From: Sophie Ismail [mailto:sismail@actu.org.au]
Sent: Wednesday, 10 May 2017 1:45 PM
To: AMOD
Cc: 'Ruchi Bhatt'; Julian Arndt; 'Nigel Ward'; Brent Ferguson; Chambers - Ross J
Subject: AM2015/2 - Family Friendly Working Arrangements

Dear AMOD team,

Below is a link to a cloud drive which contains the ACTU's initial submissions (also attached to this email) and witness evidence for filing in this matter.

The ACTU requests that Witness 1's statement **not be published** until it has been tendered (at which point we will seek the appropriate confidentiality orders) because it contains sensitive information about his children, and we are concerned that despite the redactions the witness's identity may still be discernible from his evidence.

The following evidence is filed:

1. Expert Statement of Professor Siobhan Austen
2. Expert Statement of Dr Ian Watson
3. Expert Statement of Dr Jill Murray
4. Witness Statement of Andrea Sinclair
5. Witness Statement of Ashlee Czerkesow
6. Witness Statement of Jessica van der Hilst
7. Witness Statement of Julia Johnson
8. Witness Statement of Katie Routley
9. Witness Statement of Michelle Ogulin
10. Witness Statement of Monika Bowler
11. Witness Statement of Nicole Mullan
12. Witness Statement of Perry Anderson
13. Witness Statement of Sacha Hammersley
14. Witness Statement of Sherryn Jones-Vadala
15. Witness Statement of Witness 1

The link is to the cloud drive is here:

[redacted].

The password is:

[redacted]

You should find three folders entitled 'Submissions', 'Lay' and 'Expert', with sub-folders marked with each witness's name containing their statement and attachments. Please let me know if you have any difficulty accessing the material.

The employer parties were served with the witness evidence on 8 May, and are copied to this email.

Yours sincerely,

Sophie

Sophie Ismail
Legal and Industrial Officer

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The ACTU respectfully acknowledges that our building stands on the lands of the traditional owners and continuing custodians of Melbourne, the Boon Wurrung and Woi Wurrung language groups of the greater Kulin Nation.

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

SUBMISSIONS
OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 9 May 2017

D No: **55/2017**

Lodged by: The Australian Council of Trade Unions

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INTRODUCTION

1. The ACTU is seeking to vary all modern awards[1] to provide employees with an entitlement to temporary reduced hours to accommodate their parenting and/or caring responsibilities. Underlying the application is the need – widely acknowledged by employees, employers, and governments – to assist employees to reconcile work and family responsibilities while maintaining strong connections to the workforce.

2. Australia has one of the highest rates of part-time work in the developed world, but not all part-time work is equal. Men's and women's labour force participation is relatively equal until childbirth, when there is a dramatic divergence in employment. The majority of women work part-time until their children are school aged, whereas men's employment remains steady, with very high rates of full-time employment compared to their wives and partners. This divergence has negative ramifications for women's lifetime earnings and superannuation, and more broadly, for the national economy. Existing regulatory approaches are not meeting the needs of parents and carers, because access to flexible working arrangements is arbitrarily and inequitably granted, unable to be enforced in most cases, and even when granted, can involve occupational downgrading in the form of less secure and lower status work.

3. Family friendly work arrangements cannot alone solve the problem of women's underrepresentation in paid work and overrepresentation in unpaid work. But for as long as Australian women continue to do the majority of unpaid child-rearing and care work to the detriment of their connection with the labour force, there is a strong need for structural reform to enable greater and more secure workforce participation for parents and carers over the life cycle.

4. Twelve years ago, in the last test case before the advent of Work Choices, the Full Bench of the Australian Industrial Relations Commission wrote that "*achieving a balance between work and family is fundamental to Australia's national interest and to a cohesive, productive society*".[2] While much has changed in the industrial landscape in 12 years, it is the ACTU's submission that the importance of balancing work and family to Australia's national economic interest, and to the interests of employees and employers, has only strengthened. The ACTU's proposed Family Friendly Working Hours clause is a significant step towards achieving that goal.

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1 With the exception of the *Fire Fighting Industry Award 2010*.

2 *Parental Leave Test Case 2005* (2005) 143 IR 245, [76].

5. In this submission, *flexible working arrangements* and *family friendly working arrangements* are used interchangeably and mean any arrangement between an employer and employee that permits the employee to meet their parenting or caring obligations while also participating in paid work.

6. These submissions address the following matters:

Part A – The Statutory Framework

1 *Relevant principles*

2 *The industrial history of flexible work arrangements*

3 *Necessity*

Part B –Parenting, Caring, and the Workforce

1 *The Australian population and the Australian labour force*

2 *The impact of parenthood on patterns of employment*

3 *The economic impact of parenthood*

4 *The inadequacy of existing regulation*

Part C – Family Friendly Working Hours

1 *The positive impact of a guaranteed right to family friendly working hours*

2 *The operation of the proposed clause*

3 *Meeting Australia's international obligations*

Part D – The Statutory Tests

1 *Sections 3 and 578 of the FW Act*

2 *The modern awards objective*

3 *Conclusion*

A THE STATUTORY FRAMEWORK

1 *Relevant principles*

7. The applicable principles governing the task of the Fair Work Commission (**the Commission**) in conducting the four yearly review of modern awards are largely uncontroversial.

8. The requirement to conduct the four yearly review is contained in s. 156 of the *Fair Work Act 2009* (Cth) (**FW Act**). The four yearly review is essentially a regulatory function. The Commission is not creating an arbitral award in settlement of an *inter partes* industrial dispute,[3] and is not constrained by the terms of a particular application.[4]

9. The Commission must review each modern award in its own right, but this does not prevent the Commission from reviewing two or more modern awards at the same time.[5] In 2014, both this application and the ACTU's proposed family and domestic violence leave clause (AM2015/1) were designated as common issues.[6] A matter identified as a common issue is to be determined by a Full Bench as a 'stand alone' proceeding, as distinct from having the issue determined on an award-by-award basis during the Award stage of the review,[7] and may result in the Full Bench issuing determinations varying particular modern awards or issuing statements of principle that may be considered when reviewing individual awards.[8]

10. In addition to s. 156, a range of other provisions in the Act are relevant to the review.[9] Those provisions include the objects of the Act (s. 3), the modern awards objective (s. 134(1)), and the general provisions relating to the performance of the Commission's functions and exercise of powers (ss. 577 and 578).

11. A term should be included in a modern award "*only to the extent necessary to achieve the modern awards objective*".[10] The determination of what is 'necessary' requires the Full Bench

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3 *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406 (***Annual Leave Decision***), [156] (Ross P, Harrison SDP, Hampton C).

4 *4 Yearly Review of Modern Awards – Fire Fighting Industry Award* [2016] FWCFB 8025 (***Fire Fighting Award Decision***), [21] (Ross P, O'Callaghan SDP, Wilson C).

5 FW Act s. 156(5).

6 [2014] FWC 8583, [29].

7 *Annual Leave Decision*, [4].

8 *4 Yearly Review of Modern Awards – Common Issues* [2014] FWC 1790, [6].[

9 *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Jurisdictional Issues Decision***), [10].

10 FW Act, s 138.

to form "*a value judgment*" based on the considerations delineated in s. 134(1) of the FW Act,[11] and having regard to the evidence and submissions directed to those considerations.

12. The exercise of forming a value judgment about what modern award terms are 'necessary' does not take place in a vacuum. The general provisions relating to the Commission's performance of its functions apply to the four yearly review. Section 578 requires the Commission to take into account the objects of the Act and of any part of the Act. It states:

> **578** In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:
>
> (a) the objects of this Act, and any objects of the part of this Act; and
>
> (b) equity, good conscience and the merits of the matter; and
>
> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

13. The object of the FW Act is set out in s. 3, which provides:

> **3** The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses.

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[11] *Jurisdictional Issues Decision*, [36].

14. The object of the part of the Act relevant to the review of modern awards is set out in s. 134(1) of the Act, which provides:

> **134(1)** The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the ***modern awards objective***.

15. The factors in the modern awards objective at ss. 134(1)(a) to (h) are "*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*".[12]

16. The modern awards objective is very broadly expressed, and the criteria "*do not set any standard against which a modern award could be evaluated"*. Many criteria are properly described as "*broad social objectives*."[13] No particular weight should be attached to any one consideration over another; and not all of the matters identified in s. 134(1) will necessarily be relevant to a particular proposal to vary a modern award.[14]

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12 *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

13 Ibid.

14 *Annual Leave Decision*, [19], [20].

17. To the extent there is any tension between some of the considerations in s. 134(1), "*the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.*"[15] Further, while the Commission must take the s. 134 considerations into account, the relevant question is whether the modern award, together with the NES, provides a guaranteed *fair and relevant* minimum *safety net* of enforceable terms and conditions of employment.[16]

18. 'Fairness' is to be assessed from the perspective of both employees and employers.[17] 'Relevance' is to be assessed by reference to contemporary standards.[18]

19. Central to the task of the Commission in conducting the four yearly review is the notion that modern awards, together with the NES, form part of the 'safety net' of minimum terms and conditions of employment. The safety net is protective in nature.[19] It is an inherent component of the concept of a 'safety net' that minimum terms and conditions are guaranteed and enforceable, and this is reflected in the words of s. 134 of the FW Act. Put another way, minimum standards without enforcement mechanisms are not properly protective.

20. As set out in *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, variations to modern awards must be justified on their merits, but the extent of the merit argument required will depend on the circumstances. Where significant changes are sought, and where merit is "*reasonably contestable*", a proposed variation "*should be supported by an analysis of the relevant legislative provisions, and where feasible, probative evidence*."[20] The need for a stable modern award system supports the proposition that a party seeking to vary a modern award in the four yearly review must advance a merit argument in support of the proposed variation.[21]

21. The Commission's power to order that all modern awards be varied to include the ACTU's Family Friendly Working House clause is in s. 139(1)(b) of the Act, which provides that

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15 *Annual Leave Decision*, [20].

16 *Fire Fighting Award Decision*, [28].

17 *4 Yearly Review of Modern Awards – Stevedoring Industry Award* [2015] FWCFB 1729 (Watson VP, dissenting), [96].

18 *Fire Fighting Award Decision*, [29].

19 *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (Ross P, Catanzariti VP, Asbury DP, Hampton C and Lee C) (***Penalty Rates Decision***), [123]–[124].

20 *Penalty Rates Decision*, [52], [111(b)].

21 *4 Yearly Review of Modern Awards – Common Issue – Award Flexibility* [2015] FWCFB 4466 (Ross P, Smith DP and Roberts C) (***Award Flexibility Decision***), [14].

modern awards may contain terms about "*the facilitation of flexible working arrangements, particularly for employees with family responsibilities*".

2 *The industrial history of flexible work arrangements*

22. In conducting the four yearly review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue.[22]

23. Many of the statutory family friendly work entitlements in Australia have their genesis in the industrial tribunal, including:

    (a) Parental leave, including for casual employees – now in Division 5 of Part 2-2 of Chapter 2 of the FW Act .[23]

    (b) The extension of sick leave and annual leave for use by parents and carers, now in s. 97(b) of the FW Act.[24]

    (c) A right to refuse overtime on the grounds of family responsibilities,[25] now in s. 62 of the FW Act.

    (d) The right to request part-time work for parents and carers,[26] now in s. 65 of the FW Act.

24. The Full Bench of the Australian Industrial Relations Commission (**AIRCFB**) provided an overview of the history of these cases in the *Parental Leave Test Case 2005* (2005) 143 IR 245 (***Parental Leave Test Case***).[27] The issues that are relevant to these cases appear with a degree of repetition in each decision, and remain of central relevance to this review. They are:

    (a) The female labour force participation (**LFP**) rate has increased substantially over time.

    (b) The work of caring for young children, in particular, is substantial and is largely borne by women, regardless of their LFP.

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22 *Jurisdictional Issues Decision*, [27].

23 Per *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (*Maternity Leave Case)* (1979) 218 CAR 120; *Re Clothing and Allied Trades Union of Australia (Clothing Trades Adoption Leave)* (1985) 298 CAR 321; the *Parental Leave Case* (1990) 36 IR 1; and the *Parental Leave – Casual Employees – Test Case (Re Vehicle Industry – Repair, Services and Retail Award 1981)* (2001) 107 IR 71.

24 Ibid.

25 *Re Working Hours Case July 2002* (2002) 114 IR 390.

26 *Parental Leave Test Case 2005* (2005) 143 IR 245.

27 See [37]–[56].

(c) As a result, the majority of part-time workers are women with dependent children.

(d) Family responsibilities have a negative effect on employment patterns and earning prospects of women who are mothers.

(e) The increase in female LFP is associated with changing workforce demographics that make reconciling work and family responsibilities an issue of importance. Both men and women regard employment *and* parenthood as important aspects of their lives.

(f) Attempting to reconcile work and family obligations can create conflict and tension.

(g) There is general awareness, although not necessarily progress, of the need for men to share more of family and household responsibilities.

