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FAIR WORK AUSTRALIA

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 26938-1

VICE PRESIDENT WATSON

AM2010/92

s.158 - Application to vary or revoke a modern award

Application by Jobs Australia Limited
(AM2010/92)
Social, Community, Home Care and Disability Services Industry Award 2010

(ODN AM2008/79)
[MA000100 Print PR991066]]

Melbourne

9.34AM, TUESDAY, 20 JULY 2010

PN1

THE VICE PRESIDENT: Can I have the appearances, please?

PN2

MR FELLE: I was going to say if the Commission pleases. Your Honour, I appear on behalf of Jobs Australia. Felle, initial M.

PN3

THE VICE PRESIDENT: Yes, Mr Felle.

PN4

MS A. MATAERE: Your Honour, Ms Mataere, initial A, for the Catholic Commission for Employment Relations.

PN5

THE VICE PRESIDENT: Ms Mataere.

PN6

MR K. HARVEY: Your Honour, this morning I appear on behalf of the Australian Services Union, the Health Services Union, the Liquor, Hospitality and Miscellaneous Union and the Australian Education Union. My name is Harvey, initial K, and appearing with me today is Mr Fridell, initial W, your Honour.

PN7

THE VICE PRESIDENT: Mr Harvey. And in Sydney?

PN8

MR D. STORY: Your Honour, if the Commission pleases, my name is Story, initial D, from the Australian Federation of Employers and Industries.

PN9

THE VICE PRESIDENT: Yes. Thank you, Mr Story. You can remain seated when you speak. We can actually see you better when you do.

PN10

MR STORY: Sure, that's fine.

PN11

THE VICE PRESIDENT: Thank you. Yes, Mr Felle?

PN12

MR FELLE: Your Honour, Jobs Australia is fully aware that to succeed in this application Jobs Australia and the other parties supporting this application must satisfy Fair Work Australia that making the proposed amendment to the Social and Community Home Care and Disabilities Services Industry Award (2010) is necessary to achieve the modern award's objective.

PN13

As your Honour is aware, the modern award's objective is outlined in section 134 of the Fair Work Act. In this application it is submitted that section 134(f) and (g) are the relevant provisions to be applied in this matter. For the sake of completeness I'll outline 134.1 says that:

PN14

The FWA must ensure the modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of

terms and conditions taking into account subsection (f), the likely impact of any exercise of modern awards' powers on business, including on productivity, employment costs and the regulatory burden.

PN15

And subsection (g):

PN16

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

PN17

In the recent decision your Honour handed down on 9 July 2010 on an application to vary the Retain Industry Award, FWA 5068, your Honour outlined at 15 and 16 of that decision the general approach, we would submit, to be followed in considering applications to vary the modern award. Jobs Australia does not contest this approach. Importantly, it is submitted that the context of this application is detailed and comprehended. This application is not presented merely as a re-examination or re-argument on the decision of the Australian Industrial Relations Full Bench handed down on 22 December 2009; that's AIRC FB 971.

PN18

It is submitted that there are exceptional circumstances that warrant the support of this application. The Social and Community Home Care and Disability Services Industry Award (2010) is unique, in our submissions. Of the 122 modern awards created under the award modernisation process there is, to my knowledge, only one award that has deferred wages transition provisions operable from 1 July 2011. The extent of confusion and administrative burden in this industry was not, it is submitted, fully comprehended and apparent until the implementation of the modern award and Division 2B awards commenced in 2010.

PN19

The uncertainties regarding award coverage are specific in this industry and will be resolved in the main when the modern award replaces Division 2B awards in 2011. This industry has a high level of non trading corporations, which means that there is a considerable degree of complexity as to the industrial instruments already. We have NAPSAs versus Division 2B awards. There are continuing schedule 6 instruments versus state and state referenced transitional awards, all with a variety of penalties and loading provisions which relate to the wage rates in those industries.

PN20

THE VICE PRESIDENT: I am not too sure that I understand the relevance of the question about award coverage. I understand the point that non constitutional corporations are not covered by the award until 1 January 2011 but isn't that a question that arises now as to whether it applies or not?

PN21

MR FELLE: I will come to that and I will outline what, in fact, has changed since the 22 December 2009 decision that has altered the position that was comprehended by the parties in regards to non trading corporation standards.

There has been a significant change to the, I will say, understanding of the application of those provisions relative to the continuance of Division 2B awards, for example, compared to the operation of the modern award from 1 January next year.

PN22

The circumstances surrounding this confusion, your Honour, I will indicate, as is touched upon in our application, resulted in the Fair Work Ombudsman convening a meeting of national industry stakeholders, including employer groups and unions, on 27 May 2010 to discuss issues on the introduction of this modern award. For the sake of completeness I'll seek to tender to the Tribunal a copy of the parties who were invited and attended that meeting on 27 May. A number of the parties present at this meeting expressed their position, that it was desirable that the phasing in of penalty rates and loadings be delayed by 12 months to July 2011.

PN23

Jobs Australia has served a copy of this application on all employer and employee parties who attended this meeting. Some parties have expressed their own respective positions in these proceedings to Fair Work Australia. In that respect I will refer to what has been submitted and is on the Fair Work Australia website. The Australian Council of Social Service, which represents 2500 organisations nationally, has presented its position to this Tribunal, as I said, on 19 July, supporting the application and indicating, as I have briefly touched upon and will expand further, issues relating to the confusion and difficulties associated with the implementation of this award.

PN24

Secondly, the National Disability Services also have lodged a written submission in support of the application being lodged by Jobs Australia in this matter. Other parties who are present in today's proceedings I am sure can and will ventilate their own views in regards to this matter. The AFEI were present at the meeting on 27 May, as were the Australian Services Union. The issue in regards to what circumstances have changed is that since the decision made in 2009 there has been a change that warrants the support of Fair Work Australia and, in our view, warrants the approval of this application.

PN25

In previous hearings before the Australian Industrial Relations Commission Full Bench in relation to varying the transitional provisions in this award, Jobs Australia has maintained the position that alternate provisions were necessary for the transitioning of loadings and penalties due to, in summary, the level of uncertainty that existed at the time - December 2009 - the social and community sector on the non trading corporation status of organisations; two, the resultant confusion from this status on whether Division 2B awards would apply, and the fact that the wages were deferred until July 2011 to await the outcome from the pay equity case, but in fact, the loadings and penalties have not.

PN26

This approach, on having one consistent transitional provision date that we are making this application, was only ever put forward by Jobs Australia and that position adopted for the purpose of minimising the disruption to those affected by

the introduction of this modern award. However, there has, in recent times, been even more confusion created by a decision by the Federal Court of Australia in regards to the non trading corporation status of organisations.

PN27

The precedents, if any, that arguably did exist in December 2009, established by previous decisions of state and federal industrial tribunals on the non trading corporation status of organisations, has in fact now been, we would submit, turned on its head by the recent Federal Court of Australia decision in the matter of Bankstown Handicapped Children's Centre Association Incorporated v Hillman FCAFC 11, handed down on 25 February 2010. For the sake of this matter I'd seek to tender a copy of that decision.

PN28

This Federal Court of Australia decision overturned the original Full Bench of the New South Wales Industrial Court in the matter of Hillman v Bankstown Handicapped Children's Centre and the Aboriginal Legal Services v Lawrence Western Australian Commission decision, which were previously held as authorities on the status of government funded non trading corporations. This decision has added further uncertainty and lack of clarity in regard to what is the organisational status of social and community sector organisations and accordingly, has added to the uncertainty and lack of clarity in regards to whether they should be following this modern award from 1 January 2010 or maintain their operation under a Division 2B or other industrial instrument until at least the end of this year.

PN29

From this situation flows that, in fact, which penalties should these organisations apply if they are either covered by the modern award or by the Division 2B preserved award. Should they apply penalties and loadings from 1 July of this year? Should they apply them from 1 January 2011 when they transition to the modern award? And then added to that is the minimum wage increase of 1 July 2010 that has added to the overall issues having to be confronted by often small, volunteer managed community organisations that have difficulties and continue to have increasing difficulties in regards to the application of the award provisions.

