**FAIR WORK COMMISSION**

**Fair Work Act**
**s.156 - 4 Yearly Review of Modern Awards**

**Family Friendly Working Arrangements (AM2015/2)**

**Statement of Dr Jill Murray**

1. My name is Jill Murray. I am an Associate Professor in the College of Arts, Social Sciences and Commerce in the La Trobe Law School.

2. Prior to this, I was a research fellow at the University of Melbourne Law School.

3. I hold degrees in Law, Arts and Industrial Relations from Melbourne and Oxford Universities. I have published extensively on Australian and international employment law. My research interests include analysing modes of Australian and international labour law, insecure work and the legal regulation of working time.

4. I am a member of Australian Labour Law Association and on the Editorial Board of the Australian Journal of Labour Law.

5. A copy of my curriculum vitae including a full list of my research publications is attached to this Statement and marked **Annexure JM-1**.

6. I was requested by the Australian Council of Trade Unions to prepare a report for the Fair Work Commission proceedings relating to Family Friendly Work Arrangements. Attached to this Statement and marked **Annexure JM-2** is the letter of instructions I received from the Australian Council of Trade Unions.

7. I subsequently prepared a report in accordance with the letter of instructions, a copy of which is attached to this Statement and marked **Annexure JM-3**, dated 4 May 2017.

8. I have read, understood and complied with the Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT) in the preparation of my Report.

9. The Report reflects my specialised knowledge gained through training, study, research and experience as outlined in this Statement and Annexure JM-1.

**Jill Murray**

**(Signed)**

**Date** 6/5/2017

# Curriculum Vitae

**Dr Jill Murray**
**School of Law**
**La Trobe University**

## EDUCATIONAL QUALIFICATIONS

Bachelor of Arts (first class honours), University of Melbourne, English with History (1979)

Master of Arts (first class honours), University of Melbourne Economics and Commerce Faculty, labour studies and industrial relations (1992)

Master of Science, Oxford University (degree ungraded), industrial relations and human resource management (1996)

Doctor of Philosophy in Law, Oxford University, thesis on the international regulation of working time by the European Union and the International Labour Organisation (1999)

## EMPLOYMENT HISTORY

2010 Associate Professor, La Trobe University School of Law
2005 – 2010 Senior Lecturer, La Trobe University
2003 – 2005 Lecturer Law School, La Trobe University

2000 – 2003 Research Fellow, Law School, University of Melbourne

1999 (three months) Convenor of on-line conference, 'The Future of Organised Labour', International Labour Organisation, Geneva Switzerland

1996 – 1999 Junior Dean, St Hilda's College, Oxford University while undertaking doctoral studies

1986 – 1995 National Industrial Officer, Health Services Union of Australia

198 –1985 Victorian government employment in industrial relations, conditions of work and classification areas.

## AWARDS AND APPOINTMENTS

2016 Elected member, La Trobe University Council

1998 Overseas Research Scholarship, Oxford University

1997/8, 1998/9 St Hilda's College Graduate Scholarship

1995 Commonwealth Relations Trust Travelling Bursary to travel to United Kingdom for four months to study British labour regulation

**CONSULTANCIES AND RELATED ENGAGEMENTS**

2010 With Dr D McCann of University of Manchester Law School, preparing report on the legal regulation of domestic work for the International Labour Organisation

2008/9 Participant in *ILO Project on Working Conditions Laws in an Integrating World*, production of 20,000 word report on Australia's regulation of working conditions for this project

2008 Paper for the *ILO Century Project* on the history of ILO regulation of working conditions

2007 Member of Expert Meeting Group advising the United Nations' Commission for Social Development on 'Full Employment and Decent Work for All', New York, USA
(See http://www.un.org/esa/socdev/social/meetings/egm5/)

2006 Invited to attend Fairness and Equity Roundtable, University of Adelaide Law School and gave paper on possible utility of the ILO Workers with Family Responsibilities Convention

2006 Called as expert witness by Australian Council of Trade Unions in the Work and Family Test Case conducted by Australian Industrial Relations Commission including preparation of a detail report on international and national trends in the regulation of work and family matters

2002-3 Member of expert group advising the World Commission on the Social Dimension of Globalization, headed by the Presidents of Finland and Tanzania and instituted by the ILO. Presented papers at two meetings on corporate social responsibility and labour standards, Geneva, Switzerland.

2002-3 Member of the Brotherhood of St Lawrence Ethical Standards Board, overseeing the operation of its company in China.

2001 Presentation to the group convened by Australian Department of Foreign Affairs and Trade on the OECD Guidelines on Multinational Enterprises.

1998 Member of EU Delegation to the EU/USA Symposium on Codes of Conduct and International Labour Standards, Washington DC, USA.

**CURRENT RESEARCH GRANTS**

One of Chief Investigators on 2017 ARC LIEF with AustlII digitising labour law reports and materials.

**PUBLICATIONS**

**Books**

R Owens, J Riley and J Murray, *The Law of Work* (2nd edition), Oxford University Press, South Melbourne 2011.
J Murray, *Transnational Labour Regulation : the ILO and EU Compared*, Kluwer Law International, The Hague, 2001.
J Murray (editor), *Work, Family and the Law*, The Federation Press, Sydney 2005.

**Book Chapters**

Jill Murray, 'Understanding Australian Labour Law as International' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law*, The Federation Press, Sydney, 2017.

J Murray, 'Taking Social Rights Seriously: Is there a Case for Institutional Reform of the ILO?' in C Fenwick and T Novitz (eds.), *Labour Rights as Human Rights*, Hart Publishing, Oxford, 2010, 359 – 382.

J Murray and R Owens, 'The Safety Net' in A Forsyth and A Stewart (eds.), *Fair Work: The New Workplace Laws and the Legacy of Work Choices*, The Federation Press, Sydney, 2010, 40 – 74.

J Murray, 'Labour standards, safety nets and minimum conditions', in J Riley and P Sheldon (eds.), *Remaking Australian Industrial Relations*, CCH Australia Ltd., Sydney, NSW, 2008, 129 – 138.

J Murray, 'Workplace Relations', in R Manne (ed), *Dear Mr Rudd : Ideas for a Better Australia*, Black Inc Books, Melbourne, 2008, 234 – 249.

J Murray, 'The Legal Regulation of Volunteer Work', in Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, The Federation Press, Sydney 2006, 696 – 713.

J Murray, 'Labour Issues in Times of Globalisation : Is the Social Clause an Appropriate Legal Response?' in J Chen and G Walker (eds), *Balancing Act*: *Law, Policy and Politics in Globalisation and Global Trade*, The Federation Press, Sydney, 2004, 283 – 306.

J Murray, 'Re-labelling the International Labour Problem: Globalization and Ideology' in C Dauvergne (ed), *Jurisprudence for an Interconnected Globe*, Ashgate Publishing, Aldershot, 129 – 158.

J Murray, 'The Global Context: Multinational Enterprises, Labor Standards and Regulation', in Hartman et al (eds), *Rising Above Sweatshops: Innovative Approaches to Global Labor Challenges*, Praeger, Westport Connecticut, USA, 2003, 27 – 49.

J Murray, 'Labour Rights, Corporate Responsibilities: the role of Core Labour Standards' in R Jenkins et al (eds), *Corporate Responsibility and Labour Rights*, Earthscan, London, 2002, 31 – 42.

**Refereed Journal Articles**

S Cooney, J Howe and J Murray, 'Time and Money under *WorkChoices*: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29(1) *University of New South Wales Law Journal* 215 – 241.

J Murray, '*WorkChoices* and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35(4) *Industrial Law Journal* 343 – 366.

J Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18(3) *Australian Journal of Labour Law* 325 – 343.

J Murray, 'A New Phase in the Regulation of Multinational Enterprises: the Role of the OECD' (2001) 30 *Industrial Law Journal* 255 – 270.

J Murray, 'The Sound of One Hand Clapping? The "Ratcheting Labour Standards" Proposal and International Labour Law' (2001) 14 *Australian Journal of Labour Law* 306 – 332.

J Murray, 'Time for a New Working Time Convention? Ideas, Themes and Possibilities',
(2008) 18(3) *Labour and Industry* 1 – 18.

J Murray, ‘Work and Care: New Legal Techniques for Mechanisms for Adaptation’ (2005) 15(3) *Labour and Industry* 67 – 88.

J Murray, ‘The International Regulation of Maternity: Still Waiting for the Reconciliation of Work and Family Life’ (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 25 – 46.

J Murray, ‘Social Justice for Women? The ILO’s Convention on Part-Time Work’ (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 3 – 21.

J Howe, R Mitchell, J Murray, A O’Donnell and G Patmore, ‘The Coalition’s Proposed Industrial Relations Changes: An Interim Assessment’ (2005) 31(2) *Australian Bulletin of Labour* 189

J Murray, ‘Corporate Social Responsibility’ (2004) 4 *Global Social Policy* 171 – 195.

**Other articles, notes, reviews**

J Murray, Review of *Transnational Labour Regulation: A Case Study of Temporary Agency Work* (2009) 47(4) *British Journal of Industrial Relations* 788 – 789.
J Murray, ‘Comparative Method and Labour Law: An Australian Perspective’ (2010) 23(2) *Australian Journal of Labour Law* 148 – 150.
J Murray, [Review], ‘Riding the Boundaries, Talking Labour Law’ (2007) 20(3) *Australian Journal of Labour Law* 329 – 333.
J Murray, [Review Essay] ‘Searching for a New Map for Labour Law’ (2003) 16 *Australian Journal of Labour Law,* 123- 132.
J Murray, [Review] ‘Social and Labour Rights in a Global Context’ (2003) 32 *Industrial Law Journal* 68 – 72.
R Mitchell and J Murray [Review] ‘Legal Regulation of the Employment Relation’ (2002) 31 *Industrial Law Journal* 199 – 205.
J Murray [Review] ‘Regulating International Business: Beyond Liberalization’ (2001) 30 *Industrial Law Journal* 246 – 250.
J Murray [Review] ‘Global Business Regulation’ (2001) 30 *Industrial Law Journal* 246
J Murray, [Note] ‘Australia in the Dock: the ILO’s Decision on the Waterfront Dispute’ (2000) 13 *Australian Journal of Labour Law* 167 – 170.
J Murray, [Note] ‘Opting Out: A New Proposal for Self-Regulation’ (2000) 13 *Australian Journal of Labour Law* 315
J Murray, [Note] ‘Normalising Temporary Work: the Proposed EU Directive on Fixed Term Work’ (1999) 28 *Industrial Law Journal* 269 – 275.
J Murray, Review of J Riley, *WorkChoices: A Guide to the 2005 Changes* (2007) 32 *Alternative Law Journal* 30 – 32.
J Murray, ‘Labour Law: Reconciling Work and Care Responsibilities’ (2005) 30 *Alternative Law Journal* 86.
R Mitchell, J Murray and A O’Donnell, ‘Labour Law and a New Social Settlement’ (2001) 49 *Growth* 66
J Murray, [Report of on-line conference conducted by ILO which I convened] ‘Labour Faces the Future’ (2000) 16 *International Journal of Comparative Labour Law and Industrial Relations*, 30
J Murray, [Non-refereed research paper] ‘Corporate Codes of Conduct and Labour Standards’ in B Kyloh (ed), *Mastering the Challenge of Globalisation*, ILO Geneva, 1998, 47 – 108.

