IN THE FAIR WORK COMMISSION

Matter No.: AM2014/300

Fair Work Act 2009

Section 156 - 4 yearly review of modern awards

Award Flexibility

Submissions in Reply of:

Australian Council of Trade Unions (ACTU)

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Introduction

1. The Australian Industry Group (AiG) has made an application to insert provisions into some awards which deal with time off in lieu of payment for overtime (TOIL) and make-up time (MUT) (together AiG's Claim).[1]

2. We oppose the AiG's Claim. TOIL and MUT provisions are not necessary to ensure that the awards meet the Modern Awards Objective (MAO).[2] The reasons for our opposition are set out in these submissions.

3. Our affiliate, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) has also made an application (22 March 2015) to improve TOIL provisions in five awards. We support the AMWU application and rely on aspects of their submissions.

The AiG's Claim

4. The AiG's application is couched in terms of seeking flexibility to assist employees with work-life balance issues. There is a strong focus on the needs of employees to meet family responsibilities,[3] such as caring for children and older family members, as well as to a lesser extent on the needs of students.[4]

5. However the AiG's submissions fail to recognise that the *Fair Work Act 2009* (Act), the National Employment Standards (NES) and the award safety net already provide the sorts of flexibility that AiG's Claim seeks to achieve.

6. The existing provision in the Act allow for employees to make requests for flexible working arrangements[5] (RTR) and the ability to enter into an individual flexibility arrangement under an award or agreement (IFA). Such provisions mean that the proposed clauses have no work to do. We discuss this under the heading 'RTR and IFAs' below. Further, the proposed clauses have the potential to undermine the various protections afforded to employees under the Act and as such, the AiG's Claim should be rejected.

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[1] Note that the AiG has also filed a submission dated 13 November 2014 and a supplementary outline of issues dated 5 December 2014 which were in a more restricted form than the 18 March 2015 submissions.
[2] Section 134 of the Act
[3] AiG submissions dated 18 March 2015 at pars 4, 10, 15, 59, 92, 93 and 98
[4] AiG submissions dated 18 March 2015 at par 15
[5] Section 65 of the Act

7. The AiG's Claim will not provide employees with family friendly working conditions as neither clause gives an employee any control over the timing of TOIL or MUT. The employer retains ultimate discretion as to whether to allow an employee to access a provision and how it is accessed.

Time off in lieu of payment for overtime clause

8. We continue to hold our fundamental objection as argued in the *Family Leave Test Case*[6] to the way in which many award clauses treat TOIL provisions.

9. TOIL should be accounted for at the appropriate overtime rate. That is, if an award provides for overtime at the rate of time and a half for the first two hours and double time for all hours thereafter and an employee works two hours of overtime that employee should receive three hours' TOIL. The absence of payment at the relevant rate undermines the entitlement to penalty and overtime rates as provided for in the relevant awards.

10. This is consistent with the claim by the AMWU and the way in which a number of awards already operate to ensure that the value of overtime is not reduced.

11. Allowing overtime rates to be reduced by discounting the original value of the overtime simply because the overtime is taken as time off instead of being received as wages provides an incentive for employers to apply undue pressure on employees to opt to take TOIL rather than overtime payments.

12. We set out below relevant research that supports our view that it is necessary to take a cautious approach in respect to employer-sought flexibility measures.

Make up time clause

13. Similarly to the TOIL provision, the proposed MUT clause undermines relevant entitlements for shiftworkers to be paid appropriate loaded rates. It would, for example, permit shiftworkers to take time off during normal hours and work them at a later time and receive ordinary rates when otherwise shift rates would apply. Again, this allows for shift rates to be avoided and hence provides an incentive for employers to pressure employees to 'agree' to forfeit the additional wages.

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[6] Dec 2200/94 M Print L6900 and Dec 2435/95 M Print M6700

14. The provision also has consequences for non-shift workers who could be asked to take time off during their normal work hours and work it later in such a way that the provision operates like a de facto stand down clause.

15. As such, the proposed MUT clause creates a new circumstance in which an employee could be stood down that is not contemplated by section 524 of the Act. This undercuts the existing provisions of the Act which already set out an exhaustive list of occasions where employees can be lawfully stood down.

16. It is not the role of the Award safety net to undercut the Act. It would not be serving the MAO to insert into awards a provision which is less beneficial to employees than that provided for in the Act.

17. The provision undermines protections for part-time employees relating to their agreed hours and days of work. A number of awards, including some set out in Attachment 3 to the AiG's submission, provide that an employer and part-time employee must agree on the hours and days to be worked.

18. For example the Air Pilots Award 2010 relevantly provides:[7]

    11.4 Part-time employment

    > *…*
    >
    > *(d) At the time of engagement the employer and the part-time pilot will agree in writing, on a pattern of work and which days of the week the pilot will work.*
    >
    > *(e) Any agreed variation to the regular pattern of work will be recorded in writing.*
    >
    > …

19. Another example of a more prescriptive provision which provides certainty to part-time employees is clause 11.4(b) of the Airline Operations – Ground Staff – Award 2010 which relevantly provides:

[7] For further examples, see also clause 13 of the Aircraft Cabin Crew Award 2010, clause 10.4 of the Ambulance and Patient Transport Industry Award 2010, clause 10.3 of the Asphalt Industry Award 2010, clause 10.3 of the Black Coal Mining Industry Award 2010, clause 12.4 of the Cleaning Services Award 2010, clause 10.2 of the Coal Export Terminals Award 2010, clause 10.3 of the Commercial Sales Award 2010, clause 13.2 of the Textile, Clothing, Footwear and Associated Industries Award 2010

(b) Part-time day workers

(i) At the time of engagement or appointment of an employee as a day worker, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying:

- *the guaranteed minimum number of ordinary hours to be worked per week; or*
- *which days of the week the employee will work and the actual starting and finishing times each day.*

(ii) Subject to the employer's rights in clauses 8.4 and 28.4 to change an employee's hours of work, changes in hours may only be made by agreement in writing between the employer and employee. Changes in days can be made by the employer giving one week's notice in advance of the changed hours.

20. Clause 13 of the Building and Construction General On-site Award 2010 relevantly provides:[8]

13.3 Before commencing a period of part-time employment the employee and the employer will agree in writing:

(a) that the employee may work part-time;

(b) upon the hours to be worked by the employee, the days upon which the hours will be worked and commencing times for the work;

(c) upon the classification applying to the work to be performed; and

(d) upon the period of part-time employment.

13.4 The terms of an agreement may be varied, in writing, by consent.

13.5 A copy of the agreement and any variation to it will be provided to the employee by the employer.

20. Both the General Retail Industry Award 2010 and the Fast Food Industry Award 2010 both include the following provisions:

12. Part-time employees

[8] For further examples, see also clause 10.4 of the Cement and Lime Award 2010, see clause 11.4 of the Concrete Products Award 2010

…

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- *the hours worked each day;*
- *which days of the week the employee will work;*
- *the actual starting and finishing times of each day;*
- *that any variation will be in writing;*
- *minimum daily engagement is three hours; and*
- *the times of taking and the duration of meal breaks.*

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee.

