

# **WORK AND FAMILY TEST CASE**

## **OUTLINE OF CONTENTIONS**



Australian Industry Group  
Engineering Employers' Association, South Australia

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# **1. Introduction**

## **1.1 Ai Group**

1. The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia, representing employers in the manufacturing, construction, information technology, telecommunications, labour hire, call centre, energy, aviation and other sectors.
2. Ai Group has had a strong and continuous involvement in the industrial relations system at the national and state levels for over 130 years.
3. This outline of contentions is filed by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA), in accordance with the Commission's directions of 20 April 2004.

## **1.2 Scope of this Outline of Contentions**

4. Consistent with Ai Group's understanding of the Commission's directions of 20 April 2004, this Outline of Contentions only deals with those matters in respect of which Ai Group is pursuing changes to existing award standards and does not deal with Ai Group's position on the ACTU's claims nor those instances where Ai Group has proposed an alternative acceptable form of award clause to address issues which are essentially claims of the ACTU. Also, this Outline does not deal with matters relating to paid personal/carer's leave which are to be the subject of further conciliation in the Commission.
5. This Outline identifies the award variations which are being pursued by Ai Group and key arguments in support of such variations.

6. Consistent with Ai Group's understanding of the Commission's directions of 20 April 2004, Ai Group is required to file a further Outline of Contentions and evidentiary materials by 2 July 2004 in respect of those areas where the ACTU is pursuing claims which have not been agreed upon. These include, but are not limited to the unions' applications:
- To extend the current 12 month unpaid parental leave entitlement to 24 months, with the ability to extend the period for a further 12 months up until the child reaches school age by agreement with the employer;
  - To provide that employees returning to work after parental leave are entitled to work part-time in one or more periods until the child reaches school age;
  - To allow employees to be able to request changes to the number of hours worked, the pattern of hours worked and/or the physical location at which the employees work and to require employers to not unreasonably reject such requests;
  - To entitle employees to be able to take unpaid emergency leave when family and dependant care emergencies arise;
  - To allow employees to "purchase" up to an additional 6 weeks of annual leave per annum through a salary averaging arrangement.
7. Ai Group is required to file an Outline of Contentions relating to paid personal/carer's leave by 2 July 2004.

## 2 Overview of Ai Group applications

### 2.1 Key Elements of Ai Group's Applications

8. Ai Group filed its applications in the Work and Family Test Case in August 2003. Ai Group's applications have been framed to be consistent with the following principles:

- Employers recognise the importance of assisting employees to balance their work and family responsibilities. At the same time, employers need to retain the right to manage their businesses in an efficient manner.
- Education, leadership and facilitation are likely to be more successful than an unduly prescriptive approach.

9. The applications filed by Ai Group deal with the following areas:

- A **Job-share** clause.
- Additional **annual leave flexibility** to be available, by agreement between the employer and the individual employee such that an employee would be able to forgo annual leave loading in return for a proportionately longer period of annual leave.
- Additional **long service leave flexibility** to be available, by agreement between the employer and the individual employee, such that:
  - An employee would be able to take long service leave in any number of separate periods, including single days;

- An employee would be able to take additional long service leave and have his/her long service leave pay averaged over a longer period (eg. 26 weeks leave after 13 years service on half pay).
  - Additional **hours of work** flexibility, by agreement between the employer and the individual employee, such that an employee would be able to work additional hours and bank time over a period of up to 12 months to enable the employee to have the time off at a later stage.
10. In contrast to the abovementioned aspects of Ai Group’s application, the following Ai Group proposals, in essence, represent alternative forms of wording for what are essentially ACTU claims. Accordingly, Ai Group intends to address these issues in the materials to be filed by 2 July 2004:
- An employee would be able to purchase an additional period of leave (up to 2 weeks) in return for a correspondingly reduced salary.
  - An employee would be able to take additional annual leave and have their annual leave pay averaged over a longer period (eg. 8 weeks leave on half pay).

### **3 Conciliation Process**

11. Ai Group, the ACCI and the ACTU (the “major parties”) have participated in an extensive conciliation process before Senior Deputy President Marsh. Many Conciliation Conferences were convened by the Commission throughout the second half of 2003 and further discussions were held directly between the parties.

