

11. RDO FLEXIBILITY

Summary of ACCI/NFF core contentions

- The question currently before the Commission is not whether scope to take single days of paid leave can contribute to the balance of work and family, it is how this should operate and the award system and whether there should be continue to be barriers in specific industries to the capacities of employers and employees to access a clearly beneficial additional measure by agreement.
- RDO arrangements provide some employees with a entitlement to paid time from off from work. However, this operates inflexibly and rigidly in many cases.
- RDOs could be used more flexibly by agreement to meet employee work and family priorities.
- There is nothing new or novel to the system in what ACCI/NFF propose.
- The proposed clause reflects existing RDO flexibilities contained in various awards and agreements.
- The legitimacy and work and family utility of using RDOs as proposed by ACCI/NFF was recognised a decade ago – the problem is that too many major awards do not provide these flexibilities in practice.
- ACCI / NFF can see no basis not to make the operation of award RDO arrangements, where they exist, more flexible to reflect established flexibilities in the award and agreement system.

ACCI/NFF proposed clause

[11.1] This case, and the consideration of the intersection of employees' working and family lives, demands an examination of all facets of employment regulation, and in particular an examination of a variety of areas of award entitlements can play in assisting employees in balancing their work and family responsibilities.

[11.2] In particular, ACCI has examined the award system for opportunities for employees and their employers to pursue flexible and creative approaches to the use of existing leave / absence accruals in response to familial and caring matters.

[11.3] It is on this basis that ACCI/NFF seek the inclusion of the following clause in awards as a test case standard of the Commission within the meaning of Principle 10¹, and as an indivisible part of any package of work and family award variations arising from these proceedings/from any fresh Test Case decision during 2004/2005.

ACCI / NFF Proposed Clause

RDO Flexibility

- X.1 To assist employees in balancing their work and family responsibilities, an employee may elect with the consent of the employer:
- (a) To bank rostered days off.
 - (b) To substitute rostered days off for alternative days.
 - (c) To take rostered days off in part day amounts.

[11.4] ACCI/NFF's proposed clause reflects a range of existing RDO flexibilities contained in both awards and agreements. There is nothing new or novel to the system in what is proposed. The clause gathers a range of existing flexibilities into a single targeted work and family clause to ensure the familial and caring benefits offered by employee RDO accruals can be extended to as many employees / workplaces as possible. It will allow RDOs (where applicable) to contribute to the work and family balance capacity of more employees in more workplaces.

Instant and ongoing scope for family and caring

[11.5] As is the case for the entire package of ACCI/NFF proposals for work and family, the proposed RDO clause would deliver greater capacity to address both instant / pressing familial and caring demands and longer term familial and caring priorities by agreement between employee and employer.

¹ Print PR002003

[11.6] Banking of RDOs will, for example offer increased capacities to transform RDOs into additional extended leave with families, or additional leave to use as single days for familial and caring exigencies. For example:

- a. Banking RDOs across a given period (e.g. 10 months) to facilitate a longer holiday – for example to travel with children.
- b. Banking RDOs to provide a bank of paid leave at the time of a birth of a child (particularly for new fathers).
- c. Banking RDOs to provide greater scope to synchronise the leave of spouses.
- d. Banking RDOs to use for work and family based exigencies (e.g. an employee with a small child may chose to bank RDOs to provide for childhood illnesses, doctor’s visits etc).

[11.7] Scope to access RDOs in part days, or to shift them by agreement from their scheduled days can also offer scope to address more instant familial and caring demands upon employees. For example:

- a. Emergencies and exigencies.
- b. Scheduled medical appointments.
- c. School sports days.
- d. Parent / teacher interviews, etc.

[11.8] Again, the ACCI/NFF clause seeks to offer increased avenues within awards to address work and family priorities at workplaces. It can deliver very real gains for work and family without any detriment to employers or the system as a whole.

How this would work in practice - I

[11.9] ACCI/NFF does not advance this work and family flexibility measure at large or for all awards. It is proposed to operate only in awards and workplaces in which there are existing RDO arrangements in place. ACCI/NFF does not seek any revision to the established scope for the introduction of RDO arrangements.

