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2 July 2004

The Hon. Justice Giudice
President
Australian Industrial Relations Commission
Nauru House
80 Collins Street
MELBOURNE VIC 3000



Dear Justice Giudice,

**Re: Work and Family Test Case C No s 2003/4198, 2003/4199, 2003/4203/
2003/4301/ 2003/4301**

Attached please find the ACTU's outline of arguments and evidence filed in accordance with the Directions of the Full Bench dated 20 April 2004.

Also included are submissions filed for and on behalf of the National Union of Workers.

Yours faithfully,

**CATH BOWTELL
INDUSTRIAL OFFICER**

cc: P. Anderson – ACCI
S. Smith – Ai Group
E. Cole – Commonwealth
D Harris -NFF
Julian Clarke Freehills, for CSL
K Ellinson HREOC
Peter Henneken DIR Qld
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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996



IN THE MATTER OF

C2003/5166, C2003/5168 and C2003/5272 and others

"WORK AND FAMILY TEST CASE"

Further to directions issued by the Commission on 20 April 2004 the National Union of Workers ('NUW') makes the following submissions which are in addition to the submissions made in reply by the ACTU.

A: OVERVIEW : THE ACCI & NFF APPLICATIONS - ROOSTER OR DUCK?

1. It is the NUW's submission that the ACCI and NFF applications in C2003/5166, C2003/5168 and C2003/5272 seek to contract out of provisions contained in the award minimum safety net such as shift loadings, overtime and penalty rates under the guise of inserting work and family provisions into awards. In other words, that the employers are using the concept of balancing 'work and family' as an excuse to promote further flexibilities for employers at the expense of workers.
2. The NUW submits that this 'Work and Family' test case should not be used as a vehicle by employers to erode award safety net provisions. Further, that this test case should not result in workers with family responsibilities suffering a diminution in employment conditions and protections under the guise of more choice for employees as promoted by ACCI and the NFF.
3. No choice of words captures the situation quite as well as the following quotations.

'The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck.'

Re Porter (1989) 34 IR 179 at p. 184 per Gray J; *Massey v Crown Life Insurance* [1978] 2 All ER 576 at p. 579 per Lord Denning approved by the Privy Council in *AMP v Chaplin* (1978) 18 ALR 385 at p. 389.

'To revert to the idiom, it is not enough that it might look like a duck, or that you detect much quacking from the hides or from bystanders. It must be a duck. I shall respond to any further inquiries from duck-watchers accordingly.'

Clout Engineering and AMWU re certification of agreement (22 October 1998, Munro J, Print Q7710)

4. Here, it is our respectful submission that the employers' efforts to contract out of award safety net provisions under the guise of work and family flexibilities and choice for employees, is a classic case of the 'rooster' and the 'duck'. It is not enough to insert the words 'work and family' in clauses designed to contract out of award minimums, to state that the clauses then relate to work and family and insist that the Commission, the Government, the ACTU and the unions, the employers and most importantly the employees, all recognise the clauses as 'work and family.' Whilst there might be some quacking there is no 'duck' at least in terms of the employer applications.

B: BACKGROUND

5. The Victorian Employers' Chamber of Commerce and Industry ('VECCI') has made application pursuant to s.113 of the *Workplace Relations Act 1996* ('the Act') to vary the *Rubber, Plastic and Cable Making Industry – General – Award 1998* ('RPC Award') and the *Storage Services – General – Award*

1999 ('SS Award') to insert provisions purporting to relate to work and family responsibilities (C Nos. 2003/5166 and 2003/5168 respectively).

6. The National Farmers Federation on behalf of named respondent employers have made application pursuant to s.113 of the Act to vary the Storage Services – Fruit Packing – Victoria Award 2002 ('SS Fruit Packing Award') to insert part-time provisions and also provisions purporting to relate to work and family responsibilities (C No. 2003/5272).
7. The NUW opposes the applications. In relation to the application for a part-time provision in the SS Fruit Packing Award, the NUW outlines an alternative provision to that sought by the NFF in the event that the Commission is of the view that the Award requires such a provision. (See paragraphs 19-21)

C: THE ACCI AND NFF SUBMISSIONS

8. We refer to the contention of ACCI and NFF that not all awards contain provisions matching those arising from the *Personal and Other Forms of Leave Decision* [Print M7000, 1995]. If any of the three NUW awards identified above contain different provisions than those arising from the *Personal and Other Forms of Leave Decision*, it is because the parties to these awards have agreed to make other arrangements when implementing the decision. Further, the NUW awards have all undergone the award simplification process as follows:
 - The SS Award underwent the award simplification process before Commissioner Hingley (C No. 30592 of 1998);
 - The RPC Award underwent the award simplification process before Commissioner Merriman (C No. 00653 of 1998); and
 - The SS Fruit Packing Award underwent the award simplification process before Commissioner Whelan (C No. 00204 of 1998).

The employers did not seek to address this issue during the simplification process which is indicative of the current arrangements suiting the parties and the particular industries in which the awards operate. Nearly ten years has passed since the *Personal and Other Forms of Leave Decision* and there is no evidence provided by ACCI or the NFF that employees under the NUW awards seek any change in the manner proposed.

