

6. INTERNATIONAL COMPARISONS

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Introduction

[6.1] The ACTU contend at 8.1 to 8.7 that the award variations sought are comparable to national regulations in other developed nations. They argue at the conclusion of the chapter that:-

“Granting the ACTU claims would not be inconsistent with practices in other jurisdictions. Most comparable nations provide, through national regulation, superior provisions, and many are considering further regulation to assist employees with their caring responsibilities.”

[6.2] ACCI has responded to these contentions and supporting evidence on an individual basis in respect of various of the ACTU claims¹. This section responds to the general contentions made by ACTU in Chapter 8 of its core contentions.

Relevance generally

[6.3] Drawing on intentional comparisons is always a problematic and is often a less than helpful exercise. Australia’s federal and constitutionally based legal system and the legal capacities for award regulation in Australia are unique in international terms. Other national jurisdictions usually legislate for minimum standards and conditions without the jurisdictional limitations and statutory framework applicable in an award based system.

¹ See sections on Parental Leave and Part Time Work.

[6.4] Countries such as the UK are free to design legislation with detailed consultation and communication provisions. This freedom is not available to the AIRC in establishing test case standards due to the limitations of Australia's federal and constitutional based legal system and legal capacities for award regulation. The provisions of, for example, section 143(1B) of the Workplace Relations Act, 1996 mean that many of the legislative provisions on consultation and agreement in the UK cannot be placed in award provisions and are more appropriate, in any case, for enterprise bargaining /workplace determination.

[6.5] Comparisons with many European countries, particularly the Scandinavian and the civil legal systems of France and Germany etc. are inappropriate due to the differing socio-economic, historical, cultural and economic foundations of these countries as well as fundamentally different approaches to social welfare, social security and government policy in those respects. Any valid comparison should take into account the complete picture of tax regimes, welfare expenditure and transfer payments to workers with children, along with fertility rates and women's labour market performance.

[6.6] As a number of observers have shown, apart from differences in economic circumstances, there are not only major differences between countries in ideas about individual responsibility, the welfare state, the family and state but differences over time within the same countries as political differences ebb and flow². Indeed, the current economic situation of many of these countries is another reason to be cautious about slavishly applying and seeking to regulate based on comparisons with these countries.

[6.7] Australia is not unique in this view; there was a similar debate in the UK at parliamentary committee level prior to the introduction of its new legislation:-

"..Having listened to the Second reading and to wider debates, Committee members will expect us to consider the burden that will be imposed, particularly on small business, in the interests of delivering what I fully acknowledge is a good to the wider community. The issue is of great importance, not just because business suffers the immediate burden of costs and regulatory compliance, but because if business suffers, we all suffer in the medium to longer term. If business is not efficient and competitive, society will be less prosperous, unemployment will be higher and we will be less able to maintain our competitive position in the world.

² Moss P and Devan F (eds) Parental leave: Progress or Pitfall? NIDI CBGS Publications 1999; Hardy S and Adnett N The Parental Leave Directive: Towards a 'family-friendly' Social Europe? Number 2001.09 School of Law, University of Manchester

We need only look to Germany for a warning spectre of the way in which well-intentioned improvements in employment conditions can have unintended and negative consequences if they are not carefully monitored. I worked in Germany during the late 1970s and 1980s, when its economy appeared to be gravity-defying. Employment costs were very high, yet the world clamoured to buy German goods. Part of the reason was that skills levels in the work force were also very high, and the unit cost of employment seemed more reasonable in that context. However, the world has caught up with Germany.....Germany is teetering on the brink of having 4 million unemployed – ours looks almost rosy. The lucky ones who are still in work continue to enjoy the generous employment protections and benefits that have been enshrined for the German work force, but the cost is an uncompetitive labour rate in many sectors of German industry, rising unemployment and the export of German jobs to less expensive countries. I know a little about that, because I was involved for some years during the 1980s in the process whereby medium technology business in Germany was expatriated to Estonia, Poland, Czechoslovakia and other countries with lower labour costs. We must beware that danger³.

[6.8] These problems demonstrate precisely the difficulties inherent in simplistic assumptions of the ability to transplant labour market regulation between national systems.

[6.9] There is a complex interface between legislation, benefits, income levels and tax, yet the ACTU has restricted its commentary to the legislative framework alone. In contrast to Australia, the countries cited (with the exception of New Zealand) have far higher proportions of employee and public funding into social welfare schemes for employee absence for any reason, including parental leave, illness and job loss.⁴

[6.10] International instruments recognise that measures need to be taken which are appropriate to “national conditions and practice”. Article 4 of ILO Convention number 156 requires “....*all measures compatible with national conditions and possibilities to be taken...*” Similarly in ILO Convention No. 111 on discrimination, articles 2 and 3 require members to undertake “...*by methods appropriate to national conditions and practice...*”

³Phillip Hammond, Member for Runnymede and Weybridge: Hansard debates of House of Commons Standing Committee F, debate on Employment Bill on Tuesday January 8th, 2002 at column 254, attachment.