21. Not only do the above clauses provide that a part-time employee's hours of work must be agreed in writing, any variation thereto must be recorded in writing. In the case of the Airline Operations – Ground Staff Award 2010, any changes proposed by the employer must be preceded by a week's notice. The Building and Construction General On-site Award 2010 also provides that a copy of the agreement and any variation be given to the employee. The proposed MUT clause does not require that the agreement be made in writing in order to change an employee's pattern of hours. Nor does it include a period of notice or a requirement that an employee be provided with a copy of the MUT agreement.

22. The proposed MUT clause would be a way in which an employer could avoid obligations to keep time and wages records in this regard.

23. In relation to rostering, the proposed clause would be an additional way in which an employer could alter an employee's roster without recourse to award requirements.

24. For example, clause 24.2 of the Electrical Power Industry Award 2010 relevantly provides:

(d) An employer must not change the structure of a roster or implement a new roster unless it has given all affected employees at least four weeks' notice of the change or new roster, or secured the agreement of all affected employees.

(e) An employer may require an employee to work a different shift or shift roster upon giving 48 hours' notice or such shorter period as is agreed or as operational circumstances reasonably require.

(f) Subject to the approval of the employer, employees may, by agreement, exchange shifts and days off, but in these circumstances pay will be as if the work had proceeded according to the roster.

25. Clause 8.2 of the Building and Construction General On-site Award 2010 provides:

(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.

(b) The employer must:

(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

(c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

26. Clause 24.4. of the Poultry Processing Award 2010 relevantly provides:

(e) Shift notice

(i) An employee must be given at least 48 hours' notice of a requirement to work shiftwork and any alteration to their hours of work. By agreement between an employer and an employee, the notice requirement may be waived.

(ii) The hours for a shiftworker when fixed may be varied for breakdowns or other causes beyond the control of the employer.

27. Clause 23 of the Wool Storage, Sampling and Testing Award 2010 provides:

23. Rostering

23.1 Employees other than shiftworkers

> *An employer may vary an employee's days of work or starting and finishing times to meet the needs of the business by giving 48 hours' notice or such shorter period as is agreed between the employer and an individual employee.*

23.2 Shiftworkers

> *(a) A shift system may be implemented by the employer and may be altered from time to time to meet the needs of the business in accordance with this clause. The employer may carry out operations 24 hours per day, seven days of the week and implement and change roster systems to meet its operational requirements from time to time, having regard to the health and safety of employees.*
>
> *(b) Employees may be required to change between day work and shiftwork. An employee may be required to commence to perform or cease to perform shiftwork upon one week's notice.*
>
> *(c) Where an employee is performing shiftwork, the employer may change shift rosters or require an employee to work a different shift roster upon 48 hours' notice. These time periods may be reduced where agreed by the employer and the employee or at the direction of the employer where operational circumstances require.*
>
> *(d) The employer must, upon request by a directly affected employee, consult with directly affected employees about any changes made under this clause.*

28. It is clear that misuse of the MUT provision would circumvent these kinds of provisions which provide protection to employees in terms of being able to manage their work and life obligations. The kinds of protections referred to include notice of changes to rosters and consultation about proposed changes.

Written records

29. Neither the proposed TOIL nor MUT provisions include any requirements that agreement be recorded in writing. Section 535 of the Act requires that an employer must make and keep employee records for seven years.

30. The *Fair Work Regulations 2009* (Regs) prescribe that these employee records must include information about, among other things, overtime hours and IFAs.[9]

31. It can be seen that in the case of the proposed TOIL clause the AiG seeks to avoid obligations to record overtime hours.

32. Sections 144 and 203 of the Act provide that an IFA, made under an award or agreement, must be in writing and a copy provided to an employee.

33. In terms of both the TOIL and MUT clauses AiG is seeking to avoid obligations on employers to keep records of IFAs by creating a new way in which to make an arrangement with an employee which could also be made under an IFA.

34. A glaring difference between the existing obligations under the Act and the AiG's Claim is that the latter lacks any obligations relating to written agreements and the provision of a copy to an employee.

Better off overall

35. The AiG's Claim fails to provide any mechanism to ensure that employees who make use of the TOIL and/or MUT provisions are better off overall than if they otherwise had not. This is discussed further below.

36. The requirement that an employee be better off overall is important to ensure that employees are not taken advantage of and that employers turn their minds to the content of an individual agreement such as an IFA.

37. The proposed TOIL and MUT clauses do not include this requirement.

38. In relation to an IFA, where for example, the employer fails to ensure that an employee is better off overall, this failure constitutes a breach of the flexibility term of the award or agreement and a contravention of a civil remedy provision, being a general protections provision.[10]

[9] Reg 3.30

39. The proposed TOIL and MUT clauses do not include the above protection.

40. The lack of transparency is exacerbated by the absence of record keeping which means that employees will have no means to assess over time whether they have been paid correctly or that enables a reconciliation of the time (and wages) that have been forfeited under such arrangements.

Flexibility for whom?

41. What does 'flexibility' mean? Many have argued it translated into increased work intensification, long and unpredictable hours and a deterioration in their work-life balance. On the other hand, some have argued that flexibility is a two-way affair, and that workers also gain flexibility.

42. One of the reasons that employers adopted flexible working arrangements was to ensure that the business could attract and retain skilled and experienced workers by being able to offer working conditions which were able to accommodate the employees' personal circumstances, such as caring obligations.

43. Today, flexibility is viewed as a way of providing employers with the ability to manage and respond to production and supply demands by having a workforce which is responsive to peaks and troughs. Unions have been (and continue to be) critical of flexibility in circumstances where it is used as a means to confine workers in insecure, unpredictable and variable work: it is a euphemism for control.

44. A Canadian study indicates that flexible work schedules are created for business reasons rather than for the needs of individual workers.[11]

45. Research shows that employees in managerial and professional occupations tend to have better access to flexibility than employees in blue collar and service jobs.[12] Those who have autonomy

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[10] See EM at 577, 874

[11] See Zeytinoglu, Isik U., Gordon B Cooke and Sara L Mann, *Flexibility: Whose Choice is it Anyway?*, *Industrial Relations*, 64(4), 555-574, 2009.

[12] Zeytinoglu, Isik U., Gordon B Cooke and Sara L Mann, *Flexibility: Whose Choice is it Anyway?*, *Industrial Relations*, 64(4), 555-574, 2009, at 557

and control at work, such as managers and professionals are in a better position to negotiate flexible work schedules suitable to their personal needs.[13]

46. While award-reliant employees are less likely than managerial and professional employees to have autonomy and control at work, the AiG's Claim will do nothing to improve this situation.

47. TOIL and MUT provisions do not provide employees with anything more than a right to request certain rights; an employee's ability to access the provisions is ultimately contingent on the employer's agreement.

48. Further, award/agreement free employees, such as managers and professionals, along with those covered by enterprise agreements both have significantly more industrial power than their colleagues who are award reliant.

49. Award/agreement free employees are likely to have significantly more bargaining power due to their personal or individual status. They may for example have specialised or expert skills or knowledge gained through training or experience that is not widely found in the greater workforce. These employees are likely to be in a position which enables them to use their power to achieve positive industrial outcomes.

