

3. THE COSTS OF THE CLAIM

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Part I

Properly assessing the costs of the claims

[3.1] The ACTU provides what purports to be a costing of the impact of its claims – which is responded to this Section and Section 4.

[3.2] It will quickly become clear that ACCI/NFF object to this costing in the strongest possible terms and emphatically refute that it can be used to in any way determine the economic impact of the battery of the ACTU's claims.

Sparse objective evidence as to benefit

[3.3] There is no objective evidence that employers as a whole benefit from making workplace adjustments for the family responsibility activities of their employees, or evidence that universally there are financial gains for employers from providing work and family measures. Whilst various studies have demonstrated positive effects in specific circumstances on work performance, turnover, productivity and return to work rates, it is not clear that the net benefit of these effects is positive for firms.¹ As Evans concluded "*Overall, it seems difficult to reach a general judgement about the salience of the business case on the basis of current knowledge*"². It is also not clear that there is any authority to make conclusions on that a battery of measures would yield nett benefits.

[3.4] Larger scale, cross-national research has not demonstrated a widespread or consistent pattern of employer provisions. If benefits exceeded costs, a much greater consistency in approach would be apparent, even allowing for legislative and cultural differences. Prominence on the political agenda, legal sanctions and legislative pressure to change corporate norms, along with subsidies as incentives appear to underlie corporate initiatives overseas, rather than an enthusiasm for the purported benefits of family friendly measures at work.³

¹ OECD Employment Outlook 2001 p148

² Evans J Firms Contribution To The Reconciliation Between Work And Family Life Labour Market And Social Policy Occasional Papers No 48 OECD February 2001

³ Den Dulk I 1999 Employers and Parental Leave: A Comparative Analysis in Moss & Deven (eds) p 243. The Danish National Institute of Social Research evaluation of child care work did not demonstrate clear benefits to employers. Moss & Deven p 37. In three surveys of Swedish companies in the early 1990's, 40% to 70% said parental leave caused problems for them. Again, where benefits are described, these are linked to specific company circumstances, and usually described in generic, subjective rather than measurable terms (what's good for the individual is good for the company etc)

[3.5] Analysis of the effect of increasing employer costs through maternity leave provisions on women’s labour market performance by Alewell and Pull⁴ cautions against using a regulatory standard which increases costs for employers. In their study (sympathetic to provision of paid maternity leave), the two factors found to be most costly for employers and likely to worsen women’s labour market position were:

- a. Imposing a lengthy period of leave over which the employer had little control as to duration of leave or certainty as to return to work, and
- b. Increasing the cost of leave to employers, either through mandatory payments to employees or some form of tax.

[3.6] In this comparison of maternity leave duration and source of financing maternity pay, and the employment levels and relative wages of women, Germany (which had the largest cost burden for employers of the countries studied) had the lowest employment levels and relative wages for women.

[3.7] A further German study investigating the low take up of paternity leave (and which argues that individual and societal preferences and values mitigating against its use are so strong that a “structural” legislative solution is required - i.e. employers and males must be coerced into changing their preferences) identifies the difficulties employers have with extended parental leave.⁵

[3.8] These barriers include the high professional position or qualification of the employee, finding a replacement for a specialist position temporarily, long duration of leave / part time work wanted after return to work.

[3.9] As would be expected, employers face greater loss and difficulties from the absence on leave of more senior, highly qualified staff whose positions can only be filled temporarily, amongst other factors. These factors apply equally to women, and as women increasingly occupy more senior and skilled positions, their absence on maternity leave (paid or unpaid), presents their employers with relatively greater costs.

Moss & Devan p58-59. The Finnish Confederation of Service Sector Employers has calculated that their average cost of each child born is FIM 48,000 rising to FIM 76,000; the average monthly female wage is FIM 9,900, ie 4 to 6 months of an employee’s salary. Moss & Deven p 102-103.

⁴ Alewell D & Pull K An International Comparison and Assessment of Maternity Leave Regulation <http://www.wiwi.uni-jena.de/Papers/wp-a0102.html>

⁵ Moss & Deven p 262.

[3.10] Another German study⁶ assessed impact of 1992 legislation to extend leave to three years and guaranteed re-employment:

- a. Two thirds of working women with their first child take leave.
- b. Companies cite cost and human resource problems, point to loss of investment in human capital through deskilling which occurs whilst on leave.
- c. A high proportion of women were unemployed after leave.
- d. There were company differences in response depending on size, industry, skill levels (precluding the generalisations and extrapolations relied upon by the ACTU).

The real costs of unpaid leave

[3.11] One of the major myths which the ACTU seeks to advance in this matter is the assumption that unpaid leave carries no additional costs to employers. This is something along the lines of - well a claim to multiply leave for new fathers eightfold wont cost you anything because its unpaid leave.

[3.12] ACCI/NFF reject this assumption in the strongest possible terms.

[3.13] Simply because something does not add to remuneration of the relevant employee, does not mean it is no-cost to the employer.

[3.14] That the ACTU seriously advance to the Commission (and through the Commission, to the community as a whole) that unpaid leave of absence (or for that matter, employee-based movement of hours or location of work) is without any additional cost to an employer because it is unpaid is so patently wrong, that it should cause the Commission to reflect on the unreality and lack of balance that characterises the ACTU claims in this matter.

