IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

CLOSING SUBMISSIONS OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 19 December 2017

D No: **156/2017**

Lodged by: The Australian Council of Trade Unions

Address for service: Level 4, 365 Queen Street Melbourne VIC 3000

Tel: 03 9664 7333

Fax: 03 9600 0050

Email: sismail@actu.org.au

INTRODUCTION

1. Modern work is still organised around an old idea: the default employee is unencumbered by parenting and caring responsibilities and is available to work full-time throughout their life. The system of workplace regulation and workplace norms adhere to this idea. Carers of children and others are required to work around this norm; any departure from the norm is required to make out a case to justify the departure. The norm itself is not really challenged. This situation is fundamentally disconnected from the reality of people's working lives.[1]

2. The ACTU seeks a variation to modern awards to include an enforceable right to reduced hours for employees with the primary care for a child under school age, or with caring responsibilities. These submissions address the relevant legal issues, the key findings that the ACTU contends should be made based on the evidence, and the merits of the ACTU's proposal. The submissions are limited to addressing matters raised by the employer parties that participated in the evidentiary (common issues) stage. The ACTU reserves its rights to address award-specific matters at a later stage of proceedings.

3. Existing regulation regarding family friendly working arrangements is inadequate and is failing to assist employees to balance their work and family responsibilities. The 'right to request' flexible work arrangements in s 65 of the *Fair Work Act 2009* (Cth) (**FW Act**) does not provide employees with a right to anything at all. It simply codifies an employee's existing ability to ask their employer for a change to their working arrangements, with no capacity for an employee to challenge an adverse decision. The provisions in s 65 are neither guaranteed nor enforceable. They do not represent a 'minimum' condition or standard in relation to flexible working arrangements. At best, s 65 may 'promote discussion' between employers and employees about flexible working arrangements. As a result, there is a real and substantial gap in the safety net regarding flexible working arrangements.

4. While many employers can and do recognise employees' needs to accommodate their parenting and caring responsibilities, too many workers depend on goodwill and luck for these rights. Lower-paid employees are particularly disadvantaged. The incompatibility of full-time hours with parenting and caring responsibilities has a negative effect on the nature and quality of labour force participation, and the impact on women is particularly profound.

5. The ACTU recognises that assisting working parents and carers to reconcile work and family commitments is complex and multi-factored. No single regulatory change can increase women's labour force participation after children arrive, or increase men's willingness to work

[1] ACTU submissions dated 7 May 2017 (**ACTU primary submissions**) at [41], [46].

reduced hours and more evenly share the workload of parenting and caring. However, numerous studies have identified that there are certain regulatory responses particularly crucial to improving labour force participation for parents and carers, namely affordable and high quality childcare, tax reform, and access to flexible work arrangements that meet the needs of employees.[2]

6. It is within the jurisdiction of the Commission to meaningfully address one of these key aspects by determining that there should be a minimum, enforceable right to family friendly working hours for parents and carers in the employment safety net.

A THE STATUTORY FRAMEWORK

1 *Relevant principles*

7. The proper approach to the conduct of the four yearly review was set out in the ACTU's primary submissions at paragraphs 7–21, and in the ACTU's reply submissions at paragraphs 42 and 44. The ACTU relies on these earlier submissions. There does not appear to be any meaningful dispute between the parties about the statutory principles that apply to the Commission's task in conducting the four yearly review.[3]

Previous decisions relevant to a contested issue

8. In conducting the four yearly review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue, and to follow those decisions in the absence of cogent reasons for not doing so.[4]

9. In *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, the Full Bench identified that 'cogent reasons' for not following a previous decision relevant to a contested issue might include differences in the legislative context, the extent of evidence and submissions made in the previous decision, and the extent of the previous Full Bench's consideration of the contested issue.[5]

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2 The multi-factor approach was acknowledged in the *Parental Leave Test Case* at [398]. See also John Daley, C McGannon and L Ginnivan (2012), *Game-Changers: Economic Reform Priorities for Australia*.

3 See AIG submissions dated 31 October 2017 (**AIG submissions**) at [18]–[28]; ACCI submissions dated 30 October 2017 (**ACCI submissions**) at [5.1]–[5.5]; NFF submissions dated 30 October 2017 (**NFF submissions**) at [7]–[12].

4 *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Jurisdictional Issues Decision***), [27].

5 At [255].

10. In their submissions dated 31 October 2017, AI Group acknowledged that many of the previous decisions of the Commission and its predecessors concerning flexible and family-friendly work arrangements were made in a different statutory context, specifically without the requirement in s 138 of the FW Act that modern awards contain only terms necessary to meet the modern awards objective; and prior to the introduction of s 65 of the FW Act.[6] Nevertheless, the ACTU agrees that decisions concerning family-friendly or flexible work arrangements remain relevant to the Commission's task in this four yearly review. Further, while the introduction of the FW Act involved some departure from the objects of the previous legislation, many of the key objects of the Act, specifically the need to assist employees to balance their work and family responsibilities, the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination based on, relevantly, family responsibilities, and the requirement to assist to give effect to Australia's international obligations, remain central to the exercise of the Commission's functions and powers.[7]

11. The ACTU set out the history of decisions concerning family-friendly work arrangements and part-time work in its primary submissions at paragraphs 22 to 40, and refers to and repeats those submissions here.[8] The *Parental Leave Test Case 2005* (2005) 143 IR 245 (***Parental Leave Test Case***) decision is of particular relevance.[9] In making this application, the ACTU is expressly seeking to build on and advance the progress made in the *Parental Leave Test Case* decision, save in one significant respect, where the ACTU is seeking simply to *restore* the existence of an enforceable right. It was not ever intended by the AIRC that the 'right to request' introduced in the *Parental Leave Test Case* would not be an enforceable award right. The AIRC determined that some positive step was required to assist employees to negotiate flexible work arrangements, and that it was "necessary to go beyond simply providing for agreement" between employers and employees.[10] The AIRC also intended that the new provision would operate for a reasonable period and then subject to review, ideally assisted by the results of a professional, bipartisan survey.[11] Unfortunately, due to the introduction of the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth), the provision adopted by the AIRC was only available for incorporation into awards for just over seven months, and the review exercise proposed by the AIRC was not able to be undertaken.

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6 See AIG submissions, [45].

7 See *Parental Leave Test Case*, [32]; and cf *Fair Work Act 2009* (Cth) ss 3(a), 3(d), and 578(c).

8 See also the detailed discussion of the history of part-time work in *4 Yearly Review of Modern Awards – Fire Fighting Industry Award* (2016) 261 IR 272, [59]–[64] and *4 Yearly Review of Modern Awards - Casual Employment and Part-Time Employment* [2017] FWCFB 3541, [87]–[97].

9 See ACTU primary submissions at [34]–[39].

10 *Parental Leave Test Case*, [395].

11 *Parental Leave Test Case*, [399].

12. The history of this decision and its predecessors as set out in the ACTU submissions and the AIG submissions demonstrates that in considering flexible working arrangements, the Commission has regularly found that:

    (a) The female labour force participation (**LFP**) rate has increased substantially over time, but there has been no equivalent reduction in the work done by women in caring for young children.

    (b) As a result, the majority of part-time workers are women with dependent children. Family responsibilities have a negative effect on employment patterns and earning prospects of women who are mothers.

    (c) Both men and women regard employment and parenthood as important aspects of their lives.

    (d) Access to flexible working arrangements are associated with greater competition, productivity, and efficiency of industry.[12]

13. Since the ACTU filed its primary submissions on 5 May 2017, the Full Bench of the Commission has handed down its decision in *4 Yearly Review of Modern Awards - Casual Employment and Part-Time Employment* [2017] FWCFB 3541 (***Casual and Part-Time Decision***). That decision contained a number of findings that are relevant to the issues in this case, namely that:

    (a) Casual employees are "disproportionately female, and 59.1 per cent of long-term casuals are female";[13]

    (b) Casual employees are "disproportionately award-reliant workers and, both on a weekly and an hourly basis, earn significantly less on average than permanent workers notwithstanding that they are paid a casual loading". The pay gap is attributable in part to the fact that many casual workers are employed in lower-paid industry sectors;[14] and

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12 Paragraph 29 of the ACTU primary submissions cited the Productivity Commission's *2008 Working Paper* in support of the statement that the introduction of the structural efficiency principle had encouraged more flexible work practices (footnote 31; 2008 *Working Paper* at page 51). This citation is an error.

13 *Casual and Part-Time Decision*, [357](2).

14 *Casual and Part-Time Decision*, [357](3).

(c) Long-term casual employees find it difficult to obtain loans and this can mean they are excluded from the wealth acquisition usually associated with home ownership in Australia.[15]

The FWC has jurisdiction to make the ACTU's draft determination

14. The AI Group and ACCI have maintained their position that the Commission does not have jurisdiction to vary modern awards to include the ACTU's proposed clause. The ACTU addressed these objections in its reply submissions dated 27 November 2017 at paragraphs 7 to 28, and refers to and repeats those submissions. The ACTU maintains that the correct approach to assessing whether the Commission has jurisdiction to vary modern awards in the terms proposed by the ACTU is as follows:

(a) First, ascertain whether the term is a permitted term within the meaning of s 136(a) of the Act. Section 136(1)(a) provides that a modern award may include terms about any of the matters in s 139(1) of the Act. Section 139(1)(b) and (c) provides that modern awards may include terms about flexible working arrangements and arrangements for variation of working hours. The ACTU's proposed clause is accordingly a 'permitted term' within the meaning of s 136(1)(a) of the Act.

