



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

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JUSTICE ROSS, PRESIDENT

AM2020/103

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

**Award Flexibility – Hospitality and Retail Sectors
(AM2020/103)**

Restaurant Industry Award 2020

Hospitality Industry (General) Award 2020

Registered and Licenced Clubs Award 2010

Melbourne

12.52 PM, THURSDAY, 17 DECEMBER 2020

PN1

JUSTICE ROSS: All right, let's get underway. If I can deal with the appearances first, and can you also put your microphones on mute because I'm getting some feedback noise from some of the parties. If I run through the organisations that I have announcing an appearance. There's no need to go through if there's more than one representative from the organisation.

PN2

Mr Redford from the United Workers Union; Mr Crawford from the AWU; Mr Kempfi from the ACTU; Ms Lawrence from ACCI; Ms Nicola Shaw from Clubs Australia Industrial; Peter Cooper from the Club Managers Association Australia - so put yourself on mute, whoever's doing the paper shuffling - Mr Strong from (indistinct); I think I had Mr Harris from the Pharmacy Guild; Mr Ryan from the AHA; Mr Harrington from Ai Group. I had Mr Rizzo from ABI. Are you representing ABI, Ms Whish?

PN3

MS WHISH: I am. Your Honour, I'm also representing Restaurant and Catering Industry Association, just on behalf of the Restaurants Award.

PN4

JUSTICE ROSS: Thank you. There was a Mr Mark Smith from the Perth Workers Resource Centre; and we have Ms Durbin from the Attorney General's Department. Have I missed anybody, any organisation?

PN5

MR MCKENTY: Your Honour, Mark McKenty from (indistinct), I'm joining Peter Strong.

PN6

JUSTICE ROSS: Yes. No, that's fine. If there's more than one representing an organisation, no need to add to the list. I just wanted to make sure I had covered the organisations. Thanks, Mr McKenty.

PN7

All right, well, in the statement of 10 December I attached the copy of the Minister's letter. I indicated that I'd be having this conference and the conference tomorrow in relation to the Retail Award. I identified four matters that would be the subject of discussion at the conference and they're set out at paragraph 16, as I wanted to, if you like, kick the process off before the Christmas period. Since that statement I've received correspondence from the Department outlining the assistance and support they are able to provide and that's been posted on the website.

PN8

I want to go to that item first before I canvass with you some of the issues raised in the Minister's letter and to get some initial reaction from the parties and then discuss a process about how we might develop the conversation. Can I go to you, Ms Durbin, for a moment?

PN9

MS DURBIN: Yes, we're here, your Honour.

PN10

JUSTICE ROSS: Thank you. I had a couple of questions about the correspondence. You indicate there that you expect to provide select data on working time arrangements; patterns of work; days of week worked; and earnings in the hospitality and retail sectors. As the parties would be aware that information will be particularly important in the assessment of any loaded rate proposal.

PN11

Can I ask, Ms Durbin, it's got that you 'expect to provide.' I was just wondering if you had a timeframe on when you might be able to provide that information.

PN12

MS DURBIN: Your Honour, I think as we foreshadow in our letter there is some data releases that we expect next week and into early January, so we would hope to be able to start providing, potentially on an (indistinct) basis if that would assist, by probably the third week of January.

PN13

JUSTICE ROSS: All right, thank you. And the same question - I have two questions about what you say about the workplace agreement database material. The first is also a timeframe question but the second is, often with loaded rate agreements in these sectors they're also the subject of undertakings in order to satisfy the BOOT. I wasn't sure whether the database captured the undertakings. Perhaps if you can deal with that one first and then we'll go to the timing question.

PN14

MS DURBIN: Look, it's probably not a uniform answer. It does at a higher level but I think as we indicated in our letter, we would need to do all analysis manually. So where there is something signalled at a higher level in the WAD(?) we could potentially do some further exploration to make sure that we collect all the undertakings.

PN15

JUSTICE ROSS: And if it assists we can also provide copies of undertakings if you've got the agreement reference. What's the likely timeframe for that material, Ms Durbin?

PN16

MS DURBIN: So that one, we're happy to discuss further. We probably will have some discussions with ABS because it will be sample data, so it will be, not necessarily representative but we would talk to the ABS to see if we could do anything that could be extrapolated. That's potentially pretty challenging. But again, depending on the timetable that is something that we could identify and provide on an ongoing basis. So, you know, look at an initial sample that would give some indication, and then if that proves to be useful, increase the sample size if we thought there was merit in that.