50. Enterprise agreement employees achieve their industrial power through collective bargaining.

51. Award reliant employees are not in the same position as award/agreement free and enterprise agreement employees. They are unlikely to have the individual or the collective power of either of these groups. As such, award-reliant employees are less likely to be able to access any flexibility available of their own volition and on their own terms. This is the case regardless of how many provisions are inserted into awards which aim to provide said flexibility.

52. We submit that in the case of the AiG's Claim it is more likely that award reliant employees will have the TOIL and/or MUT provisions foisted upon them as and when it suits their employers much as was the case when AWA's were in operation.

53. There is no evidence that these claims are sought in the best interests of employees. In light of the fact that such flexibility can already be afforded to employees under existing mechanisms it

[13] Zeytinoglu, Isik U., Gordon B Cooke and Sara L Mann, *Flexibility: Whose Choice is it Anyway?*, *Industrial Relations*, 64(4), 555-574, 2009, at 568

is clear that the AiG's Claim is directed at increasing employer flexibility. This is something the AiG admits.[14]

Economic and industry information

54. AiG includes economic and industry information in its submission. While there is a lot of information, much of it does not support and is not relevant to the AiG's Claim. It certainly does not assist the AiG demonstrate that its TOIL and MUT clauses are necessary to meet the MAO.

55. For example, AiG refers to data suggesting that up to 70% of those currently working part-time are not able to work more hours.[15] We note that this data is not referenced. It appears that the Commission is invited to draw a conclusion that this may be because these workers do not have access to the required forms of flexibility. We submit that the Commission cannot draw such a conclusion and there are likely a multitude of other reasons why this is the case, including that employers will not give such employees more hours of work or that employers refuse to engage in RTR and IFAs.

56. We do not disagree that flexible work arrangements are vital to achieving increased participation in the workforce, particularly among those with young children, caring responsibilities and study commitments.[16] We disagree that the type of flexible work arrangements needed are those set out in the AiG's Claim. As set out below, RTR and IFAs provide the flexible work arrangements that help to increase workforce participation.

57. Claims that certain employment trends will elevate the importance of flexible working and hours will enable stronger employment growth are mere assertions.[17]

58. Likewise claims that a more flexible award system would assist 'discouraged jobseekers' back into the workforce lack any foundation.[18]

59. AiG asserts that inclusion of the proposed TOIL clause would increase the number of employees in receipt of TOIL for working overtime.[19] Again, this is a mere assertion, not backed up further. On the one hand it may be logical as more employers may force employees to take TOIL rather than the appropriate payment for overtime. However, on the other hand it is not logical to

[14] AiG submission pars 130, 131 and 137
[15] AiG Submission 18 March 2015 at par 13
[16] AiG Submission 18 March 2015 at par 15
[17] AiG Submission 18 March 2015 at par 21
[18] AiG Submission 18 March 2015 at par 23
[19] AiG Submission 18 March 2015 at par 37

assume that this would eventuate in practice because the employer has the ability to veto such an option.

60. The simple fact that TOIL is a feature of some awards does not support the conclusion that it is necessary in the remaining awards, and certainly does not mean that the MAO is met in that regard.

61. Further, just because employees highly value flexibility in the workplace does not mean that the TOIL provision should be included in more modern awards.[20] There are other ways an employee can already seek and obtain flexible work practices which we discuss below. The AiG's assertion that "clearly a large proportion of employees prefer time off ahead of overtime"[21] is merely an assertion that is not backed with any supporting evidence.

Right to Request Flexible Working Arrangements and Individual Flexibility Arrangements

62. As noted above RTR and IFAs allow employees to obtain the flexibility that the AiG's Claim seeks to achieve. The flexibility afforded by RTR and IFAs means that employees do not suffer a financial disadvantage as a result of balancing work and life.

63. AiG submits that there is a low take up of IFAs for a number of reasons and that smaller businesses prefer informal agreements.[22] This does not demonstrate that there is a need for other kinds of flexibility, rather it may demonstrate that employers prefer to avoid the safeguards and other protective obligations that IFAs (and RTR) provide.

Right to Request Flexible Working Arrangements

64. Section 65 of the Act provides:

Requests for flexible working arrangements

Employee may request change in working arrangements

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

[20] AiG Submission 18 March 2015 at par 46
[21] AiG Submission 18 March 2015 at par 47
[22] AiG submission 18 March 2015 at par 150

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

65. Section 65 of the Act allows certain employees to seek flexibility to meet their particular needs. These employees are:

   a. Parents of children who are school aged or younger;

   b. Carers, that is a person who provides personal care, support and assistance to someone who needs it because that other person has a disability, has a medical condition, has a mental illness or is frail and aged[23];

   c. People with a disability;

   d. People who are 55 years of age or older;

   e. People who are personally experiencing, or supporting someone else who is experiencing, domestic violence.

66. Further, employees who are parents or who have the responsibility for the care of a child who are returning to work after a period of parental leave have the ability to seek to work on a part-time basis. AiG acknowledges that the incidence of part-time work is increasing in Australia.[24]

[23] See *Carer Recognition Act 2010* (Cth) s 5

67. There is already a mechanism to provide the employees identified by AiG, and others, with the ability to request part-time work. This mechanism is no less flexible or certain than AiG's proposed clauses which can be vetoed by an employer in any case.

68. The Explanatory Memorandum to the Fair Work Bill 2008 provides, as part of the regulatory analysis of the provision:

> *"r.46. The consideration of a request for flexible working hours may involve some minor administrative cost, primarily the time spent by management and/or human resources staff to consider a request and prepare a written response to the employee. However, the department does not expect this requirement to be onerous for the vast majority of businesses and therefore these costs are likely to be minimal.*
>
> *r.47. Furthermore, any costs incurred by businesses in considering requests for flexible working arrangements where industrial instruments did not offer such flexibility may be offset by the benefits to employers such as increased staff retention and loyalty. Indeed, businesses that are able to offer flexible working arrangements may benefit by being viewed favourably as an 'employer of choice'."*

69. The above extracts illustrate that claims about an increased regulatory burden, or 'red tape' associated with the use of RTR or IFA provisions in the Act which necessitate the introduction of the AiG's Claim, should not be accepted. Any claims along these lines signal an intention to avoid obligations under the Act which operate to protect employees from exploitation.

Individual Flexibility Arrangements

70. Sections 144 and 202 of the Act respectively provide that an award and an agreement:

> *must include a term (a flexibility term) that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the award/agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer*

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[24] AiG submission 18 March 2015 at pars 11-13

71. Importantly the award[25] and agreement[26] IFAs both include a requirement that an employee be better off overall under the IFA than if one had not been entered into. As set out previously certain protections flow from this. These protections should not be circumvented.

72. The model IFA clause for awards provides as follows:[27]

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

[25] S 203(4)
[26] S 144(4)(c)
[27] Example taken from the Cotton Ginning Award 2010, clause 7

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving 13 weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the Fair Work Act 2009 (Cth)).

7.9 The notice provisions in clause 7.8(a) only apply to an agreement entered into from the first full pay period commencing on or after 4 December 2013. An agreement entered into before that date may be terminated in accordance with clause 7.8(a), subject to four weeks' notice of termination.