**Membership of Professional Bodies**

Associate Member, Centre for Employment and Labour Relations Law, Law School, University of Melbourne, 2000 to present

Member, Australian Labour Law Association, inception (2004) to present

Member of the Editorial Board and Book Review Editor, *Australian Journal of Labour Law*

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15 March 2017

Dr Jill Murray
School of Law
La Trobe University

Via e-mail: jill.murray@latrobe.edu.au

*CONFIDENTIAL AND SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE*

Dear Dr Murray,

FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY FRIENDLY WORK ARRANGEMENTS

*Background*

The Australian Council of Trade Unions (**ACTU**) is the peak body for Australian unions, representing 46 affiliated unions and approximately 1.8 million working Australians and their families.

Under s 156 of the *Fair Work Act 2009*, the Fair Work Commission must review all modern awards every four years (**the four yearly review**). As part of the current four yearly review, the ACTU has applied to the Commission to vary most modern awards to include a right for working parents and carers to work part-time or on reduced hours to accommodate their responsibilities as parents and/or carers, with a right to revert to their former working hours afterwards.

The ACTU has provided the employer parties with a draft of the proposed clause and will shortly seek to file the proposed clause with the Commission. We will provide you with a copy of the proposed clause as soon as possible.

*Engagement*

We wish to engage you to:

1. Prepare a written report containing your expert opinion in relation to the matters set out below; and

2. If required, review any relevant material filed by the employer parties' and prepare any report in reply; and

3. Appear to give evidence at the hearing of the application before the Commission between 10 – 21 October 2017 (the exact time and date of your evidence is yet to be confirmed).



Australian Unions
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*Duty*

You are engaged by the ACTU to assist the Commission by providing your expert opinion in accordance with the terms of this and any other letter of instruction. Your overriding duty is to assist the Commission. You are not an advocate for the ACTU.

**Enclosed** with this letter is a copy of the Expert Witness Code of Conduct published by the Federal Court of Australia. Although you are not formally bound by the Code, as a matter of good practice we intend to adopt the Federal Court Rules concerning the engagement of expert witnesses, and the terms of the Code that govern your conduct under this engagement. Please read the Code carefully.

*Request for Expert Opinion*

You are requested to prepare a written report containing your expert opinion in response to the following questions.

In providing your response to these questions, please ensure you have considered and addressed the matters set out in the Federal Court Practice Note, in particular, Guidelines 1.1 to 1.3, and 2.5 to 2.7.

*Assumptions*

The terms set out below are used in this letter in accordance with the following definitions:

- 'Family friendly working arrangements' means any arrangement between an employer and employee that permits the employee to meet their parenting or caring obligations while also participating in paid work.
- 'Parental leave' means parental leave whether paid or unpaid, and whether provided by statute, enterprise agreement, workplace policy or otherwise.
- Any reference to 'parents' in the questions below is a reference to 'an employee who has responsibility (whether solely or jointly) for the care of a child of school age or younger'.
- Any reference to 'carers' in the questions below is a reference to 'an employee who is responsible for providing personal care, support and assistance to another individual who needs it on an ongoing or indefinite basis because that other individual (a) has a disability; or (b) has a medical condition (including a terminal or chronic illness); or (c) has a mental illness; or (d) is frail and aged.

Question 1

*Background*

Since 1 January 2010, section 65 of the *Fair Work Act* has provided that an employee who wishes to change their working arrangements because of their responsibility for the care of a child under school age, or a child under 18 years with a disability, may request the employer for a change in working arrangements relating to those circumstances. From 1 July 2013, the right to request was extended to employees with responsibility for the care of a child who is of school age or younger, and/or employees who are carers within the meaning of the *Carer Recognition Act 2010*, as well as a number of other categories of employees. Employers may refuse the request on reasonable business grounds.

The complete text of s 65 of the FW Act is at **Attachment A**. The definition of 'carer' in the *Carer Recognition Act* is at **Attachment B**. Please have regard to Attachments A and B when conducting your research and answering Question 1.

*Questions*

(a) What evidence or information is there, if any, about the utilisation of the 'right to request' in s 65 of the FW Act by parents and/or carers?

(b) What evidence or information is there, if any, about employers' responses to requests by parents and/or carers under s 65 of the FW Act? In answering this question, please provide evidence or information, if available, about:

i. the employee's reason for requesting a flexible working arrangement under s 65 of the FW Act;

ii. where the request is granted – the nature of the change in working arrangements sought and granted; and

iii. where the request is refused – the grounds of refusal.

In answering questions 1(a) and 1(b) above, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answers. For example, the employee's age, gender, and employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

## Question 2

*Background*

Section 84 of the *Fair Work Act* provides that an employee ending parental leave is entitled to return to their pre-parental leave position, or if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position (**alternative position**). Section 84 of the FW Act has been in effect since 1 January 2010.

The complete text of s 84 of the FW Act is at **Attachment C**. Please have regard to Attachment C when conducting your research and answering Question 2.

*Questions*

What evidence or information is there, if any, about the number of employees who:

iv. take parental leave (as opposed to, for example, resigning from work); and

v. return to their pre-parental leave position; or

vi. return to an alternative position; or

vii. are unable to return to their pre-parental leave position or an alternative position and are made redundant.

In answering Question 2, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answer. For example, the employee's age, gender, and employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

## Question 3

*Background*

Section 144 of the *Fair Work Act* provides that a modern award must include a term enabling an employee and their employer to agree on an arrangement (an ***individual flexibility arrangement*** or IFA) varying the effect of the award in relation to the employee and the employer, in order to meet the

genuine needs of the employee and employer. Section 144 of the FW Act has been in effect since 1 January 2010.

The application of a flexibility term in a modern award can vary between awards. The flexibility term may apply to all the terms in the modern award, or it may only apply to some of the terms, per s 144(4)(a) of the FW Act.

The complete text of s 144 of the FW Act is at **Attachment D**. Please have regard to Attachment D when conducting your research and answering Question 3.

*Question*

(a) What evidence or information is there, if any, about:

   i. the utilisation of IFAs by employees and employers to meet the needs of (1) parents, and (2) carers.

   ii. the suitability of IFAs to meet the needs of employees who are parents or carers. For example, are IFAs applicable to terms in modern awards that deal with hours of work?

In answering Question 3, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answer. For example, the employee's age, gender, and employment status (eg full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

Question 4

(a) What evidence or other information is there (if any) about the nature and utilisation of family friendly working arrangements other than those discussed at Questions 1, 2 and 3 above?

In answering Question 4, please include information, if available, about the characteristics of employees and employers who are identified in your answer. For example, age, gender, employment status (full time, part time, casual), whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

*Report Format*

Your expert report will be annexed to a brief witness statement setting out the qualifications and experience that establishes your expertise. You should attach a detailed curriculum vitae to your witness statement, along with this letter of instruction.

Your role is to assist the Commission by providing your expert opinion in accordance with this letter of instruction. Please address your report to the Fair Work Commission.

In order to ensure your report can be used easily at the hearing of this matter, we ask that you include the following matters in the report:

(a) a brief summary of your opinion or opinions at the beginning of the report;

(b) a glossary of any specialised terminology;

(c) references to any literature or other materials cited in support of your opinions. Please use a uniform citation method throughout the report. If you use parenthetical referencing (Chicago-style citation), please provide pinpoint citations where applicable;

(d) a bibliography;

(e) numbered paragraphs and page numbers, and headings where appropriate; and

(f) margins of at least 2.5 centimetres, and line spacing of at least 1.5 points, with 12 points between paragraphs;

(g) at the conclusion of your report, please include a signed and dated declaration in the following terms:

> *I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Commission.*

*Communications and Timing*

Your report is due to be filed in the Commission on **24 April 2017**.

We are required to file comprehensive written submissions that address the findings we will ask the Commission to make based on your evidence. We will be in contact in due course regarding your progress.

Please note that all communications between you, the ACTU and its legal representatives can, on request, be provided to the employer organisations and the Commission. This includes any draft of your report, including your working notes.

If you have any questions, or wish to discuss this correspondence further, please do not hesitate to contact Sophie Ismail on 03 9664 7218 or [redacted] or sismail@actu.org.au.

Yours sincerely,

**Sophie Ismail**

Legal and Industrial Officer

# Attachment A

## Division 4—Requests for flexible working arrangements

### 65 Requests for flexible working arrangements

*Employee may request change in working arrangements*

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

*Formal requirements*

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

*Agreeing to the request*

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;



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(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

## 66 State and Territory laws that are not excluded

This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.



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# Attachment B

(2) If a public service care agency enters into a contract or funding arrangement with another person or body (the ***first entity***) for the first entity to develop, implement, provide or evaluate care supports (the ***funded activities***):

(a) the first entity is an ***associated provider*** in relation to the funded activities; and

(b) if the first entity enters into a contract or funding arrangement with another person or body (the ***second entity***) for the second entity to undertake all or part of the funded activities—the second entity is an ***associated provider*** in relation to the funded activities or the part of the funded activities (as the case requires).

(3) Subsection (2) does not apply to a contract or funding arrangement that a public service care agency, or another person or body, enters into with a State or Territory.

## 5 Meaning of *carer*

(1) For the purpose of this Act, a ***carer*** is an individual who provides personal care, support and assistance to another individual who needs it because that other individual:

(a) has a disability; or

(b) has a medical condition (including a terminal or chronic illness); or

(c) has a mental illness; or

(d) is frail and aged.

(2) An individual is not a ***carer*** in respect of care, support and assistance he or she provides:

(a) under a contract of service or a contract for the provision of services; or

(b) in the course of doing voluntary work for a charitable, welfare or community organisation; or

(c) as part of the requirements of a course of education or training.

(3) To avoid doubt, an individual is not a ***carer*** merely because he or she:



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(a) is the spouse, de facto partner, parent, child or other relative of an individual, or is the guardian of an individual; or

(b) lives with an individual who requires care.



ComLaw Authoritative Act C2010A00123

# Attachment C

(b) if, before starting the unpaid parental leave, the employee:
    (i) was transferred to a safe job because of her pregnancy; or
    (ii) reduced her working hours due to her pregnancy;
the position the employee held immediately before that transfer or reduction.

## 84 Return to work guarantee

On ending unpaid parental leave, an employee is entitled to return to:

(a) the employee's pre-parental leave position; or
(b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

## 84A Replacement employees

Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:

(a) that the engagement to perform that work is temporary; and
(b) of the rights:
    (i) the employer; and
    (ii) the employee taking unpaid parental leave;
have under subsections 77A(2) and (3) (which provide a right to cancel the leave if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
(c) of the rights the employee taking unpaid parental leave has under:
    (i) subsections 77A(4) to (6) (which provide a right to end the leave early if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
    (ii) section 84 (which deals with the return to work guarantee); and



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# Attachment D

(b) employees must be specified by inclusion in a specified class or specified classes; and

(c) organisations must be specified by name.

## 144 Flexibility terms

*Flexibility terms must be included*

(1) A modern award must include a term (a ***flexibility term***) enabling an employee and his or her employer to agree on an arrangement (an ***individual flexibility arrangement***) varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

*Effect of individual flexibility arrangements*

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in a modern award:

(a) the modern award has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement; and

(b) the arrangement is taken, for the purposes of this Act, to be a term of the modern award.

(3) To avoid doubt, the individual flexibility arrangement does not change the effect the modern award has in relation to the employer and any other employee.