PN17

JUSTICE ROSS: All right. I'm not quite following why the ABS would be of any assistance in relation to the WAD data.

PN18

MS DURBIN: Sorry, your Honour, it's around methodology. Otherwise it would just be us pulling out agreements from the database. If we want to do any extrapolation from that information we would talk the ABS, for example, to make sure we could get a sample that was representative. So that would be the only involvement from the ABS.

PN19

JUSTICE ROSS: All right.

PN20

MS DURBIN: So that one, because it is manual we probably would be looking at later in January.

PN21

JUSTICE ROSS: Look, the final question I have for you, Ms Durbin, relates to the Department's submission to the Senate Economics References Committee Inquiry into the Unlawful Underpayment of Employees Remuneration. It's dated March 2020. In that you identify some issues with both the Restaurant and the Hospitality Award. In relation to the Restaurant Award, you say that the coverage clause, and I'm not disputing the proposition I've come to why I'm raising at the moment, but the coverage clause is complex because it requires reference to multiple other awards to determine the coverage. And in relation to the Hospitality Award, you point out that the average of 38 hours per week can be calculated in eight different ways, and rostering arrangements are then subject to up to 15 clauses and subclauses.

PN22

The short point is whether the Department can assist by providing a potential solution to those issues that have been identified, so that the parties can consider a practical proposition to make either the coverage clauses simpler or the navigation of the 38 hour week and rostering arrangements simpler.

PN23

MS DURBIN: Your Honour, we're happy to give some further thought. It's certainly something that as you said, in our inquiries and through a range of research that we've undertaken, we've identified what stakeholders have said around those issues and we understand the drivers of some of the challenges that employers, you know, particularly small businesses face. In terms of providing a potential model that's not something that we have turned our mind to at this stage.

PN24

JUSTICE ROSS: All right, well, I'd ask you turn your mind to that because I think we can accept the point that there is a level of complexity in the provision. If our starting proposition is, at least, for those provisions, that it's not intended to alter the legal effect of the term but it's to make it simpler and easier to understand then I think the process would be assisted if the Department could turn its mind to

how that might be done. That doesn't, of course, preclude any other party from advancing ideas about those issues but I think it would assist if we can have something in front of us.

PN25

MS DURBIN: Yes, certainly. We'll look at that.

PN26

JUSTICE ROSS: All right. Thanks, Ms Durbin. Then can I go to the other agenda items and the first was to canvass the issues raised in the Minister's letter, in broad terms and to seek some initial comments from the parties about what they might be interested in pursuing, and then we'll discuss the next step in the process, which is how we might elicit proposals about those issues and the timetabling of them.

PN27

As you know, I attached the Minister's letter to the statement and the ideas advanced fall into two broad categories. The first was simplified pay arrangements and the second was the streamlining of the pressing(?) classification structures. If we go to the first, the simplified pay arrangements in the form of either loaded rates or exemption rates, as you know there are effectively exemption rates, a form of exemption rate, in both the Hospitality Award and the Clubs Award, and the Restaurant Award, I think, doesn't deal with managerial classifications in any event.

PN28

So if we perhaps for these group of awards, though I'm happy for you to pursue exemption rates if you wish, if you look at loaded rates the concept here is that broadly a loaded rate provides a margin above the hourly rate of pay for a particular classification that is also paid in lieu of certain other award provisions. Most usually it's weekend and evening penalty rates. It can also, of course, canvass or incorporate allowances and other payments.

PN29

There is no particular magic about loaded rates. The calculation of them is pretty straightforward to ensure that people are not worse off. The real issue is around what sort of pattern of work do you want the loaded rate to cover. I think it's also a common misconception that you only have to have one loaded rate. That's not necessarily the case, particularly in, say, the Hospitality Award which does cover - has a number of sub-segments. So a particular loaded rate may not suit each sector of the industry covered. And you can also design it, as is the case with agreements, whereby you have a loaded rate of, for example, X, for a particular classification level, and that loaded rate is paid on the basis that over an average of four weeks, say, those employees work no more than so many hours on the weekend and a minimum of so many hours during the week. So you can build some parameters around it that are relatively simple and can ensure that at the end of the day the employer just has to pay the higher hourly rate and doesn't have to calculate the penalties, provided they follow what are short rules.

