Senate Select Committee on Work and Care

Fair Work Commission

Questions on Notice

Senate Select Committee asked the following question:

A. Wages in the childcare sector

The FWC decision in November to award a 15 per cent pay rise to Australia's aged care workforce in light of expert evidence that 'feminised industries' including care work have been historically undervalued' is of particular interest to the committee.

Question 1: As the early childhood education and childcare sector is also a 'feminised' industry which has been historically undervalued, what are the lessons from the aged care case for the FWC that are relevant to the early childhood education and childcare sector? The committee is particularly interested in the approach that the FWC will now take given that gender equality is an objective of the *Fair Work Act 2009* and the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* introduces measures to secure equal pay objectives and makes it easier for the FWC to order pay increase for low-paid workers in female-dominated industries.

Fair Work Commission response:

As a quasi-judicial tribunal the Fair Work Commission (Commission) is unable to comment on any matter currently before the Commission or to foreshadow the approach it might take to matters that may come before the Commission in the future.

The Commission does not publicly comment on its decisions, which are published and open to public scrutiny. The decision of the Full Bench in the work value case for the Aged Care Industry issued on 4 November 2022 ([2022] FWCFB 200) must stand on its merits. That work value case is ongoing before the Commission, with the Full Bench issuing a statement on 13 January 2023 and Directions issued advising interested parties to file submissions and evidence. The Committee may also wish to refer to the Commission's former President also issued a Statement on 4 November 2022 'Occupational segregation and gender undervaluation'.

The Commission also is not in a position to discuss the policies informing legislative changes or their intended operation. The Department of Employment and Workplace Relations, as the agency that administers the *Fair Work Act 2009* (Cth) (the Fair Work Act) and the lead policy agency on workplace relations, will be able to assist the Committee in that regard.

The Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* describes the amendments to the objectives of the Act as follows:

> PART 4—OBJECTS OF THE FAIR WORK ACT
>
> Overview

330. This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.

331. In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that would best achieve the object of the FW Act wherever possible (see section 15AA of the AI Act). The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements.

332. This Part would also introduce improved access to secure work and gender equality into the modern awards objective in section 134 of the FW Act as matters the FWC would be required to take into account when setting terms and conditions in modern awards. This Part would also introduce gender equality into the minimum wages objective in section 284 of the FW Act as a matter the FWC would be required to take into account when setting minimum wages.

Senate Select Committee on Work and Care

Fair Work Commission

Questions on Notice

Senate Select Committee asked the following question:

B. Right to request flexibility and enforcement

The NES include a right for certain employees to request flexible working arrangements which is vital to those workers with informal caring responsibilities. *The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* amends rules relating to requests for flexible work arrangements and introduces new provisions to empower the FWC to resolve disputes regarding such requests.

Question 2: Based on FWA's experience and data sources, please provide any analysis you are able about variations in the right to request flexibility across Australian workplace agreements and awards.

Question 3: Please provide statistics and any qualitative information on complaints from employees whose requests for flexible work arrangements have been refused and please elaborate on the common grounds for refusal.

Question 4: Please provide any information on resolution of disputes regarding requests for flexible work arrangements including numbers, frequency and please outline the FWC dispute resolution process as it is expected to operate under the Secure Jobs, Better Pay Act.

Question 5: The concept of flexible work means something different to everyone, depending on individual circumstances - if an employee was to request flexible work arrangements what is the flexibility baseline now, what could an employee reasonably ask for under current legislation, and what arrangements should be available for future legislation?

Question 6: What support is available for employers to help them introduce, accommodate and communicate flexible arrangements for employees? Similarly, what support do employees generally have as they contest the process of refusal of a right to request?

Question 7: What is the best method for employers to consult with employees about flexibility needs, and is there help for employers to do this, or model approaches to flexibility requests?

Question 8: What lessons arise from FWA's experience historically in relation to the NES right to request flexibility, and in relation to provisions in awards and agreements?

Fair Work Commission response:

Question 2

The Commission does not collect data on or analyse the wording of individual clauses within enterprise agreements or other workplace arrangements which provide a right to request flexibility.