PN30

Confusion and potential unintended liability of employers and uncertainty for employees is an issue that is very much the basis of this application and this will be further compounded unless the application we submit is supported in the manner that we have outlined. Suffice to say, Jobs Australia would not have made this application unless there was a significant demonstrated level of confusion and difficulty in seeking to explain to our 1200 members nationally on these issues. Submissions of ACOSS and NDS, both national organisations, support the position that there is a significant degree of confusion and difficulty associated with the implementations of loading and penalties from 1 July 2010.

PN31

We submit that the modern award's objective will not be achieved if this variation is not made. The regulatory burden being placed on the small, not for profit community organisations in the sector is proving to be immense. Jobs Australia itself conducted a series of workshops for our members from Cairns to Perth over

the last four months, seeking to outline and explain the implementation of a modern award process. We also have significant resources accessible electronically to our members in regards to these issues.

PN32

However, despite these resources and these efforts, the capacity for the individual workplace to implement and employees to understand the issues related to 1 January 2010 applicable award provisions, the July 2010 and the July 2011 provisions, are proving exhausting, particularly for those organisations. Bear in mind we also have the upcoming issues in this Tribunal in regard to the termination of modernisable instruments and the statement of this Commission of 23 April, and the Division 2B statement of this Tribunal, add to what we would see the complexities that arise particular to this industry and to this award.

PN33

There has not been provided, in our submission, by the award modernisation process in this award, a simple, easy to understand, stable and sustainable modern award system, and that is primarily the basis of our variation. The variation, if it was granted, would not be a panacea for all of these ills and we comprehend that, but it is submitted that any actions taken by Fair Work Australia to ease the regulatory burden and further provide a simpler modern award system is appropriate and should be so taken.

PN34

We are mindful of the circumstances that have been raised and the issues that have been raised by, particularly, the CCER in its submissions to this Commission, where it raises the fact of what will happen in case an organisation may have already indicated the loading and penalties transition changes from 1 July 2010. Large organisations with large human resource services available to them I am sure will have implemented these provisions. Many of the small, not for profit, volunteer managed organisations that we represent have not, in fact, implemented significantly, if at all, the changes to the loading of provisions, if they are applicable.

PN35

There are a couple of issues raised by CCER and in part by AFEI in this respect and we agree that any employer that has implemented the existing transitional provisions or loadings before 31 July this year should not be prejudiced or liable, it having taken such action. Why that is referred to both in the terms of prejudice or liable relates to the fact that there are loadings and penalties that there are both increases and decreases applicable under the transitional provisions of this award. Or, as we explain it to our members, there are unders and overs. So it's not a situation of seeking to gain a particular advantage for employers. Nor is it sought to gain a particular advantage for employees, this application.

PN36

There are pluses and minuses. As I have indicated, it's solely to seek to maintain the modern award objective: simply, minimal regulatory burden, so that the organisations in this sector can continue on and operate under this award on a common date, particularly in regards to wages and penalties and loadings from 1 July 2011. I also note that overnight the Commonwealth has lodged a written submission in regards to this application. I note that there may be a typing

mistake in paragraph number 4 of the date of the meeting but we see also that the submission on behalf of the Australian Government is supportive of the application. We see that it is supportive of the principles and the basis for the application and we consider that the Fair Work Australia Tribunal should adopt the variation as proposed by Jobs Australia.

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THE VICE PRESIDENT: What was the typographical error at page 4?

PN38

MR FELLE: Sorry. In paragraph 4 of the submission of the Australian Government refers to 27 April.

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THE VICE PRESIDENT: Yes.

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MR FELLE: I believe that should be 27 May, your Honour.

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THE VICE PRESIDENT: All right. So if I understand what you are saying, Mr Felle, there appears to be two sources of confusion, the first concerning the scope of the award; the second concerning the content, if I can group them in that way.

PN42

MR FELLE: Yes.

PN43

THE VICE PRESIDENT: You say that the scope of the award is uncertain because of the nature of activities of many employers that operate in this sector but that that uncertainty will cease to be an issue from 1 January? Is that correct?

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MR FELLE: That's correct, your Honour. The uncertainty that certainly has occurred since the introduction of WorkChoices in 2006 - there was uncertainty in December 2009 but the position that I am indicating in the changed circumstances is now there is even uncertainty, whereas the existing or accepted authorities, as such, have in fact been overturned by the Federal Court of Australia. So there is further uncertainty than there was previously and, secondly, the position in regards to the capacity of the sector to implement the loadings and penalties provisions at different times is proving to be complex, not simple to follow and a significant regulatory burden on, again, the members in this sector.

PN45

Even though we have 1200 members of which approximately 1000 are in the social and community sector, the average EFT of those organisations is less than five. So the capacity in terms of delivery of what is proving to be - well, which is a complicated system of transition is even more demonstrated when you look at the actual numbers. But from my position, being all of my colleagues, five of us, who have sought to explain this process from Cairns to Perth and placed significant materials available to our members to understand, but even since 1 July - if possible, the inquiries and the explanations trying to be provided to our members has increased exponentially.

PN46

We see that that itself - I mean, that comes with the territory. That's our job. That's our role. But we are mindful and concerned that there will be considerable mistakes, considerable unintended consequences of potential overpayment and underpayment and liability created because, in the minds of the small, not for profit organisation, no matter how much we all try to assist them in this decision-making process about their trading and corporation status and the explanation of the awards, they throw their hands up in the air. It's too complicated. They'll continue - - -

PN47

THE VICE PRESIDENT: Aren't there provisions of the awards, other than wages and other than loadings and penalties, that commenced to operate from 1 January this year?

PN48

MR FELLE: Yes, there are. There are allowances and other provisions that commenced from 1 January for those that are correctly covered by the modern award, yes.

PN49

THE VICE PRESIDENT: In some cases it might have been clear that the award did cover and in other cases it might have been thought that it didn't cover until a decision of the Federal Court, to which you refer?

PN50

MR FELLE: Yes.

PN51

THE VICE PRESIDENT: But those provisions of the award that are not covered by the transitional provisions, they need to be complied with by every trading corporation, do they not?

PN52

MR FELLE: Indeed, that is the case and indeed, that is the advice that we give to our members. The question in regards to whether they are or are not trading corporations, as I have indicated, was uncertain and continues to be so. Even the allowances changes and the other provisions of - well, which are primarily, I would say, the National Employment Standards, are very much simpler to follow, very clear and unambiguous and are, in fact, in many cases, a continuance of the provisions that were in the previous industrial instrument. There hasn't been, I would submit, significant change in those provisions.

PN53

In the penalties and loadings there is considerable change. The casual loading has significantly changed, the shift loadings have changed and issues in relation to those is where the confusion that I have referred to is manifesting itself, and that is - - -

PN54

THE VICE PRESIDENT: Well, if you put aside the question of whether the award applies or not and you just look at the content, why isn't it simply a matter of determining what award previously applied, what the relevant loading is under the modern award and determining the nature of the obligation - people who give

advice to small organisations to indicate what the obligations is? Why is it more complex than that?

PN55

MR FELLE: Well, the circumstances, as I would indicate, and I'll give an example. The casual loading provision in the award has changed in the award to the standard casual loading of 25 per cent. Organisations, for example, in New South Wales previously had a casual loading provision process which was 15 per cent plus an annual leave payment component, to the case of up to approximately 23.86 per cent in pay. So if that organisation was proved operating under a state NAPSA pay application prior to 1 July, in July and therefore the modern - we'll say for the sake of my explanation the modern award does apply; they are a trading corporation, putting aside the fact that some people are already revisiting this issue but we'll leave that to one side.

PN56

If they were a trading corporation, then they get to the situation of July of this year in terms of the casual loading, the wage rate to which the casual loading is to be applied is the casual loading in the previous existing wage rate in the NAPSA because there isn't a wages provision in this award that commences until July this year. So then we have a situation of looking at a transitional step, the 20 per cent difference between existing provisions and the new provisions to be applicable from 1 July 2010. The circumstances are, and trying to explain this to, again, the audience that I have referred to, that they apply it to - which wage rate do they apply it to, they don't comprehend.