25. The ACTU's proposed variation includes a right to part-time work for full-time employees, or to reduced hours for employees who are already part-time or casual. The history of part-time work provisions in awards and modern awards is relevant because consideration of part-time work over the last 30 years has proceeded from the assumption that access to less than full-time working hours is essential for employees seeking to reconcile work and family commitments, as well as the notion that flexible and family friendly work arrangements are associated with greater productivity and efficiency for employers.

26. The evolution of part-time work as a commonplace term of employment can be traced back to at least the late 1980s, with the introduction of the structural efficiency principle, and to the 1990 decision of the Australian Industrial Relations Commission (**AIRC**) in *Parental Leave Case* (1990) AILR 284. Prior to those decisions, part-time employment was included in federal and state awards on a largely *ad hoc* basis, with provisions often tailored to the specific industry, and with restrictions to protect the position of full-time employees.[28]

27. The structural efficiency principle was introduced by the *National Wage Case* decision in 1988, and was part of a package of wage fixation principles designed to increase efficiency of industry.[29] It was perceived that greater competition and productivity was necessary, and that awards should be 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

[28] See, eg, the discussion of the history of part-time employment in the 1983 decision of the AIRC in *Application by the Motor Traders' Association of New South Wales & Ors to vary the Vehicle Industry – Repairs Services and Retail – Award (1980)* 246 C.A.R. 21; and the 1983 decision of the ACA Commission in *Application by Cadbury Schweppes Pty Ltd to vary the Confectioners' Award (1981)* 261 C.A.R 99.

[29] *National Wage Case August 1988* (Print H400).

principle, and as a result, the issue of part-time (and casual) employment was regarded by the Full Bench as an issue to be considered by the parties for inclusion in awards.

28. The structural efficiency principle was applied by the Full Bench as a precondition for parties seeking the minimum wage increases in awards. In the *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.[30]

29. According to a 2008 Working Paper published by the Productivity Commission, the structural efficiency principle encouraged more flexible work practices, including part-time employment, and resulted in an increased take-up of part-time employment provisions in awards.[31]

30. Shortly after the introduction of the structural efficiency principle, but during the period of its implementation, the AIRCFB handed down its decision in the *Parental Leave Case*.[32] Among the rights granted by the decision, the Full Bench gave employees taking parental leave the right to negotiate with their employer for part-time work as an alternative to an immediate return to full-time work. The *Parental Leave Case* created a model clause for parental leave, of which the right to negotiate part-time work was a sub-clause. In making its decision, the Full Bench observed that "*there are a number of reasons why part-time work should be more generally available for both men and women*".[33]

31. Consistent with this, the AIRCFB observed in the *Personal/Carer's Leave Test Case* (1995) 57 IR 121 that "*part-time employment is one of the ways in which families reconcile their work and family commitments*" and that "*the evidence shows an employee preference for part-time work, particularly among women*."[34]

32. In 1996, the AIRC began to conduct the award simplification process required by the *Workplace Relations and Other Legislation Amendment Act 1996* (**WROLA Act**).

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

31 Productivity Commission, 'Part Time Employment: the Australian experience' (Productivity Commission Staff Working Paper, June 2008), 51.

32 *Parental Leave Case* (1990) AILR 284.

33 *Parental Leave Case* (1990) AILR 284, 8.

34 *Australian Liquor, Hospitality and Miscellaneous Workers' Union & Others/Personal/Carer's Test Case – Stage 2* (1995) 57 IR 121.

Relevantly, the WROLA Act provided that the AIRC must ensure, where appropriate, that awards contained provisions enabling the employment of regular part-time employees.[35]

33. In December 1997, the Full Bench of the AIRC handed down the *Award Simplification Decision December 1997* (Print P5700), which, *inter alia*, published a draft order setting out nine guiding principles to parties as to the way in which awards should be reviewed and simplified in accordance with the allowable award matters identified in the WROLA Act. Relevantly, Principle 4 provided that when varying an award, the AIRC seek to ensure that at the end of the process the award has provisions enabling the employment of regular part-time employees.

34. In 2005, the AIRCFB handed down its decision in the *Parental Leave Test Case*. The ACTU sought variations to a number of awards regarding variations in hours, emergency leave, purchased leave, parental leave, and part-time provisions. For the purposes of these submissions, only the part-time provisions claim is relevant.

35. The part-time claim made by the ACTU in the *Parental Leave Test Case* proceedings was a provision that entitled an employee to work part-time following a period of parental leave until his or her child reached school age.[36] This claim was supported by State and Territory governments (with modifications), but opposed by the Commonwealth government and employer parties.

36. In addition to the ACTU claim, a number of employer groups made claims for award variations regarding flexible work. The Australian Chamber of Commerce and Industry (**ACCI**) and the National Farmers' Federation (**NFF**) sought, relevantly, award variations permitting agreement between employees and employers about variation to hours of work on the basis of family responsibilities.[37] The Australian Industry Group (**AIG**) sought, relevantly, an award variation permitting employees to work additional hours and 'bank' those hours to be taken off in the future. Like the ACCI and NFF proposal, the rationale for the AIG proposal was to assist employees to better balance work and family responsibilities.[38]

37. In considering the ACTU's claim for part-time provision, the AIRCFB considered it was appropriate to take steps to encourage employers to provide part-time work for carers,[39] and

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35 WROLA Act, Item 35.

36 See *Parental Leave Test Case*, [243].

37 *Parental Leave Test Case*, [257]. The claim was rejected by the AIRCFB on the basis that it would allow parties to opt out of various award obligations.

38 *Parental Leave Test Case*, [307].

39 *Parental Leave Test Case*, [254].

that it should take a positive step to assist employees to reconcile work and family responsibilities. Ultimately, the AIRCFB decided on a provision substantially in the form proposed by the State and Territory governments, which was in turn based on UK legislation. The provision determined by the AIRCFB read:

> **P. Right to request**
>
> P.1 An employee entitled to parental leave pursuant to the provisions of clause [ ] may request the employer to allow the employee:
>
> P.1.1 to extend the period of simultaneous unpaid parental leave provided for in clause [ ] up to a maximum of eight weeks;
>
> P.1.2 to extend the period of unpaid parental leave provided for in clause [ ] by a further continuous period of leave not exceeding 12 months;
>
> **P.1.3 to return from a period of parental leave on a part-time basis until the child reaches school age, to assist the employee in reconciling work and parental responsibilities.**
>
> P.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.
>
> (emphasis added).

38. Following the publication of the *Parental Leave Test Case* decision on 8 August 2005, the Commonwealth government enacted the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) (**Work Choices**). Work Choices became law on 27 March 2006, and amended the *Workplace Relations Act 1996* (Cth) to provide, relevantly, for 20 allowable award matters, and five Australian Fair Pay and Conditions Standards, neither of which included the right to request to part-time work following a period of parental leave.

39. In 2007, Williamson and Baird examined the approximately 2,200 federal awards that existed prior to Work Choices to analyse which of those awards were varied between 8 August 2005 and 27 March 2006 to incorporate the *Parental Leave Test Case* clauses (which included the clause quoted above, but also various other clauses that were resolved by conciliation during the proceedings).[40] They found that 428, or just under 20 per cent, of all federal awards were varied to include some form of *Parental Leave Test Case* clause, with 99 per cent including at least one of the parental leave clauses, and 76 per cent including all of the parental leave

[40] Sue Williamson and Marion Baird, 'Family Provisions and Work Choices: Testing Times' (2007) 20 *Australian Journal of Labour Law* 53.

clauses.[41] It was not possible to say how many employees were covered by the varied awards. The maintenance of those parental leave clauses in pre-reform awards was complex and depended on, for example, whether an employee became covered by an agreement that did not include the clause, or whether the employee was a state public sector employee.

40. The next significant event after the structural efficiency principle, award simplification, the *Parental Leave Test Case*, and Work Choices, was the award modernisation process and the enactment of the FW Act. By the time the award modernisation process had concluded, all but seven of the 122 modern awards had clauses permitting part-time work,[42] and all modern awards contained compulsory flexibility terms pursuant to s. 144 of the FW Act, including with permissible limitations pursuant to s. 144(4)(a) of the FW Act. Further, the FW Act contained a right to request part-time work for parents and carers, per s. 65 of the FW Act, and a return to work guarantee for employees returning from unpaid parental leave, per s. 84 of the FW Act. The limitations of the right to request in s. 65 of the FW Act is discussed at Part B4 of these submissions.

3 ***Necessity***

41. Modern work is still organised around an old idea: the default employee is unencumbered by parenting or caring responsibilities, and is available to work full-time throughout his or her life, and primary carers of children and others are required to 'work around' this model. The workaround is problematic, and the default model is outdated. The propositions that follow demonstrate both the existing problems, and how family friendly work arrangements can be a solution.

42. In 2014, the Australian Human Rights Commission (**AHRC**) published a national review of employees' experiences of pregnancy and return to work.[43] The AHRC conducted quantitative and qualitative surveys, and published research examining, among other matters, women's and men's experiences of returning to work after the birth of a child.

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41 Ibid, 59, 61.

42 Since the *Firefighters* decision, all but six of the 122 modern awards contain part-time work provisions, and each of the six awards that do not provide for part-time work do provide for casual or contract work – see *Fire Fighting Award Decision* at [63].

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

43. The AHRC made only four Recommendations arising out of its research. Recommendation 3 recommended that the government address gaps in the protection of rights within the current legislative and policy framework, including:

> … strengthening the 'right to request' provisions under s. 65 of the Fair Work Act 2009 (Cth) (FWA) by:
>
> - removing the qualification requirements in section 65(2)(a) of the FWA (the requirement for 12 months continuous service)
> - introducing a positive duty on employers to reasonably accommodate a request for flexible working arrangements
> - establishing a procedural appeals process through the Fair Work Commission for decisions relating to the right to request flexible working arrangements to ensure processes set out in the FWA have been complied with.

44. In conducting the quantitative survey, the AHRC (via Roy Morgan) interviewed 2,002 mothers and 1,001 fathers. The survey participants were drawn from the Department of Social Services' database as recipients of paid parental leave, the baby bonus, or the 'dads and partners' payment in 2011. Results from the Mother's Survey were representative of the experiences of working mothers aged 18–49 years with a child of approximately two years of age.[44] However, due to the relatively small numbers of fathers who accessed the 'dads and partners' scheme, the Father's Survey is not representative of all working fathers and partners who have had a child, and the results from the Father's Survey cannot be compared to the results of the Mother's Survey.[45]

45. The AHRC survey measured workplace discrimination at several points in time including, relevantly, after the birth or adoption of a child. Of the 1,576 or 78 per cent of survey respondents who returned to work after the birth or adoption of a child, 36 per cent reported discrimination when returning to work, with half of those reporting discrimination when requesting flexible working arrangements [46] Of the mothers who were still on leave or had not returned to work as an employee at the time of the survey, one in ten could not find work, or could not negotiate return to work arrangements.[47] The majority (70 per cent) of mothers who returned to work requested adjustments to their working hours, most commonly reduced hours, and the majority of requests (89 per cent) were granted.[48] It is clear that return to work arrangements are available and work for some women, but not all. Pocock et al have found

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44 AHRC, *Supporting Working Parents*, 24.

45 AHRC, *Supporting Working Parents*, 25.

46 AHRC, *Supporting Working Parents*, 29.

47 AHRC, *Supporting Working Parents*, 47.

48 AHRC, *Supporting Working Parents*, 47.

there are still a significant minority of workers who do not request family friendly work arrangements, including because they felt the workplace was openly hostile to flexible work and feared reprisals. The report of Dr Ian Watson found that family friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces.[49]

46. It is not sufficient to meet the claim of necessity by pointing to existing rights to flexible work, because, as set out below at Part B4 of these submissions, those rights are inadequate to meet the needs of many employees who require reduced hours for a period, but who wish to retain their pre-parenthood occupation and method of engagement. As Murray predicted in 2005, the "*imbalance of knowledge, power and resources which exists between many employers and employees*" has, in numerous instances, nullified the impact of the right to request.[50] There is a need for a shift in the balance of power between employees and employers when it comes to family friendly work arrangements. For too long, attempts to accommodate workers' family responsibilities have proceeded from the starting point that all employees will be available to work full-time, and any attempt to reconcile work and family commitments must make out a case to justify departure from that norm. The ACTU's application seeks to tilt the starting point to a more equitable and realistic position, where it is accepted that employees must reconcile work and family responsibilities, and to align workplace norms to the reality of workers' lives.

47. The ACTU's proposed family friendly work arrangements clause is necessary because:

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

(b) The work of caring for young children, in particular, is substantial and is largely borne by women, regardless of the nature of their pre-parenthood labour force participation. As a result, the majority of part-time workers are women with dependent children.

(c) The high levels of part-time work in Australia disguise the fact that many part-time positions are precarious, and do not offer secure employment that properly supports working parents and carers or allow them to re-enter the full-time workforce when they are able to do so.

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49 Report of Dr Ian Watson dated 4 May 2017 (**Watson Report**), Figures 3.7 and 3.11, and 128.

