IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Section 156 – Four-Yearly Review of Modern Awards

AM2015/2 – FAMILY FRIENDLY WORK ARRANGEMENTS

SUBMISSIONS ON EVIDENCE

NATIONAL RETAIL ASSOCIATION

DATE:	18 December 2017
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NATURE OF THESE SUBMISSIONS

[1] The National Retail Association (**NRA**) makes these submissions pursuant to directions issued in this matter by Gooley DP on 4 December 2017, in particular Direction [3] thereof.

[2] NRA repeats and relies on its previous written submissions filed on 30 October 2017.

[3] The submissions herein shall be limited as much as possible to the evidence put by the parties and the conclusions that the Full Bench, in NRA's respectful submission, ought to draw from that evidence.

[4] NRA will defer to the other employer parties to pass comment on the evidence led by those parties; NRA will instead focus these submissions on the evidence led by the ACTU in support of its application.

[5] NRA advises that it will make more general final submissions orally on 21 December 2017.

THE CASE TO BE ESTABLISHED BY THE ACTU

[6] The substantial part of the ACTU's claim (clauses X.1 and X.2) should be dismissed as, if permitted, these clauses would do nothing that is not already capable of being done under existing flexibility provisions.

[7] NRA does not disagree with the notion that flexible working arrangements can be beneficial for employers and employees.

[8] The case that the ACTU needs to establish for the purposes of this application is why the employee needs to be given the ability to dictate the terms and conditions of their employment, regardless of how impracticable, unfeasible, or unsustainable to the employer, as provided for in clause X.3 of the draft determination.

[9] NRA submits that the ACTU has provided plenty of evidence as to why flexible working arrangements are beneficial, but has led nothing to support the existence of clause X.3.

EVIDENCE LED BY THE ACTU

Expert evidence

[10] The ACTU led evidence from four expert witnesses:

- [a] Professor Siobhan Austen
- [b] Dr Ian Watson
- [c] Dr Jill Murray
- [d] Dr James Stanford

[11] As a general comment, NRA notes the following trends in the expert evidence tendered by the ACTU:

- [a] Whilst much analysis is made of the correlation between an employee becoming a parent/carer, no analysis whatsoever has been done (or even attempted) of the causational relationship between these.
- [b] Whilst significant opinion has been given as to why flexible working arrangements are needed and/or are beneficial, there has been no distinction whatsoever made between existing entitlements to flexible working arrangements and the proposal of the ACTU which is under consideration by this Full Bench.
- [c] All that the ACTU has provided is evidence generally in support of provisions such as s 65 of the *Fair Work Act 2009* and the model clause 7 (Award flexibility) included in all

Modern Awards. It has provided no evidence at all which supports the variation sought by the ACTU.

Professor Siobhan Austen

Written evidence

[12] Professor Austen's report[1] at various times refers to studies which link negative effects of parenthood on women's participation in the workforce to high childcare costs and poor childcare quality[2].

[13] Professor Austen's report also noted that other factors resulting in parenthood having a negative effect on women's participation in the workforce included ""inflexible job conditions "in terms of day or hour arrangements", the absence of special leave entitlements ..."[3].

[14] NRA notes that in a period which predates the right to request flexible working arrangements, the studies cited by Professor Austen do not identify the lack of such a right as the most significant barrier to parents remaining engaged in the workforce.

[15] Significantly, NRA notes that the cost and quality of childcare was identified as the key factor determining whether a caregiver remained within the workforce, not the lack of a right to request flexible working arrangements.

[16] It must however be noted these observations are based on reports which relied on data collected between 2001 and 2005[4] and 2001 to 2007[5].

[17] Each of these periods is prior to the enactment of the universal paid parental leave scheme in 2010, and prior to the enactment of flexible working arrangements in s 65 of the *Fair Work Act 2009* in 2010.

[18] Similarly, much of the data relied on by Professor Austen in her report is derived from the HILDA survey conducted between 2001 and 2014.

[19] The matters described at paragraph [17] above are significant changes which took place near the end of the collection period for the data relied on by Professor Austen and the various studies cited in her report.

[20] Only 30% of the data relied on by Professor Austen was collected under the current industrial relations regime, and as such the remaining 70% of the data (and the observations based upon it) must be considered substantially irrelevant to the current industrial relations situation.

