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TRANSCRIPT OF PROCEEDINGS
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VICE PRESIDENT LAWLER
SENIOR DEPUTY PRESIDENT WATSON
COMMISSIONER HAMPTON

C2011/4864

s.604 - Appeal of decisions

Appeal by Shop, Distributive and Allied Employees Association (C2011/4864)

Melbourne

10.10AM, FRIDAY, 15 JULY 2011

Continued from 15/07/11

PN176

VICE PRESIDENT LAWLER: Appearances, please. Mr Friend.

PN177

MR W. FRIEND: If the tribunal pleases, I think we already have permission to appear. I appear with MR C. DOWLING for the SDA. I can foreshadow we don't oppose permission being granted to anyone else being represented.

PN178

VICE PRESIDENT LAWLER: Ms Symons.

PN179

MS C. SYMONS: Thank you. I appear on behalf of the National Retail Association. I seek permission to appear. And I appear also on behalf of the Australian Chamber of Commerce and Industry.

PN180

VICE PRESIDENT LAWLER: Thank you, Ms Symons.

PN181

MR N. TINDLEY: Your Honour, Tindley, initial N, of FCB, seeking leave to appear on behalf of the Australian Retail Association, which in turn seeks leave to intervene in the proceedings.

PN182

VICE PRESIDENT LAWLER: Thank you, Mr Tindley. Mr O'Grady.

PN183

MR P. O'GRADY: Yes, if the tribunal pleases, I seek permission to appear on behalf of the Minister for Employment and Industrial Relations for the state of Victoria.

PN184

VICE PRESIDENT LAWLER: Thank you, Mr O'Grady. Are there any objections to the respective applications for permission to appear or leave to intervene?

PN185

MR FRIEND: The only concern we have in relation to Mr Tindley's application to intervene, your Honour, is that the matter be completed in the time allotted. We wondered if he could be confined to his written submissions and anything that's not raised by the other parties in their oral or written submissions.

PN186

VICE PRESIDENT LAWLER: Why don't we leave Mr Tindley till last and see how the time is going.

PN187

MR FRIEND: Yes.

PN188

VICE PRESIDENT LAWLER: Because I suspect that we may not in fact have - well, who knows, but it may be that that problem doesn't arise.

PN189

MR FRIEND: Yes, that would be satisfactory, your Honour.

PN190

VICE PRESIDENT LAWLER: So we'll proceed on that basis.

PN191

MR FRIEND: Thank you.

PN192

VICE PRESIDENT LAWLER: So permission and leave is granted respectively. I should disclose that Mr Michael Donovan is the - I think the state secretary of the SDA Victoria - and I have some social contact with Mr Donovan from time to time on account of him being a friend of my partner. I don't know whether that causes any difficulty for anyone, but if it does you should speak up now. There are no takers? Fine. Yes, Mr Friend.

PN193

MR FRIEND: Thank you. We've prepared a written outline of our submissions which I can hand up to the bench, and we also have copies of folders of authorities which I'd also seek to hand up.

PN194

VICE PRESIDENT LAWLER: Thank you very much.

PN195

MR FRIEND: I'll only be reading from one or perhaps two of them but at least there are the authorities referred to in the outline. We've provided copies of the outline to our learned friends when it was finished this morning about 8.30, so they've had it for a little time.

PN196

VICE PRESIDENT LAWLER: Should we adjourn for a few moments and read this, Mr Friend?

PN197

MR FRIEND: I'm content for that to happen, your Honour.

PN198

VICE PRESIDENT LAWLER: We'll adjourn for five or 10 minutes.

<SHORT ADJOURNMENT [10.14AM]

<RESUMED [10.24AM]

PN199

VICE PRESIDENT LAWLER: Yes, Mr Friend, we've read those submissions.

PN200

MR FRIEND: Thank you, your Honour.

PN201

VICE PRESIDENT LAWLER: Admirable for their clarity.

PN202

MR FRIEND: I'm sorry, your Honour?

PN203

VICE PRESIDENT LAWLER: Admirable for their clarity.

PN204

MR FRIEND: Thank you. We've tried hard to distil what we're trying to say. The fact that the tribunal has had an opportunity to read them now will shorten what I propose to say. Can I leave the sections dealing with leave and just rely on them as they are up to paragraph 6 and then take you through to paragraph 7 and following. The reference to the previous full bench decision which is in the folder of authorities, it's perhaps worth directing the tribunal's attention to that if you can and ask you - it's tab 2 in 12 - to look at paragraphs 20 to 23 without of course reading them.

PN205

We, in an earlier examination of one of these applications have gone to the explanatory memorandum of the Act where it is said that "such variations would only be exceptional" and other like words, and the full bench in the case that I've referred the tribunal to quite properly said, "Well, that's not the right approach; you just go to the words of the section." So that's where we are. In terms of the section we've pointed out in paragraph 8 that the decision is discretionary but it's a confined discretion. There has to be satisfaction that the variation is necessary. We've also drawn attention to the fact that the modern awards objective is a composite thing and its primary content is in relation to the fair and relevant minimum safety net of terms and conditions.

PN206

The grounds are set out in paragraph 10. We've outlined those. If I can go to the decision now of Vice President Watson and just highlight those parts of it that we say are of some significance in relation to all these aspects of the case. Paragraph 19 contains some findings. His Honour said:

PN207

> *I'm satisfied that if shorter periods of engagement are unavailable then employers may be more prepared to hire school students after school.*

PN208

He notes that it's difficult to assess the extent of that. He then says, "It appears that it may arise where opening hours are limited." And furtherly - and this is significant:

PN209

> *It may also arise where longer opening hours operate but there is a desire to engage junior employees to work for short periods to undertake specific tasks or assist at busy times.*

PN210

The balance of paragraphs 20 to 23 deal with issues of youth employment in Australia and the various factual material that was put before his Honour which isn't particularly contentious. We note in passing that in paragraph 20 his Honour notes that:

PN211

> *The proportion of school children in employment is higher in Australia than in most OECD countries but the youth unemployment is also relatively high.*

PN212

The reasoning for the decision commences at paragraph 37. His Honour makes some observations about the retail sector, employment in Australia amongst school students. At 41 he says that:

PN213

> *Different groups of persons are likely to be affected in different ways if this application were granted. One group, comprising existing employees and those in similar circumstances, may have their employment rendered unviable and may effectively be deprived of the opportunity to work. Another group, those who are not able to secure jobs, may be able to obtain valuable employment.*

PN214

The tribunal will note that his Honour doesn't go beyond "may" in relation to any of these observations. In 45 he states that:

PN215

> *The employer evidence did not establish how the change would impact on retail operations. Its case was very brief and indirect. It did not deal with the issues relevant to employer flexibility in any meaningful manner. Nor did it attempt to address the impact of the proposed change on school students and other existing employees.*

PN216

PN217

He finds there for that there's no case made out based on the employers' desire for more flexible engagement practices. One of the factors to be considered in relation to the modern awards objective is flexibility, and that was one that was relied upon. Another one is social inclusion. His Honour moves on to that in paragraph 46:

PN218

> *The issue of promoting social inclusion by increased workforce participation is a significant matter in the retail industry because of the importance of this issue to youth employment generally.*

PN219

He then says he's of the view that:

PN220

> *Granting the application in its present form may create more opportunities for some students while disadvantaging others.*

PN221

Paragraph 47 really explores that observation and in 48 we come to really the crucial aspect of this decision. This is where his Honour actually discloses the finding and so far as we can see them, the reasons for it; considers that:

PN222

> *A modified variation to the Award should be made which confines the exception to the three hour minimum period to circumstances where a longer period of employment is not possible.*

PN223

It doesn't say there on what basis not possible, whether it's hours or operational requirements. But we know the answer to that because we had a draft determination. I'll come to that in a minute. He then refers to the different types of students who may be affected on way or another in relation to the application and says:

PN224

> *Given the circumstances in which the modified clause will operate I consider that the benefits of promoting social inclusion arising from the variation mean that the change is necessary to achieve the modern awards objective.*

PN225

He says that that can be - in 49 - "additional conditions allow that be achieved". If I ask the tribunal to turn over to the draft determination we have the clause which is proposed. This was subject to submissions which were made, but because of the timing of the matter his Honour was proposing to deal with the matter and have the clause come into effect on 1 July. My client felt that it needed to obtain a stay and the effect of the stay is that there's been no final determination on what would be imposed, so we have to work on what would be the new determination, the variation to the modern award. So this is what we have to work on.

