

# **REASONABLE HOURS CASE**

**COMMONWEALTH  
GOVERNMENT OUTLINE OF  
CONTENTIONS**

**NOVEMBER 2001**

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## SECTION 1 INTRODUCTION

1. As a matter of principle, the Commonwealth considers that employees should not regularly be required to work excessive hours. Furthermore, the Commonwealth is of the view that employers should take all steps appropriate to assist employees balance work and family.

2. That said, the Commonwealth opposes the Australian Council of Trade Unions' (ACTU) claim. The ACTU's claim fails at its first hurdle to demonstrate that there is a widespread problem with working time patterns in Australia. More critically, the ACTU seeks to impose an unnecessary 'remedy' that not only fails to satisfy the requirements of the Workplace Relations Act 1996 (the Act) but also would be unworkable at the workplace and costly to implement.

3. The Commonwealth's outline contends that the ACTU's proposed reasonable hours clause:

- *is unwarranted because Australian average working hours are actually declining rather than increasing and long hours are generally worked by those in non-award areas and by choice;*
- *is unnecessary because, currently, working time concerns are capable of, and usually are, being addressed effectively through industrial awards and agreements, and through the comprehensive regime of occupational health and safety (OHS) legislation and guidelines;*
- *fails to satisfy the legislative requirements;*
- *would be unworkable at the enterprise or workplace level and is unbalanced in not considering both the interests of employers and employees; and*
- *is inappropriate to be instituted as a test case standard.*

4. The Australian Industrial Relations Commission (the Commission) and its predecessors have, almost since the inception of the federal jurisdiction, dealt with issues surrounding hours of work. In doing so the Commission has been engaged in the enduring task of industrial arbitration, balancing the competing needs of businesses and their employees as well as the public interest.

5. The Commission has in the past confined any general standards regarding working time arrangements to setting standard ordinary hours. As regards the whole panoply of other provisions dealing with hours, the Commission has generally taken an approach that focuses closely on the particular circumstances of the given award and the industry it covers. Despite the development of some common features in the resulting provisions, the Commission's decisions have generally been responsive to differences between industries, occupations and awards.

6. In this case the Commission is being asked to set up a single, uniform and universally applied set of provisions overlaying the existing diversity of award provisions, albeit expressed in terms that leave enormous room for doubt as to what is to be mandated.

7. In the Commonwealth's submission there is little merit in the approach urged by the ACTU. That is not to say that existing awards cannot or should not ever be altered so as to better respond to circumstances where employees' working time arrangements are said to be unreasonable or excessive. It may be that some awards might, on close examination of relevant evidence, be found to be deficient in some way or warranting some updating. But the existing system of workplace relations is capable of dealing with these issues, whether through existing award level flexibilities, through conciliation or through arbitrated variation of particular awards or, most appropriately, through agreement making. There is little merit in taking a standardising approach to this issue and no merit in the 'standard' proposed in these applications. As one of the ACTU's supporting documents says, "It is obvious that a one-size-fits all approach to working time policy will no longer suffice."<sup>1</sup>

8. The ACTU must show why in this case workplace bargaining should not be permitted its primacy as the appropriate locus for seeking improvements in conditions of employment. Beyond that it would then need to show why the kinds of conditions and flexibilities present in many awards are insufficient to deal with issues like unreasonable or excessive hours. It would need to show that the issues sought to be remedied by the application are endemic to the industrial system as a whole, thereby warranting the establishment of a test case standard.

9. In relation to micro-industrial issues – ones where individual or local considerations are critical – the matter should be addressed at that level rather than through the more global quasi-instrument of a test case standard.

10. The wage fixing principles do not in any way diminish the heavy onus, which the applicants, through the ACTU, must bear. If the issues raised in these applications are dealt with by establishment of a new test case standard, then, absent any separate direction by this Full Bench, the only avenue for departure from that outcome in relation to other awards will be through the special case principle. Such a result would be entirely inappropriate in relation to a matter where local considerations – particular operational exigencies and the needs and preferences of different workforces and indeed different individuals – are paramount.

11. The Australian Chamber of Commerce and Industry (ACCI) has also lodged an alternative claim that seeks to ensure awards contain a range of flexible provisions. The Commonwealth supports this proposition, not least because it recognises the vast range of approaches that can be used to address working time arrangements and appropriately provide for such matters to be dealt with on a case-by-case basis.

## **SECTION 2 WORKING TIME – LABOUR MARKET SITUATION AND TRENDS**

12. Key contentions are:

- *There is no demonstrated widespread problem of employees being required to work long or excessive hours. Contrary to the ACTU's claims, working time in Australia is not increasing.*
- *Long hours are concentrated in particular industries and occupations, and in non-award occupations.*
- *Employees across the board do not have a preference to work shorter hours, with some preferring the additional pay for the longer hours.*
- *Claims that there is widespread incidence of unpaid overtime being worked are greatly overstated.*

### **Weekly hours**

13. Australian Bureau of Statistics (ABS) statistics show that average weekly working hours in 2001 were 39.7 hours for males and 29.0 hours for females.<sup>2</sup>

- These averages have fallen over the past 30 years, for both males and females, due to a strong increase in the number of part-time jobs.
- There has been an increase in the proportion of employed persons working 49 hours per week or more over the last few decades, particularly during the 1980's (before the advent of widespread bargaining), but the level has been stable at around 19 per cent since 1993.
  - These proportions are less when owner managers (who are self-employed) are excluded from the data.
  - These data refer to actual hours worked rather than usual hours worked. The latter are generally less than the former for those working long hours.

14. Long hours are concentrated in particular industries and occupations, and in non-award occupations - for example, the highest incidence of very long working hours (60 hours or more per week) is amongst professionals (26.8 per cent), associate professionals (19.0 per cent), managers and administrators (15.7 per cent), and intermediate production and transport workers (15.3 per cent).<sup>3</sup>

- The majority of those in managerial and professional occupations fall outside the formal workplace relations system, for example ABS data showed that in May 2000, awards covered only 2.8 per cent of private sector managers and administrators, 17.1 per cent of professionals and only 13.6 per cent of associate professionals.<sup>4</sup>

15. In relation to international comparisons, the Commonwealth notes that complexities arise when comparing hours worked between Australia and other countries and the results of such comparisons should be treated with caution. The OECD itself warns in its Occasional Paper No 45 that the data used “are unsuitable for comparisons of the level of average annual hours of work for a given year, because of differences in their sources”<sup>5</sup>.