(b) Second, ascertain whether the proposed clause offends s 136(c) of the Act, which provides that a modern award must only include terms permitted or required by s 55 of the Act. Relevantly, s 55(4)(b) of the Act provides that a modern award may include terms that supplement the NES to the extent that the effect of those terms is not detrimental to an employee when compared to the NES. The ACTU contends that the proposed clause supplements the NES,[16] and is not detrimental to an employee when compared with their NES entitlement.[17]

(c) Third, ascertain whether the proposed clause offends s 55(1) of the Act, which provides that a modern award must not exclude the NES or any provision of the NES, noting that a term will not offend s 55(1) where it is permitted by s 55(4) of the Act. The ACTU contends that its proposed determination is permitted by s 55(4) of the Act,[18] and that it does not exclude s 65 of the Act.[19]

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15 *Casual and Part-Time Decision*, [357](5); Witness Statement of Sherryn Jones-Vadala at [25].

16 See ACTU reply submissions, [15].

17 See ACTU reply submissions, [16].

18 Per sub-paragraph (b) above.

19 See ACTU reply submissions, [20]–[28].

B THE EVIDENTIARY FINDINGS

1 *Parents and carers experience lower labour force participation and economic power*

15. The ACTU made detailed submissions concerning the labour force participation rates of women who are mothers and carers in the primary submissions dated 7 May 2017 at paragraphs 62–69 and 84–85, and repeats and relies on those submissions here. The evidence concerning the both the extent and nature of labour force participation by parents and carers was not challenged in cross-examination. A summary of the key findings are presented here.

    (a) As at February 2017, there were approximately 24 million people in Australia, with nearly 16 million aged between 15 and 64 years of age, and 12 million employed.[20]

    (b) There is a gender gap in rates of employment in Australia of between 10.5 and 11 per cent, depending on the measure used.[21] The gender gap favours men's employment across the life cycle except for teenagers, with the highest differential between male and female employment occurring during the peak child-rearing ages of 30–39.[22] This is despite the fact that the gender education gap has and continues to favour women: over 30 per cent of women have a bachelor level qualification or above, compared with approximately 25 per cent of men.[23]

    (c) On entry to the workforce, women and men have reasonably conformable levels of full-time employment, but after childbirth, a large majority of men continue to work full-time regardless of the age of their children, whereas the majority of women aged 35-44 work part-time.[24] Austen's examination of 2014 HILDA data found "a strong negative correlation between motherhood and paid work", with the presence of young children remaining a significant factor in determining the participation of women in paid work. The employment rate of women without young children was 77.8 per cent in 2014, compared with between 50 and 57 per cent for women with children under the age of five.[25] Using the same dataset, the employment rates of men with children under the age of five was between 88.8 and 90.4 per cent, with employment rates increasing with the number of children under five.[26]

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20 See ACTU primary submissions, [51], [52], [59].
21 See ACTU primary submissions, [59]–[61].
22 Watson Report, Table 1.5, 18.
23 Austen Report, [15].
24 Austen Report, [9].
25 Austen Report, [22].
26 Austen Report, [69(c)].

(d) Female labour force participation is closely correlated to the age of their youngest child. Dr Watson found that "the presence of dependent children in families has an important impact on the hours worked by employed mothers", and "the age of the youngest child was fundamental to the employment outcomes of female parents."[27]

(e) There are significant differences in levels of labour force participation between male and female parents. In 2014, 69 per cent of mothers were in employment when the youngest child was aged under two or three years, increasing to 89 per cent when the youngest child was aged nine to 12 years. In marked contrast, the proportion of employed fathers stayed above 90 per cent, irrespective of the age of their children.[28]

(f) Just under half of Australia's 2.7 million carers are employed.[29] Both male and female carers experience higher levels of labour force transition, with Dr Watson reporting that data suggests that about 22 per cent of carers were no longer employed the following year, compared with about 17 per cent of employed individuals without caring responsibilities.[30]

2 ***Parents and carers need access to flexible work arrangements if they are to maintain their labour force participation***

16. Working less than full-time hours is an important source of employment for parents and carers. In its submission dated 7 May 2017, the ACTU outlined the evidence demonstrating a strong correlation between part-time work and women with the responsibility for young children or other family members.[31]

17. Working and raising a family and/or undertaking caring responsibilities are rarely matters of simple preference. The Commission can take judicial notice of the fact that it is simply not possible to raise a family without a steady and predictable income, and it is not possible to meet parenting and caring responsibilities while working. The evidence that parents, mostly women, seek part-time work to manage parenting and caring responsibilities was not seriously challenged during the hearing,[32] and is summarised below.

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27 Watson Report, [108], [113].

28 Watson Report, [113].

29 Watson Report, [147].

30 Watson Report, [152].

31 See paragraphs 70 to 80.

32 Ms Toth cited the Reserve Bank's use of HILDA data that suggested that the most common reason for Australians working part-time was studying, preference for part-time work, and caring for children, but conceded in cross-examination that there could be overlap between workers who indicated a 'preference'

18. Australia's rates of part-time employment are high compared OECD countries.[33] The part-time share of total employment has grown steadily since 1967 to a present rate of about 32 per cent of all work.[34] Watson's analysis of the data shows that part-time employment since 2000 has grown by 94 per cent among men, and 57 per cent among women.[35]

19. Although rates of part-time work have experienced considerable growth in Australia since 2000, particularly for men, the rates of growth have not altered the fact that male part-time employment remains the smallest category for all males except teenagers and those aged 65 or older.[36] As at February 2017, 47.4 per cent of all Australian women worked part-time compared with 18.7 per cent of Australian men.[37]

20. Gender gaps between labour force participation rates and part-time work are present in all age groups, but are largest in the 35–44 year age group, where 47.1 per cent of women work part-time compared to 8.8 per cent of men.[38]

21. Working part-time and flexible work were the most common arrangements used by mothers to reconcile work and family.[39] However, such arrangements are not always available. Dr Murray reported "strong evidence that Australian women wish to work part-time after the birth of a child",[40] but that preferred hours of work for women to combine work and family care are not always available.[41]

22. Further, it was not disputed that women are much more likely than men to be in part-time employment – nearly half of all employed women in Australia are employed on a part-time basis, compared to 18 per cent of male employment.[42]

23. The evidence of all of the ACTU's lay witnesses demonstrates the preference for part-time hours among working parents and carers, and among mothers especially. Katie Routley and Sherryn Jones-Vadala are examples of employees left with no option but to exit the workforce due to an inability to secure family friendly working hours.

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for part-time work, and workers who seek part-time work to care for children (and between 'preference' and any other reason): see Transcript, Thursday 14 December 2017, PN1816–1820.

33 OECD, *Connecting People with Jobs: Key Issues for Raising Labour Market Participation in Australia*, 2017 (**OECD Report**), 15; see Stanford Report, Figure 3, 16.

34 Since 1967: see Graph 1 in Toth Statement; Since 1980: see Stanford Report, Figure 1, 14.

35 Watson Report, [44].

36 Watson Report, [37].

37 Austen Report, [7].

38 Austen Report, [9].

39 Watson Report, [115].

40 Murray Report, [75]; and see [38]–[42].

41 See Murray Report at [76]–[77].

42 Stanford Report, [37].

3 *Parents and carers who are unable to access optimum flexible work arrangements may experience occupational downgrading and/or barriers to labour force participation*

24. While there is plenty of part-time work available in Australia, a significant proportion of part-time work is precarious and insecure casual employment. Women who shift from full-time to part-time work often experience occupational downgrading, both in terms of the skills and status and security of employment, which in turn compounds the motherhood pay penalty. By contrast, parenthood strengthens men's attachment to full-time work. Further, while most women return to work after having a child, there is a significant proportion of women who experience barriers to re-engagement with the labour force as a result of the inability of the labour market to provide family-friendly working arrangements.

Part-time and casual employees

25. There are approximately 2.3 million award-reliant employees in Australia, representing nearly 20 per cent of employed Australians. The majority (86 per cent) of award-reliant employees are adults.[43]

26. Caution should be taken when reading statistics concerning part-time work; 'part-time' employment as used by the ABS refers to working less than 35 hours per week and says nothing about whether the employee is engaged on a permanent or casual basis.[44]

27. The evidence of Ms Toth was that as at August 2016:

    (a) There was approximately 3.89 million part-time workers in Australia (including approximately 675,000 self-employed persons);

    (b) More women than men worked part-time (2.65 million women compared to 1.24 million men, including self-employed persons); and

    (c) More part-time women than part-time men had *no* paid leave entitlements, ie, were casual workers (1.05 million women compared to 663,000 men, excluding self-employed persons).[45]

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43 Statistics taken from the *Annual Wage Review 2016–2017* [2017] FWCFB 3500, [2], [55].