[3.15] In making this submission, the Commission is being asked to conclude what is simply and manifestly not the case. If such a finding were made it would - given its profound error - be likely to devalue the authority and legitimacy of any such decision.

⁶ Englebrech G & Jungkunst M Institute for Employment Research Germany 2001

[3.16] In these circumstances the Commission should make it clear that there are costs – real costs – as outlined below.

[3.17] The ACTU assertions fail to reflect any business or operational reality for the reasons set throughout this submission and through the evidence of the various employer witnesses contained in this submission outline.

[3.18] Specific additional costs which do flow through to employers from unpaid leave include (as is developed throughout this submission, in the evidence of various witnesses and as will be developed throughout this case):

- a. Lost efficiency / productivity / sales etc through the loss of the experience and contacts of the primary staff member.
- b. Loss of corporate knowledge and experience of primary staff.
- c. The costs of recruiting replacement staff (advertising, interview, selection costs etc).
- d. The costs of training replacement staff (a cost which directly doubles training costs already expended for the primary employee).
- e. Additional costs for short term replacement staff (e.g. casual loadings, premiums for labour hire)
- f. Additional labour costs to attract scarce replacement staff.
- g. Administrative costs of (a) the unpaid leave arrangement, and (b) the employment of replacement staff.

[3.19] When the true costs of unpaid leave are properly taken into account, this must further weigh against various of the ACTU claims in this matter.

But people won't use it....

[3.20] There is also in the ACTU contentions an apparent argument (e.g. ACTU paragraph 5.52, p.37) that it is acceptable to massively increase unpaid leave, essentially because not many people will actually use it / it will not be used in full. The assumption appears to be that not many people can afford to take the time off without pay, particularly for extended periods:

- a. Firstly, and primarily this is an unsubstantiated assumption. The ACTU has not brought forward any evidence that any new leave entitlement will not be used in full when it is accessed, in many if not most cases. Evidence from the introduction of the range of leave entitlements of the Commission is that they are used in full.
- b. If this is the ACTU position then it is clearly seeking a condition beyond any scope to which it may be merited. If many people will not use two years unpaid parental leave – you have not made out a case for two years unpaid parental leave as a matter of generalised industrial merit.
- c. If this is the ACTU position then it clearly is seeking a condition beyond any legitimate safety net level. For a condition to be a safety net, it would need to fall within the boundaries of actual or expected use in practice. A condition sought well in excess of anticipated levels of usage in workplaces cannot as a matter of logic be a safety net.
- d. The rights sought in this claim are not going to just be used by people who live as individuals – it will be used by couples budgeting on the basis of dual incomes. This will increase propensity and capacities to use unpaid leave at higher levels than a traditional single breadwinner would have been able to.
- e. Nothing in various of the clauses sought would stop an employee working elsewhere and obtaining income.
- f. More generally, there are the inherent costs to employers of uncertainty. At what point will any employer know that a particular is going to use all or just some of their unpaid leave entitlement? The longer the potential period of leave the more the uncertainty.
- g. It is also not clear that extended capacities for unpaid leave will not in practice lead to uncertainty, disruption and disputation. Employees may well seek access to the extended leave as sought by the ACTU (for example 8 weeks for new fathers) and then find part way through this period that they want to come back to work (the money begins to get tight, or they find their partners do not need the help they anticipated, etc). Where does this leave an employer when an employee seeks to come back part way through a period of leave he or she has requested?

[3.21] In all, any suggestion that it is acceptable to manifestly inflate unpaid leave as a minimum condition on the basis that it will not be used most of the time is fundamentally flawed. It does not properly advance the ACTU claims.

Understanding costs in a commercial context

[3.22] What is important in this matter is to not focus on the abstract, but on the reality of business operations. It is in that context that costs must be assessed.

[3.23] Employers are rightly cautious when persons other than those who operate businesses claim that they know better than business owners or managers what is good for the business in terms of cost and business impact (as the ACTU clearly purports in this matter).

[3.24] ‘Benefits’ to employers through savings or efficiencies asserted or speculated by non business people, researchers or academics need to be tested in the real world of business operations. That means: are these speculated ‘benefits’ real after taking into account factors such as:

- productivity;
- efficiency;
- consumer demands;
- client demands;
- effect on employees in general;
- cash flows;
- labour to sales ratios;
- wage and salary budgets;
- absenteeism; and
- staff workloads.

[3.25] Businesses, and in particular (but not exclusively) small and medium sized businesses do not have the luxury of waiting and see whether speculative conclusions of researchers and academics about business ‘benefits’ are correct or not.

[3.26] The real economy does not allow for these liberties to be taken. Rational, not abstract or theoretical judgements drive business survival or failure, drive or job growth or contraction, drive productivity improvement or decline, and drive customer satisfaction or rejection.

[3.27] The evidence to be brought by employers has a purpose fundamental to proper decision making on these union claims; claims that have great potential to interfere with the lawful rights and interests of private employers – that purpose being to provide the Commission with the basis to assess how in the day to day operation of a business the ACTU claims would impact on the abovementioned factors.