How this would work in practice – II

[11.10] Consistent with the terms in which it is drafted, and consistent with the majority of the propositions advanced by ACCI/NFF in this matter, this clause would only provide access to increased RDO flexibility:

- a. For the purposes of assisting employees in balancing their work and family responsibilities. ACCI/NFF are not advancing the proposition that all awards should contain avenues to use RDOs as set out for all and any agreed purposes. This is however a perfectly legitimate approach and ACCI/NFF proposes no variation to any award which contains capacities to use RDOs on such a basis.
- b. At the employee's election, with the consent of the employer. This clause is designed to operate at all times at the initiation of the employee, where the employer agrees to an employee request. ACCI is not advancing this proposition to in any way deliver additional scope for employers to direct the taking of RDOs on any particular basis beyond that which already exists under the award system.
- c. This formulation advanced is fundamental. Any approach which operates other than by employer agreement is not supported.

How this would work in practice – III

[11.11] A variety of awards already contain provision for one of more of the flexibilities contained in the ACCI application, and a very small minority of awards may contain all elements of the ACCI application.

[11.12] ACCI/NFF advances this clause for inclusion in federal awards on a very specific basis, and solely on that basis, as follows:

[11.13] Awards including some but not all the flexibilities contained in the ACCI application: Many awards contain some but not all of the RDO flexibilities contained in the ACCI/NFF applications. For example, an award may provide for banking of RDOs, but not for the shifting of scheduled RDOs or for the taking of RDOs in part day amounts.

[11.14] In such cases, it is proposed that the ACCI/NFF clause be added solely to address the areas of flexibility lacking in the current award. Thus, the formulation of the ACCI / NFF clause would become an additional option in the prescribed circumstances.

[11.15] A complication in such cases is that existing award flexibilities may not operate in terms of employee election / employer consent, nor solely for work and family purposes. It is not the intention of ACCI/NFF in advancing these proposals that any existing capacities in awards become less flexible or narrowed in their access.

[11.16] It is for this reason that where some of the propositions in the ACCI / NFF application are to be added to an award, they should be added as an additional option. For example, the *Storage Services Award 1999* contains the following RDO provision.

22.1.10 Rostered days off

Where a system of working is adopted to allow one rostered day off in each four weeks an employee shall not be entitled to more than twelve such rostered days off in any twelve month period.

22.1.11 Notice of rostered days off

Except as provided in 22.1.13 in cases where, by virtue of the arrangement of his/her ordinary working hours, an employee in accordance with 22.1.4 of this award, is entitled to a rostered day off, such employee shall be advised by the employer at least four weeks in advance of the weekday he/she is to take off.

22.1.12 Flexibility in relation to rostered days off

An individual employee, with the agreement of the employer may substitute the day he/she is to take off for another day.

22.1.13 Rostered days off - substitute days

An employer with the agreement of the majority of employees concerned, may substitute a rostered day off for another day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

[11.17] Of the matters in the ACCI application, this award solely addresses the substitution of days. The ACCI/NFF clause would therefore add the following additional subclause:

22.1.14 Rostered days off – additional flexibility

To assist employees in balancing their work and family responsibilities, an employee may additionally² elect with the consent of the employer:

- (a) To bank rostered days off.
- (b) To take rostered days off in part day amounts.

[11.18] Awards addressing some of the flexibilities contained in the ACCI application, but on a more restrictive basis: Some awards address some of the matters contained in the ACCI/NFF applications, but do so on a more restrictive basis than ACCI/NFF would provide.

[11.19] For example, the *Clothing Trades Award 1999*, provides the following:

32.1.4 Arrangement of Working Hours

- 32.1.4(a) Where an employer and the majority of employees agree in accordance with 11.5 the hours of work, (subject to the daily limitations specified in 32.1.3); may be worked in accordance with any one of the following methods:
- 32.1.4(a)(i) Working shorter hours on one or more days of each week.
 - 32.1.4(a)(ii) Fixing a day on which all employees will be off during particular work cycle.
 - 32.1.4(a)(iii) Roster employees off on various days of the week during a particular work cycle.
- 32.1.4(b) An employer must give an employee who is entitled to a rostered day or days off in accordance with 32.1.4(a)(ii) and 32.1.4(a)(iii), at least four weeks in advance of the weekday the employee is to take off.
- 32.1.4(c) Where an employee, has not accumulated a full day's entitlement when a rostered day off occurs, the employee must receive payment for that day for the actual time accrued.
- 32.1.4(d) Rostered days off may accumulate to a maximum of seven days which must be taken:
- in one or two continuous periods within one month of accrual; or
 - by agreement between the employer and a majority of employee's, in accordance with 11.5 and 11.6.