PN57

To explain that they have to be loading increases to 24.664 per cent in the transitional phase from 1 July is difficult in the extreme to explain why it is, in that situation, and then to - - -

PN58

THE VICE PRESIDENT: Why is it necessary for them to understand why, if that's the obligation? If you work out that that's the obligation, you give that advice - - -

PN59

MR FELLE: Most of the people that I service, I don't just tell them what the increase is. Invariably, they ask why. We put out pay tables that indicate the position that I have just referred to in regard to the casual loading.

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THE VICE PRESIDENT: Yes.

PN61

MR FELLE: People want to know why it is 24.664 per cent and what is it calculated on.

PN62

THE VICE PRESIDENT: Yes. You could have a calculation that explains how you get from 23 point something to - - -

PN63

MR FELLE: It's on the pay table. Yes. It would be nice. If the world was only so simple. But the problem again is despite expensive workshops, despite extensive resources, despite us communicating all of these changes and why and how and how to calculate them, the reality is that those who do the pay table implementation is often a part-time employee who works two hours a week. They haven't attended the workshops that have been run across Australia. They haven't accessed the Jobs Australia website or the FWA website, nor have they read the explanation provided. They get a pay table that says 24.664 per cent, just on the casual loading issue. Why is it?

PN64

You explain it to them and the deathly silence on the phone is an interesting process. Or again, even in workshops that I have proceeded - - -

PN65

THE VICE PRESIDENT: Well, why is it going to be any different next year?

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MR FELLE: Well, next year there will be a modern award wage rate on 1 July 2011, which all of these penalties and loadings will apply to. Currently, there is a wage rate - - -

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THE VICE PRESIDENT: There is still going to be a very strange looking calculation for - - -

PN68

MR FELLE: Indeed. Unfortunately, many of our members have taken the existing wage rate that is published in this award, which is not meant to be followed until July of 2011, and calculated the new loadings themselves based upon that and have implemented it or are seeking to implement it. Then we put out information explaining that that's not the process which is to be followed. In July of 2011, if these two provisions were lined up it would mean there is an award rate. There is not a NAPSA rate, a Division 2B rate or any other state instrument or any other industrial instrument. There will be one.

PN69

THE VICE PRESIDENT: It's a phased rate, though, isn't it? Not one rate?

PN70

MR FELLE: There certainly will be a phased process which continues for a number of years. I don't deny that. But it will be - again, we are talking about simplifying the process of understanding of modern awards. That's the situation that we are confronted with, that's the reality of the environment in which we operate, that's affirmed by other parties in the industry. ACOSS represents those who deliver social and community services. National Disability Service does the same, represents those who provide disability services across the sector. They are conscious - - -

PN71

THE VICE PRESIDENT: It's not possible simply to avoid the uncertainties by moving immediately to the modern award rates? It's the portability, I take it?

PN72

MR FELLE: Well, many things are possible. Whether they are able to occur is another thing. The circumstances of our members to - they could elect to ignore all of the complicated provisions and outlined rates that we are sending to them. Unfortunately, our members are - I won't even say that they're asset rich but they are certainly income poor. Their capacity to flow on increases, to simplify it by administrative action, is again not a measure that would be available. The reality of our sector is it is totally dependent upon other than certainly larger church groups, for example, and other charities, but the members that we represent are in the not for profit sector. They don't have additional resources to apply to administratively make it simple for themselves. If only.

PN73

If they did, I am sure they would proceed down that path, but they don't have that income available to them. They are award reliant dependent and their income streams are linked to the costs associated with the applicable award, whatever that should be. So there isn't a quick fix, as we see it, in regards to or alternate to the methods of what we are proposing. If the wages and penalties are aligned to when the new wage rates in this award come into place, both on 1 July 2011, we believe it's in the best interests of those who have the regulatory burden, who have the responsibility to implement the decisions and meet the legal obligations at the local level.

PN74

As I indicated, our average EFT for our members in this sector is less than five. I could run around the country every day for the next year explaining it if I needed to, but I don't think I am available to do that with our members because we don't want them to create unintended liabilities. We don't want them to make mistakes. We don't want them to not implement the decisions at all, which is a likely outcome. It's not recommended but sometimes people throw their hands up in the air: it is too hard. Again, that goes to the award modernisation objective: simple process, easy to implement, and that's the basis of our application, nothing more and nothing less. That's the submissions of Jobs Australia.

PN75

THE VICE PRESIDENT: Why is it simpler to implement, in the example you gave, the casual loading where the phasing in is deferred so that instead of being 23 point something it's now 24 point something? Why is it - - -

PN76

MR FELLE: Well, next year it will be around about 24.82, if my maths is correct, bearing in mind the transitional. If the same transitional provisions were implemented for penalties and loadings as they have been for wages in this award it will mean a 40 per cent difference, unders or overs, but taking the casual only. So there'll be an increase. But the question that I relate that to is what is the award wage rate to which that transition applies? There are members that we seek to assist. They are referring it to the NAPSA rates pre 1 January 2010 or is it the NAPSA rates as amended for the annual wage review decision or is it the wage rates that are printed and published in this award, which isn't operable but some people read the wage rates and forget to look and don't even know there's a schedule?

PN77

THE VICE PRESIDENT: What is the answer?

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MR FELLE: Well, I think the answer is the nature of the application I have put. There will be one - - -

PN79

THE VICE PRESIDENT: No. What's the answer to the question you pose about which wage rate to use?

PN80

MR FELLE: Well, it depends whether or not the organisation is a constitutional trading corporation.

PN81

THE VICE PRESIDENT: Okay.

PN82

MR FELLE: And how do I find that out? I have to spend at least 15 minutes running over those issues in here.

PN83

THE VICE PRESIDENT: Well, if they are a trading, the award applies.

PN84

MR FELLE: Yes.

PN85

THE VICE PRESIDENT: There is an answer to your question, isn't there?

PN86

MR FELLE: Well, it depends which state they are in, too.

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THE VICE PRESIDENT: Yes.

PN88

MR FELLE: Bearing in mind there's different situations.

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THE VICE PRESIDENT: But what state?

PN90

MR FELLE: The answer will be the wage rate that has been created by the application of the annual wage review decision. That will be the 1 July wage rate, as amended from whatever industrial instrument they previously followed.

PN91

THE VICE PRESIDENT: That's the advice that you provide.

PN92

MR FELLE: We do, and have - - -

PN93

THE VICE PRESIDENT: I take it that the Fair Work Ombudsman could consider that question as well and - - -

PN94

MR FELLE: Well, I don't wish to go on about the Fair Work Ombudsman but unfortunately many of the members of our organisation who ring the Fair Work Ombudsman advice line are given the wrong information. No disrespect for the officers who walk in a call centre for the FWA. But for them to comprehend the maze of transitions that we've just briefly touched upon - many of our members ring up and say, "Well, I've just rung the FW wage line," as recently as yesterday afternoon. Someone in Tasmania, not a trading corporation, has been following the Community Services Award in Tasmania for the last 10 years, rang up the Fair Work Ombudsman yesterday afternoon and they say, "Oh, you should be following the modern award from 1 January."

PN95

Didn't tell them, go the issue of the preserved Division 2B status, and again, no disrespect - you know, junior officers at a call centre didn't indicate in any way at all that there were transitional provisions about wages rates and penalties. That is not an uncommon occurrence. We send out materials. People read it. They choose to ring the FWA and they say, "Oh, we've been told what you put out is wrong." We say, with the greatest respect, let's run through the history and the sequence and the details of this because the generalist information you're getting about modern awards from the FWA, which is a part - the other 121 awards don't have transitional provisions on wage rates and penalties and loadings in the same manner that is or we are proposing in this award.

PN96

The issue of non trading constitutional corporations is not an issue for the majority of the other 121 modern awards. So we've got a unique situation where the major issues in regards to non trading corporation status sit in this award. Nowhere else, and if that's the case the industry has to deal with it. We've presented positions in regard to this. We discussed it. The Fair Work Ombudsman convened a meeting to try and develop a common approach on how we would deal with the complexities. At that meeting the majority - not everybody - indicated the position of supporting what we're putting today.