7.10 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

73. The model flexibility term allows an employer and an employee to enter into an agreement which would achieve what the AiG is seeking through its proposed TOIL and MUT clauses.

74. It should be noted that during bargaining an employer and employees can agree on which terms of the agreement can be varied by an IFA. Such a clause in an agreement can offer even greater flexibility than that provided for under an award clause or the model term.

75. In relation to TOIL it is clear that clause (1)(a)(ii) of the model clause provides that an employer and employee can agree to vary the effect of terms of an agreement dealing with overtime rates. There is no need for the proposed TOIL clause in light of this.

76. In relation to MUT it is clear that clause (1)(a)(i) of the model clause provides that an employer and employee can agree to vary the effect of terms of an agreement dealing with when work is performed. There is no need for the MUT clause in light of this.

77. In light of the fact that the outcomes of two clauses sought can be achieved under award clauses or the model clause alone, we do not see the need for additional award clauses.

78. Further, section 138 of the Act makes it clear that an award is able to include terms "only to the extent necessary to achieve the modern awards objective".

79. We urge the Commission to be cautious in its consideration of the claim and turn its mind to the real reason for the claims which we assert must be to avoid the existing protections under the Act.

NES provisions

80. The current statutory context is significantly different to that which existed at the time the *Family Leave Test Case* was being decided and we submit that this is something to which the Commission should have regard in this matter.

81. In particular, the safety net has changed since the *Family Leave Test Case* decisions were handed down. It now provides additional flexibilities, protections and rights to employees and employers which it did not do 20 years ago. There are a number of examples of increased flexibility which exist today. We focus on the following matters considered during the *Family Leave Test Case* below.

82. We submit that the significant changes which are highlighted below are further compelling reasons why the AiG's Claim should not be granted.

83. In addition to the expansive flexibility offered by RTR provisions and IFAs there are other terms of the NES which operate to provide employees with flexibility to achieve a balance between work and life.

Personal/carer's leave

84. In Stage 1 of the *Family Leave Test Case* the Full Bench determined that employees could access sick leave to care for or provide support to a member of their family who is ill.[28]

85. In relation to Stage 2 the Full Bench proposed that sick leave and compassionate/bereavement leave could be aggregated to allow an employee to care for or provide support to a member of the employee's family who is ill.[29]

86. Without tracing the intricacies of the development of the current safety net contained in the NES we can see that currently employees are able to access paid personal/carer's leave each year which accrues at the rate of 10 days per year and accumulates from year to year.[30]

87. Importantly this paid leave can be used because of a personal illness or injury of the employee or to care for or support a family member or a member of the employees household who is ill, injured or has experienced an emergency.[31]

88. This is a much improved position to that which existed in 1994-95 in terms of the leave being paid and being available for use in relation to a wider category of people.

89. The greater flexibility afforded to employees in terms of how they can use personal/carer's leave is another reason why the AiG's proposed clauses are not necessary.

Annual leave

90. Again in Stage 1 of the *Family Leave Test Case* the Full Bench decided to introduce greater flexibility in relation to the taking of annual leave.[32]

91. The Full Bench determined that up to one week of annual leave could be taken in single days.

92. Without tracing the intricacies of the development of the current safety net contained in the NES we can see that currently there is no limit on the way in which annual leave can be taken.[33]

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[28] Family Leave Test Case – November 1994 – Stage 1 (1994) 57 IR 121 at 146
[29] Family Leave Test Case – November 1995 – Stage 2 (1994) 62 IR 47 at 53-62
[30] S 96
[31] S 97
[32] Family Leave Test Case – November 1994 – Stage 1 (1994) 57 IR 121 at 147
[33] S 88

That is an employee's entire compliment of annual leave can be taken in single days, or part days, if the employee so choses.

93. This is a significant increase in terms of flexibility from that which existed in 1994-95.

94. The greater flexibility afforded to employees in terms of how they can take annual leave is another reason why the AiG's proposed clauses are not necessary.

Part-time work

95. This item of consideration is not specifically an NES provision, however, for convenience we deal with it in this section.

96. In Stage 1 of the *Family Leave Test Case* the Full Bench acknowledged that some employees may desire to work part-time to balance their work and family needs.[34] In 1994-5 part-time work was not a prevalent as it is today. AiG recognise the growth in part-time employment.[35]

97. Part-time work is another way in which employees can balance work and family responsibilities and another reason why the AiG's proposed clauses are not necessary.

Current modern awards

98. In this section we consider three things. The first is that the Full Bench of the Commission in the *Preliminary Jurisdictional Issues Decision*[36] made some important findings in relation to modern awards; the second is that if the AiG's claim is granted it will result in a significant reduction to a number of existing award provisions; and thirdly awards already contain a great deal of internal flexibilities.

Preliminary Jurisdictional Issues Decision

99. In the *Preliminary Jurisdictional Issues Decision* the Full Bench said:

> *"In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for*

[34] Family Leave Test Case – November 1994 – Stage 1 (1994) 57 IR 121 at 135
[35] AiG submission 18 March 2015 at pars 12 and 13
[36] [2014] FWCFB 1788

the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. 14 In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made."[37] (emphasis added)

100. There is no evidence that since awards were made there have been any significant changes warranting the introduction of the AiG's proposed clauses. The arbitral history of a number of pre-modern awards shows that previous tribunals have dealt with these particular matters on an award by award basis, and that as a result of those proceedings the provisions now sought were not included in those awards.

101. In the same decision the Full Bench also said:

"There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective".[38]

102. Awards already reflect appropriate terms and conditions for the industries and occupations which they cover.

103. There is no substance to claims that there is no reason why some awards and not others should have had TOIL and MUT provisions included in them.[39]

104. There were obviously good reasons for these outcomes which have been reflected in modern awards as they stand now and this has been endorsed recently by the Commission in the *Preliminary Jurisdictional Issues Decision.*

[37] At par 24
[38] At item 6 of par 60
[39] AiG submission 18 March 2015 at pars 111 and 112

Reduction to current terms and conditions

105. It should be noted that the AiG is attempting to reduce existing terms and conditions of employment in the awards set out in Attachment 2 to its submissions.

106. The AiG says that awards operate as a minimum safety net and as such the lowest common denominator in terms of a TOIL provision should apply to all awards.[40] This argument has no merit when one considers that the NES is the absolute minimum safety net which cannot be undercut in any way and that the Act allows modern awards to supplement the NES.[41]

107. Not only does the argument have no merit it is unfair particularly when one considers the reluctance of employers to bargain with their employees so that employees have a chance to improve upon the NES and awards.

108. We oppose any reduction in current terms and conditions of employment.

109. In the *Family Leave Test Case* the ACTU attempted to secure TOIL at the appropriate overtime rate.

110. While we were not successful in securing this in all awards, there was no reduction to provisions which were already more beneficial.

111. Print No M2701[42] is a decision of Commissioner Whelan dealing with the outcomes from the *Family Leave Test Case* in relation to the Victorian Local Authorities Interim Award 1991. It provides:

> *"The application is consistent with the Commission's principles in that it seeks to incorporate a test case standard into an award. Where the award already provides for the flexibility which the test case orders seek to ensure it is not necessary for the orders to contain those provisions."*

112. We commend the approach taken by the Commissioner in M2701. This approach reflects what the Full Bench said in the *Preliminary Jurisdictional Issues Decision*.