² Wording added to reflect the construction of the clause. This is not a material departure from standard ACCI / NFF application.

32.1.4(e) The starting and finishing times, daily working hours and weekly working hours worked under an arrangement, must be regarded as the ordinary working hours and work performed outside or in excess of these hours must be paid under 34.

32.1.4(f) An employer and a majority of employees may agree to vary the arrangement of working hours, provided that agreement is in accordance with 11.5 (Majority Agreement) and 11.6 (Additional Safeguards).

32.1.5 Substitution of Rostered Day off

32.1.5(a) In the case of:

- breakdown in machinery, or failure or shortage of electric power, or requirements of the business in the event of rush orders; or
- some other emergency situation an employer may, by agreement with the majority of employees concerned, substitute the rostered day off agreed to for another day.

32.1.5(b) by agreement with the majority of employees concerned, substitute the rostered day off agreed to for another day provided in accordance with 11.4.

32.1.5(c) An individual employee may with the agreement of his/her employer substitute the day he or she is to take off, for another day, provided such agreement is in accordance with 11.4.

[11.20] The accumulation/banking of leave under this award is restricted by sub-clause 32.1.4(d). Consistent with the intention of ACCI / NFF in prosecuting its clause, the following would be added to this award:

32.1.5A Rostered days off – additional flexibility

Notwithstanding the provisions of sub-clauses 32.1.4 and 32.1.5, to assist employees in balancing their work and family responsibilities, an employee may additionally³ elect with the consent of the employer:

- (a) To bank / accumulate rostered days off⁴.
- (b) To substitute rostered days off for alternative days.
- (c) To take rostered days off in part day amounts.

³ Wording added to reflect the construction of the clause. This is not a material departure from standard ACCI / NFF application.

⁴ If necessary, it may be appropriate to add a note in this award to ensure that users recognise there is no cap to agreed RDO banking.

[11.21] Awards more flexible than ACCI proposal: The ACCI/NFF clause is not advanced for inclusion in awards which already provide scope for the usage of RDOs in a less restrictive manner than proposed by ACCI. Where the existing terms of awards operate on a more flexible or less restrictive basis than that sought by ACCI/NFF, no change to the award is proposed. For example the *Transport Workers (Mixed Industries) Award* contains the following in regard to changing RDOs:

27.5.2(a)(iv) An employee's normal rostered day off may be changed during a roster period by:

- agreement between the employer and the employee; or
- by the employer giving at least 48 hours' notice of the alteration.

[11.22] Such an award provision is not proposed to be altered by the ACCI/NFF applications.

[11.23] There may be other scenarios under the award system. ACCI/NFF will address these as appropriate to the extent they arise during these proceedings.

What the Commission has already found – POFL Cases

[11.24] The Commission has already accepted as early as the November 1994 *POFL Case – Stage I*, that RDOs had a role to play in the reconciliation of working and familial priorities.

[11.25] In the *POFL Case – Stage II* decision⁵ the Commission concluded as follows:

Having regard to the submissions of the parties we favour a facilitative clause in respect of RDOs which has the following elements:

- an employer and individual employee may agree to take an RDO at any time;
- RDOs should be able to be taken, by agreement, in part day amounts;
- by agreement some or all RDOs would be able to be accrued for the purpose of creating a bank to be drawn upon by an employee at times mutually agreed by the employer or subject to reasonable notice by the employee; and
- the general arrangement to be implemented in a particular enterprise should be subject to the majority agreement before it becomes operative. For example:

⁵ [Print L6900], Section 4.6, p.43

"Despite any award provision to the contrary, the employer and the majority of employees at an enterprise may agree to establish a system under which the employer and individual employees agree to take an RDO at any time."

[11.26] The current ACCI/NFF proposal seeks to give direct and renewed effect to this determination, save that the approach to the taking of RDOs need not, with the further experience of a decade, and in a differing statutory context, be subject to majority validation.

[11.27] In regard to majority approval, ACCI cannot reconcile the role accorded to unions in some awards with the Commission's finding in the Stage II decision. There appears to have been an unduly union oriented approach taken in the application of this decision to specific awards.

[11.28] It is valid to re-examine this issue because:

- a. Many award RDO arrangements do not provide scope for work and family accommodation in workplaces.
- b. Experience since 1994 and the changed statutory schema obviate the ongoing need for the approach to majority facilitation in the 1994 decision.
- c. It is not appropriate that there continue to be a majority veto over the work and family accommodation preferences of individuals which can otherwise be agreed with the employer.