PN97

We have submissions of ACOSS, NDS - the union hasn't spoken but I'm sure they will and the Commonwealth supporting what we're putting and the reasons why. There's a consistent thread of the reasoning why. If we could find a simple, clear, non regulatory burden approach to resolving this, we would. All that we have available to us is what we submit is a means where the fact that the non trading corporation status issue, in the main, will disappear, because everybody will be covered by the modern award come 1 January 2011. If that is the case, which I understand that to be, subject to any changes in IR legislation, that means that the non trading corporation issue, which is a complexity, will disappear.

PN98

The second complexity is again having which wage rate do you apply these unders and overs to, because the fact is that the wage rate structure in this award doesn't come into place till July 2011. I submit it's a point of simple logic. Let's have all the transitional changes operable at the same time. Also that's the second tranche and element of our application, as you correctly put, your Honour.

PN99

THE VICE PRESIDENT: Yes, thank you, Mr Felle. Ms Mataere?

PN100

MS MATAERE: Your Honour, CCER has filed written submissions in the matter and as such I intend to only briefly address those submissions, unless the Tribunal has a differing view. Firstly, CCER would like to put on the record that it didn't consent to this application, as is alluded to in the application that was filed initiating these proceedings. Nonetheless, CCER neither supports nor opposes the application. This is due to the time restraints surrounding the application. We haven't had sufficient time to consult with our members and formulate a specific position.

PN101

However, given the significance that this application would have on the modern award which does apply and will apply to many of our members, CCER would like to highlight three issues to the Tribunal which it considers are relevant in the determination of this application. Firstly, the significant amount of time, money and resources which employers would have put in to preparing for the transitional provisions and preparing for a move from or to the modern award. As my friend highlighted, from Cairns to Perth he's been out explaining these issues. That's not unique to Jobs Australia.

PN102

CCER has also been running training courses with its members, explaining to those who were transferred to the federal system under WorkChoices and those who were transferred in December last year, the differences and the transitional provisions that will apply to them either from 1 July this year, 1 January next year and 1 July 2011. We submit that that's a relevant factor that should be considered. We also are of the view that confusion will be created, or further confusion, where employers have already informed employees of upcoming changes contained in schedule A of the modern award, those changes which do apply, given that 1 July has already passed.

PN103

THE VICE PRESIDENT: Have applied, yes.

PN104

MS MATAERE: Lastly, the issue of back pay; I understand my friend's acknowledgement that no one should be prejudiced if they have already complied with the obligations in the modern award and we note that a similar provision would also apply to employees who may already be under A5 already be receiving an increase in any loading or penalty. Again, CCER doesn't express a view in either support or opposition of this application. Rather, it addresses these matters as factors which it considers to be of importance in the Tribunal's considerations.

PN105

THE VICE PRESIDENT: You don't appear to be suggesting that there should be a deferral of a consideration until you get instructions. You simply intend to put the submission that you neither support nor oppose it and draw these factors to my attention.

PN106

MS MATAERE: That's correct, your Honour.

PN107

THE VICE PRESIDENT: Yes, thank you, Ms Mataere. Mr Harvey?

PN108

MR HARVEY: Yes. Thank you, your Honour. Your Honour, as I've previously indicated in announcing appearances, I appear on behalf of four employee organisations today, they being the principal employer organisations concerned with and covered by the modern Social and Community Home Care and Disability Services Industry Award, which I think everybody is still referring to colloquially as the SACS Award because no one can get their head around the acronym otherwise. But on behalf of those four organisations, your Honour, I indicate that those unions support the application to vary the modern award in the terms sought by Jobs Australia and supported by others.

PN109

For much of this year I think it's fair to say that the unions, and particularly the Australian Services Union, have been in discussion with relevant employers and other organisations in the social and community services sector and the disability sector regarding the matter of the transition to the modern award. I support the submissions that Mr Felle has made this morning on behalf of Jobs Australia and I support the response that he has given to your Honour in answer to your Honour's various questions, but if we are to try and simplify this matter, which I think is complicated in a number of respects, I think to try and simplify what we see as the point of the application, it is to try and simplify the transitional arrangements under this award, and nothing else.

PN110

What I think is the point of the application and the proposed variation to the transitional provisions is simply to reduce the number of steps in this transitional process for employees and employers covered by this award, effectively as far as we can reducing the number of transitional stages or steps to one, and to commence that phasing process with regard to wages and penalties and loadings to at least a single commencing point, which is the middle of next year, by which time we hope a number of things will have been resolved and settled so that employers and employees in the industry and the Fair Work Ombudsman and everybody else who is concerned about the implementation of this award can have one document on which they can rely and infer, not only to determine the answers to the questions that your Honour has been posing or asking of Mr Felle this morning but other issues as well.

PN111

THE VICE PRESIDENT: It's not one document, is it, Mr Harvey, because the transitional provisions were made to identify the pre-existing instrument and make calculations. It might be 60 per cent, rather than 80 per cent and it might cover wages as well as allowances and loadings, but it still is necessary to have regard to the pre-existing instrument and the modern award in relation to those things.

PN112

MR HARVEY: Your Honour is right, of course. To do the calculations it will be necessary to compare the rates of pay and other penalties and loadings in the

preceding instruments, but we would suggest that means you can do that once and have a transition or phasing arrangement which starts at one point in time, rather than the situation that we have now, inasmuch as the modern award applies in some respects as of now - as of 1 January it's applied. There is a second transitional point, which was 1 July this year, if the award is unchanged. There is a third transitional point, presumably on 1 January next year, for employees who were and employers who were covered by Division 2B awards. Then there's a fourth transitional point on 1 July of next year.

PN113

The issue is partly, as your Honour has attempted to draw out of Mr Felle, but I think successfully - the issue is partly about the coverage of the modern award, but it's also partly about the rates of pay which apply under the various transitional instruments, all of which, we would say, are still live in this industry - in this sector - with respect to wages, which is not the case with most of the others under the other 121 modern awards. They are not live and they are going to be set aside, presumably, some time in the near future.

PN114

The Australian Services Union for its part, under the termination of modernisable instruments proceedings, has said that Fair Work Australia should not set aside any of the transitional instruments in this sector because they've all still got work to do. So if somebody does, for example, want to know what they are paid now and therefore what is the rate of pay for which they're going to calculate the penalty of the loading they can't go to the modern award, although I agree with Mr Felle that some of them are. They can't go to the modern award; they've got to go look at the transitional instrument and some of those transitional instruments - most of them, in fact - have been varied by the decision of the minimum wage panel of Fair Work Australia.

PN115

So as we understand it, transitional Australian Pay and Classification Scales have been varied by that decision, but you can't find them anywhere; they don’t exist in any hard copy or electronic form that we can refer somebody to. The state reference transitional awards, which also apply in this industry, in this sector, have also been varied by the decision but, as far as we know, there is no intention of Fair Work Australia to publish those amended wage rates in those instruments, although we have formally asked Fair Work Australia whether that will be done.

PN116

So there is a degree of difficulty in making this transition work and, of course, there is the other degree of difficulty with regard to either the NAPSA rates; that is, the transitional Australian Pay and Classification Scales versus the Division 2B awards, and that is partly a matter of constitutional issues which Mr Felle has ventilated today but we are getting inquiries from our members as to which rate they are on. Are they on the NAPSA/transitional APCS rate or are they on the Division 2B award rate and, you know, it's impossible to give a simple answer to that question, but the rates are different.

PN117

For example, with regard to the New South Wales Social and Community Services Award the rate is - I haven't got the exact figures in front of me, but it's

around $26 or more different between the NAPSA rate and the Division 2B as a result of varying decisions - - -

PN118

THE VICE PRESIDENT: I understand there is a lot of complexity and there's a lot of things happening. There's all the transitional points. But the first transitional point does apply in any event to trading corporations.

PN119

MR HARVEY: Yes, your Honour. I think the fully correct answer to that question is that it applies not only to trading corporations but to non trading corporations who were covered by federal transitional awards in those states which referred their power to social and community services to the Commonwealth.

PN120

THE VICE PRESIDENT: Yes, I see. Yes. Thank you for that. The third transitional point at 1 January next year applies to the remainder, and that still applies. That's still going to occur.