PN226

It's a proviso to 13.4, which is the three hour minimum clause. The three hour minimum doesn't apply, it's one hour and 30 minutes if the employee is a full-time secondary school student; the engagement is between 3.00 and 6.30 pm on a school day; the employee agrees, and a parent or guardian of the employee agrees; and employment for a longer period than the period of the engagement - whatever it is - is not possible either because of the operational requirements of the employer or the unavailability of the employee. So it's not opening hours, it's operational requirements that determines whether or not it's an hour and a half or three hours. If you go back to paragraph 19 of the decision, the sentence I read to you in the sixth line:

PN227

> *It may also arise where longer opening hours operate but there is a desire to engage junior employees to work for short periods to undertake specific tasks or assist at busy periods.*

PN228

So his Honour seems to be implementing that aspect or trying to meet that aspect of the possibility of a desire to employ students for less than three hours with the draft determination. At paragraph 18 we set out the first of our three grounds in relation to what we say is an error in process. His Honour, we say, didn't really consider whether the variation was necessary to meet the modern awards objectives. It's clear that his Honour took the view that there would be some increased opportunity for employment or there might be some increased opportunity of employment. That's paragraph 19, which we've referred to. I should also add paragraph 41 there in paragraph 20 of our submissions.

PN229

So far as we can understand paragraph 46, his Honour is saying that workforce participation in the retail industry is of importance because of the importance of youth employment. So much may be accepted. But all we get about necessity is the final sentence of paragraph 48 where his Honour says he considers:

PN230

> *That the benefits of promoting social inclusion arising from the variation mean that the change is necessary to achieve the modern awards objective.*

PN231

In our submission finding that it's necessary to make that change to achieve the objective is the obverse of believing that the modern awards objective is not being met. We'll come to this in a range of ways about evidence and lack of evidence and the consideration of the modern awards objective. As we read the decision there's no coming to grips with the question of whether this change is necessary to meet the objective; there is simply an assertion that that's so. If we're wrong about that and the words in the decision are sufficient to establish that the right test was applied then we have a subsidiary ground which is set out at paragraph 38 to 40 of our outline, which is that there are no reasons because the mere statement that it's necessary doesn't explain how it's necessary. They're alternatives - - -

PN232

VICE PRESIDENT LAWLER: Isn't it necessarily implicit in the reasoning that his Honour took the view that the three hour minimum was unreasonably excluding this class of employee or potential employee from proper participation in the workforce? That that was a matter that went to social inclusion; that so far as that segment of the workforce is concerned, the modern awards objective is not being met?

PN233

MR FRIEND: His Honour took the view that it might be the case that there might be some additional jobs offered, but that's as far as it went. How we get from that to "necessary" is the difficulty that we say exists in the decision.

PN234

VICE PRESIDENT LAWLER: Sorry, where is that finding again that they just might be necessary?

PN235

MR FRIEND: 19 and 41, your Honour; "May be more prepared to hire school students after school." He says himself there's no evidence. What we say is that it's not possible to get to "necessary" on the basis of that finding.

PN236

VICE PRESIDENT LAWLER: Yes.

PN237

MR FRIEND: Thank you, your Honour. If I can move on to the next point, which is the wrong test in considering whether the modern awards objective is met. If I can ask the tribunal to turn to section 134 of the Act briefly, the modern awards objective is one objective; it's to "provide a fair and relevant minimum safety net of terms and conditions, taking into account" - a number of factors.

One of those factors - and it's the one we're concerned with now - is, "The need to promote social inclusion through increased workforce participation." The way that his Honour dealt with that is that in paragraph 46 he said that the issue of promoting social inclusion is a significant matter.

PN238

That's the foundation of paragraph 48, that a variation should be made which confines the proposed exception to circumstances where a longer period of employment is not possible. In the last sentence:

PN239

> *Given the circumstances in which the modified clause will operate I consider that the benefits of promoting social inclusion arising from the variation mean that the change is necessary to achieve the modern awards objective.*

PN240

So what his Honour has done is said that if there is more employment - and on the facts of the decision if there's a possibility of more employment - but if there is more employment, that is a good thing, and therefore that founds a finding or a satisfaction that it's necessary to vary the award.

PN241

VICE PRESIDENT LAWLER: Isn't it also necessarily implicit in the reasoning that the Vice President think it's unfair that employees - school students who want to get some work after school - are prevented from doing so by the three hour minimum, and that a fair and relevant minimum safety net would be one that made provision for - appropriately constrained - provision for those classes of employees who have access - - -

PN242

MR FRIEND: It may be that that was one of the things in his Honour's mind, but we don't see that reflected in the reasons.

PN243

VICE PRESIDENT LAWLER: If on the re-hearing - assuming permission to appeal is granted - we took that view, why would we be wrong?

PN244

MR FRIEND: Why would you be wrong? Well, it wouldn't necessarily be wrong, your Honour. It's a question of considering all of the material - and there's a good deal of material. It is one factor. And then if we had the opportunity to make submissions in relation to the exercise of the discretion we would be pointing to the very substantial body of evidence that the SDA filed, including the two experts who dealt with a range of material about these matters. Bear in mind that his Honour is only here dealing with social inclusion.

PN245

If we go into the broader question about whether the variation is justified our submissions would be the same as they were below. We simply direct the tribunal's attention to those, which was that there was really no evidence of anything that led to any unfairness; that there was any difficulty; that there was a problem at all about this; that anyone would want these jobs. We're talking about jobs for an hour and a half at, I think, $7 or $8 an hour, and people travelling to

and from them. There's a range of material in relation to that. I don't really want to - unless it assists the tribunal - go into a side track in relation to those matters.

PN246

It may become relevant, but it's a long submission and it's dependent upon the outcome of the appeal and whether this full bench wants to exercise their discretion or admit it or simply dismiss it.

PN247

SENIOR DEPUTY PRESIDENT WATSON: Mr Friend, did the Vice President have before him - was he addressed on each of the matters to be taken into account in section 134?

PN248

MR FRIEND: In the modern awards objective?

PN249

SENIOR DEPUTY PRESIDENT WATSON: Yes.

PN250

MR FRIEND: No. Two matters were relied upon by the applicant and the Minister and the other intervener; they were flexibility and social inclusion.

PN251

SENIOR DEPUTY PRESIDENT WATSON: And did the SDA put any submissions in relation to, if you like, the negative side of any of those other things? There being some - - -

PN252

MR FRIEND: Not by pointing to the section itself from my recollection, your Honour, but the SDA's submissions were about the factors that are relevant to the modern awards objectives in a general way. That's the best I can do on my feet without going back to the submissions. We certainly didn't go through each of the matters. We dealt with the two matters that were relied upon.

PN253

SENIOR DEPUTY PRESIDENT WATSON: It didn't, for example, submit that the making of a variation would discourage collective bargaining?

PN254

MR FRIEND: No, we didn't submit that.

PN255

SENIOR DEPUTY PRESIDENT WATSON: Or have any effect on the relative living standards and needs of the low-paid?

PN256

MR FRIEND: No, I don't think anything would have covered that. But our point is a more general one. It's not about whether each of those items was ticked off, it's that you've got to look at the matter as a whole. It's about the safety net. What his Honour seems to have done is said, "If there are more jobs, that's enough." He's lowered the safety net and proposes to lower it in respect of school students on the basis of employer's operational requirements. There needed to be a broader consideration.

PN257

One of the matters that was relied upon by the SDA - and there was a good deal of evidence about - was people saying, and students saying, and union organisers saying no-one will want to work - it's very inconvenient to work these short hours. Parents won't want to drive their children to the place of work and then come back and pick them up after an hour and a half. There are a range of factors in relation to the types of jobs and the amount of pay related to them which go to the fair safety net issue. His Honour, as we read 48, simply says, "Once there's more jobs, more workforce participation, then that's a good foundation," without considering it in the broader perspective.

PN258

VICE PRESIDENT LAWLER: I'll put a proposition to you for your comment. Please don't infer that somehow or other I've got any commitment to this, but it's just a thought that's been flowing through my head.

PN259

MR FRIEND: Yes, your Honour.

PN260

VICE PRESIDENT LAWLER: It's a compound proposition. First of all the general state of affairs in society is not something about which we need evidence.

PN261

MR FRIEND: Agreed.