All 121 industry and occupational modern awards contain a model term relating to the right to request flexibility. This model term was the subject of consultation with interested parties and came into effect on 1 December 2018.[1]

The model award term supplements the current NES provision in the following ways:

- it provides that, before responding to an employee's request, the employer will be required to discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances, having regard to a number of indicia
- it provides that, if the employer refuses the request, the written response must include details of the refusal (including the business grounds for the refusal and how the ground or grounds apply) and state whether or not there are any changes in working arrangements the employer can offer the employee so as to better accommodate the employee's circumstances, and
- it provides that disputes about whether the employer has discussed the request with the employee and responded to the request in a way required by the award, can be dealt with under the award's dispute resolution clause.

As the Committee has observed, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* will amend the NES provision for requests for flexible working arrangements. Amongst other changes, the amendments will pick-up aspects of the model award term.

Question 3

The Commission's Quarterly Report to the Minister publishes the number of applications we receive quarterly to deal with disputes in relation to a refusal by an employer for flexible working arrangements made under s.739 of the FW Act. In the Report to the Minister Oct-Dec 2022, we reported 5 relevant applications lodged. The Quarterly Reports must be read in conjunction with the Information Note which accompanies them, which includes information about how the date in the reports is collected and the limitations of the data presented in the reports.

The Commission does not currently publish information regarding the outcome of these matters.

The only available qualitative information that the Commission can provide on complaints from employees whose requests for flexible work arrangements have been refused is that discussed in the *General Manager's report into the operation 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): 2018–21* (the GM's Report).

[1] See [2018] FWCFB 6863; [2018] FWCFB 5753; [2018] FWCFB 1692

Under section 653 of the Fair Work Act, the General Manager must periodically conduct research into the operation of the provisions of the National Employment Standards relating to employee requests made under ss.65(1)—requests for flexible working arrangements. The GM's Report was tabled in the Senate on 14 April 2022.

The GM's Report refers to a survey commissioned by the General Manager and undertaken to assist with the report. Most interviewees who responded to the survey commented that requests were agreed by employers or agreed following negotiations. Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions.

Requests were refused when there were rostering difficulties, the need for staff availability at opening hours or when the business welcomed clients, as finding staff to cover particular hours or days could be difficult, with some employers preferring not to have too many individual alterations to rosters.

Some interviewees mentioned that employers resisted requests to work from home prior to the pandemic because employees were not set up to work remotely and/or there were concerns about supervision. Others referred to concerns about performance as a basis for refusal, although in one instance this was dealt with as a separate performance issue which was not reasonable grounds for refusal.

In accordance with the interviews, the quantitative survey found that requests were refused when there was either no capacity to, or it was impractical to, change the working arrangements of other employees to accommodate the request. Other reasons included impact on customer service, significant loss of efficiency/productivity if the requested changes were implemented and that the requested changes could not be accommodated within an existing shift (see GM's Report section 5.1.5, page 20).

Question 4

The current NES provisions (and award model term) do not generally provide an avenue for employees to challenge in the Commission or in the courts whether an employer had reasonable business grounds to refuse a request for flexible working arrangements (unless in the case of the Commission, the parties have agreed in writing to the Commission dealing with such a dispute) (see Fair Work Act ss.44(2) and 739(2)). The Commission does not record the outcomes of conciliation conferences relating to disputes concerning flexible working arrangements pursuant to s.739.

One case in which the Commission was able to deal with such a dispute (because the parties had agreed to this) is reported in the GM's Report (see GM's report section 3.5.1, page 9):

The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police [2018] FWC 5695

The Police Federation of Australia applied under section 739 of the Fair Work Act for the Commission to resolve a dispute in accordance with the settlement procedure of the Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015. The dispute concerned a refusal by Victoria Police to approve a flexible working arrangement request made under a clause of the agreement which, for the purposes of assessing the request, deferred to section 65. Victoria Police alleged the

request was refused on reasonable business grounds as under section 65. The Commission was not prevented from assessing the basis of Victoria Police's refusal as the enterprise agreement allowed for the Commission to deal with the matter.

The employee concerned, aged 57 years, had requested a change from ten 8-hour shifts per fortnight to eight 10-hour shifts, to provide him with two additional days off per fortnight to assist his transition to retirement. At the time, Victoria Police refused the request on the basis that it raised occupational health and safety risks associated with fatigue and would impose an unreasonable financial burden on them. Victoria Police later relied on a number of further bases for refusal.