PN121

MR HARVEY: Well, yes, your Honour, except that is one of the opportunities, because it's in the future, that we can also do something about and we would be certainly on behalf of unions, although we haven't discussed with employers at the moment, intending to make specific submissions about how the transition should operate with regard to those employers and employees coming off the Division 2B awards from 1 January next year and what they should do, because we have an opportunity to take that, or at least say something about that transitional point to perhaps line it up with 1 July next year as well.

PN122

THE VICE PRESIDENT: But that's the case, one way or the other, that you will have that opportunity. This application doesn't affect that point.

PN123

MR HARVEY: No, your Honour.

PN124

THE VICE PRESIDENT: That's subject to dates. At the moment it's 1 January. Its impact might be minimised by possible applications. The fourth transitional point will still exist, being 1 July next year; no application to change the introduction of wage rates in the modern award from that date. So this application only affects one of the four transition points. Is there no advantage in having the penalties and loading issues resolved at this point in advance of other things so that there are less things all happening at once? It might be easier to say, well, let's just defer everything because every step is too hard and I understand the argument being put by the applicant and also confirmed by the government is that it's likely to be easier if these things are dealt with all together, rather than separately.

PN125

But I am wanting to understand why that is the case compared to forcing the parties to actually face up to the issues and get their head around it and understand it now and move, to the extent that they can and then move to the subsequent

steps later. Why is the course advocated - that you are advocating - simpler? It could be said that it's more complex by just putting everything off and everything happening at once next year.

PN126

MR HARVEY: Well, I hope not, your Honour. I hope that wouldn't be the outcome. I think our answer to that, your Honour, would be that it would be better to have one transitional point or commencement point. Not everything happens on 1 July next year and there still are phasing arrangements to run, obviously, beyond that date. But we think it would be better to have one commencement of transitional arrangements and phasing for both wages, penalties and loadings from that date. We will all know, we hope, by that date, for example, what the outcome is of the equal remuneration case that five unions have commenced.

PN127

I mean, the deferral of the wages and salaries under the modern award was specifically designed to accommodate that case. That was the basis on which we put it and, as we understand it, the basis on which the former Commission - - -

PN128

THE VICE PRESIDENT: It might have been simpler not to have deferred wages so that they are all happening now.

PN129

MR HARVEY: Does your Honour want me to answer that question or is that an observation? But yes, your Honour, I mean, it - - -

PN130

THE VICE PRESIDENT: It's just one point.

PN131

MR HARVEY: It is true that there are some complexities that have developed as a result of the position that was put by the parties at the time and was agreed to and that's one of the reasons why we are still trying to work through these things. It's not the only reason, because there is the question of the Division 2B awards, which are very significant in this industry. They have been frozen or preserved for this year. At the moment, employees under Division 2B awards haven't got a wage increase as a result of the minimum wage case this year so they're on different rates to people who are on NAPSAs, et cetera, et cetera.

PN132

We are having questions which, I think, are increasingly coming up about take home pay audits and how you calculate those at the present time, as to whether people have overall suffered any reductions as a result of these things all happening together because not only the complexity of award coverage in the sector is important, the question of the constitutional coverage, but the relatively complex interactions, as Mr Felle has said, between particularly the penalties and loadings on evenings and weekends in some areas; in particular, the disability services sector, as the NDS submissions say, do produce a bewildering array of calculations that can be made but are complicated to make and difficult to explain to people.

PN133

I might say I am undertaking some training tomorrow, run by the Fair Work Ombudsman, to work through their on line tools and I hope that helps. But without naming the person or the organisation they work for, a very senior employer representative rang me yesterday about this award and said, "We've been asked some questions about this. I wasn't sure of the answer so I rang up the Fair Work Ombudsman and they told me that this award applied as of 1 January and I should be paid under it. We have had a look at that and we think that's wrong. What do you think, chief?" So fortunately, that person and I completely agreed about what the situation was after we had done our - - -

PN134

THE VICE PRESIDENT: You are performing the training tomorrow?

PN135

MR HARVEY: No. I'm the recipient of the training tomorrow. But we do appreciate also for the Fair Work Ombudsman that this is a complicated and unique award because of the way it's structured in terms of its transitional arrangements, but also because there is this degree of constitutionality about it. We haven't yet mentioned, but I will now, the continuing schedule 6 instruments which apply in this industry still in the state of Western Australia, which of course has not referred any of its power, where there are a number of transitional awards operating; and, for example, the Australian Services Union is now preparing applications to vary those awards because they haven't been varied by the minimum wage panel's decision.

PN136

They said they didn't have the power to vary those awards so they haven't but they said it was up to the parties to apply to vary those awards, so we are doing that as well, but that's just another slight complication in this, as it applies in the west. So we are not resiling from the fact but we are not saying this is all too hard, make it go away because we don't want to do the work. I think Mr Felle and other employer organisations, as well as the unions, have been doing their best to explain this to people, but we just think that the transitional process would be simplified by taking one, and we would be proposing, if we can, to take another step out of it on 1 January next year to line everybody up, to get it all going from the one day, as far as we can, when there's better knowledge and at least one document to work out what the rate of pay should be from that point on.

PN137

Of course, there is the issue that I mentioned earlier on about the equal remuneration order, hopefully, from the applicant union's point of view, coming in over the top of that. The other instrument or two instruments that are applying in this sector, of course, are the equal remuneration orders made by the Queensland tribunal, which are also in play at the present time as well. So it is a case about transition. It's certainly not a case about the content of the award. As Mr Felle has indicated, there have been discussions during the course of the year which led to that stakeholders meeting, as I think it was called, convened by the Fair Work Ombudsman.

PN138

We appreciate, having slightly criticised them during the course of this morning, we appreciate the efforts and their role in bringing the parties together to talk

about this and to say, as the whole of the sector, how do you see the way forward from that. The Australian Services Union and the other unions that I represent today support the outcome of that meeting, which was to propose, as Jobs Australia has taken the lead in doing, a deferral of the transitional arrangements with regard to the penalties and loadings until 1 July next year.

PN139

THE VICE PRESIDENT: What do you say to employers that have implemented the transitional arrangements in accordance with the 1 July date?

PN140

MR HARVEY: Well, we understand the submission of CCER today. I would say two things, thinking about the submission which I only saw yesterday. I would say two things. One is it shouldn't be really a major impact on those employers, partly because at the present time, 20 July, not all of the employees concerned will be employees who were engaged before 30 June this year. There may obviously have been some new hires in the last nearly three weeks. But those employees, and this is the one significant thing I differ with CCER in their submissions; they were saying, well, look, there might be a problem with back pay because we've reduced the terms and conditions for some of these employees. We don't want to have to back pay them if that was the case.

PN141

Well, we would say on that point, as a matter of law and award entitlement, that employees who were engaged before 30 June this year were entitled not to have any reduction in their take home pay as a result of the implementation of the modern award as provided for in the Fair Work Act. It's also provided for in clauses, I think, 2.5 and 2.6. No, that's wrong. That's the wrong award clauses, but it's also a term of this award which says that employees shouldn't suffer any reduction in their take home pay and if they did they could access a take home pay audit via this Tribunal.

PN142

So we would say that in the event that somebody had suffered a reduction and they were engaged before 30 June this year, well, they shouldn't have and they would be entitled to back pay, anyway, by a take home pay audit.

PN143

THE VICE PRESIDENT: What if someone has been advised that the casual loading has increased from 23.79 to 24.68 and they have implemented that in accordance with the advice they were given? They understood that there is complexity behind the reasons but they probably have got better things to worry about than to understand those full complexities, but they got advice and they have implemented it. This application seeks to effectively retrospectively remove the obligation that applied to increase that loading, so employers who have complied with their obligations, listened to the advice and verified the calculations and now they will be told that it's something they didn't have to do. They are paying their employees that higher amount.

PN144

Do they take it off the employees they have paid it to? Is there a legal basis for doing that, either retrospectively or on an ongoing basis? Or are they effectively,

in a practical sense, because they have complied with their obligations, stuck with continuing that position, even though the obligation might be reduced?