[3.28] Aside from the direct costs to business arising from these broader considerations, the ACCI/NFF submission is that the ACTU claims would materially prejudice the capacity (and indeed the right and responsibility) of a business to maintain control over the most basic of business imperatives that regulates cost - having staff in the right place at the right time to productively do what they are employed and contracted to do.

[3.29] The submissions and evidence presented by the ACTU provides no basis on which the Commission could safely conclude that this is a no-cost or a low-cost claim, as asserted.

[3.30] On the contrary, when the evidence and submissions of employers are considered, and when issues of cost are looked at in the proper context, it will be an irresistible conclusion that the union claims impose a high and unjustifiable cost on award governed employers, and that those costs powerfully mitigate against the granting of the ACTU claims or the relief sought.

[3.31] On the issue of cost – let alone other issues of merit (such as lack of balance, realism, fairness, need) the unions claims should be rejected.

Part II

Fundamental problems with ACTU Sect. 6

[3.32] Sections 6.1 to 6.20 of the ACTU outline of contentions⁷ address the ACTU's assessment of the economic impact of its claims in this matter. ACCI understands they are to be read in conjunction with the additional material from Professor Mitchell (lodged after the primary outline of contentions).

Nowhere near enough to satisfy the Commission

[3.33] This purports to be the ACTU's assessment of the economic impacts of its claim⁸. Properly examined, it constitutes no such thing, and cannot perform the function the ACTU nominally attaches to it in the submission.

[3.34] The ACTU's supposed assessment of the economic impact⁹ of its claim encompasses a partial and summary "assessment" of:

- a. Australia's ageing population.
- b. Fertility.
- c. Maternal labour force participation
- d. (A limited assessment of) The impact of higher maternal participation/attachment.
- e. Economic benefits of greater labour force access for mothers.

[3.35] That's it. The ACTU purports to satisfy the economic considerations which the Commission must have regard to under the *Workplace Relations Act 1996* (and indeed inherently for any test case) based on a partial grab-bag of hand picked factors (which themselves are presented with little rigour and support), designed to paint the ACTU claim in the best light rather than assess the actual overall economic impact of the ACTU claim

[3.36] The ACTU has provided no assessment of the impact of its battery of claims on the economic and labour market considerations which this Commission must have regard to in determining matters such as this. There is, for example, no assessment of the impact of the claims on:

⁷ ACTU *Outline of Contentions*, 30 April 2004, pp.39-43

⁸ Hence the title of Section 6 of the ACTU outline.

⁹ ACTU *Outline of Contentions*, 30 April 2004, pp.39-43

- a. The national economy (and the constituent parts of it).
- b. Economic growth.
- c. Inflation and prices.
- d. Wages growth and its impacts on the economy.
- e. International competitiveness, terms of trade etc.
- f. Employment and unemployment.

[3.37] Absent of such information the ACTU has neither costed its claim, nor provided any reliable information on “The Economic Impact of the Claims”. The title of Section 6 of the ACTU outline is a misnomer based on the information provided.

Statutory consideration of economic impacts

[3.38] The Commission has clear statutory duties to subject the ACTU claim to rigorous economic consideration, including s.3, s.88B(2), and s.90 of the *Workplace Relations Act 1996*. The Commission must also properly consider the merits of any proposed changes to the award system (s.110(2)(c)), which in this case clearly requires a far more rigorous economic assessment than that supplied to date.

[3.39] The importance of a proper, rigorous economic assessment to matters such as this is also illustrated by:

- a. The level of economic analysis brought to bear by the Commission in examining and determining previous test case claims.
- b. The level of economic analysis brought forward by prosecuting and responding parties in previous comparable test cases.

[3.40] It is not difficult to determine the economic considerations which must be addressed to present the Commission with a properly robust economic assessment of any claim. The Safety Net Cases and the Commission’s Safety Net decisions provide a clear outline of the economic factors the Commission has regard to in assessing the economic impacts of claims before it, and in particular how these are operationalised under the *Workplace Relations Act 1996*.

[3.41] This is not to say that a party prosecuting a conditions claim need necessarily run the same level of economic case as the ACTU prosecuting a national wages claim – rather these cases exemplify the framework of the economic considerations the Commission brings to the consideration of any claim to substantially alter the safety net. A party bringing a test case claim which is likely to impact on the economy (as the ACTU clearly is in this matter) would need to provide the Commission with information which goes to such a framework. The ACTU has manifestly failed to do this.

A costing is not an economic assessment

[3.42] At best, the ACTU brings forward a costing of its claim via the work of Professor Mitchell, rather than Section 6 of its outline (and we will contest Professor Mitchell's conclusions, commencing with proper cross examination).

[3.43] A costing is not however an economic assessment – an assessment makes the next link and shows how the claim, and its cost impact as appropriate, will impact on the economic and labour market the Commission has regard to. The ACTU has manifestly failed to do this – it does not even begin to satisfy the Commission on the economic impacts of its claim.

A manifest framework error

[3.44] The ACTU makes a framework or technical error in misunderstanding how it would need to satisfy the Commission in regard to the economic impact of its claim.