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[40] AiG submission 18 March 2015 at par 55
[41] S 55
[42] Link: https://www.fwc.gov.au/search/documents/results?query=M2701&indexes[0]=1&start=0&page=0&keys=M2701&sort=score&order=asc&filename=/documents/decisionssigned/html/M2701.htm

113. In the supplementary outline of issues dated 5 December 2014 AiG says that a number of award clauses 'deviate' from the test case standard in relation to TOIL. This assertion does not accurately reflect the outcome of the *Family Leave Test Case*.

114. We refer to pages 9 – 10 of the Background Paper which sets out what occurred as a result of a conference on the issues.[43]

115. The *Family Leave Test Case* was considered further in Print No M6700.[44]

116. In relation to TOIL, under the heading 4.4 of Print No M6700, the Full Bench said:

> *"Where an award currently provides for time off in lieu of payment for overtime at overtime rates then that part of the package we have determined should not be inserted into the award in question. In this regard the approach adopted by the Commission in the variation of the Victorian Local Authorities Interim Award 1991 [Print M2701] is appropriate."*

117. It should also be noted that in the *Family Provisions Case*[45] the Australian Industrial Relations Commission (**AIRC**) refused to grant various employer claims. Importantly the AIRC refused to grant ACCI's claim for MUT provisions and TOIL provisions which did not require the agreement of a majority of employees as part of a facilitative provision.

118. The *Family Provisions Case* provides:[46]

> *"ACCI/NFF submitted that the alterations it seeks to the existing test case make-up time provision, which include removing the requirement for majority facilitation of make-up time requests and allowing make-up time to be made up at any time mutually agreed, will significantly improve the access and utility of make-up time arrangements for work and family purposes.*
>
> *The ACCI/NFF claim was opposed by the ACTU on the basis that the Commission has already established a make-up time standard. The ACTU submitted that to the extent that ACCI/NFF seek to depart from the existing test case provision they do so in a way that is unfair to employees and*

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[43] Link: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014300-FWC-paper-100315.pdf

[44] Link: https://www.fwc.gov.au/search/documents/results?query=M6700&indexes[0]=1&start=0&page=0&keys=M6700&sort=score&order=asc&filename=/documents/decisionssigned/html/M6700.htm

[45] PR082005

[46] PR082005 at [274]-[275], [276]-[279]

is a device to avoid award obligations. The ACTU also submitted that ACCI/NFF provided insufficient evidence to support its application."

119. In relation to TOIL the *Family Provisions Case provides*:[47]

"ACCI/NFF submitted that many key awards "have not delivered the options and capacities this clause is so clearly designed to deliver" and that in practice "many federal award provisions differ from this model, they are complicated, and they do not actually deliver direct access to direct toil arrangements". Reasons given included that time off in lieu provisions in many awards have been made subject to employee majority veto clauses, a circumstance that ACCI/NFF submitted is inappropriate and impractical."

120. The ACTU opposed any variation to the existing standard, submitting that there is no evidence of problems with it or sufficient evidence to justify removal of the safeguard entitling an employee to elect to convert their time off back to wages if more than four weeks has elapsed since the entitlement was earned. The ACTU also submitted that a majority of awards already containing time off in lieu provisions provide for such time off at overtime rates (rather than ordinary rates) and that if the ACCI/NFF proposal was granted, workers taking time off for family reasons would be disadvantaged."

121. The ACTU's submissions were accepted by the AIRC as the ACCI/NFF claim in relation to MUT and TOIL was not granted.48 We commend this approach to the Commission in relation to AiG's Claim.

Awards already contain a great deal of internal flexibilities

122. At **Attachment A** to these submissions we include some examples of the flexibility which already exists in a number of modern awards. The flexibility works for both employers and/or employees depending upon the provision.

123. This demonstrates that there is significant flexibility which already exists in awards and that the AiG's Claim is not necessary.

[47] PR082005 at [278]-[279]
[48] PR082005 at [388]-[401]

Consideration of the MAO

124. AiG has not brought any evidence in support of their submission that the proposed clauses are necessary to ensure that respective awards meet the modern awards objective. We deal with each of the criteria as set out in section 134 of the Act.

The relative living standards and the needs of the low paid

125. At the time of the *Family Leave Test Case* there was no MAO specifically like that set out in section 134(1)(a).

126. While the *Industrial Relations Act 1988*[49] (IR Act) had, as one of its objects the establishment and maintenance of an effective framework for protecting wages and conditions of employment through awards[50] the Full Bench in the *Family Leave Test Case* focussed its consideration on four objectives.

127. The Background paper provides an extract from the *Family Leave Test Case* at paragraph 24, however for convenience we include the extract:

> "In our view the decision we have taken in this matter represents an appropriate balance between the following objectives:
>
> - helping workers to reconcile their employment and family responsibilities consistent with the Commission's obligations under section 93A of the Act to take account of the principles embodied in the Family Responsibilities Convention;
> - promoting enterprise bargaining by maintaining an incentive to bargain;
> - introducing greater flexibility into the award system consistent with the Commission's statutory obligation to ensure that "awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees interests are also properly taken into account" [section 88A(c)];
> - the need to have regard to the economic impact of our decision pursuant to the Commission's obligations under section 90 of the Act.

[49] As at 1 May 1994
[50] IR Act s 3(b)(i)

128. These four objectives do not take into account the needs of the low paid. Low paid workers, such as those receiving award wages, need to receive the full value of their wages, overtime and penalties to make ends meet. Employees receiving award wages are receiving the legislated minimum rate for the type of work they are doing, they are by any definition low paid.

129. In fact, in our submission this alone provides a compelling reason for the Commission to review existing award provisions which discount overtime through TOIL provisions and to reconsider whether current provisions which do this meet the MAO, at least in terms of this specific objective.

130. Importantly, as set out previously, there are other provisions of the Act which can be utilised to ensure that employees can balance the demands of work and life without having to give up a significant percentage of their hourly rate in order to do so. We refer to RTR provisions and IFAs.

131. Specifically in relation to IFAs the ACTU's position is that they cannot be used to trade off monetary for non-monetary entitlements. This is in part due to the fact that employers have the ability to pressure or coerce employees to enter into an IFA which assists the employer monetarily.

132. The EM provides:[51]

> *"Because the value that a particular employee may place on a non-monetary benefit is important, it is less likely that an employee would be better off overall where the employer has initiated a request to agree an individual flexibility arrangement under which the employee gives up a monetary benefit in exchange for a non-monetary benefit. Similarly, it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged."*

133. Under the AiG's proposed TOIL provision, and the MUT provision relating to shift workers, an employee will forgo a monetary benefit in terms of the applicable overtime rate or penalty rate. There is no way that a clause can prevent an employer putting pressure on an employee in this regard.

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[51] At par 868

134. Further, there is no likelihood of an employee ever actually being able to access the purported flexibility in the provisions as the employer has the ultimate ability to say no and is likely to do so unless the employer receives a benefit.