44 See Watson Report, Glossary, 87.

45 See Toth Statement, [13]. Using Ms Toth's terminology in [12], it appears that the calculations in the first two dot points are percentages of the total number of part-time ***employees*** (ie, excluding self-employed people and employers). The calculations in the third dot point are percentages of the total number of all ***workers*** (ie, including self-employed people and employers). The calculations in the fourth and fifth dot points are percentages of the total number of ***workers***. The percentages in those dot points

28. Both Dr Watson and Ms Toth relied on ABS and HILDA data to establish that the rate of casual employment in Australia has remained steady at about 20 per cent since about 2000.[46] The actual figure may be higher. Relying on the expert evidence presented in that case, the Full Bench of the Commission found in the *Casual and Part-Time Decision*, the proportion of casual workers in Australia peaked at about 27 per cent in 2003, and has since stabilised at around 24 per cent.[47]

29. Dr Watson compared HILDA and ABS data and found that the Australian labour force is characterised by high rates of casual and fixed-term employment (between 27 and 33 per cent).[48] Professor Austen reported that in May 2016, 25.4 per cent of female employees compared with 19.7 per cent of male employees were engaged as casual workers.[49] The OECD found that 41 per cent of lone mothers were employed on a casual basis, more than double the rate of partnered mothers in 2014.[50] Part-time employment is not all voluntary – in 2015, 29 per cent of part-time workers wished to work more hours.[51]

30. Dr Watson analysed HILDA data to ascertain workplace entitlements by mode of engagement, and found that entitlements to flexible working arrangements were "far less available to lower paid, lower skilled, casually employed, award-reliant workplaces working in smaller workplaces".[52]

Workforce transitions and occupational downgrading

31. High rates of part-time work are not a proxy for suitable flexible working arrangements. The Grattan Institute observed that the large numbers of women working in part-time or casual jobs does not reveal "whether these are genuinely flexible in a way that meets the needs of women caring for children, or are mostly structured for the benefit of the employer".[53] Dr Stanford concurred. His evidence was that while Australia's labour market "is already highly flexible (as evidenced by high rates of part-time and non-standard employment)... in most cases that flexibility reflects employer preferences and decisions, rather than employee preferences".[54]

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do not add up to 100 because Ms Toth has not included the percentages of women and men who are part-time and self-employed or employers: the percentages are 15.10 and 22.50 respectively.

46 See Watson Report, [63] and Toth Statement, [57].

47 See *Casual and Part-Time Decision*, [347] (Figure 1).

48 See Watson Report, [69], and Table 6.1, 25.

49 Austen Report, [11].

50 OECD Report, 27.

51 OECD Report, 15.

52 Watson Report, [128], and see Figures 3.7 to 3.11.

53 See ACTU primary submissions at [70]; John Daley, C McGannon and L Ginnivan (2012), *Game-Changers: Economic Reform Priorities for Australia* (**Grattan Institute Report 2012**), 47.

54 Stanford Report, [29].

Under cross-examination, Dr Stanford explained that reciprocity in decision-making power between employees and employers would mean that employees have some meaningful power to make decisions that affect the relationship between their work arrangements and their other responsibilities.[55] The current system does not grant employees reciprocal decision-making power at anything close to the level of decision-making power vested in employers. The high levels of occupational downgrading reflect this power imbalance.

32. In her report, Professor Austen utilised the methodology established by existing literature to conduct an analysis of HILDA data on employment transitions for employees aged 24–60 during the period 2001–2015. Her findings were set out in the ACTU primary submissions dated 7 May 2017 at paragraphs 87–88. Dr Watson's analysis of employment transitions was consistent with Professor Austen's findings (see ACTU primary submissions at paragraph 89). The propositions set out in the ACTU primary submissions are relied on here. In summary:

    (a) Occupational downgrading is relatively high for women who move from full-time to part-time work, and highest for women who change employers.[56]

    (b) Approximately 18 per cent of women who move from full-time to part-time work move from permanent to casual work.[57]

    (c) About 23 per cent of employees in permanent part-time positions lost that status after parenthood, and moved into casual positions.[58]

33. There is a stark contrast between male and female patterns of employment transitions over the life cycle. The data shows a strongly asymmetric pattern in women's transitions, whereas men enjoy a steady and persistent pattern in employment. Professor Austen presented this data in Figure 25 of her report, which was reproduced in the ACTU primary submissions at page 26 and again here:

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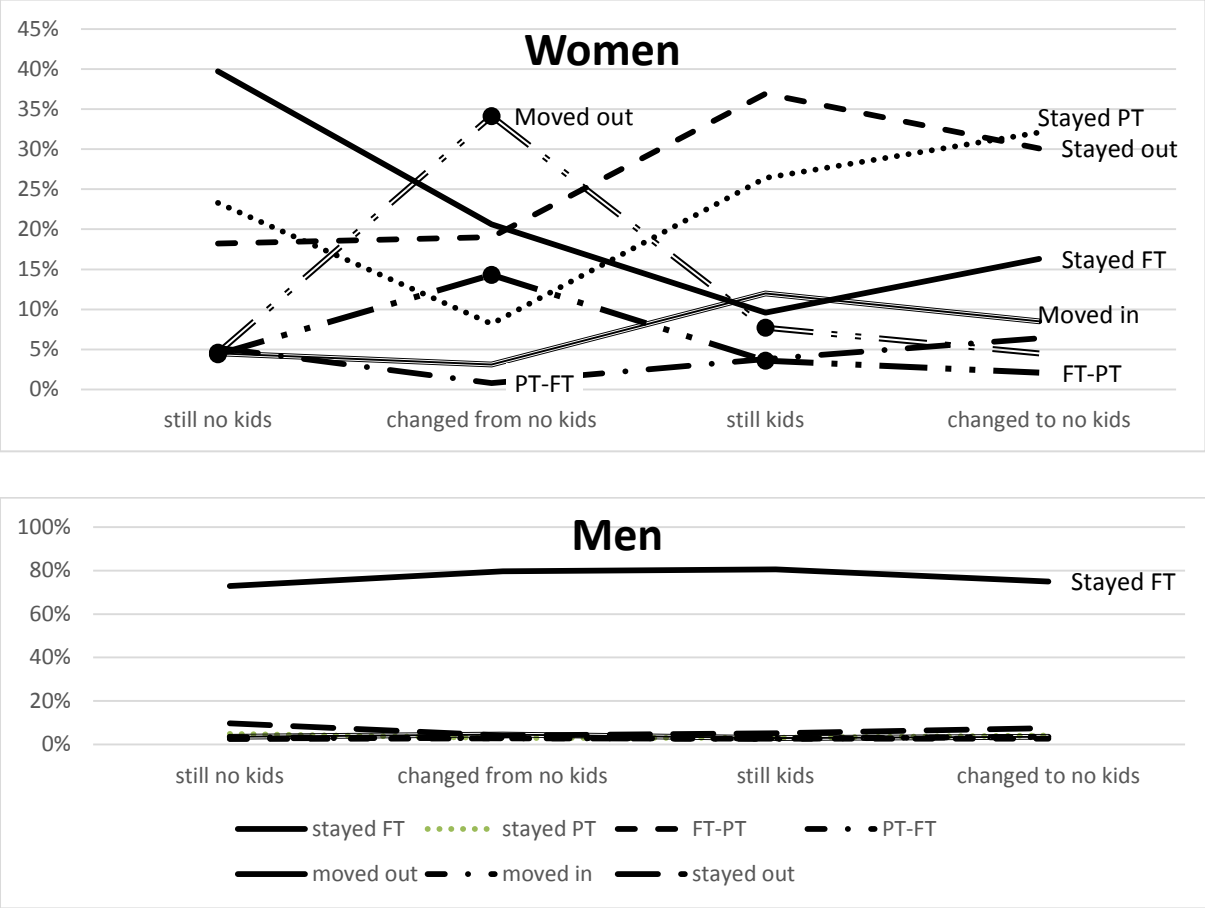
55 See PN908 and PN913–914.

56 Austen Report, [52].

57 Austen Report, [56].

58 Watson Report, [139], Table 3.10.

Figure 25: Employment Transitions Across Household Situations Associated with Parenthood in HILDA, 2001-2015, per cent of all transitions, by Gender



Barriers to labour force participation:

34. The presence of young children is a significant factor determining the participation of women in paid work. The employment rate of women without young children was 77.8 per cent in 2014, compared with between 50 and 57 per cent for women with children under the age of five.[59] Using the same dataset, the employment rates of men with children under the age of five was between 88.8 and 90.4 per cent, with employment rates increasing with the number of children under five.[60]

35. Numerous studies have linked women's weak labour force participation rates during their prime parenting years to a lack of access to suitable flexible work arrangements.[61]

36. Although the labour force participation rates for women over 25 years have increased between August 2000 and August 2017, this increase does not establish that barriers to labour force

59 Austen Report, [22].

60 Austen Report, [69(c)].

61 See, eg, Stanford Report, [45], and the studies cited within those paragraphs.

entry for women had reduced over the relevant period.[62] Under cross-examination, Ms Toth accepted that factors including the increase in women's educational qualifications and the decline in fertility for women under 30 have contributed to the women's increased labour force participation rates, and are not 'barriers to entry'.