PN30

The challenge is to make them useful for businesses that are covered by these awards. And that involves getting information from business and also from the Department about what are the standard working pattern arrangements in these particular sectors. And it may be that as I've indicated, you have more than one. You might have one for businesses that only operate Monday to Friday; for businesses that only operate Monday to Saturday; and for seven day businesses. But that's broadly the challenge, to try and elicit, one, is there interest from the industry participants in loaded rates in these sectors; secondly, it's how do we then work through what would be the most useful form of a loaded rate.

PN31

The second issue talks about the streamlining of present classification structures. As you know, each of the awards that are the subject of this conference have broad banded classification rates. I'm not aware of what particular issue has come up in the working parties or direct discussions between parties about the classification structures so I'm in your hands about all of that. But let's just go, if we can start with the various employer organisations, if I can get your observations about loaded rates at this point, and also about streamlining the classification structure. I'm interested in which award you're talking about, in particular, and whether you've got an interest in the idea and if you've got any observations you want to make about it.

PN32

We'll go in no particular order but we might go to you, Mr Ryan, first. I'll go through the employers list and then I'll come back to Mr Redford and Mr Crawford and Mr Kemppi. Mr Ryan?

PN33

MR RYAN: Thank you, your Honour. From the outset can I say that the Australian Hotels Association is open to the concept of loaded rates in the Hospitality Industry Award. We agree with the views that your Honour has expressed today that a loaded rate doesn't necessarily have to be one 24/7 rate. There could be a range of different loaded rates depending upon days of the week or ranges of days of the week.

PN34

In terms of a loaded rate that operates over a longer period of time that is expressed to have some premise around it, we agree with the observation of your Honour that the rules should be short and should not make the use of the system complex. The overarching principle of this process is to add simplification to the award system. So where any loaded rate comes in, the rules should be short and easy to understand, an applicable as far as possible to those employers, and employers that wish to use them.

PN35

As an alternative to a loaded rate, per se, we've had some initial discussions internally here at the HA and one of the options might not be so much grouping days of the week, but might be rolling in the allowances. So the concept is that you still end up with a Monday to Friday rate, a Saturday rate, a Sunday rate and a public holiday rate but it's an all-inclusive rate that covers all matters for work performed on those days. And we think if that could be done that would add a lot

of simplification to the current system. It's easy to educate employers on their obligations. It's easier to explain it to employees. It's easily identifiable on payslips and the like. So that is something we would envisage being part of, or at least canvassed, as part of this process.

PN36

In terms of classifications we haven't got too far down that path but one observations is in relation to the Hospitality Award is there are two streams of juniors. There are juniors other than office juniors and then there are those juniors who are employed within the clerical stream. The volume to the award that having those two streams in the Hospitality Award, particularly for schedule B, I think adds around 460 odd different hourly rates. So as a preliminary position or observation, if there was the opportunity to at least consolidate the two junior streams, and we're not sure how that could be done at this point or what transitional arrangements might be required but that is something we'd be keen to look at.

PN37

JUSTICE ROSS: All right. Can I just ask, Mr Ryan, when you talk about the allowances folding into the hourly rate, what allowances in particular do you have in mind?

PN38

MR RYAN: That's a very good question, your Honour. The allowances - we haven't got too far down that path but because the allowances may or may not apply, that is, I suppose, the difficulty. But the typical allowances in the industry are the tool and equipment allowance; the broken periods allowance; for Monday to Friday it would be at the late 7 pm to midnight penalties, and the midnight to 7 am penalties. The other allowances may be a bit more difficult. The forklift allowances are quite rare but it's an all purpose allowance. The meal allowance only applies if you work overtime more than two hours, having not been advised the previous day.

PN39

JUSTICE ROSS: Yes.

PN40

MR RYAN: And then the first aid allowance only applies if you're designated. So we appreciate there is some complexity in working out what a number would be. But if that was achievable to have a rate that covered everything for those daily periods and you could simply say, well, if you work on a Monday to Friday, you get \$26, if you work on a Saturday it's \$32. Obviously that changes for the classification, the wage level, but it makes it much simpler for employers, employees and regulators alike.

PN41

JUSTICE ROSS: Yes. Thank you. Can I go to Ms Lawrence? Anything you wanted to add?