PN262

VICE PRESIDENT LAWLER: We live in the society and therefore have a direct exposure to it. That's proposition number 1. Proposition number 2; there is obviously a range of incomes in the community, but there is a slice of the community at the bottom end of the income range where parents do not have the money to fund children for discretionary expenditure. If those children want to have money to go to the movies with their friends, to buy a new T-shirt or the like, they need to earn it themselves. They can't earn it themselves unless they get a job. The purpose of the minimum engagement ultimately is to prevent the exploitation of workers.

PN263

The concern is if you don't have a minimum engagement then employers can - particularly in relation to casuals - put the employee to the considerable time and expense of getting to their place of employment - expenditure on fares and the like - only to turn around and say after one hour, "Go home." The employee is - to use the vernacular - duded in that context. In terms of adult employees - people in the full-time workforce - the proposed variation doesn't in any way interfere with the operation of that minimum engagement as a safety net in respect of those adult workers. So that scope for exploitation is still protected.

PN264

MR FRIEND: Yes.

PN265

VICE PRESIDENT LAWLER: Why can't we, just on the basis of our own experience of the society, come to the conclusion that a fair safety net would make an exclusion - like the one that the Vice President has proposed - in order to

give that slab at the bottom end of the economic scale - that slab of children - the opportunity to have a better prospect of earning some discretionary income to meet those basic little expenses to have a better quality of life?

PN266

MR FRIEND: It's a discretionary decision, your Honour, and I'd need to address you in relation to all of the factors that would need to be taken into account. Obviously that would be one factor that you could take into account, that the level of wages, we're told - I'm not an economist - effects employment; the lower they are the more employment there is. That's an argument for having the lowest possible wages that people can subsist on because there will be more employment.

PN267

VICE PRESIDENT LAWLER: I think that's a very contentious issue. Read Card and Krueger and we'll debate about it.

PN268

MR FRIEND: No, I'm not trying to debate it, your Honour, I'm just saying - - -

PN269

VICE PRESIDENT LAWLER: Adjoining US states, neither of which have minimum wage regulation, one of them introduces minimum wage regulation; Card and Krueger say, "Here is" - part of the problem is that you can't cut the economy in half and say, "Let's conduct an experiment with a control group."

PN270

MR FRIEND: Yes.

PN271

VICE PRESIDENT LAWLER: But here was a natural experiment. Two neighbouring states, one was about to introduce minimum wage regulation. They say, "Let's look at the fast food industry," a very standardised industry. Each McDonalds is set up to operate exactly the same way. You would have expected when the minimum wage regulation was introduced in one of those states that employment in the fast food industry to go down because it became more expensive to employ the staff. It went up. There's been a debate - a very bitter debate, as I perceive it - amongst labour market economists as to whether or not Card and Krueger were right in their research. But all I'm saying - - -

PN272

MR FRIEND: I said I wasn't an economist, your Honour.

PN273

VICE PRESIDENT LAWLER: - - - that proposition you put is a very contentions proposition.

PN274

MR FRIEND: All right. I'll withdraw that proposition and try and deal with what your Honour said. What your Honour has put to me is that there will be more employment of those students at the bottom end if they can work for an hour and a half.

PN275

VICE PRESIDENT LAWLER: No, not that there will be more employment - - -

PN276

MR FRIEND: More opportunity.

PN277

VICE PRESIDENT LAWLER: - - - but people at the moment - children at the moment - students - who are deprived of an opportunity of earning a tiny bit of income to give themselves some discretionary expenditure they otherwise won't have, will get that opportunity. That means there will be an increase in fairness.

PN278

MR FRIEND: Yes. One would need to - at the same time as you make that reduction, you do it for everyone, not just for that group. That's the first point we'd make in relation to that.

PN279

VICE PRESIDENT LAWLER: No, you do it for school students.

PN280

MR FRIEND: Sorry, every school student, your Honour. Sorry, I was trying to take that as read. It's for every school student including those working for three hours at the moment, some of whom might be in that group. That's the first point. So you have to assess - if you're going to exercise a discretion on that basis - how many people are going to be given that opportunity and how many of them are going to take it up, because that's a relevant factor. There is evidence before the tribunal below that the students who get employment are not people at that lower level, they're people from wealthier families and families with more - from higher socioeconomic groups. They're not the students of families who are poor by and large. There's research about this. It's been conducted and it's in evidence before the tribunal.

PN281

VICE PRESIDENT LAWLER: What's the exhibit number?

PN282

MR FRIEND: It's in Dr Price's, I think - basically in Dr Price's evidence, and that - - -

PN283

VICE PRESIDENT LAWLER: Okay, that's fine.

PN284

MR FRIEND: That's in her oral evidence under cross-examination and in her witness statement, which is at tab 19, exhibit F10.

PN285

VICE PRESIDENT LAWLER: Thank you.

PN286

MR FRIEND: So you'd need to - I think I have to accept, your Honour, that that could be a consideration of fairness, that there's a range of things to balance out in relation to that. Sometimes you can toss out the baby with the bathwater because you get rid of the three hour minimum for a number of other people who may well be depending on it. Mr Dowling points out to me, your Honour, that this is a 157 application as well, so it's a question of necessity for a single member. There

is a two-year review and a four-year review of the award. These matters can be raised there on a basis which is perhaps not quite such a high bar.

PN287

Yes, I've dealt with the second aspect of the error that we point to. Your Honour, your Honour's questions really were directed in a way at this issue of social inclusion as well. This is our third point. There was quite a deal of evidence about this concept of social inclusion. It's an odd position to be in in some ways because we've got social inclusion used as English words in a statute so they have their ordinary English meaning, but there is a good deal of literature and other material about what social inclusion means. His Honour was taken to some of that. I will just very briefly take the tribunal now to some of that material, or perhaps to some of the expert witness material on that.

PN288

Dr Campbell's statement at page 341 of the appeal book behind tab 16 - it commences at paragraph 31 and then through to 38 and deals with this issue of social inclusion in respect to school children. I perhaps won't read that but go to his cross-examination. Yes, I'm sorry, paragraph 33 is the better one, on 342:

PN289

> *Secondary school children are not normally included in Australian discussions on the need to increase workforce participation.*

PN290

And if I could ask you to read the balance of the paragraph.

PN291

SENIOR DEPUTY PRESIDENT WATSON: Sorry, what's the conclusion you're asking us to draw out of that?

PN292

MR FRIEND: That social inclusion isn't really a relevant concept with respect to full-time school students. They're already socially included.

PN293

SENIOR DEPUTY PRESIDENT WATSON: But isn't it a matter of - an incremental matter of increasing social inclusion rather than - - -

PN294

MR FRIEND: Well - - -

PN295

SENIOR DEPUTY PRESIDENT WATSON: There's no issue as to someone is socially included or not socially included.

PN296

MR FRIEND: Yes. The submission we make is that it's not - - -

PN297

VICE PRESIDENT LAWLER: That's just a preposterous proposition.

PN298

MR FRIEND: I'm sorry.

PN299

VICE PRESIDENT LAWLER: It takes 10 seconds' consideration to see that that proposition cannot be correct. Social inclusion, no matter which definition within the available range you choose, has got to do also with a capacity for the person to participate in the good things and the vibrancy of a society. That is a function of money. If you're poor you've got less social inclusion than if you're wealthy or if you're well off.

PN300

MR FRIEND: Your Honour - - -

PN301

VICE PRESIDENT LAWLER: And poor children are less socially included - even if they go to school full-time - than others. End of story. What's wrong with that?

PN302

MR FRIEND: Well, your Honour - - -

PN303

VICE PRESIDENT LAWLER: Tell me I'm wrong.

PN304

MR FRIEND: Your Honour, it's about socially excluded people.

PN305

VICE PRESIDENT LAWLER: No, you don't someone is socially included just because they go to school.

PN306

MR FRIEND: Well, that's what the expert evidence was before the tribunal.

PN307

VICE PRESIDENT LAWLER: What if they go to school but they can't play sport on the weekends because they can't afford the football boots that they need in order to be able to participate in the team? They can't go with their friends to the movies because they haven't got the money to buy a movie ticket - - -

PN308

MR FRIEND: Yes, well, I think I have to accept that - - -

PN309

VICE PRESIDENT LAWLER: - - - they can't go the art gallery because they can't afford a bus fare or the tram fare to get to the art gallery.

PN310

MR FRIEND: Yes.

