

### 3. THE ACCI / NFF APPLICATION

#### Overview

[3.1] The ACCI/NFF application seeks to revisit and reinforce key entitlements and principles arising from the Personal and Other Forms of Leave decision, and marry these with various additional measures, some of which have arisen in enterprise bargaining or by variation to particular awards.

[3.2] The ACCI/NFF application, if granted, would result in:

- a. Increased capacities for employers to flexibly consider and agree to employee requests in relation to leave and hours of work.
- b. More choice for employees and employers in respect of how they would like to best make use of award entitlements to assist in balancing work with family responsibilities (subject to an assessment of their appropriateness to business needs).

[3.3] Components of the ACCI/NFF application and their purpose are listed below:

Provision	Work and Family purpose
Part-time employment flexibility	Provide greater access to part-time work for employees who wish to work less than full-time hours.
Part-time work principle	Provide additional grounds for parties to seek to include part-time work provisions in awards which currently do not provide for part-time work.

Provision	Work and Family purpose
Casual employment flexibility	Provide employees with greater access to ongoing casual employment in awards which restrict access to such an employment type.
Flexibility to balance work and family responsibilities	Additional capacity to request variations to hours, times and days of work for work and family purposes.
Time Off in Lieu of Overtime	Capacity for employees to be compensated for overtime by taking additional leave.
Make Up Time	Capacity to take time off during ordinary hours and work those hours back at a later time.
Rostered Days Off Flexibility	Will provide employees with greater capacity to use rostered days off flexibly, and to utilise rostered days off for work and family needs.
Time Off in Lieu of Penalty Rates	Will allow employees to be compensated for work attracting penalties by taking additional leave.
Single Day Annual Leave	Additional capacity for employees to take leave in whatever form they wish.
Carrying forward annual leave	Will provide employees with greater capacity to time leave to accommodate family responsibilities.
Leave loading as additional leave	Employees will be able to request to take leave loading as additional leave – equating for most employees to an additional 3 days leave.
Carers Leave	Additional capacity to take personal leave as carers leave, above the current cap of 40 hours per year.
Extended Annual Leave	Capacity for accrued annual leave to be taken as ‘double the leave for half pay’.
Long Service Leave Flexibility	Flexibility regarding the manner that employees would best like to make use of long service leave,

Provision	Work and Family purpose
	including to double the period leave by taking half pay.

[3.4] The key concepts underlying the claim are:

- a. To give employers additional capacities to accommodate employee requests on work and family balance issues.
- b. To provide scope for existing leave capacities to be of maximum utility to the management of working and family considerations for individuals, both by extending leave and providing greater choice about when leave is used
- c. To provide employees with greater choice about how to best use ‘compensations’ or loadings such as leave loading or penalty rates.
- d. To provide greater scope for hours and working flexibility.
- e. To incorporate supporting arrangements which help employers meet employee requests, both with regards to cost and award restrictions.

## **The Personal and Other Forms of Leave Decision Revisited**

[3.5] ACCI/NFF’s application is informed by, and seeks to extend and improve the operation of, provisions arising out of the 1994 Personal and Other Forms of Leave Decision (the POFL Decision), consistent with contemporary workplace relations practice and the current statutory context.

[3.6] The case gave rise to a decision in two stages – the Family Leave Test Case Decision (November 1994, Print L6900) and the Personal/Carer’s Leave Test Case – Stage 2 Decision (November 1995, M6700). The Stage 2 Decision is attached and our considerations in this outline of contentions are largely directed to it.

[3.7] The decision provided for carer’s leave to be introduced within the framework a personal leave clause, and for a range of facilitative provisions in relation to make-up time, single day annual leave, time off in lieu of overtime, and rostered days off flexibility.

[3.8] These facilitative provisions specifically recognised ‘majority facilitation’, i.e. decisions regarding whether to introduce a system of time off in lieu would be

subject to agreement by a majority of employees at the enterprise. An example of these provisions still in its original “facilitative” form is the following clause from the *Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000*:

## 26.2 Alternative time off in lieu of overtime arrangements

Notwithstanding provisions elsewhere in the award, the employer and majority of employees at an enterprise may agree to establish a system of time off in lieu of overtime provided that:

- 26.2.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.
- 26.2.2 Overtime taken as time off during ordinary time hours shall be taken at the overtime rate, in accordance with 26.6 hereof.
- 26.2.3 An employer shall, if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed elsewhere in clause 26 - Overtime, for any overtime worked under this subclause where such time has not been taken within four weeks of accrual.
- 26.2.4 Clause 26.9 is subject to the employer informing each 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 time off in lieu of overtime flexibility, and providing a reasonable opportunity for the union(s) to participate in negotiations.
- 26.2.5 Once a decision has been taken to introduce an enterprise system of time off in lieu, in accordance with this clause, its terms must be set out in the time and wages records.
- 26.2.6 An employer shall record time off in lieu arrangements in the time and wages book each time this provision is used.”

[3.9] The decision also introduced a principle supporting the introduction of part-time work to awards which did not currently have part-time work provisions.