37. Access to affordable and good quality childcare is undoubtedly a significant barrier to women's labour force participation rates. However, increased access to childcare cannot improve women's labour force participation rates without a corresponding increase in the flexible work arrangements available to parents. The need for family-friendly work arrangements is complementary to access to childcare,[63] a point that was conceded by Ms Toth in cross-examination.[64]

38. The evidence of a number of the ACTU's lay witnesses demonstrates the interaction between the need for access to reduced hours and the availability of childcare:

    (a) Andrea Sinclair's proposal to her employer for reduced hours was dependent on the childcare days she had managed to secure: at [13];

    (b) Ashlee Czerkesow gives evidence about the cost, lack of availability and lack of flexibility of childcare and the ongoing and significant impact this had on her unsuccessful attempts to negotiate reduced hours: at [15], [16], [19], [21], [22], [25], [27];

    (c) Jessica Van Der Hilst gives evidence about the impact of the availability of childcare on her requests for reduced hours: at [10], [11];

    (d) Sherryn Jones-Vadala gives evidence of the impact of limited childcare availability on her ability to accept flexible work proposals offered by her employer: at [15].

39. This evidence was not challenged in cross-examination.

40. Reporting on the findings of the AHRC *Supporting Working Parents* survey, Dr Murray found that nearly 80 per cent of mothers who took parental leave returned to work within 12 months of the birth of their child,[65] although not necessarily to the same position. Discrimination in pregnancy or after childbirth was not uncommon. The AHRC survey found that 36 per cent of respondents who returned to work after having a child reported discrimination, with half of

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62 See Toth Statement, [10] and PN1763–1768.

63 Per Stanford Report, [56].

64 Transcript, Thursday 14 December 2017, PN1769–1775.

65 Murray Report, [71].

those reporting discrimination when requesting flexible working arrangements.[66] Discrimination during pregnancy had a measurable impact on labour force participation – nearly one quarter (22 per cent) of mothers who were discriminated against during pregnancy did not return to work at all, compared with 14 per cent of women who were not discriminated against during pregnancy.[67] Of those who were discriminated against, nearly one third (32 per cent) looked for another job or resigned.[68] One in ten women who did not return to work after having a child could not find work or negotiate return to work arrangements.[69]

41. A number of the ACTU's lay witnesses gave unchallenged evidence of adverse treatment in relation to their requests for reduced hours, including as set out below:

    (a) Andrea Sinclair was advised that Sussan did not employ part-time managers. She was required to either continue with her full-time hours or give up her job security and status. She considered making a discrimination complaint but was concerned about the time and cost in light of her responsibilities to her newborn baby, as well as damage to her relationship with her employer: at [15]-[18];

    (b) Katie Routley was told that her employer was opposed to job-share and part-time work, despite putting forward a carefully developed and workable proposal for consideration: at [14];

    (c) Michelle Ogulin's director expressed reservations about having a part-time manager on two occasions: at [5], [7]. Ms Ogulin's title, status and responsibilities were subsequently reduced after she commenced in her management role on a part-time basis [14].

<u>The economic consequences of motherhood</u>

42. Parenthood has as negative impact on women's economic status. In the submissions dated 7 May 2017, the ACTU described the impact of parenthood – and specifically motherhood – as measured by the gender pay gap and the motherhood pay penalty.[70] The gender pay gap in pay, hours, and labour force participation combines to reduce women's lifetime earnings, superannuation, and savings, by a significant measure.[71] This evidence was uncontested. The

66 See ACTU primary submissions, [45].
67 See ACTU primary submissions, [85].
68 Ibid.
69 Murray Report, [73].
70 ACTU primary submissions, [93]–[101].
71 ACTU primary submissions, [103]–[106].

measures of difference identified by Professor Austen and KPMG each favour male workers, and include:

(a) A difference in labour force participation rates of at least 10.5 per cent;[72]

(b) A difference in the part-time employment rate of 28.7 per cent;[73]

(c) A reduction in hourly pay of 0.7 per cent for each full year of removal from the labour force;[74]

(d) A gender pay gap of 18.2 per cent,[75] of which at least one quarter is attributable to years out of the labour force;[76]

(e) A gender gap in weekly earnings of 31 per cent;[77]

(f) A difference in average superannuation balances of 53 per cent.[78]

43. It bears repeating that although men and women enter the workforce in similar numbers, women experience a much greater disconnect from the labour force over their lives. The principal difference between men and women's labour force participation is that women are primarily responsible for raising small children and adjusting their engagement with the labour force to accommodate these responsibilities.

4 ***The safety net is inadequate for workers with parenting and caring responsibilities***

44. The need for flexible working arrangements to enable employees to balance their work and family responsibilities is central to the object of the Act,[79] the modern awards objective,[80] and the matters that the Commission must take into account when performing functions and exercising powers.[81] Yet under the current minimum safety net, employees have no entitlement to working arrangements that allow them to meet both work and family commitments.

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72 Austen Report, [5].
73 Austen Report, [7].
74 ACTU primary submissions, [98].
75 Austen Report, [16].
76 ACTU primary submissions, [99].
77 Austen Report, [17].
78 Austen Report, [19].
79 FW Act s 3(d).
80 FW Act s 134(1)(d).
81 FW Act s 578(a) and (c).

45. Almost 100 years ago, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 15 CAR 297, Higgins J observed that "there is nothing that steady family men desire more than constant work, and some certainty as to their income for a week or more ahead".[82] Despite the passage of time, the truth of this statement has remained constant, albeit expanded to acknowledge that both 'family men' and 'family women' desire constant work and certainty of income.

46. While s 65 of the Act provides a mechanism under which employees can request a flexible working arrangement (in terms broader than the ACTU's proposed clause, which is limited to reduced hours), the right to request in s 65 is not properly part of the safety net, because it is not enforceable. The lack of an enforceable right to flexible working arrangements is inconsistent with the object of the FW Act in providing a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards and modern awards.[83]

47. The fact that many employees are able to negotiate family-friendly work arrangements with their employers, whether via s 65 or otherwise, does not negate the necessity for a minimum standard concerning family-friendly work arrangements. This is because (a) the use of s 65 is very low; (b) award-covered women and men are less likely to be in a position to negotiate informally with their employers and (c) informal arrangements are dependent on the goodwill of the employer, which is prima facie not a minimum safety net entitlement.

48. In the *Casual and Part-Time Decision*, the five-member Full Bench determined to introduce a casual conversion clause for long-term casual employees working for the same employer who preferred permanent employment, even while acknowledging that the majority of casual employees did not have those characteristics. The Full Bench said that:

> The fact that the majority of casual employees do not have these three characteristics does not operate to deny the proposition that the significant minority who do should not be permanently denied access to permanent employment and the NES entitlements that come with it on the basis of the employer's preference for casual employment at the point of engagement.[84]

49. The approach taken in the *Casual and Part-Time Decision* is consistent with that taken by the AIRC in the *Parental Leave Test Case*. The AIRC acknowledged that while it was likely that "most employers are sensitive to the family responsibilities of their employees and do their best to accommodate those needs", there are some employers who "are unlikely to accommodate the

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82 319–320.

83 Per FW Act s 3(b).

84 At [366].

family responsibilities of their employees, even where it is practicable to do so". It was with "those employers particularly in mind" that the AIRC concluded that awards should contain provisions providing employees with a better opportunity to obtain their employer's agreement to changes in working arrangements.[85] The problem of unwilling or reluctant employers has not gone away. Dr Murray identified research which found that even in recent years, organisational culture was determinative of whether a worker could negotiate a flexible work arrangement, quite separate from any extant workplace policies or human resources functions.[86]

50. The evidence of a number of lay witnesses called by the ACTU and the employer parties demonstrated the fact that employees do not have any enforceable or guaranteed right to reduced hours to accommodate parenting and caring responsibilities. The evidence suggests that, in light of their need to maintain employment for financial reasons, employees are generally reasonable and flexible in their approach to negotiations. However, once an impasse is reached, employees are left without recourse:

    (a) Andrea Sinclair's proposal for reduced hours was refused outright on the grounds that management positions were not offered on a part-time basis, leaving Ms Sinclair with no option but to work full-time hours despite the impact on her family responsibilities: at [13] – [18];

    (b) Ashlee Czerkesow gives evidence of repeated failed attempts to negotiate reduced hours over a period of years. As a result of her employer's refusal to allow her to work reduced hours, Ms Czerkesow's child was placed in full-time care from eight months of age until she started school: at [19], [20] – [23], [28];

    (c) Sherryn Jones-Vadala was advised by her employer that job share was not allowed and part-time hours are likely to be spread out over the week: at [12]. Ms Jones-Vadala was not able to negotiate part-time work despite many months of negotiations and despite offering to teach a wide range of different subjects on various different days: at [11];

    (d) Jae Fraser of Edge Early Education provided five examples of requests for flexible work received over the past three years. In all five examples, the employee requested reduced or changed hours. The reason for the requests are not clear in every case from Mr Fraser's statement, but assuming the requests were to accommodate parenting or caring responsibilities, they would have been covered by the ACTU's proposed

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85 *Parental Leave Test Case*, [393].

86 See Murray Report, [62]–[68]

clause. The employees' requests were considered under a Parental Leave Policy. In each case described by Mr Fraser, the employee's request was either not accommodated and the employee resigned as a direct result; or she accepted a lower-status position (lead educator to assistant educator; educator to bus driver; lead educator to personal trainer) in order to access reduced hours of work. Mr Fraser's evidence is that the accommodations in each case would have imposed additional costs and inconvenience on the business. Mr Fraser does not give evidence that the accommodations were not viable or impossible for the business to implement.