### **Employee preferences and control over hours**

16. Most employees who work long hours do not want to work less hours, particularly if it entails less pay.<sup>6</sup>

- Only 13 per cent of those working very long hours would work fewer hours for less pay.

17. The growth of enterprise bargaining has led to an increasing divergence and flexibility in working time arrangements across the workforce with ABS statistics showing that those working long hours have more control over their hours of work than those who work standard hours.<sup>7</sup>

- Overall, 37 per cent of all employees (excluding owner managers) are able to work extra hours and then to take time off, while 35 per cent of employees have flexible start and finish times. Forty-four per cent of employees who work 50 hours or more per week have flexible start and finish times.

### **Unpaid hours**

18. A critical issue in the debate about ‘unpaid overtime’, which has not been addressed by the ACTU, is the interpretation of what the term actually means. The following matters should be considered:

- What does unpaid overtime mean for managerial and professional staff, or teachers who are not paid for working a set number of hours but are paid for performing a certain set of tasks and receive a salaried remuneration package rather than a wage?
- Managerial and professional staff may describe as “unpaid” overtime an time worked beyond the ordinary hours applicable to the majority of employees in their workplace, despite these standard hours not necessarily being relevant to them because of the different nature of their jobs.
- Annualised salary arrangements often incorporate a payment for overtime worked in the course of duties.
- Overtime may be compensated by non-monetary methods such as time off in lieu arrangements.

19. That said, ABS data show that most of the reported unpaid overtime worked in Australia (71 per cent) is worked by managers and administrators, professionals and associate professionals.<sup>8</sup>

- Paid overtime is rare for managerial and professional employees while unpaid overtime is rare for less skilled employees.
  - Employees in occupations that are highly skilled, highly paid and which provide authority, variety, job security and training are much less likely to be paid additionally for the “overtime” they work than their counterparts in low paid jobs.
- Most of these employees are satisfied with the number of hours they work.

### **SECTION 3 WORKING TIME PROVISIONS IN AWARDS AND AGREEMENTS**

20. Key contentions are:

- *The ordinary processes of industrial arbitration have always given significant weight to considerations of fairness to employees in weighing the competing demands as regards hours generally.*
- *Awards and agreements currently deal comprehensively and effectively with working time matters in a manner that is appropriate in each instrument and that provides a fair balance between the needs of employees and employers.*
- *There is no unfettered right to require the working of hours of work beyond standard ordinary hours.*
- *Contrary to the ACTU’s assertion, an examination of the content of certified agreements does not suggest that hours of work provisions in agreements are heavily skewed to employer-only flexibility or that they have increased hours of work while at the same time reducing recognition or penalties for overtime performed.*
- *Workplace culture can be a significant factor influencing the nature of working arrangements in an organisation, but it is neither effective nor appropriate to attempt such issues through award regulation.*

## **Awards**

### Introduction

21. The reasonableness of hours of work provisions in awards has been a central issue over the history of industrial arbitration in Australia and fairness to employees is always a key consideration in determining these provisions, balancing the operational needs of business and other legislative provisions such as s.143(1B) of the Act, for example in the Award Simplification Decision in relation to broken shifts.<sup>9</sup> The range of hours-related conditions now in awards, including the use of facilitative provisions, represent what the award parties and the Commission have historically seen as being able to best accommodate and reconcile employers' and employees' needs.

22. Awards, including many of those awards before the Commission in this case, provide various protections for employees or incentives to employers not to require unreasonable work arrangements, including:

- meal breaks and breaks between shifts (with penalties where not observed);
- time off in lieu provisions (TOIL), which allow employees to regain some of the time they were required to work as leisure time;
- a requirement that overtime requested must be 'reasonable', and thus cannot be unreasonable; and
- dispute settling procedures providing an avenue of redress of local or individual disputes.

23. Facilitative provisions also allow some scope for striking a better balance at the level of the individual or workplace as appropriate, with safeguards where warranted<sup>10</sup>. These, in conjunction with a range of other provisions commonly provided for in awards such as regular part-time work, make-up-time and personal/carer's leave, assist employees to balance their work and other responsibilities and interests.

- However, the level of agreement set out in some facilitative provisions may warrant review to ensure an avenue for individual agreement is available where appropriate.

## Ordinary hours of work

24. Commission decisions regarding standard ordinary hours have been informed by the notion of a community standard about the amount of time an employee may ordinarily be required to work in return for the employee's weekly wage. The Commission is well-versed in striking a fair balance between the competing needs of enterprises and their employees, as well as the public interest<sup>11</sup>, as is apparent from the decisions of the Commission in key hours cases, including the Standard Hours Inquiry<sup>12</sup> and the 1983 National Wage Case in relation to 38 hour week claims<sup>13</sup>.

25. There is considerable variation in ordinary hours provisions in awards, including in regard to:

- the number of weekly ordinary hours;
- averaging of hours over various cycles;
- span of hours during the day;
- days of the week that ordinary hours can be worked on;
- shiftwork, rostering arrangements and provisions for RDOs; and
- facilitative provisions.

That variety is an inevitable result of the Commission's careful balancing of the different priorities and needs of enterprises and employees in the context of different industries and awards.

## Overtime

26. Since the Standard Hours decision, awards have typically included provisions empowering an employer to require an employee to work reasonable overtime. This provision was found to be essential in order to build some flexibility into the concept of standard hours<sup>14</sup>. Disputes about these clauses have also been effectively dealt with through the ordinary processes of the Commission, which examines and places emphasis on the particular facts and circumstances of the case to decide the relevant issues and balance the needs and wishes of employers and employees<sup>15</sup>. It is clear from Commission decisions that:

- The concept of reasonableness has not been intended to provide the employer with a right to resolve chronic inadequacies of planning or organisation by extensive use of overtime<sup>16</sup>.
- It includes the employee's right to his or her own life 'beyond the four walls of employment'<sup>17</sup>.
- Depending on occupational level, a requirement to work overtime where that overtime is not paid for at the appropriate overtime rate will be unreasonable<sup>18</sup>.