Commissioner Wilson, drawing on an earlier decision by the Commission involving flexible working arrangements, found that the basis of Victoria Police's refusal did not amount to reasonable business grounds and that the request instead be approved. The Commissioner found that only one of the five bases advanced by Victoria Police as grounds for refusal of the request in the proceeding had grounding in objective fact.

As the Committee has observed, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* introduces new provisions that empower the Commission to resolve disputes about an employer's refusal of a request for flexible working arrangements or failure to respond to such a request within 21 days, including by arbitration. These new provisions will commence on 6 June 2022. The Commission is presently developing new forms and procedures for the handling of such disputes.

Question 5

Under the current NES provision an employer may refuse a request for flexible working arrangements made in accordance with s.65 of the Fair Work Act only on 'reasonable business grounds' (see s.65(5)). Section 65 does not specify any 'flexibility baseline' or provide exhaustively what constitutes reasonable business grounds. Rather, s.65(5A) lists some circumstances that constitute such grounds.

As related above, the current NES provisions (and award model term) do not generally provide an avenue for employees to challenge in the Commission or in the courts whether an employer had reasonable business grounds to refuse a request for flexible working arrangements.

It follows that there is presently little guidance from case law as to when refusal of a request will be reasonable, and whether or not a refusal is reasonable is likely to depend upon the particular circumstances of the workplace concerned.

Once the amendments to the NES under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* come into operation, it may be anticipated that Commission decisions dealing with disputes under the new provisions might assist in providing such guidance.

The question of 'what arrangements should be available for future legislation' goes to legal policy. The Commission's role is administer its jurisdiction in accordance with the Fair Work Act. The Commission does not enter into legal policy debate.

Question 6

The Fair Work Ombudsman has the statutory function of 'providing education, assistance and advice to employees, employers … and organisations and providing best practice guides to workplace relations or workplace practices', so as to promote harmonious, productive and cooperative workplace relations and compliance with the Fair Work Act and fair work instruments (see Fair Work Act s.682(1)).

Accordingly, the Fair Work Ombudsman has developed dedicated resources about flexible working arrangements, including guidance on how an employee may request a flexible working arrangement. It is not the function of the Commission to develop such resources and the Committee may wish to direct its questions about this type of support to the Fair Work Ombudsman.

Where an employee is able to bring a dispute to the Commission about flexible working arrangements under the terms of an enterprise agreement or award, the employee will typically be entitled to support or representation in the proceedings, for example, from an employee organisation (subject to the limitations in the Fair Work Act on representation by lawyers and paid agents).

Question 7

See the response to question 6 above.

Question 8

The Committee's question as to 'what lessons arise' appears to call for an evaluation of the benefits and shortcomings of the current NES right to request provision and provision for flexibility arrangements under awards and enterprise agreements. The Commission's role is to administer its jurisdiction in accordance with the Fair Work Act. The Commission does not enter into legal policy debate.

As related above, the GM's Report contains research conducted by the General Manager into the operation of the current NES provision for requests for flexible working arrangements.

In a series of Full Bench decisions in 2018, the Commission dealt with an ACTU claim for modern awards to be varied to include an entitlement to part-time work or reduced hours for employees with parenting or caring responsibilities. The Full Bench decisions relate to submissions of the parties and evidence brought by them about issues with the operation of the current NES right to request (see [2018] FWCFB 6863, [2018] FWCFB 5753 and [2018] FWCFB 1692 and more generally the materials from the Family Friendly Work Arrangements case published on the Commission's website). While the ACTU claim was rejected, the proceedings resulted in the introduction of the model award term that supplements the current NES right to request provision (see the response to question 2 above).

Senate Select Committee on Work and Care

Fair Work Commission

Questions on Notice

Senate Select Committee asked the following question:

C. Rostering justice and good rostering practice

Throughout the inquiry, the committee has heard evidence about the lack of rostering justice for employees, many of whom have to organise care for children or others when at work and therefore benefit from predictable, stable rosters to manage their work and care responsibilities.

Question 9: Based on FWA experience, and experience with existing awards and agreements can you provide examples of good rostering practice and what are the key elements?

Question 10: Please provide any data collected or available to the Commission on rostering practices and trends across Australian workplaces.