50 Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: the End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *Australian Journal of Labour Law* 325, 331–32.

(d) Family responsibilities have a negative effect on employment patterns and earning patterns of women who are mothers, and parenthood is associated with high rates of occupational downgrading that are not experienced by men after becoming fathers, or by women without children.

(e) Existing regulation regarding family friendly working arrangements is failing to meet the needs of working parents and carers.

(f) The AHRC Report found that discrimination against mothers in the workplace is 'pervasive': 36 per cent of women who returned to work after parenthood reported discrimination related to family responsibilities when returning to work, with half of those reporting discrimination when requesting flexible working arrangements,[51] and one in ten mothers still on parental leave could not find work, or could not negotiate return to work arrangements.[52]

(g) The economic and productivity benefits that flow to employees, employers, and the national economy from the increased female labour force participation of parents and carers associated with family-friendly working arrangements.

48. These matters are addressed in Parts B and C of these submissions.

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51 AHRC, *Supporting Working Parents*, 29.

52 AHRC, *Supporting Working Parents*, 47.

B PARENTING, CARING, AND THE WORKFORCE

1 *The Australian population and the Australian labour force*

49. The ACTU will rely on the evidence of Dr Ian Watson and Dr Siobhan Austen to set out the demographic profile of Australian workers, and specifically the population of working parents and carers who are assumed to benefit from family friendly work arrangements. The evidence of the lay witness who will be called by the ACTU provide powerful real-life stories that illustrate the statistics.

Australia in 2016

50. The Australian workforce has undergone a fundamental demographic shift since the early 1970s, largely associated with the rise of female labour force participation after marriage and children. This shift has shaped the workplace, with female employment, part-time work, and flexible work all now common features of the industrial landscape.

Population

51. In 2016, the Australian population was estimated at approximately 24 million people, composed of 11.9 million men and 12.1 million women.[53] The population has grown by nearly five million people since September 2000, with the largest increases over the period 2000–2016 among those in the age group spanning 55 to 70 years.[54]

52. The 'working age population', defined as persons aged between 15 and 64, was in 2016 nearly 16 million people, or 65.9 per cent of the total population.[55] The largest proportion of persons were in the 25 to 34 age range, comprising 33 per cent of the total working population.[56] However, because people over 65 are employed, labour force statistics are not limited to the working-age population, but rather focus on activity (in the sense of being in paid work or not).

Fertility rates

53. Fertility rates in Australia have declined since the peak of 3.6 babies per women in 1961. In 2002, the fertility rate had dropped below two babies per women, [57] but recent trends show the

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53 Watson Report, [21].

54 Watson Report, [21].

55 Watson Report, [26].

56 Watson Report, Table A2.

57 *Parental Leave Test Case*, [129].

fertility rate climbing between 2005 and 2016, with a sharp increase between 2005 and 2009, and another spike in June 2016. The average fertility rates between 2005 and 2015 were between 2.0 and 1.8 births per woman.[58]

54. Fertility rates are relevant in two ways. First, fertility rates provide some quantification of the number of employees who will need to balance family responsibilities with their working lives. Second, low fertility levels create an imbalance between the working age and the dependent population.

55. The ACTU does not suggest that family-friendly working hours are alone necessary to, or capable of, addressing declining fertility rates in Australia, but rather, are necessary to meet the needs of the employees who are having babies and need to continue working.

Ageing population

56. The ratio of people aged over 65 years to those of working age (between 15–64), or the number of dependents per 100 persons of working age, is described as the dependency ratio. A higher dependency ratio means a greater population of older people compared to people of working age. This has implications for workforce participation rates, because the higher the number of family members over 65, the more likely it is that a proportion of those people will have greater care needs, which in turn need to be met by the working population.

57. The dependency ratio in 1990 in Australia is increasing. The dependency ratio was 48.7 per cent in 2004 and had reached 51.7 per cent by 2016.[59]

<u>The Australian workforce</u>

Labour force participation rates

58. In the *Parental Leave Test Case*, the AIRCFB summarised the shift in workforce demographics since the late 1970s.[60] In 1978, total labour force participation (**LFP)** in Australia was 61.2 per cent, with 44 per cent of women and 80 per cent of men in the labour force. By 2004, total LFP had risen to 63.5 per cent, with 56 per cent of women in the labour force, an increase since 1978 of 12 percentage points, and 72 per cent of men in the labour force, a decrease since 1978 of eight percentage points.[61]

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58 Watson Report, [23]–[25].

59 Watson Report, Table 1.3, 5.

60 See *Parental Leave Test Case*, [77]–[99].

61 *Parental Leave Test Case*, [80], [83]

59. The Watson Report measures the employment ratio as the number of employed persons (12 million) over the civilian population over 15 years (19.7 million), producing an employment ratio in February 2017 of 61 per cent.[62] Measured this way, the employment ratio comprises 66.6 per cent of men and 55.7 per cent of women in the civilian population, a gender gap of 11 per cent.[63]

60. Using the unemployment rate as a measure, Austen puts the LFP rates of Australian women in February 2017 at 72.1 per cent and the male LFP at 82.1 per cent, a 10.5 percentage point gap, with employment rates peaking at 88 per cent for men in their 30s, and 75 per cent for women in their late 40s.[64]

61. Watson states that employment to population ratios "*are primarily influenced by gender, the life cycle, and the economic business cycle*."[65] Both measures of employment used by Watson and Austen reveal a gender gap of between 11 and 10.5 per cent overall in the labour force data for February 2017. The gender gap favours men's employment across the life cycle for all ages except for teenagers, with the highest differential between male and female employment occurring in the 30s – the gender gap measured by the employment ratio is as high as nearly 20 per cent during the peak child-rearing ages of 30–39.[66] 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,[67] suggesting that it is not formal qualifications, but other factors, that are impacting on women's diminished connection with the labour market over time.

Parenthood and labour force participation

62. Male and female LFP rates are converging, but they are not the same. The AIRCFB found in 2005 that having children and elder care affects female employment, while male participation rates are largely unaffected by parenthood or family caring responsibilities.[68] The picture has not changed significantly in the ensuing 12 years.

63. Although the 'traditional' family model of a full-time employed male breadwinner and female, stay-at-home housekeeper and primary carer has largely disappeared, there are still

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62 Watson Report, [48].

63 Watson Report, [57].

64 Dr Siobhan Austen, *The Effects of Parenthood and other Care Roles on Men's and Women's Labour Force Participation and Experiences of Paid Work* (**Austen Report**), [5].

65 Watson Report, [50].

66 Watson Report, Table 1.5, 18.

67 Austen Report, [15].

68 *Parental Leave Test Case*, [86]–[87].

considerable differences between men and women's workforce participation *after* childbirth. 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.

64. Household composition is relevant to labour force participation, because the availability of parents to care for children and others can impact the labour supply. Sole parents are far more likely to need family friendly work arrangements to maintain their connection to the labour market.

65. In 2002, 34 per cent of families had a father employed full-time and a mother employed part-time, whereas only 19 per cent of families had both parents employed full-time.[69] In 2016, there were about 5.6 million families living as couple families in Australia, and nearly one million sole parent families. The majority of employed female parents whose children were under 15 were working part-time.

66. In the case of couple families, both partners were employed in the majority (53.5 per cent) of cases, with only 15.6 per cent of families comprised of husband/partner in the labour force, and wife/partner not in the labour force.[70]

67. These figures develop greater meaning when compared to the statistics concerning couple families where both partners are of working age, and have dependent children. In families without dependent children, where the husband/partner worked full-time, 23 per cent of wives/partners worked part-time. By contrast, in families with dependent children, where the husband/partner worked full-time, 34.5 per cent of wives/partners worked part-time. This was the most common combination for working parents, with the next most common being both partners working full-time (24.2 per cent of wives/partners of full-time employed husbands/partners).

68. Overall, the majority of women in couples of working age *without* dependent children worked full-time (46 per cent, compared to 32 per cent of women working part-time), whereas the majority of women in couples of working age *with* dependent children worked part-time: 38 per cent compared to 29 per cent of women working full-time.[71] Thirty per cent of wives/partners with children are not in the labour force, compared to 19 per cent of those

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69 Cited in *Parental Leave Test Case*, [167].

70 Watson Report, [94].

71 Watson Report, Table 3.4.

without dependent children.[72] In the case of one parent families, just over half are employed, another 6 per cent are looking for work, and nearly 40 per cent are not in the labour force, with sole mothers more likely than sole fathers to be outside the labour force.[73]

69. Female labour force participation is closely correlated to the age of their youngest child. 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*."[74] 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.[75]

Increase in part-time employment

70. As observed by Austen, while labour force participation rates are key measures of the level of engagement of individuals in paid work, they are limited in that they do not distinguish between individuals' participation in full-time and part-time work. In February 2017, over 47 per cent of employed Australian women worked part-time, compared to 18.7 percent of Australian men, a percentage gap of close to 30 per cent.[76] The majority of those women working part-time are aged between 35 and 44, peak child-rearing years, with 47.1 per cent of women working part-time compared with only 8.8 per cent of men, a gender gap of 38.3 per cent.[77] High rates of part-time work among women is not a proxy for suitable flexible working arrangements – as the Grattan Institute stated, 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*".[78]

71. Part-time work is an important source of employment for women with dependent children (and at least theoretically, for men with dependent children as well). In 2004, Australian Bureau of Statistics (**ABS**) data demonstrated that 60 per cent of employed women with

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72 Watson Report, [99].

73 Watson Report, [101].

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

75 Watson Report, [113].

76 Austen Report, [7].

77 Austen Report, [9].

78 John Daley, C McGannon and L Ginnivan (2012), *Game-Changers: Economic Reform Priorities for Australia* (**Grattan Institute Report 2012**), 47.

children under 15 worked part-time, compared to around 30 per cent of women without children or living alone, who tend to be employed on a full-time basis.[79]

72. There has been considerable growth in the rates of part-time employment in Australia since 2000. 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.[80]

73. Australia's rates of part-time employment are high compared OECD countries.[81] Among OECD countries, only the Netherlands and Switzerland have higher part time rates.

74. In considering this data, it is important to keep in mind that 'part-time' employment refers to working less than 35 hours per week; it says nothing about whether the employee is engaged on a permanent or casual basis.[82] The Australian labour force is characterised by high rates of casual and fixed-term employment (between 27 and 33 per cent).[83] Austen reports 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.[84] 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.[85] Part-time employment is not all voluntary – in 2015, 29 per cent of part-time workers wished to work more hours.[86]

75. Watson found that the two key groups of workers who remain disproportionately represented in the casual workforce are those aged under 25, and women aged from 30 to 49 years, many of whom are parents working part-time.[87] By contrast, among men aged from 30 to 59, full-time permanent employment is still the norm.[88]

76. Working part-time (39 per cent) and flexible working hours (40 per cent) were the most common arrangements used by mothers to reconcile work and family. While 30 per cent of

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79 *Parental Leave Test Case*, [101] and Table 6, 273.

80 Watson Report, [44].

81 OECD, *Connecting People with Jobs: Key Issues for Raising Labour Market Participation in Australia*, 2017 (**OECD Report**), 15.

82 See Watson Report, Glossary, 87.

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

84 Austen Report, [11].

85 OECD Report, 27.

86 OECD Report, 15.

87 Watson Report, [63].

88 Watson Report, [64].

fathers utilised flexible work (ie, start and finish times) to accommodate family responsibilities, only five per cent of fathers worked part-time for this reason.[89]

77. 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.[90] Watson considers that the dominance of permanent full-time work for men aged between 30 and 59 may suggest that men are poorly placed to contribute effectively to parenting and caring without facing significant time pressures. However, using HILDA data, Watson found that 72 per cent of fathers thought they had formal access to permanent part-time work, suggesting that factors other than the perceived availability of entitlements are inhibiting the take-up of part-time employment by fathers.[91] The trend data suggests that the challenges faced by women in undertaking parenting and caring responsibilities lies in avoiding part-time casual jobs when part-time permanent jobs may be required.[92]

Caring responsibilities

78. The 1998 ABS Survey of Disability, Ageing and Carers identified 2.3 million carers in Australia, representing 13 per cent of people living in households. Women were the majority of those carers,[93] and a large number of people caring for the elderly, sick, and disabled, were also employees.[94] By 2012, the number of carers had grown to 2.7 million carers, with the majority (56 per cent) being women,[95] and just under half (1.3 million) of all carers being employed.[96] The age groupings of both male and female carers, mostly commonly in the 45 to 54 age group, "*suggests that managing the work and family balance*" is "*likely to be a challenging area amongst carers as well as parents*".[97] The data suggest 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.[98]

89 Watson Reports, [115].
90 Watson Report, [37].
91 Watson Report, [123]–[124].
92 Watson Report, [65].
93 Cited in *Parental Leave Test Case*, [153].
94 See *Parental Leave Test Case*, [156].
95 Watson Report, [142].
96 Watson Report, [147].
97 Watson Report, [143].
98 Watson Report, [152].