[3.45] Contrast what the ACTU has addressed with some of the core features of a proper economic impact submission (see table below). A proper economic costing, whilst not necessarily needing to be econometric or calculation based must approach an empirical basis, and enable the Commission (whether through empirical means or otherwise) to reach conclusions on the impact of any measures sought, on (for example) the national economy, employment, inflation etc.

<u>What the ACTU Raises</u>	<u>Elements of a proper economic assessment</u>
<ul style="list-style-type: none"> - Australia’s ageing population. - Fertility. - Maternal labour force participation - (A limited assessment of) The impact of higher maternal participation/ attachment. - Economic benefits of greater labour force access for mothers. 	<ul style="list-style-type: none"> - The national economy (and the constituent parts of it). - Economic growth. - Inflation and prices. - Wages growth and its impacts on the economy. - International competitiveness, terms of trade etc. - Employment and unemployment.

[3.46] At its core, a party purporting to make an economic assessment needs to get somewhere near satisfying the Commission on the constituent parts of, if not the product of the fundamental macro economic equation for any economy:

$$\mathbf{GDP = C + I + G + (X - M)}$$

$$GDP = \underline{C}onsumption + \underline{I}nvestment + \underline{G}overnment expenditures + (e\underline{X}ports - i\underline{M}ports)$$

[3.47] (Complicated of course in any real life economy by assessments of Inflation / prices (p) and Employment (N or Un) – which are also matters the Commission is required to take into account under the Workplace Relations Act 1996).

[3.48] The ACTU material in Section 6 of its outline of contentions is as far removed from such an empirical assessment as could possibly be conceived of:

- a. It is partial and inadequate, failing to even begin to approach the range of core economic considerations fundamental to any issue of national economic policy, any regulatory assessment, and in particular any proper discharge of the Commission’s duties under the *Workplace Relations Act 1996*.
- b. It is manifestly non-empirical, if not anti-empirical in nature. The contentions advanced are not capable either of proof or disproof, nor of any reliable conclusions on their probability in the context of an attempt to determine the overall economic impact of the ACTU claims.

Costing what the ACTU actually seeks

[3.49] The ACTU seeks a battery of claims / variations to the award system:

- a. Doubling parental leave
- b. Child rearing leave
- c. Part time rights following parental leave
- d. A right to vary hours and place of work
- e. A right to purchased leave
- f. 8 weeks simultaneous parental leave for fathers
- g. Additional rights to consultation during parental leave.

[3.50] A proper costing or evaluation would need to assess the costs of – and ultimate impact of – the battery of measures sought (and in doing so would almost certainly need to have engaged the specific costs and impact of each individual change sought).

- a. The work of Professor Mitchell appears to attempt this, and will be addressed at an appropriate juncture.
- b. However, this not, and does not purport to be, an economic assessment of the impact of the claims. Section 6 of the ACTU material received to date in particular fails to begin to engage costing the battery of measures sought.

Part III

Response to what the ACTU does contend

[3.51] This sub-section responds to the specific arguments advanced by the ACTU under the heading of “The Economic Impact of the Claims” (Section 6 of the ACTU outline).¹⁰

Labour market effects of an ageing population¹¹

[3.52] ACCI does not contest that demographic change is underway in Australia, nor that an ageing in the Australian demographic is a major ongoing national policy challenge. This is however a well understood phenomenon, and is a matter of major national policy discussion across a wide range of policy areas, including through the major intergenerational report attached to the 2002-3 Budget.

[3.53] The OECD has however observed that:

A challenge that faces Australia, as other Member countries, is adapting to an ageing society. The purely fiscal implications of public pensions in the Australian case are not particularly preoccupying, because the pay-as-you-go Age Pension element is small relative to average wages, and the demographic structure is less unfavourable (in part because of sustained immigration — see next Chapter). Nevertheless, official estimates of the fiscal impact of ageing, reflecting higher expenditures on health and care services for an older population, as well as on other age-related expenditures and revenues, suggest a significant rise in fiscal pressure relative to GDP on the basis of current trends and parameters. This emerging burden could be lightened by policies that raise productivity and labour force participation. Assuming no adverse impact of such policies on equity or the work/leisure trade-off, these are policies that are desirable even in the absence of age-related fiscal pressures.¹²

[3.54] *The emerging burden could be lightened by policies that raise productivity and labour force participation...* This does not support the prescription sought by the ACTU in this matter – properly considered and in light of the wider observations of the OECD and in light of Australian experience to during the past decade, eschewing agreement based approaches in favour of standardised compulsion is precisely what Australia should not do to meet the challenge of demographic change.

¹⁰ ACTU *Outline of Contentions*, 30 April 2004, pp.39-43

¹¹ ACTU *Outline of Contentions*, 30 April 2004, pp.39-40

¹² OECD (2003) *OECD Economic Surveys – Australia*, p.72

[3.55] Age of labour force entry and exit: The ACTU contends “*In the absence of significant shifts in the ages at which individuals enter and leave the labour force, these changes will see a decline in the labour force : population ratio, and an increase in the dependency ratio*”¹³.