⁴OECD Taxing Wages Special Feature: Taxing Families 2001-2002 Note the methodology adopted by the OECD specifically excludes Australian employer statutory payments for employee superannuation, workers compensation, leave, termination, redundancy and payroll tax as these are not defined as social security payments.

[6.11] Thus in international obligations recognition is made of the difficulties inherent in simplistic assumptions of transplant ability of labour market regulations.

[6.12] Even if international comparisons were appropriate, or validly transferable, the ACTU's core contentions at Chapter 8 "cherry pick" the highest of international comparators in respect of each of its applications and argues that this demonstrates that its applications should be conceded to as a minimum award safety net standard in Australia. For example, why should Ireland be quoted in respect of carer's leave but its provisions in respect of parental leave are omitted?

[6.13] With respect, international comparisons need to be treated with far more caution for the reasons introduced above. Even if they are relevant, cherry picking the highest standards in specific areas out of a national jurisdiction and using that as a purported basis for setting award safety net standards is inaccurate, highly inappropriate, and diminishes the process of conciliation and arbitration.

[6.14] Even if international comparisons were appropriate or sustainable, many of the international comparisons do not actually support the ACTU applications. The extent of the ACTU application for part time work for example, is not in fact supported by any of the international comparisons cited by the ACTU's expert witness in regard to the level and extent of the entitlement⁵.

[6.15] This is conceded by the ACTU at 9.1(c) of its core contentions where it concedes that legislated rights in Germany, the UK and the Netherlands to vary employee rights to accommodate caring needs are "subject to the needs of the enterprise". Yet the ACTU in its application seeks an absolute right to part time work. Therefore it is unclear whether the ACTU is actually relying on Germany, UK or the Netherlands in respect of their application for part time work or not.

[6.16] The level of extension of parental leave sought is similarly not supported by the ACTU's own expert witness's identification of standards⁶.

[6.17] Of the countries examined by Ms. Murray **and taking recent increases in provision into account since Ms. Murray's paper was written**, two major

⁵ See further section on Part Time Work claim for a further examination of this point.

⁶ See further section on Parental Leave/Child Rearing leave for a further examination of this point.

jurisdictions have a lesser entitlement than Australia (US and EU), 2 countries have recently increased entitlements so as to have the same level as Australia (Ireland and New Zealand) and five states have a greater entitlement. Of the states that have a greater entitlement, all, with the exception of Germany, have an entitlement to less than 24 months as is being sought by the ACTU.

OECD Comparisons – ACTU Contentions

[6.18] The ACTU at 9.1(a) states that two thirds of OECD nations provide for greater than 12 months leave associated with the birth of the child, and that one third provide for longer than two years. This is based on a 2001 OECD report⁷. It is however equally valid to examine these figures a number of ways. For example,

- a) 10 countries provide for less than 1 year, 2 countries provide for 1 year, 8 countries provide for between one and two years and 10 countries provide for more than two years.
- b) Of the 8 countries that provide for between one and two years, 6 of those provide less than 78 weeks, with an average amongst that group of 64.3 weeks. Included in the countries cited with less than 12 months entitlement is the closest comparators to Australia, namely, Canada, the US and the UK.
- c) 12 countries provide for more than 78 weeks.

[6.19] Therefore from the evidence cited, 60% of OECD countries provide for less than 18 months parental leave in total with an average entitlement amongst that group of 43 weeks and 40% provide for more than 18 months, with an average entitlement of 138.4. The purpose of this exercise is to demonstrate the futility of international comparisons in this context as the figures can be examined in so many different ways and international comparisons can be cut up to suit practically any argument.

[6.20] This OECD table⁸ also includes child care leave entitlements other than those associated with the birth of the child. (E.g. parental leave is included in

⁷ OECD Economic Outlook 2001, Chapter 4: Balancing Work and Family Life: Helping Parents into Paid Employment. Table 4.7 at 144.

⁸ OECD Economic Outlook 2001, table 4.7.

Ireland and the UK which can be taken up to the child reaching 5 years). Therefore it is not accurate to describe it as “leave associated with the birth of the child as the ACTU has done at 9.1 (a). The table relates to overall maternity and parental leave entitlements which can be taken other than at the time of the birth of the child and are not consecutive obligations in a number of countries.

[6.21] Even if the ACTU analysis of the data were accepted, of the 10 countries with more than 2 years entitlement, the average is approximately 139 weeks, with the highest being the Slovak republic at 184 weeks. This data is a far cry from supporting the ACTU’s application for an entitlement to 104 weeks leave with the option for additional rolling twelve months periods of child caring leave by request, a total, if the child commences school at 5 years of 260 weeks. It does not, as the ACTU contends at 9.1 show that “the award variations sought by the ACTU are comparable to national regulations in other developed nations.” In reality it is in no way comparable. International comparisons provide no foundation for support for the ACTU claims.

[6.22] It is difficult to see how such an arrangement would as the ACTU seem to suggest, assist in retaining any individual’s attachment to the labour market. The OECD has specifically identified problems with long term leave creating difficulties in returning to the job if there have been significant changes in the technological and organisational context of the firm in the meantime⁹.