PN311

VICE PRESIDENT LAWLER: You're telling me that those people are just as socially included as the others who can afford those things. Isn't that right, Mr Friend?

PN312

MR FRIEND: No, your Honour, I can't make that proposition.

PN313

VICE PRESIDENT LAWLER: Good, thank you.

PN314

MR FRIEND: I'll move on, your Honour.

PN315

VICE PRESIDENT LAWLER: Fair enough.

PN316

MR FRIEND: I've already adverted to the no reasons ground of appeal. We can move on to no evidence. We've set out some authorities in relation to that. We say at 44 that in order to determine whether the variation was necessary to achieve the modern awards objective his Honour had to consider how many jobs might be created; not make a finding about it, but at least find that there were some jobs that were going to be created at some level; a small number, a large number; and whether there was any demand for those jobs. We say that there's just no evidence in relation to any of that.

PN317

Prior to the modern award the minimum engagement for many years throughout Australia was three hours, including for school students, subject to two exceptions; an exception for school students in South Australia of two hours in certain circumstances, and a two hour minimum in Victoria since late 1980s. At 48 we say that the NRA evidence was largely - - -

PN318

VICE PRESIDENT LAWLER: Let me confess, I haven't read the evidence.

PN319

MR FRIEND: I'm sorry, you have?

PN320

VICE PRESIDENT LAWLER: I confess I haven't read the evidence.

PN321

MR FRIEND: Yes.

PN322

VICE PRESIDENT LAWLER: Was there any evidence that the introduction of those reduced minima led to the adverse outcomes that are speculated upon or adverted to in your submissions as far as - - -

PN323

MR FRIEND: No. There was no evidence that increasing from two to three hours in Victoria led to any problems.

PN324

VICE PRESIDENT LAWLER: But on your side the SDA didn't call any evidence that these changes had led to problems?

PN325

MR FRIEND: We didn't suggest that three hour minimums had led to any problems.

PN326

VICE PRESIDENT LAWLER: No, the reduction from - the exception - - -

PN327

MR FRIEND: From three to two in 1989 - - -

PN328

VICE PRESIDENT LAWLER: You've told South Australia and Victoria introduced - - -

PN329

MR FRIEND: Yes. We had no evidence about what happened in 1989, I think it was, or 91, when there was a reduction in Victoria for everyone and we had no evidence - I'm not sure what the historical position was in South Australia, when it was introduced or how or what the effect was.

PN330

SENIOR DEPUTY PRESIDENT WATSON: A completely random and unrelated question to anything that's been discussed; where did the one and a half hour concept come from?

PN331

MR FRIEND: Your Honour - - -

PN332

SENIOR DEPUTY PRESIDENT WATSON: Given what you've said that previous instruments prescribed two hours - - -

PN333

MR FRIEND: I think it comes from the prospect that in the - it arose this way, I think, in the first case before Vice President Watson, which involved an application to reduce to two hours, there was evidence led about two students who were unable to work three hours. It transpired as the case unfolded that they wouldn't have been able to work two hours either, and so - because of the closing time of the place where they were employed at that time. And so it seems that one and a half hours would have given them time to get there from school and work until closing time.

PN334

SENIOR DEPUTY PRESIDENT WATSON: I see.

PN335

MR FRIEND: But that evidence wasn't before Vice President Watson in this case.

PN336

COMMISSIONER HAMPTON: Mr Friend, you might want to look a little more closely at the South Australia provision. I think you'll see that that's actually - well, it was at some stage 1.5 hours.

PN337

MR FRIEND: Thank you, your Honour. It's my mistake. The summary of the NRA evidence is contained in paragraph 11 of the decision.

PN338

SENIOR DEPUTY PRESIDENT WATSON: That might also partly answer my question about where one and a half hours came from.

PN339

MR FRIEND: Yes, your Honour. It's a question of why they asked the question about one and a half hours, I suppose is the one that I was trying to answer.

PN340

SENIOR DEPUTY PRESIDENT WATSON: Yes.

PN341

MR FRIEND: If one then turns to the survey - and I won't ask the tribunal to do it - it's contained in the appeal book at pages 191 to 201, there were 67 members of the NRA surveyed. In paragraph 9 of his statement in describing the survey Mr Black said at paragraph 189 of the appeal book:

PN342

> *I've asked my staff to conduct a phone survey of as many employers that we can reasonably get to in the time available. I asked them to focus on smaller employers because the majority of the retail chains had enterprise agreements in place. This sort of survey is the most effective way of getting structured feedback from retailers on minimum hours issues.*

PN343

So the application was lodged on 18 October, the statement was filed on 12 November. So in the time available the most that they could talk to was 67 and the results are more or less as described. One our expert witnesses, Dr Campbell, considered the survey and we've extracted some of what he says at paragraph 49 of the submissions. There was also an ARA survey relied upon and Dr Campbell makes some comments about that which are referred to at paragraph 50, without taking the tribunal to those. Our position in relation to that is that is we say the survey is just not probative evidence that anyone is going to get employed - that there will be any offers of employment.

PN344

We accept fully if there's any evidence that could be relied upon - it doesn't matter whether it's good or bad or what our opinion or what this full bench's opinion is, that's enough. We have to get to the stage of saying that this type of evidence is simply not probative of anything. That's what we submit.

PN345

SENIOR DEPUTY PRESIDENT WATSON: But what type of evidence is available in relation to these issues?

PN346

MR FRIEND: If one looks at the expert witness statements that were filed by the SDA there's a substantial body of evidence about what is actually happening and people who make a living on considering these things and writing academic papers about them.

PN347

SENIOR DEPUTY PRESIDENT WATSON: But there's no - - -

PN348

MR FRIEND: We've relied on that.

PN349

SENIOR DEPUTY PRESIDENT WATSON: There's no evidentiary basis in terms of a social experiment available to - - -

PN350

MR FRIEND: No social experiment and no properly conducted wide-ranging survey that could have gone to show that there was a problem. That does take a good deal of time, we have to say.

PN351

COMMISSIONER HAMPTON: Mr Friend, you referred earlier to some of the evidence that was before the Vice President in the first case.

PN352

MR FRIEND: Yes.

PN353

COMMISSIONER HAMPTON: This question arises partly because of, I guess, the confusion about appeal book 2. Some of that material was included in appeal book 2 then removed and now back in.

PN354

MR FRIEND: Yes.

PN355

COMMISSIONER HAMPTON: Was that before the Vice President?

PN356

MR FRIEND: It was before the Vice President. It was part of the Victorian government's submissions. It was our error in removing it, but it was actually attached to their submissions. They don't actually refer to it, but it was attached, so it was before his Honour and it was material before the court.

PN357

SENIOR DEPUTY PRESIDENT WATSON: I notice Mr Black referred to Terang in the statement you just took us to.

PN358

MR FRIEND: Yes.

PN359

SENIOR DEPUTY PRESIDENT WATSON: So it's clear, isn't it, that everyone was aware of the evidence - - -

PN360

MR FRIEND: Everyone is aware of - - -

PN361

SENIOR DEPUTY PRESIDENT WATSON: - - - before the Vice President in the earlier proceedings.

PN362

MR FRIEND: Yes. The final point that we rely upon is the discrimination one. Section 153 provides that a modern award cannot be discriminatory.

PN363

VICE PRESIDENT LAWLER: Mr Friend, it's a matter for you, but can I suggest that we wait until you hear the submissions from the other side before you respond to that. It's very clear to my way of thinking that your opponents are going to have to expose the error in your reasoning in that regard. Just I think it might be quicker.

PN364

MR FRIEND: Thank you, your Honour. That is all that we have to submit on the appeal.

PN365

MS SYMONS: Thank you, your Honour. Your Honour, I might do as counsel for the SDA has done and pass up copies of our outline of submissions.

PN366

VICE PRESIDENT LAWLER: Shall we do the same for you, Ms Symons, and take a short break?

PN367

MS SYMONS: I was going to suggest that, your Honour. Thank you.

PN368

VICE PRESIDENT LAWLER: We'll adjourn for a few moments.