[21] There is nothing in Professor Austen's report to suggest that she considered any effect that the introduction of the right to request flexible working arrangements and the universal paid parental leave scheme in 2010 may have had on the participation of caregivers in the workforce.

[22] As such NRA urges that the Full Bench use caution in placing much weight on Professor Austen's report, given that it is based on data which substantially predates the current industrial relations regime and fails to distinguish any changes which may have been brought about by the introduction of the current industrial relations regime.

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[1] Exhibit ACTU1 Annexure SA-3
[2] Ibid at [24] and [25].
[3] Ibid at [25]
[4] Ulker and Guven (2011)
[5] Breunig et al. (2011)

Oral evidence

[23] In cross-examination, Professor Austen conceded that employers are increasingly interested in retaining women in their organisations, and as such in working collaboratively with their employees in coming to arrangements to accommodate their responsibilities as parents[6].

[24] Professor Austen also conceded that nothing in the data she had analysed gave any indication as to the motivation of any employee in making an employment transition[7].

[25] In particular, Professor Austen conceded that nothing could be drawn from the data to indicate that a denial of a request for flexible working arrangements resulted in any particular trend in employment transitions[8].

Conclusion as to Professor Austen's evidence

[26] NRA submits that the Full Bench should consider Professor Austen's written evidence as little more than uncontextualized historical commentary given the vast time period in which the data considered by Professor Austen was collected, and the lack of any distinction between pre-reform and post-reform trends.

[27] NRA submits that Professor Austen's oral evidence supports this proposition, as Professor Austen conceded that no conclusion could be drawn from the data analysed by her to indicate what effect the availability or lack of flexible working arrangements had on the decisions of individuals with respect to their employment.

Dr Ian Watson

Written evidence

[28] NRA submits that Dr Watson's report[9] is deceptive in its use of language.

[29] Dr Watson states as a 'key finding' that a key date for what is described as a 'plateau' in the use of flexible working arrangements is 2008, which Dr Watson links to the advent of the global financial crisis (GFC)[10].

[30] NRA submits that by identifying the GFC and its aftermath as a key influencer on labour force trends in subsequent years, Dr Watson has identified a factor which the Full Bench ought to consider as skewing the data relied on by Dr Watson.

[31] It is significant that in Table 3.8 of Dr Watson's report, it is quite clear that while the growth of the use of flexible working arrangements may have plateaued since 2008, the reversal of such use is not as great as Dr Watson's language may suggest.

[32] Per Table 3.8 of Dr Watson's report[11], in 2014 42% of male parents had some form of flexibility arrangement in place to assist in caring for their child or children, whilst 72% of female parents had some form of flexibility in place.

[33] NRA notes that whilst the proportion of women with flexible arrangements in place dropped by 3% from 2011 to 2014, the proportion of men with flexible arrangements in place increased by 2%.

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[6] Transcript, 12 December 2017, PN210 and PN212
[7] Transcript, 12 December 2017, PN227
[8] Transcript, 12 December 2017, PN228
[9] Exhibit ACTU3 Annexure IW-3
[10] Ibid, page ix, paragraph [9]
[11] Ibid, page 52

[34] Dr Watson's report does not appear to address the possibility that a reduction in the number of women accessing flexible arrangements may be the result of more men accessing such arrangements as societal perceptions as to the role fathers as care-givers changes.

[35] Dr Watson also makes the finding that "taking on the role of carers or parents sees people penalised by both the labour market and the workplace"[12]. NRA submits that this 'finding' is manifestly false based on Dr Watson's own report.

[36] Dr Watson describes both full-time and part-time workers as 'losing out' in the workplace – part-time workers by "turning down work opportunities", and full-time workers by "missing out on home-based activities"[13].

[37] In both of these cases, Dr Watson has, presumably, made the conscious choice to use language which firmly places the discretion of these decisions on the employee. The part-time worker is not 'refused' employment – the part-time worker 'turns it down'[14]. As such it would appear that whilst Dr Watson's 'key finding' is phrased in such a way as to make it appears it is the labour market that reduces these opportunities, it is in fact the employee themselves that declines these opportunities.

[38] NRA also notes something rather significant in Table 3.9 of Dr Watson's report[15], which describes the various entitlements which are available to employees to help them meet their parenting/caring responsibilities.