51. The approach taken in the *Parental Leave Test Case* and the *Casual and Part-Time Decision* should apply here. The fact that a majority of workers are able to negotiate family-friendly work arrangements with their employer does not negate the need for a minimum safety net entitlement to flexible work.

52. The ACTU made detailed submissions regarding the inadequacy of the safety net for parents and carers seeking flexible work in its primary submissions at paragraphs 111–115 and 124–125. In reply submissions dated 27 November 2017 at paragraphs 29 to 40, the ACTU explained why remedial legislation concerning discrimination, unfair dismissal, and general protections, are should not be considered part of the safety net in the sense used in s 134(1) of the Act. The ACTU relies on those submissions. The evidence of Andrea Sinclair also illustrates the inadequacy of complaint processes in assisting employees to balance their work and family lives, at [15]-[18].

<u>The evidence of Dr Jillian Murray</u>

53. Dr Jillian Murray was asked to answer four questions regarding (1) the utilisation of s 65 of the FW Act; (2) the employment patterns of workers after taking a period of parental leave; (3) the utilisation of individual flexibility arrangements (**IFA**) and their suitability for parents and carers; and (4) the nature and utilisation of family friendly working arrangements other than pursuant to s 65, parental leave, or an IFA.

54. Dr Murray conducted a literature review and filed a report dated 4 May 2017. Her evidence was described in the ACTU's primary submissions at paragraphs 115, 132, 136–138, and 144–147, and the ACTU relies on those paragraphs and the discussion in Part B4 of its primary submissions concerning the inadequacy of existing regulation to meet the needs of parents and carers.

55. Dr Murray's evidence establishes the following propositions.

56. First, the most common reason for requesting flexible working arrangements is to care for a child or children. The second most common reason was to care for a family member other than a child.[87] The majority of employees request a reduction in working hours.[88]

57. Second, the majority of employees who make requests for flexible working arrangements do not utilise s 65 of the FW Act.[89]

58. The evidence about the utilisation of s 65 of the FW Act is primarily derived from the *General Manager's Report* concerning the utilisation of s 65 of the Act,[90] which was based on the Australian Workplace Relations Study (**AWRS**) for the period 1 July 2012 to July 2014, and on qualitative research conducted for the Fair Work Commission by the Centre for Work + Life at the University of South Australia (**CWL**).[91] The CWL also conducts quantitative research for the Australian Work and Life Index (**AWALI**). Data from the 2012 and 2014 waves of AWALI was used to supplement the qualitative research conducted by the CWL for the Commission and is reported in the General Manager's Report.

59. The General Manager's Report recorded the following data from AWRS:

    (a) About two fifths (40.4 per cent) of employers reported that they had received a request for flexible working arrangements. Just 1.3 per cent of all employers received a request pursuant to s 65 of the Act; 38.5 per cent were unsure of whether the request was made in accordance with s 65 or not.[92]

    (b) Just over a quarter (27.9 per cent) of employees reported that they had made a request for flexible working arrangements, with 4.1 of all employees making that request pursuant to s 65 of the Act; 23 per cent made the request outside of the s 65 provisions, and 0.8 per cent were unsure of the basis of their request.[93]

    (c) Of the employers who received a request for a flexible working arrangement pursuant to s 65 of the Act, 90.2 per cent granted the request; 9.1 per cent granted some

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87 See Murray Report, [38]–[42].

88 Murray Report, [43].

89 See paragraphs 59(a) and (b) below.

90 O'Neill, Bernadette, *General Manager's Report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s 653 of the Fair Work Act 2009* (Cth), November 2015 (***General Manager's Report***).

91 See Murray Report, [22]–[37].

92 *General Manager's Report*, Table 5.1. Note that the percentages of 1.3 and 38.5 per cent reported as percentages of the total number of employers surveyed, ie, not of the employers who received requests.

93 *General Manager's Report*, Table 5.7. As with Table 5.1, the percentages regarding the applicability of s 65 and otherwise are reported as percentages of the total number of employees surveyed, ie, not of the employees who made requests.

requests. About a quarter of that 9.1 per cent of requests were granted following discussion about alternative arrangements between employer and employee.[94]

(d) The employees who made a request for a flexible working arrangement pursuant to s 65 of the Act reported slightly lower acceptance rates – 85.8 per cent of requests were granted; 12.1 were granted with changes; and 2.1 per cent were refused.[95]

(e) Employees reported that the rate of acceptance was higher where a request was made pursuant to s 65 of the Act; around 8 per cent of informal requests were refused; 16 were accepted with some changes; and 76 per cent were accepted.[96]

60. The General Manager's Report also reported findings from AWALI regarding requests for flexible work arrangements, although the Report does not differentiate between requests made pursuant to s 65, and otherwise. The AWALI results cited in the General Manager's Report show that nearly two thirds (64 per cent) of employees who made a request for a flexible working arrangement had their request granted, and 17 per cent had their request partially granted.[97]

61. Third, while the majority of employees who make a request for flexible working arrangements have the request granted either wholly or in part, a significant proportion of employees do not ask at all, even though they are unhappy with their working conditions. These 'discontented non-requestors' were first described by Skinner and Pocock in 2011,[98] and were observed in the 2014 AWALI study,[99] which was analysed by Skinner, Cathcart and Pocock in 2016.[100] That study observed that discontented non-requestors did not request family-friendly working arrangements for reasons including because they felt that the workplace was openly hostile to such arrangements, and that a quarter had changed jobs in the months after their participation in the AWALI survey, many because they sought flexible working arrangements or more reasonable hours.[101]

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94 *General Manager's Report*, Table 5.6. Dr Murray was cross-examined about whether the reference in the *General Manager's Report* to a 90 per cent acceptance rate referred to all requests for flexible work arrangements, or just those made under s 65 of the Act. She was taken to the summary page of the *General Manager's Report* (page vii) (see PN754 and PN774), and was not able to give a definitive answer: see PN766 and PN776. However, Table 5.6 states that the data in that table (which includes the 90 per cent acceptance rate) relates to requests made under s 65 of the FW Act.

95 *General Manager's Report*, Table 5.11.

96 *General Manager's Report*, 32.

97 *General Manager's Report*, 34.

98 See ACTU primary submissions, [132]–[133].

99 Murray Report, [105].

100 ACTU primary submissions, [134]–[135].

101 ACTU primary submissions, [135].

62. Fourth, the use of individual flexibility arrangements for family-friendly work arrangements is rare. Because many employees trade away rights under IFAs to secure flexibility, and because IFAs can be terminated by the employer on short notice, their suitability for providing access to family-friendly work arrangements is limited.[102]

63. Finally, informal arrangements are widespread, but the ease of informality can mask poor communication and expectation management, leading to suboptimal results. Informal discussions leading to shorter hours often "fail to cover important matters of substance such as the performance expectations and the workload of the worker."[103] Research cited by Dr Murray found that where there is a lack of formality around family-friendly work arrangements, "decision-makers exercise great personal discretion over whether or not requests are granted".[104] This aspect of decision-making can lead to employees characterising their arrangements as the result of 'good luck',[105] which, needless to say, is an insufficient basis on which to make major decisions about balancing work and family. Similarly, the studies cited by Dr Stanford found a strong correlation between the presence of family-friendly work practices and high levels of skill, quality, and capacity of management, although it was difficult to definitively identify the direction of the causation between flexible work and quality management.[106]

5 ***Family-friendly working arrangements benefit employees, firms, and the national economy***

The evidence of Dr James Stanford

64. In the *Parental Leave Test Case* at [183], the AIRC said:

> There is an absence of high quality evaluation data in relation to the business benefits associated with family friendly practices. However, the available data support the view that the introduction of family friendly initiatives can benefit business. For instance, such initiatives are associated with lower employee turnover (see Dex, S, & Schebel, F 'Business Performance and Family-Friendly Policies' (1999) 24(4) *Journal of General Management*). But there is insufficient data to determine whether granting the ACTU claim would or would not provide a net benefit to business.

65. Dr James Stanford was asked by the ACTU to provide a review of the available research since 2004 about the nature and scope of business benefits associated with family-friendly work practices, and to the extent possible, the order of magnitude of any such benefits relative to the costs associated with their introduction. With Ms Alison Pennington, he conducted a review of

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102 Murray Report, [87], [89], [93]–[98].

103 Murray Report, [102], and see [101]–[104] and [108]–[112].

104 Murray Report, [52]–[55].

105 See Murray Report, [55]; Witness Statement of Jessica van Der Hilst at [12].

106 Stanford Report, [31].

the relevant literature, analysed the collective results of over 500 published works dealing with this topic,[107] and provided analysis of his findings. Dr Stanford found that the extant research demonstrated that "flexible work practices have a positive effect on firm performance, or at a minimum, a cost neutral impact".[108]

66. Dr Stanford's review identified a number of benefits at the firm and economy level associated with family-friendly working arrangements. These benefits at the firm level were:

    (a) Increased retention of staff "by reducing turnover of staff who might otherwise resign due to the perceived impossibility of balancing their paid work and caring duties",[109] and corresponding savings in recruitment and training costs as the need for replacement employees is reduced;[110]

    (b) Perhaps as a corollary of (a), improved staff morale and increased staff loyalty to the enterprise;[111]

    (c) A reduction in absenteeism of staff with parenting and caring responsibilities,[112] with concurrent reduction in costs for personal leave;

    (d) Greater success in recruiting new workers;[113]

    (e) Increased productivity (about which, see below),[114] including reduced preesenteeism.