12. The Conciliation process was useful in narrowing the differences between the parties and enabling agreement to be reached on various aspects of particular award clauses. A table was filed with the Full Bench on 27 February 2004 setting out the position of the parties as at 26 February 2003. The table is entitled *Final Comparison of Positions Following Conciliation – Work + Family Test Case* and it has been marked as exhibit ACTU 1. The table is set out in *Tab 3 of Volume 1*.
13. During the Conciliation process, agreement was reached that each major party would file with the Commission a document in the form of an application to amend one award. It was agreed that the document would reflect the changes to the relevant party's position as a result of the conciliation process. Accordingly, a document in the form of an amended application to vary the *Business Equipment Industry – Technical Service – Award 1999* is set out in *Tab 2 of Volume 1*.
14. Following discussions between the major parties during late March / early April 2004, regarding the various paid personal/carer's leave proposals of the parties, it was agreed:
  - That, given that the paid personal/carer's leave proposals of the ACTU and Ai Group were not tabled until the end of the conciliation process, the parties would request that the Commission schedule further conciliation in respect of the personal/carer's leave proposals of ACCI, Ai Group and the ACTU;
  - That the proposed further conciliation not delay the commencement of hearings in the Test Case from 30 August 2004;
  - That the rights of all parties be reserved to amend their paid personal/carer's leave proposals following the conclusion of the conciliation process;

- That the parties seek that the Commission amend paragraph [7] of the directions issued on 10 March 2004 to reflect the understandings reached by the major parties.
15. The Commission gave its approval of the approach requested by the major parties and issued amended directions on 20 April 2004.
  16. Further conciliation, regarding the paid personal/carer's leave issues, has been listed before Senior Deputy President Marsh on 10 and 20 May 2004.

## **4 The Importance of Work and Family Balance**

### **4.1 Demographic Challenges**

17. Assisting employees to achieve a better balance between work and family responsibilities is an increasingly importance task for employers and industry as a whole.
18. Over the last 10 years there have been significant changes in the composition of the labour force and modes of employment. When considered in the light of forecast changes in the size, profile and distribution of Australia's population - work and family balance will have important implications for Australia's economic growth and living standards.
19. Over the past decade total female employment has grown from 3.25 million to 4.25 million, an increase of over 30%. Female participation rates have risen from 51.7% to 56.1% over the decade and of those participating females there has been growth in the proportion that have children aged 0-4 years (47.6% to 49.2%)<sup>1</sup>.

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<sup>1</sup> Ai Group Vol. 1 - Tab 1

20. Whilst increasing, the participation rate for women in the workforce continues to be punctuated by periods of absence from the workforce due to family responsibilities. This pattern of participation is different from that of male employees who continue to remain employed on a full time basis despite their family responsibilities.<sup>2</sup>
21. The composition of the typical household has changed over time to reflect the changing patterns of working families in Australia. Sole parent families now account for 21% of all family households, and with increased participation rates of women in the workforce, 62% of families now have both parents working.<sup>3</sup>
22. The proportion of the population in households made up of a husband and wife with dependents is declining (from 35.1% in 1979 to 28.3% in 2000). The paradigm of the male sole breadwinner family unit is rapidly shifting in Australia to a mixture of single parent and two working parent households.
23. These trends include lower rates of marriage, higher rates of separation, lower rates of childbearing within marriage and delayed childbearing by women, which compounds the lower rates of childbearing per female.
24. Against this background, there are also important policy considerations. The rate of natural increase in Australia's population is in long term decline and the total fertility rate of Australian women is below replacement level and is currently around 1.75%.<sup>4</sup>
25. The rate of growth in Australia's labour force is expected to decline further in the next 40 years, falling to less than 1% in the decade between 2032 and 2042, creating serious consequences for the economic prosperity of the country.

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<sup>2</sup> Ai Group Vol. 1 - Tab 6