- a. The ACTU does not put the importance of such an outcome in context – how is this ranked in the range of possible policy responses which could address the ageing of the population? Is changing the age of entries and exits the most important factor in addressing an ageing population?
- b. ACCI cannot see how the ACTU claim in any way links to the age at which persons are entering the Australian labour market. It cannot (and we suspect would not intend to) cut the length of time younger Australians are spending in education prior to commencing their career labour force participation for example.
- c. The ACTU’s contention must therefore link to the age at which people are exiting the labour force, and apparently to some change in this.
 - i) Which part of the ACTU claim would secure such an outcome?
 - ii) How would this occur? What evidence is there to support this conclusion?

[3.56] The ACTU then contends: “*Maternal and carer labour force participation is one way to ameliorate the impact of an ageing society*”.

- a. It’s not clear how. The ACTU fails to go the next step and flesh out this contention and how it links to the claims it makes.
- b. No link is drawn between the ACTU claim and increasing the labour force participation of women and carers. How does the ACTU contend its claims will actually lead to the outcomes it identifies?
- c. Specifically, the ACTU in no way shows that a move to compulsion rather than consensual approaches to work and family matters will secure greater maternal and carer labour force participation.

¹³ ACTU *Outline of Contentions*, 30 April 2004, [6.6] pp.39-40

[3.57] Evidence would in fact suggest the opposite. The OECD states that:

- a. *Australia is comparatively well placed to address the ageing of its population based on the health of its overall economy¹⁴, which in turn has been contributed to by labour market reform and ‘deregulation’ from the early 1990s (i.e. agreed rather than imposed approaches).*
- b. *Policies must address both labour force participation and productivity (see above). This is directly at odds with the ACTU claim in this matter, which is inherently anti productivity in nature and likely outcome.*
- c. *Policies to increase labour market participation are highly complex and rest on issues including taxation¹⁵, social security, and workplace relations reform – it would be partial and simplistic to assume they could be affected by the measures proposed by the ACTU.*
- d. Participation rates in Australia have already increased significantly during the period of substantial labour market reform in Australia – particularly for female Australians:

Participation Rates (%)¹⁶

	May 1993	May 2004
Males	73.6	71.9
Females	51.5	55.8
Persons	62.3	63.7

Employment to population ratio (%)¹⁷

	May 1993	May 2004
Males	65.2	67.9
Females	46.6	52.6
Persons	55.8	60.1

- i) This shows that the system is securing the gains identified by the ACTU without the intervention proposed.

¹⁴ OECD (2003) *OECD Economic Surveys – Australia*, p.52

¹⁵ OECD (2003) *OECD Economic Surveys – Australia*, p.9

¹⁶ ABS - 6202.0.55.001 Labour Force, Australia, Spreadsheets - Table 01. Labour force status by Sex – Trend.

ii) It also shows the benefits a greater emphasis on agreement based approaches (rather than compulsory ones) can contribute to our labour market.

e. Australia's NAIRU has also been revised downwards as a direct function of factors including industrial relations reform¹⁸.

[3.58] Fundamentally, the OECD having considered the challenge of Australia's ageing population and other economic and societal challenges concludes that it is of vital importance that Australia continues rather than retreats from the direction of labour market reform.

[3.59] Importance of flexibility: ACCI/NFF has pursued the various parts of our claim in this matter specifically on the basis that they be measures to aid work and family. However additional flexibilities in areas such as part time and casual work clearly carry scope to aid workforce retention of older Australians. More flexibility in how and when we work, greater options for part time work etc, all appear geared to providing Australians of traditional or common retirement age with additional options short of a workforce exit.

Fertility levels¹⁹

[3.60] Australia has continued to secure higher rates of female employment, participation and employment to population ratio during the past 10 to 15 years. Clearly fertility challenges are more complex than mere reference to overall headline levels of female employment.

[3.61] Fertility determinants are also highly complex in any society, particularly in a highly developed, first world country like Australia (this is what the Castles paper²⁰ cited by the ACTU shows). A wide range of national policy settings come into consideration in considering fertility including taxation policy, social security and income transfers, childcare and infrastructure policies, health policies etc (paragraph 6.10 of the ACTU contentions appears to acknowledge this).

[3.62] It would be simplistic and misguided to overstate the extent to which

¹⁷ ABS - 6202.0.55.001 Labour Force, Australia, Spreadsheets - Table 01. Labour force status by Sex – Trend.

¹⁸ OECD (2003) *OECD Economic Surveys – Australia*, p.29

¹⁹ ACTU *Outline of Contentions*, 30 April 2004, [6.7] to [6.9], p.40

²⁰ ACTU III, pp.43-46

workplace relations regulation and awards in particular can determine fertility outcomes in our complex economy, labour market and society.

[3.63] There is no evidence that the ACTU's rights/compulsion based approach will "*make it easier to combine having second or subsequent children with continued employment*" – as this would sensibly be operationalised under the *Workplace Relations Act 1996*. The causation claimed does not appear a valid contention.

[3.64] How does the ACTU prove that its claim "*assists women to compensate for the late start*"²¹:

- a. Why is this the best approach?
- b. Why does the solution to the so-called problems identified in the ACTU submission lie in employment regulation? – Has the ACTU proved this?
 - i) What about taxation reform? Education reform? Childcare policies? etc.
 - ii) Survey the policies and approaches of government, and other areas of regulation are far more germane to the issues raised by the ACTU under the topic of fertility (6.7 to 6.9).
- c. Why is "*making it easier to combine having second and subsequent children with continued employment*" the right measure. Isn't such a social policy debate a matter for Australian governments.

