

2. WORK AND FAMILY REGULATION

Work and Family Regulation – Introduction

[2.1] Throughout its history, the Australian industrial relations has always had regard to, and been influenced by, the challenge of balancing work with family life. Indeed, the Harvester decision of 1904 explicitly had regard to family issues in establishing an appropriate minimum award wage.

[2.2] There is always a challenge in balancing family life and work. Paid employment provides income – income that is essential for family needs. However employees must make decisions about how to balance that need for income against their family arrangements and for those employees with children, their caring requirements.

[2.3] Businesses do not engage labour based around an employee's family responsibilities, but rather to meet business operating requirements. Work and family considerations should never override the basic requirements that industry has for engaging labour in the first place.

[2.4] Key work and family challenges may have changed throughout the years, just as society has changed. Society and household circumstances have become more diverse. Therefore the work and family challenge that we face as a society has diversified.

[2.5] The key challenge is managing industry requirements and increasing business pressures against increasingly circumstances. The challenge is to unlock the potential for industry to operate more flexibly and consequently better be able to assess employee working arrangements.

[2.6] Whilst there is wide reference to the work and family challenge this should not mask the inherently individual and diverse nature of families, individuals' family commitments and priorities, and how they want this to interact with their work. One of the key dangers in this case is any over assumption of homogeneity, and any resultant attempt to impose one size fits all approaches, or to assume that employee preferences can be easily accommodated in every workplace.

[2.7] This said, as the work and family challenge has evolved, so the workplace relations system and awards have evolved and responded to meet changing needs.

[2.8] Legislative reforms during the 1990's, which have entrenched workplace-level bargaining within the workplace relations system, have been the key (formal) mechanism whereby work and family balance has been addressed, and the challenge of meeting diverse employee needs and preferences has been answered.

[2.9] An examination of both certified agreements and Australian Workplace Agreements (AWAs) provides ample evidence of widespread bargaining on what might be considered a wide range of 'family friendly' provisions. Indeed, the extensive range of different provisions is itself evidence of the diversity of employee needs and preferences in relation to work and family.

Informality, Negotiation, Discussion and Interpersonal Relationships

[2.10] This said, neither awards, nor agreements, nor employment regulation generally can ever be as important in securing accommodation of employee familial considerations as informal, day to day, interpersonal relationships in workplaces – regardless of the evolution of that employment regulation.

[2.11] Accommodation of the diversity of work and family considerations can only ever be achieved at the workplace level:

- a. Any regulatory approach will rely for its operation on interpersonal interaction at the workplace level.
- b. This is to some extent as clear from the ACTU propositions in this matter as it is from the employer propositions. The ACTU does not seek to provide a single quantum of purchased leave for example, but would devolve this to the individual.
- c. It will be ACCI's specific contention that in addition to being the essential and unavoidable mode of work and family accommodation, interpersonal agreed and negotiated approaches represent a superior approach to the operation of work and family regulation and should lie at the heart of any new regulatory approaches.

Addressing work and family needs

[2.12] "*Work and Family*" is not of course a "Term of Art" in legal terms. What may be included under the term 'work and family' is extremely broad, and differs between individuals based on their perspectives and experiences.

[2.13] Clearly, in any solution to the entire spectrum of work and family issues that face society, the role played by the employment regulation system will be limited. There are also central roles to be played by government and the community in addressing family needs. For example, the provision of childcare subsidies or family support payments is a role that has traditionally been performed by government and one which is important in meeting family needs.

[2.14] The key role that is played by employers is providing paid employment to enable employees to gain income to support their families. This is the key contribution that employers have played throughout our industrial relations system. Private enterprises must remain competitive, profitable and viable if they are to play this critical role.

[2.15] The industrial system and the province of the employment relationship, therefore can play an important but fundamentally limited role in addressing work and family issues.

[2.16] It is also important to recall at the outset of this matter the inherent limitations of considerations at hand. Employers cannot and should not be called on to play a social welfare role or take on responsibilities which are beyond their capacities as commercial entities contracting with individuals for their labour.