*Requirements for flexibility terms*

(4) The flexibility term must:

(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and

(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and

(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off



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overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

## 145 Effect of individual flexibility arrangement that does not meet requirements of flexibility term

*Application of this section*

(1) This section applies if:

(a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in a modern award; and

(b) the arrangement does not meet a requirement set out in section 144.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

*Arrangement has effect as if it were an individual flexibility arrangement*

(2) The arrangement has effect as if it were an individual flexibility arrangement.



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**Four Yearly Review of Modern Awards – Family Friendly Provisions**

**Report to the Fair Work Commission**

Associate Professor Jill Murray

La Trobe University Law School

4 May 2017

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## Overview of Findings

1. I have been asked to answer a number of questions about employees' access to flexible working arrangements (defined as any arrangement between an employer and employee that permits the employee to meet their parenting or caring obligations while also participating in paid work), including the operation of the right to request flexible work pursuant to s 65 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**), the right to return to work after parental leave pursuant to s 84 of the Fair Work Act, the use of Individual Flexibility Agreements (IFAs) and other approaches adopted by employees for this purpose.

### The Right to Request – section 65 of the Fair Work Act

2. Approximately one in five Australian workers requests flexible working arrangements each year, a rate that has not changed markedly since the introduction of the s. 65 of the Fair Work Act, also referred to as the National Employment Standards 'right to request' provisions, in 2010.

3. The majority of requests are not made pursuant to s 65 of the Fair Work Act.

4. The most common reason for seeking flexible work is to care for children, with another significant group seeking to care for disabled family members or elders.

5. Around one-quarter of employees are not happy with their working arrangements but did not make a request for change.

6. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible work. Women do most of the unpaid care work in Australia, and they seek to adapt their paid work primarily by working part-time, and by other means as detailed in paragraph 44. Men, including fathers, are much more likely than women to continue working full-time, and are more likely than women to seek flexibility measures such as variations to starting and finishing times and the like.

7. Large and medium employers are more likely to receive requests. Requests are most likely in female-dominated industries and permanent workers are more likely to make a request than those employed as casual or on a fixed term contract.

8. A majority of requests (both informal and those made pursuant to s 65 of the Fair Work Act) is approved in full, some requests are approved with amendments and a proportion is rejected outright [see paragraphs 46 – 48].

9. The main reason for granting a request was associated with a 'win win' approach of many businesses and employees: the employer was able to retain valued staff and acknowledge that caring for family was important and a respected choice, while the employee could continue their engagement with the firm with time to care.

10. The main reason given for refusal is operational grounds, including the difficulty of finding another person to take up the time vacated by a worker going part-time.

11. Workplace culture and norms also play an important role, especially where informal, undocumented processes are utilised to make and respond to requests for flexible working arrangements.

### Return to Work after Parental Leave – section 84 of the *Fair Work Act*

12. Eighty-nine per cent of women in Australia take maternity leave around the birth of their child. Within one year of birth, 79% of mothers had returned to work.

13. Seventy-one per cent returned to the jobs they had while pregnant, with 33% returning to the same job with the same conditions.

14. One in five women returned to work with changes in job tasks or responsibilities and one in five changed employer when they returned after maternity leave.

15. Nearly one in four women were made redundant while on maternity leave or dismissed or their contract was not renewed by the employer.

16. One in ten workers (11%) who had not returned to work after one year said they could not find work or negotiate a return to work.

17. The characteristics of women not returning to work after maternity leave includes those working short hours prior to the birth, those in lower status jobs, those in casual jobs, younger women, those with lower educational levels, health problems or disabilities, and those with poor English skills.

## Individual Flexibility Agreements (IFAs)

18. The utilisation of IFAs has been low: approximately 2% of Australian workers report having an IFA with their employer.

19. Sixty-one per cent of employees who had initiated an IFA said the outcome was flexibility to better manage non-work commitments [see paragraph 94].

20. Fourteen per cent of employees reported that they had had to trade-off conditions in order to obtain a benefit from their IFA. Nineteen per cent of these were women and 12% were men.

## Other techniques to balance work and family life

21. The literature review undertaken in preparation of this report identified four methods of adaptation to the balancing of work and family other than the statutory provisions identified above: informal requests outside the statutory system; not asking for a change in working conditions; 'buying' flexibility by trading off conditions and/or benefits of a job either formally or informally; and exiting employment.

## Question One

(a) What evidence or information is there, if any, about the utilisation of the 'right to request' in s 65 of the FW Act by parents and/or carers?

In answering Question 1(a), please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answers. For example, the employee's age, gender, and employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangements, and the size of the employer's business.

### Evidence of utilisation of the right to request in s 65 of the *Fair Work Act* by parents and/or carers

22. The Fair Work Act does not require employers or employees to report or hold records on requests made pursuant to s 65, so there is no central bank of primary information which can be accessed to answer this question. However, the General Manager of the Fair Work Commission reports on the statutory 'right to request' scheme, and various other quantitative and qualitative studies examine the incidence of requests for flexible working arrangements both in the statutory context and beyond.

23. The Centre for Work and Life at the University of South Australia has conducted the Australian Work and Life Index study (a national survey of 2,279 employees, see Appendix 1 for more details) every year since 2007, most recently in 2014 (**AWALI 2014**). AWALI 2014 found that the rate of requesting flexible work, whether pursuant to the Fair Work Act or through some other process, had remained relatively stable across its 2009, 2012 and 2014 surveys, at around 20% of workers making a request for flexible work arrangements in the period under examination.[1] The evidence of AWALI 2014 is that 20% of employees made a request for flexible working arrangements, but it was "rare that the actual provisions of s 65 are invoked". ABS data suggest that, as at 2012, the proportion of Australian employees with flexible hours is also relatively stable at 31%. This figure had been 23% in 2006, with the most significant increase occurring between 2006 and 2009.[2] The introduction of Paid Parental Leave (**PPL**) by the federal government in 2011, an important change in the statutory environment in which work-life decisions are taken, has also not

[1] Natalie Skinner and Barbara Pocock, *The Australian Work Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work and Life, University of South Australia, Adelaide, 2014.

[2] Australian Bureau of Statistics, Measures of Australia's Progress, 2013, Cat No 1370.0.

significantly altered the use of flexible work arrangements by mothers after giving birth. Amongst new mothers, the use of some kind of flexibility arrangement after birth was 88% prior to the introduction of PPL and 90% in 2014.[3]

24. Only a small proportion of all requests made for flexible work arrangements are made pursuant to the Fair Work Act's right to request provisions: data collected by the Australian Workplace Relations Study (AWRS) Data Centre in 2014 suggests just over 1% of employers had received a request pursuant to s 65, although some 35% of employers said they were unsure about whether the request had been made under the Fair Work Act or not. The AWRS data show only 4% of employees reported making requests pursuant to s 65 of the Act. The AWALI 2014 survey found that only 2.8% of requests used the s 65 provisions and its procedures. AWALI 2014 shows that 57% of requesters 'just asked' for the change. Some 40% applied under employer policy or the term of an enterprise agreement.[4]

25. As Pocock puts it, the right to request:

> has had absolutely no discernable effect on flexible request-making by Australian workers: basically those who feel secure about asking, ask – and mostly get what they ask for. They have reciprocal, respectful arrangements with their supervisors/employers – and they ask from a place of relative power. Those who do not, do not ask.[5]

26. The low proportion of total requesters using the statutory provisions has remained stable. Skinner and Pocock noted that despite growing awareness of the Act's right to request provisions amongst the AWALI subjects (up from 30% to 40% of employees aware between 2012 and 2014), there was little variation in the rate of requesting between 2012 and 2014.[6] They conclude:

> …successive AWALI surveys show that the existing RTR is not enlarging the proportion of workers who request flexibility beyond those who felt comfortable 'just asking' before the legal RTR was introduced.[7]

27. This finding was borne out in the qualitative survey of AWALI requesters.[8]

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[3] Institute for Social Science Research, *Paid Parental Leave Evaluation: Final Report No 4*, University of Queensland, 2014, 78.

[4] Skinner and Pocock, AWALI 2014, above n 1, 4.

[5] Barbara Pocock 'Holding up half the sky? Women at work in the 21st century' (2016) 27(2) *The Economics and Labour Relations Review* 147, 157.

[6] Skinner and Pocock, AWALI 2014, above n 1, 40.

[7] Ibid, 5.

28. According to the General Manager of the Fair Work Commission's report into the operation of s 65 using the AWRS data, while 40% of employers reported receiving a request for flexible working arrangements, fewer than one per cent of employers received requests pursuant to the Fair Work Act between July 2012 and 2014 when the survey was undertaken.[9] The AWRS data shows that 1.8% of men made a s 65 request, compared with 6.2% of women.[10]

## Characteristics of requesters

29. Women are more likely than men to request flexible working arrangements. AWALI 2014 found that 20% of workers had made a request for flexible work in the past 12 months, 25% of these workers were women and 15% men.

30. There are gendered patterns in relation to the utilisation of the various different kinds of flexibility, including part-time work, working from home, change in shifts or rosters, and flexible start and finish times. For example, following the birth of a child, women who return to work seek to work part-time, whereas their male partners are more likely to utilise flexibility around starting and finishing hours without an overall reduction in hours. The ABS 2011 data found that 61% of male partners of women with children under two years of age - 433,900 men - who started or returned to work after the birth of their child used flexible working hours (other than a reduction in hours, e.g. changed start and finish times) after the birth of a child, 31% worked from home, and only 12% utilised part-time work. By contrast, 48% percent of the female partners of these men (or 205,500 women out of a total 523,300 women with a child under two) returned to work, and 84% of those women returned to work part-time.[11]

31. The Australian Human Rights Commission (**AHRC**) survey (for methodology see Appendix 1) of 2,000 mothers and 1,000 fathers and partners made similar findings in

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8 Natalie Skinner, Barbara Pocock and Claire Hutchinson, *Report to Fair Work Australia, A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions*, 2015, 45. An exception was the health sector employers who said more men were requesting after an influx of younger male nurses with young families.

9 Bernadette O'Neill, General Manager's report into the operations of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s 65 of the Fair Work Act 2009 (Cth) 2012 – 2015, Commonwealth of Australia, Melbourne, 2015, Table 5.8, p 28.

10 Ibid, Table 5.8, p 28.

11 Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011. The 2011 data are the most recent in this data set.

2014: 70% of those mothers returning to employment after giving birth requested flexible working arrangements, while only 22% of fathers did. Whereas women most commonly request reduced hours of work, men most commonly seek flexible hours without hours reduction, and only 14% seek part-time work.[12]

32. The characteristics of employees making a request under s 65 were analysed by the General Manager of the Fair Work Commission in 2015 as follows: 83% per cent of the requesters had dependent children under the age of 15, and 17% did not.[13] The most common reason a request under s 65 was made was to care for a child or children (see paragraph 38 and following below). Women were three times as likely to make a request compared to men (81% of those making a s 65 request were women, compared with 18% who were men); a higher proportion of part-time employees (53% of those making a request) than full-time employees (47%) made a request. Thirty-six per cent of requests were made by employees aged 25 – 34; 41% by employees 35 – 44; and 17% by employees 45 – 54. The majority of the requesters (86%) were permanent employees; 5% casual and 9% fixed-term contract workers.

33. Wright et al note that:

> While there is a large number of men who are not content with their work arrangements there are few who formally request flexible hours, with many being much more likely to 'tinker' with work hours on an informal and temporary basis….The reasons for this are not well researched.[14]

34. There were also variations across different age groups: 30% of 18 – 24 year olds, 22% of 25- 34 year olds, 20% of 35-44 year olds, 16% of 45- 54 year olds and 15% of 55 - 64 year olds had made a request.[15] The characteristics of requesters in the AWALI 2014 survey were as follows: 40% of mothers with pre-school aged children requested, compared with 15% of men and 29% of women caring for elders or disabled dependents.[16]

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12 Australian Human Rights Commission (AHRC), *Supporting Working Parents: Pregnancy and Return to Work National Review Report 2014*, Sydney, 2014, 76.