[3.65] Conception: The Castles paper appears to highlight the importance of gains in the technology of contraception as one of the major drivers of falling fertility²².

[3.66] The reference to childcare at [6.9] is of no assistance to the ACTU – such a claim is not before the Commission.

[3.67] The ACTU must also be made to show the Commission the relevance of fertility to the matters the Commission must have regard to under the *Workplace Relations Act 1996* – and how this aid the Commission in determining the matter before it.

[3.68] On examining the information available, the causal link between the claims

²¹ ACTU Outline of Contentions, 30 April 2004, [6.8], p.40

²² ACTU III, pp.43-46, at p.45

sought, and indeed workplace relations generally, and fertility seems marginal on the available information.

Labour markets, supply and maternal attachment²³

[3.69] ACCI/NFF does not understand paragraph 6.10 of the ACTU contentions, however:

- a. Which measures will take 20 years to have effect, measures generally or those sought by the ACTU?
- b. We are already increasing the proportion of the working aged population in paid employment, through labour market and workplace relations reform not through greater regulation.
- c. Greater participation will be secured by more flexibility not more rules – providing more potential employees with more options in the way they work to chose from (the lesson of our labour market data in Australia across the past 15 years).
- d. The ACTU observation implies that its claim will have no impact on labour demand and the creation of jobs (particularly for mothers). This is not the case – the claims will have impacts on capacities to create jobs for the potential working aged population.

[3.70] Paragraph 6.11 of the ACTU outline is an observation regarding the potential labour supply in Australia, not about the proportion of this population who secure work or who chose to participate. It is descriptive not determinative. It does not advance the ACTU argument.

Economic impact of higher labour force participation²⁴

[3.71] ACCI/NFF do not contest that there are economic and social benefits to greater labour force participation amongst all cohorts of the Australian community – indeed more jobs for more Australians is a key goal of all areas of ACCI policy.

[3.72] However the ACTU does not show:

²³ ACTU Outline of Contentions, 30 April 2004, [6.10] to [6.13]

- a. That the measures it is advancing in this case will lead to greater labour market participation and employment,
- b. How this would occur. How does the ACTU claim that (a) its battery of claims will lead to (b) the outcomes identified in paragraph 6.14?

[3.73] The ACTU also fails to show how the gains it identifies can and should be secured through the regulation of work through the award system. Why should awards be used to pursue the aims set out at ACTU paragraph 6.14:

- a. Is this the best approach? Why? On what basis does the ACTU say the Commission should accept this?
- b. What about social and community policy, and government initiatives?
- c. Why should imposts on employers be imposed in place of the legitimate role of governments, their programs and their expenditures?

[3.74] The ACTU claims that:

It is in the public interest, having particular regard to levels of employment, that barriers to maternal and female labour force participation are removed.²⁵

[3.75] This may well be the case:

- a. Which barriers? Do differing barriers demand differing solutions?
- b. On what basis does the ACTU claim to have correctly identified the barriers to maternal and female labour force participation?
- c. Why would industrial / award considerations be the key to this?
- d. How does this advance the ACTU claims? Could not this equally apply to the ACCI/NFF proposals in this matter? How does this advance one approach over another?

[3.76] The ACTU then contends:

How well the benefits are delivered, and whether there are associated costs, depend on the quality of the employment and on how well parents and carers can combine work and their caring roles.²⁶

²⁴ ACTU Outline of Contentions, 30 April 2004, [6.14] to [6.15]

²⁵ ACTU Outline of Contentions, 30 April 2004, [6.15]

[3.77] Perhaps – but again, how does this assist the Commission in arbitrating between the measures before it?

Making work more accessible for mothers and carers²⁷

[3.78] The ACTU contends at 6.16 that:

6.16 Whether parents and carers work is determined in part by the conditions attaching to work. While other factors including demographic and personal attributes, and the tax and transfer system are also relevant, the Commission can effect labour force attachment by enhancing the attractiveness of work and removing barriers to it.

[3.79] This is problematic.

- a. How important are the conditions attaching to work in determining whether parents are carers work? How does this compare to other factors and policy settings? Why should the Commission conclude that it should act in place of governments and other labour market initiatives? Is there research to evaluate which measures are more and less important?
- b. There is already increasing female participation and employment secured without the intervention sought by the ACTU – why should this approach be abandoned? How does the ACTU satisfy the Commission that this will secure superior outcomes?

[3.80] Gray, Qu, de Vaus and Millward²⁸:

- a. (This is material the ACTU relies upon without providing it to the Commission and parties).
- b. This paper does not support the ACTU. It is an attempt to empirically isolate the determinants of the employment of lone mothers. The factors examined do not appear to support any particular policy approach in this matter – and in fact point to the importance of measures such as initiatives to retain lone mothers in education, language training,
- c. It is not correct to characterise the factors considered in the *Gray et al* paper

²⁶ ACTU Outline of Contentions, 30 April 2004, [6.15]

²⁷ ACTU Outline of Contentions, 30 April 2004, [6.16] to [6.20]

²⁸ See Matthew Gray, Lixia Qu, David de Vaus and Christine Millward. *Determinants of Australian mothers' employment: an analysis of lone and couple mothers* AIFS Research Paper no.26, May 2002

as other extraneous, or lesser factors beyond the core consideration advanced by the ACTU in 6.16.