Question 11: Is there a particular modern award or awards that provide greater flexibility in relation to rostering? The Manufacturing and Associated Industries and Occupations Award 2020 has been highlighted in evidence for greater flexibility in relation to rostering. Is this award a good model in this regard?

Question 12: While the right to work flexibly outside allotted work hours can assist some workers, it can result in extended hours of work, including unpaid working hours. Based on the Commission's experience and analysis, what measures would assist in preventing unpaid extra hours? What effective measures has the Commission witnessed that support workers disconnecting from work outside their paid hours? And what would the Commission recommend as good practice on these issues based on experience to date?

Question 13: What are the benefits of changing legislation to require employers to provide stable rosters for casual or non-casual employees?

Question 14: What analysis can you provide about the usage and effectiveness or otherwise of casual conversion rights? (Including by industry, occupation, age and gender). Are there more effective mechanisms to reduce insecure work available through existing industrial instruments?

Fair Work Commission response:

Question 9

The Committee's question appears to call for an evaluation of rostering practices. The Commission does not collect data on rostering practices and does not enter into legal policy debate. The Commission's role is to administer its jurisdiction in accordance with the Fair Work Act.

Question 10

The Commission does not collect data on rostering practices and/or trends across Australian workplaces.

Question 11

Most industry and occupation modern awards contain clauses that set out the ordinary hours of work and rostering provisions. Each award provision is different, reflecting matters that may include, for example, the history of the award, the particular circumstances of the industry or occupation concerned, practices in the industry or occupation concerned, and the outcome of proceedings before the Commission in which interested parties have sought to vary the award provision on the basis of submissions and evidence going to their circumstances and the regulation of the award provision under the Fair Work Act.

For the Committee's information, the *Manufacturing and Associated Industries and Occupations Award 2020* at clause 17—Ordinary Hours of work and rostering, is as follows:

17. Ordinary hours of work and rostering

[Varied by PR730919, PR747335]

17.1 Hours of work

(a) Maximum weekly hours and requests for flexible working arrangements are provided for in the NES.

(b) Facilitative provisions in clauses 17.2 to 17.5 operate in conjunction with clause 7.3 or clause 7.4 as relevant.

17.2 Ordinary hours of work—day workers

(a) Subject to clause17.5, the ordinary hours of work for day workers are an average of 38 per week but not exceeding 152 hours in 28 days.

(b) The ordinary hours for day workers will not exceed 8 per day unless otherwise agreed in accordance with clause 17.5.

(c) The ordinary hours of work may be worked on any day or all of the days of the week, Monday to Friday. The days on which ordinary hours are worked may include Saturday and Sunday subject to agreement between the employer and the majority of employees concerned. Agreement in this respect may also be reached between the employer and an individual employee.

[17.2(d) substituted by PR730919 ppc 01Jul21]

(d) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be moved up to one hour forward or one hour back by agreement between an employer and:

(i) the majority of employees at the workplace;

(ii) the majority of employees in a discrete section of the workplace; or

(iii) an individual employee.

Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.

[New 17.2(e) inserted by PR730919 ppc 01Jul21]

(e) Any change to regular rosters or hours of work is subject to the consultative provisions in clause 42.2.

[17.2(e) renumbered as 17.2(f) by PR730919 ppc 01Jul21]

(f) Any work performed outside the spread of hours must be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work.

[17.2(f) renumbered as 17.2(g) by PR730919 ppc 01Jul21]

(g) Where agreement is reached in accordance with clause17.2(c), the rate to be paid to a day worker for ordinary time worked is:

(i) between midnight on Friday and midnight on Saturday—**150%** of the ordinary hourly rate; and

(ii) between midnight on Saturday and midnight on Sunday—**200%** of the ordinary hourly rate.

[17.2(g) renumbered as 17.2(h) by PR730919 ppc 01Jul21]

(h) A day worker required to work on a public holiday must be paid for a minimum of 3 hours' work at the rate of **250%** of the ordinary hourly rate. The **250%** rate must be paid to the employee until the employee is relieved from duty.

[17.2(i) inserted by PR747335 ppc 14 Nov22]

(i) Hours of work performed immediately before or after a part-day public holiday, that form part of one continuous shift, are counted as part of the minimum payment/engagement period in clause 17.2(h).