79. Austen found that in 2015, 71.8 per cent of all primary carers of individuals with disabilities, longer-term conditions, or older persons, were women. The LFP rate of those women was only 53.7 per cent.[99]

80. Although data is limited on the causal relationship between caring roles and LFP, studies have indicated that *increases* in informal care commitments have, on average, a detrimental effect on the chances of women retaining their paid work roles. However, this proposition differs depending on whether the women providing informal care is from a low or high income background: Austen reported that women in low-income households, on average, increase their attachment to paid work when informal care needs arise, in contrast to other women, who are more likely to drop out of paid work. Of those studies that found a negative impact on women's labour force participation rate associated with caring, it was also the case that women's engagement with paid work did not rebound when the informal care roles ended.[100]

2 ***The impact of parenthood on patterns of employment***

81. It is undeniable that parenthood is a key life event that is often greeted with joy (and perhaps some small trepidation). The profound emotional impact of parenthood, however, is also accompanied by profound economic consequences for individuals, families, and the national economy. This section outlines the key findings of Austen's report concerning the impact of parenthood and caring responsibilities on male and female employees' employment patterns and lifetime earnings.

82. Austen found that parenthood disrupts women's involvement in paid work, and on return to work, is associated with occupational downgrading. The disruptive effects of parenthood on women's employment and occupations contributes to a 'motherhood pay penalty' and ultimately, lower lifetime earnings and superannuation. By contrast, parenthood tends to strengthen men's attachment to full-time work, although occupational downgrading and lack of job security is a relatively common experience for those men who move from full- to part-time work to meet the needs of their families.

83. Women also take on the majority of informal caring roles, which has various impacts on workforce participation depending on levels of income. Although there is a lack of consensus among the literature about the impact of caring responsibilities on women's LFP, no studies showed a positive correlation.

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99 Austen Report, [59]–[60].

100 Austen Report, [66]–[68].

The impact of parenthood on female and male employees – a comparison

Labour force participation

84. Further to the LFP rates described above, Austen's examination of the 2014 Household, Income and Labour Dynamics in Australia Survey (**HILDA**) data demonstrated "*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.[101] 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.[102]

85. In addition to the findings reported in Austen, the AHRC found that of the mothers who reported experiencing discrimination at work during their pregnancy, 22 per cent did not return to the workforce as an employee. In contrast, only 14 per cent of mothers who did not experience discrimination at work during their pregnancy did not return to work. Thirty-two per cent of all mothers who were discriminated against at some point went to look for another job or resigned.[103]

Occupational downgrading

86. In her report, Austen considers the effects of parenthood on women's and men's transitions between full and part-time employment, and permanent to casual or fixed-term engagement. While there is a relatively small amount of literature addressing the particular issue of parents changing occupations or employers to achieve part-time work, Austen utilised the methodology established by the existing literature to conduct an analysis of HILDA data on employment transitions for employees aged 24–60 during the period 2001–2015.

87. As a result of this analysis, Austen found that "*parenthood is a source of instability in the engagement of women with paid work*",[104] and that "*the prevalence of occupational downgrading is relatively high for women who move from full-time to part-time work, and*

101 Austen Report, [22].

102 Austen Report, [69(c)].

103 AHRC, *Supporting Working Parents*, 33.

104 Austen Report, [48].

highest for women who change employers" when making this shift.[105] Specifically, the analysis of HILDA data found that:

(a) There is a relatively low rate of continuous full-time employment among Australian women, with a strong asymmetric pattern in the data on mothers' employment transitions.[106] There is relative stability and a strong persistence of full-time work in father's employment transitions.[107]

(b) The employment transitions of Australian women were characterised by a relatively high rate of transition to part-time work.[108] However, the year-on-year employment transitions of men were associated with a very high rate (74.4 per cent) of retention in full-time work.[109]

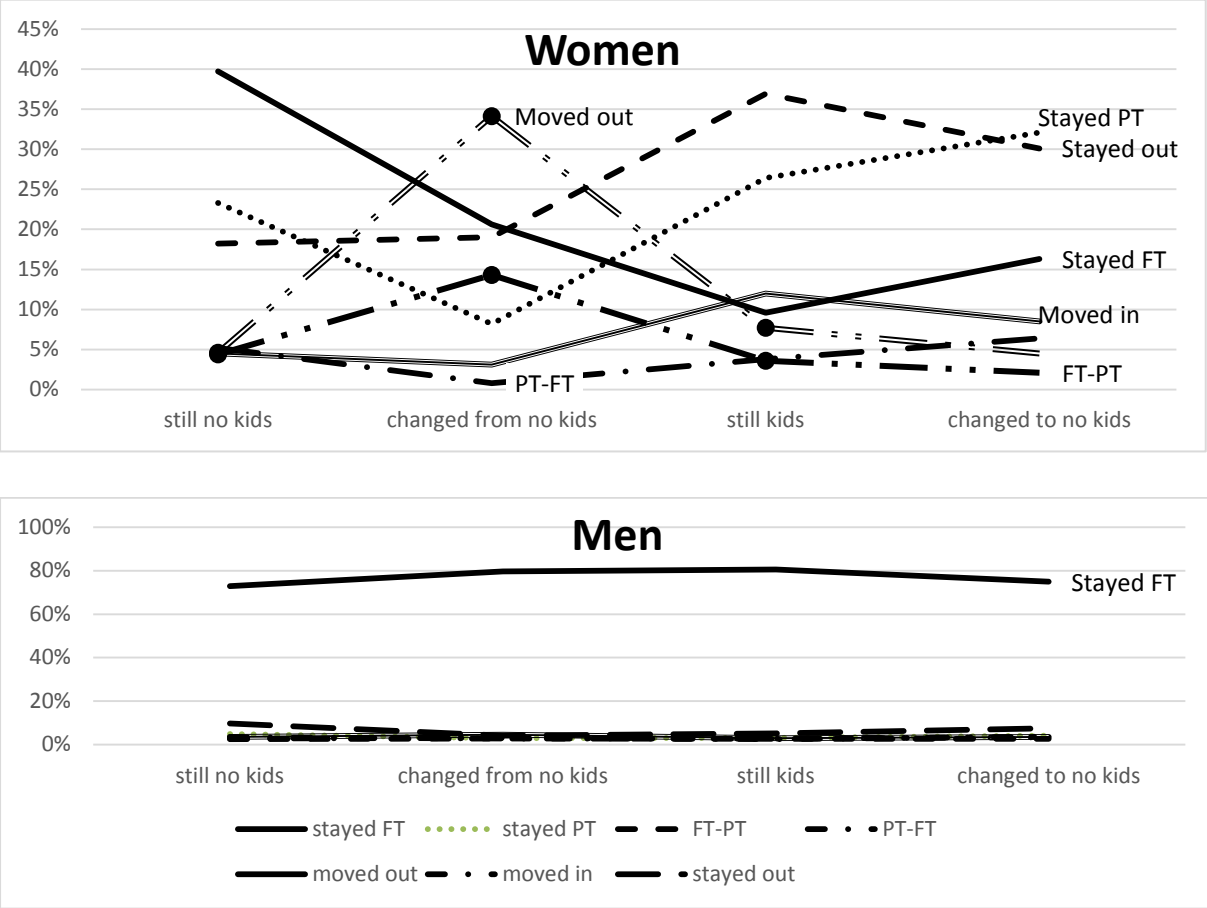
(c) The proportion of women who continue in full-time work across consecutive years falls dramatically to 13.8 per cent as a result of the presence of a new child in their household.[110]

(d) Approximately 18 per cent of women who move from full-time to part-time work move from permanent to casual work.[111] Although only a very small number of fathers transition from full- to part-time work, the prevalence of occupational downgrading is relatively high, with close to 30 per cent of fathers moving from full- to part-time work with the same employer reporting a change in contract type from permanent to casual.[112]

88. The contrast between men's and women's experiences of employment transitions over the life cycle is starkly illustrated by Figure 25 of the Austen Report, reproduced here:

105 Austen Report, [52].
106 Austen Report, [49], and see Figure 12; [43].
107 Austen Report, [75].
108 Austen Report, [45].
109 Austen Report, [73]–[74].
110 Austen Report, [46].
111 Austen Report, [56].
112 Austen Report, [77].

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



89. Watson also examined transitions in employment. Noting that all employees, not just parents, move through transitions from year to year, he nonetheless found that "*parenting can be costly in terms of job security*".[113] Only about five per cent of employees in full-time, permanent jobs who became parents did not retain their permanent full-time status after parenthood, whereas about 23 per cent of employees in part-time permanent positions lost that status after parenthood, moving into non-permanent positions. For those in permanent part-time jobs who did not become parents, the transition rate was much lower – only 19 per cent moved into non-permanent jobs.[114] These figures illustrate the necessity for the ACTU's Family Friendly Work Hours clause to be available to part-time employees as well, not just those wishing to move from full-time to part-time work.

113 Watson Report, [139].

114 Watson Report, [139], Table 3.10.

90. The OECD has described Australia's labour market as "*characterised by comparatively high job turnover and low job tenure among employees, with almost a fifth of employees employed on a casual contract*".[115] Using data from HILDA, the OECD found that 17.4 per cent of employees aged 20 to 64 separated from their employers each year over the period 2002 to 2014, but only 3.8 per cent of those employees were retrenched for economic reason or for cause.[116]

91. Occupational downgrading associated with post-motherhood workforce transitions are associated with job insecurity and periods out of work for women, which have a negative effect on lifetime earnings and superannuation.

Lay witness evidence

92. The ACTU will call evidence from the following lay witnesses in support of the proposition that returning to work in a less than full-time position after childbirth is associated with occupational downgrading:

(a) Michelle Ogulin;

(b) Sherryn Jones-Valada;

(c) Julia Johnson;

(d) Katie Routley.

3 ***The economic impact of parenthood***

93. The economic impact of parenthood and caring roles reflects the different employment roles occupied by employees who are parents of young children. As set out above, Austen found that over 47 per cent of employed Australian women work in part-time jobs compared to 18.7 per cent of employed Australian men. Reflecting the difference in hours worked, the gender pay gap in weekly earnings is 31 per cent. Regardless of hours worked, the gender pay gap in average rates of full-time pay in Australia remains high at 18.2 per cent. The differences in hours worked and the gender pay gap is compounded when assessing lifetime earnings and superannuation: in 2013–2014, there was a 53 per cent gap between the average individual superannuation account balance of men and women aged 50. These matters are addressed in detail below.

115 OECD Report, 16.

116 OECD Report, 20.

The gender pay gap

94. In the *Annual Wage Review 2015–2016* [2016] FWCFB 3500, the Full Bench expressly acknowledged the link between the gender pay gap, restrictive workplaces and structures (which by definition must include legal entitlements), and part-time and casual employment for workers with family responsibilities, stating:

> [545] The gender pay gap refers to the difference between the average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.
>
> [546] The causes of the gender pay gap are complex. Research and reviews of literature into this area have observed that only a proportion of the gender pay gap can be explained by productivity-related characteristics such as work experience or education. This work has identified that factors influencing the gender pay gap may also include:
>
> - differences in the types of jobs done by men and women, such as industry, occupation, location, method of setting pay and the levels of discretionary payments (bonuses, commissions, allowances, etc.);
> - structures and workplace practices which restrict the employment prospects of workers with family responsibilities, leading to higher part-time and casual employment and less training; and
> - the historic undervaluation of the work and skills of female dominated professions.
>
> (citations omitted).[117]

95. As noted above, for full-time Australian workers, the gender pay gap in Australia is 18.2 per cent, with the difference in weekly earnings being "*substantially larger than the gender pay gap*" at 31 per cent.[118]

96. The relationship between age and earnings is referred to in labour economics as the 'return to experience'. Age earnings profiles of Australian women and men reveal, on average, that individuals' earnings increase with age. However, Austen found that women's 'return to experience' are lower than men's, contributing to the gender pay gap.[119]

97. Austen examines the phenomenon of a pay gap between parents and others (the 'family pay penalty'). The lower wages of women with children is not due only to mothers having less work experience than other women (by reason of time out of the workforce), but that "*the*

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[117] After considering various methods of measuring the gender pay gap, the Full Bench held that it was around 17 per cent: *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [559].

[118] Austen Report, [17].

[119] Austen Report, [85].

family pay penalty derives from the effect of parenthood on the job and/or occupation continuity of women."[120] The recent study conducted for the Commission by Broadway and Wilkins concerning the incidence of low-paid work, found that the gender gap was only found to exist amongst older workers. Broadway and Wilkins linked the relatively low pay of older women to the effects of parenthood.[121]

98. These results are consistent with a report prepared in October 2016 by KPMG for the Diversity Council of Australia and the Workplace Gender and Equality Agency (**WEGA**), which examined the factors underlying the gender pay gap. Applying statistical analysis to the 2014 HILDA data, and acknowledging that the factors contributing to an individual's pay and differences in pay between individuals are complex and multi-faceted, holding the effects of all other factors constant, KPMG found that:

(a) Each full year of removal from the labour force reduces hourly pay by around 0.7 per cent.