13 O'Neill, General Manager's report, above n 9, Table 5.8, p 28.

14 A Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340, 356.

15 Skinner and Pocock, AWALI 2014, above n 1, 40.

16 Ibid.

## Characteristics of employers receiving requests

35. There was some variation between the characteristics of businesses that received requests pursuant to the Act. More requests were received by medium (20-199 employees) and large (over 200 employees) firms than small (5-19 employees), and public sector organisations were more likely to receive s 65 requests than those in the private sector.[17]

36. The AWALI 2014 survey found that requests were more prevalent in certain industries and occupations:

> …workers in sales and community and personal service occupations were most likely to make a request to change work arrangements, which is not unexpected given the high proportions of women working in these occupations. Conversely, requests are least common in the more male-dominated occupations of technicians and trades and machinery operation/driving. These patterns are consistent with the findings in 2012.[18]
>
> By industry, the rates of request in 2014 were highest in retail (28.8%), accommodation and food services (34.6%), industries which were 'more female-dominated with more part time jobs than other industries in which rates of request-making were lower.'[19]

37. The AWALI 2014 survey suggests that most workers did not identify which industrial instrument, if any, their request was made under: 57% of requesters 'just asked' for the change. Some 40% applied under employer policy or the term of an enterprise agreement.[20] The General Manager of the Fair Work Commission notes that it is a limitation of the AWRS survey data that it relates to 'the incomplete understanding of research participants about industrial relations matters.'[21]

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17 O'Neill, General Manager's Report, above n 9, [5.2.2].
18 Skinner and Pocock, AWALI 2014, above n 1, 41.
19 Ibid, 42.
20 Skinner and Pocock, AWALI 2014, above n 1, 4.
21 O'Neill, General Manager's Report, above n 9, [4.2.1].

Question 1(b) What evidence or information is there, if any, about employer's responses to requests by parents and/or carers under s 65 of the FW Act? In answering this question, please provide evidence or information, if available, about:

(i) the employee's reason for requesting a flexible working arrangement under s 65 of the FW Act;

(ii) where the request is granted – the nature of the change in working arrangements sought and granted; and

(iii) where the request is refused – the grounds of refusal.

In answering Question 1(b), please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answers. For example, the employee's age, gender, and employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangements, and the size of the employer's business.

## Reasons for requesting a flexible working arrangement under s 65 of the *Fair Work Act*

38. In the Australian Workplace Relations Survey (AWRS) of 7883 employees and 3057 enterprises surveyed between February and July 2014, employers were asked what reasons staff gave for requesting flexible working arrangements under the Fair Work Act: 73% of employers stated that the reason an employee had made a s 65 request was to care for a child or children; 28% reported that the reason for the request was to care for a family member other than a child (including elderly relative); and 23% of employers had received a request from a worker who was over 55 years of age. In addition 3% reported requests related to experience of family violence.[22]

39. Employees reported to AWRS that the reason they sought flexible work was to care for a child/children (55%), and the next largest category was employees who requested because they wished to care for another family member (15%).[23]

40. Similarly, the AWALI 2014 data showed that the group most likely to request flexible work was mothers who wished to care for pre-school children (41%),[24] followed by requests for employees who wished to care for elders (18.9%), with a further 6.3% who combined both child care and elder care.[25]

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22 O'Neill, General Manager's Report, above n 9, [5.2.3].

23 Ibid [5.3.3].

24 Skinner and Pocock, AWALI 2014, above n 1, 4.

25 Ibid, 31.

41. The Institute of Social Science Research evaluation of the federal PPL scheme (which does not distinguish between informal requests for flexible working arrangements and those made pursuant to s 65 of the Fair Work Act) found that 90% of mothers post-PPL used at least one flexibility provision:

> Permanent part time arrangements and flexible hours were the most commonly used provisions, with nearly 60% of mothers with changed employment arrangements using flexible hours and almost the same proportion taking permanent part time hours.[26]

42. AWALI 2014 showed that the most common reason for a request for flexible work was to reduce working time to accommodate child care in the home for pre-school age children.[27] The group most likely to request flexible work arrangements was mothers of pre-school age children, making up 41% of requestors. Only 15% of fathers of pre-school age children made a request.

## Requests granted – the nature of the change sought

43. The AWRS data includes information from employers about the flexibility sought by employees who used s 65 to request a change in working arrangements (multiple responses were permitted so these numbers do not add up to 100%): 67% of employees sought a reduction in hours of work; 57% sought a change to start/finish times; 56% sought a change in the days worked; 33% sought to work from home; 14% sought a change in shift arrangements or rostering; 5% sought a change in amount of leave and 5% sought a change in role/responsibilities.[28] As noted above at paragraph 38, the most common reason these employees requested a change was to care for a child or children and the second most common was to care for a family member other than a child. Skinner, Pocock and Hutchinson reported that employers interviewed in their qualitative study agreed that part-time work was the most commonly received request, with the most common request being women returning from maternity leave wanting to work part-time. The employers observed that that request (for part-time work for women returning from maternity leave) had "increased most noticeably since the introduction of the right to request."[29]

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26 Institute for Social Science Research, *Paid Parental Leave Evaluation: Final Report No 4*, University of Queensland, 2014, 78-79.

27 Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8.

28 O'Neill, General Manager's Report, above n 9, [5.2.3].

29 Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8, 44.

## Employers' response to requests

44. This section considers the available material on whether or not requests are acceded to by employers, and the differences, if any, between the acceptance rates of informal requests and those made pursuant to s 65 of the Fair Work Act.

45. The General Manager reported that, based on the AWRS data, the vast majority of requests made pursuant to s 65 are granted. According to employers' self-reporting of their response to requests in the AWRS data, 90% of employers granted the request/s in full, with a further 9% not being immediately granted.[30] Employers reported that 60% of those requests not immediately granted were accepted in a different form after further discussion.[31]

46. According to AWRS employee evidence of requests made pursuant to s 65, 85% of requests were accepted: 12% granted with amendments and only 2% refused.[32] Where employees made an informal request outside the NES provisions (and not in writing), 76% employees reported that their request was accepted; 16% accepted with some change and about 8% had their request refused.[33]

47. The AWALI 2014 survey also found that the majority of requests (made both pursuant to the right to request and in relation to other instruments or informally) were approved but at a lower rate than that reported by AWRS: 64% were fully granted, 17% partly granted and 11% refused, a pattern comparable to AWALI surveys in 2009 and 2012. Part-timers were more likely to have their requests granted (71%) than full-timers (57%).[34]

48. Reasons given in the AWRS data by employers for accepting requests made under s 65 included:

> …recognition of the challenges of combining paid work with care responsibilities and recognition of the substantial benefits to employee well-being in assisting in reducing work/life conflict through accommodating care responsibilities.[35]

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30 O'Neill, General Manager's Report, above n 9, [5.2.4].
31 Above [5.2.4].
32 Above [5.3.4].
33 Above [5.3.4].
34 Skinner and Pocock, AWALI 2014, above n 1, 42.
35 O'Neill, General Manager's Report, above n 9, [5.3.5].

49. Employers in the qualitative survey of Skinner, Pocock and Hutchinson observed that the existence of the s 65 provisions "had resulted in more careful and considered decision-making with regard to flexibility requests, including the acceptance of requests that were likely to have been rejected prior to 1 January 2010". In the rare instances of refusal, usually for business reasons such as staff shortages, the employer tried to find an alternative arrangement.[36]

50. Qualitative employer interviews showed that employers who granted requests:

> …recognised and respected the importance of parenting and family responsibilities, and [the fact that] that work arrangements would need to be adjusted to support parents' capacity to work and care for their children… Employers also recognised that the organisation benefitted from accepting requests for flexibility, particularly in retaining valuable employees.[37]

51. The granting of a request was seen as a 'win/win' by employers.[38]

52. Reasons for acceptance or refusal of a request for flexible work may be influenced by the personal view and values of the 'gate-keeper' manager who makes the decision. Researchers found that in informal decision-making processes where law and employer policy may not be adhered to, decision-making managers exercise great personal discretion over whether or not requests are granted.[39] Qualitative research has shown that decisions vary according to issues not mentioned in the legislation: for example, employers "were more likely to accept flexibility requests where the employee is highly valued, perceived to be trustworthy and could be expected to maintain their performance and productivity when working flexibly".[40] This was also confirmed in interviews with managers conducted by the AHRC:

> Trust is an issue – the business needs to feel confident that the employee will not abuse the trust of flexibility….I would not allow such flexibility with every member of the team. [I need to] trust[that they] will deliver regardless of where [they] work from.[41]

53. Reeve et al noted that where informality governed the application and granting of flexible work, individual managers may make exceptions to their own unwritten rules

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36 Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8, 45.

37 Ibid, 50-51.

38 Ibid, 4.

39 Baird and Heron 'Women, work and elder care: new policies required for inclusive growth' in P Smyth and J Buchanan (eds), *Inclusive Growth for Australia: Social Policy as Economic Investment*, (2013) 242, 252.

40 Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8, 4.

41 AHRC, *Supporting Working Parents*, above n 12, 140.

in special cases, suggesting that the impetus to grant requests of valued, trusted workers might be deep-seated even where not expressed in formal policies or law.[42]

> Managers were willing to make exceptions to their informal rules or create informal arrangements for employees who were highly valued because of their skills, knowledge, productivity or ability to give a bit extra to the organisation.[43]

54. The determination by individual managers of which staff did represent such value created "significant scope (for the manager) to interpret values such as employee worth according their own criteria and on a case-by-case basis".[44]

55. This aspect of decision-making was also reflected in employee attitudes that they were asking for a personal favour in seeking flexible work, which, if granted, meant they were 'lucky' and should express gratitude. Walters and Whitehouse analyse this construction of the requesting process and decision-making in terms of 'entitlement' and 'resignation': those workers who perceive they do not have an entitlement to flexible work are more likely to see access to flexible work as associated with 'a sense of guilt, gratitude or obligation.'[45]

## Grounds for refusal

56. In the AWRS survey of employers, the most common reason given by employers for refusing a request was that the request was 'not operationally viable', with employers identifying negative impact on productivity/efficiency or customer service as reasons for refusal.[46] Similar information was gleaned from the qualitative interviews by Skinner et al: four of the employers interviewed had refused requests for organisational or business reasons, most commonly staff shortages "due to factors such as organisational downsizing or a lack of employees available to fill particular shifts".[47]

57. There were some reports of difficulties in acceding to requests in small units within larger enterprises. One individual example of this is given in the qualitative study conducted by Skinner et al. In that case, a human resources professional who had asked

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[42] Reeve et al, 'Regulation, Managerial Discretion and Family-Friendliness in Australia's Changing Industrial Relations Environment' (2012) 54(1) *Journal of Industrial Relations* 57, 68.

[43] Ibid, 70.

[44] Ibid, 71.

[45] Peter Walters and Gillian Whitehouse, 'Mothers' perceptions of support in the workplace: a sense of entitlement or resignation?' (2015) 51(3) *Journal of Sociology* 769,771.

[46] O'Neill, General Manager's Report, above n 9 [5.2.4].