135. It is not appropriate for the AiG to assert that an award-reliant employee is in the best position to decide whether he or she values time off or overtime payments (or even the appropriate shift rate in relation to shift workers and MUT).[52] The first reason for this is that employees in this situation have very little say over their working conditions; the second is that by virtue of being low paid such employees may have a strong preference to take the monetary value or be entitled to a fair exchange of work for time e.g. TOIL at overtime rates; and the third is that as noted the employer has the ability to veto the employee's choice.

136. The AiG's Claim will not maintain the living standards of the low paid nor will it support their needs.[53] The AiG relies on an employee's ability to choose whether to access either TOIL or MUT provisions, however, as noted, an employee's choice is thwarted any time that an employer does not provide consent.

137. Further, AiG's reliance on TOIL and MUT not affecting an employee's ordinary earnings is disingenuous. As noted, both RTR and IFAs already allow for this. The AiG's proposed clauses are clearly aimed at cost reduction and flexibility for employers only. The proposed clauses will act as significant deterrents to RTR and IFAs for these reasons.

138. We also adopt the submissions of the AMWU at paragraphs 43-55 of its submissions.

The need to encourage collective bargaining

139. While it is true that in a technical sense the AiG's Claim will 'not disturb the ability of employers and employees to collectively bargain',[54] we submit that granting employers additional flexibility at the safety net level will do nothing to encourage them to engage in collective bargaining. If employers are granted everything they want in awards there will be no incentive for them to engage in collective bargaining with their employees.

140. In contrast to the AiG[55] we submit that it is always appropriate for collective bargaining to provide the solution for flexibility to accommodate individual needs that vary not only from

[52] AiG submission date 18 March 2015 at par 9
[53] AiG submission date 18 March 2015 at par 114-116
[54] AiG submission date 18 March 2015 at par 117
[55] AiG submission date 18 March 2015 at par 119

person to person, but from enterprise to enterprise. As previously submitted, flexibility provisions work best in environments where there is co-operation and a sense of mutual understanding of each other's' needs. This is best achieved through collective bargaining, not by imposing conditions of the type sought by AiG into the safety net.

141. There is no impediment to an individual employee having access to the types of flexibility purportedly offered by the proposed TOIL or MUT clauses because of the need for majority approval of an enterprise agreement.[56] The types of flexibility afforded by TOIL and MUT provisions are better and more fairly afforded through RTR and IFAs.

The need to promote social inclusion through increased workforce participation

142. We adopt the submissions of the AMWU at paragraphs 57-58 of its submissions in relation to TOIL provisions as proposed by the AMWU.

143. In relation to the AiG's Claim we submit that granting it will have negative impacts on social inclusion and workforce participation as employees will, in some cases have less income to spend as their shift or overtime rates have been removed or discounted. Further they will have less time to participate in social activities such as time with their families or communities if the rate at which they accrue and take overtime is reduced under the proposed TOIL provision. Further, the ability to change an employee's working pattern as per the proposed MUT clause means it will be even harder for an employee to dedicate time to activities outside of work.

144. AiG's assertion that its proposed clauses will increase workforce participation must be taken with a grain of salt.[57] The reason for this is that the intended aims of the clauses is already realised and achievable through existing RTR and IFA provisions of the Act and awards. The AiG again cite working parents, carers of school-aged children and carers of elderly family members as those who would benefit from its proposed clauses. These kinds of employees already have the ability to obtain flexible working arrangements.

145. What is really needed is a genuine shift in employer attitudes towards the kinds of people we should be encouraging back into, or to participate to a greater extent, in the workforce.

[56] AiG submission date 18 March 2015 at par 120
[57] AiG submission date 18 March 2015 at par 123 and 124

Inserting provisions that are open to abuse by employers will not achieve the aims espoused by the AiG.[58]

The need to promote flexible modern work practices and the efficient and productive performance of work

146. AiG clearly demonstrates that the TOIL and MUT clauses will be used by employers to increase flexibility for a business rather than to address the needs of employees.[59] The aim is to give businesses, rather than employees, flexibility.[60]

147. The AiG's Claim provides employers with the ability to undermine and remove penalty or overtime rates. In terms of a productivity equation, an employee may put in 1.5 hours' work and receive time off of 1 hours' work. This is clearly a very efficient equation in terms of the gain to employers because if 1.5 hours' overtime equals one unit of labour, an employee only receives 2/3 of the value of that unit. This is remarkably unfair.

148. AiG's Claim would also unfairly empower employers to change employees working schedules, under the guise of employee agreement to do so.

The need to provide additional remuneration for employees working: overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; shifts

149. We rely on the submissions of the AMWU at paragraphs 62 to 73.

150. In addition we ask the Commission to refuse the MUT clause on the basis that for shift workers they will miss out on shift loadings which would otherwise be applicable.

151. The clauses may be voluntary in a technical sense, however, in reality this will not be so, and as already submitted, an employer can simply not consent to an employee's request. The only time a request will be granted is where the employer gets a benefit.

The principle of equal remuneration for work of equal or comparable value

152. We adopt the submissions of the AMWU at paragraphs 74 to 78.

153. We submit that the same arguments and reasoning apply to the proposed MUT clause.

[58] AiG submission date 18 March 2015 at par 124-127
[59] AiG submission date 18 March 2015 at par 128-131
[60] AiG submission date 18 March 2015 at par 129

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

154. The AiG again displays one of its main goals in securing the proposed TOIL and MUT clauses, that is a reduction in the regulatory burden.[61] The regulatory burden must be that associated with the safeguards related to RTR and IFA provisions which we have previously demonstrated are lacking in the AiG's Claim.

155. As previously set out the 'burden' associated with IFAs is not onerous, as demonstrated by the provisions of the Explanatory Memorandum extracted above.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

156. The need to ensure a simple and easy to understand modern award system does not require that all awards contain standardised provisions.[62] Each modern award is the result of rationalisation of a great number of awards from specific industries with the result that the provisions of the modern award reflect the provisions appropriate for a particular industry or occupation.

157. As previously set out, this has been endorsed on a number of occasions and there is no reason to depart from previous authority.

158. Further, as noted above the lack of record keeping obligations and transparency of these largely informal arrangements creates additional complexity for employees in ensuring that they have been paid correctly over a period of time, and that they are fully aware of the amount they have 'forfeited' under such arrangements.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

159. If the AiG's Claim will have a positive impact on employment growth, performance and competitiveness[63] then we would expect to see evidence demonstrating this taken from the time of the *Family Leave Test Case*. There is none, and this is telling.

[61] AiG submission date 18 March 2015 at par 136 and 137
[62] AiG submission date 18 March 2015 at par 139-141
[63] AiG submission date 18 March 2015 at par 142

160. We make the same criticism of claims in relation to benefits to the competitiveness of the national economy.[64]

161. As set out above, in terms of productivity the equation results in greatly increased outcomes for employers, particularly in terms of TOIL. Assertions that we need to improve productivity do not add any weight to or provide evidence as to why the AiG's Claim should be granted.[65] There is no specific evidence which shows that granting the AiG's Claim would improve productivity in any way other than one which is inherently unfair to employees.

