

## **12. HOURS FLEXIBILITY**

### **Summary of core contentions**

- Contemporary family arrangements provide an increased impetus for more flexible ways of structuring hours of work.
- Awards should better facilitate requests to vary hours of work whilst protecting employers from the adverse financial and operational consequences of meeting potential requests.
- A range of award provisions potentially prevent such requests from being granted even where an employer can agree to a request, operationally and financially, including for example span of hours and minimum engagement provisions.
- Hours would only be varied at the initiation of the employer. Penalties for hours sought by an employer remain intact, as do all existing restrictions and protections.

### **ACCI/NFF Proposed Clause**

[12.1] ACCI/NFF propose a clause that would facilitate employee requests to vary hours of work, both on an ongoing basis and as single or periodic variations.

[12.2] The clause would allow varied hours to apply, even where provisions of the award would otherwise prevent those hours being worked.

[12.3] The clause would only be accessible for work and family purposes.

### **Proposed variation – hours flexibility**

[12.4] ACCI/NFF propose the following clause be given Full Bench endorsement:

## Flexibility To Balance Work And Family Responsibilities

- X.1 An employee may request, and employer may agree to vary hours, days and times of work (including breaks and meal times), on the basis of employee family responsibilities.
- X.2 Agreed variations may be on an ongoing basis, or as single or periodic variations to accommodate particular employee requests.
- X.3 Where agreement is made under this clause that agreement shall apply notwithstanding any contrary provisions of this award.
- X.4 This clause operates only by agreement. Nothing compels an employee to make a request under this clause, or an employer to agree to a request.

### Proposed variation – no additional penalties

[12.5] ACCI/NFF also seek the accompanying clause which establishes obligations to pay penalties, loadings and additional loadings in respect of hours varied:

#### Payment for Agreed Hours of Work

All varied hours worked at the request of the employee and by agreement between employer and employee under clause “X” *Flexibility to Balance Work and Family Responsibilities*, shall be payable at the employee’s ordinary time rate of pay, regardless of when the varied time is worked.

No additional penalties, loadings, allowances, or payments which may otherwise apply under this award, will apply to hours varied at the employee’s request under clause “X”.

[12.6] The clause seeks to ensure that there are no additional costs to employers from granting employee requests. Employee wages remain as they were prior to the request and are therefore not negatively affected. This provision will employers to accede to a far wider range of employee requests.

#### How the clauses would work

[12.7] Whilst many hours requests may be facilitated without breaching award conditions, in some situations award clauses will often prevent employee requests being granted.

[12.8] A common example of this is a request by employees to work through their lunch hour and leave early. In many awards, this is not possible. A range

of award clauses can limit the capacity of employee requests to be granted, including:

- a. Days of the week on which ordinary hours may be worked.
- b. Minimum engagement requirements.
- c. Span of hours.
- d. Breaks.

[12.9] When choosing to grant a request which breaches another award provision, the employer would be able to act with certainty that the award supported the arrangement sought and had not in fact been breached.

[12.10] Examples:

- a. An employer respondent to the *Licensed Clubs (Victoria) Award 1998* receives a request from a part-time employee, working a 6 hour shift to work through their lunch break and leave early to pick up a child from school. Clause 13 requires the employee to receive a half hour break after five hours and therefore prevents the employer from granting the request, even though the employee requests this arrangement.
- b. An employer respondent to the *Furnishing Industry National Award 2003* receives a request from an employee to start later on a particular day, e.g. at midday, and finish work at 8pm. Under clause 29 of the award, the span of ordinary hours ceases at 6pm. In order to grant the employee request, the employer will be required to pay overtime rates to the employee. The employer would be justifiably reluctant to grant the request because of the financial implications of doing so.
- c. An employer respondent to the *Liquor and Accommodation - Restaurants - Victoria - Award 1998* receives a request from a part-time employee, who usually works four hours on a Tuesday and four hours on a Friday, to work two hours on a Tuesday and six on a Friday to accommodate changed care requirements in relation to their child. Under clause 13.3.5 of the award, the minimum engagement for part-time employees is 3 hours, and the request cannot be granted.

[12.11] If the ACCI/NFF claim was granted, all three situations could be accommodated, thus leading to a far greater capacity to balance work and family requests, by providing employers with far greater capacity to do so.

[12.12] The ACCI/NFF clause does not disturb existing award protections and restrictions, except in the very limited circumstances of an employee request based on family responsibility grounds.

### **No additional penalties**

[12.13] The ACCI/NFF application recognises that even where certain hours arrangements are permitted by an award, additional costs can be a significant limiting factor in granting any such request.