[47] Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8, 53.

to reduce their working time from 0.8 FTE to 0.6 FTE had been refused outright because they worked in a small unit of four people which, in the employer's view, could not function with fewer staff. The head of HR in the firm was "not confident that a job share arrangement would be suitable or effective for the participant's particular position."[48] This employee and two other employees (one whose request had been partially met and another who had not yet heard back on their request) were either planning to leave their employment or already had, in response to the outcome of their request.[49]

58. While most requests were granted and where refused, alternatives were sometimes offered, in other cases employers did not take that approach:

> …some managers make very little effort to accommodate employee requests, taking the rather narrow view that the only requirement is to consider the request.[50]

59. One example of this kind of approach is given by the Australian Human Rights Commission:

> Karen is a midwife in a public hospital. Her work involves rotating rosters and shift work. On return to work after parental leave, Karen requested to work less hours and on certain days due to limited child care options. Her request was denied and her manager refused to be flexible with the rosters. The reason given was that rostering was hard enough to do with shit work and there was a requirement to have certain numbers of staff working at any one time. However, Karen was aware that other departments could be flexible with their rosters.[51]

60. Some industries claimed it was difficult to accede to flexible work in general (for example, legal industry based on billable hours) or particular roles (customer facing/sales) where 'client demands are unpredictable and immediate.'[52] And working environments with shift work and rosters were seen by some employers as difficult to adapt to flexible working requests. Particular patterns of work such as fly-in/fly-out (which may involve four weeks away from home, then a one week break) made it difficult to accommodate flexibility.[53]

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48 Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 9, 32.

49 Above, 33.

50 Above, 53.

51 AHRC, *Supporting Working Parents*, above n 12, 95.

52 Ibid, 140.

53 Ibid.

61. In relation to the impact on productivity, the issue of being able to find a replacement staff member for the hours cut from someone's job as a result of a request for part-time work was seen as problematic by some employers:

> When an employee is coming back from maternity leave and [requests] to work part time, this means that we are missing [somebody to cover] the other days [when they not in the office], which has a huge effect on productivity.[54]

62. The AHRC found that not all employers fully understood what flexible work means or how it works, with one employer commenting:

> Flexibility [is] still seen as part of the "too hard" basket. What's more [negotiating a flexible work agreement] can be challenging if employees feel reluctant to share their requests for flexible work upon return to work for fear of appearing uncommitted to their job.[55]

63. Even in firms with established work/life balance policies and large human resources functions, there could be gaps between workplace policy and the actual practices of managers when determining requests from staff:

> The organisation has written policies in relation to part time work, which sounds great, but it…says something along the lines of part time work can be granted, where it is operationally suitable – and hence that line is used all the time as a basis for refusal of part time work.
>
> Returning [maternity leave] employees were seen as a problem to be eradicated rather than an asset to be nurtured… Out of a global workforce of 35,000 employees, and a finance department workforce of 800 employees, [Human Resources] couldn't provide me with a single example of [job share arrangements]. [56]

64. As noted above in the discussion of the reasons why employers accede to requests, some researchers examine the broader organisational context within which individual decisions on requests are made.[57] Skinner et al argue that a 'supportive organisational culture' is important to an employer's willingness to approve flexible working arrangements, whereas an "unsupportive organisational culture is one of the strongest and most consistent predictors of work-life conflict", based on meta-analyses by Kossek et al 2011 and others.[58] Workplace culture, defined by Walters and Whitehouse

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[54] Ibid,140.

[55] Ibid.

[56] Ibid, 95.

[57] Reeve et al, 'Regulation, Managerial Discretion and Family-Friendliness', above n 42.

[58] Kossek et al, 'Workplace social support and work-family conflict: a meta-analysis clarifying the influence of general and work-family specific supervisor and organisational support' (2011) 64(2) *Personnel Psychology* 289; Barbara Pocock, Sara Charlesworth and Janine Chapman, 'Work-family and

as 'the everyday shared symbols or dispositions in a workplace',[59] may trump extant work-life balance policies.[60] Organisational culture or cultures may shape not only attitudes within the workplace to requests for flexible work but also reflect underlying values and expectations to do with broader social roles such as mother, father, dependent, family, carer, grandmother, grandfather and so on. Pocock, Charlesworth and Chapman found:

> …strong undercurrents of traditional values…with contradictory norms that support women's increased employment participation yet insist that mothers' primary responsibilities are to their families. This norm can be described as the expectation and cultural assumption that workers are willing and able to prioritise work over other life activities and commitments such as care for children and elders.[61]

65. Crettenden et al stated in relation to their study of mothers who were primary carers of children with a developmental disability:

> …there is an apparent societal expectation in Australia and other Anglo-Saxon countries, reflected in the words of fathers and mothers in the survey (Juggling Work & Care – see Appendix 1), that career progression and greater work responsibilities are tied to spending longer hours at work…[62]

66. Unconscious bias on the part of decision-makers may influence their perceptions of whether or not roles can be successfully performed part time and the costs and benefits of acceding to flexible work requests. The AHRC investigation into discrimination against pregnant workers and mothers returning to work found that workers on flexible conditions encountered both unconscious bias and direct discrimination. Workers with flexible conditions such as part time work, job sharing, working from home and flexible start/finish times experienced negative attitudes from managers and colleagues:

> I continuously have had to deal with prejudiced statements on what a part time person can do. There is still very much a culture of 'part time person: part time brain.'
>
> The company has recently confirmed that there will be no possible career progression within the company for any part time senior staff. They have raised this on the grounds that because I am not able to participate in late afternoon events such as Friday evening

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work-life pressures in Australia: Advancing gender equality in "good times"? (2013) 33 I*nternational Journal of Sociology* 594.

59 Walters and Whitehouse, 'Mothers' perceptions of support', above n 45.

60 Natalie Skinner, Abby Cathcart and Barbara Pocock (2016) 26 *Labour and Industry* 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' 103.

61 Quoted in Skinner, Pocock and Hutchinson, Report to Fair Work Australia, above n 8, 70.

62 Quoted in A Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340, 356.

> drinks I am not able to mentor junior staff and am hence not a constructive part of the office culture.[63]

67. A significant minority of workers in various studies report that their jobs/workplaces are not suitable for flexibility and that adaptation is impossible. The ABS found that 74% of the partners of mothers with children under 2 (that is 322,400 out of the cohort of 433,900 male partners) did not use flexible work arrangements: 50% of those who did not use flexible work arrangements reported that such arrangements were not available, and another 20% did not know if there were such arrangements available to assist them to care for their child.[64]

68. The AWALI 2014 report noted that 15% of workers reported that flexibility was "not possible or available" in their jobs.[65] Nineteen per cent of surveyed fathers who were secondary carers for their disabled child also reported that they could not obtain flexibility if they wanted it.[66] The research into organisational culture and prevailing norms raises a question about whether their perceptions are in fact correct.

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[63] AHRC, *Supporting Working Parents,* above n 12, 128.

[64] Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011.

[65] Skinner and Pocock, AWALI 2014, above n 1, 4.

[66] A Wright et al, 'Dads care too!', above n 62.

## Question Two

What evidence or information is there, if any, about the number of employees who:

(i) take parental leave (as opposed to, for example, resigning from work); and

(ii) return to their pre-parental leave position; or

(iii) return to an alternative position; or

(iv) are unable to return to their pre-parental leave position or an alternative position and are made redundant.

In answering Question 2, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answer. For example, the employee's age, gender, employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

### The number of employees taking parental leave

69. The AHRC found that in 2014, 89% of mothers took some form of leave to care for their child after birth. The federal PPL scheme provides for 18 weeks paid leave, and 60% of mothers took leave other than, or in addition to, the 18 week period, including unpaid parental leave and annual leave.[67]

### Who accesses parental leave?

70. The same study found that young mothers (18-24) were less likely to take leave (74%) than mothers aged 25-34 (93%) and those aged 35 years and older (92%). Women in casual jobs during their pregnancy were less likely (68%) than mothers in permanent jobs (95%) to take leave to care for their child. Full time workers (94%) were more likely to take leave than part time (83%). Those in large workplaces were the most likely to take leave (93%), medium (90%) and small (81%).[68]

### Evidence of the number of employees returning to their pre-parental leave position

71. The AHRC found that 79% of mothers who took leave to give birth and care for their child in its first months returned to work within 12 months. Mothers who were in

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67 AHRC, *Supporting Working Parents,* above n 12, 47.

68 Ibid.

permanent positions and employed in larger organisations took more leave than those employed on a casual basis and in smaller workplaces.[69]

72. The federal PPL scheme has increased the proportion of women returning to work after maternity leave, and increased those who return to the same job. The 2014 PPL Evaluation found that one result of the operation of PPL was that women tended to return to work about six months later than they had prior to the scheme's introduction. Of these, 77% of women return to the same job as before the birth (this figure was 73% before the introduction of PPL). The proportion of women who returned to their job on the same conditions (including hours and pay) also increased from 28% prior to PPL to 33% in 2014.[70]

73. Of the women in the AHRC survey who had not returned to work after having a child, about half (49%) said they preferred to stay at home and were able to do so financially; 17% had another child or were pregnant again; 14% could not find childcare or thought it was too expensive; and one in ten (11%) could not find work or could not negotiate return to work arrangements.[71]

74. The ABS found in November 2011 there were 205,500 mothers with children under two who had started or returned to work after the birth of their child, about 39% of the total number of mothers with at least one child under two. The most common reason for returning was 'to keep job/employer requested return' (26%), financial (15%) and to maintain self-esteem (15%).

75. There is strong evidence that Australian women wish to work part-time after the birth of a child.[72] Of the 205,500 women discussed in the previous paragraph, 84% usually worked part-time, with a majority (54%) working between 15 – 34 hours per week.[73] Mothers with children under one year old who are in paid employment work part-time

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69 AHRC, *Supporting Working Parents,* above n 12, 47.

70 Institute for Social Science Research, *Paid Parental Leave Evaluation: Final Report No 4*, University of Queensland, 2014, 5.

71 AHRC, *Supporting Working Parents* above n 12, 64.

72 Brigid van Wanrooy, 'Couple Strategies: Negotiating Working Time over the Life Course', in Ann Evans and Janeen Baxter (eds), Negotiating the Life Course: Stability and Change in Life Pathways, Springer Netherlands, 2013.

73 Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011.

(16%) or full-time (1%) while the rest are on leave or not in employment.[74] Baxter showed that mothers' workforce participation increases with the age of their children: by the time their child is one year old, 44% of mothers are in employment, rising to 75% when the child is eleven.[75] She stated that "(o)ne of the very significant features of maternal employment in Australia is the high incidence of part time work". Thirteen per cent of women with children under one year of age work fewer than 15 hours a week.[76]

76. Therefore, most mothers who are not already working flexibly are likely to seek flexible working conditions on their return to work. There is some evidence that the preferred hours of work for women to combine work and care for their child are not always available: the Australian Institute of Family Studies reports that "some mothers in their FCCS survey group[77] returned to work full-time because "part-time work was not available to them in their job or if they wanted to continue their career".[78] The authors state:

> We heard this especially from FCCS parents with less say over their shifts, inflexible work hours, or particular constraints at home, such as being a single parent or having a partner who also works shifts[79]

77. This is also confirmed by the ABS which found that of the women who had returned to full-time (33,200 women or 16% of the total number of women with a child under two who had returned to work), six in ten preferred to work part-time.[80] The remaining 84% were employed part-time on their return to work.