[2.17] Within that limited role, the bargaining system, and the increasing priority given to bargaining as the driver of employment terms and conditions, has successfully addressed work and family issues within the workplace relations system. The diversity of needs, preferences, circumstances and employer capacities means that it is only through workplace level bargaining that work and family issues can be satisfactorily addressed. This includes both formal bargaining for registered agreements and underpinning consensual day to day understandings upon which work and family considerations must be based.

[2.18] Whilst not everyone gets what they want through bargaining and there are always trade-offs involved and compromises involved, bargaining is the only effective mechanism to match the plethora of diverse employee requests in relation to work and family with business viability and workplace operating requirements:

[2.19] In addition to being the primary mechanism provided under the statutory schema and the *Workplace Relations Act 1996* to address this issue, bargained and negotiated approaches:

- a. Are the only effective mechanism to addressing what are personalised, diverse and heterogeneous considerations for employees.

- b. Will remain the key to addressing work and family considerations in workplaces regardless of the terms of the finalisation of this matter. Negotiation, discussion and agreement have always been the key to accommodating work and family and this will remain the case.

Scope of the work and family challenge

[2.20] We can therefore identify the issue of work and family balance on three levels:

- a. Level 1: the challenge of work and family at its broadest, which is addressed by government and the community (and employers as part of the community) and refers to a range of measures in relation to how the needs of families interact with the world of work (including for example the provision of childcare, taxation issues, issues concerning the organisation of schooling etc.). At this level, it must be remembered that core considerations are building business efficiency, viability and increasing productivity. This is the only way to ensure ongoing economic prosperity which is the foundational condition for meeting **any** family requirement. Without businesses generating income, governments will not have the resources to address family needs. Without business generating jobs, families will not have income to provide for even basic needs. Without business matching labour to commercial demands, the efficiency of business will be compromised along with its capacity to address future work and family considerations.
- b. Level 2: the challenge of work and family within the industrial system. This refers to the range of measures that have been developed and implemented within the industrial system to assist in balancing work and family.
- c. Level 3: within the industrial system, the role played by awards. The central and most effective mechanism for addressing work and family balance is through the bargaining system. However awards, as a safety net of minimums, can play a limited, residual role.

Work and family balance – the role of awards

[2.21] The case currently before the Commission only concerns level 3 in this conception of work and family considerations – the limited role that can be played by awards in assisting in the achievement of work and family balance.

[2.22] Awards, by their very nature, cannot address the full range of possible work and family issues which may arise between employers and employees. Furthermore, there are other compelling reasons for adopting a measured approach to any role that awards will play.

[2.23] Awards determine minimum standards and conditions of employment. They apply to all (award respondent) businesses and to all employees covered by those awards, no matter what the circumstances, capacities, financial situation, operating requirements or market conditions.

[2.24] It is therefore important that whatever provisions or standards are incorporated into awards are capable of being accommodated by businesses in a diverse range of circumstances and capacities. Many conceivable or theoretical work and family measures are however costly and ambitious; attempts to apply some concepts which have emerged in enterprise bargaining to awards would have disastrous results on a number of grounds. They are clearly not suited to awards.

[2.25] This is consistent with the general inapplicability and inadvisability of simplistically transplanting measures from agreements into the award safety net, and the general fundamental inconsistency of such an approach with awards as operating as a safety net. This said, various of the ACCI propositions advanced in this matter do also find favour in some agreements. As ACCI shall develop throughout this case, a proper understanding of these propositions renders them suitable for inclusion in awards where many other agreement provisions would not be so transplantable.

[2.26] Furthermore, by comparison with the legislation that applied to most previous work and family cases, the *Workplace Relations Act 1996* clearly accords to awards a limited role as providing a safety net of minimum terms and conditions. Section 3(d)(i) states an object of the Act as providing '*for wages and conditions to be determined as far as possible by the agreement of employers and employees at the workplace level, upon a foundation of minimum standards..*'.

[2.27] The statutory objects strongly inform ACCI's approach to the contemporary solution of work and family issues as articulated in the applications filed. It is an approach to awards which provides an effective safety net of fair and enforceable minimum wages and conditions while providing choice to employees and employers on how those entitlements are best accessed and made use of.

