



**WRITTEN SUBMISSION  
to the  
AUSTRALIAN INDUSTRIAL  
RELATIONS COMMISSION  
PARENTAL LEAVE FOR LONG-TERM  
CASUAL EMPLOYEES**

**(C Nos: 39482, 39483, 39484, 39485 and 39486 of 2000)**

**2 APRIL 2001**

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## INTRODUCTION

The Australian Catholic Commission for Employment Relations (ACCER) is a Commission established by the Australian Catholic Bishops' Conference (ACBC) and supported by the Australian Conference of Leaders of Religious Institutions (ACLRI).

The ACCER makes this submission to the Australian Industrial Relations Commission (AIRC) on behalf of Catholic Church organisations engaged in the sectors of health, education, community services and diocesan and parish administration.

Fundamentally, the ACCER makes this submission based on the principles contained within Catholic Social Teaching. The ACCER therefore makes this submission from a unique industrial position, that of employer and social advocate.

In principle the ACCER supports the claim of the ACTU for the provision of parental leave to "long term" casual employees. In this case, the ACCER argues that parental leave should be provided to those long term employees not fortunate enough to have been deemed as either full-time or part-time.

While the ACCER has concerns about the misclassification of employees as "long-term" casuals when in fact they are more properly viewed as *full-time* or *part-time* employees, it contends that the AIRC must deal with the practical reality at hand. It would appear that there is an increasing number of employees being engaged as "casual employees" over an extended period. This contradicts the commonly accepted understanding of what is meant to be a "true" casual employee; that is, an employee engaged on a *short term, irregular and uncertain basis*.

While the ACCER does not wish to reinforce or endorse the misclassification of employees as "long term" casuals, it acknowledges that this has occurred, is occurring and, in all likelihood may continue to occur into the future. Given this, the ACCER does not wish this case to be hindered by arguments about the definitional aspects of different types of employment. This may be more appropriately dealt with by the AIRC at a later date.

In essence, this submission focuses on the achievement of a fair, just and practical implementation of parental leave for employees who have been engaged as "casual employees" but who, in fact, work on a regular and systematic basis *for several periods of employment or an ongoing period of employment during a period of at least 12 months*. Such employees often have the same workplace continuity as permanent employees, yet are engaged without the same entitlements, such as parental leave.

## **CATHOLIC SOCIAL TEACHING**

Catholic Social Teaching is a collection of teachings and principles, based on Christian values and beliefs, which aim to bring about a good and fair society for the benefit of all.

Official texts establishing Catholic Social Teaching include papal documents - known as encyclical letters - documents of the Second Vatican Council - 1962 to 1965 - and the statements of local, regional and international conferences of Catholic Bishops, such as the Bishops' Committee for Employment Relations (BCER). Such texts often respond to social questions and problems occurring at the time of writing. However, the principles and teachings contained in Catholic Social Teaching still have relevance to modern society.

The primary principle affirmed by Catholic Social Teaching is that of the dignity of the individual. This should be at the core of any industrial relations system.

Within this context the Catholic Social Teaching promotes the following fundamental principles:

- the right to work;
- the right to just wages;
- the right to form associations;
- the right to strike; and
- the right to adequate rest.

For the purposes of this submission, the employment relationship as identified in Catholic Social Teaching and the role of the third party in the employment relationship will be examined. This section will also focus on the importance of integrating family and work commitments.

### **The employment relationship**

Work is considered to be one of the principal means by which people seek personal fulfilment, dignity and make their contribution to the common good. Therefore, people should not be treated like any other resource or commodity in the market.

Catholic Social Teaching prescribes mutual duties on both the employer and the employee, which are based on the just treatment of people. In particular, employees have the duty to *“perform entirely and conscientiously whatever work has been voluntarily and equitably agreed upon ....”*<sup>1</sup>

Correspondingly, Catholic Social Teaching places the following duty on employers:

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<sup>1</sup> Pope Leo XIII, *Rerum Novarum; On the condition of the working classes*, May 1891; Daughters of St. Paul: Boston, page 18.

