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**Australian Industrial Relations Commission
Family Provisions Test Case
Matter C2003/4198**

**Final submission of the
Women's Electoral Lobby
November 2004**

Submission index

Part 1	Introduction	3
	Highlighting the impact of the proposed award variations on the employment rights and opportunities of women – the focus of WEL’s intervention	3
	Overview of the Women’s Electoral Lobby’s argument	4
	The Commonwealth’s arguments	5
	Eradicating structural sex discrimination in employment	8
	Failure of the current system and the need to step up the pace of change	10
Part 2	WEL’s position in the applications	12
	Importance of Award Minimum Conditions for women	12
	Role of the AIRC in meeting international and national requirements	13
	The public interest and economic considerations	14
	Right to return part-time	17
	Right to request variation in hours of work	20
	Extending Parental Leave	22
	Eight weeks simultaneous leave	23
Part 3	Conclusions	24
	Appendix one	26

Part 1: Introduction

Highlighting the impact of the proposed award variations on the employment rights and opportunities of women – the focus of the Women’s Electoral Lobby’s intervention

1. The purpose of Women Electoral Lobby’s final submission in this case is to clarify and highlight arguments about the impact of proposed variations to the awards on the employment rights and opportunities of women. Women’s interests in this matter should be strongly represented, given the particular burden they carry of balancing work and family, and the direct impact of work and family entitlements on the quality of their lives. It is noted that while the Commission has been presented with extensive evidence of the particular implications for women of the Australian Council of Trade Unions (ACTU) claims, the Women’s Electoral Lobby (WEL) is the only independent women’s advocacy organisation intervening in this case. Women’s voices must be heard in this case, including the workers and expert witnesses called by the ACTU.¹
2. Most women seek to combine paid work with caring for children or other family members in different ways over the course of the life-cycle. It is important to understand that the interface between home and work is where gender differences are most stark and where gender inequalities still manifest strongly. The traditional model of full-time work had at its centre a ‘male breadwinner’ with a wife providing the necessary domestic support and infrastructure. Demographic and social changes, and women’s aspirations for substantive equality, mean this is no longer sustainable.
3. The Commission has received much evidence about these changes and associated social trends. Here WEL simply emphasises that widespread workplace change is now imperative, to allow women and men more flexibility in managing their family responsibilities while participating

productively in paid employment. Varying awards on the basis of the provisions encapsulated by the ACTU application would bring community standards into the award system. The ACTU claim is based on the way many families seek to arrange their work and family life in Australia.

4. Although WEL regards the ACTU claims as modest, we note the importance of this case for women and urge the Commission to deliver an outcome that will take us further along the road to women's equality, as have previous landmark decisions by the AIRC. Earlier test-cases on maternity leave, parental leave, adoption leave and family/carers leave have improved women's employment security and conditions, advancing women's equality with no adverse impacts on the economy. However, Australia still lags markedly behind most other developed economies in work and family workplace entitlements. Without progress in this area women will continue to pay a disproportionately high price for having children, and the economy will continue to be deprived of many women's skills.

Overview of the Women's Electoral Lobby argument

5. There is broad agreement between the Commonwealth, employer bodies, unions and women's groups about the desirability of extending family friendly workplace provisions to more employees in the workforce. Disagreements are focused on the nature of these provisions and the mechanisms to extend them (in particular, whether they should be award entitlements or should only result from agreement making).
6. ACCI's and the Commonwealth's positions are broadly in support of the status quo. The Commonwealth argues that agreement making is the most appropriate mechanism to extend family provisions. WEL disputes this contention and, together with our first submission, this submission presents evidence to show that the current system is not meeting the needs of workers, particularly women, who have family responsibilities. The

¹ See APPENDIX ONE for more information about WEL

submission argues that in the absence of statutory entitlements, it is through the awards system that we can substantially improve the spread of family provisions through the workforce, promoting broadly accepted equity and economic goals.

7. Although the wages and conditions of most workers are set out in certified agreements, awards establish standards for these agreements and thereby influence the workforce as a whole in a way that dispersed agreement-making alone cannot. Significantly too, awards benefit the substantial proportion of workers who do not have access to agreement-making, or who are not in a position to demand family-friendly provisions through agreements. Only an entitlement-based system, such as the award system, can adequately accelerate the spread of family-friendly provisions and provide (in the absence of statutory entitlements) the most equitable possible access to these.

8. The submission first rebuts the Commonwealth's contentions in response to WEL's first submission, demonstrating the inadequacy of the evidence on which the Commonwealth has relied to argue for the advantages of agreement making. A response to the Commonwealth's and others' threats of sex discrimination is also presented. The submission then puts forward further evidence of the failure of the current system and the importance of improvements to Awards. The role of the AIRC in meeting national public policy goals, and keeping pace with community and international standards relating to family provisions in the workplace, is then discussed, and evidence regarding the economic importance of the ACTU's claims is presented. The submission then deals in turn with each of the ACTU's applications.