[6.23] In summary therefore, the OECD comparison does little to assist international comparisons, even if such are appropriate or helpful. The ACTU have attempted to use this table to support its claim for parental leave at the birth of the child when in reality the table compares information for parental leave throughout the child rearing years. It fails to provide support for the ACTU claims and clearly shows the difficulties in providing long term leave and maintaining attachment to the labour force.

OECD Contention in Context

[6.24] If one is using OECD comparisons, it is worthwhile to point out that the OECD has also found that Australia has one of the highest rates of voluntary part time work in the OECD and the highest availability of flexible working hours. In

⁹ Economic Outlook 1995 – Long Term Leave for Parents in OECD Countries at page 188.

its 2001 Economic Outlook, Australia ranked **first** out of 19 OECD countries for percentage of employees reporting that they work flexi-time (50% of employees) and **fifth** for the percentage of women in employment working part-time on a **voluntary** basis¹⁰ In a separate 2001 paper, it also found that Australia had the second highest incidence of part time work in the OECD after the Netherlands.¹¹

[6.25] What overseas comparisons do show is that work and family regulation, even when part of a much broader and integrated social welfare framework, such as the “Nordic model” has not optimised employment levels, progressed gender equality or raised fertility rates. Women’s earnings remain below those of men in all countries; and whilst employment rates for women in the Nordic countries have always been above the OECD average, with or without children, these countries have among the highest levels of occupational segregation, higher than Australia’s¹². Australia also has a lower gender pay gap)¹³.

Full Range of OECD Conclusions on Australia

[6.26] If the ACTU is to rely on the work of the OECD, then it should also have regard to the more general findings and recommendations of the OECD in regard to the future of the Australian workplace relations system.

[6.27] The OECD has observed and recommended that:

“The benefits of a comprehensive approach to structural reform have become apparent in the pick up of Australia’s multi-factor productivity growth...better management practices and work arrangements have improved capital productivity...

The flexibility of the labour market has increased by the move towards a more decentralised system of setting wages and other conditions of employment, but there is a need for more effective decentralisation...

The reform process needs to be completed in the light of Australia’s level of structural unemployment and the need to sustain the improvement in productivity performance.”¹⁴

[6.28] And further that

¹⁰ Economic Outlook 2001 – Balancing Work and Family Life; Helping Parents into Paid Employment at page 149

¹¹ Table 3- Part Time Work as a percentage of total employment. Occasional Paper No. 45; Trends in Working Hours in OECD Countries, 30 March 2001.

¹² OECD Employment Outlook July 2002 Women at Work: who are they and how are they faring?. See also Sundstrom K Can governments influence population growth? OECD Observer Dec 4 2001

¹³ OECD Employment Outlook July 2002 p97

¹⁴ OECD (2001) *Economic Survey Australia 2001*

“Much of the economic policy shift of the last two decades, including workplace reform, has been directed at improving Australia’s growth rate of productivity. Productivity is a key performance measure for the economy – it underpins international competitiveness and is fundamental to sustained improvements in living standards. Productivity represents the ability of the economy to employ its resources, both human and capital, to produce output (and therefore income).

The impact of workplace reform on the labour market and the economy more broadly is difficult to quantify as it has occurred in an economic environment characterised by rapid technological and structural change...

There are a number of indications however that the process so far of reforming Australia’s complex industrial relations system has had profound effects on many industries. It has been an important factor in reducing labour inefficiencies and increasing the flexibility of working conditions...

It has also contributed to keeping wage increases broadly in line with productivity growth during the economic recovery of the 1990s allowing a virtuous combination of low inflation, rising real wages, good productivity growth and rising profits.”¹⁵

“...structural reforms undertaken in Australia during the past two decades were the principal factors underpinning the pick up in productivity growth. The effect of such reforms may not yet have emerged in full, nor has the scope for further reform been exhausted.”¹⁶

[6.29] When properly considered, the perspectives offered by the OECD do not assist claims to include prescriptive approaches in awards, and the eschewing of workplace determination (which are the clear character and consequences of the ACTU claims). The OECD’s recommendations for further reforms do not appear to accord with the claims brought forward by the ACTU in this matter.

The risks of transplanting international law into Australia

[6.30] It is also relevant to consider the issue of transplanting legal approaches between systems more generally. The transplantation of international approaches between national systems is one of the core considerations in the analysis of comparative labour law.

[6.31] One of the fundamental building blocks of the comparative labour law discipline and one which has been very influential in the development of labour law throughout the world is the seminal work of Professor Sir Otto Kahn-Freund¹⁷ on transplanting of labour law between national systems.

¹⁵ OECD (2001) *Economic Survey Australia 2001*

¹⁶ OECD (2001) *Economic Survey Australia 2001*

¹⁷ [1] Sir Otto Kahn-Freund, (1966) “Comparative Law As An Academic Subject” 82 LQR 41.