PN42

MS LAWRENCE: Your Honour, we will merely endorse the statements of Mr Ryan and our other affiliates with respect to the particular awards being discussed today so I might leave the particular desires with respect to loaded rates and classifications structures, albeit just to note that I was involved in the working group process and I think that the classification structure discussion both revolves around whether it is possible to do any further broad-banding but in respect of certain awards also making simply the titles of the classifications reflect to a greater extent the actual tasks being performed by the employees in the particular industry, merely to simply aid particularly smaller businesses that operate in these sectors identify what is the correct classification.

PN43

I'm sure that the unions might be able to talk to that further if that is raised. The only other thing I'd just like to add is that we completely concur with the sentiments with respect to making any changes short and easy to understand. We believe that as far as possible if there could be a focus on greater administrative simplicity and avoiding any complex processes, that this will lead to great business confidence, greater business performance, and in turn hopefully greater employment opportunities and more hours being offered. Thank you, your Honour.

PN44

JUSTICE ROSS: Thank you. Ms Whish.

PN45

MS WHISH: Your Honour, the Restaurant and Catering Industry Association is certainly interested in conferring further with the United Workers' Union in relation to the simplification of classifications. They are interested in looking at exemption rates for what I'll call senior employees in the restaurant award and of course looking at possible loaded rates for either a weekly loaded rate or possibly a week - a rate for Monday to Friday and a weekend rate, that could be a loaded weekend rate. In relation to the New South Wales Business Chamber, and ABI, they are supportive of those comments of the Restaurant and Catering Industry Association and also endorse the comments from my colleagues today.

PN46

JUSTICE ROSS: Thank you. Ms Shaw, from Clubs Australia.

PN47

MS SHAW: Thank you, your Honour. We haven't had a huge opportunity to canvas our members over it and with regard to classification, as we haven't had that opportunity and we've just finished the four-year review, we think it's unlikely that we would be suggesting any further changes there but we're happy to do some further discussions with our members. It may be some tidying up; a bit of housekeeping of those classifications, to just make it a tiny bit clearer. But we don't propose there would be any real substantial changes at this stage. With regards to loaded rates, we would have some interest in it as long as it was opt-in only and potentially looking at some weekend rates.

PN48

But it would really depend on the complex nature of using those rates and the ability for our members to be able to access those.

PN49

JUSTICE ROSS: Thank you. Mr Strong from (indistinct).

PN50

MR STRONG: Thank you, Ross J. Very quickly, we have developed the principles for loaded rates among the membership which my chairman will go through. Let me say what we have talked about in all the groups and anything else that we've talked about: it is about jobs and it is about reflecting the reality of what happens in small businesses, that we will often yell out to someone across the shop, 'Can you work on Friday?' They say yes or no. You work from there. We aren't big businesses with the capacity to do those things so we're looking for a system that's good for the employee, that's good for the owner of the business to understand and that also means it's got to be good for the regulator - and Mr Ryan also mentioned that - the regulator in the job that they do.

PN51

It's always easier to catch the dodgy people when you've got a simpler system. So that is what is driving everything that we're talking about in CSBWA is that simplicity so that that individual doesn't understand it, understands it quite quickly. The employee does as well, removing any clashes in the workplace which is often based around confusion rather than anything else. We would have our principles, if I could pass over to - Ross J - if I could pass over to Mark McKenzie, my chairman.

PN52

JUSTICE ROSS: Sure - Mr McKenzie.

PN53

MR MCKENZIE: We had an opportunity to have a look at this in terms of all small businesses. So our interest is to look at some of the macro-principles and obviously look at the precedent that might be set by the discussion of hospitality and retail. Very similar lines to Mr Ryan, our presence here is to actually see a rate that is actually separated on weekdays and weekends, just on the basis of the challenges of getting a loaded rate that is actually affordable, if it's smoothed over a seven-day week basis. We also open, though, to the idea that to remove the outlier effect that we might look at a situation where loaded rates might apply for a certain time period in those weekday, weekend periods; so sort of a 7 am to 10 pm or 7 am to midnight.

PN54

In that context, very much looking for something that is actually not necessarily one rate, as you've rightly highlighted, but one that actually identifies the opportunity to exclude some of the outliers, which has been, as we understand it, part of the problem in the past. I suppose the second issue for us is very much one that Peter has actually mentioned around the fact that one of the challenges for small business is actually grappling with the complexity of the various penalties that are actually around. So we see the opportunity for loaded rates, particularly

on the basis of the omnibus bill that's being talked about, that will actually increase the purity of action for wage non-compliance.