[39] In this table, the raw figures show that, other than home-based work, over half of all employees have access to some form of workplace entitlement, with the proportion of employees so entitled either increasing over the period 2002 to 2015, or fluctuating within a small range over that period.

[40] What is missing entirely from Dr Watson's subsequent analysis of these figures, as presented in the report, is any comment on the very small proportion of employees able to access child care support. Across all workers in 2015, only 9% were able to access child care support.

[41] Despite 9% of all workers being able to access child care support, and as such is the single least-accessible entitlement for all employees, Dr Watson fails to provide any cogent analysis whatsoever of the potential impact that the inaccessibility of government childcare subsidies may have on parental decisions to access flexible working arrangements.

[42] NRA notes a curious observation made by Dr Watson with relation to the use by male employees of certain entitlements – namely the remark:

> *"... the HILDA data suggests the 'formal availability' of part-time work is reasonably high, and certainly not far behind what is available to women. This suggests that other factors may inhibit the take-up of part-time employment by fathers."*[16]

[43] Put another way, this statement acknowledges that an employee can be given an entitlement to flexible working arrangements by any means – by contract, by company policy, or indeed by a Modern Award – and a significant number of employees may simply choose not to access that entitlement.

[44] Or, put even more bluntly, what Dr Watson's comment suggests is that it is entirely possible that granting the ACTU's application in this matter will have no effect whatsoever on employees' abilities to meet their caring responsibilities.

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[12] Ibid, page x, paragraph [14]
[13] Ibid, page 65, paragraph [141]
[14] Ibid
[15] Ibid, page 56
[16] Ibid, page 55 at [124]

Oral evidence

[45] NRA makes no comment on Dr Watson's oral evidence.

Conclusion as to Dr Watson's evidence

[46] Dr Watson's report provides extensive analysis of what entitlements are available to employees, but provides relatively little analysis of whether employees take up these entitlements and why they do so.

[47] Dr Watson also confirms, in the data relied upon by him, that where employees need flexible working arrangements, a significant proportion of employees have such arrangements in place under existing provisions.

[48] Dr Watson's choice of language at certain parts of his report also quite clearly places the responsibility for any disadvantage occasioned on employees due to their caring responsibilities on the employee themselves, not on the employer and not on any regulatory barrier to flexible working arrangements.

[49] Dr Watson fails in his report to make any comment as to why the variation sought by the ACTU is necessary in order for employees to have access to flexible working arrangements. Dr Watson also fails to identify what elements of the current scheme of flexible working arrangements prevent employees from accessing such arrangements.

[50] As such Dr Watson's report, like most of the ACTU's expert evidence, is evidence only of why provisions such as s 65 and the model flexibility clause are beneficial. It is in no way evidence in support of the ACTU's proposed variation.

Dr Jill Murray

Written evidence

[51] NRA submits that Dr Murray's report is helpful to the Full Bench as a demonstration of why the variation sought by the ACTU is not necessary for the purposes of achieving the modern awards objective.

[52] Unlike Dr Watson and Professor Austen, Dr Murray examines how flexible working arrangements are implemented in the workplace.

[53] In her report[17], Dr Murray examines the rates of acquiescence to requests for flexible working arrangements based on AWRS data. Dr Murray notes that 90% of such requests are immediately granted, with only 9% not immediately granted. Of those not immediately granted, 60% were subsequently granted[18].

[54] Dr Murray also found that since the introduction of s 65 of the *Fair Work Act 2009*, employers had ceased acting carelessly with such requests and instead taken careful, genuine consideration of the request in the context of their business[19].

[55] Dr Murray also considered the reasons provided for refusal of requests for flexible working arrangements; her report notes such matters as a tension between contemporary principals such as increased female participation in the workforce with traditional views of women as primary care givers[20]. However, it should be remembered that these considerations only arose in a total of less than 6% of all requests for flexible working arrangements.

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[17] Exhibit ACTU5 Annexure JM-3
[18] Ibid at [45]
[19] Ibid at [49]
[20] Ibid at [64]

Oral evidence

[56] Dr Murray's oral evidence confirms the elements of her report referred to above, and as such NRA submits that Dr Murray's evidence as a whole should be taken as evidence that the substantial majority of requests for flexible working arrangements are granted by employers, with or without modification[21].