The Commonwealth's arguments

9. In their response to WEL's first submission, the Commonwealth "reiterates its contentions that agreement making provides the appropriate avenue to introduce workplace flexibilities" (para 1.5, 13 August 2004). WEL notes that the Commonwealth does not say it is the most effective avenue. In fact

the Organisation for Economic Cooperation and Development (OECD) commented in its review of work and family that “opinion is very divided on whether this (the decentralisation of industrial bargaining) has promoted the penetration of family friendly work practices, or hindered it” (para 6.4.3, *Babies and Bosses*, Vol 1, OECD 2002).

10. In contrast, award variations have indisputable direct and flow-on impacts on wages and conditions. The Commonwealth’s rejection of most of the applications and its promotion of agreement making as the “appropriate avenue” therefore suggests that despite its stated adoption of the goal of family-friendly workplaces, this goal is seen as secondary, and not to be allowed to impinge on existing arrangements. In this submission, WEL presents evidence to support the view that, instead, existing arrangements must be fundamentally altered, and that this is only achievable through a system based on entitlements, not on bargaining.
11. Like other parties in this case, WEL has been hampered by the present inadequacy of national data on work and family provisions. It is nearly a decade since the last comprehensive Australian Workplace Industrial Relations Survey (AWIRS 1995). Therefore, when the Commonwealth states, in para 1.10, referring to the introduction by employers of family friendly policies and practices, that “there is clear evidence that this is happening”, unfortunately clear evidence is just what is lacking.
12. Because of public concern about the potential inequities of workplace bargaining, the Commonwealth Government has a statutory duty to report on the outcomes of agreement making. Under s.358A of the *Workplace Relations Act 1996*, the relevant Minister must review and report on ‘developments...in bargaining for the making of agreements covered by Parts VIB and VID’ and ‘*in particular, the effects that such bargaining has had in Australia during that period on the employment (including wages and conditions of employment) of women, part-time employees, persons from a non-English speaking background and young persons*’. For this it

relies on its internal Workplace Agreements Database (WAD) to which the public and independent researchers have limited access.

13. The WAD data is of limited value in considering the ACTU application because:

- it does not consistently distinguish between mutually beneficial and employer-oriented flexibility in its reporting on flexible work provisions. Evidence on this and on the importance of some measure of employee control in identifying provisions in agreements as family friendly, can be found for example in *Key Work and Family Trends*, Appendix 1 PARA 261, p. A1-7 (in evidence). The point has often been made, including by the OECD review, that “flexible hours certainly can be a family-friendly provision, but are not inherently so”².
- it does not record whether a provision in an agreement is just reiterating an award or statutory provision (for example family/carers leave), in which case it is of course quite misleading to suggest that the entitlement derives from the agreement; or necessarily provides an enhanced entitlement;
- it does not reveal sectoral differences and these can have a significant impact, including on gender coverage and on types of provision for example on working hours arrangements; and
- it provides no information on employee take-up and usage of provisions, for which an AWIRS-type employee/employer survey is required; In the absence of that we must rely on case-studies and the Commission has been presented with a great deal of evidence of this kind.

14. The Commonwealth cannot, in light of these limitations, legitimately claim that it has clear evidence of a positive impact of agreement-making on workers' access to and use of family-friendly provisions. In fact, as presented below, there is evidence that the current system, in which employers are simply encouraged to introduce family-friendly measure, is failing.

² *Babies and Bosses: Reconciling work and family life*, Vol 1, 2002, para 6.4.1, p.182

15. WEL is concerned that the Commonwealth has misinterpreted the basis on which WEL is critical of current arrangements, and might not fully appreciate the policy goals that might be pursued through the applications. Contrary to the Commonwealth's assertion in its Contentions in Response (13 August) WEL did not "suggest that the Government is not doing enough to support families" (para 1.18). It is accurate to say that WEL is critical of the lack of Government investment in measures to support mothers' workforce participation and attachment. These are distinct though overlapping policy goals. WEL is concerned that the issue of women's workforce attachment is being overlooked, despite the fact that it is critical in demographic and economic, as well as social, terms. Evidence about this is presented below. As Whitehouse recently noted in commenting on the Treasury discussion paper *Australia's Demographic Challenges*, "policy suggestions thus far have been limited to extremely broad notions of enhancing opportunity and flexibility with the most specific initiatives focused on restricting options for early retirement."³

Eradicating structural sex discrimination in employment

16. WEL notes suggestions from ACCI and the Commonwealth that if the applications were granted employers would be deterred from employing women. It would of course be unlawful to discriminate against women in the way threatened. It is certainly disappointing to see such attitudes being legitimised by the Commonwealth twenty years after passage of the Sex Discrimination Act, and despite the evidence of the business benefits of providing family-friendly work arrangements (some of which is presented below).

17. The threat that employers would refuse to employ women is also unrealistic, given the labour market's reliance on women's labour supply, especially in the current climate (and with regard to future projections) of labour shortages and in the sectors represented in this case. The question is to what extent direct and indirect discrimination against

³ Whitehouse, G. Policy and Women's Workforce Attachment, Just Policy, September.

women (and workers with caring responsibilities in general) is institutionalised, legitimised and entrenched. The Commonwealth's and ACCI's comments appear designed to encourage women to accept existing levels of discrimination, and to expect retribution if further steps toward equity are pursued. This highlights the continued structural inequality of the labour market, in which women are allowed a place, provided we do not demand the kind of changes that would allow substantively equal opportunities. Further evidence of sex discrimination in Australian workplaces is provided in the sections following.