### **The Current ACCI/NFF application**

[3.10] ACCI / NFF seeks in this application:

- a. That elements of the existing test case be revisited and that a Full Bench reaffirms the importance of the provisions in the decision for work and family balance purposes.
- b. That the facilitative component of these provisions is streamlined and the role of majority facilitation be removed.

- c. That the principles of facilitation which informed the POFL decision be extended to other entitlements such as non-overtime penalty rates and leave loading.

[3.11] We seek this on the following grounds:

- a. The changed statutory objects of the Act, which support the changes sought by ACCI/NFF;
- b. The flow of these provisions through the award system has been patchy, and therefore re-examination, redesign and reaffirmation is appropriate;
- c. Developments in awards and bargaining support the changes sought;
- d. The nature of the contemporary work and family challenge make current facilitative approaches no longer appropriate.

### Statutory Objects

[3.12] The POFL Decision was determined under the *Industrial Relations Act 1998*, which contained different objects to the current *Workplace Relations Act 1996*, and different statutory provisions in relation to award form, content and functions.

[3.13] In particular, the facilitative framework adopted by the Commission at that time was specifically made with reference to the statutory obligations of the Act . By contrast, section (d)(1) of the *Workplace Relations Act 1996* states that a principal of object of the Act is to provide:

“(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards..”.

[3.14] By allowing simpler and more effective access to these provisions, the ACCI application will facilitate agreement and on that basis would result in awards supporting to a far greater degree this statutory object.

[3.15] The application is also supported by s.93A(b) which requires the Commission to have regard to ‘*helping workers to reconcile their employment and family responsibilities.*’ By building on, supporting and extending the provisions of the POFL Decision, the ACCI application is directly supported by this statutory consideration, and will gives better effect to it than:

- a. The status quo.
- b. Other alternative propositions in this matter.

[3.16] It is ACCI/NFF's contention, and evidence is advanced in this regard in other parts of this outline of contentions, that the flow of many components of the POFL decision has been patchy and is still insufficient. A renewed Full Bench decision would provide parties with fresh grounds to revisit their awards and make application to have these provisions included in them, and would also strengthen the understanding within the industrial system of the role played by these clauses in assisting employees to balance work with family responsibilities.

[3.17] ACCI/NFF also relies on developments in bargaining and within individual awards. In some awards and in many agreements forms of these provisions have emerged which are less far less bureaucratic and enable far easier access to these provisions without any major problems occurring. Arguably, the introduction of a workplace relations system based on bargaining has made parties more comfortable with workplace level agreement making and therefore many of these facilitative mechanisms are seen as less necessary than they once were.

[3.18] We also seek to support our application by reference to a 'practical analysis' of the nature of the work and family challenge and its relationship to these provisions.

[3.19] Consider the framework for time off in lieu facilitation listed above. An employee reading the award and seeking to work out how to request time off in lieu of overtime may be intimidated by what is required, to say the least. So might the employer. Many requests will arise without much warning. They will need to be accommodate quickly to be effective. For example: an employee working overtime on a Sunday may request time off in lieu of overtime pay on the following Tuesday to take their child to the zoo.

[3.20] However, it is not even plausible on the above scenario that this could be done in this award. In order to comply with the award, the employer would be required to:

- a. Bring the employees at the enterprise together, or in some way communicate the facilitative request to them, and inform them of the process for determining if the majority of employees agree;
- b. Presumably, provide employees with reasonable opportunities to discuss the request and have their views heard;
- c. Inform each union which is a party to the award of the request, whether or not the employees making the request are union members, and provide them with a reasonable opportunity to participate in negotiations.

[3.21] The effect of such requirements is to limit and discourage arrangements being introduced into many workplaces.

### **Majority veto is inappropriate**

[3.22] There does not appear under the current statutory framework to be a valid role for the majority of employees to veto employee work and family requests. Family circumstances, as explained, are diverse, and employee need requirements are just as diverse. No role should be given for the majority in determining how an individual employee best wishes to utilise their award entitlements for a work and family purpose. The effect of perpetuating such an approach can only be to limit access to such provisions in some workplaces.

[3.23] This is particularly so in those workplaces where workplace culture is not particularly supportive of work and family considerations. This may be the result of a multitude of factors, many legitimate, but in particular could be a function of a workplace where only a small minority of employees have family responsibilities and therefore work and family balance is not well appreciated.

### **Bargaining**

[3.24] There has been a great deal of activity in relation to work and family in the bargaining stream, and as stated earlier, this is evidence that the workplace relations system is, for most employees, meeting the work and family challenge.