*“Workers are not to be treated as slaves; justice demands that the dignity of human personality be respected in them...”<sup>2</sup>*

Therefore, the relationship between the employer and employees should be one of mutual respect and dignity, with both employer and employees working towards the objectives of the business and security of employment.

### **The Indirect Employer**

Underlying and supporting the relationship between the employer and employees is the *indirect* employer.

*“Apart from governments, significant influence on the employment relationship can come from courts, tribunals and other institutions which shape the legal framework and the manner in which the employer/employee relationship is regulated.”<sup>3</sup>*

On occasions, it is recognised that the relationship between the employer and the employee may not be harmonious and that matters of difference between the employer and employee may not be easily resolved. An independent third party may be required to assist employers and employees to settle such differences in a fair and just manner.

In some instances it may also be necessary for an industrial tribunal to intervene in the employment relationship, in order to protect the social and economic considerations and interests of the community. Additionally, the indirect employer may also think it appropriate to establish a set of minimum standards of wages and conditions of employment based *“on respect for the dignity of each human person engaged in the workplace and cognisant of the needs of the worker and his or her dependents.”<sup>4</sup>*

### **Family and work**

Catholic Social Teaching intricately binds the right to work and the formation of family life. Indeed, *Laborem Exercens* states explicitly that *“work constitutes a foundation for the formation of a family.”<sup>5</sup>*

While a family is often dependent on the income earned through work, the formation of a family requires a worker to have the right to rest and to be able to attend to family and community commitments and to provide for the emotional and spiritual care and support of family members.

Correspondingly, families provide support to the employee. Physical, spiritual and emotional nurturing is often provided by families, which assist the employee to successfully complete the tasks required by the workplace.

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<sup>2</sup> Pope Leo XIII, *Rerum Novarum*; *On the condition of the working classes*, May 1891; Daughters of St. Paul: Boston, page 18.

<sup>3</sup> Bishops' Committee for Industrial Affairs, *Industrial Relations - The Guiding Principles*, August 1993, page 4.

<sup>4</sup> Bishops' Committee for Industrial Affairs, *Industrial Relations - The Guiding Principles*, August 1993, page 5.

<sup>5</sup> Pope John Paul II, *Laborem Exercens*, *On Human Work* September 1981, St. Paul Publications: Homebush page 41.

## **THE ACTU CLAIM**

On the 15th February 2001, the Australian Council of Trade Unions (ACTU) made an application to the Australian Industrial Relations Commission (AIRC) to vary the following awards:

- Vehicle Industry - Repair, Services and Retail Award 2000;
- Retail, Wholesale and Distributive Employees (NT) Award 2000;
- The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998;
- Clerical and Administrative Employees (Victoria) Award 1999; and
- Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993.

The application seeks variation to the awards to provide an entitlement to parental leave for an “eligible” casual employee. In this regard, an “eligible” casual employee is considered to be *“a casual employee employed by an employer on a regular and systematic basis for several periods of employment or an ongoing period of employment during a period of at least 12 months.”*<sup>6</sup>

A further application seeks to vary the *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993* to include a parental leave entitlement for all eligible employees.

For the purposes of this submission an “eligible” casual employee is considered to be a “long term” casual employee.

The ACCER supports, in principle, the application to vary the awards. It is contended that the provision of parental leave for “eligible” casual employees is equitable and assists the employee in balancing the relationship between work and family commitments.

This corresponds with the principles of Catholic Social Teaching relating to the integration of work and family commitments and responsibilities. Further, Catholic Social Teaching also supports the right of employees to rest away from the workplace in order to spend time with family members. Such time away from the workplace is especially valuable in the early days of family life.

Further information relating to the detail of the implementation of the claim is discussed in **Part D** of this submission.