(b) Industries and occupations with a high representation of male employees have higher levels of pay, with each 10 per cent increase in the ratio of men to women in an industry increasing the average wage by 1.9 per cent.

(c) Part-time workers earn on average 5.4 per cent less per hour than full time workers.[122]

99. KPMG found that by far the greatest contributing factor to the gender pay gap was sex discrimination (38 per cent), with the next two largest contributors being industrial and occupational segregation, representing 30 per cent, followed by years not working (21 per cent).[123] Women's share in part-time employment accounted for only four per cent of the gender pay gap, down from 14 per cent in 2007. KPMG suggested that one possible explanation for this is that between 2007 and 2014, across both genders, the largest increase in share of part time employees was in women within high income brackets.[124]

100. In its discussion about the forms of labour market discrimination, KPMG identified that:

> discrimination can be overt or systemic in nature. The existence of more embedded and structural discrimination … has remained fairly constant in the last

120 Austen Report, [88].

121 Austen Report, [89]–[90].

122 KPMG, *She's Price(d)less – The Economics of the Gender Pay Gap*, 2016 (**KPMG Report**), 11.

123 KPMG Report, Table 4.2, 12–13.

124 KPMG Report, 13.

> two decades … [with] many studies including that lower rates of return to education and experience are indicative of discrimination in the workplace.[125]

101. KPMG argue that "*the existence of constraints and the degree of workforce mobility faced by women around child bearing and rearing time, has the potential to represent a significant market failure and contributing factor to the gender pay gap*", pointing to research showing that the introduction of flexible working arrangements for both men and women may also enable families to have more choices in considering the role of primary care giving.[126]

Occupational segregation

102. Consistent with the *Annual Wage Review 2015–2016* decision and the KPMG Report, the Australian labour market is characterised by a high degree of occupational and industry segregation, with gender-based occupational segregation reflecting gender stereotypes. According to the WEGA, in 2016, the three occupational groups with the highest proportion of female employees were clerical and administrative workers, community and personal service workers, and sales workers (74.8, 68.8 and 60.7 per cent respectively). Unsurprisingly, these three groups had the lowest numbers of male employees, who were concentrated in machinery operation and drivers, technicians and trade workers, and labourers (90.9, 85.3 and 67.5 per cent respectively). The KPMG Report found that industries and occupations with high representation of male employees have higher levels of pay.[127]

<u>Lifetime earnings, superannuation and savings</u>

103. In her review of the relevant data, Austen found that "*the gender gap in pay, hours and labour force participation combine to produce a gender gap in the lifetime earnings of Australian men and women*".[128] 'Lifetime earnings' comprise the sum of the individual's earnings over the life course. There are no direct measures of lifetime earnings of Australian men and women, but researchers have been able to rely on cross-sectional data on age-earnings profiles to simulate data.[129] The findings from these studies show that the gender pay gap, differential returns to experience, and parenthood all contribute to predicted gaps in gross lifetime earnings between men and women.[130] Parenthood was also found to have a negative effect on categories of wealth such as savings.[131]

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125 KPMG Report, 27.

126 KPMG Report, 35.

127 KPMG Report, 11.

128 Austen Report, [18].

129 Austen Report, [94].

130 See discussion of relevant studies in Austen Report, [95]–[103].

131 Austen Report, Part 4.3.

104. Superannuation balances are proportional to lifetime earnings for most individuals. Australian women have considerably less superannuation than their male counterparts. Austen found that, among Australians with an individual superannuation account:

(a) Men have an account balance that is, on average, 53 per cent higher than women's by the age of 50.

(b) In 2012–2014, 45.9 per cent of women and 37.8 per cent of men aged over 65 had zero superannuation assets.[132]

105. Moreover, because of the effects of compound interest, the largest negative effect on superannuation will be associated with career interruptions relatively early in a person's working life.[133]

106. This material emphasises the importance of maintaining a lifetime connection to the workforce to ensure financial stability on retirement. It is apposite that the greater a woman's job insecurity and pay gap compared with men, the higher the prospects of her having low lifetime earnings, and low or no superannuation on retirement.

Caring responsibilities and work/life interference

107. The caring responsibilities on people attempting to reconcile family responsibilities and work contribute to high levels of work/life interference and can create conflict and tension. The right to work family friendly working hours to accommodate caring responsibilities can reduce work/life interference. The ACTU will rely on the AWALI 2014 study in support of this proposition, and on the evidence of lay witnesses:

(a) Andrea Sinclair;

(b) Ashlee Czerkesow;

(c) Jessica van der Hilst;

(d) Sherryn Jones-Valada;

(e) Julia Johnson;

(f) Katie Routley;

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132 Austen Report, [19].

133 Austen Report, [92].

(g) Monika Bowler;

(h) Nicole Mullan;

(i) Sacha Hammersley; and

(j) Witness 1.

4 *The inadequacy of existing regulation*

108. There is no doubt that many Australian employees already ask for, and are granted, flexible working arrangements of various kinds under enterprise agreement provisions, workplace policies or the FW Act. It is also clear that a number of Australians, including many parents and carers, work reduced hours.

109. However, there are a significant minority of Australian employees who cannot or do not access family friendly working arrangements and who continue to struggle to combine paid work and unpaid parenting and caring responsibilities. The evidence shows that family friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces.[134]

110. Overall, the use of flexible working arrangements has stalled over the last decade. The use of part-time work to manage parenting responsibilities has dropped for mothers and remains almost non-existent for fathers. Access to permanent part-time work for award covered employees has declined.[135]

<u>Section 65 – the Right to Request</u>

111. Employees have always been entitled to request a variation to their working conditions. Due to the lack of an enforcement mechanism, the 'right to request' flexible work arrangements does not provide employees any substantive entitlement to anything at all. It is a right *to request* a change to working arrangements only, not a *right to* changed working arrangements, with no capacity for an employee to challenge an adverse decision. Section 65 merely places minimum procedural requirements on employees and employers when a request for flexible working arrangements is made under the FW Act.

112. The Explanatory Memoranda to the *Fair Work Bill 2008* and the *Fair Work Amendment Act 2013* explain that the intention of s. 65 is to *promote discussion* between employers and

134 Watson Report, Figures 3.7 and 3.11, and 128.

135 Watson Report, 116–19.

employees about flexible working arrangements. Notably, there is no mention of assisting employees to balance their work and family responsibilities or providing for flexible working arrangements. Perhaps the 'soft' regulatory mechanism in s. 65 is appropriate to achieve this modest goal, although the evidence discussed below suggests that it is not capable of achieving even this, particularly for employees who have limited bargaining power.

113. In any event, s. 65 is located in what is supposed to be a guaranteed minimum set of enforceable employment standards. In its current form, it does not meet these criteria – 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. On the contrary, all an employer has to do is respond to a request in writing, providing reasons if a request is refused.

114. As a result, there is a significant gap in the safety net regarding flexible working arrangements. The evidence discussed below suggests that s. 65 is, perhaps unsurprisingly, failing to meet the FW Act's objectives in s. 3(d) of assisting employees to balance their work and family responsibilities and providing for flexible working arrangements.

115. The ACTU will rely on at least the following evidence that suggests that the 'right to request' is not assisting employees to balance their work and family responsibilities, or providing for flexible working arrangements:

(a) In 2015, ABS data showed that 1.8 million Australians reported they would prefer to work fewer hours than they usually worked each week, and 35 per cent of Australian men and 42 per cent of women 'always or often' felt rushed or pressed for time. These percentages are higher among those who provide care.[136]

(b) Approximately 20 per cent of Australian employees, or one in five, request flexible working arrangements each year, a rate that has not changed markedly since the introduction of s. 65. The proportion of Australian employees with flexible working arrangements is relatively unchanged and has plateaued at around 31 per cent.[137]

(c) A tiny proportion of requests are made pursuant to s. 65 and awareness of the right is low, particularly among mothers of young children – the group most likely to request and need flexible working arrangements.[138]

136 Dr Jillian Murray, Report to the Fair Work Commission dated 6 May 2017 (**Murray Report**), [106].
137 Murray Report, [23].
138 Murray Report, [24].

(d) The requests that are made continue to be concentrated in certain sectors, industries and business sizes.[139]

(e) Very few men request flexible work, and fewer still request or use reduced hours.[140]

(f) While the majority of employees who actually make a request have them granted or partially granted, there is a significant proportion of employees who do not ask at all, even though they are unhappy with their working conditions.[141]

The provisions

116. Commencing from 1 January 2010, s. 65 of the FW Act established the 'right to request' a change in working arrangements for employees with a minimum of 12 months continuous service (including long-term casuals with a reasonable expectation of ongoing employment), in various circumstances. Initially, s. 65 applied only to employees responsible for the care of a child under school age and/or a child under 18 with a disability.

117. Amendments made in 2013 extended coverage to a range of circumstances, including where the employee is responsible for the care of a child of school age or younger or is a carer (within the meaning of the *Carer Recognition Act 2010*). The 2013 amendments confirmed that an employee returning to work after taking leave in connection with the birth or adoption of a child for whom they are responsible, is entitled to request to work on a part-time basis to assist the employee to care for the child.[142]

118. A 'change in working arrangements' is not defined in the FW Act, but a note to s 65(1) says that examples include changes in the hours, patterns and location of work.

Reasonable business grounds

119. Section 65(5) provides that an employer may only refuse an employee's request on 'reasonable business grounds'.

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139 Watson Report, [136]–[143].

140 Murray Report, [29]–[33]; and Watson Report, [115] and Table 3.8

141 Murray Report, [105].

142 Per s. 65(1B) of the FW Act.

120. Prior to the 2013 amendments, the FW Act did not define reasonable business grounds or provide any examples of what it might include. The amendments made to the FW Act in 2013 included the following non-exhaustive list of what may constitute reasonable business grounds, at s. 63(5A):

(a) the excessive cost of accommodating the request;

(b) that there is no capacity to reorganise work arrangements of other employees to accommodate the request;

(c) the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;

(d) that there would be a significant loss of efficiency or productivity;

(e) that there would be a significant negative impact on customer service.

121. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* states that "*The list of reasonable business grounds is not exhaustive and such grounds will be determined having regard to the particular circumstances of each workplace and the nature of the request made.*"[143]

122. The factors listed at s. 63(5A) relate to the employer's interests only and do not require any consideration of the circumstances of employees, or the impact that a rejection of a request will have on the employee or their family. The factors also relate exclusively to the possible negative consequences of granting an employee's request and do not address any of the positive benefits of flexible work arrangements for employers.

123. Parliament envisaged that the Commission would provide further guidance on the content of 'reasonable business grounds'.[144] However, due to the prohibition on the Commission dealing with disputes about the matter (discussed further below), this has not eventuated. There has been very little consideration by the Commission of the meaning of the phrase 'reasonable business grounds', and therefore very limited guidance for employees and employers in the form of decided cases.

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143 At [39].

144 Explanatory Memorandum 2009 at [268]

Enforcement

124. No cause of action arises under the FW Act when an employer refuses an employee's request under s. 65(5).[145] The Commission must not deal with a dispute about whether or not an employer had reasonable business grounds for refusing a request, unless the parties have authorised it to deal with a dispute under s. 65(5) in an enterprise agreement or other written contract, or an enterprise agreement contains a term similar in effect to s. 65(5).

125. The enforcement issue was considered in *Brow v National Offshore Petroleum Safety and Environmental Management Authority* [2016] FWC 4416. In that case, the applicant's employer had rejected the employee's request to work from home for six months so that he could support his wife who was about to give birth to their first child. Commissioner Cloghan found that the Commission did not have jurisdiction to deal with the dispute for reasons including that there was nothing in the employee's contract of employment or the applicable award specifically authorising the Commission to deal with a dispute under s. 65(5). A general provision authorising the Commission to deal with disputes about the NES was held to be insufficient.[146]

Other causes of action

126. Section 66 allows State and Territory laws to continue to apply to employees where they provide more beneficial entitlements in relation to flexible work arrangements. Even though there is no cause of action under s. 65, an employee may have remedies under relevant discrimination legislation, including the discrimination provisions under the FW Act, if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

Procedural requirements

127. While the substantive question of whether or not an employer has reasonable business grounds for refusing a request cannot be dealt with by the Commission, the procedural provisions discussed below are civil remedy provisions that can be enforced by employees. The Federal Court has imposed small financial penalties on employers for failing to respond to a request in writing with appropriate detail or in the timeframes required by the FW Act.[147]

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145 Or s. 76(4), which provides a right to request additional unpaid parental leave. See ss. 44(2), 146, 186(6), 739(2) and 740(2) of the FW Act.

146 At [45] to [48].

147 *Poppy v Service to Youth Council Incorporated* [2014] FCA 656 at [139]–[149] and [173]–[179]; *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 at [169]–[178] and [234]–[241].