Conclusion on Dr Murray's evidence

[57] The conclusion that the Full Bench should draw from Dr Murray's evidence is that existing provisions allowing for flexible working arrangements are sufficient.

[58] Dr Murray's evidence is that employers are inclined, where possible, to grant flexible working arrangements.

[59] Nothing presented by Dr Murray examines any effect the variation proposed by the ACTU may have on employees' ability to access flexible working arrangements.

[60] Nothing in Dr Murray's evidence supports anything other than the benefits of the existing provisions allowing for flexible working arrangements.

Dr James Stanford

Written evidence

[61] Dr Stanford's report[22] describes extensively the benefits of flexible working arrangements and provides a cost-benefit analysis of flexible working arrangements.

[62] As such Dr Stanford's report is evidence of nothing more than flexible working arrangements, like those which employees already have the right to request under existing provisions, being beneficial. It is no evidence at all in support of the ACTU's application.

[63] Notwithstanding this, Dr Stanford concludes his report by supporting the ACTU's application in this matter[23].

[64] Dr Stanford's support for the ACTU's application should be disregarded entirely as there is nothing in his report to indicate that he has had any regard for the existing provisions permitting flexible working arrangements when forming this view.

Oral evidence

[65] In cross-examination, Dr Stanford declared that he gave his evidence on the presumption that employers act irrationally[24].

[66] Dr Stanford gave no reason, or evidence supporting any reason, for this presumption.

[67] The trend in Dr Stanford's oral evidence is a presumption that employers will not grant requests for flexible working arrangements due to being uninformed, uneducated, or uncaring[25].

Conclusion on Dr Stanford's evidence

[68] Dr Stanford's evidence should be regarded as nothing more than a case in support of s 65 of the *Fair Work Act 2009* and the model flexibility clause. It cannot, and should not, be regarded as evidence in support of the ACTU's application.

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[21] Transcript, 12 December 2017, PN743 – PN780
[22] Exhibit ACTU6 Annexure JS-3
[23] Ibid at paragraph [59]
[24] Transcript, 12 December 2017 at PN882 – PN884
[25] Ibid at PN884

[69] Dr Stanford has not indicated anywhere in his evidence that he took existing provisions allowing for flexible working arrangements into account.

[70] Dr Stanford indicted that he proceeded on that basis that employers are irrational and unreasonable, despite the test in all legal and regulatory circumstances being based on the presumption of rationality and reasonableness.

[71] NRA notes that Dr Stanford's presumption is substantially displaced by the evidence of Dr Murray, whose evidence states that employers overwhelmingly grant flexible working arrangements when they are requested.

Conclusion as to expert evidence

[72] NRA repeats and relies on the observations made at paragraph [11] above, and asserts that whilst the ACTU has led extensive evidence as to the benefit of flexible working arrangements, the inclusion of flexible working arrangements in the *Fair Work Act 2009* and the Modern Awards for the last seven years makes such evidence largely irrelevant.

[73] What the ACTU needed, and failed, to show was evidence supporting a variation of the right already granted under s 65 of the *Fair Work Act 2009*, which would completely remove collaboration and discussion from the question of flexibility.

[74] Ultimately, the ACTU has failed to lead any expert evidence to support the notion that the views of the employer are irrelevant to the question of an individual employee's request for flexible working arrangements.

[75] As such the expert evidence of the ACTU should be largely disregarded save as outlined in these submissions.

Lay evidence

[76] The ACTU also led evidence from 11 lay witnesses:

[a] Ms Katie Routley (Exhibit ACTU7);

[b] Ms Sherryn Jones-Valada (Exhibit ACTU8);

[c] Ms Sacha Hammersley (Exhibit ACTU9);

[d] Ms Jessica van der Hilst (Exhibit ACTU10);

[e] Ms Michelle Ogulin (Exhibit ACTU11);

[f] Ms Monica Bowler (Exhibit ACTU12);

[g] Ms Nicole Mullan (Exhibit ACTU13);

[h] Ms Andrea Sinclair (Exhibit ACTU14);

[i] Mr Perry Anderson (Exhibit ACTU15);

[j] Witness 1 (Exhibit ACTU16);

[k] Ms Ashlee Czerkesow (Exhibit ACTU17).