<SHORT ADJOURNMENT [11.12AM]

<RESUMED [11.23AM]

PN369

MS SYMONS: Thank you. Your Honour, given that the tribunal has had the opportunity to read those submissions, what I would propose to do is not to trouble the tribunal with respect to what I would describe as the preliminary matters; matters which in my submission deal with the pallet jurisdiction of the tribunal; matters which in my submission are not controversial, but are set out in any event in the opening paragraphs through to paragraph 7 of the NRA's submissions. What of course I do seek to emphasise is the very high bar which in my submission the SDA is required to overcome on a number of levels. At the first instance, the threshold, if you like, with respect to obtaining permission to appeal.

PN370

What we say is that in the first place it's not in the public interest that this matter proceed. My submissions with respect to that are set out at paragraphs 8 and 9 of the submissions. If the tribunal was against me on that basis then the submission which follows is that by virtue of the principles which are set out in House v King which in my submission severely circumscribe the basis upon which a discretionary decision can be appealed from. Likewise, the SDA's appeal cannot succeed. My submissions directed to that aspect will be developed with what I say as follows; I take it, your Honours, that those principles in House v King are not controversial. We, of course - - -

PN371

VICE PRESIDENT LAWLER: I think you can proceed on that basis. There are one or two cases that have applied House v the King, I think.

PN372

MS SYMONS: Yes, I think that we can take that as the accepted approach. At this point it may be appropriate, your Honours, that I hand up the authorities which the NRA does rely on. I'm told that my instructor has already taken care of that. At the threshold the principles in House v King, as I've submitted, reduce the basis upon which an appeal for discretionary decision can be made to - in essence - four grounds of appeal. The submission of the NRA is that none of the arguments which are raised by the SDA come within the bounds of those principles. As I've indicated, I'll develop on that during the course of dealing with each of the grounds of appeal.

PN373

The way in which the NRA has approached the exercise of looking at the grounds of appeal is to characterise them as falling within one of four categories of appeal ground. The first grounds of appeal we refer to generally as no evidence grounds. In my submission those would include appeal grounds 1, 2, 3 and 7. In our submission those are directed primarily at challenging the evidential basis of the findings of Vice President Watson. In my submission grounds of this nature are not squarely comprehended by the principles in House v King. In any event - and probably more significantly - the no evidence grounds, as its name suggests, requires that there be that no evidence whatsoever upon which a decision-maker can proceed.

PN374

In my submission there was evidence before Vice President Watson upon which he could reach not just the state of satisfaction that was required under section 157, but he was able to satisfy himself in relation to the discrete aspects which ultimately form the basis upon which that discretion was exercised. To provide specific examples by reference to paragraph 16 of my submissions, the base propositions upon which Deputy President Watson proceeded either identified as firstly - I'll withdraw that.

PN375

In essence it's my submission that what Vice President Watson did - and it's obvious from reading the whole of the decision and not just confined to paragraph 48 - that he found effectively that certain condition existed in Australia - and particularly in the retail sector and particularly by reference to the experience of working school students - which meant that ultimately it was necessary that he make the variation in the terms which he did and are reflected in the draft determination.

PN376

In my submission those conditions included a number of matters. The first, which I refer to at paragraph 16 is that retail establishments across Australia have a variety of opening hours including hours that reduce the opportunity to work beyond 5.30 or 6 pm. Your Honours, that finding appears in Vice President Watson's decision and it's supported - and just for the purpose of reading this into transcript, in my submission there is evidence to that effect which can be found at PN 91, which is at appeal book 26; at PN 97 to 99, which is appeal book 27. Both

those references, your Honours, are to the evidence that was given by Mr Black, who as you would appreciate, appeared on behalf of the NRA.

PN377

There was also evidence from a Ms Munro at PN 132 in appeal book 60 which was evidence about her own experiences as a student participating in the workforce and evidence that her particular employer had opening hours to 5.30 during the week. The second finding which in my submission supports this general finding that certain conditions - conditions that were ripe for the making for the variation - existed, was the proposition that some retailers had indicated a preparedness to employ more school-aged children after school if a minimum one and a half hour shift was implemented. Primarily this evidence - we say the evidence was certainly before the tribunal.

PN378

The evidence came in the form of the evidence of Mr Black again at PN 53 in appeal book 23 and from the survey results; the survey which you heard from Mr Friend was conducted by the NRA and which formed part of the evidential case upon which the NRA proceeded before Vice President Watson. That survey is reproduced in its entirety at appeal book 191 to 201. In particular question 5 was framed at asking the various shop owners whether or not should the variation be implemented, would they be prepared to employ more school-aged children. The majority of those persons surveyed - I think it was 67 per cent - indicated that they would certainly be prepared to consider that possibility.

PN379

We accept that the survey generally, and by reference to each of its questions, was the subject of some challenging criticism by Dr Campbell. Notwithstanding that, we say that it was still evidence that could be probative of the matters which are under consideration and certainly probative of the specific question, "Were there employers out there who would be prepared" - it wasn't put as high as "was there a guarantee of jobs" and certainly the Vice President never proceeded on that basis, but there was evidence of a preparedness to explore that option should it become available. In my submission that survey evidence, notwithstanding any criticism directed at it, was evidence that could support such findings. Certainly there is no basis, having regard to that evidence, for a no evidence submission to stand to sustain an appeal.

PN380

The third proposition which in my submission was relevant to this more general finding of the relevant circumstances or conditions was evidence that a variety of factors and personal circumstances ultimately influenced the decision of school students as to the duration of the shifts which they wished to take on. In general terms, your Honours, it is fair to say that certainly the student witnesses that appeared on behalf of the SDA spoke in terms of being quite happy with the three hour or longer duration shift, but it was notable that I think with no exception each of those students was also prepared to make the concession that ultimately what was important was personal circumstances, the other activities that they were engaged in, and other factors which were gone through in some detail below; changed travel time, expense, and related.

PN381

The evidence which I refer to in the form of this type of concession appeared at PN 106 at appeal book 58; at PN 141, appeal book 61; PN 193, appeal book 67; PN 461, which is appeal book 105; PN502, appeal book 108; and PN 522, appeal book 110. The fourth factor which in my submission again supports the overall finding the conditions that currently prevail support the need for a variation is that the Australian retail sector is a significant employer of students. Your Honours, I don't believe that this is such a controversial proposition and it came out in fact from the expert evidence of Dr Campbell, upon whom the SDA relied. Specifically, your Honours, the references are PN 275 at appeal book 76 and PN 280, which is appeal book 77.

PN382

Your Honours, the final proposition which in my submission again went toward this general finding of relevant circumstances or conditions was that participation by students in work can have considerable benefits, including the development of social networks. In this respect if I could draw your attention again to the expert evidence of Dr Campbell at PN 357, appeal book 94. The evidence of Dr Price, who was the other expert called by the SDA below is at PN 628 at appeal book 123, PN 650 at appeal book 126 and PN 677 at appeal book 130.

PN383

Dr Price in her statement, which was also before the tribunal, makes reference to the benefits of work for students at paragraph 15 of her statement, which is at appeal book 394. Your Honours have heard there was also other material tendered to the tribunal; in particular the House of Representatives standing committee report formed part of the evidence; specifically at paragraph 3.58 of that report, which is reproduced at appeal book 651 there were enumerated various matters which can only be described as indicators of the benefits of participation by students in the workforce. That material in my submission again can support a finding that there are considerable benefits which anew to school students who participate.

PN384

Your Honours, I've already submitted that what is required to sustain an attack based on no evidence is no evidence at all. It's not an attack - and Mr Friend accepts this in any event - but it's not an attack on the weight or the degree to which such evidence was produced, but it's an attack on the basis that there was absolutely nothing upon which the Vice President could have proceeded. In my submission the manner in which the Vice President dealt with the evidence - and it's set out in the decision in respect of - certainly the NRA at paragraph 11 and then in the following paragraphs, 12 through to at least 18, the evidence before the tribunal more generally is set out.

PN385

In my submission it is fairly apparent from the reasons that Vice President Watson was careful in his approach to the evidence and he certainly did not overstate the quality of the evidence or the strength of the respective parties' evidential positions. It's clear, particularly from paragraph 10, where the Vice President talks about the weight of some of the evidence being limited, that he was aware of the indirect nature of a lot of the evidence. It is an appropriate inference to draw

from those observations that the Vice President took this into account and afforded proper weight to the evidence in any event.

PN386

Your Honours, appeal ground 2 is again comprehended in this more general character of a no evidence ground. The challenge by appeal ground 2 is that there was no material upon which the tribunal could be satisfied that there was a group of secondary school students unable to obtain employment because of the minimum engagement provision for casual employees provided in the current clause 13.4 of the modern award. In respect of that, I would say two things. The first submission that I make is notwithstanding the statements which were relied upon by the NRA in earlier proceedings - these statements which were related to two students who had been employed in Terang - were not strictly part of the evidence before Vice President Watson.