128. A request under s. 65 must be in writing and set out the reasons for the request: s. 65(3). The Federal Circuit Court has held that a request which otherwise meets the requirements of s. 65 but which is not in writing, is not a request made under s. 65.[148]

129. An employer must give the employee a written response to their request within 21 days, stating whether the request is granted or refused, and including details of the reasons for any refusal, per ss. 65(4) and (6). A bare refusal is insufficient. Reasons should be detailed enough to enable the employee to understand why their request is being rejected.[149] The extent to which these provisions require an employer to take reasonable steps to consider and investigate an employee's proposal before rejecting it is unclear.

130. Section 65 places no notice or evidence requirements on employees. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* states at [28]: *Consistent with the current operation of the right to request provisions and the intent of these provisions to promote discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request*.

131. Employees must have completed 12 months of continuous service before they are eligible to make a request under s. 65 of the FW Act. Employees who do not meet the minimum service requirements are not prevented from making a request, but the procedural requirements of s. 65 would not apply.[150]

Utilisation of s 65 and the right to request

132. Research has found that about 20 per cent of all employees make a request (under s. 65 and informally),[151] and the majority of requests (somewhere between 63–90 per cent) are fully or at least partly granted.[152] Most employees (80 per cent) do not request flexibility at all, the main reason being that they are content with their working arrangements. However, a large proportion of the employees who do not ask for flexibility (around 30 per cent) are discontented with their working arrangements, yet do not ask for changes.[153] These employees were described as 'discontented non-requestors' by Skinner and Pocock in 2011.[154] The

148 *Sagona v R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875 at [244].

149 Explanatory Memorandum 2009 at [265].

150 Explanatory Memorandum 2009 at [270].

151 Murray Report, [23]

152 Murray Report, [45]-[47].

153 Murray Report, [105] and [107].

154 Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53(1) *Journal of Industrial Relations* 65.

AWALI 2014 report noted that an additional 15% of workers reported that flexibility was "not possible or available" in their jobs.[155]

133. Skinner and Pocock found that a large number of discontented non-requestors were men. This is consistent with research by the Diversity Council of Australia, which shows that a significant number of men desire greater access to flexible work arrangements than they currently experience, and this is especially the case for young fathers.[156] It is also consistent with research showing that 19 percent of fathers who were secondary carers for their disabled child report that they could not obtain flexibility if they wanted it.[157]

134. In 2016, Skinner and Pocock analysed AWALI survey data to try to determine why 'discontented non-requestors' do not ask for flexibility even though they desire it.[158] It was observed that discontented non-requestors did not request flexible work for reasons in the following three broad categories:

(a) They thought their application would be rejected so it was not worth asking;

(b) They thought flexible work was frowned on by the leadership, even in workplaces with formal flexibility policies where employees had arrangements approved;

(c) They felt the workplace was openly hostile to flexible work and feared reprisals, and this included casuals who feared having their hours reduced or shifts changed.

135. Pocock and Skinner found that discontented non-requestors and employees whose requests are declined or only partially granted experience high levels of work-life interference. They also observed that around one in four of the discontented non-requestors had changed jobs in the seven to eight months since their AWALI interview, many because they sought flexible working arrangements or more reasonable hours.

136. It is not mandatory to use s. 65 to request flexible working arrangements, and the evidence shows that most employees do not use it: of the 40 per cent of requests received by employers between 1 July 2012 and 2014, only one per cent were made under s. 65 of the FW Act.[159]

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155 Murray Report, [68].

156 Quoted in AHRC, *Supporting Working Parents*, 18.

157 Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340, 356, quoted in Murray Report, [68]

158 Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 *Labour and Industry* 103.

159 Murray Report, [100].

Even if s. 65 is utilised, parties are not required by the FW Act to report on or keep records about requests made, or commit any particular details about an agreed arrangement to writing. As discussed above, employers are not required to do anything more than provide reasons in writing for a refusal, and employees have no recourse if their request is refused.

137. Supervisors and managers play a key role in determining access to flexible working arrangements, and an environment of informality is more likely to mean that decisions about requests are subject to the personal outlook and values of the line manager, rather than company policies or legislative requirements.[160] It also means that any arrangement that is agreed to may fail cover important matters of substance, such as performance expectations and workload.[161] The evidence of a number of witnesses, including Jessica Van der Hilst, Julia Johnson, Katie Routley and Michelle Ogulin is relevant to this.

138. The evidence suggests the current regulatory environment has resulted in a high level of informality regarding flexible working arrangements, which is hindering equitable access to flexible working arrangements for Australian employees. Employees in supportive working environments who feel comfortable asking for changes still ask (mostly women, in larger businesses, the public sector and sales and community and personal service occupations) and most are granted their request. Of the remainder, employees who are denied have no recourse and a significant number of employees do not ask at all.

139. The ACTU will rely on the lay evidence of the following witnesses regarding the inability of existing regulation to meet the needs of working parents and carers:

    (a) Andrea Sinclair;

    (b) Ashlee Czerkesow;

    (c) Julia Johnson;

    (d) Katie Routley;

    (e) Michelle Ogulin; and

    (f) Sherryn Jones-Vadala.

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160 Murray Report, [52], [104].

161 Murray Report, [102], and see Rae Cooper and Marian Baird, 'Bringing the 'right to request' flexible working arrangements to life: From policies to practices' (2014) 37(5) *Employee Relations* 568; and 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.*

Sections 96 and 102 – Paid and Unpaid Carers Leave

140. Paid and unpaid carers leave is provided for in ss. 96 and 102 of the FW Act, and forms part of the National Employment Standards.

141. An employee is entitled to 10 days of paid personal and carer's leave per year, plus two days unpaid leave for each occasion which meets the eligibility requirements of the provision. The entitlement accrues progressively and accumulates from year to year. An employee is entitled to carers leave if the leave is taken to provide 'care or support' to a member of the employee's immediate family or household who needs care or support due to a personal illness or injury or an 'unexpected emergency'.

142. Although carer's leave can be used to supplement flexible working arrangements,[162] carer's leave is not sufficient to assist parents providing ongoing, regular care for their children, or for employees providing ongoing, regular care for a person with disability or a frail/aged parent.

Section 84 – Return to Work Guarantee

143. Parental leave and related entitlements are dealt with in ss 67 to 85 of the FW Act, and form part of the National Employment Standards. Section 84 entitles an employee to return to their pre-parental leave position immediately after unpaid parental leave, or if that position no longer exists, to another available position for which the employee is qualified and suited nearest in status and pay. Section 84A requires an employer to advise a replacement employee of the temporary nature of their engagement and of the return to work guarantee. Section 84 relates to s. 83, which requires an employer to consult an employee regarding any decision which will have a significant impact on the status, pay or location of the employee's pre-parental leave position.

144. The return to work guarantee is an important protection for employees returning from parental leave (most of whom are mothers), who are at risk of dismissal from their employment during or upon return from parental leave.[163] It has been held that a 'pre-parental leave position' includes the same shifts[164] and location[165] and may entitle a returning mother to priority access to redeployment positions following a restructure.[166]

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162 See, eg, the lay witness statement of Perry Anderson at [7].

163 Murray Report, [80]

164 *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509.

165 *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479.

166 *Kristina Iannello v Motor Solutions Australia Pty Ltd [2010] FWA 3125*.

145. Section 84 of the FW Act seeks to prevent disruption to the job security and career continuity of mothers who take parental leave. This is consistent with the intention of the ACTU's Family Friendly Working Hours clause, which seeks to ensure that those who need reduced hours to attend to caring responsibilities, including mothers returning from parental leave, can also retain their existing position, including location, status and remuneration. Section 84 and the ACTU's clause are complementary, in that a returning mother would be entitled under s 84 to return to her former position (or a suitable alternative position), then access a family friendly working hours arrangement in connection with that position. Under the ACTU's clause, she would have the right to return to her former working hours after the end of the family friendly working hours arrangement. These provisions together would assist in ensuring that mothers can take parental leave and subsequently access reduced hours to care for new babies and young children, without sacrificing their job security, status or remuneration level.

Individual Flexibility Arrangements (**IFAs**)

146. Only two to three per cent of employees covered by the FW Act use IFAs, and awareness of their availability is low.[167] Of the small number of employees who utilise IFAs, they are more likely to be women with dependent children. IFAs are more common in larger enterprises and in the public sector.[168] Most employees using IFAs sought changes to when work was performed, but a small number reported that they used IFAs to secure a change in their employment arrangements from full-time to part-time or from permanent to casual, or to facilitate a return to work after a period of parental leave.[169]

147. As observed by Murray,[170] the suitability of IFAs for providing access to family friendly working hours is limited. Setting aside the extremely low uptake, by definition employees are encouraged to 'trade off' rights to entitlements in awards and agreements in order to secure flexibility. Mothers with dependent children are mostly likely to use an IFA, and the evidence shows than more women than men report 'sacrificing' conditions in order to receive a benefit from an IFA.[171] It is undesirable that employees seeking to perform essential caring roles should be required to trade off existing entitlements in order to perform these roles effectively, including because this further exacerbates the gender pay gap by 'penalising' carers. IFAs can also be terminated by either party on relatively short notice, providing a level

167 Murray Report, [86], [87].
168 Murray Report, [87], [90] and [92].
169 Murray Report, [95].
170 Murray Report, [96] – [98].
171 Murray Report, [96] and [97].

of uncertainty which is inappropriate and unworkable for employees with long-term, ongoing caring responsibilities.

C FAMILY FRIENDLY WORKING HOURS

1 *The positive impact of a guaranteed right to family friendly working hours*

For employers

148. Flexible working arrangements have been shown to produce measureable benefits to employers, in the form of increased productivity and greater retention rates.

149. The AHRC reported on international research that found gender balance has a direct positive impact on the efficiency and performance of individual organisations of all sizes and across all sectors.[172]

150. 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*", and that 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.[173] 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.[174]

151. These findings are consistent with 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.[175]

For employees

152. Unsurprisingly, employees report considerable satisfaction with family friendly working arrangements that allow them to meet their parenting and caring responsibilities while participating in paid work. In their examination of executive level support for flexible work arrangements, Williams, McDonald and Cathcart argued that "*it is now widely acknowledged that flexible work arrangements have positive health benefits for employees by reducing the stress associated with seeking a balance between paid work and life outside work.*"[176]

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172 AHRC, *Supporting Working Parents*, 17 et seq.

173 Ernst & Young, *Untapped Opportunity: The role of women in unlocking Australia's productivity potential* (2013) (**Ernst & Young Report**), 3.

174 Ernst & Young Report, 4.

175 Williams, McDonald and Cathcart, above n 159, 3.

176 Ibid, 3.

Similarly, the OECD found that flexible work practices, including part-time work, can also improve the work/family balance, often in a manner consistent with enterprise needs.[177]

153. The ACTU will call evidence from the following witnesses regarding the benefits of family friendly working hours:

(a) Monika Bowler;

(b) Sascha Hammersley;

(c) Jessica van der Hilst;

(d) Perry Anderson;

(e) Nicole Mullan; and

(f) Witness 1.

<u>For the national economy</u>

154. A guaranteed right to family friendly working hours would benefit the national economy by increasing labour force participation, leading to an increase in GPD; a greater return on investment in education; and the substitution of women's unpaid labour for paid labour.

Increased labour force participation of women

155. Family friendly work arrangements are likely to increase women's labour force participation, both in terms of women in the workforce, and the reinforcement of women's ties to their occupational status and security following childbirth.

156. In its 2017 review of labour force participation in Australia, the OECD found that inactive and/or women working part-time (who are more likely to be caring for young children) are one of the greatest areas of untapped potential in the Australian labour force. Female employment in Australia still ranks in the lower third of OECD countries,[178] with a gap of almost nine percentage points in employment rates of women with children compared to all women without a child.[179] In addition to mothers not in the labour force, the OECD found that there is also great untapped potential among mothers working part-time.

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177 OECD Report, 101.

178 OECD Report, 22.

179 OECD Report, Figure 1.6, 23.

157. The OECD examined a target population of working age individuals who are persistently out of work, as well as individuals whose labour market attachment is weak, and identified seven different combinations of barriers to employment for the target population. Twenty per cent of the target population consisted of mothers with dependent children, although those groups differed substantially in terms of their individual and household characteristics, and as a result faced different barriers to employment.[180]

158. Prime age, partnered women with young children formed the third largest cluster, accounting for 13 per cent of the target population. These families have on average two children with the youngest aged two and the partner working in the vast majority of cases. Women in this cluster had the highest education level of the target population, with an average of 14.5 years of schooling and 60 per cent of members having completed an advanced diploma or graduate degree. The other relevant cluster, representing 7 per cent of the target population, consisted of younger women (33 years on average) with children, who had multiple employment obstacles including high risks of poverty and high reliance on income support from government, and the lowest average number of years of schooling, with 66 per cent having low educational skills.