<sup>3</sup> Ibid

<sup>4</sup> Ibid

26. In addition, the proportion of the population that is termed “very old” (over 85 years of age) is expected to triple over the next 40 years, while the proportion of the population in the prime working age range of 15 to 64 is expected to fall.
27. When all these factors are considered it is essential that measures be taken to reduce barriers which discourage persons from participating in the labour force. It is essential that the safety net of minimum terms and conditions of employment provide sufficient flexibility to enable Australian employers and employees to reach agreement on measures to assist employees to achieve a better work / family balance.
28. Industry initiatives and approaches to work and family balance are heavily influenced by the national regulatory framework of the award safety net. Through increased flexibility of existing award provisions, employers and employees will be better placed to deal with work / family balance issues.
29. An unduly restrictive award safety net leads to organisations being unduly constrained in their ability to provide flexible work and family balance options to their employees. One result of such inflexibility is that employers are faced with higher levels of stress amongst employees trying to balance their work and family responsibilities. This can lead to increased absenteeism and poor work performance. Job satisfaction and organisational commitment may also decline and these factors impact upon Australia’s economic performance.
30. The current award safety net provides insufficient flexibility to enable employees and employers to address work/family balance issues in a sufficiently wide range of ways. For example, in Victoria, where the federal award system operates extensively, paid time off in the form of personal leave is the most common entitlement used by employees to manage work and family balance issues whilst other forms of workplace flexibility such as banking of hours and

annual leave flexibility are less prevalent.<sup>5</sup> It is likely that award restrictions account for some of this difference.

#### **4.2 The Importance of not Hindering Companies in their Ability to Manage their Businesses**

31. Industry recognises the importance of assisting employees to balance their work and family responsibilities. However, it is important that greater work / family balance for employees is not achieved at the expense of reduced competitiveness for Australian companies. If this was to occur there would be negative employment effects and other detrimental economic consequences.
32. Australian industry is under increasingly robust competitive pressures following the deregulation of its markets. Australian companies now more than ever before are competing in an innovative and globally connected world economy.
33. Australia's prosperity in this market place is dependent upon organisational structures and management practices being efficient, productive and flexible.
34. It is vital that the outcomes from the Work and Family Test Case not hinder companies in their ability to efficiently manage their businesses nor reduce their competitiveness, profitability, or capacity to employ Australian workers.

### **5 Legislative and Award Framework**

#### **6.1 Consistency with the Legislation**

35. An important consideration for the Commission in this case is the consistency of the applications made by the various parties with the objects of the *Workplace Relations Act 1996*.

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<sup>5</sup> Ai Group Vol.1 - Tab 5

36. Such objects emphasise the importance of agreement-making between employers and employees, and establishing mutually beneficial work practices between employers and employees to assist employees with their work and family responsibilities: section 3(b), 3(c), 3(d)(i) and 3(i) of the *Workplace Relations Act* 1996.
37. The need for the Commission to assist employees in reconciling their employment and family responsibilities is specifically recognised in s.92A of the Act.
38. The applications filed by Ai Group in this case, which place considerable emphasis upon facilitation rather than prescription, are consistent with the scheme of the Act and the Commission's statutory obligations under Part VI of the Act. In contrast to the bilateral nature of Ai Group's applications, the unilateral provisions sought by the unions fundamentally conflict with the objects of the Act.
39. In addition, the jurisprudence of the Commission over recent years has fostered many positive developments in the award safety net to assist employees to balance their work and family responsibilities effectively. Such developments reflect a facilitative, rather than prescriptive, approach being adopted by the Commission to safeguard the position of both employers and employees.
40. The current Act is significantly different to previous legislation. The Act clearly gives primary responsibility for determining matters affecting the relationship between employers and employees to the employer and employees at the workplace or enterprise level. Wages and conditions of employment are to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level: section 3(b), (d)(i) and (d)(ii) of the Act. In addition, the Commission is required to exercise its functions and powers in relation to making and varying awards so as to encourage the making of agreements between employers and employees at the workplace level:

section 88A. This includes both registered and unregistered forms of agreement.

41. The granting of the applications filed by Ai Group in this case would be entirely consistent with the objects of the Act and the exercise of the Commission's statutory responsibilities under Part VI. The Ai Group applications seek to establish a minimum award safety net based upon the concept of agreement being reached between employers and employees at the enterprise level. The applications, if successful, would ensure that the main responsibility for determining matters affecting work/family balance remains with the actual workplace parties, within a framework of minimum conditions and safeguards established by the Commission for the benefit of both employers and employees.
42. The applications by Ai Group are also consistent with the objective of assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers: section 3(i). The applications, if granted, would foster the development of "win-win", family friendly measures at the enterprise level on issues such as job sharing, banking additional hours, and access to additional leave.
43. In contrast, the prescriptive approach advanced by the ACTU applications would deter employers from adopting family friendly workplace policies and provisions. Almost by definition, the ACTU applications do not seek the development of mutually beneficial work practices between employers and employees. Rather, the ACTU applications seek the imposition of new unilateral provisions which will harm the efficient performance of work, regardless of the circumstances and needs of employers.