67. These findings were not seriously challenged in cross-examination. Rather, the cross-examination of Dr Stanford focused on the cost to employers of the ACTU's proposed clause. These matters are addressed below.

<u>Labour productivity of part-time workers</u>

68. Flexible working arrangements have been shown to produce measureable benefits to employers in the form of increased productivity. The ACTU relies on the following material in support of this proposition:

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107 See Stanford Report, [18].
108 Stanford Report, [16].
109 Stanford Report, [21], [51(a)].
110 Stanford Report, [24], [51(b)].
111 Stanford Report, [28]–[29], [51(h)].
112 Stanford Report, [22], [51(d)].
113 Stanford Report, [24], [51(c)].
114 Stanford Report, [23], [51(g)].

(a) Unchallenged findings in the Stanford Report about the increased productivity of part-time workers.[115]

(b) A 2013 report by Ernst & Young found that "*women in flexible roles (part-time, contract or casual) appear to be the most productive members of our workforce*", because women in flexible roles waste less time than the rest of the working population.[116] Collectively, Australian and New Zealand employers could save at least $1.4 billion on wasted wages by employing more productive female employees in flexible roles.[117] The research found that women with a high level of job flexibility waste less time, are more productive, and have more clarity over their career direction.[118]

(c) Research cited by Williams, McDonald and Cathcart, which found that businesses enjoyed happier, more productive employees and reduced absenteeism and turnover, which assisted with managing workforce costs.[119]

(d) International research reported by the AHRC, which found that gender balance has a direct positive impact on the efficiency and performance of individual organisations of all sizes and across all sectors.[120]

69. The history of part-time and flexible work provisions in awards demonstrates the correlation between flexible working arrangements and improved productivity. As the ACTU described in it submissions dated 7 May 2017 at paragraphs 27–28, the introduction of the structural efficiency principle in the *National Wage Case* decision in 1988 was part of a package of wage fixation principles designed to increase efficiency of industry.[121] Awards were reviewed with a view to implementing measures designed to "improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs". The necessity of a more flexible labour force was part of the structural efficiency principle, which was applied by the Full Bench as a precondition for parties seeking the minimum wage increases in awards. In the

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115 Stanford Report, [23], [51(g)] and the literature reviewed at pages 71–74 of the Stanford Report (part of the Appendix).

116 Ernst & Young, *Untapped Opportunity: The role of women in unlocking Australia's productivity potential* (2013) (**Ernst & Young Report**), 3. The Ernst & Young Report was tendered as Exhibit **ACTU-18**.

117 Ernst & Young Report, 3.

118 Ernst & Young Report, 4.

119 Penelope Williams, Paula McDonald and Abby Cathcart, 'Executive-level support for flexible work arrangements in a large insurance organisation' (2016) *Asia Pacific Journal of Human Resources*, 3.

120 Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report* (2014) (***Supporting Working Parents***), 17 et seq.

121 *National Wage Case August 1988* (Print H400).

1991 National Wage Case decision, the Full Bench stated that any party to an award seeking the increases allowable under the decision must satisfy the Commission that the parties had examined whether "basic work patterns and arrangements are appropriate", including specific consideration of the employment of part-time employees.[122]

The evidence of Julie Toth

70. The AI Group called evidence from Ms Julie Toth, who is employed by AI Group as Chief Economist. Ms Toth provided a written statement containing her opinion about various matters said to be relevant to the ACTU's proposed draft determination.

71. Ms Toth's evidence should be treated with caution. The opinions in her statement were often unsupported and speculative. Where she did rely on particular sources, those sources were not robust studies[123] or peer-reviewed articles,[124] and were inaccurately cited or described.[125] She gave disproportionate weight to sources which supported her opinion and cited very limited material overall.[126] She chose to present data in a way that, at best, required close reading to be understood properly, and at worst, was unclear and potentially misleading.[127] When these matters were put to her in cross-examination, she failed to make appropriate concessions unless or until she was presented with contradictory evidence (and even then, not on every occasion). While each example by itself is not decisive, together they reveal a witness whose evidence should not be accepted without independent corroboration.

72. Ms Toth stated in cross-examination that her appearance before the Commission was to provide evidence of her "own views" about "the questions that were put to me about participation and productivity et cetera".[128] Ms Toth stated at least three times that she was provided with written instructions regarding the matters or questions to be addressed in her statement.[129] The letter was called for, but has not been produced. The ACTU will seek to recall Ms Toth to be cross-examined before the commencement of oral closing submissions on Thursday 21 December 2017.

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122 *National Wage Case April 1991* (Print J7400).

123 Eg, Productivity Commission, *Part-Time Employment: The Australian Experience* (June 2008): see PN2044.

124 Eg, the Reserve Bank's *Quarterly Bulletin*, see PN1805–1806.

125 See PN1824–1830 and PN2050, PN2058–2059 (regarding Toth Statement, [19]); and see paragraph 73 below.

126 See paragraph 73 below.

127 See, eg, Chart 1 and PN1749, PN1757–1760; Toth Statement, [13] and PN1794 et seq.

128 PN1732.

129 PN1735, PN1737, PN1741.

73. In her statement, Ms Toth relied heavily on a Productivity Commission working paper concerning part-time employment in Australia (***2008 Working Paper***)[130] to argue that productivity losses would result from the engagement of part-time employees.

74. It was put to Ms Toth in cross-examination that she had seriously overstated what the Productivity Commission said in the *2008 Working Paper* about the productivity of part-time workers. The sentence in the *2008 Working Paper* relied on by Ms Toth stated that:

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

75. In her statement, Ms Toth prefaced this quote by describing it as what the Productivity Commission said "regarding *productivity losses that result* from the engagement of part-time employees".[131] In cross-examination, Ms Toth refused to accept that there was any difference between *lower productivity* that *may* result from certain activities, and *productivity losses that* result from the engagement of part-time employees.[132] The difference is plain. The Productivity Commission was expressly contemplating the prospect that employees who work less than full-time hours *may be* less productive; by contrast, Ms Toth stated definitively that productivity *losses will result* (ie, to firms) from the engagement of part-time employees. The difference is not merely semantic; it illustrates Ms Toth's cavalier approach to the use of evidence which (at least appears to) support her arguments concerning the productivity of part-time workers.

76. Ms Toth stated that "the detail and analysis" in the *2008 Working Paper* had not been contradicted by subsequent Australian sources or research papers,[133] but conceded in cross-examination that while she had "looked at a range of other things", she did not cite any research regarding part-time work and productivity other than the Reserve Bank of Australia's September 2017 *Quarterly Bulletin*, and the *2008 Working Paper*, the latter included only because it was cited by the Reserve Bank.[134] She was not familiar with the Ernst & Young paper which was put to her in cross-examination, and did not offer any criticism any of the sources in the Stanford Report which found productivity benefits to be associated with flexible working arrangements. Ms Toth justified her reliance on the relevance of the *2008 Working*

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130 Productivity Commission, *Part-Time Employment: The Australian Experience* (June 2008).

131 Toth Statement, [29].

132 PN1850–1870.

133 Toth Statement, [25].

134 PN1913–1915.

Paper on the basis that it was cited by the Reserve Bank in the *Quarterly Bulletin*. This is plainly circular reasoning.[135]

77. The Productivity Commission's statement regarding the potential difference between the productivity of full time and part time workers is, self-evidently, brief and speculative, and not a considered conclusion based on an assessment of the available literature. Even taking the statement at its highest, the productivity losses contemplated in the *2008 Working Paper* will not apply to all part-time employees: persons working three out of five full-time days a week will not allocate any more time to meal breaks and setting up as their five-day-a-week counterparts; and persons working four or five hours a day may not take a meal break (regardless of whether they are entitled to one under a modern award).[136] Under questioning by Ross J, Ms Toth agreed that the opinions in the *2008 Working Paper* were unsupported by any quantitative or qualitative research, and were not expressed as a statement of fact as to differences in productivity between part- and full-time workers.[137] Ms Toth ultimately agreed that individual part-time workers may well be more productive than their full-time counterparts.[138]

Costs to employers

78. Dr Stanford's research found that while employers may incur costs associated with disemployment of incremental employees,[139] and administrative costs associated with implementing and managing family-friendly work arrangements,[140] these costs would not be onerous or a significant burden on employers.

79. Dr Stanford accepted in cross-examination the general proposition that employers *may* make greater use of labour hire or other (not identified) non-standard forms of employment to fill vacancies in hours left by the employee working reduced hours, should it be necessary to fill those hours by hiring new employees rather than deploying existing labour supply resources.[141] Of course, employers already have the ability to use labour hire for fixed term periods of employment (for example, periods of parental leave) and to supplement existing part-time workers' (noting again part-time and casual employment is very common in Australia). Nevertheless, there was no evidence before the Commission about the magnitude of use of

135 This was put to Ms Toth in cross-examination; she disagreed: PN1846.

136 Ms Toth was cross-examined about these matters: see PN1875–1881.

137 PN2044.

138 PN1898, PN1902.

139 Stanford Report, [52(b)].

140 See Stanford Report, [32]; [52(c)].

141 Transcript, Tuesday 12 December 2017, PN815–818; regarding the ability to deploy existing labour supply resources, see Stanford Report.

labour hire for fixed term periods of employment, or to supplement the work of part-time and casual labour. The prospect of a significant increase in the use of labour hire as a result of the ACTU's proposed clause is a straw man.