27. The more recent TOIL provisions in awards, often written in a facilitative fashion, provide a direct remedy where employees have worked hours that, in terms of the applications, would be treated as excessive.

### Shiftwork

28. The Commission has facilitated the introduction of shiftwork to allow for the operational exigencies resulting in businesses needing to operate outside ordinary hours<sup>19</sup>. Again, the Commission has treated the needs of the business and the right of employers to manage their own business as important considerations<sup>20</sup>, but has also considered industrial fairness in placing conditions on shiftwork<sup>21</sup>. Some considerations have included:

- Times when a business must be staffed including, for example, the provision of essential services such as medical<sup>22</sup> or firefighting services<sup>23</sup>, or where general community requirements dictate, such as in the retail and hospitality industries<sup>24</sup>.
- The efficiency of operation or the economical use of equipment<sup>25</sup>.
- Conditions imposed on the implementation of shiftwork include requirements for notice<sup>26</sup>, consultation<sup>27</sup>, trial periods or pilots of the roster arrangement, formal evaluation of the shift arrangement<sup>28</sup> and requirements to consider potential health and safety impacts<sup>29</sup>.
- Provisions for penalty rates, which take into account the social and domestic disamenity arising from shiftwork, and additional annual leave<sup>30</sup>.

It is important to note that employees often regard shiftwork as a benefit<sup>31</sup>.

### Regular part-time work

29. The Act now encourages facilitation of regular part-time work in awards (s.143(1C)) and many awards now include regular part-time work provisions in various terms. The growth in part-time work is a key factor in allowing employees with family responsibilities to maintain their participation in the workforce or to resume their participation much sooner.

### **Certified Agreements**

30. Hours of work provisions are the most common condition of employment recorded in enterprise agreements, with 84 per cent of agreements certified during in 1998 and 1999 containing such provisions. Agreements contain a wide diversity of working time arrangements tailored to address the needs of employees and employers at the workplace. Many provisions in agreements provide for innovative, flexible arrangements but this does not mean that employees are disadvantaged by such arrangements. Analysis of data from the Department of Employment, Workplace Relations and Small Business (DEWRSB) Workplace Agreements Database (WAD) provides more information as follows.

### Ordinary hours and days of work

31. There has been no increase in the average number of ordinary hours specified in certified agreements over the last three years, with average weekly hours remaining stable at 38 hours per week in agreements certified each year from 1998 to 2000. Agreements providing for a greater than 40 hour working week decreased significantly from eight per cent in 1998 to one per cent in 2000 and those agreements which do contain over 40 hour working week provisions often incorporate specified amounts of mandatory overtime in a higher base rate of pay

32. There also has been no trend for ordinary hours to be worked on more days of the week, such as Monday to Saturday or any day, as against Monday to Friday. Only 10 per cent of agreements certified in 2000 allowed ordinary hours to be performed on any day of the week.

33. In respect to shiftwork, there appears to be fewer agreements providing for 12 hour shifts in 2000 (7.5 per cent) than in 1999 (13.1 per cent) and 1998 (12.5).

### Flexible hours and employer/employee role

34. Methods of determining and negotiating hours of work are an important aspect in achieving flexible and innovative working arrangements. Many agreements allow employees to average their hours over an extended period or compress their working week. How hours and working patterns are determined is vital and may be an indicator of 'reasonableness' in particular circumstances.

- Clauses that provide the employee with a role in determining hours are far more prevalent than those that provide either complete employer prerogative to alter hours or allow employers to alter hours of work after consulting with employees (25 per cent, three per cent and six per cent respectively in 2000). Clauses involving employees have also increased in prevalence from 15 per cent in 1998. This is despite that fact that in some industries such as education, such employee flexibilities are clearly constrained by the nature of the work.
- Rostered Days Off provisions, which are more commonly used in smaller enterprises, often allow them to be banked or accrued, or they can be varied by mutual agreement.

### Overtime

35. Although overtime provisions are relatively common in certified agreements, there is no evidence that agreements are being used to reduce entitlements for employees.

- The incidence of penalty rate provisions has been stable as have provisions for time off in lieu, both at penalty and ordinary rates.
- In addition, only five per cent of agreements certified in 2000 contained provisions that absorbed overtime or annualised salary, a similar level to that in 1998 and 1999. The absorption of overtime, including through annualised salaries, is often offset by a higher ordinary rate of pay that incorporates payment for a notional amount of overtime.

- By contrast, the incidence of flexible overtime provisions in certified agreements, which can be beneficial to both employers and employees in terms of who performs the overtime and when it is undertaken, has doubled from six per cent in 1998 to 12 per cent in 2000. These provisions may include the use of an overtime roster, or that access or change of access to overtime may be negotiated between the employer and affected employees.
- Some agreements include clauses relating to the circumstances surrounding use of overtime such as proper notice, mutually agreed overtime hours limits, respect for employees' family responsibilities, and recognition of production commitments. Another approach in some agreements has been the provision for 'productivity leisure days', a form of paid leave accrued on a daily basis based on ordinary hours worked.

### Occupational Health and Safety

36. General commitment to OHS and provision of OHS training provisions are relatively common in certified agreements (58 per cent and 46 per cent respectively in 2000) underlining support for employees in ensuring that their working arrangements do not create OHS issues.

### **Workplace Culture issues**

37. The ACTU's submission, drawing on the *Fifty families* study, the *What About the Bosses?* study and a number of the ACTU's witness statements, suggests that the issue of hours is often tied to the prevailing culture at the workplace with a culture of long hours becoming entrenched.

38. In regard to the material put in the *Fifty families* study, the Commonwealth notes that this is a small study providing qualitative, anecdotal material and for this and a range of other reasons concerning the methodology cannot be taken to be representative of employees and their families.

39. If there is an issue about a 'long hours culture' in a workplace, the most appropriate way to deal with that issue is at that workplace, either through agreements and/or through the use of a range of other measures such as policies, training, management initiatives etc, rather than

through changes to award provisions. Changing the prevailing culture at a workplace is seldom either swift or easy, and often requires a range of informal and formal strategies. It is inappropriate, if not impossible, to remedy cultural attributes of particular workplaces through a safety net of minimum pay and conditions.