Previous work and family test cases

[2.28] There has been a gradual evolution of the award system to accommodate social change and assist employers in achieving work and family balance.

[2.29] Key decisions of the Commission over the past thirty years have assisted employees in balancing their family responsibilities and working. They include:

- a. The Maternity Leave Case [Print D9579, 1979]
- b. Adoption Leave Test Case [Print F9852, 1985]
- c. Parental Leave Test Case [Print J3596, 1990]
- d. Family Leave Case [Print L6900, 1994]
- e. Personal and Other Forms of Leave Decision [Print M7000, 1995]
- f. Parental Leave for Casual Employees Decision [PR904631, 2001].

[2.30] These major national test cases do not represent the only source of innovation in award conditions to provide greater capacity to balance work and family responsibilities. There have also been some variations to individual awards which have introduced measures which are of potential benefit to employees and employers in meeting the challenge of assisting work and family balance.

The idea of a ‘model’ award

[2.31] It is ACCI’s contention that there are enough sufficient ‘rights’ existing within the award system to address most work and family balance issues – if applied correctly, flexibly enough, in the right form, and consistently across awards.

[2.32] Far too many awards continue to lack key, mainstream provisions that could be of assistance to employers and employees in their efforts to balance work and family are simply unavailable.

[2.33] A second level of difficulty is where provisions are included in awards, but are included in a form which means, in practical terms, they are difficult to access or utilise effectively in work and family terms. For example, an award entitlement may place a variety of bureaucratic obstacles or hurdles in the path of accessing a particular arrangement which may make it difficult for employee requests to be met or accommodated within a reasonable timeframe. To better

address the work and family challenge new provisions are needed less than better crafted existing provisions.

[2.34] What would an ideal¹ award look like?

- a. It would contain existing safety net award conditions which assist work and family balance, and it would contain them in a form which allowed easy access to provisions for work and family purposes.
- b. It would also contain unimpeded access to the full range of types of employment – casual, part-time and full-time and would not place restraints on other forms of work. People need access to a range of employment (and non-employment in some circumstances) arrangements to meet their particular work and family requirements. Their caring arrangements and family circumstances differ, but providing employees seeking to balancing work and family with as many employment options as possible is vital.
- c. It would give employees flexibility in how and when to best make use of leave entitlements.
- d. It would give employees choice about whether they wish to take some entitlements in the form of income or as additional leave.

[2.35] As of yet, very few awards approximate to this model. While they may contain some, few contain all the features outlined above (or they contain provisions, but in an unsuitable form). Therefore the challenge for the award system remains better application of existing provisions, before any consideration of extensive new provisions even needs to be considered.

[2.36] This situation is a function of the current system for award variation. While a Full Bench may set certain standards and apply to particular award provisions ‘test case’ status, these conditions must then be ‘flowed on’ to particular awards by applications being advanced under s.113 of the Act.

[2.37] There is always discretion in how or if a test case provision is to be applied in a particular case, and parties remain free to make submissions regarding the suitability of particular test case provisions to their industry.

¹ Ideal is used in the context that this submission is being made in 2004. An ideal award in the future may evolve further the point where it is a short statement of minima and each of the issues dealt with in this case is considered a matter for workplace determination.

[2.38] For whatever reason, there has been relatively patchy take-up of many of the award provisions that have arisen from recent test case, such as the *Personal and Other Forms of Leave Case*. Furthermore, although somewhat improved by the passage of the *Workplace Relations Act 1996*, basic award conditions such as access to casual or part-time work remain limited or problematic in some awards.

