that they received prior to the implementation of the Family Friendly Working Hours Arrangement, but it does not address our contention that a literal reading of

[279] ACTU Reply Submission at paragraph 47

[280] Ai Group submission dated 31 October 2017 at paragraphs 693 – 706.

the clause might suggest that no reduction in the remuneration of an employee is permissible in such circumstances.

197. Regardless, the ACTU does not grapple with the various other issues that we have raised in relation to the remuneration of an employee who accesses Family Friendly Working Hours. Given the approach adopted in the ACTU Submission, it is sufficient to refer the Full Bench to our previous observations regarding related matters[281] and to merely observe that no element of the clause sets out how an employee's remuneration will be reduced to reflect their modified hours of work or provides for such an outcome.

Issue 3 - Would an Employee Accessing Paid Caring Work be able to Access Reduced Hours?

198. Ai Group acknowledges the clarification in the ACTU Submission that the clause is not intended to apply to an employee who wishes to access Family Friendly Working Hours to accommodate their paid caring responsibilities. We do not rely upon paragraph 705 of our October Submission.

Issue 4 - The Period during which an Employee is Entitled to Family Friendly Working Hours

199. The ACTU Submission seeks to clarify the period during which an employee is entitled to Family Friendly Working Hours.[282] We welcome their submission that it is intended that a parent will have access to reduced hours only up until their dependent child is of school age. Nonetheless, we maintain our submission that this is not apparent from the definition contained in X.4.1. The clause is by no means 'simple and easy to understand'.

200. The ACTU now also submit that the clause is drafted to ensure that access to reduced hours is limited in duration to the period of accommodation of either

[281] Ai Group submission dated 31 October 2017 at paragraphs 693 – 703.

[282] ACTU submission dated 27 November 2017 at paragraph 51.

parenting or caring responsibilities. Their submission provides: (emphasis added)

> An employee's entitlement to Family Friendly Working Hours (and their right to revert to their former working hours) ceases at the end of a two-year period, or when their caring responsibilities cease.[283]

201. This raises new questions about the operation of the proposed clause. While, clause X.3.1 requires an employee to give an employer reasonable notice of the period of time that the employee requires Family Friendly Working Hours and the date on which the employee wishes to revert to their former working hours, it seems that 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. That is, it does not seem that the proposed clause X.2 merely sets an outer limit for the right to revert to an individual's former hours.

202. It would be unfair for an employer to be required to accommodate an employee's reversion to their former working hours at any point that suits the individual, especially if this could happen at short notice. It would be unfair for an employer to be unable to rely upon the date provided pursuant to X.3.1(c), unless they otherwise agree. In many circumstances, it will likely be very difficult to recruit a replacement employee if an employer is not even able to guarantee the tenure of any position that they may offer them. Moreover, if an employer puts arrangements in place to accommodate the reduced working hours of an employee (such as outsourcing the work or changing their operations), they should not be compelled to reverse such changes simply because an employee's circumstances change. It is reasonable that employers have a degree of certainty around how a flexible working hours arrangement might work.

203. We nonetheless, agree that it would be unfair for an employee to be *entitled* to continue to access Family Friendly Working Hours if their circumstances

[283] ACTU submission dated 27 November 2017 at paragraph 52.

change so that the arrangement is no longer required to accommodate an employee's caring responsibilities.

204. The ACTU Submission identifies that the proposed clause "limits the duration of a Family Friendly Working Arrangement to accommodate caring responsibilities to a period of two years" but nonetheless confirms that "it is correct that an employee with caring responsibilities which commence beyond a two-year period could seek access to a further period of periods of Family Friendly Working Hours."[284] This begs the question; what is the point of including a two-year limit if it can simply be circumvented in the manner identified?

205. 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 clause X.3 is undertaken every 2 years. As has been effectively observed in numerous Full Bench decisions handed down as part of this review, a *fair* and relevant safety net of minimum conditions requires balancing the interests of employers and employees.[285] It is plainly unreasonable that an employer be required, in all circumstances, to accommodate the caring responsibilities of an employee for an unlimited period of time.

Issue 5 – What Constitutes Parenting and/or Caring Responsibilities?

206. The ACTU disputes Ai Group's contention that reasonable minds may differ as to what constitutes 'parenting responsibilities' and/or 'caring responsibilities'. They assert that these terms are clear and well understood.[286]

[284] ACTU submission dated 27 November 2017 at paragraph 52.

[285] See for example the Penalty Rates Decision.

[286] ACTU submission dated 27 November 2017 at paragraph 53.

207. We maintain our concerns that the proposed terms are ambiguous and/or uncertain. The ACTU has not proffered any evidentiary basis for the assertion that the terms are "well understood."

208. The ACTU contends that dropping a child at extra-curricular activities is "…clearly a parenting responsibility which would be covered by the clause". Presumably, this would mean that taking a child to any form of sporting activity, music lesson or concert, educational or even social event (such as a play date) that a parent voluntarily elects to involve their child in would constitute a "parental responsibility" that an employer would need to accommodate through a modification of an employee's hours, if an employee so mandates pursuant to the proposed clause.

209. Surely, 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 absolutely any of the raft of activities that a parent may choose to involve their child in.

210. The ACTU Submissions highlight the extent to which the proposed clause could be utilised to enable a parent to dictate that their working arrangements be adjusted in order to accommodate their own personal preferences as to the manner in which they parent their child, without any regard to the impact that this may have on their employer. In this regard we note that we do not accept the ACTU submission that employees only reduce their incomes out of necessity when no other option is feasible. A pertinent element of the evidence was the extent to which it established that parents make decisions about the extent to which they will work as opposed to care for their child based on matters such as their subjective assessment of the quality of child care available to them; the perceived value of working once child costs are considered; their own views on parenting, and their desire to not burden other family members with the care for their child.