[6.32] Kahn-Freund issued key cautions on seeking to transplant approaches between jurisdictions which are very instructive in properly understanding the relevance of international material and comparisons to Australia, and the extent to which they can and should inform domestic policy making and labour market regulation.

- a. He argued that law (and in particular labour law), cannot be separated from the national purposes and circumstances in which it is made.
- b. He also cautioned against letting homonyms and synonyms lead to undue comparison purely on the basis of similarities in nomenclature.

[6.33] Professor Kahn-Freund proposed a two step process to determine if any proposed legal transplant is viable:

- a. Examine the relationship between the legal rule that you want to transplant, and the socio-political structure of the donor state.
- b. Compare are the socio-political structure of the donor and receiving states.

[6.34] In this case, the propositions being advanced are grounded in labour relations systems which differ markedly from that in Australia. If we take the UK as an example, the differing influences include:

- a. the UK's unitary political system and essentially common law constitutional arrangement. This contrasts significantly with Australia which has a system of State and Federal labour relations regulation and Australia's dispute based federal award system.
- b. European law and the obligations of the United Kingdom's European Union membership. In particular, the UK has obligations under EU employment directives which preclude comparison to the Australian system and in particular replication regulation between the systems.
- c. A fundamentally different workplace relations system, including in particular no award system and a differing focus on workplace determination (i.e. fundamental differences in the levels of regulation and deregulation in Australia).

[6.35] And this is only comparing the UK as an example. Other international comparisons are used which differ even more widely. The ACTU has advanced nothing to convince the Commission that the fundamental caution against transplantability of regulation, which the work of Kahn-Freund dictates, has been discharged/satisfied.

[6.36] In particular, the work of Kahn-Freund makes clear that a rigorous assessment of both donor and recipient systems (and of the proposition itself) is necessary before any transplant can be considered. This rigour has not been supplied by the ACTU – and it cannot reasonably be assumed that what would work in the UK or any other country would work here.

[6.37] The question must also be asked – why and how could you transplant any international approach to Australia absent of the checks and balances, and wider systemic context in which it was developed, legislated and implemented? Considering the fundamental lessons of comparative labour law, this would appear to be a particularly short sighted and inappropriate outcome.

Other specific ACTU contentions

[6.38] At 9.1, the ACTU contend:

“The award variations sought by the ACTU are comparable to national regulations in other developed nations. In particular:

- (a) Two thirds of OECD nations provide for greater than 12 months leave associated with the birth of a child, and one third provide for longer than 2 years.
- (b) Additional extended leave associated with family care is available in Sweden (60 days per annum for sick children), Ireland (65 weeks for the care of a disabled or incapacitated dependent) and the United Kingdom (13 weeks per parent per child before a child’s 6th birthday for child care, more for disabled children).
- (c) The United Kingdom, Netherlands and Germany have legislated rights to vary hours to accommodate caring needs, subject to the needs of the enterprise.
- (d) Part time work for young children/part time parental leave is available in Sweden, the Netherlands and is under consideration in Norway.
- (e) A number of jurisdictions provide temporarily leave to assist the disabled (Sweden, Denmark, the Netherlands, Ireland and Canada). [See Murray (2004) ACTU III, p 371-449 at p 407-435, Bittman et al (2004) ACTU II, p 299-509, p 328-336]”.

[6.39] Contention 9.1(a) has already been considered in detail above. In respect of Contention 9.1(b), whilst carer’s leave is no longer the subject of this application, it is significant to point out the following inaccuracies in the ACTU’s contentions. In Ireland, the 65 weeks’ carer’s leave is only available subject to the independent assessment of the individual in need of care by a state officer¹⁸. The reference to

¹⁸ Section 6(5) Carer’s Leave Act 2001

the UK appears to be a reference to the Parental Leave provisions as distinct from carer's leave entitlements¹⁹.

[6.40] At 9.1(c), the ACTU state that

“The United Kingdom, Netherlands and Germany have legislated rights to vary hours to accommodate caring needs, subject to the needs of the business”

[6.41] The UK provisions are considered in detail below and elsewhere in this document, but it should be noted that in the UK, it is a “right to request” as distinct from a “right to vary” and a huge information and public awareness campaign attended the introduction of the new legislation, in order to ensure that the introduction went smoothly and that parties were to the greatest extent possible, assisted in reaching agreement at enterprise level.

[6.42] With the exception of the UK, the entitlement is in reality an entitlement to part time/variation in hours which may be refused subject to “serious needs of the business” in the Netherlands and may be refused for “operational reasons” in Germany. There are restrictions on the ability of employees to request changes regularly, minimum written notification periods and process requirements and a small business exemption. Therefore it is not correct for the ACTU to contend as it has done, that such provisions support its claims. Indeed the UK provisions are materially different from the relief sought by the ACTU.

[6.43] At 9.1(d), the ACTU again refer to the same provisions for part time work in the Netherlands and refer to proposals in Norway which are not elaborated on or supported by their evidence.