159. The OECD found that the under-representation of the target populations had many causes, but of those, structural factors in policy and the way in which institutions function could be addressed most easily. The OECD predicted that such change would have repercussions for other causes and parameters, thereby creating considerable room for improvement in the participation and employment rates of women with young children.[181]

160. Several factors have been identified as contributing to mothers' low labour force participation in Australia, including tax barriers and access to affordable child care. Evidence from lay witnesses Ashlee Czerkesow, Jessica van der Hilst and Sacha Hammersley clearly demonstrates the direct link between access to childcare and access to family friendly working hours.

161. In addition to the material referred to in these submissions, this factor has been acknowledged by the Business Council of Australia, which identified limitations in job design and workplace flexibility as a barrier to mothers' workforce participation,[182] and recommended that

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181 OECD Report, 11.

182 Business Council of Australia, 'Realising the Potential of People and Workplaces' in *Action Plan for Enduring Prosperity* (2013), 12–13.

workplace relations law encourage more flexible work arrangements and supportive cultures for working parents.[183]

Increase in economic growth as a result of increased LFP

162. An increase in the LFP of mothers, either on re-entry to the workforce using family friendly working hours, or by upsizing to full-time or increased hours after working family friendly hours, will have a positive impact on economic growth.

163. The OECD considers that there are potentially large losses to the economy when women stay at home or work short part-time hours, and this is particularly the case given that women's level of educational attainment now match or outpaces men in most OECD countries.[184]

164. The Grattan Institute considered a wide range of possible economic reforms, and found that only three out of a possible 25 reforms could 'change the game' in terms of serious increases in economic growth. These 'game changers' were tax mix reform, older person's workforce participation, and female workforce participation.[185] Female workforce participation was explicitly linked to child-rearing, with the authors stating that "*female workforce participation can only change significantly if more mothers have jobs*".[186]

165. The Grattan Institute estimated that increasing women's workforce participation by about six per cent could increase the size of the Australian economy by more than one per cent of Australia's GDP, or $25 billion.[187]

A greater return on investment in education

166. The OECD found that the loss of highly educated women, in particular, from the workforce to parenthood is a cause of potentially large losses to the economy, with 53.7 per cent of women aged 25–34 having attained tertiary education compared to 42.5 per cent of their male peers.[188]

167. This view was supported by the Grattan Institute,[189] and by Ernst & Young.[190] While award-covered women are less likely to have graduate and postgraduate qualifications, the

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183 Business Council of Australia, 'Realising the Potential of People and Workplaces' in *Action Plan for Enduring Prosperity* (2013), Action 4.12, 14.

185 Grattan Institute Report 2012, 2.

186 Ibid, 38.

187 Ibid, 39.

188 OECD Report, 22.

189 Grattan Institute Report 2012, 40.

interaction of the award safety net and enterprise agreements means that the inclusion of family friendly working hours in modern awards is likely to have a 'trickle up' effect on the content of agreements.[191]

Substitution of unpaid work

168. Australian women undertake the bulk of unpaid domestic work. Pocock, Charlesworth and Chapman found that, as in most other OECD nations, Australian women undertake around twice as much unpaid domestic work and care as men, which contribute to feelings of overload for most women. The authors suggested that Australian women who can afford to do so "*have turned to market substitutes for their time where they can such as pre-prepared food and paying for cleaners and baby sitters*."[192]

169. As observed by the Grattan Institute, the unpaid work of women "*would have a very substantial economic value if paid at market rates*".[193] The Grattan Institute cited ABS estimates of the total value of unpaid household work at $237 billion in 1997, and estimated that women did 65 per cent of that work.[194] In 2017, PWC published an analysis of the market replacement cost of unpaid work valued at $565 billion in 2011 dollars.[195]

170. The largest proportion of unpaid work was childcare, comprising 72 per cent of all unpaid work, with domestic work (23.5 per cent), care of adults (2.7 per cent) and volunteer work (1.4 per cent) comprising the remaining proportions. Women undertook 72 per cent of all unpaid work, and 76 per cent of childcare and 69 per cent of caring for adults. PWC found that unpaid childcare was undertaken by mothers across all socio-economic status, with little differential according to education or income levels.[196]

171. If unpaid childcare was formally included in the Australian economy, it would account for nearly 20 per cent of the value of the entire economy, or $345 billion in 2011 terms, almost *three times* the formal economy's largest industry.[197]

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190 Ernst & Young Report, 6.

191 See s. 193 of the FW Act.

192 Pocock, Charlesworth and Chapman, 606.

193 Grattan Institute Report 2012, 40.

194 See Grattan Institute Report, 40.

195 PWC, *Understanding the Unpaid Economy* (March 2017), 2.

196 Ibid, 3.

197 Ibid.

2 ***The operation of the proposed clause***

172. The ACTU's proposed clause would entitle eligible employees to temporary reduced working hours in their existing position to accommodate their parenting responsibilities and/or caring responsibilities (defined in the proposed variation as **family friendly working hours** or **FFWH**), with a right to revert to their former working hours after the FFWH arrangement ceases.

173. The ACTU's claim is carefully targeted to a narrow and well-defined section of the population with a demonstrated and pressing need for assistance.

174. The ACTU's claim applies only to working parents and carers, a narrower range of employee circumstances than is covered by s. 65 of the FW Act. This reflects the highly disruptive effect of unpaid parenting and caring roles on the economic activity of people who undertake them, as well as the fundamental importance of these roles to healthy and cohesive families and communities.

Parenting

175. An employee has 'parenting responsibilities' for the purpose of the ACTU's clause if the employee has responsibility (whether solely or jointly) for the care of a child of school age or younger. This definition closely reflects s. 65(1A)(a) of the FW Act, which confirms that an employee who is the parent, or has responsibility for the care, of a child who is of school age or younger may request a change in working arrangements under s 65(1)(b).

176. The ACTU's claim filed on 15 June 2015 related solely to 'primary carers' returning from parental leave. It is envisaged that this category of employees will certainly be covered by the ACTU's current clause, and in fact is the group most likely to access reduced hours under the clause. However, the amended clause would apply to a broader range of employees, because it does not make the entitlement to FFWH conditional on the employee being in a primary carer role or having taken or returned from parental leave. The decision was taken to remove these terms because the vast majority of people who take parental leave and who hold 'primary' caring roles (at this point in time) are women, which would have had the undesirable outcome of effectively excluding men's access to the clause.

177. By contrast, the ACTU's current clause will entitle both men and women with parenting responsibilities (whether or not they have taken parental leave, and whether or not they are 'primarily' responsible for caring for the child in question) to reduce their hours to accommodate their parenting responsibilities. It is hoped that this will encourage men and

women to share caring roles more equitably (generating benefits for both men and women, as well as families and communities) and help reduce any stigma and other barriers associated with men utilising family friendly working hours in order to undertake caring responsibilities.

Caring

178. An employee has 'caring responsibilities' for the purposes of the ACTU's clause if the employee is responsible for providing personal care, support and assistance to another individual who needs it on an ongoing or indefinite basis because that other individual has a disability; a medical condition (including a terminal or chronic illness); a mental illness; or is frail and aged. This definition is closely based on the *Carer Recognition Act 2010* (the definition adopted by s. 65) except that the ACTU clause requires the care to be 'ongoing or indefinite', in order to more clearly distinguish circumstances in which FFWH would be required from circumstances where carer's leave might be required. As provided for in the *Carer Recognition Act*, paid caring roles are not intended to be included in the definition of caring responsibilities in the ACTU's clause, and the mere fact that an employee resides with someone who needs care would not be, of itself, sufficient to enliven the clause.

179. The ACTU's original clause did not apply to carers. The decision to include carers reflects the evidence regarding Australia's aging population and increasing dependency ratio, as well as the evidence that carers form the second largest group (after mothers of young children) requesting changed working arrangements.[198]

Reduced hours only

180. There are many types of flexible working arrangements, including working from home, changes in shifts or rosters, flexible start and finish times, changes in work location and access to part-time work or reduced hours.

181. The ACTU's clause provides access to a *temporary reduction in working hours* only, not any other form of flexible working arrangements. This is narrower in scope than s. 65, which does not place any limits on the types of changes to work arrangements that can be requested. 'Changes in working arrangements' are not defined in s. 65, but include changes in hours, patterns and locations of work.

[198] Watson Report, [29], Table 1.3; Murray Report, [38]

182. A reduction in hours is the most common type of request[199], which reflects its importance as a mechanism for employees to balance work and life, but it is also a type of flexibility that can be difficult to access, particularly for men.[200]

Right to revert

183. Under the ACTU's proposal, eligible employees will have a right to return to their former working hours at the end of their FFWH arrangement. The period of the reduced hours and the date of reversion to former working hours must be included in the employee's written notice of their intention to access FFWH (clauses X.3 and X.4.5 of the ACTU's proposed variation). Clause X.5 requires any replacement employee to be advised of the temporary nature of their employment, similar to the requirement in s. 84A of the FW Act. In this way, the employer, the employee and any replacement employee are provided with clarity and certainty regarding the terms of the arrangement.

184. Employees with parenting responsibilities are entitled to revert to their former working hours up until the child is of school age, after which time the right to revert expires. The clause envisages that there will be one FFWH arrangement per child. There is evidence that parents continue to require flexible working arrangements for many years after a child starts school, but it is clear that the need for reduced hours is particularly acute before a child starts school.[201]

185. Carers are entitled to revert to their former working hours for a period not exceeding two years from the date of commencement of the arrangement, after which time the right to revert expires.

186. Nothing in the ACTU's clause would prevent an employee from agreeing to work on a reduced hours basis under a FFWH arrangement for a longer period than set out in the clause (including on a permanent basis), but the right to revert to former working hours expires after the relevant deadline. Any increase in working hours after that point would have to be by agreement.

187. While the length of the arrangement and the date of reversion must be specified in the written notice, there is nothing preventing an employer and employee from later agreeing to a variation to the FFWH arrangement, including the length of the arrangement or the date of reversion. There is also nothing in the ACTU's proposal preventing an employer and

199 Murray Report, [43].
200 Murray Report, [30]–[33].
201 Austen Report, [22] and [36].

employee agreeing to a 'staged' arrangement under which an employee gradually increases their hours and reverts to full-time hours on a certain specified date.

188. The term 'working hours' is used in the clause rather than 'position' or 'role' because the intention of the clause is that employees will work on a reduced hours basis in their *existing position*, including the same location, status and remuneration level, as defined in clause X.4.6 of the ACTU's proposed clause.

Eligibility and procedural requirements

189. There is a six month minimum service requirement for access to FFWH under the ACTU's proposed clause, compared with a 12 month minimum service requirement for s. 65. Employees are working for increasingly shorter periods of time with their employer, which means that employees in need of FFWH may be precluded from accessing them where overly long minimum service requirements apply.[202]

190. In contrast to the right to request under s. 65, the ACTU's clause requires an employee to provide reasonable notice of their intention to access FFWH, and to provide evidence of eligibility if required by the employer. These requirements are consistent with the aim of the ACTU's clause, which is to meaningfully assist employees to reconcile their work and family responsibilities by providing a clear entitlement to FFWH's when they are needed, rather than simply promoting discussion about these matters. Consistent with this stronger entitlement, the clause permits an employer to request evidence that would satisfy a reasonable person that the employee has in fact got either caring or parenting responsibilities as defined by the clause. Consistent with common practice, such evidence may include a document or certificate from a relevant professional or a statutory declaration from the employee.

191. An employee need not exhaust existing leave entitlements before being eligible to access FFWH.

Dispute resolution

192. If the employee meets the eligibility and procedural requirements of the clause, the employee is entitled to FFWH and the employer must implement the arrangement. Disputes may arise under the clause in relation to:

(a) An employer's refusal to implement the arrangement;

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202 AHRC, *Supporting Working Parents*, 12.

(b) An employee's eligibility, including whether or not evidence provided is adequate;

(c) Whether or not 'reasonable' notice has been provided;

(d) Whether or not the required details have been included in the written notice;

(e) The practical details of the arrangement, including the employee's days and hours or work, the length of the arrangement and the date of reversion.

193. It is envisaged that disputes under the clause would be dealt with in the usual way, under the dispute settlement provisions of the relevant award or by the Federal Court or Federal Circuit Court where a breach of the award is alleged.

Interaction with s 65 of the FW Act

194. As outlined above, s. 65 covers both a wider range of employee circumstances and a wider range of flexible working arrangements than the ACTU's clause. Section 65 does not require notice or evidence to be provided and contains no dispute settlement process. Section 65 is aimed at promoting discussion about flexible working arrangements, whereas the ACTU's clause is aimed at providing employees with access to temporary reduced hours to accommodate parenting and caring responsibilities. Section 65 provides a *right to request* flexible working arrangements in certain circumstances, while the ACTU's clause provides a right *to* temporary reduced hours in certain circumstances. The ACTU's proposed clause has a shorter period of minimum service than s. 65 (six months compared to 12 months). The ACTU's clause would overlap with s. 65 only where parents and carers with at least 12 months service wish to access reduced hours. It would still be open to an employee in this category to use s. 65 if they wished. However, it is to be expected that a stronger entitlement, access to dispute settlement and clearer requirements for documenting the arrangement may encourage an employee in these circumstances to access the ACTU's clause rather than the right to request in s. 65 of the FW Act.