[12.14] It is not desirable appropriate or fair that penalties and additional payments attract to hours arrangements which have been varied at the employees request.

[12.15] Penalty rates originated as *“both compensation for, and a deterrent against, the use of long or abnormal hours being used by employers.”*<sup>1</sup> They also arose in a far less diverse labour market and society, where there was less individualisation of the hours people wished to set aside for work, or leisure, or time with their family. In this case, employers are not seeking that employees work particular hours, and therefore the rationale for penalty rates is removed.

[12.16] Greater diversity in people’s lifestyles and family arrangements mean that in general ‘unsociability’ is increasingly individualised, and penalties can actually disadvantage and limit scope for employee family responsibilities to be balanced with work.

[12.17] Hours cease to be unsociable, inconvenient or disadvantageous when they represent the employee’s most preferred hours.

<sup>1</sup> Dawkins, P, “Penalty rates and the Review of the Principles”, , *Australian Bulletin of Labour*, 11(3), June 1985, pp. 178-179

## Work and Family Imperatives

[12.18] As stated in Section 1, the growing prevalence of dual income households, or “1+0.5 households”, means that there are increased numbers of households where both partners are seeking to combine paid work with caring responsibilities. There is therefore a greater demand for flexibility to structure hours to provide care to children or other family members as required.

[12.19] Increasingly, the challenge is to reconcile the hours preferences of two household members, both working. This requires a far increased scope in the hours available to be worked by employees.

[12.20] The ACCI/NFF application also significantly furthers the objects of the Act, in particular s.(d)(i). It provides employees with capacities to determine how the safety net will best apply to their circumstances.

[12.21] Research conducted by Venn provides further evidence of the way that parents coordinate their work schedules to manage caring responsibilities and of the changed social context which supports the measures sought by ACCI/NFF:

“In general, the results show that parents coordinate their work schedules to reduce the amount of time when both partners are working in the hours directly before and after school hours, allowing them to have at least one parent **not working at the times of the standard workday** (our emphasis) when children are most likely to require care.

We might expect that these changes to couples’ work schedules would reduce the amount of time when neither partner is working, and thus the amount of time couples have to spend together. However Table 2 shows that this is not the case. Parents do not spend less time with neither partner working, nor do they spend less time together, than couples without children. There is also no significant difference in the amount of time potentially or actually spent by couples with different employment arrangements.”<sup>2</sup>

### Existing facilitation

[12.22] The ACCI/NFF application leaves undisturbed existing general facilitative provisions that apply in awards. ACCI/NFF seek to create an

<sup>2</sup> Venn, D, “Coordinating work and family – Evidence from the Australian Time Use Survey”, Paper presented at the Australian Institute of Family Studies Conference Melbourne, 12-14 February 2003

additional, work and family specific facilitation avenue. Generalised facilitative provisions cannot fulfil the functions sought by ACCI because:

- a. They represent the particular arrangements as determined by industry parties regarding how facilitation should occur in their award, and are tailored to industry circumstances. There is significant variation in the content of facilitative provisions.
- b. They are of more general application and therefore have associated with them additional safeguards and mechanism before they can be accessed.
- c. There is a role for majority approval of many facilitative arrangements which is undesirable for work and family facilitation.
- d. They are far more limited in their capacity to vary hours. They do not contain sufficient flexibility to accommodate a wide range of hours requests.
- e. Not all awards contain facilitative clauses.

### **Existing penalty arrangements**

[12.23] Penalty rates, hours restrictions and existing award provisions in relation to working hours remain in place for all situations where an employer is seeking particular hours to be worked.

### **Capacity**

[12.24] Businesses engage labour for an overriding and fundamental purpose - to meet their business requirements. These requirements change on an ongoing basis. The times at which hours are to be worked is a function of a range of essentially limiting factors such operating conditions and the demands of clients or customers. Businesses simply do not have a great deal of flexibility in some cases about when they need employees to be rostered, Some businesses have more flexibility about when certain kinds of work can be performed, while others have less flexibility. Businesses are also subject to legal and contractual requirements regarding when work must be performed and in some cases the kinds of labour that must be available.

[12.25] It will therefore not be possible for a business to accommodate all, or even many, employee requests. Hours variations must be consistent with the needs of businesses.

[12.26] Where hours available in a particular type of job do not suit an employee's particular circumstances, and a business cannot accommodate an employee's requests for certain hours of work, it is the responsibility of the individual to seek alternative work arrangements that can meet their needs.

[12.27] An open, flexible labour market that generates jobs is the best guarantor that an employee will be successful in finding employment that suits their personal circumstances. Measures aimed at trying to 'get a square peg to fit in a round hole' should be rejected.