[6.44] At 9.1(e), the ACTU state that a number of jurisdictions provide temporary leave to assist the disabled and refer to Sweden, Denmark, the Netherlands, Ireland and Canada. The reference to Ireland appears to be to the same Carer's leave provisions as is referred to and dealt with above. If it is a reference to the Irish Emergency Family leave²⁰ provisions, the Australian carer's leave arrangements are already in excess of these provisions which are limited to five days in three years and where part of a day counts as a full day. The reference to Sweden appears to be to the previous 60 days per year already mentioned above

¹⁹ The normal entitlement to parental leave is 13 weeks per parent per child in the UK or 18 weeks where the child is eligible for a disability living allowance. Maternity and Parental Leave Regulations 1999.

²⁰ Force Majeure Leave as provided for by the *Parental Leave Act, 1998*

and described by the ACTU's own expert witness as “.. *'for parental care if the child or childminder is sick' and is not intended to be used for the purposes of ongoing care*”²¹. It is difficult to see how that can be construed as a separate entitlement to care for the disabled as the ACTU appears to suggest.

[6.45] Similarly the Canadian references appear to be a reference to unpaid carer's leave of 5 days (British Columbia) or 10 days (Ontario)²² depending on the State which is consistent with what has been agreed between the parties. The reference to Denmark in the Bittman paper appears to be a reference to an entitlement to social security payments rather than leave per se²³.

[6.46] In summary therefore, the ACTU core contentions at 9.1 appear to repeat much of the same material in different contexts. two out of the five contentions relate to carer's leave which is no longer the subject of arbitration in this case. two relate to entitlements to part time work which the ACTU concedes at 9.1(c) is not an absolute entitlement, but only operates subject to the needs of the business. The final contention in 9.1 must be put in the context of OECD information outlined above and in any event fails to support the nature and extent of the ACTU application in respect of parental leave and childrearing leave.

[6.47] In summary therefore, the ACTU has failed to demonstrate by its own contentions that “*the award variations sought by the ACTU are comparable to national regulations in other developed nations*”.

Minimum EU standards and other international provisions

[6.48] The minimum EU standards and other international provisions may be of academic interest but are of no evidentiary value. Much of the international material referred to by the ACTU expert witness and in the Bittman report²⁴ refers to countries which are Member States of the EU. ACCI does not accept in principle that other countries provisions can be easily compared with or transplanted to the Australian context and would submit that international comparisons are an inherently problematic and often less than helpful exercise.

²¹ Murray (2004) ACTU III, p 371-449 at Para. 12.2.1 p 425 quoting Bjornberg.

²² Murray at 408 - 410

²³ Bittman et Al, ACTU II , p 371- 449 at 331

²⁴ Bittman et Al, ACTU II , p 371- 449 at ps 328 - 335

[6.49] However, in the context where the ACTU argue that comparison should be made with individual EU Member States, the ACCI would contend that it is not possible to draw any realistic comparisons with any individual member states, or even with EU minimum standards as a whole. Minimum EU standards are in fact provided by minimum EU provisions rather than the provisions of individual EU Member States, which vary hugely in practice due to different legal systems, economies and socio- economic history.

[6.50] Murray has argued in her paper that EU directives do not represent a national labour code, as its laws are designed to supplement those at the national level²⁵. She goes on to say that to find regulatory solutions in EU law from other jurisdictions one should be prepared to consider both the minimum European standards and the additional or different measures taken by the Member States²⁶. With respect, this opinion has some validity in areas where the EU does not attempt to make provisions or makes only some provisions, but in areas such as work and family, where the EU has enacted substantial legislation to set down minimum standards in a field where employment practice and conditions is widely variable, then the only comparable standard for safety net provisions, if albeit very limited comparison can be made, is with those minimum standards.

[6.51] Murray also appears to seek to place EU directives on a par with ILO Conventions²⁷, stating that they take the form of minimum standards. However, EU directives differ substantially to ILO Conventions in that whilst they are addressed to Member States and set out minimum standards, they must be implemented by Member States within a prescribed time, and as Murray herself points out, under the doctrine of direct effect, in the event that a member state has not implemented the directive within the prescribed time, an individual citizen can rely on the doctrine to enforce the terms of the directive. Accordingly they do set down minimum standards which Member States must comply with.

[6.52] Furthermore, Member State legislation must comply with the provisions of the Directive in all respects. Thus, for example, in the area of parental leave, notwithstanding that many individual member states had longer durations of parental leave, substantial amendment was still required to bring their provisions

²⁵ Murray (2004) ACTU III, p 371-449 at Para. 4.1.5 p394

²⁶ Para. 4.1.6 p395

²⁷ Para. 5.1.1 p399

in line with the terms of the directive²⁸. Indeed Treib and Falker argue that the effect of those minimum EU standards is to trigger additional voluntary domestic reform initiatives in the area of work and family. Accordingly, the EU sets the minimum standard across Europe (only) and has a trigger effect on voluntary arrangements at Member State level above that. Drawing of comparisons as the ACTU have done with individual EU Members States or even worse, with the individual provisions of individual Member States is neither an appropriate nor a comprehensive examination of minimum European standards.