44. The bilateral, facilitative nature of the applications filed by Ai Group are also consistent with the objective of improving living standards and international competitiveness through higher productivity and a flexible and fair labour market: section 3(a).
45. Importantly, the Ai Group applications are consistent with the terms of Section 143 of the Act. This is one of the most significant provisions of the Act in delineating the scope of arbitration in the present case. This section of the Act guides the exercise of any arbitration power in mandatory terms. The Commission must ensure that any award:
- Does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;
  - Does not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
  - Does not contain provisions that have the effect of restricting or hindering productivity, having regard to fairness to employees to the extent that it considers it appropriate to do so: section 143(1B).

The Commission's arbitration power needs to be exercised in the context of the objects of the Act and, in particular, the primary responsibility given to employers and employees to determine wages and working conditions at the workplace level.

46. The granting of Ai Group's applications in this case would not result in the Commission prescribing work practices or procedures that would restrict or hinder the efficient performance of work at the enterprise level. To the contrary, the provisions sought in Ai Group's applications would ensure fairness for both employers and employees by placing emphasis upon the need for mutually beneficial, family friendly work arrangements based upon agreement being reached between the employer and its employees.

47. Again, the various union applications are directly contrary to this approach and the provisions of section 143. If granted, the union applications would result in the Commission prescribing work practices or procedures which reduce productivity at the enterprise level, and do not make any allowance for the genuine operational circumstances of employers.
48. Ai Group's work / family approach, which centres around facilitation, education and leadership, is consistent with the work/family approaches of Federal and State Governments, together with other industry groups.<sup>6</sup>

## **5.2 Award Developments to Assist Employees to Meet Family Responsibilities**

49. In recent years, the Commission has recognised the desirability of awards providing flexibility to assist employees to meet their family responsibilities and enjoy increased leisure time. The approach taken by the Commission has been a facilitative one, requiring agreement to be reached at the enterprise level between the employee and his or her employer. Such an approach has been highly successful.
50. Some of the recent changes introduced within the award system to enable employees to meet their family responsibilities and enjoy increased leisure time include:
- A series of measures introduced as part of the *Family Leave Test Case* decisions ((1994) 57 IR 121 and (1995) 62 IR 48), introducing facilitative provisions permitting employers and employees to agree to allow:
    - Up to one week's annual leave to be taken in single days;

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<sup>6</sup> Ai Group Vol.1 – Tab 4, Tab 6 (p.7) and Tab 15

- Time off in lieu of overtime;
  - Make up time;
  - Unpaid carer’s leave and bereavement leave; and
  - More flexible access to rostered days off; and
- The inclusion of extensive facilitative provisions as part of the award simplification process, consistent with s.51 of the *WROLA Act* and s.143 of the *Workplace Relations Act 1996*. The Metals Award and the Graphic Arts Award are good examples.
51. The introduction of these new facilitative arrangements by the Commission have been accompanied by the development of principles and frameworks for the operation of facilitative provisions to ensure fairness for both employers and employees.
52. In the *Award Simplification Decision*, the Full Bench decided that a case-by-case approach needed to be taken to facilitative provisions and any safeguards which should apply, stating: “*The safeguards, if any, provided in respect of a particular facilitative provision will depend upon the nature of the provisions sought and the circumstances of the particular industry*” (1997) 75 IR 272 at 304.
53. The case-by-case approach has led to different outcomes across different industries. For example, in respect of the Metals Award and the Graphic Arts Award, quite detailed frameworks have been included within each award for the operation of facilitative provisions. The two frameworks are totally different despite the fact that Senior Deputy President Marsh arbitrated during the award simplification process in each award, reflecting the different needs of each industry. These awards can be compared to the facilitative structure within the *Business Equipment – Technical Service – Award 1999* where a simpler approach is taken and safeguards are incorporated within the specific clauses of the award, rather than in one comprehensive clause.

54. The above developments highlight that the Commission has taken many steps to assist employees to meet their family responsibilities whilst recognising the needs of employers and the circumstances of particular industries. Such steps have been taken in a facilitative manner to protect the rights of employers and employees.
55. The approach which the Commission has taken to date in these matters is reflected in the structure of Ai Group's current applications to vary the award safety net. These applications place the emphasis upon a facilitative approach which safeguards the position of both employers and employees within each particular industry.
56. This can be contrasted with the ACTU's "one-size-fits-all" applications which seek to overturn the principles established by the Commission and introduce a new regime which does not protect the rights of employers and would cause significant difficulties for both employers and employees.
57. It is essential for the continued prosperity of Australian industry that the principle of facilitation, which is clearly reflected in the Commission's jurisprudence over recent years, underpin work/family balance. Alterations to the safety net need to increase the flexibility of existing award entitlements to enable employees to reach agreement with their employer at the workplace level on how award entitlements may be used to meet the work and family needs of the employee.