[3.25] The Department of Employment and Workplace Relations *2002-2003 Annual Report* contains evidence of the wide range of matters which have been

successfully bargained on and introduced in workplaces:

**Incidence of family-friendly provisions in agreements,  
1999-00 to 2002-03,  
(as % of total certified agreements)<sup>7</sup>**

PROVISION	1999-00	2000-01	2001-02	2002-03 <sup>8</sup>
Flexible working hours <sup>9</sup>	63.1	67.4	67.5	68.1
Flexible annual leave	4.4	5.8	7.5	8.4
Access to single days annual leave	13.2	12.9	12.1	12.4
48/52 or career break	2.0	2.5	2.8	5.4
Unlimited sick leave	0.8	0.8	1.3	1.0
All purpose paid leave	5.2	3.2	3.1	3.0
Extended unpaid parental leave	1.1	1.0	3.9	3.2
Part-time work	25.7	22.0	28.1	32.2
Job sharing	2.7	2.6	3.9	5.1
Home based work	1.5	1.4	2.3	2.9
Family responsibilities	5.2	3.0	3.2	5.8
Child care provisions	0.7	0.7	1.4	3.4
Paid family leave	3.5	2.5	4.4	4.4
Unpaid family leave <sup>10</sup>	4.6	8.3	9.1	10.5
Access to other leave for family purposes	21.4	16.4	21.3	21.2
Paid maternity leave	9.6	5.6	8.3	12.7
Paid paternity leave	2.5	3.6	5.7	8.6
Paid adoption leave	1.6	2.3	3.3	6.1

[3.26] The ADAM special report, *Examination of Work and Family Measures in Queensland and Federal Enterprise Agreements: the current state of play*, also provides information on the broad range of work and family measures which have emerged and which are included in awards, and ACCI/NFF has therefore appended this report.

[3.27] By their very nature, many of the initiatives apparent in bargaining are unsuited to inclusion to awards. They fail the safety net test, and cannot viably and practically be applied across most workplaces. They are suited to the particular capacities and circumstances of business, and the preferences of their employees. They are the results of trade-offs, bargains, and productivity

<sup>7</sup> Source: DEWR Annual Report, 2002 – 03, Table 17, p.126 – Data Source: Workplace Agreements Database, Department of Employment and Workplace Relations

<sup>8</sup> Data available only for July 2002 to March 2003.

<sup>9</sup> The following 10 flexible hours provisions are grouped and only one from each certified agreement is counted: time-off-in-lieu of overtime at ordinary rates, time-off-in-lieu of overtime at penalty rates, hours averaged over an extended period, compressed working week, flexible start and finish times, flexitime system in operation, hours of work may be negotiated, hours of work decided by a majority of employees, make up time, banking/accrual of rostered days off.

improvements.

[3.28] However, ACCI/NFF believes that two particular clauses which have gained popularity and have been applied in various businesses in relation to leave, can be sensibly accommodated into awards on the basis sought. They are:

- a. Scope to take extended annual leave.
- b. Flexibility in relation to long service leave.

[3.29] In both cases, the ACCI/NFF application seeks to provide employees with greater choice about how best to make use of these key entitlements to better meet family responsibilities.

## **Cost**

[3.30] Given the significant cost and operational consequences of some employee work and family requests in relation to hours and leave, the ACCI/NFF application retains overall discretion for employers to assess business needs and circumstances in relation to employee requests. It is important to retain perspective on this issue. Businesses are not family welfare agencies. Labour is not hired to meet employee personal needs. Labour is hired to meet business needs. Employment is offered on the basis of business circumstances. Only in relation to these core economic and industry imperatives first being met, is there room for the employee's personal circumstances and preferences to be accommodated.

[3.31] The ACCI/NFF application holds open the possibility within business constraints of employees having access to far greater amounts of leave, both on a long and short-term basis, than they currently do. It will significantly assist employees in balancing work and family responsibilities. However, given the potential for access to far greater amounts of leave, employers must be in a position to evaluate and manage such requests e.g. by making arrangements to ensure such absences from work are covered and the business can continue to function.

[3.32] There are also clearly transactional, administrative and efficiency costs in

<sup>10</sup> From January 2000 this category includes agreements that contain unpaid family/carers leave but do not specify the exact amount.

any work and family accommodation. The ACCI/NFF application is an integrated set of flexibilities and additional leave capacities whose overall effect is far too significant to be introduced without such a safeguard. A comparison of the current award arrangements and the award leave provisions sought by ACCI/NFF is included below.

Leave Provision	Current Standard	ACCI Proposal
Long Service Leave	Under the most common federal award standard – 13 weeks leave	26 weeks at half pay.
Annual leave	4 weeks per year.	8 weeks at half pay.
Leave loading	Monetary entitlement.	3.5 days per year (more if shift work is taken as leave)
Make Up Time	Variable.	Improved access will lead to greater use.
Time off in lieu (overtime)	Variable.	Improved access will lead to greater use.
Time off in lieu (other penalties)	Only a monetary entitlement in most awards.	Increased use as leave.
Carers Leave - additional	5 days per year.	Full personal leave entitlement may be used.

[3.33] ACCI/NFF’s application also contains additional measures to minimise employer cost. These measures further support work and family balance by ensuring that employers have the best opportunity, from a financial perspective, to accommodate work and family requests. Minimising cost to employers will ensure the best possible outcome with return to access to these provisions in workplaces.