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<sup>6</sup> Applications to vary the Clerical and Administrative Employee (Victoria) Award 1999; Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993; The Hospitality Industry - Accommodation, Hotels and Gaming Award 1998; Vehicle Industry - Repair, Services and Retail Award 2000 and the Retail Wholesale and Distributive Employees (NT) Award 2000

## **THE REGULATORY FRAMEWORK**

The principal objects of the *Workplace Relations Act 1996* [the Act] support the provision of parental leave for “long term” casual employees within the award structure. In particular, the principal objects explicitly require the Act to:

- ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment;
- assist employees to balance their work and family responsibilities;
- respect and value the diversity of the workforce by assisting to eliminate discrimination on the basis of certain characteristics, including family responsibilities; and
- assist to give effect to Australia’s international obligations.<sup>7</sup>

The Act establishes the award system as the means of determining a safety net of *fair* minimum terms and conditions of employment. Such a safety net is to take into consideration the need to provide fair minimum standards for employees in the context of living standards in Australia.<sup>8</sup>

Given the emphasis the Act places on ensuring that discrimination on the basis of family responsibilities is minimised or eliminated, the inclusion of unpaid parental leave for employees should be considered to be a minimum standard in the context of the living standards in Australia today.

Furthermore, the Act contains minimum parental leave entitlements in Schedule 14 and establishes parental leave as a minimum term and condition of employment with its inclusion in Schedule 1A. This indicates again the emphasis in the Act of ensuring that employees have access to appropriate parental leave.

The ACCER maintains that the award system continues to be one of the most important features of the Australian industrial relations system. Therefore, the review and maintenance of the award system becomes important in ensuring that the employment conditions outlined in awards do not fall behind accepted community standards.

Furthermore, the award system is used often as a benchmark. That is, employers and employees will use an award as a basis for providing information about the terms and conditions of employment within a particular industry or the type of work to be undertaken. Given this, variations to the terms and conditions contained in awards may often have a wider influence than just the parties bound by the award.

Among other objectives the review and maintenance of the award system should continually seek to improve the living standards of those employees who may be unwilling or unable to negotiate directly with their employer. Such employees are

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<sup>7</sup> *Workplace Relations Act 1996* section 3

<sup>8</sup> *Workplace Relations Act 1996* section 88B

often those who are vulnerable or marginalised within the labour market; thus requiring protection and improvement in terms and conditions of employment from the award system.

Section 89A(2) of the Act outlines the allowable matters that may be contained in an award. Notably, this specifies parental leave, including maternity and adoption leave.<sup>9</sup> Furthermore, section 89A(2) includes “type of employment” such as full time employment, casual employment, regular part-time employment and shift work as allowable award matters.<sup>10</sup>

All of the awards involved in the application, except the *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993*, define a casual employee as being an employee who is “engaged and paid as such.”<sup>11</sup>

The *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993* defines a casual as those people “employed by the hour...”<sup>12</sup>

Additionally, the *Vehicle Industry - Repair, Services and Retail - Award 1983* includes the following exception:

*“Except for persons principally employed in tyre fitting as defined and/or in tyre repairing and retreading processes as defined. The maximum period for which a casual employee can work continuously on a full-time basis (i.e. the total daily and weekly hours elsewhere prescribed in this award) shall be six weeks. In any case where such full-time employment extends beyond six weeks, the employee shall thereafter be deemed to be employed by the week.”*<sup>13</sup>

The ACTU claim seeks variation to the awards to provide an entitlement to casual employees who have been employed *on a regular and systematic basis for several periods of employment or an ongoing period of employment during a period of at least 12 months.*<sup>14</sup>

Application has been made to vary the parental leave clauses in each of the awards to include an entitlement for an “eligible” casual employee. The exception is the *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993*, where the parties seek to include a parental leave clause in the award.

The application being made by the ACTU contains similar terms as those contained currently in the Act; namely, those applying to the *Termination of Employment* provisions under the Act and the related regulations.