9. We refer to the revised ACCI and NFF applications at Part 14 of their submissions. The employer applications seek to contract out of the award minimum safety net such as shift loading, overtime and penalty rates under the guise of inserting work and family provisions into awards. The concept of 'work and family' is about achieving flexibilities desired by employees in relation to their working conditions in order to balance family commitments and responsibilities. The concept of 'work and family' is not about achieving greater flexibility for business as referred to in paragraph 1.20 of the ACCI and NFF submissions, nor is it about driving down workers' earnings.
10. The employer applications purport to act in the interests of employees through the provision of more flexibility and choice for employees in relation to 'work and family'. However, ACCI and the NFF have not provided any direct evidence that employees are seeking to contract out of award minimum conditions in order to fulfil work and family commitments. There is also no evidence that any award employee, let alone a comprehensive number of employees, seek to remove the role of majority facilitation or that majority facilitation is not working for the benefit of employees. The best that ACCI and the NFF can imagine is the hypothetical zoo example at paragraph 3.19.
11. Further, ACCI and the NFF have not provided evidence that award employees desire a change in the award safety net in the manner proposed by the employers. For example, at paragraph 5.34 of the ACCI and NFF submissions, it is unrealistic and also insulting to award employees to refer to the preferences of employees on \$100,000 plus per year (which is more than

four times the minimum annual award wage) for greater flexibilities in relation to annual leave and then to suggest that award employees share the same preferences.

12. In relation to the NUW awards, ACCI and the NFF have not provided any direct evidence that their proposed award variations are needed, required or indeed even suit these industries i.e. in storage services / distribution or in the rubber, plastic and cable making industry.
13. The majority of employees covered by the SS Award and the RPC Award are employed under enterprise agreements, which are usually s. 170LJ agreements between their employer and the NUW.
14. The Act provides that bargaining is the primary mechanism for addressing workplace specific issues. Enterprise agreements can provide more flexibility for employees (and also employers) in relation to specific work and family requirements at the individual workplace in question. Enterprise Agreements are the appropriate mechanism for dealing with issues associated with the variations proposed by ACCI/NFF which predominantly concern individuals. Should employees in fact desire to 'contract out' of minimum award standards in order to fulfil work and family responsibilities in the manner identified by ACCI and the NFF this should be properly dealt with via the bargaining process for enterprise agreements. In addition, more positive and progressive workplace specific work and family requirements could also be addressed via the bargaining process for enterprise agreements such as increased paid annual leave, pro rata and increased long service leave and voluntary afternoon and shift work.
15. As the ACCI and NFF submissions acknowledge at paragraph 2.11:

*Accommodation of the diversity of work and family considerations
can only ever be achieved at the workplace level.*

Further, at paragraph 2.17 that:

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.

16. The award safety net plays an important role in establishing terms and conditions of employment. However, under the current industrial relations framework, the role of awards has been limited to providing a minimum set of wages and conditions of employment, usually with industry or occupation wide application. Awards are seen as providing fundamental minimum terms and conditions of employment that have common application to employees. In relation to 'work and family' this would include fundamental working entitlements such as the provision of a minimum level of personal leave (sick leave, carer's leave and bereavement leave) and the right to parental leave on the birth or adoption of a child. The process of updating fundamental working entitlements to make them more relevant to employee needs in the context of modern family arrangements should not be seized as an opportunity by employers to erode award safety net provisions.
17. Individual access to contracting out of award provisions is not something that constitutes a fundamental minimum. Indeed, it is something that undermines a fundamental minimum and would result in workers with family responsibilities suffering a diminution in employment conditions and protections.
18. The lack of any employee evidence from award based employees that they require such change as proposed by ACCI and the NFF, let alone comprehensive employee evidence, further supports the argument that the employers' variations are best left to the bargaining process.

D: C2003/5272: Insertion of part-time provisions in the Storage Services – Fruit Packing – Victoria Award 2002 (SS Fruit Packing Award)

19. The NUW submits that the SS Fruit Packing Award does not require the insertion of part-time provisions because the nature of the work covered by the award, fruit packing, is not conducive to part-time employment. Fruit packing is work that is highly seasonal in nature as it is based on the fruit season. Accordingly, the award makes provision for full-time, casual and seasonal work which suits the needs of the industry.

20. In addition, the limited award responsibility is also a factor in relation to why there are no part-time provisions contained in the award. The parties bound by the SS Fruit Packing Award are VECCI and three employers. The NUW is not aware that VECCI has any member companies that are bound by the award by virtue of their VECCI membership which leaves only the three employer respondents. Given that none of these three respondents have previously identified to the NUW that there is a need for part-time work in their fruit packing operations, including during the opportune time of the award simplification process, the NFF's application to vary this award for part-time provisions at this point in time is somewhat mystifying. The NUW notes that the fruit packing sector has not been the subject of a Royal Commission or government inquiry in relation to its industrial relations practices.

21. The SS Fruit Packing Award operates in a sub-section of the storage services and distribution sector, namely in the fruit packing sector. The award is based on the parent award, the SS Award. In the event that the Commission is of the view that the award should contain a part-time clause, the NUW submits that consistent with other provisions in the award such as wage rates and classifications, the part-time provisions should reflect those in the parent award. Accordingly, if part-time provisions have to be inserted into the SS Fruit Packing Award, they should reflect those contained in the SS Award. Attachment A outlines the part-time provisions in the SS Award.

Attachment A

Part-time provisions from the Storage Services – General – Award 1999

X Regular part-time employment

- X.1** An employer may employ regular part-time employees in any classification in this award.
- X.2** A regular part-time employee is an employee who:
- X.2(a)** works less than full-time hours of 38 per week; and
 - X.2(b)** has reasonably predictable hours of work; and
 - X.2(c)** receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- X.3** At the time of engagement the employer and the regular part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
- X.4** Any agreed variation to the regular pattern of work will be recorded in writing.
- X.5** An employer is required to roster a regular part-time employee for a minimum of three consecutive hours on any shift.
- X.6** An employee who does not meet the definition of a regular part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with XX.
- X.7** All time worked in excess of the hours as mutually arranged will be overtime and paid for at the rates prescribed in clause XX - Overtime, of this award.
- X.8** A regular part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- X.9** Commencement of part-time work and return from part-time to full-time work shall not break the continuity of service or employment.