Existing RDO flexibility under awards

[11.29] Awards of this Commission already contain the specific RDO flexibilities proposed by ACCI/NFF as generalised flexibilities in RDO clauses.

[11.30] The *Entertainment And Broadcasting Industry - Cinema Award - 1998* provides that:

28.10 Rostered Days Off

Notwithstanding provisions elsewhere in the award the employer and the majority of employees at an enterprise may agree to establish a system of RDO to provide that;

- 28.10.1 An employee may elect, with the consent of the employer, to take a rostered day off at any time.
- 28.10.2 An employee may elect, with the consent of the employer, to take

rostered days off in part day amounts.

- 28.10.3 An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at time mutually agreed by the employer, or subject to reasonable notice by the employee or the employer.

[11.31] The *Crisis Assistance, Supported Housing Industry – WA Award 1997* also provides each of the proposed flexibilities sought by ACCI/NFF:

30.5 Rostered Days Off

- 30.5.1 Notwithstanding the provisions elsewhere in the award, the employer and a majority of employees at an enterprise may agree to establish a system of RDO provided that:
- 30.5.1 (a) An employee may elect, with the consent of the employer, to take a rostered day off at any time.
- 30.5.1 (b) An employee may elect, with the consent of the employer, to take rostered days off in part day amounts.
- 30.5.1 (c) An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to reasonable notice by the employee or the employer.

[11.32] These are just two examples – there are many more. They demonstrate that:

- a. The Commission and the award system is already familiar with each of the ACCI/NFF proposals for RDOs.
- b. The Commission has included each of them in awards made under the *Workplace Relations Act 1996*, they are allowable, and consistent with the duties upon the Commission in the making of awards.
- c. There is nothing exploitative or inappropriate in adding these capacities to awards to allow more employees to enjoy the capacities for agreed approaches of employees in the two industries highlighted above.
- d. Whilst we are not directly familiar with whether these awards were made by consent, or which parties may have prosecuted the form of the RDO clause, we feel it is reasonable to conclude that award parties are familiar with these approaches and do include them in their awards.

So why do we need change – I

[11.33] Existing RDO provisions of awards do not provide sufficient utility and access to such flexibilities, and do not therefore allow RDOs to contribute to the work and family balance as they otherwise might (and can in the cinema and social services examples outlined above).

[11.34] Put simply, too many employees working under award RDO arrangements cannot access them flexibly as proposed by ACCI/NFF and will not be able to do so for work and family purposes unless their awards are varied as proposed.

[11.35] Specifically:

- a. Many awards prescribing RDO arrangements provide none of the flexibilities identified by ACCI from other federal awards.
- b. Some federal awards provide some flexibility but do not provide each of the 3 proposed additional capacities for work and family accommodation.
- c. Some awards envisage or articulate some level of RDO flexibility, but then make it subject to a “facilitative” approach which is inconsistent with both the nature of work and family accommodation and the reality of relations in most contemporary workplaces. Even in the cinema and social services examples outlined above, the introduction of the RDO flexibility outlined is subject to a role for the unions. For example, the *Crisis Assistance, Supported Housing Industry – WA Award 1997* contains the following additional provisions:

30.5.1 (d)30.5.1 is subject to the employer informing the union which is both party to the award and which has members employed at the particular enterprise of its intention to introduce an enterprise system of RDO flexibility, and providing a reasonable opportunity for the union to participate in negotiations.

30.5.1 (e)Once a decision has been taken to introduce an enterprise system of make up time, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A - 131R of the Industrial Relations Regulations.

30.5.1 (f)An employer shall record RDO arrangements in the time and wage book, as prescribed in clause 44 of this award.

[11.36] ACCI / NFF consider that when the form of the proposed clause is properly considered, and the familiarity of the system with these concepts is properly taken into account, the Commission can validly include these capacities in a simple and direct form for awards applying RDO arrangements.

[11.37] The form of majority veto over scope for flexible RDO use in awards is also inherently contrary to the concept of work and family reconciliation. A bureaucratic process for majority consideration and union consideration can do nothing to address the concerns of a parent having to take a child to the dentist at very short notice. Even with the best will in the world, this is not a process which can meet the inherent need for working parents to rapidly access agreed paid leave approaches.

So why do we need change - II

[11.38] The other key basis for change, and for the 1994 determinations to be revisited, re-energised and re-articulated is that awards simply have not been varied to deliver the work and family benefits RDO flexibility can offer.