A scorecard – 5 awards

[2.39] ACCI has selected five awards and examined the provisions of these awards, as a preliminary example of our contentions on the incidence of work and family provisions across the award system. We have selected several categories of award conditions, all of which are important in achieving work and family balance. These include:

- (1) **Employment categories** – access to part-time, casual and full-time employment, so that employees have a range of options regarding their hours of work.
- (2) **Hours of Work** – although there is many dimensions to hours flexibility that can be examined, we have examined what days of the week ordinary time can be worked on. This has a bearing on the capacity of employees and employers to structure the days on which work is performed to assist in balancing work and family.
- (3) **Overtime:** we examine whether time off in lieu of overtime arrangements are available.
- (4) **Make Up Time:** we examine whether the award allows employees to take time off which is then ‘made up’.
- (5) **Annual Leave:** we examine scope to take annual leave in a flexible manner, including single day annual leave.
- (6) **Rostered Days Off:** for those awards containing RDO provisions, whether such provisions allowed RDO’s to be accessed on a flexible basis.
- (7) **Single Day Annual:** as provided for by the *Personal and Other Forms of Leave* decision, whether annual can be taken in single days.

[2.40] Taking a sample of 5 awards from Wagenet’s “Most Requested Awards”, the following was observed:

- a. *The Horse Training Industry Award 1998:*

- i) **Employment categories:** access to casual employment is restricted. No restrictions on access to part-time work.
 - ii) **Hours of work:** ordinary hours may be worked Monday to Saturday (6 days per week).
 - iii) **Overtime:** may be taken in the form of time off in lieu.
 - iv) **Make up time:** no provision.
 - v) **Annual leave:** provision for two or more continuous periods of annual leave, providing one is at least two weeks in duration. No explicit reference to single days annual leave.
 - vi) **Rostered days off:** employees may agree to change their rostered half day off in any week.
- b. *Retail and Wholesale Industry – Shop Employees – ACT Award 2000:*
- i) **Employment Categories:** access to part-time and casual employment.
 - ii) **Hours of Work:** ordinary hours may be worked on any day of the week.
 - iii) **Overtime:** provision for establishing a system of time off in lieu of overtime (requiring majority agreement).
 - iv) **Make up Time:** provision for establishing a system of make-up time (involving majority agreement).
 - v) **Rostered Days Off:** a system of flexible rostered days off must be established (requiring majority agreement).
 - vi) **Annual leave:** scope for a system of single day annual leave (of up to 5 days per year) to be introduced at a workplace by majority agreement.
- c. *Hairdressing and Beauty Services – Victoria – Award 2001.*
- i) **Employment Categories:** access to part-time and casual employment.
 - ii) **Hours of Work:** ordinary hours may be worked on any day of the week.
 - iii) **Overtime:** time off in lieu is available.
 - iv) **Make up Time:** no provision.
 - v) **Annual leave:** scope for single day annual leave (up to 5 days).

- d. *Electrical Engineering and Contracting Industries (Northern Territory) Award 2002*:
- i) **Employment Categories:** no part-time work available under the award.
 - ii) **Hours of Work:** ordinary hours may be worked Monday to Friday.
 - iii) **Overtime:** no time off in lieu.
 - iv) **Make up Time:** provision for make-up time.
 - v) **Annual leave:** flexibility in the manner in which annual leave is taken.
- e. *Glass Industry - Glass Merchants and Glazing Contractors (Tasmania) Award 1997*:
- i) **Employment Categories:** restrictions on casual employment extending beyond 14 weeks.
 - ii) **Hours of Work:** ordinary hours may be worked Monday to Friday.
 - iii) **Overtime:** no time off in lieu.
 - iv) **Make Up Time:** no provision.
 - v) **Annual Leave:** 14 days annual leave must be taken at Christmas. No specific recognition of the capacity to take single day annual leave.

[2.41] The above five examples examine the practical availability of a range of provisions that ACCI contends are important in providing employees and employers with the capacity to balance work and family requirements.

[2.42] Some of the provisions examined above were introduced with the *Personal and Other Forms of Leave (POFL) Case* ten years ago (e.g. make up time, me off in lieu of overtime, single days annual leave).

[2.43] However only one of the example awards examined above, the *Retail and Wholesale Industry – Shop Employees – ACT Award 2000*, contains the all of those award provisions.

[2.44] Even there, ACCI contends that the form of the provisions – allowing for their introduction by majority agreement – potentially places significant barriers in the way of easy, timely access to such arrangements.

[2.45] A major consideration before the introduction of any additional award measure to assist in balancing work and family is how well award apply current provisions which can be directed to that purpose.