PN145

MR HARVEY: Yes. I understand the point your Honour is making and it's a point with some validity. However, thinking about this and particularly having read the CCER submissions, I would say two things in response to your Honour's point. Firstly, we think that at this point the implications are relatively small. It would depend on, if this variation is granted by the Tribunal, if it is backdated to 1 July.

PN146

THE VICE PRESIDENT: It doesn't serve any purpose unless it is backdated to 1 July; otherwise, there's an obligation on everyone to make the transition and then un-transition it.

PN147

MR HARVEY: Yes. Your Honour is right. So, on the assumption that if the variation to the award was agreed to and implemented from 1 July, there would be some implications on employers with regard to that. We would from the union's point of view, entertain any proposal that was advanced by the employers to protect the interests of employers who had done that in that period of time. But in any case, we would say that the benefits of doing this to employers and employees - you know, granting this application - far outweigh any downside there might be along the lines your Honour has put forward.

PN148

We understand that the timing of this application could have been earlier but it is also true to say that the processes of consultation which culminated in the meeting convened by the Fair Work Ombudsman on 27 May left little time after that point to further consult with people and presumably for Jobs Australia to file the application. So there are some consequences and difficulties that arise from this but we think in the overall employers and employees will benefit from the 12 months' deferral.

PN149

THE VICE PRESIDENT: These were matters that were addressed by full benches of the Commission on, I think, two previous occasions. Perhaps the full extent of the implications were not understood but the points were raised and addressed. Once those decisions were made, and the second one was in December, it was a live issue. There could have been consideration to the implications and efforts made much earlier in a meeting in May and an application at the end of June - 30 June - was something that was going to have effect in accordance with the terms on 1 July, the following day.

PN150

That meant that it's likely that many employers complied with the obligation and have made the transition. That consequence wouldn't have arisen if this matter was heard and determined before 1 July.

PN151

MR HARVEY: Yes. That's clearly the case, your Honour. I think, I mean, certainly the unions had a particular point of view about it and we discussed this

issue as widely as we could with everybody. These processes took time to work their way through and for everybody, if I can put it this way, to go on to the same page with regard to these issues and what the best way forward was. So the delay - I would say we attempted to anticipate but not everybody was on board about it, but we think the majority of employers now are and that's the process we had to go through.

PN152

But I would also say, even though there is this issue of retrospectivity which needs careful consideration, but the modern award, and I think this is clauses 2.5 and 2.6, does allow for the Tribunal to vary the transitional provisions at any stage, either on the Tribunal's own initiative or on application by employers or employees who are covered by the modern award. Notwithstanding the fact that there are clearly going to be some issues about it, it would seem to us that the overwhelming majority of both employee organisations, certainly, and employers covered by this award have come to the view that the greater good is served by a deferral of the transitional arrangements from 1 July this year, with regards to penalties and loadings, to 1 July next year.

PN153

So notwithstanding the complications and the issues that your Honour has rightly alluded to, as far as we can see the overwhelming viewpoint within the industry by people who are concerned with the practical operation of the modern award and the transitional arrangements on a day-to-day basis, both on the employers' side and the union side think that the best way to deal with this matter is both by way of this application and a deferral of the transitional arrangements. So they have thought about it - - -

PN154

THE VICE PRESIDENT: How do I know that? I have got the applicant, I have got other written submissions in support of it and I've got other submissions that don't oppose or don't support and I've got other submissions that oppose it. How do I know what the majority position is? I mean, there's a lot of people that were represented at the meeting at the Medina Grand on 27 May who have not expressed a view in these proceedings.

PN155

MR HARVEY: Well, they have certainly had the opportunity to express a view. I think Mr Felle indicated that he had given the application to every one of the organisations who were at that meeting and some of them, as your Honour alludes to, such as CCER said, well, we don't oppose or support it at this stage. As far as we know, AFEI is the one employer organisation that opposes the application. But we also have, not evidence so much, but we have the submission from the Australian Government who assisted in the convening of the meeting and asked the Fair Work Ombudsman to convene it and hosted it and who attended the meeting in the capacity of departmental representatives from the federal department.

PN156

We have got their submission that they filed last night, which indicates in paragraph 4 in the second sentence there:

PN157

There was broad consensus at the meeting that there was confusion surrounding the transitional provisions in the SACS Award and this was causing some practical difficulties.

PN158

Et cetera, et cetera. And the submission goes on - - -

PN159

THE VICE PRESIDENT: They end up saying that:

PN160

Fair Work Australia should give consideration to the important issues that are raised.

PN161

MR HARVEY: Yes, your Honour.

PN162

THE VICE PRESIDENT: It doesn't seem that it lends its support to the application.

PN163

MR HARVEY: Well, we would say that it does, your Honour. These issues of transition were raised with the government and the government's response was, well, let's get together and see what the industry as a whole says. So we've gone through that process. The Fair Work Ombudsman has convened a meeting, and I think there was a relatively exhaustive of going through to identify who the key players, the key organisations interested were. They were invited. Nearly all of them turned up and we would certainly say, and it's supported by the Australian Government's submission that the views of the industry players in this matter are of significance and importance.

PN164

Effectively, what the submission is saying is that in these circumstances there are grounds for varying the standard transitional arrangements with regards to penalties and loadings. If that's what the industry is saying to the Tribunal then we would submit that that's what the industry, broadly speaking, is saying to this Tribunal.

PN165

THE VICE PRESIDENT: But do you accept that those that haven't implemented the transitional arrangements will obviously support and benefit from the application being granted, that it can be deferred and everything is to be looked at, assuming that it's all going to be simpler all looked at together next year for some benefit? Those who have implemented the award transitional arrangements will now have a problem they have to deal with. You say it's a question of degree and the advantages outweigh the disadvantages even for them. But that view might not be shared by others; I don't know, sitting here, what the true position is in that regard and it looks like it might be a contested view, at least. Who should bear the inconvenience? The ones that have complied with the award or the ones that haven't?

PN166

MR HARVEY: Well, I am assuming, your Honour, that many employers have determined to comply with the award and have done their best to do so. I presume amongst those employers are many members of Mr Felle's organisation or many members of ACOSS, for example, and both of those two organisations are either present today or by written submissions in the case of ACOSS supporting the variation. I mean, I can't speak for employers in that regard but I would say there's significant material before this Tribunal that, notwithstanding what the implications might be for some employers, employers in this sector as a whole, including - I didn't mention the National Disability Services, who are supporting this application, notwithstanding what the implications might be for them as employers.

PN167

I think that should be of considerable weight in the Tribunal's consideration of these matters. As to others out there who may have a different view, well, we don't know that, your Honour, and we never know that in these types of proceedings. Mr Felle's application was sent to all the organisations on the Fair Work Ombudsman's stakeholders meeting list but as I understand it, notice of this application and this hearing today was sent to everybody on Fair Work Australia's social and community services distribution list, so they have had the opportunity to come and say something about it and if they have chosen not to, then presumably, we would submit, they have no difficulty with the application.

PN168

THE VICE PRESIDENT: But submission by the disability - I am asking you these questions, Mr Harvey, because you are on your feet.

PN169

MR HARVEY: Yes, your Honour.

PN170

THE VICE PRESIDENT: It's not necessarily that it's fair to ask them of you, but as the points occur to me I am raising them. Certainly, Mr Felle may wish to respond. What I read there is that to defer the transitional penalties ensures that those not experienced in these transitional arrangements will not have to undertake the process of the transitioning. Well, that suggests that those in that category haven't done the exercise. If they have done the exercise, then they don't need to do it again, or they have been advised about what to do and they are doing it. It might be those that are finding the most difficulty are the ones that are protesting the loudest and they are the voices you hear.

PN171

But there is a silent group that are not really the point behind the application, but they will then have an issue because they have transitioned now and now have got an issue. They have to either live with what they have done or reverse it and in either case it's not a good outcome.

PN172

MR HARVEY: Well, we don't know who they are, your Honour, with the exception, perhaps of CCER who have turned up today and raised some - - -

PN173

THE VICE PRESIDENT: They might be members or affiliates of each of the organisations that are putting the point on behalf of those that are having difficulty with the transitional.