[77] Of these witnesses, only the following were subject to cross-examination:

[a] Ms Katie Routley;

[b] Ms Sherryn Jones-Valada;

[c] Ms Sascha Hammersley;

[d] Ms Jessica van der Hilst;

[e] Ms Ashley Czerkesow.

[78] The ACTU also filed written evidence of Ms Julia Johnson, however withdrew Ms Johnson's statement. As such NRA will not comment on Ms Johnson's evidence.

General observations of the lay evidence

[79] NRA notes that of the 11 lay witnesses put forward by the ACTU in support of its application to vary all Modern Awards, only two of these witnesses[26] (18.18% of all lay witnesses relied on by the ACTU) are employed under a Modern Award.

[80] One of these witnesses[27] is employed by the Queensland Government through the State Department of Education (Education Queensland), and is therefore not a national system employee.

[81] The remaining eight lay ACTU witnesses (72.72% of ACTU lay witnesses) are employed under an enterprise agreement.

[82] As this application is to determine the rights and entitlements of employers and employees under the Modern Awards, the Full Bench should exercise extreme caution when considering the probative value of the evidence of employees who are excluded from the Modern Award system.

[26] Exhibits ACTU13 and ACTU14
[27] Exhibit ACTU15

[83] The evidence of those employees excluded from the Modern Award system is relevant only insofar as it goes towards their personal experience of flexible working arrangements under s 65 of the *Fair Work Act 2009*.

Written evidence alone

[84] Of those lay witnesses relied upon by the ACTU, six were not subject to cross examination and provided written evidence alone.

Ms Michelle Ogulin

[85] Ms Ogulin is employed under an enterprise agreement rather than a Modern Award[28].

[86] The written evidence of Ms Ogulin, insofar as it pertains to her ability to obtain flexible working arrangements, demonstrates her employer as one that generally engaged in a full and frank dialogue with Ms Ogulin regarding her maternity leave and return to work from maternity leave[29].

[87] Ms Ogulin appears to use her statement as a platform to express a grievance with the consultation and restructuring process undertaken by her employer approximately one month after her return to work[30].

[88] Whilst Ms Ogulin may be aggrieved by this restructuring process, it is separate and distinct from her ability to request or obtain flexible working arrangements.

[89] Ms Ogulin's evidence is that her employer did exactly what it was supposed to with respect to flexible working arrangements, in that it engaged in discussions with her and came to a mutually agreeable resolution.

Ms Monica Bowler

[90] Ms Bowler is employed under an enterprise agreement rather than a Modern Award[31].

[91] Ms Bowler's evidence is that she made the personal decision, at the end of her parental leave for her first child, to return to work for four days a week at a lower role than her pre-maternity leave role. Ms Bowler cites the longer hours needed for her previous role of Supervisor, the desire to not put her child in child care, and a desire to reduce stress[32].

[92] Ms Bowler also states that her employer readily agreed to flexible working arrangements when she returned to work following the birth of her second child[33].

[93] It should be noted that the enterprise agreement under which Ms Bowler is employed requires that the hours of work for an employee returning from maternity leave are by agreement between the employer and the employee[34]. Ms Bowler did not, and does not, have an unabrogated right to demand specific hours of work.

[94] Ms Bowler's evidence of her experience of flexible working arrangements is that her employer engaged in discussions with her and came to a resolution which was acceptable to both Ms Bowler and the employer. The Full Bench should consider her evidence as indicative of employers taking a considered and deliberative approach to the matter of flexible working arrangements.

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[28] Exhibit ACTU11, paragraph [2]
[29] Ibid at paragraphs [4] to [11]
[30] Ibid at paragraphs [12] to [20]
[31] Exhibit ACTU12, paragraph [2]
[32] Exhibit ACTU12 at paragraphs [11] and [12]
[33] Ibid at paragraph [16]
[34] Exhibit ACTU12, Attachment A, Appendix A, clause 1.7(b)

Ms Nicole Mullan

[95] Ms Mullan is one of the very few ACTU lay witnesses employed under a Modern Award[35].

[96] Ms Mullan's evidence is that when she made a request to return to work part-time following maternity leave, her employer readily engaged in discussions with her about her request. The employer asked if Ms Mullan was able to vary her proposed Thursday working hours, to which Ms Mullan agreed[36].