PN387

Vice President Watson was clearly aware of the circumstances of those students. In fact, Mr Black in his statement does refer to the Terang experience. So to that extent there was certainly some material or some knowledge that there were at least two students that had been affected directly by the variation to the modern award. The second submission I'd make is that even supposing there was not that material, in my submission Vice President Watson was not required as a precondition to reach the state of satisfaction required under section 157 in any event to identify such a group of students.

PN388

In my submission what was required - and the language of section 157 is quite clear - is that the Vice President turn his mind to the question of what was necessary or whether the variation sought was necessary to achieve the modern awards objective. Certainly we can't resile from the proposition that it may have been helpful to identify such a group of disaffected students, but in our submission it wasn't a necessary precondition to the exercise of a discretion or to the making of the NRA's case.

PN389

In my submission the balancing exercise which the Vice President engaged in involved consideration of whether or not there were circumstances that supported the variation and whether those had a potential to achieve the award objective. It's difficult to conceive of how evidence could be supported or provided short of guarantees from prospective employers that the variation sought would in fact give rise to specific job opportunities. In my submission it was sufficient that there could be identified a potential for such opportunities to arise and that to go that step further was not required to give effect to section 157.

PN390

The balance of the NRA's submissions directed at the no evidence ground, which is set out at paragraphs 20 and 21, in my submission don't require further development here. There's a reference at paragraph 21, your Honours, to the decision of Australian Stevedoring Industry Board. That is in my submission merely to highlight that in circumstances such as these where there may be - I withdraw that. In my submission the challenge which in effect has been made by the SDA is that there was an insufficiency of evidence on material as distinct as

there be no material before the tribunal. As my submissions have already indicated, we say that there was adequate material and there was some material on which the tribunal could proceed to make the findings that it did and to exercise the discretion in the manner that it did.

PN391

Your Honours, I could turn now to what I refer to generally as the construction grounds, which are comprehended in the notice of appeal at grounds 4, 5 and 6, your Honours. What we say in respect of these grounds, generally at least, is that it's plain from the decision that the Vice President was well aware of the task he was required to undertake pursuant to section 157. As a starting point - and we accept that it's not necessarily the end of the inquiry - but it is noteworthy that the Vice President referred in his decision to the legislation itself. Your Honours will see at paragraph 8 through to paragraph 9 that sections 1 through 4 and section 157 of the Act are set out by the Vice President.

PN392

Similarly the Vice President states in a couple of paragraphs in the decision the language of section 157, the necessity to find that variation need be made, and that is done both before he proceeds to make his - what in effect are the reasons of the decision. Just prior to paragraph 37 in appeal book 12 and in other parts of the decision that test is re-stated. Your Honour's, the Vice President in determining the matter under section 157 refers to those matters enumerated at section 134 subsection (1). But in particular - and as you would well expect - the focus through that enquiry is on those matters which the parties themselves have placed emphasis upon in their own submissions.

PN393

In the NRA's original submissions three or four of the matters referred to under section 134(1) are highlighted. As the hearing progressed it would be fair to say that there were two factors which bore the brunt of scrutiny and certainly were the subject of submissions at the end. Those are submissions dealing with the flexibility and then of course the issue of social inclusion. It's completely understandable that the decision of Vice President Watson is directed at those two matters because as I've submitted, that was where the inquiry of the parties certainly was directed.

PN394

Your Honours, as my learned friend has indicated, the way in which Vice President Watson ultimately disposed, if you like, of the application or dealt with the application was to proceed by reference to the social inclusion matter, but the Vice President equally dealt - prior to doing so - with the question of flexibility and determined that this was not something which would engage the discretion under section 157. In terms of the way in which Vice President Watson approached the exercise, the criticism which the SDA I understand makes is that the approach - notwithstanding it was done by reference to the commission of social inclusion - did not properly grapple - the question was not balanced against what is required by section 134.

PN395

In my submission there is an obvious lack of prescription evident both from the language of section 134 and section 157, and also the explanatory memorandum

which deals with both of those provisions. In any circumstance where there is this lack of prescription and where there is an exercise of discretion it's uncontroversial that the decision-maker is given a great degree of latitude as to how they will determine the matter. Having regard to the way the submissions were made and the mandate that in determining whether the modern awards objective has been achieved - that factors set out at section 134(1) are considered - it is in my submission difficult to conceive of how the Vice President could otherwise have gone about his task.

PN396

The balancing which in my submission he engaged in is reflected not just at paragraph 48, which is where the ultimate finding is made, but there is reference throughout the entirety of the decision to factors which bore on the Vice President's determination. For example, the question of fairness, which is obviously very relevant to the determination in section 134, in my submission is apparent from references by his Honour to - the identification, for example, of potential impact on persons from lower socioeconomic groups. Those are referred to at the decision at paragraph 39 of appeal book 12; a comparison, if you like, of that group of persons with those students who are currently part of the workforce. Again, that's a reference at appeal book 13 and in paragraph 41 of the decision.

PN397

Whilst it might not be explicit from the decision, it's my submission that the very fact that the Vice President ended up making a determination in a qualified form is evidence that he did in fact engage in a balancing exercise and an assessment as to both the need, the fairness and the relevance of making the variation sought by the NRA.

PN398

In my submission what the Vice President has achieved by the draft determination and the variation, which is articulated therein, is not necessarily the introduction of more jobs, whilst it might be a necessary consequence or an obvious consequence; but what he's done is to create a mechanism based on circumstances which he has identified as currently prevailing in the Australian retail industry; a mechanism to deal with those circumstances in a very circumscribed manner to afford opportunities to a group which currently is dealt with in the mainstream, if you like.

PN399

As I've submitted, there was the evidence to support both the circumstances and then the need for this creation of the mechanism. Your Honours, I propose now just to deal fairly briefly with what is described as the discrimination ground. Your Honours will be aware that this arises through the operation of section 153 of the Act. What I'll say in relation to the discrimination ground is firstly that in terms of the way in which the case was run before Vice President Watson - but it was a matter that received fairly scant attention, certainly from - - -

PN400

VICE PRESIDENT LAWLER: That's just irrelevant, isn't it?

PN401

MS SYMONS: Sorry?

PN402

VICE PRESIDENT LAWLER: That's just irrelevant, isn't it? The level of attention it received before the Vice President is irrelevant. If 153 is infringed, that's the end of the matter.

PN403

MS SYMONS: Yes, I have to accept that that's the necessary result of - perhaps just to put it in context, that during the application it did not receive a great deal of attention by the parties. The variation that in my submission, however, the way in which the Vice President dealt with the application was - putting to one side the discrimination ground - was that he was satisfied pursuant to section 157 that the variation should be made. That satisfaction was reached appropriately. In my submission that was the independent basis upon which to grant the variation and disposed of the discrimination matter.

PN404

VICE PRESIDENT LAWLER: Ms Symons, this is not a discretionary matter; either that provision applies or it doesn't, to the facts as found. We're in as good a position to make that assessment as the Vice President. This is a Warren v Coombes scenario. If we're persuaded by Mr Friend that 153 is operative in this case, he wins. You need to persuade us that it doesn't. What the Vice President has said or not said is really rather beside the point, given that he didn't deal with it in any particular detail. Correct me if I'm wrong, but that's my understanding of what the - - -

PN405

MS SYMONS: No, I - - -

PN406

VICE PRESIDENT LAWLER: That's the legal framework within which this bench operates. A thought that's occurred to me since I suggested to Mr Friend that he wait until his reply is the significance that might need to be attached to the word "against". In other words, is 153 attempting to prohibit discrimination totally, or is it only trying to prohibit adverse discrimination; treating people adversely because of their age, physical/mental disability, colour, sex, race, et cetera. In this case this is not adverse discrimination.

PN407

MS SYMONS: No.

PN408

VICE PRESIDENT LAWLER: This is beneficial discrimination.

PN409

MS SYMONS: Yes.

PN410

VICE PRESIDENT LAWLER: In other words, it doesn't say - isn't it the notion of distinction between "against" and "in favour of"?

PN411

MS SYMONS: Sorry, your Honour, I missed that one.