3 ***Meeting Australia's international obligations***

195. Section 578 of the FW Act requires the Commission to take into account the objects of the FW Act, as well as "*equity, good conscience and the merits of the matter*", and "*the need to respect and value diversity of the work force by helping to prevent and eliminate discrimination on the basis of … sex … family or carer's responsibilities, [or] pregnancy*".[203]

[203] FW Act, ss. 578(a), (c).

The objects of the FW Act include "*providing workplace relations laws that … take into account Australia's international labour obligations*".[204]

196. When Australia becomes a party to an international treaty, it undertakes to put into place domestic measures and legislation compatible with its treaty obligations and duties. The appropriateness of various measures taken depends on all the relevant circumstances, including the nature of the obligation, the practical demands and urgency of the situation and the resources and capacity of the relevant State.

197. OECD data show that Australia is one of the most unequal countries with respect to men's and women's sharing of unpaid domestic and care work.[205] In order to accommodate their unpaid caring or parenting responsibilities, many employees are forced to either drop out of the paid workforce altogether, or work fewer hours in poorer quality jobs. Significant numbers of returning parents and pregnant women suffer workplace discrimination. These factors lead to various social and economic problems and contribute to gender inequality in Australia, including our comparatively large and persistent gender pay gap. Existing industrial entitlements and discrimination law have failed to make sufficient progress in overcoming these problems.

198. The introduction of a safety net entitlement to temporary reduced working hours to assist employees to better manage their parenting and caring responsibilities is consistent with Australia's international obligations, and therefore the Commission's obligations under ss. 3 and 578 of the FW Act, in that it will assist to:

(a) create equality of opportunity between men and women workers with family responsibilities, as well as between men and women with those responsibilities and those without; and

(b) prevent and eliminate discrimination against women and workers who have family and caring responsibilities.

199. There are a number of international instruments ratified by Australia which are relevant to the ACTU's claim. The following are the most relevant:

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204 FW Act, s. 3(a).

205 R Cooper, M Foley and M Baird, *Women at Work: Australia and the United States*, The United States Studies Centre at the University of Sydney, 15.

(a) The International Labour Organisation *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (**ILO 156**).

(b) The International Labour Organisation *Convention Concerning Discrimination in Respect of Employment and Occupation* (**ILO 111**).

(c) The United Nations *Convention on the Elimination of all Forms of Discrimination Against Women* (**CEDAW**).

(d) The United Nations *Convention on the Rights of the Child* (**CROC**).

ILO 156

200. ILO 156 deals specifically with the issue of family responsibilities and employment. It applies to men and women workers responsible for caring for dependent children or immediate family members where such responsibilities restrict their participation in economic activity.

201. ILO 156 requires Australia to take all appropriate measures:

(a) to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities [Art 3];

(b) take account of the needs of workers with family responsibilities in the terms and conditions of employment [Art 4(b)];

(c) ensure that family responsibilities shall not constitute a valid reason for termination of employment [Art 8].

202. ILO 156 has a dual purpose, in that it seeks to create equality of opportunity between men and women workers with family responsibilities, and also between men and women with family responsibilities and workers without such responsibilities. This is because the ILO has recognised that the 'excessive burden' of caring and household responsibilities on women constitutes one of the most important reasons for continuing gender inequality in employment and occupation. ILO 156 recognises that employment practices which assist both male and female employees to better manage conflict between paid work and family responsibilities can reduce gender inequality, because they enable men and women with family

responsibilities to participate more fully in the labour market, encourage men to take greater responsibility for caring work, and avoid further entrenching gendered divisions of labour.[206]

203. In giving effect to its international obligations under ILO 156, Australia has committed to "*taking continuous action towards eliminating discrimination in ways that are most appropriate to the individual circumstances of the state*." The ILO has observed that measures taken to combat discrimination should be adapted regularly to new problems and circumstances.[207]

ILO 111

204. ILO 111 is aimed at preventing and eliminating discrimination in employment, including "*any distinction made on the basis of sex or such other distinction, exclusion or preference, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*." This includes discrimination on the grounds of family responsibilities or pregnancy.[208]

205. ILO 111 requires Australia to undertake all appropriate measures to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination.

CEDAW

206. States have an obligation under CEDAW to take all appropriate measures to eliminate discrimination against women and create equality between men and women.

207. The preamble to CEDAW states that:

> the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole and that a change in the traditional role of women in society and in the family is needed to achieve full equality between men and women.

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206 See ILO, *General Survey: Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [25] and [62]; ILO, *Time for Equality at Work*, International Labour Conference, 91st Session; 2003, Geneva, Report I(B), [228]–[241].

207 ILO, General Survey: *Workers with Family Responsibilities*, International Labour Conference, 80th Session 1993, Geneva, Report III Part 4B, [251].

208 Ibid, [3].

208. CEDAW requires Australia to take all appropriate measures to:

(a) ensure that family education includes the recognition of the common responsibility of men and women in the upbringing and development of their children [Art 5(b)];

(b) encourage the provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life [Art 11(2)(c)]; and

(c) eliminate discrimination against women in all its forms, including on the grounds of pregnancy in the area of employment [Art 1, 2 and 11].

CROC

209. The preamble to CROC states that the family, "*as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community*."

210. Article 18 relates to the balance of responsibility for child-rearing between parents and the State.[209] It requires Australia to take all appropriate measures to ensure that both parents have common responsibilities for the upbringing and development of children; and to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.

[209] Art 17 of the International Convention on Civil and Political Rights is similar to Art 18 of CROC.

D MEETING THE STATUTORY TEST

1 *Sections 3 and 578 of the Fair Work Act*

211. Section 578 of the FW Act requires the Commission to take into account the objects of the FW Act in performing its functions and exercising its powers.

212. Section 3(d) provides that one of the seven objectives of the FW Act is assisting employees to balance their work and family responsibilities by providing for flexible working arrangements. As outlined in this submission, the FW Act has not effectively provided for flexible working arrangements, particularly for low paid employees and men. For the reasons set out in this submission, the ACTU's proposed clause will be a significant step forward in meeting the objective in s. 3(d) of the FW Act.

213. Section 3(a) provides that one of the FW Act's objects is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by "*providing workplace relations laws that… take into account Australia's international labour obligations*". For the reasons set out in Part C3 above, the proposed clause is consistent with Australia's international labour organisations.

214. Section 578(c) of the FW Act requires the Commission to take into account equity, good conscience, and the merits of the matter when performing functions (such as the modern awards review) and exercising powers (such as granting applications for award variation). The ACTU has addressed the merits of its case in these submissions. We consider that equity and good conscience requires the Full Bench to recognise the fact that new regulation, specifically the ACTU's Family Friendly Work Hours clause, is necessary to assist employees to balance their work and family commitments and provide for flexible working arrangements.

2 *The modern awards objective*

Section 134(1)(a) – the needs of the low-paid

215. In the *Annual Wage Review 2015–2016*, the Fair Work Commission Expert Panel acknowledged that the available information, as a whole, suggested that the majority of award-reliant employees are probably also low-paid,[210] and that "*there is no doubt that the*

[210] By reference to the two-thirds of median weekly earnings benchmark: *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [369], [449].

low paid and award reliant have fallen behind wage earners and employee households generally in over the past two decades".[211]

216. The evidence will show that, for those parents and carers (both male and female) who seek to return to work on reduced hours in order to accommodate their family responsibilities often suffer occupational downgrading, including by taking less senior roles and/or from permanent to casual employment. This downgrading has a direct negative effect on income and lifetime earnings.

217. The evidence also suggests that family friendly working arrangements are far less available to lower paid, lower skilled, casually employed, award-reliant employees working in smaller workplaces.

218. The non-existent enforcement mechanism for s. 65 of the FW Act and the consequent environment of informality impacts negatively, in particular, on those with less bargaining power in the workplace, many of whom are award-dependent employees.

219. Women are overrepresented among the low-paid and award dependent, and constitute a large majority of parents and carers. This means that a significant number of low paid employees are disadvantaged by the gap in the safety net relating to flexible working arrangements, and will be assisted by greater access to family friendly working hours.

220. The ACTU's proposed variation is expressly designed to ensure that parents and carers can maintain a secure connection with their employment, which will lead to improved economic outcomes for parents and carers.

Section 134(1)(b) – the need to encourage collective bargaining

221. The award safety net is the foundation for fair agreements.

222. In the review of the *Firefighting Industry* Award, the Full Bench considered an application by the Victorian fire services to remove the prohibition on part-time work in the modern award. The variation was opposed by the United Firefighters' Union of Australia (**UFUA**). The variation was permitted, with the Full Bench holding that:

> *… varying the Fire Fighting Award to permit part-time employment… will encourage collective bargaining in respect of this issue. The current award terms provide little incentive for the UFUA to bargain in respect of this issue – it can simply rely on what is effectively an award prohibition on part-time employment… Accordingly, we are satisfied that varying the Firefighting*

[211] *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [372].

> *Award in the manner described will 'encourage collective bargaining' within the meaning of s. 134(1)(b).*[212]

223. The ACTU submits that the same considerations would apply in this case. The un-enforceability of s. 65 of the FW Act offers no incentive for employers to bargain in favour of family friendly work arrangements. Inclusion of the ACTU's proposed clause would encourage collective bargaining over family friendly working hours and family friendly work arrangements more generally.

Section 134(1)(c) – social inclusion

224. Section 134(1)(c) requires the Commission to ensure that modern awards, together with the NES, promote social inclusion through increased workforce participation. This has been interpreted to mean increased employment.[213]

225. The evidence clearly demonstrates that maternal workforce participation is low, and that there is no positive correlation between caring responsibilities and workplace participation. Before childbirth, men and women have similar rates of labour force participation, but after children, women's labour force participation correlates to the age of their youngest child, with most mothers not returning to full-time or increased hours until their children are in school. Family responsibilities have a negative impact on employment patterns and the earning prospects of the majority of mothers, because in order to work less than full-time hours after the birth of a child, women typically leave full-time or permanent employment and take up lower status and quality work.

226. Guaranteed family friendly working hours will encourage greater workforce participation by enabling those parents and carers who are unable to access flexible work to re-enter the workforce, and by ensuring that parents and carers who do not wish to give up their positions are able to retain their connection to their workplace while accommodating their family and caring responsibilities, until such time as they wish or are able to increase their working hours.

227. It will also assist in reducing stigma and other barriers to men's access to family friendly working hours, supporting more men to participate in caring work.

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212 *Fire Fighting Award Decision*, [142].

213 *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [465].

Section 134(1)(d) – flexible modern work practices and efficient and productive work

228. Section 134(1)(d) is significant in the context of the ACTU's application. Family friendly working hours are by their nature flexible, modern work practices, and the evidence is that employees working flexible hours are more productive than other employees.

229. Existing flexible work provisions in the FW Act are inadequate to address the needs of working parents and carers. Modern awards contain no standard entitlement to family friendly working hours. There is a clear need to address this gap in the safety net.

Section 134(1)(da) – the need for additional remuneration in prescribed circumstances

230. The ACTU submits that this sub-section is neutral to the application.

Section 134(1)(e) – equal remuneration principle

231. The absence of family friendly working hours is a significant contributor to the gender pay gap. The Full Bench has acknowledged the link between the gender pay gap and restrictive workplaces and structures along with high rates of part-time and casual employment. The 'family pay penalty' identified by Austen is derived from the lack of occupation continuity for mothers, compounding the gender pay gap

232. Current workplace and social norms are based on a model of society that presumes one parent, almost always the woman, will leave or reduce work to care for children. The accompanying shift from stable to precarious employment within the same sector is a major reason for the gender pay gap. Family friendly working hours that reinforce and strengthen the connection to the workforce, and assist more men to access reduced hours to undertake caring work, are a means of addressing the gap.

233. This matter is also relevant to s. 578(c) of the FW Act, which requires the Commission to help to prevent and eliminate discrimination.

Section 134(1)(f) – productivity, employment costs, and the regulatory burden and section 134(1)(h) – performance of the national economy

234. Family friendly working arrangements are associated with highly productive employees, benefiting business at the microeconomic level. Because businesses already grant the majority of requests for flexible working arrangements, accommodate parental leave and employ high numbers of casual and part-time employees, there is unlikely to be any significant increase in the regulatory burden as a result of the variation sought.

235. Family friendly working arrangements are also strongly associated with benefits to the national economy. Increased labour force participation of parents and carers, particularly of women aged 35-44, of just six per cent is estimated to increase GDP by $25 billion. Increased labour force participation of women, who perform the large majority of unpaid childcare, adult care, and domestic labour, is estimated to have a market replacement value of $565 billion in 2011 dollars.

Section 134(1)(g) – a simple, easy to understand, and sustainable modern award system

236. The application of a common entitlement across all modern awards will be simpler and easier to understand than a piecemeal approach.

3 *Conclusion*

237. For the reasons set out in these submissions, the Fair Work Commission should grant the variation sought by the ACTU.

9 May 2017

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