[11.39] There are a wide variety of atypical and one off award provisions which operate to restrict the capacity of employers and employees to utilise the work and family benefits RDOs have been found to be able to deliver.

32.1.4(d) Rostered days off may accumulate to a maximum of seven days which must be taken:

- in one or two continuous periods within one month of accrual; or
- by agreement between the employer and a majority of employee's, in accordance with 11.5 and 11.6.⁶

[11.40] ACCI can see nothing in the *POFL Stage I or II* decisions which legitimises these restrictions on RDO use. There is no basis to limit banking to 7 days, nor to require that these be used in a month (which makes it difficult to see how you could ever bank 7 of them). There is also nothing the decision about referring banking to majority determination – the only matter that was referred for majority determination under the Stage II case was scheduling of RDOs.

⁶ Clothing Trades Award 1999.

[11.41] Clearly, in this major industry award, RDOs are not operating consistently with a test case decision designed to improve work and family outcomes consistent with s.93A of the Act. They are operating more restrictively. (It is also valid to consider the industry – the TCF industries have a high proportion of female employment and presumably at least as high a proportion of employees seeking to balance work and family as any other major industry).

[11.42] Clearly – the POFL test case determination on RDOs needs to be revisited to ensure that that the 1994 outcomes (with some further evolution as proposed) are in fact delivered in more industries.

[11.43] Another example of an award which serves to restrict the capacities of employers and employees to use RDOs as outlined is the *Graphics Arts - General - Award 2000*. It relevantly provides the following in regard to RDO usage:

6.1.4(c) Days off

Where pursuant to 6.1.4(a)(iii) and 6.1.4(a)(iv) an employer adopts a system of work which entitles an employee to a day off during the work cycle, the following provisions apply:

6.1.4(c)(i) An employer and an employee or the majority of employees at the plant or work section or sections concerned may by agreement substitute the day the employee or employees concerned are to take off during a work cycle for another day. This agreement is not subject to 2.3.

...

6.1.4(e) Banking of rostered days/shifts

By agreement between the employer and employee or majority of employees at the plant or work section or sections concerned, rostered days/shifts off may be accumulated (banked) up to a maximum of five days/shifts and must be entitled to be taken in a manner agreed upon between the employer and the employee or the majority of employees prior to the first of such days/shifts accumulating. This agreement is not subject to 2.3.

[11.44] In addition to lacking any flexibility at all for part day usage of RDOs and only allowing for 5 RDOs to be banked, variation of the taking of RDOs is subject only to majority facilitation. It appears that for example, an employee wanting to access a day off at very short notice for work and family purposes would need to go cap in hand to the majority of the workplace and seek their permission to do so. There is also of course the issue of the time this would take compared to simply allowing employer employee agreement with the appropriate safeguards proposed by ACCI/NFF.

RDO flexibility under agreements

[11.45] Providing additional flexibility in the use of RDOs is a also frequent measure addressed in agreement making. The Department of Employment and Workplace Relations reports that hours of work was the most commonly addressed condition of employment in agreement making, and that of these provisions RDOs were amongst the most commonly addressed hours provisions (addressed in 51% of agreements).⁷

[11.46] Numerous agreements provide some combination of the three proposals advanced by ACCI.

[11.47] For example, the *Marbletex Glass Pty Ltd (Enterprise Bargaining) Agreement 1999* provides the following in regard to banking RDOs:

2.4 Rostered Days Off

To allow greater flexibility in the taking of rostered days off and facilitate the most efficient use of labor, RDO's may be banked.

(a) By such agreement, rostered days off may be banked to a maximum of five days.

(b) By agreement, rostered days off may be banked to be taken with the next or subsequent RDOs, or taking on a day as agreed with the Employer. Nothing in this clause entitles the company to direct a worker to take a single RDO on a Tuesday, Wednesday or Thursday.

(c) Banked rostered days off must be taken within 12 months of banking.

(d) By mutual agreement, the company may pay accrued RDOs of the employee at a single time rate of pay.

[11.48] Just as each of the propositions advanced by ACCI/NFF appears in awards to which ACTU affiliates are party, they also appear in agreements to which these affiliates are party.

[11.49] Again, when the protections and limitations of the ACCI proposal are properly considered there appears no valid basis to oppose the additional flexibilities proposed.

⁷ *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*, p.78.