## Evidence of the number of employees returning to an alternative position

78. ABS data shows that in 2011 there were 185,800 women (36% of the total number of women with a child under two) who had a job during pregnancy and had started or returned to work with a child under two at the time of the survey. Of these, "80%

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74 Australian Institute of Family Studies, Flexible Child Care and Australian Parents' Work and Care Decision-Making Research Report No 37, November 2016.

75 Jennifer Baxter, 'Employment Characteristics and Transitions of Mothers in the Longitudinal Study of Australian Children', Australian Institute of Family Studies Occasional Paper No 50, 2013, 8.

76 Ibid, 29.

77 See Appendix 1.

78 Australian Institute of Family Studies, Flexible Child Care and Australian Parents' Work and Care Decision-Making Research Report No 37, November 2016.

79 Ibid, [6.10]

80 Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011.

returned to the same employer and about one in five (19%) of these women reported returning to a role where their job tasks and/or responsibilities changed". Twenty per cent of the mothers returning to work changed employer/business. 104,500 women with a child under two (27% of the total number of women with a child under two) who had had a job during pregnancy permanently left their job, almost half of these (49%) saying the reason was "to care for the child." [81]

79. Most women returning to work after maternity leave requested adjustments to their working arrangements and most of these requests were granted, which suggests that they returned to a job which had changed from the one they left prior to giving birth. Of the 84% of women who returned to work as an employee, 77% requested adjustments to their working arrangements: most asked for part-time work or job sharing (50%), flexible hours (32%), a change in start and finishing times (16%) and changes to shift/roster patterns (15%). The majority of these requests were granted (89%).[82]

## Evidence of the number of employees who are made redundant

80. In its 2014 survey of discrimination against pregnant women and mothers returning to work, the AHRC found that nearly one-quarter (23%) of 2,000 women surveyed reported being made redundant through restructuring, or being dismissed or not having their fixed term contract renewed during maternity leave or on returning to work.[83]

81. The same survey found that one in ten women (11%) who had not yet returned to work reported that they either could not find work or could not negotiate return to work arrangements.[84]

82. In 2011, the ABS studied a cohort of 523,300 mothers with at least one child under two: 104,500 or 27% of women left the job they had had during pregnancy, with 49% of this group identifying their reason for leaving work as "to care for the child". The remaining nearly three-quarters of mothers did not leave their jobs.[85]

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[81] Ibid.

[82] AHRC, *Supporting Working Parents,* above n 12, 65.

[83] Ibid, 43.

[84] Ibid, 67.

[85] Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011.

83. Cooper and Baird, in their 2016 analysis of qualitative interviews with 66 employees and managers at two very large companies (see Appendix 1 for details) found that a "significant group" of women who had taken maternity leave found that a major organisational restructure had occurred while they were on leave, and some found their job no longer existed, despite the legal protections in place for women returning from maternity leave.[86]

## Characteristics of women exiting employment after maternity

84. As noted above, in its 2014 survey, the AHRC found many pregnant women and women returning to work after giving birth suffered discrimination. The survey also found that nearly one third of the women who had experienced discrimination at this time either resigned or started looking for another job.[87]

85. Baxter provided an analysis of the characteristics of mothers in relation to their participation in employment after having a child. She found that there are high rates of exit from employment amongst those who had been in short hours work prior to giving birth (fewer than 15 hours per week), those in lower status occupations and casual jobs. Generally, participation in employment after giving birth was lower for younger mothers, those with lower levels of education, or with health problems, those who are Indigenous and those with poor English proficiency. Single mothers or those with a non-employed[88] partner also had lower levels of engagement in paid work, as did mothers who were not employed when pregnant with their first child.[89]

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[86] Rae Cooper and Marian Baird, 'Bringing the "right to request" flexible working arrangements to life: from policies to practices (2015) 37(5) *Employee Relations* 568.

[87] AHRC, *Supporting Working Parents,* above n 12, 47.

[88] 'Non-employed' includes those unemployed and not in the labour force.

[89] Baxter, 'Employment Characteristics', above n 75, (ix).

## Question 3

What evidence or information is there, if any, about:

(i) the utilisation of IFAs by employees and employers to meet the needs of (1) parents and (2) carers.

(ii) the suitability of IFAs to meet the needs of employees who are parents or carers, for example, are IFAs applicable to terms in modern awards that deal with hours of work?

In answering Question 3, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answer. For example, the employee's age, gender, employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business.

### Utilisation of IFAs to meet the needs of parents and carers

86. In 2015, the Productivity Commission published a report into workplace relations regulation in Australia which found that "2% of Australian employees covered by the Fair Work Act" had reached an Individual Flexibility Agreement (IFA) with their employer. The final report expressed surprise that more employers and employees did not use IFAs, and noted that "many had not even heard of them".[90]

87. The Fair Work Commission General Manager reports on the use of IFAs, and her analysis of the period 2012 – 2015 based on the AWRS data found that 3% of employers reported that they had only one employee subject to an IFA, and a further 11% had more than one employee with an IFA.[91] The AWRS data from employees showed that 2% of employees had made an IFA during the research period.[92] This small percentage of employees using IFAs creates problems for data analysis: as the General Manager pointed out, if young people represent 15% of the workforce, and IFA use is at 2%, "then only 3 in every 1,000 employees randomly sampled would be both young and have an IFA." This "limits the ability to generalise the findings." With this caution in mind, it is noted that employees with a dependent child were about twice as likely to have an IFA than those without a dependent child.[93]

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90 Productivity Commission, *Workplace Relations Framework Final Report*, Commonwealth of Australia, 2015, 39-40.

91 Bernadette O'Neill, *General Manager's report into individual flexibility arrangements under s 653 of the Fair Work Act 2009 (Cth) 2012 – 2015*, Commonwealth of Australia, Melbourne 2015, [5.1].

92 Ibid, [5.2].

93 Ibid, [5.2.2].

88. The main reason given for not using IFAs by those employers who did not have any was "a preference for using informal/undocumented arrangements as an alternative" (43%), but this varied by employer size. Large employers said that their enterprise agreement "offered sufficient flexibility".[94] Another significant reason for not having IFAs given by employers in the AWRS data was that "no employees wanted a flexible work practice."[95]

## IFAs and other industrial instruments

89. Employers reported that in about three-quarters of cases (77%) the IFA was created to vary a condition of employment found in a modern award, while 21% varied a condition found in an enterprise agreement. A further 1% varied conditions from both.[96]

## Characteristics of employers making IFAs

90. Large employers (38%) were more likely than medium (20%) or small employers (12%) to have made IFAs; public sector organisations were more likely than private sector enterprises (41% compared with 14%). There was a geographical pattern to IFA use: employers from Tasmania, the Northern Territory and the Australian Capital Territory were most likely to have an IFA, with Victoria and Queensland least likely to have made an IFA.97

91. Of the employers with a single IFA, in 86% of the cases the employee had initiated the IFA, 81% of whom were existing employees within the enterprise.98 Amongst the multi-IFA employers, 67% reported that all or some of the IFAs they had made had been initiated by the employee.99

## The characteristics of employees with an IFA

92. The characteristics of employees who were the sole employee with an IFA in the business were as follows: 72% female, 11% from a non-English speaking background, 38% part-time, 13% casual, and 20% were over the age of 45. In the firms with more than one IFA, 35% had made their IFAs exclusively with female employees, and 48%

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94 Ibid, [5.1.2].
95 Ibid, [5.1.2].
96 Ibid, [5.1].
97 Ibid, [5.1].
98 Ibid, [5.1.3].
99 Ibid, [5.1.4].

had made some of their IFAs with female employees. More multi-IFA employers had made IFAs with part time employees than with casual employees.[100] In the multi-IFA employers, 44% of firms had made IFAs solely with female employees, while 20% had made IFAs solely with male employees. Of all the employers who reported that all their IFAs had been employee initiated, 53% were made only with female employees.[101]

### Suitability of IFAs to meet the needs of employees who are parents or carers

93. Seventy-six per cent of employers who had made IFAs varied arrangements for when work is performed; 29% varied overtime provisions; 23% varied penalty rates provisions; 27.5% varied allowances provisions; 19.6% varied leave loading provisions; and 36% varied payment of wages. Where an employer had an IFA or IFAs initiated by the employee, 85% of these instruments varied arrangements for when work is performed, compared with 62% where the employer initiated the IFA.[102]

94. Employers reported that employees were better off under the IFA because of improved work-life balance (54% of employers), and 48% of employers with IFAs reported that the IFA meant that workers were "able to meet non-work commitments (eg child care)."[103] Employee data on the IFA reflected the employer information above: 55% of IFAs initiated by employees varied arrangements for when work was to be performed. Of female employees initiating an IFA, 59% of the IFAs varied when work was to be performed, compared to 37% of men. Almost 60% of employees aged 55 years or more reported that their IFA varied when work was to be performed.[104]

95. In terms of outcomes for employees, 61% of employees who had initiated IFAs reported that an IFA outcome was "flexibility to better manage non-work related commitments". This figure was 42% across all employees with IFAs, including those initiated by employers. The FWC General Manager noted:

> A small number of employees who had responded 'other' (to question about the outcomes of the IFA) noted that their IFA allowed them to change their employment

[100] Ibid, [5.1.5].
[101] Ibid, [5.1.5].
[102] Ibid, [6.1.1].
[103] Ibid, [6.1.1].
[104] Ibid, [6.2.1].

> arrangements from full time to part time or permanent to casual. Some IFAs facilitated a transition to retirement or a return to work after a period of parental leave.[105]

96. Around 14% of all employees reported that they had sacrificed pay or conditions in order to benefit from their IFA (19% of women said they had done so, compared with 12% of men). Part-time and casual employees were more likely to have sacrificed pay and conditions than full-time and permanent employees, and were also less likely to view themselves as better off as a result of the IFA. Young workers and those from non-English speaking backgrounds were also more likely to consider that the IFA reduced their working conditions without making them better off.

97. Overall, the suitability of IFAs to meet the needs of employees seeking flexible working arrangements is limited by several factors. First, the IFAs are a regulatory instrument designed to permit a deviation from the existing legally binding terms of an award or enterprise agreement. This includes the jettisoning of monetary payments for unsociable hours or overtime. As we have seen, women are most likely to seek flexible working arrangements with the most common reason being to care for a pre-school aged child. The evidence shows one in 20 female employees reporting 'sacrificing' conditions of employment in order to obtain a benefit from their IFA (whether it be capacity to care or another non-care reason such as preparing to retire). Whereas the right to request provision is structured to create a conversation about accommodation, the IFA system actively raises the question about trading off conditions for flexibility, a reality reported in the evidence of the AWRS study.

98. The second reason IFAs are not ideal instruments for obtaining flexible work is that they can be terminated by either party in a relatively short period. This creates potential unpredictability for carers, who may need to make arrangements (for, say, out of home child care) well in advance. And the AWRS data suggests that termination of an IFA no longer suitable for family care needs, for example, may not be an option for unhappy employees: AWRS showed that 88% of employees unhappy with their IFA did not intend to terminate the agreement: most "preferred not to say the reasons…though some verbatim (sic) responses indicated that they did not want to risk losing their jobs".[106]

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105 Ibid, [6.2.2].