PN412

VICE PRESIDENT LAWLER: The distinction between "against" and "in favour of" is the one that has floated through my mind. It doesn't prohibit discrimination in favour of employees - - -

PN413

MS SYMONS: No.

PN414

VICE PRESIDENT LAWLER: - - - or in favour of employees because of those reasons; it prohibits discrimination against them because of those reasons.

PN415

MS SYMONS: Yes.

PN416

VICE PRESIDENT LAWLER: Young people are not being discriminated against, so the argument would go in this case, in the case of this variation.

PN417

MS SYMONS: Yes, certainly, your Honour. The position we take is that any variation - and certainly the variation which appears in the draft determination - is not directly discriminatory in any event.

PN418

VICE PRESIDENT LAWLER: But that surely can't be the - indirect discrimination is a well-established category of discrimination; see Banovic v the High Court. This type of provision doesn't just appear here, but you also find it, for example, in relation to the approval of agreements. It's just inconceivable that the parliament intended to exclude indirect discrimination when it can operate in just as real a way - and Banovic is the classic example. There was a workforce that was all male. They eventually started engaging women; women were disproportionately represented amongst the recently engaged; they have a round of redundancies; they're going to sack people, and the criterion is last on first off. Women are disproportionately and adversely affected by that. That's as real as direct discrimination.

PN419

MS SYMONS: Yes, I accept that. There's also the example of course of the police force where height was once an issue for (indistinct). In my submission I comprehend that provision is directed at indirect discrimination as well. That is why I have acknowledged that there perhaps is some indirect discrimination which might operate with respect to the variation; discrimination on the basis that school-age students or persons of a particular age might be impacted by - - -

PN420

VICE PRESIDENT LAWLER: School students are overwhelmingly young people.

PN421

MS SYMONS: Young, that's correct. I accept that. But the answer in my submission is to be found in the language or the condition which attach to the variation which are highly prescribed, that there be certain conditions which must be satisfied - four of them - before the variation is to take effect. In particular there's a limiting factor that it must be subject to operational requirements or the

unavailability of the student; and also, not insignificantly, that there must be agreement between the student and their guardian or parent for the variation "is engaged or has taken effect with respect to their own employment". In my submission that redresses sufficiently any operative discrimination. That's the first point. The second is that - - -

PN422

VICE PRESIDENT LAWLER: So you say that in truth there is no discrimination because of those matters of redress.

PN423

MS SYMONS: Yes. Or if there is any discrimination, that, in my submission, is positive discrimination which the Act recognises could and should be allowed to operate in favour of certain segments of the workforce. Unless there's anything further.

PN424

VICE PRESIDENT LAWLER: Thank you, Ms Symons. Mr O'Grady.

PN425

MR O'GRADY: Thank you, your Honour. I too have an outline. I hope it doesn't require you to leave the room to read it. It extends only to five pages; two and a half pages of which is preliminary material. I wish to address the tribunal on three issues. Much of what is said in the outline has already been covered in submissions of Ms Symons and I don't wish to repeat that. The first is in relation to the evidence ground and necessity. This goes to paragraph 7 of the outline. What paragraph 7 of the outline reveals is that his Honour embarked upon an unexceptional logical progression of reasoning.

PN426

It goes through what is the evidence; what weight should I afford to the evidence; what are the relevant findings; and what's the conclusion? In the outline we have identified where the evidence lies. In relation to Mr Friend's submission concerning necessity and the references to "may" throughout his Honour's decision, I draw the tribunal's attention to paragraph 41 where there his Honour is addressing the interests of different groups. You'll see in the last sentence that his Honour clearly - I think expressly, if not implicitly - acknowledges that there is a group who are not able to secure jobs. That forms the basis of any finding as to necessity.

PN427

If the view is that the word "may" where it is used elsewhere in the reasons is insufficient, it's apparent from that that his Honour was of the view that there was an absolute and that he needed to vary the award to give effect to the modern award objective. Turning to Mr Friend's submission in relation to social inclusion, rather than repeat what I said below, I really just want to draw the tribunal's attention to what was said below on the part of the Minister and where it is said, and give you some assistance in understanding what was said by reference to material in the exhibits.

PN428

The submission of the Minister in relation to social inclusion commences at paragraph 805 of the transcript on appeal book page 149. In essence it comes

back to the exchange between your Honour Vice President Lawler and Mr Friend. That is your Honour's immediate reaction in relation to the issue of social inclusion was correct. One can't take a narrow view of what is comprehended by the concept of social inclusion. In essence what the modern award objective deals with is a sub-set of social inclusion, if you like, and that is the increased workforce participation.

PN429

Through paragraphs 805 to 810 of the transcript is the Minister's submission below. It refers to various aspects of the evidence. To assist the tribunal members to revisit that submission I might just read into the transcript the appeal book references to those materials. First of all there is a reference to the House of Representatives' report at paragraph 3.58. That is appeal book 651.

PN430

VICE PRESIDENT LAWLER: Sorry, where's that reference? There's a reference at the end of 809.

PN431

MR O'GRADY: There's a reference at 3.12. It may be that 3.58 was overlooked, but in essence, paragraph 3.58 talks about concepts of the need to participate in the work to be socially accepted, et cetera.

PN432

VICE PRESIDENT LAWLER: What's the appeal book reference for 3.58?

PN433

MR O'GRADY: I'm sorry, your Honour, it was appeal book 651. I might add in paragraph 4.46 of the House of Representatives report, which is appeal book 668; there is reference to it also in the NRA submission below, which is at paragraphs 30 to 34 of the NRA submission, which is appeal book 180. The reference that your Honour picked up to 3.12, which is at paragraph 809 of the transcript - that's 3.12 of the House of Representatives' review report - that appears at appeal book 632. And I also identified two paragraphs of Dr Campbell's own evidence there, paragraphs 39 and 41. They appear at appeal book pages 343 and 344.

PN434

There was also evidence in cross-examine of Dr Campbell; the relevant paragraph numbers are paragraphs 372 to 406 of the transcript, which appear at appeal book pages 92 to 96. The submission was also made that Dr Price recognised the social inclusion aspect of students participating in the workforce at paragraph 39, subparagraph (b) of her witness statement. It appears at appeal book 401. The submission is this, that evidence provides the foundation for your Honour's immediate reaction to Mr Friend's comment about social inclusion. One other aspect of social inclusion was also the subject of submissions below on behalf of the Minister. This was the question of what is it - what are the reasons why school students go to work.

PN435

The predominant reason appears to be that it provides them with discretionary income. But in addition to that there are matters such as experience, independence, development of personal autonomy and socialisation. The

evidential foundation for that submission is in Dr Campbell's statement at paragraph 39, which is at appeal book 343; the House of Representatives report at paragraph 2.7, which is appeal book 619; the House of Representatives report 3.12, which I've already made reference to, appeal book 632. And that matter is addressed in the Minister's submissions below at paragraphs 820 to 822 on page 153 of the appeal book.

PN436

The third matter that I wanted to go to was the discrimination ground. In essence what the proposed variation does is it differentiates between secondary school students and others, but it doesn't discriminate. There is no less favourable treatment. The subjective view - the submission of the SDA is that there is less favourable treatment because it's disadvantageous to school students, but that was not the finding of his Honour. The finding of his Honour at paragraph 41 was that it effects different categories of students in different ways. What his Honour has endeavoured to do by confining the variation is to address any disadvantage to part of the group, if you like.

PN437

VICE PRESIDENT LAWLER: Won't Mr Friend say in response to this that the essence of discrimination is treating people differently by reference to one of the relevant criteria; race, ethnicity, age, et cetera, and it's the very essence of discrimination if you treat people differently for one of those inappropriate or improper reasons?

PN438

MR O'GRADY: That's the very essence - - -

PN439

VICE PRESIDENT LAWLER: And he would say here that's exactly what's happened. Every other employee in the community has the benefit of a three hour - covered by this award, which covers a large slab of people - the community's workforce.

PN440

MR O'GRADY: That's correct - - -

PN441

VICE PRESIDENT LAWLER: Young people are being treated differently.

PN442

MR O'GRADY: Sorry, your Honour. It's the very essence of discrimination to treat less favourable, but not just to differentiate. The fact that the minimum hours provision is one and a half hours for students as opposed to three hours doesn't mean that it confers a less favourable treatment upon them. In fact, it confers a benefit on at least part of that group, so you can't draw a line through the whole group and say that because of the attribute of age this clause discriminates against them. The tribunal can deal with that issue without getting into the issue of whether section 153 extends only to direct discrimination or indirect discrimination, et cetera.