18. WEL is concerned that one of ACCI's witnesses appears to engage routinely in unlawful recruitment practices, for example questioning applicants about their family responsibilities. The company, Chubb Security, also claims that enabling women to return part-time after maternity leave and allowing employees to request hours that accommodate their childcare responsibilities "would be a nightmare for Chubb"⁴. Yet they provide no information about the numbers of women they employ. They say that extending parental leave would create problems yet they provide no information about how they manage the current one year entitlement. It would be useful to know, for example, how many of their employees are on maternity or parental leave at any one time. It is hard to believe that this is a "nightmare" for a security company given the other challenges they must face. It is also hard to believe they cannot manage rostering to accommodate a proportion of employees with family responsibilities. They are certainly not the only industry that has to contend with the demands of a "24/7 society" and the need to manage client expectations of continuity. Rather than presenting Chubb's account of its experience as an acceptable norm, ACCI should instead be assisting it and other companies to change its practices and implement equal opportunities.

⁴ Witness statement of William Fisher, General Manager, Human resources of Chubb Security Australia Pty Ltd.

Failure of the current system and the need to step up the pace of change

19. As the OECD review stated in *Babies and Bosses* “leaving aside those areas where legislation is present...it is difficult to avoid the conclusion that the spread of family-friendly work practices is at best patchy.” (Vol 1 – p.200). After more than a decade of enterprise bargaining and ‘encouragement’, this is a very telling conclusion. WEL therefore urges the Commission to take this opportunity to improve award standards and help accelerate the spread of family-friendly workplaces, which appears to be a goal shared by all those involved in this case.

20. The Commission has a great deal of evidence before it that shows how uneven family-friendly work arrangements are, both across and within workplaces. This has been confirmed in a recent Parliamentary Research paper⁵ which concludes that:

“...the system with the most application across the workforce – federal (and state) legislation – has a limited spectrum of work and family policies currently under its wing. Therefore, the delivery of work and family measures is likely to be made through awards or company policy. Work and family measures delivered through enterprise agreements and individual agreements have had growth, but for a variety of reasons are still limited in terms of the scope of provision and the numbers affected (in the federal system)”. (page 24)

21. The weight of academic and community opinion, much of it presented in evidence to the Commission, overwhelmingly confirms that “most family friendly benefits are available only to a minority of employees, primarily

⁵ O’Neill, S, Work and Family Policies as industrial and employment entitlements, Research Paper No 2,, 2004-2005, Department of Parliamentary Services, Canberra

composed of higher skilled workers in large and/or public sector enterprises.”⁶

22. We know from a range of research that many mothers of young children have few workplace entitlements. For example, Edith Grey has analysed data from a 1997 nationally representative survey, *Negotiating the Lifecourse* (NLC), which surveyed 2231 men and women on issues of work and family⁷ and found that “Women who have a child under five are not eligible for many workplace benefits”. She reports that “of employed women with a child under five, only 57 per cent report access to paid sick leave, 29 per cent are eligible for paid maternity leave and 38 per cent have access to family or carers' leave. Men in this group are more likely to be able to receive these benefits than men without children, or women with children, which is related to job stability”. The impact of motherhood on women’s workplace entitlements is dramatic, as before they have a child their eligibility for workplace benefits is high. Ninety per cent are entitled to paid sick leave, 42 per cent report they can access paid maternity leave, and 57 per cent are entitled to family or carers' leave. These results highlight the failure of the current system to meet the needs of those who most require support to combine work and caring roles.

23. WEL supports the promotion of best practice (such as the National Work and Family Awards) but these initiatives need to be underpinned by adequate minimum entitlements if the benefits (for employees and employers) are to be widespread. As the OECD review commented:

Prizes and publicity for good employers are no doubt valuable in educating employers about what is possible, but do not as a matter of fact, appear to have led to great inroads in spreading such practices to “difficult groups”, such as small employers or employers of low skilled workers. Hence the penetration of family

⁶ See for example the assessment of Campbell I., and Charlesworth S., *Key Work and Family Trends in Australia*, April 2004, RMIT which analyses a host of empirical material.

friendly policies is highly uneven. (OECD Babies and Bosses Vol 1, p.200).