PN174

MR HARVEY: Well, I certainly can't speak for those organisations, your Honour, but I presume that the applicant, ACOSS, National Disability Services and others have taken this decision deliberately and in consultation with their members, but I can't help your Honour with regard to that specifically. But I personally thought the submissions of the National Disability Services were very precise and correct and I agree with the submissions that they have made, particularly with regard to attempting to simplify the number of transitional arrangements that they have to go through.

PN175

Your Honour, I don't think I have referred to my written notes once so far. Your Honour has very helpfully led me through what I wanted to say, so I'll sit down in a minute, unless your Honour has some more questions. The only thing I wanted to say that your Honour hasn't drawn out of me - well, perhaps two things. Firstly, if I could just say one thing about the AFEI submissions. We note that they have filed written submissions opposing the variation and Mr Story has been waiting patiently in Sydney to speak to those. There is only one main thing I want to say about those submissions, that at paragraph 4 of the AFEI's written submissions there is a statement or a claim, and I quote:

PN176

That the award modernisation process affecting the social and community services sector was partially disrupted by the ASU handing up a heads of agreement document foreshadowing a major pay equity claim in this sector.

PN177

Of course, we would take - on behalf of the ASU I am speaking now, but the pay equity claim is made on behalf of five unions. The ASU would dispute the claim that the award modernisation proceedings were disrupted in any way by that event. The heads of agreement entered into with the Australian Government was a significant fact which should have been and was brought to the attention of the then Australian Industrial Relations Commission and, as we have been discussing this morning, it did have a relevant impact on the decision that was made with regard to this award.

PN178

AFEI, in their submissions, go on to suggest that nothing has changed the like reconsideration of this matter. We support Mr Felle's submissions that a considerable number of things have changed but in particular, the parties have continued to meet and have discussions about the implications for the modern award and what the preferred transitional arrangements would be. We say, apart from anything else, that is a significant change and as I said before, your Honour, the award allows for the transitional arrangements to be changed at any time by application or by the initiative of the Tribunal itself, and that is being sought by Jobs Australia today.

PN179

We say it's appropriate that these matters be kept under review. There are some more transitional matters to be considered in the future, particularly on 1 January next year, and we need to try and do all these things in the most effective and efficient way, where it can be demonstrated if there is a case to change we should do so, if the Tribunal agrees. Mr Felle quite properly went to the question of the basis of an application to vary a modern award under section 157 of the Act, which refers to the need to meet the modern award's objective. We don't disagree with those submissions.

PN180

We think they are generally correct but we could also say that there's an alternative view of this, that since the application may also be made under the terms of clauses 2.5 and 2.6 of the award, it is possible that a different or a lesser test might be required for the variation of transitional provisions in an award, as opposed to what you might call the substantive provisions in the award. But in any case, we would also submit, along with Jobs Australia, that the variation sought by them today is desirable to give effect to the modern award's objective and especially, as Mr Felle has indicated, section 134(1)(f) and (g).

PN181

Those are the submissions of the employee unions I represent today, your Honour. Unless your Honour has further questions?

PN182

THE VICE PRESIDENT: Thank you, Mr Harvey.

PN183

MR HARVEY: Thank you, your Honour.

PN184

THE VICE PRESIDENT: Mr Story?

PN185

MR STORY: Thank you, your Honour. The AFEI is opposing the application by Jobs Australia, largely relying upon their written submissions of 15 July 2010. It is the view of AFEI that the matter of transitional provisions for the Social and Community Home Care and Disability Services Industry Award (2010) have already twice been considered by the Full Bench of the Commission throughout Australia and on both occasions it was determined that a delay in the transitional penalties and loadings beyond 1 July 2010 was not warranted. We consider that this is just a third attempt to vary already properly considered transitional provisions for this award and we believe that there are no substantive grounds at this point to warrant a further review by Fair Work Australia.

PN186

The argument about constitutional and non constitutional corporations we believe is a flawed argument, as there are already very different terms and conditions that apply to constitutional or non constitutional corporations and those differences have applied for several years now but in particular since 1 January 2010. Contrary to the opinion of Jobs Australia, the terms and conditions that took effect on 1 January were significant, especially for the social and community services sector. There are no significant differences in hours of work, in particular in relation to the incidence of sleepovers and 24-hour work and excursions and

overtime, and many of the allowances that go with those types of terms and conditions of employment.

PN187

We also oppose the application due to its timing. We have many large and small members in this sector who have spent considerable time and money and effort in understanding the transitional provisions and implementing them by 1 July. Many of our members have been quite stressed by the idea of this commencing at 1 July but took all necessary efforts to commence at that time. That's not just large community sector employers. This includes very small micro organisations that are constitutional corporations. We feel that to reverse the transitional stage now would just create a significant administrative burden on those employers who have complied with the initial transitional stage for penalties and loadings.

PN188

THE VICE PRESIDENT: What do you say to the suggestion that there are more benefits in the deferral than the administrative inconvenience caused by the implementation?

PN189

MR STORY: Well, this award has penalties that have gone up and down, particularly in New South Wales, where you look at things like Sunday penalties, which have increased in New South Wales from 75 to 80 per cent, and casual loading, which didn't increase from the 23.8 per cent but increased from pretty much the same loading because prior to January this year, or July, the loading in New South Wales, when you add that 15 per cent and 1.12, was actually 24.6 per cent already, so it's only .4 of a per cent difference. But there are other significant reductions in penalties, in terms of, I think it was a nightshift penalty in the award.

PN190

I understand that there is a take home pay audit for employees in this situation, that many employers were able to balance out an increase in allowances, say, or a type of payment for an employee and a decrease in another penalty. So the employee received no less overall but there were certain changes in elements of their pay to receive a very similar result. I think to reverse that now is the administrative cost in particular affects those employers and we don't see any benefit at all in delaying these transitional provisions until next year. Next year is going to be just as complicated on 1 July for penalty rates and loadings.

PN191

The penalties and loadings are generally based on the minimum wages that are applicable now and they don't need to be combined with the minimum wages that will apply next year as they are all a percentage of an amount that's already applicable. So the impact is largely going to be an administrative and time burden for those employers, as opposed to a large financial impact. But it would be, I think, very significant for those employers who have spent so much time and effort in complying with these quite difficult provisions.

PN192

THE VICE PRESIDENT: Yes, thank you.

PN193

MR STORY: But other than that, your Honour, we basically just rely on our written submissions that were filed on 15 July.

PN194

THE VICE PRESIDENT: Yes. Thank you, Mr Story.

PN195

MR STORY: Thank you.

PN196

THE VICE PRESIDENT: Mr Felle?

PN197

MR FELLE: Your Honour, I will try to be brief, but certainly we did not wish to get into the question of what weight should be given to who represents who unnecessarily. It was not our intention but those issues have been raised by your Honour. I just put the facts as are currently before the Tribunal. NDS, in its written submissions, refers to 680 member organisations that are funded ADAC, or alternatively, 700, which is in the bottom of the page. So the position that that organisation is putting on behalf of its collective membership is of that order.

PN198

THE VICE PRESIDENT: How many have implemented the provisions now?

PN199

MR FELLE: I don't know. Possibly none.

PN200

THE VICE PRESIDENT: Possibly a majority?

PN201

MR FELLE: Well, we are referring to this unknown group of employers who may have implemented the provisions.

PN202

THE VICE PRESIDENT: Yes.

PN203

MR FELLE: And giving some weight to this unknown group of employers who may have done something. I think that that is not, in my submission, the way to proceed with this matter. I am not denying the fact that the law is the law and there are legal obligations. The circumstances, as I have indicated - NDS refers to its at least 680-member organisations that it puts a decision on behalf of in its written submission, on a national basis. ACOSS refers to the 2500 member organisations that it is putting a position on behalf of in its written submission. We refer to our 1200 members but I have clarified that. In the social and community sector our membership is of the order of 1000 employer members and they are relevant considerations.