[97] Ms Mullan's evidence is that the entitlement to flexible working arrangements under the *Fair Work Act 2009* and the Modern Award resulted in an outcome which was mutually agreeable to both employer and employees.

[98] As such, Ms Mullan's evidence, which is one of the few items of lay evidence directly considering any Modern Award, is that the existing provisions providing flexible working arrangements are completely adequate.

Mr Perry Anderson

[99] Mr Anderson is employed by Education Queensland, a department of the Queensland Government.

[100] As the Queensland Government did not refer its industrial relations powers with respect to government employees to the Federal jurisdiction, Mr Anderson is not a national system employee and cannot provide any evidence relevant to the matters that this Full Bench must consider.

[101] As such NRA submits that Mr Anderson's evidence should be disregarded entirely by the Full Bench.

Ms Andrea Sinclair

[102] Ms Sinclair is one of the few lay witnesses relied on by the ACTU in support of its application who is employed under a Modern Award[37].

[103] Ms Sinclair's evidence is that her request for flexible working arrangements was refused on business grounds, at least in its original terms.[38]

[104] However, Ms Sinclair was granted what flexibility her employer felt it was able to offer, namely the provision of six weeks of part-time work following her return from maternity leave[39].

[105] Whilst Ms Sinclair may feel that her employer should have been able to provide more flexibility, the following matters from Ms Sinclair's statement need to be taken into consideration:

[a] she was one person in a two-person store[40];

[b] Ms Sinclair's assessment of flexible working arrangements appears to be based on the misconception that it was the obligation of her employer to approach her about such arrangements[41];

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[35] Exhibit ACTU13 at paragraph [2]
[36] Ibid at paragraphs [10] to [12]
[37] Exhibit ACTU14 at paragraph [7]
[38] Ibid at paragraph [15]
[39] Ibid at paragraph [17]
[40] Ibid at paragraph [8]
[41] Ibid at paragraph [9]

[c] Ms Sinclair's assessment of what her employer *should* be able to offer is made having regard for her discussions with a single other employee[42]; there is nothing in Ms Sinclair's evidence to suggest that:

[i] she had any appreciation of the wider business concerns; or

[ii] that she had discussed the prospect of a job share arrangement (that she had discussed with that employee) with the relevant decision makers.

[106] As such Ms Sinclair's evidence of her experience of flexible working arrangements under the existing regulatory scheme ought to be approached with caution, as it evidences various flaws in Ms Sinclair's approach to seeking flexible working arrangements.

Witness 1

[107] As a relatively late entrant into these proceedings, NRA has not had the benefit of the evidence of the ACTU's Witness 1. Time constraints have prevented NRA from obtaining this, and as such NRA makes no comment on the evidence of Witness 1.

[108] It should be noted that for the purposes of the percentages stated in paragraphs [79] to [81] above, NRA has presumed that Witness 1 is employed under an enterprise agreement in line with the majority of ACTU lay witnesses.

[42] Ibid at paragraph [18]

Written and oral evidence

[110] Of the lay witnesses relied upon by ACTU, five were subject to cross-examination on their written evidence.

Ms Katie Routley

[111] Ms Routley is employed under an enterprise agreement, not any of the Modern Awards which are the relevant instruments in this application[43].

[112] Although Ms Routley's experience with her employer's decision not to grant her request for flexible working arrangements is regrettable, no determination of this Full Bench will have any effect on the processes and procedures applied by Ms Routley's employer in relation to this or any similar request.

[113] Ms Routley's evidence is that she 'presumed' her employer would be able to offer part-time employment given her previous employment at other schools operating under different enterprise agreements or Modern Awards[44].

[114] As such Ms Routley's evidence should be taken only as evidence of a single employee engaged under an enterprise agreement in a business which has an operational tendency to avoid part-time employment.

Ms Sherryn Jones-Valada

[115] Ms Jones-Valada is employed under an enterprise agreement, not any of the Modern Awards which are the relevant instruments in this application[45].

[116] The evidence of Ms Jones-Valada is that when she made her request to return to work part-time, her employer engaged in discussions with her in an attempt to find a mutually agreeable solution[46].

[117] Ms Jones-Valada also deposes that the requirements of child care providers also had a significant impact on her ability to negotiate an acceptable flexible working arrangement[47]. Ms Jones-Valada orally deposed that obtaining child care which she considered acceptable was also a significant factor[48].