Conclusion

162. The AiG's Claim is not necessary to meet the MAO.

163. The burden to prove that this is so is on the AiG. It has not brought a case on either a substantive or evidentiary basis which allows a decision maker to conclude that TOIL and MUT provisions are necessary to meet the MAO.

164. The AiG's Claim may be something that employers wish for or desire, and indeed the AiG has shown why it is really seeking the clauses, that is to reduce costs, increase employer flexibility and to stand employees down, among other things. However, it is not necessary to meet the MAO.

165. In *SDA v NRA (No 2)*[66] Justice Tracey considered the proper construction of s.157(1) of the Act. This was also referred to in the *Preliminary Jurisdictional Issues Decision.*[67]

166. Justice Tracey's observations are relevant to the consideration of section 138 of the Act that sets out the modern awards objective. Justice Tracey relevantly held:[68]

> *"The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective…"*

167. He went on at paragraph 46:

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[64] AiG submission date 18 March 2015 at par 143
[65] AiG submission date 18 March 2015 at par 144-146
[66] (2012) 205 FCR 227
[67] [2014] FWCFB 1788
[68] At 35

"In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary."

168. In the Preliminary Issues Decision Full Bench relevantly held:[69]

"… We also accept that the observations of Tracey J in SDA v NRA (No.2), as to the distinction between that which is "necessary" and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138."

169. There are other ways to achieve the flexibility purported sought by the AiG for employees. We have set these methods out above.

170. These methods may not achieve the flexibility which is really sought by the AiG, that is flexibility which shifts the balance further towards employers and does nothing to assist employees to manage their working and personal lives, and that is really why the AiG are seeking the TOIL and MUT provisions. As noted, the provisions do not provide many of the safeguards attendant with RTR and IFAs such as written agreement or an assessment of better off overall.

171. Should the AiG's Claim be granted employees will be stood down when work is slow, never actually able to access the provisions because an employer will say no in cases where there is no benefit to it, employees will lose a significant value of the time they spent at work, and their patterns of work will be able to disrupted. It is difficult to resolve the kinds of issues we have foreshadowed in these submissions. The AMWU have provided one good example of the kind of misuse we expect to occur.

172. The issues raised in these submissions have very real impacts on workers in terms of their health and productivity. Such issues are sometimes difficult to remedy. Often the solution is cultural change, not increased regulation in the form of award provisions that assist employers and not employees.

[69] [2014] FWCFB 1788 at 39

173. The Commission is being asked to include provisions into the award safety net that do not offer any real protections to employees. Should the Commission be minded to grant the AiG's Claim we submit that the safeguards identified by the AMWU should be adopted as they are necessary to ensure that employees receive at least a modicum of protection.

ACTU

Attachment A – Existing Award Flexibility

Commercial Sales Award 2010

- Schedule D "Part Day public holidays" provides that annualised salary employees will be entitled to additional annual leave or time off in lieu when they have worked on a public holiday.

Dry Cleaning and Laundry Industry Award 2010

- The current provisions in the relating to time off in lieu of overtime are provided in clause 22.2:

  22.2 Time off instead of payment for overtime

  An employer and an employee may agree that the employee will take time off instead of payment for all or some overtime worked. The agreement will:

  (a) provide for the time off to be taken in the normal working hours of the employee;

  (b) provide for the time off to be taken to be calculated as 'value time' i.e. if an employee works for one hour at time and a half penalty rates, they will be entitled to take one and a half hours off;

  (c) be in writing; and

  (d) provide for the time off instead of payment for overtime to be taken within a period of two months of the date on which the overtime is worked.

  and 22.5(d)

  22.5 Weekend and public holiday work

  …

  (d) Time off instead of payment for work on a Saturday, Sunday or public holiday

  An employer and an employee may agree that the employee will take time off instead of payment for all or some time worked on a Saturday, Sunday or public holiday. The agreement will:

  (i) provide for the time off to be taken in the normal working hours of the employee;

  (ii) provide for the time off to be taken to be calculated as 'value time' e.g: if an employee works for one hour at time and a half penalty rates, they will be entitled to take one and a half hours off;

  (iii) be in writing; and

  (iv) provide for the time off to be taken within a period of two months of the date on which the time is worked.

- This is not a facilitative provision.
- The provision may be used for any purpose, including to support family friendly arrangements.
- The protections in clause 22.2 are
    - The agreement must be in writing;
    - The time off in lieu of overtime must be taken within two months of working the overtime; and
    - Time off in lieu accrues at the overtime rate.
- There is current provision in the DCLI Award for make-up time.
- There is sufficient flexibility contained within Clause 7 - Award Flexibility to address any individual circumstances with appropriate protections (for example, making an IFA with respect to arrangements for when work is performed).
- Many of the submissions below in relation to the Textile, Clothing, Footwear and Associated Industries Award 2010 apply equally to this award.
- Workers who rely on this award can also be characterised as vulnerable and low paid. There is a high prevalence of part-time and casual employees, particularly in the dry-cleaning industry.

Fast Food Industry Award 2010

- There is sufficient flexibility contained within Clause 7 - Award Flexibility to address any individual circumstances with appropriate protections (for example, making an IFA with respect to arrangements for when work is performed).
- Clause 8 contains a standard consultation provision regarding changes to rosters or hours of work.
- Clause 25 deals with hours of work and rosters and provides considerable flexibilities in relation to how an average of 38 hours may be worked over a four week period.
- This award already provides ample flexibility which enables an employer to roster workers over 24 hours per day across a 7 day week spread of hours, subject to penalties/loadings.
- Clause 26.3 contains the current time off in lieu provisions:

    26.3 Time off instead of payment
    By mutual agreement the rate for overtime may be time off in lieu of overtime provided that:
    (a) Time off shall be calculated at the penalty equivalent;
    (b) The employee is entitled to a fresh choice of payment or time off on each occasion overtime is worked;

(c) Time off must be taken within one calendar month of the working of the overtime, or it shall be paid out.

- Junior rates continue to apply to workers under the age of 21 under this award.

General Retail Industry Award 2010

- There is sufficient flexibility contained within Clause 7 - Award Flexibility to address any individual circumstances with appropriate protections. (For example, making an IFA with respect to arrangements for when work is performed).
- Clause 8 contains a standard consultation provision regarding changes to rosters or hours of work.
- Clause 12 contains rostering provisions for part-time employees which allow roster changes to be made with a 7 day notice period, or, in the case of an emergency, 48 hours. In addition, rosters can be altered at any time by mutual agreement between the employer and the employee.
- This award already provides ample flexibility which enables an employer to roster workers over 24 hours per day across a 7 day week spread of hours, subject to penalties and loadings.
- Clause 28 deals with hours of work and rosters and provides considerable flexibilities in relation to how an average of 38 hours may be worked over a four week period. There is also provision for an assessment as to which method will suit the business best, which is subject to agreement between the employer and the employee.
- There is sufficient flexibility in clause 28.14 (c) to accommodate for unexpected operational requirements which enables roster changes by mutual agreement between the employer and the employee.
- Clause 28.14 (d) contains rostering provisions for full-time employees which allow permanent roster changes to be made with a 7 day notice period, or, in the case where the employee disagrees with the roster change, 14 days.
- Clause 29.3 contains the current time off in lieu provisions:

29.3 Time off instead of payment

(a) Time off instead of payment for overtime may be provided if an employee so elects and it is agreed by the employer.