## **6 One Size Does Not Fit All**

58. Where arrangements are put in place to better assist employees to reconcile work and family responsibilities, requirements of the employer and the workplace are very important – "one size does not fit all".

59. Such requirements will vary from workplace to workplace depending on the nature of work, the nature of the product or service being provided, the structure of the workplace and even the location of the workplace.
60. Emphasis should be placed on education and facilitation, rather than prescription. This includes promotion of family friendly policies that have provided win-win outcomes in various workplaces, increasing flexibility within awards to enable agreement to be reached at the workplace about the operation of award provisions, and promotion of the work and family agenda through enterprise bargaining.
61. There is evidence that employers are deriving many benefits from policies and initiatives that assist in the reconciliation of work and family responsibilities. The potential benefits include greater staff retention, preservation of skills, lower training and recruitment costs and improved morale and commitment.
62. For example, in a recent longitudinal study undertaken by Managing Work/Life Balance International (in conjunction with CCH Australia), it was found that the implementation of work/life strategies at the enterprise level has resulted in reduced absenteeism, lower turnover, higher job attraction and retention rates, improved employee satisfaction and improved service delivery or productivity. The study was based upon a survey of over 1500 businesses across all industry sectors undertaken during the past 12 months, as well as surveys undertaken in previous years.<sup>7</sup>
63. Importantly, the study also revealed significant differences between different industry sectors and occupational groups in the implementation of measures to assist employees balance their work and family responsibilities. For example, more flexible working options and work/life strategies tended to be concentrated in the service industries and “white collar” occupations such as banking and finance, legal and communications.

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<sup>7</sup> Ai Group Vol. 1 - Tab 8

64. The enormous diversity of practice both within different industries and throughout different occupational groupings is a highly relevant consideration to the determination of the applications made by the various parties in this case.
65. The ACTU seeks the introduction of a new unilateral regime across all sectors of the economy, and throughout all occupations (ranging from unskilled labourers and process workers, to tradespersons, technicians, professionals and even supervisors and managers). Yet clearly there can be very little, if any, correlation between the working patterns, and work/life strategies capable of being adopted, across different industries and different occupations. For example, the capacity of a small firm operating in the highly competitive manufacturing sector to implement work/life measures will be significantly less than a large and well-resourced Government department.
66. Support for this view can be found in the report prepared by ACIRRT for the Victorian Government in 2001 - *Working Time Arrangements in Australia: A Statistical Overview for the Victorian Government* - which highlights:

*“the importance of developing sophisticated instruments to address the problem of extended hours of work for different segments of the labour market”<sup>8</sup>*

67. ACIRRT goes on to observe:

*“It is obvious that a one-size-fits-all approach to working arrangements policy will no longer suffice.”<sup>9</sup>*

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<sup>8</sup> Ai Group Vol.1 - Tab 13, p. 23

<sup>9</sup> Ai Group Vol.1 - Tab 13, p. 29

68. In contrast to the ACTU's claims, the facilitative measures advocated by Ai Group will allow the circumstances of different industries (and the employers within those industries) to be properly taken into account, whilst ensuring fairness for employees who may wish to access more flexible working arrangements in order to meet family responsibilities.

## **7 Job-sharing**

69. Job-sharing is an arrangement in which two or more people share one full-time job, each working part-time on a regular ongoing basis.<sup>10</sup>

70. The incidence of job-sharing in Australia is growing.<sup>11</sup>

71. Job-sharing offers many benefits to employees and is of particular utility in assisting employees to better balance work and family responsibilities.<sup>12</sup>

72. Job-sharing arrangements offer benefits to employers and are often more attractive to employers than regular part-time employment arrangements.<sup>13</sup> For this reason, initiatives which increase the incidence of job-sharing will naturally increase part-time work opportunities for employees.