40. Organisations that are recognised as being family-friendly have found that work-life issues, including working time matters, need to be addressed taking into account the particular circumstances of that organisation and its employees. Importantly, experience shows that there also needs to be a focus on identification of issues and implementation of arrangements that are appropriate for the particular workplace, as workplace culture can be a barrier to the level of take-up. For example, flexible working arrangements might be supported with policies or programmes to change the workplace culture, such as training programmes for managers and supervisors.

41. Agreements have been used to assist in changing culture at the workplace, for example by including statements of commitment to supporting work-life balance for employees.

42. Imposing a uniform standard upon all workplaces would not overcome workplace cultures that fail to recognise and take into account the specific needs of a group of employees. Regulating bodies cannot from the outside impose cultural change upon organisations.

43. It also needs to be recognised that where an ‘overtime culture’ exists in an organisation, it may be just as much due to employees seeking additional remuneration or promotional opportunities as it is due to employer demands.

#### **SECTION 4 OCCUPATIONAL HEALTH AND SAFETY**

44. Key contentions are:

- *The proposed clause would establish a system of dual regulation of working hours where it impacts on health and safety matters.*
- *It would lead to confusion on a practical level both for employers and employees at the workplace.*
- *Potentially, employers could give less weight to their responsibilities under occupational health and safety laws.*

## Dual regulation

45. Both OHS legislation and the proposed clause (if adopted) would regulate working hours where they impact on workers' health and safety, which is neither necessary, nor appropriate.

46. There would be dual enforcement regimes, with potential breaches of both OHS legislation and the award:

- employers would be subject to two separate inspection services;
- employees would be able to pursue grievances relating to working hours against their employers via two different regulatory paths; and
- different and inconsistent remedies and penalties could be imposed on an employer.

47. The existing OHS regulatory framework in Australia provides an effective system for dealing with unreasonable working hours where they impact on the health and safety of workers at the enterprise or workplace level.

- OHS legislation requires employers to manage health and safety risks at the workplace primarily by imposing a duty of care on employers to protect the health and safety of their employees, and also provides for workplace consultation on health and safety matters.
- It provides a flexible approach to protecting workers from unreasonable working hours based on risk management that enables all relevant matters, including characteristics of individual workers, the nature of the particular work and the working environment, to be taken into consideration.
- It provides flexible mechanisms for dealing with particular health and safety issues affecting an employee or employees at the workplace, for example through health and safety representatives or health and safety committees established at the workplace.

48. To assist employers meet their duty of care, all State workplace safety agencies undertake education and information programmes and a range of published information is available for dealing with a range of workplace hazards.

49. In some industries where fatigue has serious implications for health and safety, there is particular reference in legislation to fatigue as a hazard, for example the *Mines Inspection General Rule 2000 (NSW)*. In South Australia, the *Road Traffic (Driving Hours) Regulations 1999* and in Queensland the *Transport Operations (Road Use Management – Fatigue) Management Regulations 1998* prescribe maximum work and driving times, as well as minimum rest times for drivers of heavy vehicles.

### **Confusion**

50. Employers would have to make separate decisions on working hours in accordance with both OHS legislation and very prescriptive award provisions. As health and safety would only be one factor in determining ‘unreasonableness’ under the clause, this could lead to confusion for employers in understanding how they should comply with both health and safety legislation and the award.

### **OHS responsibilities**

51. Under OHS legislation, the primary obligation of the employer is to protect the health and safety of persons at work.

52. The proposed ACTU clause, however, invites employers to take a different approach to their OHS obligations by balancing OHS issues against other factors listed in the clause. Employers could therefore be led to give less weight to OHS issues than other factors.

53. Even where safety is considered, there is the potential for employers (and employees) to believe that it may be ‘traded away’ for greater leave or a pay increase. This could result in insufficient weight being given to OHS issues, despite the fact that employers will still have an obligation under OHS legislation not to require their employees to work unreasonable hours if this poses a risk to their health and safety.

54. Modern OHS laws recognise the responsibility of the employer to eliminate or control hazards. A worker is no longer expected to endure risks to their health and safety, even for additional pay.

## **SECTION 5 INCONSISTENCY WITH THE WORKPLACE RELATIONS ACT**

55. Key contentions are:

- *The ACTU's claim is inconsistent with the Act with respect to the objects of the Act and Part VI of the Act, and ss.89A, 143(1B) & 143(1C).*
- *In particular, it is inconsistent with the Act's emphasis on agreement-making and it is likely that it would lead to disputation rather than solving disputes.*

### **Inconsistency with the Act**

56. The Commonwealth submits that the making or varying of an award in the terms sought:

- a) would not be consistent with the Act's priority on agreement making at the workplace or enterprise level;
- b) would act as a disincentive to bargaining about these issues at the appropriate level - that is, at the enterprise or workplace level;
- c) would be inconsistent with the Act as the proposed clauses are overly prescriptive and include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;
- d) would not be consistent with the principal object of the Act as the proposed clauses have the potential to impact adversely upon productivity;
- e) would not be consistent with the principal object of the Act as the proposed clauses would be likely to lead to disputation, an outcome acknowledged by the ACTU in its Outline;

- f) would fail to take account of subsection 143(1B) of the Act as the proposed clauses prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
- g) would provide for paid time off after working extreme hours as a type of leave, but one which does not fall within the subject matter of any allowable matter in subsection 89A(2).

### **Structure of awards**

57. The Commonwealth further submits that the making or varying of an award in the terms sought:

- h) would fail to take into account the need under subsection 143(1C) for awards to be easy to understand in content. The proposed clauses are difficult to understand because they are not expressed in clear and precise language, they are unnecessarily complex and, to the extent they establish any entitlement, it is difficult to determine the nature of that entitlement and the consequent obligation upon an employer;
- i) would fail to take account of the manner in which work is conducted at individual enterprises and workplaces;
- j) would fail to take account of the fact that, subject to appropriate safeguards, agreement on the range of working hours is more properly a matter for individual employers and employees;
- k) would fail to take into account that, even if an entitlement to paid leave for extreme hours were considered not only allowable but also potentially appropriate for insertion into the awards in question, this should in that event be dealt with by way of a facilitative clause;

and would thus not be a proper exercise of the Commission's powers in this matter.