17.3 Ordinary hours of work—continuous shiftworkers

(a) Clause 17.3 does not apply to vehicle manufacturing employees covered by clause 4.8(a)(xi). The provisions relating to ordinary hours for continuous shiftworkers for these employees are prescribed in clause 50.1 of Part9—Vehicle manufacturing employees of this award.

(b) **Continuous shiftwork** means worked carried on with consecutive shifts of employees throughout the 24 hours of each of at least 6 consecutive days without interruption except for breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer.

(c) Subject to clause17.3(e), the ordinary hours of continuous shiftworkers are, at the discretion of the employer, to average 38 hours per week inclusive of meal breaks and must not exceed 152 hours in 28 consecutive days. Continuous shiftworkers are entitled to a 20 minute meal break on each shift which must be counted as time worked. Any change to regular rosters or ordinary hours of work is subject to the consultative provisions in clause 41.2.

(d) The ordinary hours for continuous shiftworkers will not exceed 8 per shift unless otherwise agreed in accordance with clause17.5.

(e) By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.

(f) Except at the regular changeover of shifts, an employee must not be required to work more than one shift in each 24 hours.

17.4 Ordinary hours of work—non-continuous shiftworkers

(a) Clause 17.4 does not apply to vehicle manufacturing employees covered by clause 4.8(a)(xi). The provisions relating to ordinary hours for non-continuous shiftworkers for these employees are prescribed in clause 50.2 of Part 9—Vehicle manufacturing employees of this award.

(b) Subject to clause 17.4(d), the ordinary hours of work for non-continuous shiftworkers are an average of 38 per week and must not exceed 152 hours in 28 consecutive days.

(c) The ordinary hours for non-continuous shiftworkers will not exceed 8 per shift unless otherwise agreed in accordance with clause 17.5.

(d) By agreement between the employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is allowed over a period which exceeds 28 consecutive days but does not exceed 12 months.

(e) The ordinary hours of work must be worked continuously, except for meal breaks, at the discretion of the employer.

(f) Except at changeover of shifts, an employee must not be required to work more than one shift in each 24 hours.

17.5 Methods of arranging ordinary working hours

(a) Subject to the employer's right to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 17.2(d) and the employer's right to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned. This does not preclude the employer reaching agreement with individual employees about how their working hours are to be

arranged. Any change to regular rosters or ordinary hours of work is subject to the consultative provisions in clause 41.2.

(b) The matters on which agreement may be reached include:

(i) how the hours are to be averaged within a work cycle established in accordance with clauses 17.2, 17.3 and 17.4 and clauses 50.1 and 50.2 of Part 9—Vehicle manufacturing employees of this award for vehicle manufacturing employees covered by clause 4.8(a)(xi).

(ii) the duration of the work cycle for day workers provided that the duration does not exceed 3 months;

(iii) rosters which specify the starting and finishing times of working hours;

(iv) a period of notice of a rostered day off which is less than 4 weeks;

(v) substitution of rostered days off;

(vi) accumulation of rostered days off;

(vii) arrangements which allow for flexibility in relation to the taking of rostered days off; and

(viii) any arrangements of ordinary hours which exceed 8 hours in any day.

(c) Twelve hour days or shifts

By agreement between an employer and the majority of employees in the enterprise or part of the enterprise concerned, 12 hour days or shifts may be introduced subject to:

(i) proper health monitoring procedures being introduced;

(ii) suitable roster arrangements being made;

(iii) proper supervision being provided;

(iv) adequate breaks being provided; and

(v) a trial or review process being jointly implemented by the employer and the employees or their representatives.

(d) Payment for work on other than a rostered shift is in accordance with clause 33.2(g).

17.6 Daylight saving

For work performed which spans the start or finish of a system of daylight saving as prescribed by relevant State or territory legislation, an employee will be paid according to adjusted time (i.e. the time on the clock at the beginning of work and the time on the clock at the end of work).

17.7 Make up time

(a) An employee may elect, with the consent of the employer, to work make up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in this award.

(b) An employee on shiftwork may elect, with the consent of their employer, to work make up time under which the employee takes time off during ordinary hours and works those hours at a later time, at the rate which would have been applicable to the hours taken off.

Question 12

As a quasi-judicial tribunal, the Commission does not enter into legal policy debate.

The Commission has conducted some research related to flexible work as outlined below.