73. The job sharing clause in Ai Group's application is fair and consistent with Best Practice approaches to job-sharing. The clause:

- Deems the two job-share partners to be part-time employees;
- Allows a job-share employee to agree to cover his or her job-share partner's absence;<sup>14</sup>

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<sup>10</sup> Ai Group Vol.1 – Tab 15

<sup>11</sup> Ai Group Vol.1 – Tab 4, Tab 8, Tab 9, Tab 10, Tab 15 (p.7) and Tab 16 (p.9,10)

<sup>12</sup> Ai Group Vol.1 – Tab 6 (p.13), Tab 8 (p.51), Tab 10 and Tab 15 (p.7)

<sup>13</sup> Ai Group Vol.1 – Tab 10, Tab 15 (p.7) and Tab 16 (p.10)

<sup>14</sup> Ai Group Vol.1 – Tab 16, p.40

- Deals with situations where a job-share arrangement is no longer consistent with the needs of a business or where one job-share partner resigns or has their employment terminated;<sup>15</sup>

74. Job-sharing provisions are common in enterprise agreements.<sup>16</sup> Ai Group's award proposal modest and balanced. Many enterprise agreement clauses which deal with job-sharing provide less protection for job-share employees than Ai Group's proposal, including various clauses agreed upon by unions.
75. Granting Ai Group's application would promote the use of job-sharing arrangements and most likely lead to a significant increase in the incidence of job-sharing. This, in turn, would make an important and lasting contribution to the work / life balance agenda.
76. Currently, a high percentage of work arrangements which involve less than full-time hours are casual arrangements.<sup>17</sup> Ai Group's job-sharing clause would facilitate the employment of "permanent" staff by employers, rather than casuals. Many (but not all) employees would no doubt regard a "permanent" job as being of more value in assisting them to balance work and family responsibilities than a casual job (eg. Greater certainty regarding income may reduce some of the barriers to accessing childcare).

## **8 Hours of Work**

77. In its applications, Ai Group has sought to assist employees to better balance their work and family responsibilities by introducing additional hours of work flexibility, by agreement between the employer and the individual employee.

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<sup>15</sup> Ai Group Vol.1 – Tab 16, pp. 17 and 22

<sup>16</sup> Ai Group Vol.1 – Tab 7, Tab 9 and Tab 11

<sup>17</sup> Ai Group Vol.1 – Tab 13, p.VIII

78. Under Ai Group’s proposal, an employee would be able to work additional hours and bank time over a period of up to 12 months to enable the employee to have the time off at a later stage.
79. The proposed clause contains a range of safeguards for employees, including that the time off must be taken at a time or times nominated by the employee (but subject to the agreement of the employer), that the employee must not work additional hours that would result in the employee working more than 12 hours on a given day, and that the agreement must be recorded in the time and wages records.
80. At the same time, the proposed clause protects the rights of employers by ensuring that the time off is taken at the ordinary time rate (ie, an hour for each hour worked) and that any additional hours arrangements are to be reached by mutual consent.
81. The issue of flexible working hours has been identified as a key element of the emerging work/life balance agenda. For example, in its *Work/Life Resource Kit*, the Work and Family Unit of the Department of Employment and Workplace Relations has observed:

*“Flexible working hours allow employees to work an agreed number of hours, spread over a set period of time. Employees are able to work the hours they choose while enabling the organisation to function effectively. In introducing flexible hours, it is important that there is a measure of predictability in the work arrangements that are established.”<sup>18</sup>*

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<sup>18</sup> Ai Group Vol.1 – Tab 15, p.2

82. The evidence suggests that the use of flexible working hours is one of the most common techniques for implementing family friendly working arrangements.<sup>19</sup> In its *Working Time Arrangements* report published in 2001, ACIRRT noted that approximately one quarter (24 per cent) of all agreements contain a provision for the “averaging of hours” (ie, standard hours being worked can vary in any one day, week or month).<sup>20</sup> ACIRRT also notes that federal agreements are most likely to contain “hours averaging” provisions (28 per cent of all federal agreements).<sup>21</sup>
83. The ACIRRT report describes the mutually beneficial nature of flexible working hours clauses in the following manner:<sup>22</sup>

*“Hours are averaged to increase labour flexibility at the workplace level. Clauses to average hours often receive the support of both management and unions. Management benefits because hours can be altered from week to week or month to month, according to seasonal demand or unexpected changes in product demand. Workers are also argued to benefit. Although hours may not have a regular weekly pattern, a worker’s annual income is protected because the overall volume of hours is maintained.”*

84. The ACIRRT Report goes on to highlight the family friendly nature of flexible working hours options for employees.<sup>23</sup>