80. Ms Toth gave evidence about the lack of perfect substitution of labour, which was accepted by Dr Stanford in cross-examination.[142] There is no dispute that labour is not perfectly substitutable. However, to assert that the imperfect substitution of labour will have a detrimental impact on allocative efficiency, as AI Group and Ms Toth did, is to miss the point. Employers regularly deal with the imperfect substitution of labour, and yet Ms Toth failed to identify any evidence about the impact of poor substitution on allocative efficiency.[143]

Impact on the national economy

81. The impact of any regulatory proposal on the national economy is important, but not decisive. The modern awards objective makes that plain. The Commission is required to take into account the likely impact of any variation to modern awards on the sustainability, performance, and competitiveness of the national economy, but this is one consideration among many.[144]

82. The ACTU relies on its submissions dated 7 May 2017 regarding the benefits to the national economy as a result of a guaranteed right to family-friendly working hours.[145] Those submissions are supplemented here by matters that arose during the evidentiary hearing.

Allocative efficiency

83. In her statement, Ms Toth asserted that the ACTU's claim, if made, would "restrict the allocation of labour hours and any measure that restricts flexibility in the allocation of resources including labour restricts the ability to achieve maximum efficiency and production across the economy".[146] Ms Toth acknowledged, appropriately, that the likely impact of the ACTU's claim on national productivity is "difficult to measure and quantify".[147] Nevertheless, because the proposal was said to impede the ability to allocate labour to their most efficient and productive use within or between firms, Ms Toth considered that the likely impact of the ACTU's claim on national productivity would be negative.[148]

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142 PN863–874.
143 PN2018–2022.
144 See ACTU primary submissions, [16]–[17].
145 At [148]–[151], [155].
146 Toth Statement, [43].
147 Toth Statement, [51].
148 Ibid.

84. Under cross-examination, Ms Toth agreed that in certain circumstances, restrictions on the use of labour might be desirable, even at a cost to 'maximum efficiency',[149] and that such restrictions will reflect community preferences.[150] In response to a question from Ross J, Ms Toth agreed that 'community preferences' in this context are not matters reflected in an opinion poll, but rather, reflected in the regulatory framework, including the National Employment Standards and modern awards.[151]

Increase in firm profits

85. While both Dr Stanford and Ms Toth acknowledged the difficulties in ascribing precise values to the costs and benefits of family-friendly work practices at the firm and economy level.[152] Dr Stanford noted that several reports concluded that "there is indeed a net bottom-line benefit to firms adopting these practices, as captured in enhanced profitability and/or market value". These reports were not disputed by the employer parties in cross-examination.

Increase in GDP as a result of increased labour force participation

86. The Stanford Report found a high incidence of literature recommending "greater flexibility in working hours as one measure to boost Australia's sub-par levels of female labour force participation".[153] Dr Stanford posited that if women's labour force participation had continued to grow at the rate it achieved between 1997 and 2007, it would have reached a level of 62.4 per cent by mid 2017, which would represent an additional 285,000 women in the labour force. Dr Stanford calculated that the paid work effort of those additional workers would add an estimated $40 billion per year to Australian GDP and $12 billion per year to government revenues.[154]

87. It was put to Dr Stanford during cross-examination that an increase in labour supply would not guarantee a concurrent increase in labour demand. Dr Stanford accepted, appropriately, that his estimated increases to GDP would be reduced if an increase in labour supply was not met or balanced by an increase in labour demand. Nevertheless, Dr Stanford's evidence, which was not challenged, was that mechanisms in the macroeconomy generally ensure that growth in employment will track the growth of labour supply.[155] Further, Dr Stanford's evidence is consistent with findings by the Grattan Institute and the OECD in the ACTU primary

149 PN2003.
150 PN2006–2012.
151 PN2035–2038.
152 See Stanford Report, [34]; Toth Statement, [51].
153 Stanford Report, [25] and see [44]–[46].
154 Stanford Report, [44], and see [58].
155 Transcript, Tuesday 12 December 2017, PN 827–834.

submissions about the positive impact on economic growth from greater numbers of women re-entering the workforce.[156]

88. In its submissions dated 7 May 2017, the ACTU identified a number of further benefits to the national economy that would result following increased labour force participation of women. These matters, which were not challenged by the employer parties and which continue to be relied on by the ACTU, include a greater return on investment in education,[157] and the substitution of women's unpaid work, valued at between $345 and $565 billion in 2011 dollars.

6 ***Family-friendly working arrangements reflect the preferences of employers and employees***

The employer lay evidence

89. The evidence of the employer witnesses demonstrates that employers regularly receive requests for reduced hours, and in many cases already accommodate such requests in the manner contemplated by the ACTU's proposed determination. As detailed below, in many of the examples given by the employer witnesses, either the ACTU clause would not have applied; or if it had, nothing in the ACTU's clause would have required any material difference in the conduct of either the employer or the employee. Three examples will suffice.

90. Peter Ross gave evidence that Rheem "regularly receives requests for changed hours from employees returning from parental leave" and accommodates requests for flexibility wherever possible".[158]

91. While Mr Ross stated that he does not consider that Rheem "has an unlimited ability to grant flexibility to its employees,"[159] the ACTU's proposed determination does not contemplate 'unlimited' flexibility. Rather, the ACTU's proposed determination applies only in certain limited and clearly defined circumstances. Taking the examples in Mr Ross' statement by way of illustration:

    (a) Mr Ross gave evidence about a dispute between the Australian Manufacturing Workers' Union and Rheem in relation to an employee called Shane O'Neil, who requested a flexible working arrangement.[160] Mr O'Neil's child was over school age at the time of his request, and Mr O'Neil requested changed start and finish times only – not reduced hours. For these reasons Mr O'Neil's request would not have been

156 See ACTU primary submissions, [162]–[165].
157 ACTU primary submissions, [166]–[167].
158 Ross Statement, [48], [50].
159 Ross Statement, [54].
160 Ross Statement, [60] et seq.

covered by the ACTU's proposed determination, which applies to parents of children of school age or younger only, and to requests for reduced hours of work only. Mr Ross explained that the flexible arrangement with Mr O'Neil was implemented with a review period. There is nothing in the ACTU's clause which would prevent a Family Friendly Working Arrangement from including an agreed review period.

(b) Mr Ross stated that requests for changed hours on return from parental leave have only conflicted with operational requirements on two occasions. Mr Ross explained that on these two occasions, an alternative proposal was offered to the employees in question, and accepted.[161] This is exactly how clause X.3.2 of the ACTU's proposed determination is intended to operate.

92. Benjamin Norman of Glencore Agriculture gave evidence for the AI Group. Mr Norman explained that Viterra (a subsidiary of Glencore) "endeavours to accommodate requests for flexible working arrangements wherever possible because the companies understand that these arrangements can benefit both the individual and the business."[162] Mr Norman gave evidence of three requests for flexible working arrangements received by Viterra.[163] In each of those examples, the ACTU's proposed determination would either have been complied with by the business, or would not have applied at all. The first request was for reduced hours to care for a child. The request was granted. Assuming the child in question was of school age or younger, this scenario would have been covered by the ACTU's proposed determination. The second request was for changed working hours, which was accommodated after some negotiation. This request would not have been covered by the ACTU's proposed determination because it does not relate to a reduction in hours. The third request was for reduced hours to care for a child. While the employee's original proposal was not granted, an alternative was offered by the employer and accepted by the employee. This scenario would have been covered by the ACTU's proposed determination, and it is exactly the type of exchange contemplated by clause X.3.2 of the ACTU's proposed clause. Nothing in the ACTU's proposed clause would have resulted in any material change to the conduct of either party in this case.

93. Janet O'Brien of Conplant was called by the AI Group. Her evidence was that "Conplant takes a compassionate approach to its employees' personal circumstances and tries to accommodate them wherever possible."[164] Ms O'Brien gave evidence that Conplant had managed to cover an

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161 Ross Statement, [58]–[59].

162 Norman Statement, [60].

163 Norman Statement, [62]–[68].

164 O'Brien Statement, [24].

employee's lengthy absence due to illness, while continuing to hold the employee's job open.[165] Ms O'Brien explains that the business has received only one request for reduced hours due to caring responsibilities, which was granted by the business on a trial basis initially, and then on an ongoing basis. The arrangement is being accommodated by allocating some of the employee's tasks to a senior employee. While Ms O'Brien stated that there were initially "various difficulties" with the accommodation of the request, it was clear from her evidence that it has been possible for the business to both manage the arrangement and continue to operate effectively. The ACTU's proposed determination would have applied to this scenario, and there is nothing in the ACTU's clause which would have required any material difference in the conduct of either the employer or the employee in this case.