## **Exercise of Commission's Discretion**

58. When considering the ACTU claim, the following considerations are particularly relevant to the Commission's exercise of its discretion as to whether to make an award in the terms sought:

- a) the principal object of the Act (section 3);
- b) the objects of Part VI (section 88A);
- c) the factors specified in section 88B;
- d) the allowable award matters specified in subsection 89A(2); and
- e) the requirements of section 143 (with particular emphasis on subsection 143(1B) and subsection 143(1C)).

59. The legislative framework is designed to ensure that the primary responsibility for determining matters affecting the relationship between employers and employees rests with employers and employees at the workplace or enterprise level. It does this by emphasising the primacy of agreement making at the workplace or enterprise level.

60. There is no evidence that the clauses will encourage agreement-making, as claimed by the ACTU. The inclusion of such provisions in an award could simply provide another matter that can be traded off.

61. In respect of the allowability of the third subclause, that is, for paid time off after extreme hours, the ACTU claims that this is a break but also that it is a form of paid leave. The Commonwealth contends that it is not a rest break. The time off proposed does not fall within the concept of rest breaks as that concept appears in ordinary industrial usage, as the break is not required to be taken at a particular time (in comparison with meal breaks or breaks between shifts). Rather, the ACTU's proposed clause is a form of leave that, once accrued, can be taken as an accrued right exercisable at a time in the near future. In that regard, the ACTU relies

primarily on paragraph 89A(2)(g)(personal/carer's leave) as well as on paragraph 89A(2)(e)(annual leave); and/or on paragraph 89A(2)(o)(stand-down provisions).

62. In the *Forms of Leave Test Case* [Print Q9399], a Full Bench held that the expression 'personal/carer's leave' in paragraph 89A(2)(g) refers to the leave introduced in the *Personal/Carer's Leave Test Case* (1995) 62 IR 48. It further clarified the meaning of 'other like forms of leave' by noting that the leave is such as to enable an employee "to respond to a personal or domestic occurrence or series of events in circumstances where the employee has little or no control over the timing of the leave" (para 18).

63. The Commonwealth submits that paid time off after extreme hours is not personal/carer's leave, but rather a new type of leave not encompassed within the allowable award matters in the Act.

## **SECTION 6 WORKABILITY OF THE CLAUSE**

64. Key contentions are:

- *The ACTU's proposed clause is unworkable because it is confusing, attempts to deal inappropriately with individual employees' issues, cannot be applied to all workplaces and is likely to create disputes, rather than solve them.*
- *It is also unbalanced because it fails to take account of business operational requirements.*

### **Introduction**

65. The clause is difficult to understand in structure because its three separate components are not logically connected. The first subclause is open-ended and potentially covers both hours worked during ordinary time and overtime hours including 'extreme' overtime hours. The second subclause deals with overtime while the third subclause deals with 'extreme' hours, which could sometimes be constituted by a combination of standard hours and overtime yet in other circumstances could be entirely constituted by the working of standard hours only. Overall, 'extreme' hours are 'unreasonable' hours but 'unreasonable' hours are not necessarily 'extreme' hours.

## **Reasonable Hours of Work (first part of the ACTU's claim)**

66. This subclause would likely lead to increased disputation, rather than solving disputes, as employers and employees attempt to determine how these factors should be taken into account in setting working time arrangements in their particular workplace, for example:

- Should certain working patterns be adopted by all or only some employees?
- To what extent do employers need to take each individual employee's preferences and needs into account in setting hours of work and working time arrangements? What if these preferences change?
- Do workers have to advise employers of particular personal circumstances *ex ante* in order for employers to take such matters into account in determining working time arrangements for the enterprise?
- How do workplace supervisors meet the requirements of the award and State OHS guidelines?

67. The list of factors relevant to considering the reasonableness of working time arrangements are ambiguous and are unlikely to assist employers and employees in interpreting how to apply them to the workplace. For example, how much weight should be accorded to an employee's community life when determining if hours required to be worked are unreasonable, and which aspects of an employee's community life should be regarded as more important than others?

68. The factors listed for determining reasonableness are unbalanced as they only concern the individual circumstances of employees. Consideration should also be given to the operational needs of businesses, such as the efficient use of existing plant and equipment, and the potential cost of lost production. It will often not be possible to meet the changing preferences of a single employee simply because of these factors.

### **Reasonable Overtime (second part of the ACTU's claim)**

69. This subclause fundamentally changes the effect of existing reasonable overtime clauses as it effectively gives all employees an open-ended opportunity to refuse to work overtime on any particular day and, arguably, on each and every day if they consider that the employer's request is unreasonable. As such it creates a provision that is inherently contradictory – that is, the right of employers to direct the working of reasonable overtime is negated by a universal opting-out provision. Such a provision clearly has potential to cause conflict and confusion at the workplace.

70. It also exempts employees employed part-time in accordance with an award's parental leave clause. There is no justification provided for exempting these employees in all awards from the reasonable hours provision. In addition, the revised, simplified model parental leave test case clause now inserted into many awards does not refer to part-time employment at all.

### **Paid Breaks After Extreme Working Hours (third part of the ACTU's claim)**

71. This subclause would not be workable in industries and locations where it is in the interests of both the employer and employee to work such supposedly 'extreme' hours, eg at remote area locations such as fly-in mining or drilling sites. The clause does not even contain a facilitative provision to enable a more flexible approach to working hours arrangements where the parties agree.

72. The proposed clause also does not distinguish between paid and unpaid overtime and, for example, would allow employees to work long hours voluntarily (which could be unpaid and undirected) and then approach an unsuspecting employer with a demand for the mandatory two days paid time off. This is an untenable outcome and, if it were implemented, a trigger for increased disputation at a workplace. It would impose financial and resourcing hardships on enterprises even in the event that employees voluntarily worked such patterns of hours - for example, employees in the Australian Public Service (APS) could easily reach these targets by voluntarily working long hours under their current flextime arrangements.