24. The inadequacy of measures to support gender equitable economic participation is strongly implicated in women's disproportionate risk of poverty, especially in older age. As a recent research report commissioned by the Hudson Group found, "women with high levels of education (a degree or diploma) forego AUD \$239,000 in lifetime earnings from having one child," while a "woman with average education (completed Year 12) foregoes AUD \$201,000 and a woman with a low level of education (not completed Year 12) foregoes AUD\$157,000" (p.3). Partly as a consequence, "women are two and a half times more likely to live in poverty during retirement than men, and by 2019 are expected to have half the superannuation accumulated by men," as the Hudson report also found (p. 3).⁸

Part 2: WEL's position in the applications

The importance of improving Award Minimum Conditions for women

25. WEL supports the ACTU claim because of the importance for women of the safety net provisions in awards. In addition to the important standard-setting effects discussed above, women comprise over 60% of award-dependent workers. They are much more likely than men to rely on provisions in awards for their wages and conditions. Nearly double the proportion of women (26%) compared to men (15%) have their conditions determined by awards only⁹. Therefore, even if there was equality of outcomes for women and men under workplace agreements, gender inequality will persist or worsen overall if award provisions are not brought up to an adequate standard. There is research evidence of this and of the importance of safety net increases for women.¹⁰

⁷ Edith Gray, Colliding spheres: work and family initiatives, and parental realities, Just Policy, No. 24, December 2001, pp. 33-40, p.37

⁸ Hudson Global Resources & Human Capital Solutions/Josephine Palermo, 'Breaking the Cultural Mould: The Key to Women's Career Success', November 2004

⁹ ABS, Employee Earnings and Hours Survey, May 2002, Cat no 6306, 2003, p.43.

¹⁰ Whitehouse G & Frino B, 'Women, Wages and Industrial Agreements', *Australian Journal of Labour Economics*, Vol No 4, December 2003, pp 579-594

26. Women of non-English speaking backgrounds, whose capacity to bargain is constrained by their social and labour market circumstances, are especially dependent on award and statutory entitlements. They often have extensive responsibilities for family care but are not in a position to negotiate above award benefits from their employers. Their reliance on award provisions for determining their conditions makes it vital that these provisions are adequate.

The role of AIRC in meeting international and national requirements

27. The pursuit of equitable outcomes for women from workplace measures is a requirement of national laws. The *Workplace Relations Act 1996* (Cth) provides that, in performing its functions, the Commission must further the objects of the Act, which includes “assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers”¹¹ It also includes “respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of ...sex, family responsibilities, pregnancy”¹² and “assisting in giving effect to Australia’s international obligations in relation to labour standards”¹³.

28. Australia’s international obligations include compliance with the *ILO 156 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* which is incorporated into the Act. It is important to note the framework of equality within which work and family measures are required to be implemented. Article 1 and Article 4 are particularly relevant here.

29. The *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) is also important and the Commonwealth government has recently reaffirmed its commitment to implementation of that in its

¹¹ Section 88B, section 90 and section 3(i)

¹² section 3(j)

¹³ section 3(k)

report¹⁴ to the UN: “State Parties agree to take all appropriate measures including legislation and temporary special measures so that women can enjoy all their human rights and fundamental freedoms” (page 96).

The public interest and economic considerations

30. The Commission is also obliged to “take into account the public interest” which includes “the state of the national economy and the likely effects on the national economy of any award or order” that the Commission may make¹⁵.
31. Among the biggest challenges for policy makers are the mounting skills and labour shortages in the Australian economy. Research recently presented by the Women’s Economic Policy Analysis Unit (WEPAU) at the Curtin University of Technology to a House of Representatives Committee Inquiry into increasing participation in paid work found that women’s labour force participation will be critical in meeting these challenges.¹⁶ The Commission has evidence before it of the extent of women’s untapped labour due to the barriers to mothers’ workforce participation. The measures proposed in the applications will assist by facilitating women’s continued participation in paid work after having children. As the WEPAU research found, “[t]he availability of leave provisions and working time arrangements that accommodate the caring roles that both men and women have....will be directly important to women’s future labour supply.”
32. Some employers and their peak bodies allege that entitlements such as those proposed are burdensome and costly to employers, and would therefore have a negative impact on the economy. However, where employers have actually quantified the costs and benefits they seem to

¹⁴ Women in Australia, Australia’s Combined Fourth and Fifth Reports on Implementing the UN’s Convention on the Elimination of All Forms of Discrimination Against Women, Australian Government, 2003

¹⁵ section 90(1)(b)

¹⁶ Women’s Economic Policy Analysis Unit (WEPAU), Curtin University of Technology, Submission to House of Representatives Standing Committee on Employment and

find such policies save them money. Examples abound, but a recent case cited in the Hudson report is the Ford Motor Company of New Zealand which saved nearly half a million NZ dollars over two years when it introduced the right to return part-time (p. 9).