[6.53] EU legislation has regulated the field in respect of maternity and parental leave (duration of 40 weeks in total and up to five days *force majeure* leave in a three year period²⁹) and for the provision of part time work (Member States and social partners to examine and where possible, remove obstacles and barriers to part time work, employers to consider requests for part time work³⁰).

[6.54] The EU has also examined the issue of work and family in detail and has opted for a persuasive approach to other mechanisms for development of work and family matters rather than a prescriptive approach. Its Council of Ministers issued a resolution on 29 June 2000³¹ encouraging Member States to develop strategies to deal with *inter alia*, male paternity leave, gender balanced sharing of caring responsibilities, devise, launch and promote information and awareness campaigns amongst general public and specific target groups and to encourage businesses, particularly SMEs, to encourage and develop management practices to take account of family life.

[6.55] In so doing, the EU has apparently recognised that there is a limit to the extent to which legislative intervention can assist the work and family issue and has specifically eschewed specific obligations as now proposed by the ACTU.

[6.56] This is significant given that the EU is not normally slow to legislate for minimum employment conditions and indeed has legislated for a significant

²⁸ Treib and Falker; The First EU Social Partner Agreement in Practice, Parental Leave in the 15 Member States, Institute for Advanced Studies Vienna, April 2004.

²⁹ Council Directive 96/34/EC of 3 June 1996 on parental leave, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers,

³⁰ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work

³¹ Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life.

number of minimum employment standards in recent years, including minimum annual leave entitlement, contracts of employment, fixed term workers, regulation of youth workers, anti discrimination principles, transmission of business, information and consultation as well as occupational health and safety.

[6.57] This may not be a “national labour code”, but it is a significant level of legislation and it demonstrates that, where the EU decides there is a need to introduce legislation and it speculates that there may be a benefit to such an approach, it will not be slow to do so. It is significant therefore, that the EU has in overall terms adopted a persuasive strategy towards the issue of work and family rather than an entirely prescriptive one.

International Labour Standards and Objectives

[6.58] The ACTU seem to contend at 8.2 that international labour standards and conventions have objects not dissimilar to the *Workplace Relations Act, 1996*. International labour standards are considered in detail in section 7 of this submission but this assertion does not simply stand up.

[6.59] The *Workplace Relations Act 1996* sets out a framework for minimum standards and enterprise bargaining. It is a unique statutory framework.

[6.60] International labour standards deal with specific subject matters such as for example, work and family matters. In the context of EU countries, where in some Member States, provisions have existed for many years as part of their socio economic history but have had to be changed or adapted to fit minimum EU standards, and in others, minimum standards have been enacted as a response to EU directives, it is not possible, as the ACTU have attempted to do, to state that the objects of the *Workplace Relations Act 1996* and the actions of individual countries are not dissimilar.

[6.61] We have already discussed the “national conditions and practices” aspects of ILO Conventions in the international standards section. Yet in its contention at 9.2 the ACTU blithely seeks to ignore this reality. Indeed the EU itself has recognised that responses to work and family problems require approaches other than mere legislative interventions.

[6.62] At 9.3, the ACTU contend that assessments of the changes in regulatory regimes have been largely positive. With respect, this is not a proper conclusion:-

- (a) In the UK, much of the lack of difficulties with the new provisions has been as a result of the single nature of the regulatory framework and the huge investment in awareness and information, initiated

and undertaken as a part of a government policy and programme about the provisions and the emphasis of the need to resolve matters at the level of the enterprise.

- (b) In Germany, some commentators have doubted the benefit to equal opportunities arising out of its part time work provisions³².
- (c) Sweden has recently launched a further review of its work and family provisions, to examine the gender gap issue³³. Even in Sweden, where 60 days parental leave are reserved as “Daddy Days”, extensive legislative provisions and entitlements has not addressed completely the work and family problem and has not assisted gender balancing issues.

[6.63] To simply say, as the ACTU appears to be doing at 9.3, that to introduce its claims will subsequently lead to net benefits, appears to oversimplify the case. The ACTU focuses on the regulation in the EU, but not its outcomes. In doing so, it fails to establish any basis on which the Commission could reliably view the EU comparison as an evidentiary basis for conciliation and arbitration in Australia.

Other international comparisons

[6.64] Current minimum award standards in Australia compare favourably with other international comparators quoted by Ms. Murray such as the US and are not out of line with provisions in Canada and New Zealand. Specific provisions are examined in individual chapters on ACTU claims.

UK examples

[6.65] The UK provides an excellent example of the dangers of simplistically transplanting international regulatory regimes into Australia. Notwithstanding the perceived similarities in the economic systems and societies, the industrial relations regulatory system is vastly different.

³² Schmidt M – The Right to Part Time Work under German Law: Progress in or a Boomerang for Equal Employment Opportunities, *Industrial Law Journal*, 1 December 2001, vol. 30 no. 4 pp.335-352.