PN443

I know that's been the subject of debate in the tribunal and I think your Honour Vice President Lawler has made comment about that recently in the matter. But

you don't need to get into that territory because the fact is there's no less favourable treatment of people because - - -

PN444

VICE PRESIDENT LAWLER: Mr O'Grady, can you point to any authority - preferably a (indistinct) authority - where a court has, in the discrimination area, drawn that distinction that you've now drawn between differential treatment versus discriminatory treatment?

PN445

MR O'GRADY: I think one only needs to go to the standard definitions of discrimination in the statutory provisions; it's less favourable treatment. Now, there's no definition of discrimination, of course, in the Fair Work Act, but in any discrimination legislation the essential element that the discriminatory conduct is less favourable treatment.

PN446

VICE PRESIDENT LAWLER: Yes, thank you.

PN447

MR O'GRADY: If need be one could go into an analysis of section 153 and pick up, as your Honour has pointed out, "discrimination against", but I don't think you even need to go there. Those are the submissions of the Minister.

PN448

VICE PRESIDENT LAWLER: Thank you, Mr O'Grady. Mr Tindley.

PN449

MR TINDLEY: Thank you, your Honours, Commissioner. I also have an outline of submissions. They were sent through yesterday. I'll hand up a copy.

PN450

VICE PRESIDENT LAWLER: Yes, I think we've seen those submissions. Thank you, Mr Tindley.

PN451

MR TINDLEY: Your Honour, Commissioner, it's not the intention of the Australian Retailers Association to traverse in any great detail the content of those submissions. I'd just like to make a point in relation to what is essentially the key thrust of the SDA's submissions, and that is that his Honour Vice President Watson failed to undertake that balancing exercise that is required to create a fair and relevant minimum safety net. In my submission had his Honour granted the application as it was made by the NRA then there would be a relevant question as to whether any balancing exercise took place. The SDA's position that as soon as we've got social inclusion and the opportunity for more jobs, then the variation is necessary.

PN452

That's not what his Honour did. His Honour looked at the variation proposed and identified problems with it; and identified problems with it that potentially undermined that fair and relevant minimum safety net. He identified people who may be affected adversely by the variation as proposed. He did that at paragraph 41 of the decision, which the tribunal has been taken to. In that paragraph the Vice President says:

PN453

One group, comprising existing employees and those in similar circumstances, may have their employment rendered unviable and may effectively be deprived of the opportunity to work if a reduced period of engagement is able to be offered to them.

PN454

That's a very clear indication that in viewing the application before him, the Vice President observed areas that would undermine a fair and relevant minimum safety net, which then led of course, the Vice President to put together a draft determination that dealt with that issue; that minimised the impact or that eliminated the impact on existing employees where their working arrangements allowed for a three-hour minimum. The draft determination limits the circumstances. The Vice President is quite clear of the intention of the draft determination at paragraph 48 of his decision where he says:

PN455

I consider that a modified variation to the Award should be made which confines the proposed exception to the three hour minimum engagement period to circumstances where a longer period of employment is not possible.

PN456

That was the intent of the draft determination. What his Honour also did was invite parties to provide submissions on that draft determination. It appears that the SDA's positions is that his Honour has gone beyond that circumstance of the minimum engagement not being possible. If that's the case, then that was a matter for submissions on the draft determination. The draft determination may well have been modified so that it entirely reflected those limited circumstances that his Honour was trying to capture. Those are the submissions of the Australian Retail Association.

PN457

VICE PRESIDENT LAWLER: thank you, Mr Tindley. Mr Friend. Sorry, Ms Symons, yes?

PN458

MS SYMONS: Just one matter just for the record. I should also have pointed out that the submissions that were made on behalf of the NRA are adopted by (indistinct)

PN459

VICE PRESIDENT LAWLER: Yes, thank you.

PN460

MR FRIEND: Briefly on the no evidence point, your Honour, it's confined to the material that's dealt with in our outline. There was a lot of reference to other evidence which is disputed, but the outline suggests what we say, there was no evidence of or in respect to a demand or a need or anyone out there who's being affected by the award - probative evidence. The discrimination point; if I can say so with respect, your Honour, the point about discrimination having to be against someone is well made. We accept that.

PN461

The difficulty with the clause as proposed is that it goes beyond that because it's conditioned upon the employer's operational requirements; not closing hours, what the employer wants for its business. That means that persons who can work for three hours and who could not apply for and perhaps obtain a job for three hours will be in a position where an employer can say, "You've got a job. I can offer you a job for one and a half hours. Your minimum engagement is one and a half hours." That is less favourable treatment for those persons.

PN462

If it were possible to craft a clause which only reduced the minimum to one and a half hours in respect of persons who simply cannot, for one reason and another, work now for three hours, that would not be discrimination against those persons. We accept that. We actually, in the course of the proceeding, tried to craft such a clause but we haven't been able to come up with one because it's not just about closing hours. The evidence was that there's often work to be done after closing hours, so you can't say if there's less than three hours between the time the student can attend and the time the shop closes, you can have the lower minimum.

PN463

That might be what led his Honour to talk about operational requirements. But once you introduce operational requirements then it's open slather. And so all of the persons currently employed after school - - -

PN464

VICE PRESIDENT LAWLER: Mr Friend, I'm loath to interrupt you, but I think I understand the gist of the argument.

PN465

MR FRIEND: Yes.

PN466

VICE PRESIDENT LAWLER: But isn't that really an argument that goes to the form of the determination, which has not yet been finalised, rather than undermining the entire decision?

PN467

MR FRIEND: Yes, it does, but we have to deal - I mean, that's the determination that we've got to deal with, and it may be that if the bench is against me on everything else and it comes to that, the bench may either admit it with some comments about the determination, given we've had the argument - as I said, it was unfortunate - the timing - that we couldn't have the final determination. I accept that. But in reality, your Honour, if this bench decides to exercise the discretion for one reason or another it's our submission that you can't make a determination that will not be discriminatory; that will only reduce the minimum for those who can't now work for three hours.

PN468

VICE PRESIDENT LAWLER: Mr Friend, doesn't the condition in clause (d) preclude discrimination against? There is no-one under the current award lawfully working less than the three hour minimum.

PN469

MR FRIEND: Yes, your Honour.

PN470

VICE PRESIDENT LAWLER: And this only provides for working less than the three hour minimum where employment for longer periods than the period of engagement - not an hour, an hour and a half, it might be two hours or two and a half hours - - -

PN471

MR FRIEND: Yes.

PN472

VICE PRESIDENT LAWLER: - - - is not possible?

PN473

MR FRIEND: Because of the employer's operational requirements.

PN474

VICE PRESIDENT LAWLER: Yes.

PN475

MR FRIEND: You have to have some explanation of "not possible" in the instrument because otherwise no-one will know what it means. His Honour has chosen "operational requirements" rather than "closing hours" because people might be able to work after closing hours. But "operational requirements" means, as his Honour pointed out in paragraph 19, the employ might just want someone for an hour and a half because of a busy time.

PN476

VICE PRESIDENT LAWLER: But if it's not possible because of operational requirements the employer is not going to offer that employment otherwise.

PN477

MR FRIEND: Well, your Honour - - -

PN478

VICE PRESIDENT LAWLER: If you take seriously the proposition of not possible - - -

PN479

MR FRIEND: - - - as a matter of reality the employer might prefer to have someone for three hours than no-one. They might be prepared to work for three hours, but that's - - -

PN480

VICE PRESIDENT LAWLER: That gives "possible" another meaning than "possible", I would think.

PN481

MR FRIEND: I'm not sure about that, your Honour. That leaves it up to the employer to determine what's possible and what's not possible. It's not an objective test.

PN482

VICE PRESIDENT LAWLER: Ultimately it's the job of a court if the matter is pursued.

PN483

MR FRIEND: Ultimately that the employer comes along to the court and says, "That's all I want. I only want someone for an hour and a half. That's my operational requirements." The court is not going to be able to say that there's some objective factor that can undermine that, your Honour. Unless there's anything else I can say to assist the tribunal, those are the submissions.

PN484

VICE PRESIDENT LAWLER: Thank you, Mr Friend. We'll reserve our decision.

<ADJOURNED INDEFINITELY [12.22PM]