[118] Whilst Ms Jones-Valada describes her manager as uncompassionate[49], it is clear from her evidence that her manager made efforts to accommodate Ms Jones-Valada's situation despite the manager's personal feelings on the matter.

[119] As such Ms Jones-Valada's evidence should be taken as evidence of an employer attempting to meet the needs of their employee whilst also balancing the operational requirements of the business, and the effect of external factors such as child care.

Ms Sacha Hammersley

[120] Ms Hammersley in employed under an enterprise agreement, not any of the Modern Awards which are the relevant instruments in this application[50].

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[43] Exhibit ACTU7 at paragraph [1]
[44] Transcript, 13 December 2017 at PN1020
[45] Exhibit ACTU8 at paragraph [2]
[46] Ibid at paragraphs [9] to [16]; Transcript, 13 December 2017 at PN1140
[47] Ibid at paragraphs [15] to [16]
[48] Transcript, 13 December 2017 at PN1107 – PN1108
[49] Transcript, 13 December 2017 at PN1135
[50] Exhibit ACTU9 at paragraph [2]

[121] Ms Hammersley's written evidence is that each time she sought to return to work from maternity leave, she engaged in discussions with her employer about part-time working arrangements; after some negotiation, a mutually agreeable resolution was achieved each time[51].

[122] Ms Hammersley's evidence is that her employer acted reasonably, rationally, gave due regard to her requests, and where necessary engaged in discussions to reach a mutually agreeable outcome.

Ms Jessica van der Hilst

[123] Ms van der Hilst in employed under an enterprise agreement, not any of the Modern Awards which are the relevant instruments in this application[52].

[124] Ms van der Hilst's evidence is that her requests for flexible working arrangements were readily and happily approved by her employer[53].

[125] As such Ms van der Hilst's evidence should be taken as an example of existing flexibility provisions being fully adequate to their task.

Ms Ashlee Czerkesow

[126] Ms Czerkesow deposes to her period of employment under an enterprise agreement, not any of the Modern Awards which are the relevant instruments in this application[54].

[127] Ms Czerkesow's evidence is that her employer engaged in discussions with her regarding flexible working arrangements, but due to the operational requirements of the business was limited in what flexibility options it could pursue[55].

[128] Ms Czerkesow also deposes to the difficulties encountered by her in obtaining child care, including being required by the child care provider to pay for more child care than she needed[56].

[129] As such, whilst Ms Czerkesow's evidence demonstrates that not all workplaces are able to give the exact alterations that employees may wish, and that the external factor of the availability and cost of child care is also a significant determinative factor.

CONCLUSION AS TO THE EVIDENCE OF THE ACTU

[130] The evidence relied on by the ACTU is all excellent evidence in support of flexible working arrangements.

[131] It is not, however, any substantial evidence in support of the ACTU's application in this matter.

[132] The expert and lay evidence of the ACTU is that flexible working arrangements to accommodate parental and caring responsibilities of employees already exist, are beneficial to the economy, and existing provision for such arrangements, for the most part, work effectively to balance the needs of the employee and the employer so that the parties can reach a mutual agreement.

[133] There has been no evidence led by the ACTU to support why clauses X.1 and X.2 of its proposed variation are necessary given the current regulatory scheme, on the ACTU's own evidence, appears to be operating effectively.

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[51] Ibid at paragraphs [9] to [11]
[52] Exhibit ACTU10 at paragraph [2]
[53] Ibid at paragraphs [10] to [11]
[54] Exhibit ACTU16 at paragraph [2]
[55] Ibid at paragraphs [15] to [25], [29]
[56] Ibid at paragraphs [21], [24], [25]

[134] There has been no evidence whatsoever led by the ACTU to give any reason why the views and operational requirements of the employer need to be completely disregarded in making flexible work arrangements, as contemplated in the proposed clause X.3.

[135] The ACTU has made an excellent case for s 65 of the *Fair Work Act 2009*. Unfortunately for the ACTU, that argument ended about eight years ago.

[136] As such NRA submits that the ACTU has failed to lead any evidence to support the substance of its application, and as such the application must be dismissed.

Dominique Lamb
Chief Executive Officer
National Retail Association

Alexander Millman
Lawyer/Senior Workplace Advisor
National Retail Association