³³ In May 2004, the Swedish Government announced a review of parental leave and benefits to examine the situation whereby women took much more leave than men.
<http://www.eiro.eurofound.eu.int/2004/06/inbrief/se0406102n.html>

[6.66] The UK government and parliament is largely unrestricted in its ability to enact provisions in legislation. That is not the case with the award system in Australia which is subject to the restraints of the Constitution, a federal system, together with the limitations on the award system as set down in the Workplace Relations Act, 1996. In addition, whilst Australian society may have traditionally been like the UK in earlier generations, due to the predominance of Anglo Australians, this is not the case today and since the Australia Act, all legal ties with the UK have been cut.

[6.67] The UK is a member of the EU and has unlimited access to the vast markets of the enlarged EU. It can trade without hindrance with all EU Member States. It is a common market for its own benefit, one that does not include Australia. Its member states compete for labour amongst each other and increased labour mobility within the EU has resulted from and continues to drive, ongoing harmonisation of labour regulation. Australia, on the other hand, is a small economy on the edge of the world with a population of 19 million. It is not a member of any large trade block (unlike the UK) but is subject to the same international competition in goods and services and for investment.

[6.68] Even if it was appropriate to compare the Australian economy and society with the UK, the UK provisions must be looked at in their context. The UK provisions do not support the ACTU applications. The entitlement to parental leave in the UK, for example, is 13 weeks per parent per child, rising to 18 weeks where a child is disabled. The statutory right to request changes in working hours and place of work, is in fact a statutory right to request flexible working arrangements which may include a variety of solutions which suit both the employer and the employee. Most of the provisions (and the emphasis) in UK flexible working provisions is on providing a full package of support to enable employers and employees make and deal with requests³⁴. This is not a mechanism which is possible to introduce in the award system.

[6.69] The UK government rejected the idea of introducing a right to part time work as initially discussed in the green paper as being both an inappropriate burden for employers and not what employees actually wanted in favour of a flexibility arrangement where parties were assisted in reaching their own

³⁴ About Time: Flexible Working. Work and Parents Taskforce Report 2001. Tab 49 ACTU Exhibits, Para. 1.7, 1.8, 1.9 pg 530. Chapter 5 p 564 - 568

solutions³⁵. It should also be borne in mind that in enacting these measures, the UK did so in a regulatory context that is less detailed, less complex and less intensive than Australian employment and workplace relations law.

[6.70] The UK flexible working provisions have also been supported by a massive public awareness and cultural change campaign which has been largely responsible for the lack of difficulty in implementing the legislation³⁶. Again, this is not something which is possible to replicate in the Australian award system. In the absence of being able to properly support such measures, it cannot be assumed that the implementation of such regulations, even if possible, would be successful anyway.

[6.71] The ACTU state at 9.6 that the assessments of these schemes by employers have been largely positive. With respect, the flexible working provisions have only been in place since 6th April 2003 and that is not long enough to view long term trends.

[6.72] Furthermore it is not possible to say whether the results, even if accepted, are as a result of the legislation or the information and change campaign.³⁷

[6.73] The UK provisions were predicated by a long lead-in period and information campaign: the Green Paper was first published in 2000 and public debate took place prior to the setting up of the Taskforce in 2001. The Taskforce took five months to engage in substantial consultation and discussion, engaging with all stakeholders and its recommendations were produced to the UK Government prior to provisions being drafted and passing through Parliament in 2001 - 2002. The Employment Bill was also subject to examination by a special parliamentary committee³⁸. The new provisions came into effect on 6 April 2003.

[6.74] In addition, the British Government launched a Work-Life Balance Campaign in March 2000 which aimed to convince employers of the case for change and gives support to businesses to help them introduce change, over three years prior to the introduction of the legislative provisions. A Challenge Fund

³⁵ UK Taskforce Report, Paras 1.1, 1.2 and 1.3 page 528. See also Confederation of British Industry Press Releases, Attachment .

³⁶ As recommended by the Taskforce, Chapter 5 p 564-568 ACTU Exhibits III

³⁷ The introduction of parental leave took place in December 1999 and was revised with effect from 10th January 2002 to increase entitlements to parents of disabled children and to adjust the operative date for parents of children born or adopted between 15 December 1994 and 14 December 1999. Paternity leave was introduced for children born after 6 April 2003.

³⁸ See extracts of debate at Para 4 above.

was set up to provide consultancy support for employers to encourage them to introduce and develop innovative working patterns and practices. This has since been mainstreamed into the UK Department of Trade and Industry's Business Support function³⁹. Therefore the UK provisions were preceded by three years of debate and support and information campaigns, prior to the provisions coming into effect.

[6.75] The Lovell's survey is based on a response rate of only 10.3% amongst 4,914 survey questionnaires. It was conducted in September 2003, only six months after the introduction of the legislation and three and a half years after the introduction of the UK government's "persuasion" campaign. The DTI survey was based on 1,509 telephone interviews with a response rate of 60%. It was carried out between December 2002 and April 2003, prior to the introduction of the new flexible working provisions! It cannot, therefore, be said to be an assessment of the new legislative scheme by employers as contended by the ACTU at 8.7.