73. Further, there is an element of double jeopardy for employers inherent in this scheme - employees receiving paid rest breaks after working extreme hours are also likely to have been

compensated already for doing so by through overtime payments (generally at penalty rates), an annualised salary remuneration arrangement or banking of time off in lieu. TOIL already provides a mechanism for employees to take time off after working long hours. In effect the net outcome could be that the claim merely leads to an effective increase in remuneration for overtime hours.

## **SECTION 7 WHY A TEST CASE SOLUTION IS INAPPROPRIATE**

74. *A test case standard model clause is unwarranted as there is no community standard for reasonable hours.*

75. A test case occurs before the Commission when a matter is considered on the basis of evidence applying across workplaces generally. The outcome may yield a guiding principle or a model clause that can then be applied to other disputes and to other awards.

76. A new test case standard can be established by way of a model clause if the Commission is convinced that every award should contain that standard and that a party who says it should not apply to their award bears the onus of making out what special circumstances support the making of an exception. Because of that there is a much heavier onus on the ACTU in this matter than the ordinary onus usually borne by the applicant.

### **Evidence**

77. As the ACTU says in its November 2001 submission in reply to the ACCI: “To establish that the safety net of wages and conditions ought to be varied there needs to be some evidence of a problem in the award safety net and a desire by a section of industry or the workforce to alter the award safety net” (para 18). However, the ACTU has failed to demonstrate that there is any evidence of a problem in the award safety net – on the contrary, the Commonwealth will demonstrate that the award safety net is capable of, and is, dealing effectively and flexibly with issues of working time arrangements.

78. The ACTU has also failed to demonstrate that there is any real perceived need by a section of industry or the workforce to alter the safety net. Beyond an isolated instance of pattern bargaining over maximum hours caps in the electrical industry, there is no evidence of a

desire by a section of industry or the workforce to alter the award safety net. Untested comments from a small group of unrepresentative employees, mostly at the managerial or professional level, and their partners, should not be taken as evidence that a significant and widespread group of employees see a need to alter the award safety net. Reports based on aggregate data that indicate a certain level or pattern of working hours do not establish that there is widespread concern and a perceived need to change such arrangements.

### **Widespread application**

79. As the ACTU says in relation to the ACCI claim: “The nature of a test case standard is that it would apply across the entire award system” (para 24). However, as the ACTU also says: “In this case, however, it is clear that the applications being made could not apply across the entire award system as they would not accommodate the individual circumstances of each industry.” (para 25).

80. It is clear that the ACTU’s hybrid clause could not have widespread application. Awards or employee classifications without access to paid overtime – such as teachers or postal managers or university academics - would simply fall outside the scope of parts of the clause. Employees in sectors with compressed working time arrangements – eg remote oil drilling rigs, mining sites, ships at sea - could easily reach the proposed extreme hours targets, resulting in rostering chaos for employers. Even public servants could easily reach these targets through working longer hours voluntarily, resulting in additional and completely unexpected costs for employers.

81. The range of awards in this case covers many groups with atypical hours of work arrangements – such as salaried doctors, ambulance officers, teachers and racing strappers – while completely ignoring the whole of the manufacturing sector (excepting one atypical award covering draughting, technical and supervisory employees). If the ACTU was seriously intending to pursue the case as a test case, a more representative range of awards should have been chosen.

## **Community standards**

82. The ACTU must show that the issue of unreasonable or excessive hours is so widespread that it is appropriate to adopt a new across-the-board remedy. In the past the Commission and its predecessors have adopted new award test case standards only after being satisfied that they reflected a prevailing community standard. However, in this case the ACTU seeks to reverse the process by using this case to manufacture a new community standard about patterns of working hours.

83. The Commonwealth's evidence will demonstrate that no community standard currently exists for dealing with unreasonable or long hours. Rather, there is a diversity of current responses to the issue of working time patterns to be found throughout awards and agreements. Consequently, there is no standard reference point for judging the reasonableness of working time patterns that is capable of being brought into the award safety net. The ACTU's unique clause clearly does not reflect anything currently existing in laws, awards or agreements.

## **SECTION 8 AUSTRALIAN PUBLIC SERVICE AWARD 1998**

84. *The Commonwealth in its employer role opposes the ACTU's application on the grounds already set out, and additionally on the basis that the changes proposed:*

- *are unnecessary and will needlessly impose inflexibility and prescription on APS agencies;*
- *deal with matters that are more appropriately addressed through bargaining at the workplace level;*
- *will create uncertainty and disputation in an area where none currently exists; and*
- *will adversely impact on APS operations, particularly in service delivery areas.*

85. *The ACTU's application is incorrectly predicated on the assumption that long hours of work is a universal problem across the APS. The evidence submitted by the ACTU fails to establish that this is the case.*

86. *APS agencies are negotiating agreements that implement working hours arrangements that meet the particular needs of the agency and its employees.*

## **Australian Public Service Award 1998**

87. There are some 20 provisions in the *Australian Public Service Award 1998* (the Award) dealing directly with the issues of working hours and overtime. The various flexibilities contained in the Award amply deal with the perceived concerns underlying the ACTU's proposed provisions. Further, the ACTU's proposed provisions are inconsistent with the flexibilities provided by the Award, particularly flextime.

88. The higher salary levels for APS Executive Level employees (that is, Senior Officer classifications in the Award) recognise, among other things, the special demands placed on this group from time to time, the different nature of their roles and responsibilities and the fact that, historically, these employees have not had universal access to flextime and overtime.

## **APS Agreement Making**

89. Nearly all APS agencies have negotiated agreements under the Act, with over 85% of these agreements being comprehensive in that they completely displace the Award. Almost half of these agreements incorporate specific provisions intended to deal with long hours of work, clearly indicating that bargaining over this issue is not inhibited by the absence of the award provisions proposed by the ACTU and that the issue of long hours of work is not a universal issue across the APS.

90. There is no evidence of other than minimal disagreement and disputation over the issue of long hours of work.

91. An analysis of APS agency certified agreements indicates that:

- more than 50% of APS agencies have extended the Award's span of hours;
- about half have enhanced the Award's flextime provisions;
- more than 60% provide for management to 'request' rather than 'direct' employees to work overtime; and

- over 50% provide access to time off in lieu for Executive level staff and over one third provide for paid overtime in certain circumstances for staff at this level.