General Manager's reports

The General Manager of the Fair Work Commission is required, every three years, under s.653(1) of the Fair Work Act to:

- conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements
- conduct research into the operation of the provisions of the National Employment Standards relating to employee requests for flexible working arrangements (under ss.65(1)) and extensions to unpaid parental leave (under ss.76(1)).

The reports for 2018-2021 include research by the University of Sydney.

Links to the General Manager's reports for 2018-2021 are provided below:

- General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth): 2018–21
- General Manager's report into the operation 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): 2018–21

Clerks—Private Sector Award 2020 – Work from home case (AM2020/98 and AM2020/105)

The Clerks – Private Sector Award – Work from home case dealt with changes to the –Clerks—Private Sector Award 2020 in relation to flexible work. To provide assistance to parties, academics were engaged to undertake research to inform the Commission in relation to working from home. Links are provided to the research reports below:

- Baird M and Dinale D (2020), Preferences for flexible working arrangements: before, during and after COVID-19, a report to the Fair Work Commission, November
- Hopkins J and Bardoel A (2020), Key working from home trends emerging from COVID-19, a report to the Fair Work Commission, Swinburne University of Technology, November.

The Commission also produced a research reference list and survey analysis which are also published to the Commission's website.

Question 13

As a quasi-judicial tribunal, the Commission does not enter into legal policy debate. Accordingly, it would not be appropriate for the Commission to express a view on possible legislative changes.

The Commission provided a response to a question on notice regarding the impact of rostering and insecure hours on mental health (EEC-SBE21-044) as part of Supplementary Budget Estimates on 27 October 2021.

Question 14

Disputes about casual conversion

Information relating to casual conversion, including data related to disputes, is included within the Report conducted by KPMG pursuant to section 4 of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021: 'Final Report of the Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)' (tabled in the Parliament on Thursday 1 December 2022) (see pages 33-35). Questions in relation to that report, including its key findings, should be directed to the Department of Employment and Workplace Relations.

The Commission has previously provided details about casual conversion disputes in responding to an Additional Estimates question on 16 February 2022 (EEC-AE22-031), and updated data within the Commission's 2021-22 Annual Report.

4 yearly review - Casual Employment and Part-time Employment common issues case (AM2014/197 and AM2014/196)

Casual conversion clauses were considered during the Four yearly review of modern awards. As part of the Casual Employment and Part-time employment common issues case, the ACTU sought a model casual conversion clause be placed in 88 awards which did not already contain a casual conversion clause (among other applications).

In the principal decision issued on 5 July 2017, a Full Bench of the Fair Work Commission found that it was necessary for modern awards to contain a casual conversion mechanism. The Full Bench considered the history of casual conversion provisions (see paragraphs [333] to [346]) and statistical data on the use of casual employees in Australia (see paragraphs [347] to [360]). The Full Bench stated:

> "The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then we consider it to be fair and necessary for the employee to

have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment." (see paragraph [365])

The Full Bench developed a provisional model casual conversion clause for 85 modern awards which did not contain a casual conversion clause (some awards with special characteristics were considered separately). Following consultation with parties about the terms of the proposed model clause, determinations varying the awards were issued in 2018 (with limited exceptions in subsequent years).

Casual terms award review 2021 (AM2021/54)

On 27 March 2021 the Fair Work Act 2009 (Cth) (Act) was amended by Schedule 1 to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth). The amendments included introducing a definition of 'casual employee' in s.15A of the Act and casual conversion arrangements in Division 4A of Part 2-2 of the Act. The newly inserted cl.48 of Schedule 1 to the Act requires the Commission to conduct a review (Casual Terms Review) and vary modern awards where necessary to remove inconsistencies, difficulties or uncertainties caused by the amendments to the Act.

In a series of decisions, a Full Bench of the Commission considered the casual conversion terms within modern awards and found that on balance the terms were less beneficial for employees than the NES casual conversion entitlement and that the terms gave rise to uncertainty and difficulty in their interaction with the NES provision. The casual conversion terms were replaced with a reference to the NES casual conversion entitlements (see [2021] FWCFB 4144, [2021] FWCFB 5153, [2021] FWCFB 5366, [2021] FWCFB 5466, [2021] FWCFB 5530, [2021] FWCFB 6005 and [2021] FWCFB 6008.