33. The incongruence between businesses' perception of costs and the evidence of benefits is, in part, a result of the underestimation of women's skills and value in the workforce. The experience of businesses employing women who were re-entering the workforce is illustrative:

'Employers believed re-entry women were unfamiliar with current work practices and technology, lacked the skills necessary for the labour force, were likely to have high rates of absenteeism due to sick children, and would be inflexible with their hours of work and mobility. Furthermore, they believed re-entry women lacked energy, confidence, drive, ambition, and initiative. The age of re-entry women also concerned employers, who believed they would be set in their ways, difficult to train, and unable to handle stress. However, the study also found that when re-entry women got past the interview, a huge change in employer attitudes occurred. Re-entry women were reported to be stable, reliable, dedicated, mature, and responsible. They were also believed to have organisational and interpersonal skills, a good work ethic, empathy, understanding and compassion, the ability to work autonomously, and increased confidence and ambition.'¹⁷

34. There is increasing evidence of the business case for workplace policies that value diversity (including by promoting the prospects of women through family-friendly provisions). The Hudson report also cited a

Workplace Relations Inquiry into employment: increasing participation in paid work, 2003
<http://www.aph.gov.au/house/committee/ewr/emp/subs/sub08.pdf>

¹⁷ Ruth Hamon, Jacqui Cleland and Paul Toulson, Reassessing Worth: Recognising the Abilities of Re-entry Women. New Zealand Journal of Human Resource Management, 2002 No. 2.

Standard & Poors 500 study, which found the average annualised return on investment for businesses with policies that promote minority and women workers was 18.3 per cent over a five year period, compared with only 7.9 per cent for those without such a commitment (p. 8).

35. New Zealand's EEO Trust has compiled considerable evidence that promoting workplace diversity, for example by offering work and family provisions, has many business benefits, including "improve[ing] the effectiveness of [the] organisation, recruit[ing] from the biggest possible pool of talent and enable[ing] the people ... employ[ed] to contribute their full potential."¹⁸
36. Several case studies compiled by the Australian Equal Opportunity for Women in the Workplace Agency (EOWA) also support the argument that promoting women's presence and progression in the workplace has considerable benefits.¹⁹ For example, Holden introduced "a number of initiatives to instil a cultural change which supports the role that women have to play in the business", and found as a result that "[t]he business case for diversity indicates that the costs are minor when compared to the benefits offered by a culture and organisation which strongly supports diversity."²⁰
37. In terms of the possible effects of the ACTU's applications on the overall quality of the labour market, WEL is aware that the Commission may be concerned that the proposed extension of part-time work opportunities risks entrenching women's inequality because of the known characteristics of part-time work (low-paid, casual, insecure, with poor training and promotion prospects). WEL's view, supported by much of the

<http://www.humanresources.co.nz/articles/2002.asp> (accessed 19 November 2004)

¹⁸ EEO Trust, Reaping the business benefits of EEO,

<http://www.eeotrust.org.nz/about/business.shtml> (accessed 19 November 2004)

¹⁹ Equal Opportunity for Women in the Workplace Agency, Chief Executives Unplugged Case Studies 2003, http://www.eowa.gov.au/Case_Studies/CEOs_Unplugged_03.asp (accessed 19 November 2004)

²⁰ Equal Opportunity for Women in the Workplace Agency, Chief Executives Unplugged Case Study 2003: Holden, http://www.eowa.gov.au/Case_Studies/docs/CEObook_03_Case_Study_Holden.pdf

research evidence presented to the Commission, is that strengthening women's right to modify their working hours and arrangements in accordance with family care needs would be a step forward. It will improve their employment security, their employment opportunities, and their long term financial independence. Importantly, measures such as allowing women to return to their original jobs part-time would remove the need to move to segregated lower-level part-time positions, and would have a positive impact of the overall composition of part-time work.

Right to return part-time

38. As stated in our first submission, WEL strongly supports the ACTU's claim for a right to return to work part-time after parental leave and until the child reaches school age. WEL emphasised in our First Submission that access to part-time work is not a panacea. Indeed part-time work can represent a 'mummy-trap' or at least a 'mummy-track' for women. This is because at the moment part-time work is largely segregated from full-time work and confined to low paid sectors and occupations. WEL believes a right to return part-time will help break down this segregation and improve the quality and security of part-time work, while easing the transition back to work at a difficult time for many women.

39. As stated in our earlier submission, these problems may be alleviated if there were enhanced rights and opportunities to move between full-time and part-time within the same job or occupation. This is particularly important for women returning to work after having a baby. Despite the high incidence of part-time work in Australia many women still experience difficulty negotiating a return to work part-time after maternity leave. Evidence for this is the incidence of discrimination claims, representing as they do the tip of an iceberg. (Para 40 of first WEL submission).

40. Concerns about the costs to business of introducing entitlements such as the right to return part-time must be considered, but the evidence presented above supports the business and broader economic benefits of family friendly practices.

41. The importance of a right to return part-time after maternity leave was recognised by Justice Elizabeth Evatt in her judgement in the well-known case of *Hickie v Hunt and Hunt*. She inferred “from general knowledge that women are far more likely than men to require at least some periods of part-time work during their career, and in particular a period of part-time work after maternity leave in order to meet family responsibilities.”

42. In a recent speech the Hon John von Doussa QC, President of the HREOC, talked about the growth of precedent in this area and said “I don’t think this proposition can be doubted and it is likely to be accepted by the courts in this area without the need for evidence.”²¹ He referred to several cases from the last two years where the employers’ refusal to allow a woman to return part-time after maternity leave was found to have been unreasonable and hence unlawful. As von Doussa says,

‘A strong message about good management comes out of each of these cases. Significant factors leading to the employee’s success were a failure on the employer’s part to take time to properly understand the reasons for the employee’s request, a failure to properly investigate whether the request could be accommodated and a failure by the employer to reach its decision fairly on the merits.’