### **Agency views on the ACTU's proposed clauses**

92. Many APS agencies envisage practical problems with implementing the ACTU's proposed provision. Specific examples of concerns are set out below.

#### *Reasonable Hours of Work*

93. The criteria to be considered in determining what are unreasonable hours of work are subjective and ambiguous and some may raise privacy issues. This is likely to result in disagreement and/or disputation over application of the provision. Further, the criteria do not require the needs of employers or their clients and stakeholders to be considered in determining whether hours are unreasonable.

#### *Reasonable Overtime*

94. The provision is contradictory and impractical in that while an employer may require an employee to work reasonable overtime, the employee may effectively refuse to work hours in excess of ordinary hours for virtually any reason. This could have a significant adverse impact, particularly in service delivery areas. Further, the evidence generally shows that overtime is rarely directed, but that some agencies still need a residual capacity to require overtime.

#### *Paid Breaks after Extreme Working Hours*

95. The provision is both inflexible and flawed. The objective of providing a break after a period of extra hours is already available through time off in lieu.

### **ACTU Evidence**

96. The ACTU's evidentiary material does not substantiate its claim that long hours of work are endemic across the APS or that the inclusion in the Award of the ACTU's proposed provision will promote bargaining on hours of work issues. Further, the relevant material from

the *Fifty families* document is not illustrative of the situation in the APS given that it reflects the experience of only seven public sector employees out of a total APS workforce of over 118,000 as at June 2001 – that is less than 0.006 per cent of the APS workforce.

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<sup>1</sup> Buchanan J, van Wanrooy B, Considine G and Bretherton T, *Working Time Arrangements in Australia: A Statistical Overview for the Victorian Government 2001*, Reasonable Hours Test Case, ACTU Material in Support – Appendices, p29.

<sup>2</sup> ABS Labour Force Survey (Cat No 6203.0)

<sup>3</sup> ABS Forms of Employment Survey (Cat No 6359.0)

<sup>4</sup> ABS Survey of Employee Earnings and Hours (Cat No 6306.0)

<sup>5</sup> Evans J, Lippoldt D & Marianna P, *Labour Market & Social Policy – Occasional Papers No 45, Trends in Working Hours in OECD Countries*.

<sup>6</sup> ABS Survey of Employment Arrangements and Superannuation (Cat No 6361.0)

<sup>7</sup> ABS Working Arrangements Survey (Cat No 6342.0)

<sup>8</sup> ABS Working Arrangements Survey (Cat No 6342.0)

<sup>9</sup> Award Simplification Decision; Print P7500 at paragraph 26.

<sup>10</sup> Such as the recording of the agreement in the time and wages record and notification of the union of the agreement, and those related to extending shift lengths eg provision of review of the arrangements or introduction of health monitoring procedures. See for example the *Award Simplification Decision*; Print P7500 p39.

<sup>11</sup> *Re Applications by Organisations of Employees for Variation of Awards and Agreements of the Court re Standard Hours*, (1947) 59 CAR 581 at 587

<sup>12</sup> *Re Applications by Organisations of Employees for Variation of Awards and Agreements of the Court re Standard Hours*, (1947) 59 CAR 581

<sup>13</sup> (1983) 4 IR 429

<sup>14</sup> “In order to make the system perfectly flexible we have not sought in our order to distinguish between one award and another or one industry and another. Indeed the complexities of the matter are such that it would not be possible to frame any adequate a priori distinction between industry and industry and it is our intention that the working of a reasonable amount of overtime should continue so long as necessary and as occasion arises, not merely in individual industries but also in particular sections of industries or even in individual establishments and workshops. It is our intention that the determination of what is reasonable both as to the occasion and as to the duration provision shall in each instance be left to the appropriate Judge or Conciliation Commissioner.” *Re Applications by Organisations of Employees for Variation of Awards and Agreements of the Court re Standard Hours* (1947) 59 CAR 581 at 609. The decision also saw the power to require working reasonable overtime as in part a transitional arrangement, though it has become evident since that generally employers will, for operational reasons always need to have such a power, even if it rarely has to be invoked.

<sup>15</sup> *The Australasian Meat Industry Employees Union v Australian Meat Holdings* 342/93 M Print K7063, per Maher DP. The words do not allow the arbitrary fixing of or a permanent limit or extent on overtime. Each worker must be considered individually and each occasion considered independently. The “reasonableness” is decided by considering the difficulty faced by the employer and the options available to it compared with the consequence imposed on the worker having to work the overtime requested. Because the consequences imposed on the worker are usually personal, they must be communicated to the employer. *Buick v Seeley International* (1989) AILR Vol 31 No 3 par 48. “In examining the wide range of authorities concerning the assessment of what constitutes unreasonable overtime, it is clear that the Tribunals have been unwilling to give a general ruling. The actual circumstances at the particular plant need to be measured in an effort to balance the wishes and the well being of an employee with the legitimate operational requirements of the company”. *AMIEU v Australian Meat Holdings*; Print K7063.

<sup>16</sup> *Buick v Seeley International* (1989) AILR Vol 31 No 3 par 48

<sup>17</sup> *Buick v Seeley International* (1989) AILR Vol 31 No 3 par 48

<sup>18</sup> An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement. (Emphasis added) *Re: Metal Trades Award (1952)* 73 CAR 325 at 440.

<sup>19</sup> *Re: Metal Industry Award* Print F8925; *Novacoal v Construction, Forestry, Mining and Energy Union* Print N1140 (24 April 1996); *Re: Pulp and Paper Industry (Production) Award 1973 & Pulp and Paper Industry (Maintenance and Services) Agreement 1973* Print L3249 (10 May 1994).

<sup>20</sup> *Re: Cram & Ors: Ex parte NSW Colliery Proprietors Association Ltd & Ors* (1987) 163 CLR 117; *Textile, Clothing and Footwear Union of Australia v Hyuck Australia Pty Ltd* (PR 906779) 20 July 2001; *Federated Clerks*

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*Unions v Public Service Board* (1969) 128 CAR 319; 1969 AILR para 294; *Australian Federated Union of Locomotive Engineermen v State Rail Authority of New South Wales* (1984) 295 CAR 188; *The Airline Hostesses Association v Qantas Airways Limited* (1975) 172 CAR 637; *Australian Broadcasting Corporation v Media, Entertainment, and Arts Alliance* PR909667 (26 September 2001); *Re Australian Nuclear Science and Technology (General) Award 1990* Print K9526 (12 October 1993).