In particular the Act allows for regulations to exclude certain employees from the Termination of Employment provisions, this includes “employees engaged on a casual basis for a short period of time.”<sup>15</sup>

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<sup>9</sup> *Workplace Relations Act 1996* section 89A(2)(h)

<sup>10</sup> *Workplace Relations Act 1996* section 89A(2)(r)

<sup>11</sup> *Vehicle Industry - Repair, Services and Retail - Award 1993* [V0019] Clause 6(f)(i); *Retail, Wholesale and Distributive Employee (NT) Award 2000* [R0018] Clause 10.2; *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* [H0008] Clause 15.2; *Clerical and Administrative Employees (Victoria) Award 1999* [C1128] Clause 13.4

<sup>12</sup> *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993* [T0392] Clause 2(a)

<sup>13</sup> *Vehicle Industry - Repair, Services and Retail - Award 1993* [V0019] Clause 6(f)(i)

<sup>14</sup> ACTU, *Parental Leave for long-term casual employees*, C No's; 39482-39486 of 2000, Vol. 1, Written Submission, page 9.

<sup>15</sup> *Workplace Relations Act 1996* section 170CA



The regulations identifies that “a casual employee is taken to be engaged for a short period unless:

- (a) *the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and*
- (b) *the employee has, or but for a decision by the employer to terminate the employee’s employment, would have had, a reasonable expectation of continuing employment by the employer.*<sup>17</sup>

The ACCER submits that, in this case, it is appropriate to adopt similar wording to that contained in the Termination of Employment Provisions and related regulations. This enables consistency and regularity within the employment relationship and within the legal interpretation of the Act.

The practical implications of the implementation of such provisions into the specified awards will be discussed in **Part D** of this submission.

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<sup>16</sup> *Workplace Relations Act 1996* section 170CC(1)(c)

<sup>17</sup> *Workplace Relations Regulations* regulation 30(B)(3)

## **Implementation of Parental Leave for Eligible Casual Employees**

As stated in **Part C** of this submission, the ACCER supports, in principle, the provision of Parental Leave for “long term” casuals as such employees should really be considered to be permanent or part time employees.

Furthermore, there appears to be growing awareness within the community regarding the need to find a “balance” between work and family commitments. Recent academic studies and workplace surveys have brought to public attention the allegedly increasing number of hours people are working each week, and the apparently disproportionate amount of time people are spending at the workplace.

In response to this and as a means of attracting and retaining valuable employees, employers are increasingly implementing human resource policies and procedures aimed at assisting employees to balance work and family commitments. Such policies and procedures often take a unique form, dependent upon the workplace and the needs of employees within that organisation.<sup>18</sup>

In this sense employees employed under the terms and conditions of an award should not be disadvantaged because they choose or have no other choice than the award system to determine terms and conditions of employment. Indeed, the *TABCORP - Australian Services Union Telephone Betting Enterprise Agreement 1999*, includes an entitlement to parental leave for “casual employees with 12 months or more unbroken service are entitled to maternity, paternity or adoption leave...”<sup>20</sup> Yet, this provision is not reflected in the *Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993*.

Finally, the ACCER contends that the provision of parental leave to “long term casual” employees is in accordance with the provisions of the Act and it is within the jurisdiction of the AIRC to grant the application to vary.

### ***Issues of implementation***

Consent has largely been reached, in principle, to the inclusion of “eligible” casual employees into the parental leave clauses of the relevant awards. However, some concerns have been raised by the parties in respect of the implementation of the claim.

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<sup>18</sup> *Workplace Guide to Work and Family*, Department of Employment, Workplace Relations and Small Business; Work and Family Unit, Work and Family Resources

<sup>19</sup> *Workplace Guide to Work and Family*, Department of Employment, Workplace Relations and Small Business; Work and Family Unit, Work and Family Resources, page 7.