43. These women may have won their cases but they and many others have lost their jobs because their need to work part-time was denied.

44. Another telling comment was made by the NSW Administrative Appeal Tribunal in the widely reported case of *Reddy v International Cargo Express*²²:

²¹ Speech by the Hon John von Doussa QC, President of HREOC, Adelaide, 24 March 2004

²² *Reddy v International Cargo Express* [2004] NSWADT218 (30 September 2004).

‘While (her) managers may each have held the honest belief that Mrs Reddy’s proposition would lead to chaos, loss of business or added costs it is difficult to accept that that would have been the case without some testing of the scheme or at the very least a detailed and thorough assessment of the proposal.’

45. What these cases show is that employer resistance to allowing a woman to do her job on a part-time basis while her children are very young is often based on prejudice and tradition rather than a genuine assessment of the work options and impacts. It is this resistance, and the tradition of full-time work as the norm, that WEL believes the ACTU proposals will address. Any equal opportunity employer knows that ‘old habits die hard’ and many women can attest to the fact that, unfortunately, ‘management prerogative’ is often exercised in a discriminatory way. While anti-discrimination law may provide some women with individual remedies for management failures, it is a clumsy and selective instrument for asserting a general right to part-time return from maternity leave. Until there is a general entitlement, women returning from maternity leave will be subject to the discretion of management, which itself remains a largely male domain.
46. The Hudson report found that, “whilst women’s representation in management in the public sector compares favourably with other similar countries, there has been no improvement in the private sector, and possibly a decline in representation since 1986, particularly in Australian companies not covered by the Equal Opportunity for Women in the Workplace Act (1999).” (p. 4)
47. Discrimination remains widespread and systemic, despite evidence of women’s promotions. For example, the recent Hudson report cited research showing that “although women are given promotions, those promotions are essentially hollow and create a misleading appearance of increasing opportunity and responsibility for women in organisations.

Therefore, promotions 'up' the hierarchy for women do not appear to ensure entrée into the upper echelons of organisational hierarchies.”
(p. 7)

48. A recent article by Whitehouse highlights the need for “a guaranteed right to part-time hours for parents returning from parental leave and while their children are young”.²³ The paper presents evidence of the current uneven spread of permanent part-time work (from HILDA 2002 data) and argues that such a measure would enhance women’s workforce attachment and support gender equitable outcomes over the lifecycle. The author concludes that:

‘...a range of studies are confirming the influence of parental policy measures on maternal employment rates. Australian difference in both the employment patterns of mothers and provision of parental policies suggests strongly that there is a need for policy extension.’

49. WEL considers the Award provision proposed by the ACTU to be just such a timely ‘policy extension’.

Right to request variation in hours of work

50. Access to flexible work arrangements is of vital importance to parents in the paid workforce, particularly for mothers. At present working women still do ‘the double load’. That is, they perform most of the unpaid domestic and caring work in the home in addition to their paid work.²⁴ Because flexible work arrangements are not widespread, this limits their employment options: they are constrained to take work that fits in with their family responsibilities. At the same time, if men had more access to

²³ Whitehouse G Policy and Women’s Workforce Attachment, Just Policy, September 2004

²⁴ Note that the federal Government ran a campaign ‘*Working Families: Sharing the Load*’ to address this, as part of its implementation strategy for ILO 156, in the early 1990s.

flexible work arrangements they would be better placed to share more equitably in the domestic workload of family life.²⁵

51. WEL strongly supports the inclusion in awards of an employee's right to request a variation in hours (within the terms of the relevant award) to help accommodate family responsibilities. The Commission has been presented with extensive evidence on the need for this measure and WEL notes that research shows strong demand for this among women with children.²⁶ WEL supports the inclusion in awards of a mechanism for dealing with such requests, as proposed by the ACTU, including the employer's duty to consider and not unreasonably refuse the request. This framework is important, given women's disadvantaged bargaining position. WEL notes the similarity with the 'duty to consider' provisions now operating in UK employment law, which appears to be operating well there and has not caused any significant problems for employers or for business outcomes. The experience in the UK is that a system that clearly sets out the rights and duties of employee and employer is leading to positive, negotiated outcomes²⁷. There is also evidence in the UK Work-Life Balance studies that employees have an appreciation of employer business needs and do not recklessly pursue flexible work entitlements where these are in fact difficult or costly to accommodate.
52. Consistent with our commitment to workplace cultural change, WEL supports the ACTU claims for the right to request variation in hours as this will help integrate part-time work into the mainstream economy and reduce the divisions between part and full-time work.
53. This provision is of particular relevance to non-English speaking immigrant and refugee women, who are more likely than other women to work full-time and, at the same time, to have greater family care responsibilities.

²⁵ see Bittman reference above.