106 Ibid, [6.2.2].

## Question 4

| What evidence or other information is there (if any) about the nature and utilisation of family friendly working arrangements other than those discussed at Questions 1, 2 and 3 above?<br><br>In answering Question 4, please include evidence or information, if available, about the characteristics of employees and employers who are identified in your answer. For example, the employee's age, gender, employment status (full time, part time, casual); whether the employee is employed under a modern award, enterprise agreement, or other arrangement, and the size of the employer's business. |
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99. The research undertaken for this paper suggests that employees adopt different approaches when confronted with a need to adapt work for family care responsibilities other than making an application under one of the statutory provisions of the Fair Work Act. Four approaches are discussed: the use of informal procedures to request a flexible working procedure; a decision not to request a change in working arrangements despite being unhappy with the existing ones; 'buying' flexible working conditions from their employer by trading off existing entitlements and/or benefits of their current job in order to achieve the accommodation required; and finally leaving a job or the workforce generally.

### Use of informal procedures

100. As noted above, it is clear from a number of different sources that applications for flexible work arrangements made pursuant to the *Fair Work Act* form a small minority of the total number of requests for flexible working arrangements. For example, the AWRS data set show that a little more than 40% of the 3,057 employers received a request for a flexible working arrangement between 1 July 2012 and 2014, but only 1% of employers reported receiving a formal request pursuant to s 65 of the *Fair Work Act.*[107] Similarly, some 2,200 out of 7,883 employees in the AWRS sample (28%) said they had requested flexible work arrangements between July 2012 and 2014, but only 345 employees (4%) were identified as having made these requests pursuant to s 65 of the Act.[108] In relation to the use of IFAs, AWRS data suggest that "informal flexibility

[107] O'Neill, General Manager's Report, above n 9, (vii).
[108] Ibid, 17.

is much more prevalent than formal IFAs" (92% of those with a flexible work arrangement had made an informal agreement, compared to 8% with an IFA):

> In the first half of 2014, just over 30% of employees reported having an informal flexibility working arrangements with their employer that was not documented and signed.[109]

101. The Cooper and Baird case study of two large companies found "informality ruled in the request and response process in both organisations:, with company procedures routinely ignored. One interviewee said

> …there is a working from home form that's supposed to be filled in, but to be honest I haven't filled it in.[110]

102. The researchers found that the informal discussions between line manager and employee often failed to cover important matters of substance, such as the performance expectations and workload of the worker if the request for shorter hours were granted. It was 'rare' for agreements to include an undertaking about the redistribution of workload from the former working hours arrangement.[111] They state that:

> Despite the existence of detailed policies and procedures for assessing [requests for] FWA [sic, the authors are referring to flexible work arrangements] within both case studies and at the national policy level, the vast majority of interviewees, line managers and employees in both case studies lacked a clear understanding of organisational policies, enterprise agreement provisions, where relevant, or broader legal rights in relation to accessing flexible work.[112]

103. Only 13 of the 33 employees surveyed had heard of the s 65 provisions in the *Fair Work Act*, and the "overwhelming majority had a poorly developed understanding" of both the substance and procedures enshrined in the law.[113] This vacuum around the actual policy and legal requirements:

> …potentially opened a space for line managers to exert more influence, both formally and informally over employee access to flexible work arrangements.[114]

104. As discussed above, an approach based on informality shapes whether or not staff perceive they have entitlements in relation to work-life balance.[115] Baird and Cooper

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[109] O'Neill, General Manager's Report, above n 91, [5.2.1].

[110] Cooper and Baird, 'Bringing the right to request to life", above n 86, 576.

[111] Ibid, 577.

[112] Ibid, 574.

[113] Ibid, 574.

[114] Ibid, 576.

state that this explains the fact that staff did not perceive any entitlement to flexible work, and they linked their successful requests to being 'lucky' and expressed their gratitude to the person who had approved their request.[116] Staff making a request may be made to feel guilty for doing so, as in the case of a father who sought to reduce his days from five to four a week: the man's wife reported that "he was told how working four days a week would negatively impact on the workplace. He was made to feel guilty for asking for flexible working arrangements".[117] Informality is more likely to mean that decisions about requests were subject to the personal outlook and values of the line manager, rather than the extant company or legislative policies, substance and processes.[118]

## The strategy of no change: the 'discontented non-requesters'

105. The AWALI 2014 survey identified a 'sizeable group' of 'discontented non-requesters' who were not happy with their work arrangements but did not request flexibility.[119] AWALI 2014 found that 80% of workers made no request, and of these 61% were happy with their work arrangements, 15% said flexibility was not possible or available. There remained 31% of the non-requesters (this group was 23% of the whole sample) who were not content with their current working arrangements but did not make a request.[120]

106. In Australia generally there is a mismatch between worker preference and hours worked: ABS data showed that in 2015, 1.8 million Australians reported they would prefer to work fewer hours than they usually worked each week. Of these, more than a third (36%) wanted to work 6-10 fewer weekly hours, with an equal proportion (15% each) preferring 1-5 fewer hours a week, and 11-15 fewer hours a week.[121] The ABS reported that 35% of men and 42% of women always or often felt rushed or pressed for time. Rates were higher among those who provided care to another person than those who did not provide care (46% compared to 29% for men and 55% compared to 33%

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115 Walters and Whitehouse, 'Mothers' perceptions of support', above n 45, 769.

116 Cooper and Baird, 'Bringing the right to request to life", above n 86, 575.

117 AHRC, *Supporting Working Parents*, above n 12, 128.

118 Cooper and Baird, 'Bringing the right to request to life", above n 86, 576.

119 Natalie Skinner and Barbara Pocock (2011) 'Flexibility and Work-Life Interference in Australia' 55 *Journal of Industrial Relations* 118; Skinner, Cathcart and Pocock (2016), 'To ask or not to ask?', above n 60, 103.

120 Skinner and Pocock, AWALI 2014, above n 1, 43.

121 Australian Bureau of Statistics, Characteristics of Employment, Australia 2015, Cat No 6333.0, 2016.

for women).[122] The AWALI 2014 survey found that 63% of women working full-time and 49% of men working full-time experienced chronic time pressure; while 52% of women working part-time and about one-third of men working part-time experienced frequent time pressure.[123]

107. Research on these non-requesters, and the links to general data on working time preferences and work stress, is in its infancy. In 2016, Skinner et al used qualitative empirical techniques to examine the reasons underlying a decision not to request flexible working arrangements of 29 'discontented non-requesters.' This research showed that the decision not to request change could be attributed to a range of factors. This included low knowledge of the right to request, a policy-practice gap in the workplace, unsupportive workplace culture and practices of individual managers which may in some cases feed into fear of reprisals if the request was made. This research also suggests that being a discontented non-requester may be a stepping stone to resignation: one in four of the non-requesters studied by Skinner et al had changed jobs.[124]

## 'Buying' flexibility?

108. Where flexibility arrangements are subject to informal workplace decisions – largely detached from industrial instruments and workplace policies where they exist – workers' requests for flexibility are subject to the personal discretion of the decision-maker, usually their line manager, who is the de facto 'gate-keeper' to work-life adaption.[125] The strong role of personal managerial discretion in the informal processes may lead to workers 'paying' for the 'favour' they are seeking even though this trading off is not part of the statutory right to request and is unlikely to feature in formal workplace policies.

109. In their case study of two large firms, Cooper and Baird found that verbal agreements could change hours without any undertakings about reducing workload, job redesign or reassessed performance goals:

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[122] Australian Bureau of Statistics, Gender Indicators, Australia 2013, Cat No 4125.0, 2013 (2007 figures).

[123] Skinner and Pocock, AWALI 2014, above n 1, 17.

[124] Skinner, Cathcart and Pocock (2016) 26 *Labour and Industry* 'To ask or not to ask?', above n 60.

[125] Cooper and Baird, 'Bringing the right to request to life", above n 86.

> Many employees felt…compelled to undertake a similar volume of work, regardless of undertaking less paid hours.[126]

> I have been carrying a full-time workload for a number of years now despite part time hours. But I still cannot keep up with colleagues without children who work way greater than full-time hours, and work on weekends or later at night as they don't have childcare duties.[127]

110. The Australian Human Rights Commission research found significant discrimination against pregnant women and women returning to work after giving birth, some of which took the form of de facto trade-offs in exchange for flexible work.[128] Half of the women surveyed reported discrimination "when they requested flexible work arrangements".[129] Some women "said they felt pressured by the employers to give up their permanent status and accept casual employment in return for flexibility."[130] For example, one participant of the survey stated:

> On return to work my employer advised me…that unless I was going to come back [to] work full time, then I would be expected to take on a new position, and that position would be demoting me [two levels down]. I indicated that the role could easily be performed in a part time capacity…or the role could easily be performed in a job share capacity. Both suggestions were refused and my employer was not willing to contemplate a trial period.[131]

111. In another case, the worker achieved flexible working arrangements at the cost of "a reduction in role and salary and poor performance review.:[132] Another respondent commented:

> I was still granted flexibilities, ie work from home, reduced hours etc but they were in a demoted position and not the one I held immediately before commencing parental leave.[133]

112. One employee reported that working flexibly made jobs less secure:

> The company was going through a restructure and were making people redundant. Three people from my team were made redundant, a father who came back from 12 months parental leave, a female part time worker with two children and myself, part

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126 Ibid, 577.

127 AHRC, *Supporting Working Parents,* above n 12, 128.

128 Ibid, 43.

129 Ibid, 43.

130 Ibid, 86.

131 Ibid, 95.

132 Ibid,128.

133 Ibid.

> time and pregnant…all three of us sat in the top 10 of high performers, but people who were full time and under-performing kept their jobs.[134]

### Finding another job or exiting employment altogether

113. As discussed in the responses to questions 1 – 3 above, one response to workplace inflexibility is for individual employees to leave that job and find another one. Some workers may decide to exit the workforce altogether.

114. In the context of people caring for adults or children with a disability, Hill et al estimate the risk of exiting employment for workers with these caring responsibilities using the HILDA longitudinal data. Those at higher risk of leaving employment to care were those in casual employment (and 84% of casual workers are employed part time), those working part time prior to commencing caring, those with no supervisory responsibilities, non-union members and those working for a smaller firm (under 100 employees):

> The finding that casual employees are more likely to leave employment may indicate that employees in these jobs are less able to negotiate change in their employment conditions that facilitate caring…part time work was more likely to be precarious, with 43% of part timers working casual.[135]

115. Workers who cared for a disabled person and who also had a child under five faced an increased risk of leaving employment altogether of 50% compared with the baseline predication of the risk of a new carer leaving employment of 8%.[136]

## CONCLUSION

116. This report shows that employees are seeking to adapt their working times in order to meet their domestic care responsibilities in significant numbers. The statutory schema of s 65 of the Fair Work Act plays only a marginal role in shaping the processes of request and employer response. While a substantial number of employees and employers agree on flexible working arrangements, the widespread use of informal processes outside the operation of the Act carries risks in relation to lack of

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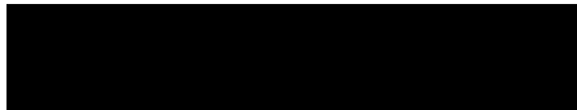
134 Ibid.

135 T Hill, C Thomson, M Bittman and M Griffiths, 'What kind of jobs help carers combine care and employment?', Australian Institute of Family Studies, Family Matters No 80, 2008, 27, 29.

136 This probability referred to a individual with the average characteristics of the new carer sample: a woman, aged 45 years, of English-speaking background, without a disability, caring for less than 5 hours per week, not an outright home owner, and in a couple, whose partner was not a carer, and whose partner was earning around $32,000 a year. Ibid.

documentation of the new arrangements and the extra-statutory trading of conditions or other work benefits in exchange for flexibility. Where requests are processed informally, great discretion resides with the decision-maker, usually a line manager, with the concomitant risk of unconscious bias, actual discrimination and arbitrary decisions based on factors which are not part of the Fair Work Act's provisions dealing with the right to request flexible work and the permissible grounds for refusal. Finally, the research shows that work/life stress persists, and that some workers who are unhappy with their current working arrangements are unwilling to request a change or believe that change is not possible.