PN204

Certainly, the timing of this application is not a preferred course of action and we do appreciate the issues that have been raised. Jobs Australia has always worked constructively with the Australian Services Union in relation to the award modernisation process. We have many arguments about many things but we certainly sought to be constructive in trying to establish a consistent

communication to both their members and our members across the nation. We have ensured and we have and they have made us aware of their publication of issues going back since December of last year. Again, the sole purpose to minimise the confusion, if possible, relative to what is a difficult sector and does have a degree of additional issues that have been ventilated today.

PN205

But in regards to the issue of how and why the application was only lodged on 30 June, I am aware again, because of that consistency of consultation with the Australian Services Union, the Australian Services Union requested the Fair Work Ombudsman on or about 14 April 2010 to convene a national stakeholders meeting. We are aware of that because, again, in matters that are of joint interest we have a significant degree of consultation between the Australian Services Union and ourselves. For whatever reason, the Fair Work Ombudsman didn't establish it until 27 May.

PN206

As has been touched upon by the various submissions, the issue of the deferral of the loadings and penalties transition was, in fact, raised at that meeting. In some of our communication to the other employers when we referred to the position at that meeting as general consensus we were jumped on from a great height, so we don't seek to use that. But what the position was at that meeting was that various parties expressed a view that that was an appropriate process and those various parties have affirmed that position today.

PN207

At that meeting on 27 May, one of the parties present - AFEI - indicated, and I don't think it was Mr Story so I do apologise, that they would consult with their members and then get back to the other parties in regards to whether they did or didn't consent. In the lead up to our application we had discussions with the Australian Services Union, the Australian Business Industrial, communication with AFEI, communication with NDS, ACOSS, et cetera, trying to clarify whether there was or wasn't a consistent position of the employer representatives. In the absence of that general consensus being communicated to us we considered we had no alternative, consistent with the wishes of our membership and many others that we knew, but that the application had to be lodged.

PN208

It was not a desirable time for it to be lodged but, in fact, that's the circumstances where it got to where it got. The industry has indicated, as we see it, on those who made this submission, is that we are struggling. We have a struggle that we see a way to which it can proceed as proposed by our application. Your Honour, you make reference to the Australian Government's submission, that it doesn't appear to support the application, but I will direct your Honour to paragraph 7 of that written submission. It indicates, and I'll quote:

PN209

The Fair Work Ombudsman has indicated -

PN210

Presumably to the Australian Government:

PN211

- that the proposed variations create a single phasing date for base rates and penalty allowances would provide for a simpler application and implementation of the SACS Award and would simplify compliance activities within the sector.

PN212

That's a clear indication of what I would say is support for this application, bearing in mind the process of where we got to, bearing in mind the communication and consultations that we would need to have, bearing in mind where the onus of compliance will rest, which is with the Fair Work Ombudsman in the end. Rightly or wrongly, whatever various parties think, they have an obligation to apply the law. The Ombudsman himself at that meeting made that point, that even though there may be some support for this proposal, you people need to sort it out and have the award changed.

PN213

THE VICE PRESIDENT: Could it be said that things have moved on since then and the number of employers how have complied with it and the hard yards that they have made and - - -

PN214

MR FELLE: Well, I think I am referring to - - -

PN215

THE VICE PRESIDENT: If I can finish my question to you so that you can comment on it?

PN216

MR FELLE: Sorry, sir. My apologies.

PN217

THE VICE PRESIDENT: That now that a number of employers have done the hard yards and have determined the nature of the obligations and, in some cases at least, implemented them, that an alternative to deferring this matter for 12 months is for the collaborative approach that has existed and the parties are committed to be directed towards communicating the nature of those obligations so that the remainder who have not complied with the instruments can now comply with the obligations. Is that an alternative that exists now, given where we are currently at, that may not have been in contemplation or at such an advanced stage as existed at the time the meeting was held in March?

PN218

MR FELLE: The position communicated at that meeting was not indicated in comprehension that - and I'll emphasise - some employers may have or some employers have done what they should have done and correctly implemented the loadings and penalties from 1 July. I don't deny that. The circumstances are do we ignore the vast majority of the industry who have a position because of, as I have indicated, some silent, unknown group who, I'll concede, will have done it. I don't deny that. But the circumstances are, it shouldn't be, in my submission, the tail wagging the dog.

PN219

The industry is struggling. The industry outlined that position at the meeting on 27 May. The reasoning for this application is because the industry is struggling. Various, what I would say, important parties for the industry, significant parties to the industry, have submitted that position, as have we. Some of our members will fall into this category of "who have implemented". I don't deny that. But they are an absolute minority and some of our members are aware that we have made this application who may have prepared themselves but have held off pushing the switch on the MYOB program to run. They do that because they make that choice themselves.

PN220

We have for the last six months - seven months, eight months - well and truly alerted people to their legal obligations. Alerting to them, then explaining them, and then those obligations being implemented are three separate processes. What the industry is saying: we are not denying the knowledge, we are struggling with some of the understanding but we are well and truly struggling with the implementation. On that basis, that's why we are before this Tribunal and again, the absolute detailed parties, in terms of numbers of employer members who are clearly indicating they are struggling and are presenting a way that they say will alleviate those issues.

PN221

I can't say and present that in any other way. The application has been made in good faith in terms of trying to resolve a problem, participating in the meetings at Fair Work Australia to try and assist in finding a solution. The date of the application is not preferable but it is what it is and I have briefly outlined why. The Australian Government indicates the Fair Work Ombudsman - - -

PN222

THE VICE PRESIDENT: I think I interrupted you explaining the reason for the delay between the meeting in May and the application being in June.

PN223

MR FELLE: Well, as I have indicated, we certainly had a number of meetings with the ASU and the ASU indicated. We had communication, well, for example, with CCER. Unfortunately, the person that I had been sending all communication to has got married and gone away and that unfortunately is the reason for that non communication. We had exchanges with the AFEI who took some exception to our summary of what we understood their position to be and I requested to clarify what their response was from their advice they would have contact with the members to ascertain their position.

PN224

In the absence of any position or any responses from a number of the parties on that list, we are in a situation that we believe something needs to be done. We could have done it on 10 June but the fact was we were trying to establish if there was industry consensus. There isn't, and that's obvious by the materials presented in these proceedings. In an attempt to get to that position, which was again also a preferred basis of making the application - in the absence of achieving that we then proceeded to make the application.

PN225

That's our responsibility. If that's wrong, we accept full responsibility for it. It does and has created a situation for some employers. We say that isn't indicative of the manner in which the industry, rightly or wrongly, is operating, is struggling and is again the basis for the application today.

PN226

THE VICE PRESIDENT: All right. Yes, thank you for those submissions. I think in all of the circumstances it is desirable that I indicate a decision at the earliest possible time. I consider it to be a most unfortunate situation to be in a position of hearing and determining this matter now when it does appear to be the case that at least some employers have implemented the transitional arrangements and, if the application is granted, there will be a need to either address in one way or another, by reversing or otherwise dealing with the situation that has developed. I think it's a most unfortunate situation and one of great difficulty that I find myself in.

PN227

The obligation on the Tribunal, of course, is to apply the provisions of the legislation and be satisfied that the variation sought is necessary to achieve the modern award's objectives. What has been put on behalf of a significant number of employers through employer organisations is that there is a very significant problem caused by the multiple dates of implementation for various provisions of the modern award and that, as far as employers are concerned and also in terms of compliance by the Fair Work Ombudsman, the task of implementing this award will be much simpler if there is a single phasing date for base rates and penalties and loadings.

PN228

That is not a universal view and the view has been expressed and questions have been raised by others as to whether that is the case or, really, too much water has flowed under the bridge and that there are now other difficulties created by the implementation of the award. I am forced into a difficult situation of balancing those competing interests.

PN229

On balance, I consider that the application should be granted. I do so with some reluctance and with the misgivings that I have expressed and I think that, given the concerns that have been expressed, the sharing of those concerns quite broadly within the sector and the agreement that has been reached between representative bodies of employers and the unions represented in the sector, that the course of deferring the implementation of penalties and loadings should be adopted. I will therefore make a determination varying the transitional provisions in line with the application with an operative date of 1 July 2010.

PN230

We will adjourn briefly before calling the next matter.

PN231

<ADJOURNED INDEFINITELY [11.33AM]