94. Paula Bayliss of Navitas was called to give evidence by ACCI. Ms Bayliss gave evidence that Navitas colleges do receive requests for flexible working arrangements[166] but did not give any evidence about the number of requests for flexible working arrangements she has considered or provide any specific details of cases in which she has been asked to provide advice. Most of the requests received by Navitas relate to changes to start and finish times or requests to work from home, neither of which are covered by the ACTU's proposed clause.[167]

95. Lauren Cleaver of Norske Skog was called to give evidence for ACCI. Ms Cleaver's evidence was that, despite some challenges, a job-share arrangement between two staff members is currently being accommodated by the business.[168] Further, all three requests for flexible working arrangements made to Norske Skog management in 2017 (including Ms Cleaver's own) were granted.[169] The first example at [42] is clearly a scenario that would be covered by the ACTU's proposed clause. The ACTU's clause would not have materially impacted on the conduct of either party. Assuming the second example at [50] involved a request for a reduced number of working hours, it too would have been covered by the ACTU's proposed clause. The clause would not have materially impacted on the conduct of either party. The third example at [53], Ms Cleaver's own request for a flexible arrangement, would not have been covered by the ACTU's clause because it relates only to changed start and finish times, not reduced working hours.

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165 O'Brien Statement, [25]–[27].

166 Bayliss Statement, [19].

167 See Bayliss Statement, [23].

168 Cleaver Statement, [33].

169 Cleaver Statement, [39].

The joint employer survey and the VACC survey

96. The AI Group, ACCI, and the NFF tendered a survey described as the **joint employer survey**. The Victorian Automobile Chamber of Commerce (**VACC**), a member of ACCI, tendered a separate survey described here as the **VACC survey**. For the reasons set out here, both surveys are hopelessly compromised and unreliable and the Commission should give no weight to their contents.

97. The ACTU objected to the tender into evidence of both the employer surveys. During the hearing of the objection, the AI Group and ACCI conceded that both the joint employer survey and the VACC survey were advanced by way of descriptive or anecdotal evidence rather than as representative of employers, or of members of the employer associations to whom the surveys were sent.[170] To the extent that the written submissions of AI Group and ACCI contend otherwise, they should be disregarded.[171] Equally, the assertions by Mr Hoang for VACC that the survey was representative of members of the motor trades' organisations[172] must be disregarded given ACCI's position that the survey is *not* intended to be representative, as well as for the reasons set out in paragraph 103 below.

98. As a result of the abandonment by the employer parties of the contention that either survey is representative, it is not necessary to refer to the long-standing line of authority in the Commission concerning the standards by which evidence put forward as survey evidence will be accepted.[173] However, that does not mean that principle has no role to play in the assessment of anecdotal survey material. Non-representative survey material which is put forward as 'anecdotal or indicative' rather than representative does not acquire probative value simply by virtue of that fact.

99. In the case of the joint employer survey, the ACTU submits that little to no weight should be attributed to the responses collected in that survey for the following reasons.

100. First, it is still not clear who the survey was sent to. The AI Group submissions stated at [505] that "the survey was sent by email to members of participating employer organisations on 3 August 2017", but the participating employer associations have not been identified. They may have included organisations that employ workers, and are covered by modern awards, or they may not. They may have included lobby groups, other industrial organisations, and individuals. There is simply no information before the Commission about the survey

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170 PN65–68, PN70; PN88; PN111–113.

171 See the submissions of the ACTU dated 8 December 2017 (**ACTU objection submissions**) at [6].

172 PN2159, PN273–78.

173 See in particular the authorities cited in the ACTU objection submissions at [13]–[15].

recipients, and there has been numerous opportunities for the AI Group and ACCI to remedy this information deficiency.

101. Second, there is no evidence of any quality control measures designed or applied to the collection of data, the analysis of responses, or any other relevant matter. In cross-examination, Mr Lappin conceded that the uniform time stamps in the exported response data meant that he could not accurately say whether or not responses were received after the purported close of the survey.[174] There was no evidence about proper quality control measures applied to the survey instrument and so duplicate responses cannot be ruled out. While the AI Group and Mr Lappin submitted that the respondents comprised 2,032 award-covered employers out of a possible 5,610 recipients, under cross-examination it was conceded that 43 out of the 2,032 award-covered respondents did not employ anyone, and taking the response IDs in the raw data as an accurate count of the number of recipients, there were 229 responses unaccounted for.[175] The best that could be said about this evidence is that it is more accurate to say that 1,989 out of 5,839 responses are relevant; at worst, the survey data included irrelevant material and appeared to be inexplicably missing a significant number of responses. In the absence of any explanation for either phenomenon, the Commission should treat this evidence with extreme caution.

102. Third, the AI Group assert that the number of respondents *alone* is "a substantial one and by virtue of that fact alone, the survey results carry significant probative value".[176] This assertion misunderstands how value should be attributed to survey evidence. The sheer volume of relevant responses tells the reader nothing about the character of the respondents. Rather, representativeness is assessed by reference to the factors set out in the *Annual Wage Review 2012–2013* [2013] FWCFB 4000, at [441]–[442].[177] There was no evidence of any of these matters before the Commission. Further, without knowing the total population of persons to whom the survey was sent, it is not possible to say what proportion of responses were relevant.[178] The total number of survey recipients was exposed during the cross-examination of Mr Lappin to be unclear,[179] and the Commission cannot assume that the numbers of survey recipients or respondents presented in or inferred from Mr Lappin's evidence or the AI Group submissions are accurate or reliable.

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174 PN1579–80.

175 PN1612–1614, PN1619–1621; PN1627–1630.

176 AI Group submissions, [511].

177 See ACTU objection submissions, [15(d) and (e)].

178 See PN134.

179 See paragraph 101 above.

103. Similar deficiencies were present in Mr Hoang's statement concerning the VACC survey.[180] However, during cross-examination of Mr Hoang, it emerged that the VACC had initially considered providing the ACTU and the Commission with highly relevant information concerning the design and conduct of its survey, and then decided not to.[181] The decision to withold this information from the ACTU continued *despite* these matters being expressly sought by the ACTU's reply submissions dated 27 November 2017. The fact that the ACTU directed its call for proper evidence to the joint employer survey does not absolve the VACC of responsibility for its decision to continue to withhold relevant evidence. It is open to the Commission to infer that the VACC deliberately or carelessly withheld relevant evidence, and this had the effect of preventing the ACTU from properly interrogating the reliability of its survey. In the circumstances, the Commission should find that the ACTU was unfairly deprived of the opportunity to properly test the VACC survey evidence, and for this reason alone, the VACC survey should be given no weight.

104. The unreliability of the VACC survey evidence was further compounded by certain matters that became apparent during cross-examination, including that (1) there is nothing before the Commission to indicate what the Full Bench should do with the responses to question 1, which deal with the application of ANZIC codes to survey respondents and so the responses to this answer must be disregarded;[182] (2) although the survey was initially said to have been sent to all 13,398 members of the motor trades' organisations, it was later conceded that it could not have gone to the indeterminate number without email addresses;[183] and (3) there is no definitive evidence about the application of any quality control measures applied to the collection of data.[184]

105. Further, and most significantly, it is open to the Commission to infer that members of ACCI and VACC received, and responded to, both the joint employer survey and the VACC survey. VACC is a member of ACCI. ACCI sent the joint employer survey to its members, and there is no evidence that VACC members were excluded from that mail-out or of any quality control measures applied by either ACCI or VACC to prevent this. Mr Hoang frankly conceded that he did not know if members received both surveys.[185]

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180 See ACTU objection submissions, [11]–[12].

181 PN2291–2305.

182 PN2251, PN2242–2258

183 PN2187–88.

184 PN2220–2226.

185 PN2216–2219, PN2305, PN2324–2327, PN2343–2369.

106. Finally, Mr Hoang conceded in cross-examination that his presentation of the survey data, which merged some sets of duplicate responses but not others, by reference to an unexplained formula, was confusing and difficult to read.[186]

107. Neither of the survey responses should not be attributed the same weight as the lay witness evidence filed by the ACTU and the employer parties. Each party was afforded the opportunity to test lay witness evidence in cross-examination. By contrast, the responses to the surveys could not be tested, including for example, by exploring in cross-examination whether a respondent's particular view was rationally or fairly held. It is true that ordinarily, a party is not able to test the responses to a survey, which are prima facie inadmissible hearsay evidence. But it is now accepted that the hearsay nature of survey evidence, and the inability to test individual responses, is cured by the person who was responsible for the survey providing evidence as to the survey methodology, conduct of the survey, and quality control measures. No such evidence was provided with respect to the joint employer survey or the VACC survey.

108. As stated during oral submissions, the ACTU contends that neither survey would be admissible in any Australian Court, and this alone indicates that the reliability of the joint employer survey and the VACC survey is so low as to be of very limited to no probative value.[187] If anything, the credibility of the surveys worsened through cross-examination; they certainly did not become less unreliable. The serious flaws in the design and conduct of both surveys, the errors in the presentation of survey data to the Commission, and the absence of proper evidence concerning the design, conduct, methodology, representativeness, and quality control measures applied to the surveys, mean that the Commission cannot safely draw any reliable findings from either survey.

19 December 2017

Kate Burke

Counsel for the Australian Council of Trade Unions

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186 PN2290,

187 PN152.