*“It has been argued that averaging of hours can benefit workers with family responsibilities. The option to change working hours from week to week means that workers can more easily accommodate child care emergencies (for example, illness) without having to use their own sick and annual leave.”*

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<sup>19</sup> Ai Group Vol.1 – Tab 4 (p.7), Tab 5 (pp.18-20), Tab 6 (p.7), Tab 8 (p.50) and Tab 9

<sup>20</sup> Ai Group Vol.1 – Tab 13, p.47

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

85. The evidence supports the inclusion of more flexible working hours options into the award safety net to assist employees with family responsibilities in the terms proposed by Ai Group's applications.
86. The evidence also supports the inclusion of provisions which safeguard the position of employers as set out in Ai Group's applications.
87. There are likely to be significant variations between different industries as to the capacity of employers to adopt flexible working hour arrangements without restricting or hindering productivity. As the ACIRRT report observes<sup>24</sup>, flexible working hours provisions do not occur uniformly across all industries. These arrangements are much more likely to occur in industries that are capable of supporting a high degree of flexibility in their rostering arrangements (eg, retail, hospitality and banking).
88. To prevent any negative impact upon efficiency and productivity, flexible working hour arrangements inserted into awards should operate by mutual agreement of the workplace parties. This facilitative approach will ensure that the needs and circumstances of the particular industry or enterprise are properly taken into account. The proposed Ai Group clause is balanced and fair toward both employers and employees, and will not hinder or restrict the efficient performance of work at the enterprise level.
89. The proposed clause will encourage the development of mutually beneficial, family friendly arrangements across Australian workplaces. The clause will increase the incidence of employees with family responsibilities being able to work the hours they want to, while ensuring that businesses will be able to continue to operate effectively.

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<sup>24</sup> Ibid, p.48

## 9 Additional Annual Leave Flexibility

90. Ai Group's applications include a proposal for additional annual leave flexibility to be available by agreement between employers and individual employees.
91. Specifically, Ai Group proposes that, by agreement between an employer and an individual employee, the employee would be able to forgo annual leave loading in return for a proportionately longer period of annual leave.
92. The evidence suggests that flexible annual leave options are a common technique for implementing family friendly working arrangements.<sup>25</sup> Indeed, the ACTU's emphasis on this issue within its applications adds weight to this argument.
93. Flexible annual leave provisions are very common in enterprise agreements.<sup>26</sup>
94. Support for this view comes from the ACIRRT *Agreements Database and Monitor Report (ADAM)* of September 2003.<sup>27</sup> This report highlights that many agreements contain innovative leave provisions.
95. Ai Group's proposed clause is sensible, practical and fair. The proposal would clearly be of benefit to employees in assisting them to better their balance work and family responsibilities.
96. The abovementioned ADAM report highlights an enterprise agreement in the hospitality industry which contains a clause that permits employees to convert their annual leave loading into additional annual leave. ACIRRT describes the clause as "innovative" and "designed to suit the employees' personal and professional needs".

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<sup>25</sup> Ai Group Vol.1 – Tab 6 (p.13) and Tab 15 (p.3)

<sup>26</sup> Ai Group Vol.1 – Tab 9 and Tab 14

<sup>27</sup> Ai Group Vol.1 Tab 14

97. The ACTU accepts that there are many employees who value a greater amount of leave more than they value a greater amount of income while they are on leave. Such proposition underpins various ACTU claims in the Work and Family Test Case (eg. The ACTU's purchased leave proposal).
98. Ai Group's proposed clause would provide a genuine "win-win" outcome in many workplaces. Converting annual leave loading to an additional amount of leave for an employee is likely to result in annual leave being administratively easier for the employer to manage than paying an annual leave loading to the employee. This fact will assist in improving access for employees to the flexibility within the proposed award clause.
99. An annual leave loading is payable in few, if any, other countries. However, in many countries (eg. Europe and the US) periods of annual leave vary from workplace to workplace and even vary between employees in the same workplace (eg. Often employees with longer periods of service are entitled to more annual leave per year).
100. Ai Group proposed award clause would assist employers and their employees to reach agreement at the enterprise level on arrangements to assist employees to better balance their work and family responsibilities.