- d. The paper makes very clear that it provides no reliable empirical basis for any particular policy intervention²⁹.
- e. This is also based on data from the 1996 census – there is scope to consider that for those lone mothers in employment, the development of agreement based measures may have assisted them.

[3.81] Toohy and Beer³⁰:

- a. (This is material the ACTU relies upon without providing it to the Commission and parties – the authors name was also incorrectly cited).
- b. This paper highlights the extent to which transitions into and out of work for persons on welfare are determined by governmental and taxation settings (not the subject of this case). The authors conclude that:

...for every hour that a low income mother with three children works above 8 hours per week, she loses at least 60 per cent of her hourly wage to tax, income tests on government cash payments and net child care costs.³¹

- c. Such a conclusion shows the low extent to which outcomes of the claims in this matter could lead to changes in workforce and employment participation. The ACTU has effectively advanced an excessively ambitious set of outcomes it claims can secure.
- d. This is reinforced by the ultimate conclusions of the Toohy and Beer paper:

The results of this paper suggest that some mothers face a difficult decision to return to work or increase their hours of work. The interaction of the tax and social security systems and the additional burden of increasing child care costs mean that for some types of families, particularly those on low incomes, the financial incentives to

²⁹ See Matthew Gray, Lixia Qu, David de Vaus and Christine Millward. *Determinants of Australian mothers' employment: an analysis of lone and couple mothers* AIFS Research Paper no.26, May 2002, p.18

³⁰ Beer, G and Toohey, M Is it worth working now? Financial incentives for working mothers under Australia's new tax system. Paper presented to the 2003 Australia Social policy Conference, 9 July 2003

³¹ Beer, G and Toohey, M Is it worth working now? Financial incentives for working mothers under Australia's new tax system. Paper presented to the 2003 Australia Social policy Conference, 9 July 2003, p.20

work can be quite small. While high income couples get to keep half of the mother's earnings when she goes from not working to working 35 hours per week, low income couples get to keep less than a third.

If you subscribe to the stepping stone argument – that a low paid casual or part-time job now may lead on to a higher paid job with more hours in the future – then this result should be worrying. The very people who stand to benefit from greater participation in the workforce are the ones who face the highest financial disincentives to do so. Furthermore, while in the long run it may be worth working even when the family is financially worse off now, those on low incomes are the least likely to have the financial capacity to do this.

[3.82] Link to the low paid: Paragraph 6.20 of the ACTU submission is not reliable or useful:

The Commission has a particular obligation to consider the impact of adjustments to the safety net on the low paid. There is evidence of polarisation of mother's employment, with lower educated mothers, those with poor English, and sole parents less likely to be in employment. These are also the workers who have lower access to work/family reconciliation provisions. Focus group research amongst mothers in low-income households confirms that a lack of carer's leave and difficulties with school holidays are deterrents to work. [See Gregory et al (2003) ACTU II, p 285-297 at p 292].

[3.83] The second sentence is problematic. It does not reflect the Commission's clear decisions in wage case matters that the references in the *Workplace Relations Act 1996* to the needs of the low paid, are to those in work, not to those out of work, for example:

...The relevant statutory provisions deal separately with the low paid and the unemployed and the expression 'the low paid' in ss.88B(2)(c) is intended to refer to persons who are in employment...³²

[3.84] That there may be differences between the availability of particular human resource capacities between award workforces and other cohorts (e.g. highly demanded managers and professionals) has not been sustained by the ACTU. Evidence in this matter appears to stand for the opposite proposition. This said this would not advance the particular prescription sought by the ACTU in this matter – it certainly would not favour them over those proposed by ACCI/NFF.

[3.85] For the reasons shown elsewhere in this outline, the ACTU misapplies the Gregory research. It does not provide authority for the propositions advanced.

³² April 1999 Safety Net Decision [Print R1999], para. 81

Part IV

Preliminary response to Professor Mitchell

Introduction

[3.86] On 7 May 2004, ACCI/NFF received via e-mail from the ACTU additional materials on the costs of the ACTU claim, being:

- a. *'Work and Family Test Case – An Economic Consideration'* – A report prepared by Professor William Mitchell of the Centre for Full Employment and Equity, University of Newcastle (April 2004).
- b. Annexure A - CV for Professor William Francis Mitchell.
- c. Accompanying witness statement of Professor William Francis Mitchell.

[3.87] The ACTU contentions were forwarded prior to the forwarding of the Mitchell report and do not make specific reference to it. The ACTU appear to rely on the report of Professor Mitchell in support of its contentions that:

- a. Its claims will have a positive impact on 'the economy'³³.
- b. Removing barriers to labour force participation by workers with family responsibilities will... have a positive impact upon gross production, fiscal balance, risk of poverty, and return on investment in education and training³⁴.
- c. The cost to employers and the economy (of the ACTU's claim) are negligible³⁵.