211. Similarly, it appears that a range of personal circumstances of an individual, such as the financial resources of their household, appear to have an impact

upon an individual's decision to take up caring roles in preference to paid employment.

212. It would be wrong to suggest that all award covered women need flexible work arrangements because they are unable to obtain or afford child care, or because they have no other option but to otherwise give up or reduce their participation in work. Nor do all people who take on a caring role for a family member do so because there is no other option. The evidence simply does not establish these propositions.

213. The ACTU's claim must be considered in this context. 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. Given this context, we assert that it reflects an unreasonable and obviously unfairly employee-centric approach to facilitating more flexible working arrangements.

214. In advancing these submissions we do not suggest that employers should not seek to assist employees reconcile their personal and working lives. Indeed, the evidence suggests that most already strive to deal with formal or informal requests for flexible working arrangements in a reasonable manner. Nor do we contend that the workplace relations system has no role to play in facilitating such an outcome (we maintain that it already does this). However, the ACTU proposal fails to strike a fair balance between the interest of employees and employers, and would disturb the fair balance that is currently contained within the right to request provisions of the NES

7. A 'RIGHT TO REFUSE'?

215. At paragraphs 54 to 57 of the ACTU Submission, it discusses whether employers should have a right to refuse to implement a Family Friendly Working Arrangement. Ai Group addressed the merits of a 'right of refusal' and associated matters in detail at paragraph 258 to 291 of our October Submission. We accordingly only make the following brief submissions in relation to the specific submissions advanced in reply by the ACTU.

216. The ACTU contends, in effect, that employers should not have a 'right to refuse' employee access to part-time or reduced hours as contemplated by their clause because "…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 in place and operational in large numbers of Australian workplaces across a range of jobs and roles."[287]

217. It is common ground in these proceedings that part-time employment (as contemplated in awards) represents a prevalent form of employment in Australia. Indeed, it can be reasonably asserted that there has, over recent decades, been an increased trend towards the use such a type of employment. There is similarly no dispute that the engagement of casual employees for less than 'full-time' hours is common.

218. There are undoubtedly various complex factors that influence the extent to which employees may seek to work less than full-time hours and the extent to which such arrangements are adopted within individual firms, within particular industries or indeed across the economy generally. While we do not seek to here set out such matters in details, we note that the submissions we have advanced and the evidence adduced in these proceeding bears this out.

219. Nonetheless, it is self-evident that the prevalence of part-time work within the Australian economy does not, in and of itself, establish that all jobs undertaken

[287] ACTU submission dated 27 November 2017 at paragraph 54.

by award covered employees can be undertaken on a part-time or reduced hours basis. Moreover, it certainly does not establish that all jobs can reasonably or sensibly be undertaken during whatever hours of work the employee nominates, yet that is the claim that the ACTU is seeking to prosecute.

220. Even if it were *possible* for award covered employees to undertake their roles on a reduced hours basis, this says nothing of the potentially unfair impact that a requirement to implement reduced working hours may have on employers. In relation to this consideration, it is salient to again have regard to the reasoning of the Full Bench in the Parental Leave Test Case of 2005, as it pertained to an ACTU claim for an award-derived absolute right for an employee to work part-time upon returning from parental leave until their child reaches school age:

> We believe that the ACTU claim, based as it is upon a right to return to work on a part-time basis, is impractical and would impose costs constraints on employers which could not be justified. Many businesses, particularly small and medium businesses, would be unable to provide part-time work and it would be unjust to require them to do so. We accept the employer's submission that employers should not be required to provide part-time work regardless of the circumstances of the enterprise…[288]

221. The case presented by the ACTU does not establish a cogent reason for now visiting upon employers a new obligation that is very similar to (although more onerous than) the the unjust requirement that the Full Bench set its mind against in the Parental Leave Test Case of 2005.

222. The ACTU accepts that a family flexible working arrangement may cause some inconvenience or cost to a business, but contends that it should not be the case that any level of cost or inconvenience – no matter how small – entitles an employer to refuse a request.[289]

223. In response, we submit that the Full Bench could not accept that the current regime, as constituted by s.65, entitles an employer to refuse a request for

[288] Parental Leave Test Case 2005 (2005) 143 IR 245 at 225.

[289] ACTU submission dated 27 November 2017 at paragraph 54.

flexible work arrangements without reasonable business grounds. Nor could it accept that, as a matter of fact, there is any common practice by employers of refusing requests that are made in accordance with s.65 of the Act. Indeed, the evidence suggests that employers generally seek to make reasonable effort to assist employees to balance their work and personal lives.

224. The ACTU proposal would push the pendulum much too far in favour of employees. Under its proposal an employer would need to accommodate a 'request' *regardless* of the inconvenience or cost to their business.

225. Ai Group does not contend that employers do not have a role to play in assisting employees to be able to balance their work and family commitments. The extent to which an employer should bear the costs of such matters must also be subject to some reasonable limitation.

226. Ultimately, the ACTU submissions regarding why they have not included a "right to refuse" in their proposed clause is a distraction. There is no claim before the Commission for the inclusion of a proposed variation to awards that is tempered by an employer right of refusal.

227. Regardless, Ai Group contends that s.65, combined with all of the avenues for flexibility and other protections afforded to employees, strikes an appropriate balance. A case for departing from the current arrangements has not been made out