²⁶ Strong demand for this among women employees was demonstrated in the ABS Surveys of Managing Paid Employment and Unpaid Caring Responsibilities (eg Queensland, 2002, Cat 4903)

Extending parental leave

54. WEL supports the claim to extend parental leave to two years, for the reasons set out in the ACTU's contentions. In particular WEL supports measures such as this because it expands the choices open to women combining work with family and for this reason WEL is surprised that the Commonwealth does not support it. WEL acknowledges that for many women taking two years unpaid leave will be financially impossible, or will not fit their preferences. For others, however, it will provide much-needed job protection and cover a period when child-care costs may outweigh the immediate benefits of a return to work. For women unable to secure child-care positions for children under two years of age, the scarcest type of child care placement, a two year leave period creates a realistic buffer for families.
55. WEL notes that a minimum of 26 weeks paid maternity leave now exists throughout Western Europe, and that in most countries this is accompanied by paid paternity and parental leave.²⁸ Paid leave of this nature provides a far more secure foundation for the return to work; in the absence of such schemes, however, an extension of unpaid leave is an important equity measure for women workers.
56. Child development experts, child policy analysts, and an increasing number of child advocates stress the importance of parental leave. Some suggest that such leave can have significant impacts upon child health and development.²⁹ A major trend in Europe in the 1980s and 1990s was to extend the leave policy to 'create a real alternative to out-of home-

²⁷ T Palmer, Employment Relations Occasional Paper (2004), *Results of the first flexible working survey*

²⁸ Deven, F., & Moss, P. (2002). Leave arrangements for parents: Overview and future outlook. *Community, Work and Family*, 5, 237-255.

²⁹ Ruhm, C. (1998) "Parental Leave and Child Health". NBER Working Paper 6554. Cambridge, MA: National Bureau of Economic Research (NBER); Galtry, J. (2000). "Policies, Practices and Support: Breast Feeding". Paper prepared for WHO/Unicef technical Consultation. Geneva, WHO

infant care and to make it a stronger instrument of gender equity'.³⁰

There is also some evidence that generous parental leaves lead to increased investment by fathers in their children and this is of potentially great significance for gender equity both in the home and in paid employment.³¹ (Gauthier and Jatzius, 1997; Carlsen, 1998; Kamerman and Kahn, 1995).

Eight weeks simultaneous leave

57. The Women's Electoral Lobby supports the application for 8 weeks simultaneous leave for both parents. Any measures that facilitate fathers' involvement in the family at such an important transition time are to be welcomed. They relieve the burden on women, tend to enhance gender equity at home and at work, and have positive outcomes for children. Men's increasing desire for such involvement is extensively documented in the report on *Men's Uptake of Family Friendly Employment Provisions*, as are the workplace barriers they currently encounter.³²

58. WEL believes it is very much in the public interest to improve leave entitlements for both parents. As Professor Sue Richardson has explained:

'The question of the quantity of parental time spent on caring for children has assumed a major importance with the movement of mothers into paid employment. When mothers were at home full-time the time spent with their fathers was hardly an issue...'³³

³⁰ Sheila B. Kamerman, "Parental Leave Policies: An Essential Ingredient in Early Childhood Education and Care Policies", *Social Policy Report*, Vol. XIV, No. 2 (2000).
<http://www.srcd.org/sprv14n2.pdf>

³¹ Sheila B. Kamerman, Michelle Neuman, Jane Waldfogel, and Jeanne. Brooks-Gunn, *Social Policies, Family Types, and Child Outcomes in Selected OECD Countries*, OECD SOCIAL, EMPLOYMENT, AND MIGRATION WORKING PAPERS, No.6 Social Policies, Family Types, and Child Outcomes in Selected OECD countries. May 20, 2003

³² Bittman M, Hoffman S, Thompson D, *Men's Uptake of family-friendly employment provisions*, Policy Research Paper No 22, Department of Family and Community Services, Canberra, 2004

³³ Richardson S *The Economics of Families and Children*, in *Investing in our children, Developing a National Research Agenda*, Academy of Social Sciences, 2002, pp 22 – 41.

59. Now there is increased emphasis on and desire for shared parenting. Providing leave entitlements that will enable and encourage fathers' involvement from the beginning, from the birth of their child, is a measure that will support this objective. Around Western Europe parental leave schemes that target working men as fathers, are being implemented. The "main underpinning of this strategy is the intention to bolster the fathers' contact with and care for their children. Another objective is to share the benefits and burdens of working life and family life between men and women."³⁴
60. It is true that men are much less likely to take leave where it is unpaid and this will limit take-up. WEL notes that a recent report in the UK by the Chartered Institute of Personnel and Development found that more than half of all new fathers could not afford to take paternity leave but four out of five would take it if it was increased to 90% of full pay.³⁵ WEL considers that providing for simultaneous leave in the award would create a foundation on which workplace provisions for paid paternity/parental leave can build. Meanwhile the 'baby payment' may enable more families than hitherto to afford to take some simultaneous unpaid leave. Of course a fully-funded and legislated parental leave scheme would be preferable. The Commonwealth demonstrates in its Contentions (paras 7.49-7.51) this would increase the utility of the leave, but this ACTU proposal is a welcome start.