## 10 Long Service Leave

101. The history and rationale for long service leave in Australia was set out in a January 2004 decision of Senior Deputy President Lacy<sup>28</sup>, as follows:

*“[8] It appears from my own research that the entitlement to long service leave generally originated in the colonial service administration of the colonies of South Australia and Victoria. It gained statutory recognition throughout the several States of Australia commencing with New South Wales in 1951. Since that time there has been little change to the structure of long service leave. It is generally regarded now as an opportunity for an employee to take some respite from a long period of service in the one business”.*

102. In 1964, federal long service leave awards were made in the metal industry and graphic arts industry. In recent times, these awards were incorporated within the *Metal, Engineering and Associated Industries Award 1998* and the *Graphic Arts – General – Award 2000*. Despite this structural change, the provisions of the awards have changed little since 1964. Ai Group is a party to both of these awards and both are vehicles for the Work and Family Test Case.

103. In the abovementioned decision, Senior Deputy President Lacy questioned the relevance of long service leave in today’s environment. The following extract is relevant:

*“[11] It seems that the rationale for a period of respite from a long period of service is no longer a valid assumption. The world today is a much smaller place than it was in colonial times. People are inclined to be far more mobile now than then. In addition to the fading of the tyranny of distance there has*

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Re. Office of the Chief Electrical Inspector Enterprise Agreement 2003, SDP Lacy, 5 January 2004, PR942414.

*been significant change in the pattern of work that raises some questions about the relevance of long service leave as a benefit in employment.”*

104. Long service leave can be made more relevant by giving employees more options regarding the taking of long service leave. Such options would assist employees to better balance their work and family responsibilities.
105. Over recent years, the long service legislation in various States has been amended to give employees more flexibility regarding the taking of long service leave. A comprehensive paper was recently prepared by Industrial Relations Victoria which compares the key provisions of the long service legislation in each State and Territory, including the flexibilities available to employees regarding the taking of leave. At a Workplace Relations Ministers’ Council Meeting (WRMC) in November last year, the Ministers agreed that each state would release the discussion paper for public comment. In response to such release, Ai Group prepared a comprehensive submission. The discussion paper is set out in ***Tab 12 of Volume 1***.
106. The abovementioned discussion paper (on pages 6 and 7) identifies the importance of flexibility regarding the taking of long service leave in assisting employees to better balance work and family issues.
107. Ai Group proposes that additional long service leave flexibility be available, by agreement between the employer and the individual employee, such that
  - An employee would be able to take long service leave in any number of separate periods, including single days; and
  - An employee would be able to take additional long service leave and have his/her long service leave pay averaged over a longer period (eg. 26 weeks leave after 13 years service on half pay).

108. Ai Group's proposed clauses are practical, fair and balanced.
109. Flexible long-service leave provisions are common in enterprise agreements, including numerous agreements reached between employers and unions.<sup>29</sup> Data obtained from the *Workplace Agreements Database* of the Department of Employment and Workplace Relations shows that for agreements current as at 31 December 2003:
- 8.7% of agreements (covering 293,277 employees) contained flexible long service leave provisions;
  - The above agreements represented 18.2% of employees covered under current enterprise agreements;
  - 73.1% of enterprise agreements (covering 1,148,620 employees) contained long service provisions of some type.
110. Many enterprise agreements allow the complete cashing-out of long service leave by agreement between the employer and the employee.<sup>30</sup> In addition, cashing-out is permitted under the long service leave legislation in place in several States.<sup>31</sup> Ai Group's proposal for long service leave flexibility is far more modest.
111. The ACTU accepts that there are many employees who value a greater amount of leave more than they value a greater amount of income while they are on leave. Such proposition underpins various ACTU claims in the Work and Family Test Case (eg. The ACTU's purchased leave proposal). This highlights the merit of Ai Group's proposal to allow an employee to take additional long service leave and have his or her long service leave pay averaged over a longer period (eg. 26 weeks leave after 13 years service on half pay).

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<sup>29</sup> Ai Group Volume 1 – Tab 7 and Tab 11

<sup>30</sup> Ibid

<sup>31</sup> Ai Group Volume 1 – Tab 12

112. With regard to Ai Group's proposal to allow an employee to take long service leave in any number of separate periods, including single days, this is consistent with amendments made to awards over recent years relating to annual leave. As set out above, unlike annual leave clauses in awards the provisions of key federal long service leave awards (such as those in the Metals and Graphic Arts Industries) have remained largely the same since they were made in 1964.
113. Ai Group's long service leave proposals would be of significant utility in assisting employees to better balance work and family responsibilities.