(b) Such time off will be taken at a mutually convenient time and within four weeks of the overtime being worked or, where agreed between the employee and the employer may be accumulated and taken as part of annual leave.

(c) Time off instead of payment for overtime will equate to the overtime rate, i.e. if the employee works one hour overtime and elects to take time off instead of payment

the time off would equal one and a half hours or, where the rate of pay for overtime is double time, two hours.

- Junior rates continue to apply to workers under the age of 20 under this award.

Market Research Award 2010

- Clause 8: consultation provides that the Employer may make changes to the hours of work in conjunction with the 'hours or work clause listed below'.
- Clause 21 provides that employees must not work more than 12 hours on one day and that the roster cycle can be over 7, 14, of 28 days.
- Clause 21.8 provides that an employee may elect to work make-up time with the consent of the employer.
- Schedule E "Part Day public holidays" provides that annualised salary employees will be entitled to additional annual leave or time off in lieu when they have worked on a public holiday.

Nurses Award 2010

- Clause 28.2 provides for an employee to take time off instead of payment for overtime where agreed between employer and employee. The amount of time off taken is one hour for each hour of overtime "plus a period of time equivalent to the overtime penalty incurred".
- Clause 7 is the standard award flexibility provision.
- Clause 8.2 is the standard consultation provision regarding changes to rosters and hours of work.
- Clause 10.3 deals with part-time employment. The clause provides that before commencing employment, the employer and employee are to agree in writing the guaranteed minimum number of hours to be worked and the rostering arrangements which will apply to those hours. The terms of the agreement may be varied by agreement and recorded in writing.
- Clauses 21.3 and 24 - The award allows for the implementation of an accrued day off (ADO) system, whereby an employee works no more than 19 days in a four week period. Five ADOs can be accrued in a year.
- Clause 25 deals with rostering provisions and provides that, unless an employer otherwise agrees, an employee desiring a roster change can give seven days' notice. The employer is

required to do likewise, except a roster can be altered at any time where an employee is absent due to illness or an emergency.

- Clause 31 deals with annual leave. The award provides an extra week of annual leave: five weeks minimum for 'standard employees' and six weeks for shiftworkers.
- Clause 32.5 is a provision that may be especially unique to the award. It was introduced in 2013, importantly after *agreement* between employer parties and the union. This allows employees to accrue additional days of leave instead of receiving double time for working on a public holiday. Where the employer agrees, the employee receives ordinary time for working on the public holiday and accrues the same amount of hours to be taken as leave (which is paid at ordinary rates). Effectively, this is similar to the existing TOIL overtime clause, where time off is at overtime rates.

Oil Refining and Manufacturing Award 2010

- Clause 25.1 provides that an employer may vary an employee's days of work or start and finish times to meet the needs of the business by giving at least 48 hours' notice, or such shorter period as is agreed between the employer and an individual employee.
- Clause 25.5 provides the employer may vary or suspend any roster arrangement immediately in the case of an emergency.
- Clause 26.9 provides that an employee may take their annual leave in advance of the entitlement accruing.
- Clause 22.3 provides that the spread of hours may be changed by the employer for non shift workers by seeking the agreement of the majority of employees.
- Clause 22.4(c) provides that a shift worker employee may be required to cease or commence shift work at one weeks' notice.
- Clause 29.2 provides that an employer may seek the agreement of a majority of employees or agreement in writing from an individual employee to substitute a public holiday for a day paid under the NES

Pharmaceutical Award 2010

- Clause 11.3 provides that a part-time employee's regular pattern of work may be varied by agreement (provided that this is recorded in writing).

- Clause 26.6 provides that, by agreement between an employer and an employee, a period of annual leave may be taken in advance of the entitlement accruing.

Poultry Processing Award 2010

- Clause 12.4 provides that a part-time employee's rostered hours of work can be altered by a minimum of 48 hours' notice.
- Clause 27.6 provides that, by agreement between an employer and an employee, a period of annual leave may be taken in advance of the entitlement accruing.

Road Transport and Distribution Award 2010

- Schedule F "Part Day Public Holidays" provides that annualised salary employees will be entitled to additional annual leave or time off in lieu when they have worked on a public holiday.
- Clause 8.1, the facilitative provision, provides that the employer, by individual agreement, make changes to spread of hours, hours of work, ordinary hours, rostered day off and travel allowance.

Textile, Clothing, Footwear and Associated Industries Award 2010

- Clause 39.5 provides:

  39.5 Time off instead of payment for overtime

  (a) *An employee may choose, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer. This agreement must be in writing. The employee must take the time off within four weeks of working the overtime.*

  (b) *If an employee takes time off instead of payment for overtime then the time taken off accrues at the same rate as the overtime payment.*

- The provision may be used for any purpose, including to support family friendly arrangements.
- The protections include:
  - The choice to take time off in lieu of overtime must be at the initiative of the employee;
  - The agreement must be in writing;

- The time off in lieu of overtime must be taken within four weeks of working the overtime; and
- Time off in lieu accrues at the overtime rate.

- The AIG proposed clause will mean that workers current entitlements under the award are reduced. This directly contradicts the MAO concerning relative living standards and the needs of the low paid: (134(1)(a)). The AIG proposed clause will enable unscrupulous employers to pay workers less for working longer hours, under the guise of assisting them to balance their working and family life.
- The current clause provides for the flexibility employees may seek, without reducing their potential entitlements to overtime rates of pay.
- There is also significant flexibility contained within Clause 7 - Award Flexibility to address any individual circumstances with appropriate protections.
- Given the nature of the TCF industry and the demography of TCF workers, including that workers are vulnerable, generally from NESB, low-paid and have concerns about ongoing job security, the TCFUA is concerned that the AIG proposed clause will result in abuse by employers, where 'consent' or 'agreement' is actually achieved by misinformation, coercion and duress. The TCFUA has current examples where the current provisions, even with the limited protections contained therein, have been abused by employers.
- The TCFUA also has concerns that these provisions will be used for unlawful stand downs. The TCFUA has current examples where employers have attempted to use these provisions and other facilitative provisions to implement unlawful stand downs.
- There is no current provision in the award for MUT.
- There is sufficient flexibility contained within clause 7 - Award Flexibility to address any individual circumstances with appropriate protections (for example, making an IFA with respect to arrangements for when work is performed).

Wool Storage, Sampling and Testing Award 2010

- Clause 23.1 provides that, in relation to day workers, an employer may vary an employee's days of work or starting and finishing times to meet the needs of the business by giving 48 hours' notice or such shorter period as is agreed between the employer and an individual employee.

- Clause 23.2(c) provides that, in relation to shift workers, the employer may change shift rosters or require an employee to work a different shift roster upon 48 hours' notice. Moreover, that these time periods may be reduced where agreed by the employer and the employee or at the direction of the employer where operational circumstances require.
- Clause 25.5 provides that an employee may elect, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer.
- Clause 26.6 provides that, by agreement between an employer and an employee, a period of annual leave may be taken in advance of the entitlement accruing.