Part 3 : Conclusions

61. WEL believes the ACTU claims constitute a much-needed, indeed overdue, and comprehensive package of family provisions at the workplace that will support workers, especially women, in combining paid work with caring for dependants over the life-cycle.

³⁴ Brandth B and Kvande E, Reflexive Fathers: Negotiating Parental Leave and Working Life, Gender Work and Organisation, Vol 9, No 2 April 2002

³⁵ 'New Parents could get a year's pay to stay at home', Sarah Hall, The Guardian, 27 Oct 2004, Article in the Guardian

62. Enterprise-level initiatives (themselves very unevenly spread across organisations) are too limited, piecemeal and fragmented to provide an adequate framework and meet contemporary standards for the majority of women workers. For example, enterprises with paid maternity leave but no part time work; generous personal/carer's leave but no flexible working time; a range of flexible and family friendly conditions but a long-hours full-time only culture for managers, may all be barriers to workplace equality for women.
63. The provisions proposed by the ACTU will provide increased opportunities for employees and employers to negotiate mutually beneficial working arrangements, by specifying both standards and procedures but without mandating usage. WEL is hopeful that these measures might help catalyse widespread workplace culture change so that our sons and daughters do not have to struggle for equal opportunities and work-family balance as we have done.
64. WEL considers that the application made by the Australian Council of Trade Unions to vary awards by the provisions submitted is both a modest and a reasonable application. The provisions reflect community standards developed over a number of decades by women and men seeking to combine paid employment with their parenting role.
65. The provisions will benefit women workers in particular because they continue to act as primary carers of children, older and disabled family members, yet who also have much to offer Australian workplaces, the community and the economy.
66. Significantly the provisions will also go some way towards redressing the historical gender and structural inequalities that are characteristic of the Australian employment system.

Electoral Lobby Application to Intervene in ACTU Family Provisions Test Case C2003/4198 and others

About WEL

Women's Electoral Lobby Australia Inc is a national, independent, non-profit women's organisation which since 1972 has been advocating on behalf of women and challenging discriminatory practices. Its objectives are attached but include:

- to promote social, political, and economic, equality for women;
- to change social attitudes and practices which discriminate against women;
- to lobby for the implementation of procedures and the enactment of legislation which will advance and benefit women, and combat sexism;
- to inform and educate the public, with a view to advancing the opportunities and conditions of women in the political, creative, civil and social fields as well as in industry, commerce, the professions, and in the community generally.

Its activities include lobbying governments, politicians and candidates, researching and publicising issues important to women, participating in public policy development and public debate, making submissions to inquiries (eg the recent HREOC Inquiry into Paid Maternity Leave), and intervening in legal cases where women's human rights are at issue.

Women's Electoral Lobby receives no government funding and relies entirely on membership fees, donations and voluntary efforts of its members and supporters. .

WEL's interest in the subject matter of the test case

WEL has a longstanding and substantial interest in the measures available to enable employees to combine their family and caring responsibilities with their paid work. The adequacy of these provisions is critical to the achievement of equal employment opportunities between, and equal treatment of, men and women. WEL's National Policy Platform includes several relevant commitments:

WEL's Policy on Family Responsibilities (extracts)

WEL believes that workers must be able to engage in employment without discrimination because of their family responsibilities and efforts must be made to minimize conflict between the two roles.

WEL believes that until society in general and employers in particular recognise that most men are fathers and provide flexible working arrangements for men to fulfill these responsibilities, women will continue to bear an excessive responsibility in private life thus limiting their participation in public life.

WEL supports the International Labour Organisation Convention No 156 Equal Opportunities and Equal Treatment for Men and Women Workers:

Workers with Family Responsibilities, and advocates for its implementation in full.

WEL's Policy on Industrial Relations (extracts)

WEL considers that an industrial relations system that promotes individual contracts and decentralised bargaining disadvantages most women workers. WEL therefore supports the strengthening and maintenance of the award system. WEL considers that equity in the workforce can only be achieved through the adoption of positive measures and actions by governments, employers, unions and industrial tribunals.

WEL has been granted standing to participate in the following inquiries:

- National Wage Cases 1988 –1998;
- Pay Equity developments dating from the 1970s, including the HPM pay equity case brought by the ACTU and MWU to most recently the NSW Pay Equity Inquiry;
- amendment of the *Workplace Relations Act (Cth)1996*.

WEL believes that it can usefully contribute to this case by drawing out and highlighting the impact of the proposed Award variations on women.

Limited intervention

WEL did not seek to call or cross-examine witnesses in this case. WEL sought only to file written submissions relating to the impacts on women that we believe ought to be taken into consideration by the Full Bench.

Reflecting WEL National Policy, WEL broadly supports the contentions of the individual unions and the ACTU, and those of HREOC, and those of the State and Territory Governments. However, we believe our role is to give more emphasis to what is at stake for women, and the extent of their structural disadvantage under current workplace arrangements. WEL does not consider its involvement will prejudice any party in these proceedings nor impose significant additional demands on them. This is a case of potentially historic significance for women and it is important that the independent voice of a national women's organisation be heard.