Preliminary Issue

[3.88] Professor Mitchell has been brought forward as expert witnesses by the ACTU in this matter. ACCI will address his detailed report through cross examination at an appropriate juncture.

³³ ACTU *Outline of Contentions*, 30 April 2004, [6.1], p.39

³⁴ ACTU *Outline of Contentions*, 30 April 2004, [6.2], p.39

³⁵ ACTU *Outline of Contentions*, 30 April 2004, [6.25], p.45

[3.89] However ACCI can identify an apparent difficulty with the report prior to cross examination of Professor Mitchell.

[3.90] The claim costed is not the claim prosecuted: Mitchell sets out that:

2. I understand that the key elements of this claim involve: (a) the extension of unpaid parental leave to two years; (b) the right to return to part-time employment following parental leave; (c) the right to request a variation in hours or location for caring responsibilities; (d) the right to take unpaid annual leave of up to 6 weeks (46/52); (e) the establishment of unpaid emergency leave; and (f) the addition of five days carer's leave to current personal leave entitlements.

[3.91] Claim (a) “the extension of unpaid parental leave to two years” is only half of the ACTU's parental leave claim. The ACTU also seeks child rearing leave, being “*additional periods of 12 months child rearing leave, until child school aged*”³⁶. Has Mitchell costed this element of the claim? If not the costing must be partial and inadequate.

[3.92] Claim (e) “*the establishment of unpaid emergency leave*” and claim (f) “the addition of five days carer's leave to current personal leave entitlements” were resolved by conciliation/agreement after the preparation of the Mitchell report and statement. To the extent that the Mitchell report contains an assessment of any cost associated with these claims, it would no longer be an accurate reflection of what's being arbitrated.

[3.93] Professor Mitchell also addresses the ACTU's claim for “purchased leave” as a claim for additional annual leave³⁷ – this is not the primary position of the ACTU as ACCI understands it and this should be resolved.

Onus on the ACTU

[3.94] ACCI accepts that Professor Mitchell's statement could not be lodged at the time initial outlines of contentions fell due. However, a duty now lies with the ACTU to identify for the Commission and parties precisely which contentions it seeks to make based on the Mitchell report.

[3.95] This should occur prior to any cross examination of Professor Mitchell. As expert witness evidence, cross-examiners need to know not just what is in the

³⁶ ACTU *Outline of Contentions*, 30 April 2004, [6.25], Table, p.23

³⁷ Mitchell, W. (2004) *Work and Family Test Case – An Economic Consideration*, Additional ACTU material, 7 May 2004 – Section 6.

Mitchell report, but what the party bringing forward intends to make of it.

[3.96] The ACTU should also consider the issue raised by ACCI in the preceding paragraphs, and in particular the apparent differences between the basis on which the report was prepared and that on which this case will proceed to consideration.

A very specific requirement of the ACTU

[3.97] Professor Mitchell cites 34 separate sources in his paper, upon which his conclusions and costings specifically rely.

- a. A minority of these are sources already in this case through the ACTU's initial outline of contentions and supporting materials. – These materials are already available to cross examining parties.
- b. Various ABS sources are relied upon – These materials are readily available to cross examining parties.
- c. However, the majority of the sources relied upon have not been provided to parties to date – These academic sources are required to properly respond to the Mitchell material on which the ACTU relies.

[3.98] In light of the additional materials cited by Professor Mitchell, the ACTU should serve on all other parties and interveners the research papers cited in the Mitchell paper – as material upon which its position in this case will rest.

[3.99] This should be provided to all other parties well prior to the commencement of hearings in this matter in late August. It would be appropriate that this be provided to the Commission and all other case participants by 2 August 2004, one month after the lodgement of reply submissions in this matter.

Conclusion

How the Commission should proceed

[3.100] We have set out in this section the onus which attaches to the ACTU as an applicant in this test case matter to satisfy the Commission in regard to the economic impact and cost of its claim.

[3.101] This onus arises from various specific and general requirements under the *Workplace Relations Act 1996*, and from the need for the ACTU to actually demonstrate that its case has nett merit and will improve “*the economic prosperity and welfare of the people of Australia*”.

[3.102] This is both a macroeconomic and microeconomic consideration. A significant focus of consideration in this case must be the impact of the ACTU’s one sided and unbalanced claims on particular enterprises in their operational, commercial, human resource and competitive contexts. It is primarily as an aggregation of such effects that macro economic assessments become relevant.

[3.103] Providing the Commission with a proper costing and economic justification for a claim such as this is not merely a hurdle to be ticked off and cleared – its a directly material consideration which the Commission needs to balance the range of considerations before it.

[3.104] The material provided to the Commission and in particular Section 6 of the ACTU outline of contentions is manifestly inadequate.

- a. The Commission is not assisted by the partial and off the track information provided.
- b. The information contained in Section 6 of the ACTU outline of contentions:
 - i) Does not constitute a proper costing or economic assessment.
 - ii) Does not in itself withstand scrutiny.
- c. The ACTU has to date failed to provide the Commission with proper evaluation of the economic impact of its claim. The ACTU has not provided the Commission with information which assists it in determining whether or not the ACTU claim should be granted.