<sup>20</sup> *TABCORP - Australian Services Union Telephone Betting Enterprise Agreement 1999*, Appendix A, clause 8

During the proceedings held on the 23rd March 2001, the ACCI consented to the applications in four of the matters, subject to “there being scope for all employers in other awards, of these present awards to argue for an exemption for small business.”<sup>21</sup> The ACCER does not agree with the seeking of an exemption for small business. It is not considered to be either fair or just for employers, with a minimal number of employees, or earning below a stated threshold profit, to be removed from their obligations towards employees. Additionally there appears to be inherent difficulties in applying a definition of small business.

Within the community there are a number of differing definitions of small business. In itself, this is fraught with problems of inconsistency. Moreover, there is potential for some employers to manipulate their company structures in order to fall within the threshold of “small business”. This may allow some employers to avoid their responsibilities to “long term” casual employees.

Employees may therefore be disadvantaged in working for small organisations, and become disinclined to work for small businesses. This, in turn, may correspond into an inability for small business to attract quality staff, especially casual employees.

The AI Group [AiG] also raised a number of concerns. In particular, the AiG has stated that it is concerned with the detail of the application in relation to how the changes may affect the labour hire sector.

The ACCER recognises that the labour hire sector is a growing phenomenon within a variety of industries within the Australian economy. It has therefore given careful consideration as to the effect that the parental leave for “long term” casual employees may have on this sector of employment .

In particular, during the proceedings of the 23rd March 2001, the AiG raised the concern that labour hire firms are not able to guarantee a return to work in the position that the employee held prior to going on paternity leave.

However, the ACCER would contend that the same situation could confront any employer with a “long term” casual employee taking parental leave, irrespective of whether they are working for a labour hire firm or not. Furthermore, it needs to be remembered that this claim affects “long term” casual employees and not “true” casuals (those people employed on a short term, irregular basis). In this regard, the Termination of Employment provisions might come directly into relevance if there is not a comparable position for the return to work. Justice would demand that the true circumstances of the person's employment be examined to determine whether the employee was properly engaged on a casual basis or not.

Pertinently, it is the ability to return to the workplace which should be the focus of the parental leave entitlement, rather than that of the casual employee's place of work. In effect, the eligible casual employee should have the right to return to work in a “comparable” position to that which was held before taking parental leave. This is currently provided for in the existing parental leave clauses for full-time and part-time employees. It is contended that the clarification relating to what constitutes a

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<sup>21</sup> Transcript of proceedings, *Applications pursuant to Section 113 of the Act to vary the Vehicle Industry (Repair, Services and Retail) Award 1993, Retail, Wholesale and Distributive Employees (NT) Award 2000, the Hospitality Industry (Accommodation, Hotels, Resorts and Gaming Award 1998, Clerical and Administrative Employees Award 1999 and Totalizator Agency Board of Victoria Off Course Totalizator Employees Award 1993 Re: Parental Leave for Certain Classes of Individuals*, Friday 23rd March 2001.

“comparable” position is contained in the sufficiently developed body of law already in existence.

Concerns have also been raised as to the interpretation of in relation to what constitutes “regular and systematic” work for a casual employee and as to how “several periods of employment or an ongoing period of employment of at least twelve months” is to be measured.

It is recognised that such terms may be open to interpretation. However, it is contended again that there is a sufficiently developed body of law, most notably within the Termination of Employment provisions of the current Act, which may assist the parties.

Those cases should assist with the definition of who is really an “eligible” casual and thereby who is able to access the entitlement to parental leave. These legal precedents may help in avoiding the inconsistency and ambiguity found across awards with respect to the definition of “casual employees.” In this respect, it may be useful for the parties, at some stage, to review the definition of "casual" employee in each award.

Therefore, as suggested by the ACCI in the hearing held on the 23rd March, the ACCER would support the introduction of guidelines relating to the implementation of parental leave for long-term casual employee. Such guidelines may consolidate the current understanding of any terms that may be open to interpretation and assist with the practical implementation of the parental leave provision.

If this application is to be granted by the AIRC, the ACCER would also suggest that the parental leave provision be open to review after a 12 month period. Such a review may enable the parties to further refine the provision to ensure that a just, fair and practical measure has been introduced.

*If the Commission pleases.*