<sup>21</sup> *Textile, Clothing and Footwear Union of Australia v Hyuck Australia Pty Ltd* (PR 906779) 20 July 2001; *Federated Clerks Unions v Public Service Board* (1969) 128 CAR 319; 1969 AILR para 294; *Australian Federated Union of Locomotive Engineermen v State Rail Authority of New South Wales* (1984) 295 CAR 188; *The Airline Hostesses Association v Qantas Airways Limited* (1975) 172 CAR 637; *Australian Broadcasting Corporation v Media, Entertainment, and Arts Alliance* PR909667 (26 September 2001); *Re Australian Nuclear Science and Technology (General) Award 1990* Print K9526 (12 October 1993); *Re: Telstra (Network Operations)/CWU Operations and Maintenance Agreement 1994* Print L4987 (29 August 1994); *Construction, Forestry, Mining and Energy Union v Pacific Coal Pty Ltd* Print P9924 (3 April 1998); *BHP Steel (AIS) Pty Ltd v Federated Ironworkers Association of Australia* [1994] NSWIRComm 127 (7 November 1994). *Textile, Clothing and Footwear Union of Australia v Hyuck Australia Pty Ltd* (PR 906779) 20 July 2001. *FIA v Australian Department of Defence* Print J3367 (6 July 1990).

<sup>22</sup> *Shiftworkers' case* (1972) 72 AR 633; 1972 AILR para 700.

<sup>23</sup> *FIA v Department of Defence* Print J3367 (6 July 1990).

<sup>24</sup> *Re: Determination No 206 of 1980* Print G5566 (16 October 1986).

<sup>25</sup> *Federated Clerks Unions v Public Service Board* (1969) 128 CAR 319; 1969 AILR para 294; *Re: Printing Staff (Australian Government Publishing Service) Award 1987* Print J5770 (5 December 1990); *Re: Pulp and Paper Industry (Production) Award 1973 & Pulp and Paper Industry (Maintenance and Services) Agreement 1973* Print L3249 (10 May 1994); *Novacoal Pty Ltd v Construction, Forestry, Mining and Energy Union* Print N1140 (24 April 1996); *Federated Clerks Unions v Public Service Board* (1969) 128 CAR 319; 1969 AILR para 294.

<sup>26</sup> *Re: Municipal Officers (SEC-WA Salaried Officers) Awards 1983* AILR para 8; *Re: Pulp and Paper Industry (Production) Award 1973 & Pulp and Paper Industry (Maintenance and Services) Agreement 1973* Print L3249 (10 May 1994); *Construction, Forestry, Mining and Energy Union v Pacific Coal Pty Ltd* Print P9924 (3 April 1998); *Re: Engine Drivers Etc Award 1976* AILR para 52.

<sup>27</sup> *Textile Clothing and Footwear Union of Australia v Hyuck Pty Ltd* PR 906779 (20 July 2001); *Re: Woolscourers and Carbonisers Award 1987 (1)* Print H8115 (15 May 1989); *Re: Pulp and Paper Industry (Production) Award 1973 & Pulp and Paper Industry (Maintenance and Services) Agreement 1973* Print L3249 (10 May 1994); *Construction, Forestry, Mining and Energy Union v Pacific Coal Pty Ltd* Print P9924 (3 April 1998).

<sup>28</sup> *Textile, Clothing and Footwear Union of Australia v Hyuck Australia Pty Ltd* PR 906779 (20 July 2001); *Community and Public Sector Union v The Minister for Primary Industries and Energy* Print N2627 (18 June 1996); *Re: Variation of Determination No 206 of 1980* Print G5566 (16 October 1986); *Re: Pulp and Paper Industry (Production) Award 1973 & Pulp and Paper Industry (Maintenance and Services) Agreement 1973* Print L3249 (10 May 1994); *Novacoal Pty Ltd v Construction, Forestry, Mining and Energy Union* Print N1140 (24 April 1996).

<sup>29</sup> *The Airline Hostesses Association v Qantas Airways Limited* (1975) 172 CAR 637; *Re Builders Labourers (Construction on Site) Award 1961* 97 CAR 333 at 335. *Re Builders Labourers (Construction on Site) Award 1961* 97 CAR 333 at 335. *Shiftworkers' case* (1972) 72 AR 633; 1972 AILR para 700. By way of further example, in *Kuhler v Ingham*, the Queensland Supreme Court found that the causative link between a car accident and the twelve-hour shift just completed by the employee was not made out: *Kuhler v Ingham Enterprises Pty Ltd* (1998) 43 AILR para 9-111.

<sup>30</sup> *Re: Private Pathology Industry (ACT) (Interim) Award 1996* (1999) 45 AILR para 3-944; *Re Australian Nuclear Science and Technology (General) Award 1990* Print K9526 (12 October 1993); *Re: Australia Post General Conditions of Employment (Interim) Award 1995* Print R8486 (9 September 1999); *Re: General Motors-Holdens Limited (Part 1) General Award 1982* Print G6086 (10 December 1986). *Shiftworkers' case* (1972) 72 AR 633; 1972 AILR para 700; *Re: Locomotive Engineers Award 1976* AILR para 142.

<sup>31</sup> *CSR Ltd v Electrical Trades Union of Australia* Print H3691 (29 July 1988); *FIA v Australian Department of Defence* Print J3367 (6 July 1990); *Metal Manufacturer Limited v Federated Ironworkers Association of Australia* (1969) 128 CAR 720; *Federated Ironworkers' Association of Australia v Australian Department of Defence* Print J3367 (6 July 1990); *The AWU-FIME Amalgamated Union Australia Pty Ltd v Nationalpak Australia Ltd* Print M7155 (22 November 1995). *Shiftworkers' case* (1972) 72 AR 633; 1972 AILR para 700. *John Fairfax and ASE* (1975) AILR para 1070.