[6.76] Based on the process engaged in by the UK government, ACTU would suggest that the impact of the UK provisions was lessened by the following factors: -

- (a) Large companies were applying the flexibilities anyway.
- (b) SMEs were assisted by a very substantial awareness campaign⁴⁰ and the detailed provisions of the legislation regarding how to go about agreeing at enterprise level.
- (c) The ongoing level of consultation and discussion on the issue, from the launch of the campaign and the Green Paper to Task Force process and report. A timeframe of three years of serious, substantial and participative consultation preceded the introduction of the provisions. Accompanying this consultation and discussion was a three year long awareness and financial support campaign for businesses to encourage them to voluntarily enter into these

³⁹ See DTI: Flexible Working: The Right to Request and the Duty to Consider: Annex B: The Work Life Balance Campaign ACTU Exhibits III p504

⁴⁰ As an example of the UK government sponsored web-based supports on work and family matters, please see the following government sites: <http://www.tiger.gov.uk>; , <http://www.dti.gov.uk/work-lifebalance/>; <http://www2.dti.gov.uk/er/index.htm>; <http://www.ets.gov.uk/>; <http://www.direct.gov.uk>; <http://www.businesslink.gov.uk>

arrangements and to convince them of the business case for work and family issues. This gave companies a substantial period of time to adjust and prepare for the new regime.

- (d) The tripartite nature of the task force report which was subsequently enacted into legislation ensured that all parties had ownership of the outcome and were less likely to oppose it.

[6.77] In fact the lessons from the UK are that to succeed in work and family issues, you should pursue an agreed approach to resolution of work and family issues and that imposing entitlements unilaterally on parties may neither suit their needs nor result in a successful outcome. The UK experience shows in fact that facilitating organisational culture and change in a persuasive manner, is an effective means to achieve outcomes.

Conclusion – how the Commission should proceed

[6.78] The ACTU concludes in relation to international material that:

- 8.7 Granting the ACTU claims would not be inconsistent with practices in other jurisdictions. Most comparable nations provide, through national regulation, superior provisions, and many are considering further regulation to assist employees with their caring responsibilities.

[6.79] The ACTU claims are not supported by the evidence which they have put forward in international comparisons. ACCI contend that making international comparisons is a problematic, (at best) very limited and sometimes less than helpful exercise. None of these international regulatory comparisons were made by reference in a form, direct or indirect, to the circumstances or conditions of Australian society or our economy, let alone the Australian workplace relations system or the circumstances of employers and employees. They were made for their local circumstances, to meet their local social, economic, political and industrial forces of the day.

[6.80] None of the architects of these other regulatory approaches purport to have made local decisions for the purposes of establishing some international standard or framework that would apply in the Asia Pacific region, let alone Australia. Other countries' employment frameworks do not transplant easily into the Australian situation, with the constitutional and legal scope of the award framework. The transformation is even more problematic, when one attempts as the ACTU has done, to compare individual elements of individual regulatory frameworks and transplant those to the Australian context. Caution must also be used due to the vastly different socio economic bases of various countries.

[6.81] International instruments recognise this difficulty when they set down obligations to be met "in accordance with national conditions and practices". It is particularly inappropriate, when one considers the safety net standard of the Australian award provisions to "cherry pick" as the ACTU have done, the most regulatory or (to the ACTU) favourable elements of several different jurisdictions and identify that as "comparable international standards" to which the Australian award safety net should comply.

[6.82] Even when international comparisons are made, it is clear that they do not support the nature and extent of the ACTU's claims. In examining international comparisons, ACCI have focussed on the ACTU's own evidence and have demonstrated that its own evidence does not support its claims.

[6.83] Even when one examines the UK, whom the ACTU have suggested is the closest possible comparator to make, the following is clear:-

- (a) UK provisions do not support the ACTU's claims in either extent or in method. There are significant and material differences between the two.
- (b) The UK experience is based on government initiated policy, predicated on a materially different system of employment regulation and was accompanied by a huge publicly funded awareness, support and financial assistance programme for business prior to the introduction of the enactments made. It focuses on cultural changes and uses bipartisan support and agreement as a key tool to drive change in the area. It is still too early to assess the outcomes.
- (c) The UK experience on work and family is not something which can or should be, reliably replicated in the Australian context.
- (d) The UK experience on work and family cannot properly be detached from the underlying system of workplace relations in the UK and cherry picked into the unique Australian system in the *Workplace Relations Act, 1996*.

[6.84] International comparisons on labour regulation are only part of the picture. If one is to complete the picture, one must also make international comparisons on economic data, considering economic growth, employment growth, productivity growth and unemployment rates. The ACTU fails to do so.

[6.85] In summary, therefore, international labour regulation comparisons do not support the ACTU claims. They are of very little, if any material value in the arbitration of this matter and for the purposes of this Commission performing its unique and specific role under Australian statutory law in the settlement of interstate industrial disputes by compulsory arbitration.