**I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Commission.**



**Jill Murray**

**(Signed)**

**Date** 6/5/2017

## Appendix 1

**Research Note**

All percentages quoted from secondary sources have been rounded up or down to whole numbers.

**Research Methodologies**

Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report 2014*, Sydney, 2014.

Quantitative Data : the Mothers Survey of 2,000 mothers about their experience of discrimination in pregnancy, upon taking or requesting leave and turning to work following parental leave. The Fathers and Partners Survey of 1,000 fathers and partners.who took two weeks of leave to care for their child under the Dad and Partner Pay (DaPP) scheme. 'As only a small proportion of new fathers and partners access the DaPP scheme, it is not representative of all working fathers who have had a child.'

Qualitative Data : group consultations with 85 individuals, 180 representatives of more than 150 community organisations including legal centres, working women's centres, unions, health organisations and academics; 170 employers and business and industry peak bodies, including those from a range of business sizes, sectors and industries.

Submissions: the National Review received 333 submissions from individuals who had experienced discrimination; 55 submissions from community organisations, 59 submissions from employers, and from business and industry associations.

National Roundtable: considered academic and social policy research from Australia and international sources; data on enquiries and complaints received by the Human Rights Commission, the Fair Work Ombudsman, and State and Territory anti-discrimination and equal opportunity authorities.

Methodology

Australian Institute of Family Studies, Flexible Child Care and Australian Parents' Work and Care Decision-Making Research Report No 37, November 2016.

*Methodology*

Draws on responses to two surveys: qualitative interviews with 119 parents including police, nurses and paramedics in the Flexible Child Care Study; and surveys and interviews with 319 parents in the School Aged Care Survey.

Rae Cooper and Marian Baird, 'Bringing the "right to request" flexible working arrangements to life: from policies to practices (2015) 37(5) *Employee Relations* 568.

*Methodology*

Qualitative interviews with 66 employees and line managers (33 employees, all interviewees screened to ensure they had direct experience of making/dealing with a request for flexible work arrangements) from two companies: a large telecommunications company with 30,000 employees and a large financial services institution with 42,000 employees.

A Crettenden, A Wright and N Skinner, 'Mothers caring for children and young people with developmental disabilities: intent to work, patterns of participation in paid employment and the experience of workplace flexibility' (2014) 17(3) *Community, Work and Family* 244.

*Methodology*

Draws in the South Australian Juggling Work & Care Study of 287 mothers who were primary care givers of children and young adults with developmental disabilities aged 0 – 25.

T Hill, C Thomson, M Bittman and M Griffiths, 'What kind of jobs help carers combine care and employment?', Australian Institute of Family Studies, Family Matters No 80, 2008, 27.

*Methodology*

Draws on data from the HILDA longitudinal study of 10,000 people in Waves 1 – 4, and tracks the employment trajectories of 595 workers who became carers for adults or children with a disability during Waves 1, 2, 3 and 4 (2001 – 2004).

Institute for Social Science Research, *Paid Parental Leave Evaluation: Final Report No 4*, University of Queensland, 2014.

*Methodology*

Survey of mothers prior to PPL (1809 participants) and post-PPL (2,444).

Natalie Skinner and Barbara Pocock, The Australian Work Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia in 2014, Centre for Work and Life, University of South Australia, Adelaide, 2014.

*Methodology*

The concepts, methods, literature, measures and pre-tests underpinning AWALI are set out in Pocock, Williams and Skinner (2007) The Australian Work and Life Index (AWALI): Concepts, Methodology & Rationale. AWALI surveys a randomly selected cross-section of the adult Australian employed population by means of computer-assisted telephone interviews (CATI). AWALI surveys different people each year: it is not a longitudinal survey of the same people. As such it can be seen as 'taking the temperature' of work-life interference at a point in time, and it allows us to compare results over time.

AWALI 2014 is a national stratified sample of interviews conducted over four weekends in March. As in previous years, Newspoll conducted the survey. In accordance with standard Newspoll practice, respondents were selected by means of a random sample process which includes a quota set for each capital city and non-capital city area, and within these areas a quota set for statistical divisions or subdivisions. Household telephone numbers were selected using random digit dialling, and there was a random selection of an individual in each household by means of a 'last birthday' screening question. The survey sample comprises 2,690 employed persons (2,279 employees and 411 were self-employed). (Source: Skinner and Pocock above, p 9)

Natalie Skinner, Barbara Pocock and Claire Hutchinson, Report to Fair Work Australia, A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions, 2015.

*Methodology*

Qualitative interviews with 25 employees selected from a group which had made a request for flexible work or extended unpaid parental leave, and 15 employers who had direct experience in managing such a request. The authors also rely on the AWALI 2012 and 2014 quantitative data.

Bernadette O'Neill, General Manager's report into the operations of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s 653 of the Fair Work Act 2009 (Cth) 2012 - 2015, Commonwealth of Australia, Melbourne, 2015.

*Methodology*

The General Manager of the Fair Work Commission has an obligation pursuant to s 653(1) of the Fair Work Act to conduct research into the operation of s 65(1) and 76(1) of the Act. The Report relies on

(1) Data from the Australian Workplace Relations Study (AWRS) which surveyed 3057 enterprises and 7883 of their employees between February and July 2014.
(2) A qualitative study (published as N Skinner et al, 'A Qualitative Study of the Circumstances and Outcomes of the NES RTR provisions', Centre for Work + Life, University of South Australia, 2014) based on responses of 25 employees and 15 employers with direct experience of making or handling RTR requests.

Bernadette O'Neill, General Manager's report into individual flexibility arrangements under s 653 of the Fair Work Act 2009 (Cth) 2012 – 2015, Commonwealth of Australia, Melbourne 2015.

*Methodology*

As per (1) above.

Natalie Skinner, Abby Cathcart and Barbara Pocock (2016) 26 *Labour and Industry* 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' 103.

*Methodology*

Uses the AWALI data augmented by 29 qualitative interviews.

A Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340.

Also draws in the South Australian Juggling Work & Care Study of 287 mothers who were primary care givers of children and young adults with developmental disabilities aged 0 – 25 (see Crettenden et al above) and uses data from surveys of fathers who were the secondary carers for these children (n= 201).

# BIBLIOGRAPHY

Australian Bureau of Statistics, Characteristics of Employment, Australia 2015, Cat No 6333.0, 2016.

Australian Bureau of Statistics, Gender Indicators, Australia, August 2016, Cat No 4125.0

Australian Bureau of Statistics, General Social Survey: Summary Results, Australia 2014, Cat No 4159.0, 2015.

Australian Bureau of Statistics, Measures of Australia's Progress, Cat No 1370.0, 2013.

Australian Bureau of Statistics, Pregnancy and Employment Transitions, Cat No 4913.0, 2011.

Australian Bureau of Statistics, Workforce Participation and Workplace Flexibility – Victoria, Cat No 6210.2, 2010.

Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report 2014*, Sydney, 2014.

Australian Institute of Family Studies, *Flexible Child Care and Australian Parents' Work and Care Decision-Making Research Report* No 37, November 2016.

M Baird and A Heron 'Women, work and elder care: new policies required for inclusive growth' in P Smyth and J Buchanan (eds), I*nclusive Growth for Australia: Social Policy as Economic Investment*, Allen and Unwin, Sydney, 2012, 242.

Jennifer Baxter, 'Employment Characteristics and Transitions of Mothers in the Longitudinal Study of Australian Children', Australian Institute of Family Studies Occasional Paper No 50, 2013, 8.

Jennifer Baxter and Jennifer Renda, 'Review of government initiatives for reconciling work and family life', Australian Institute of Family Studies, 2015.

Rae Cooper and Marian Baird, 'Bringing the "right to request" flexible working arrangements to life: from policies to practices (2015) 37(5) *Employee Relations* 568.

A Crettenden, A Wright and N Skinner, 'Mothers caring for children and young people with developmental disabilities: intent to work, patterns of participation in paid employment and the experience of workplace flexibility' (2014) 17(3) *Community, Work and Family* 244.

T Hill, C Thomson, M Bittman and M Griffiths, 'What kind of jobs help carers combine care and employment?', Australian Institute of Family Studies, Family Matters No 80, 2008, 27.

Institute for Social Science Research, *Paid Parental Leave Evaluation: Final Report No 4*, University of Queensland, 2014.

Paula McDonald, Keith Townsend and Amy Wharton, 'The legitimation and reproduction of discourse-practice gaps in work-life balance' (2013) 42(2) *Personnel Review* 205.

Bernadette O'Neill, *General Manager's report into individual flexibility arrangements under s 653 of the Fair Work Act 2009 (Cth) 2012 – 2015*, Commonwealth of Australia, Melbourne 2015.

Bernadette O'Neill, *General Manager's report into the operations of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s 653 of the Fair Work Act 2009 (Cth) 2012 - 2015*, Commonwealth of Australia, Melbourne, 2015.

Barbara Pocock (2016) 'Holding up half the sky? Women and work in the 21st century' 27(2) *The Economics and Labour Relations Review* 147.

Barbara Pocock, Sara Charlesworth and Janine Chapman, 'Work-family and work-life pressures in Australia: Advancing gender equality in "good times"? (2013) 33 I*nternational Journal of Sociology* 594.

Productivity Commission, *Workplace Relations Framework Final Report*, Commonwealth of Australia, 2015, 39-40.

Belinda Reeve, Dorothy H Broom, Lyndall Strazdins and Megan Shipley, 'Regulation, Managerial Discretion and Family-Friendliness in Australia's Changing Industrial Relations Environment' (2012) 54(1) *Journal of Industrial Relations* 57.

Natalie Skinner, Abby Cathcart and Barbara Pocock (2016) 26 *Labour and Industry* 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' 103.

Natalie Skinner and Barbara Pocock, *The Australian Work Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work and Life, University of South Australia, Adelaide, 2014.

Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 55 *Journal of Industrial Relations* 118.

Natalie Skinner, Barbara Pocock and Claire Hutchinson, *Report to Fair Work Australia, A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions*, 2015.

Peter Walters and Gillian Whitehouse, 'Mothers' perceptions of support in the workplace: a sense of entitlement or resignation?" (2015) 51(3) *Journal of Sociology* 769.

Brigid van Wanrooy, 'Couple Strategies: Negotiating Working Time over the Life Course', in Ann Evans and Janeen Baxter (eds), *Negotiating the Life Course: Stability and Change in Life Pathways*, Springer Netherlands, 2013.

A Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340.

# EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT)

General Practice Note

## 1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"), including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

## 2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

## 3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

## 4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

***Harmonised Expert Witness Code of Conduct***

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

## 5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

## 6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

## 7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) **t**he agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

***Conference of Experts***

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

***Joint-report***

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

## 8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

## 9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

# HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

## APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

## GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

## CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

## SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (I) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

## DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

   (a) confer with any other expert witness;

   (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

   (c) abide in a timely way by any direction of the Court.

## CONFERENCE OF EXPERTS

7. Each expert witness shall:

   (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

   (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

# CONCURRENT EXPERT EVIDENCE GUIDELINES

## APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

## OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

## CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

## CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

## PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.