PN55

From a lot of our members, the feedback we're actually getting is just the complexity of the penalties and allowance arrangements. So a loaded rate is actually going to make it easier for them to comply with the law. On that basis it is a very strong support within the SME community for something that moves down this line. There was also a point that was actually mentioned in terms of optionality. So our view here would be that this is actually something that is optional for a business, possibly on the basis of an inclusion of a schedule that would actually allow me as a business owner to opt to move my business into a loaded rates arrangement.

PN56

Obviously, some principles around symmetrical fairness, whereby effectively the staff would get the opportunity to also elect to participate in the process, possibly on the basis of a simple majority, with some sort of mechanism that the business owner or the employees to exit that arrangement if a workplace moves into a loaded rates arrangement wants to step out of it. They're probably the key issues for us in terms of this prospective. As I say, just to sum up our key attraction to loaded rates, it's the opportunity to actually improve compliance by reducing the complexity that small businesses are dealing with at the moment. Thanks, your Honour.

PN57

JUSTICE ROSS: Thank you, Mr McKenzie. Mr Harrington.

PN58

MR HARRINGTON: Thank you, your Honour. Ai Group is still considering its position regarding the simplification of the payment arrangements, the classification structures and the relevant awards. We don't yet have any commentary to provide on those issues. Just at a broad level, we have made some fairly clear statements that awards aren't sufficiently flexible to meet business needs at this time but for that reason we continue to have an interest in this process. But as I say, we're yet to determine our position specifically on the issues that were canvassed in the Commission's statement.

PN59

JUSTICE ROSS: Thank you. Mr Harris, did you want to add anything - from the Pharmacy Guild?

PN60

MR STRONG: Your Honour, Mr Harris had to leave.

PN61

JUSTICE ROSS: No problem. Have I missed any of the employer interests before I turn to the unions? No? Mr Redford.

PN62

MR REDFORD: Yes, your Honour - we at the United Workers' Union are concerned about the idea that these three awards might be amended in the way in which the Attorney-General appears to envisage. I wouldn't put it higher than that at this point. I wouldn't put it as high as an outright objection, because we wouldn't - we don't know what we would be objecting to. So it would be silly for us to object to something if we don't know what it is. But we are concerned about it. We have been engaged in the discussion in the working groups throughout the course of this year where these matters have been canvassed and it's perhaps where in particular the concern comes from.

PN63

It was the ideas - I won't put it any higher than this - the ideas put in that process around a model in which loaded rates would work in conjunction with changes to classification structure so that for example the advantages and disadvantages that might flow from the loaded rates proposal might offset against advantages and disadvantages that might flow from changes in classifications. So that is one idea. That is quite different from the idea that I think is envisaged in - perhaps envisaged by the Commission in the penalty rates decision, and what your Honour has alluded to, where the loaded rates concept might involve, for example, a series of schedules based on different working patterns.

PN64

That is a very different concept and yet another quite different concept is the concept advanced by Mr Ryan earlier, which is that a loaded rates concept might simply be the rolling up of allowances, where penalty rates, if you like, can continue to exist. There are three examples of quite different models. When you then consider the diversity of coverage of these awards, what I think we begin to get concerned about is how any of those models don't inadvertently create disadvantage in some place within the coverage of the award.

PN65

They're national awards. There are 10 or so classification streams, within, for example, the hospitality industry general award. I reckon in broad terms the award covers about six or seven different sort of subsectors of the industry, ranging from residential hotels to casino to pubs to commercial catering. So we'd have to first understand precisely what is being put and then apply the concept against each of those working patterns that arise from those (a) types of work and then (b) types of subsector that are covered. We think that that is what bargaining is for but that is where you're able to do these things and that the exercise in attempting to do these things against the coverage of a national award is fraught with danger in terms of potential disadvantage for our members.

PN66

JUSTICE ROSS: Can I make some observations around some of the options that you've raised: certainly from my perspective, I don't see the conversation being confined in any particular way. I don't think it ought to be confined to a particular conception of loaded rates, that just deals with penalties. I don't see why there can't be a conversation around whether some allowances might be included or along the lines that you've identified, Mr Redford, that there might be a swings-and-roundabouts approach with classification changes.

PN67

So the issues aren't necessarily in discrete boxes. I'm certainly not approaching it with any preconceived ideas about any of that. SO I think it would be helpful if all parties just retain an open mind as to how these issues might be addressed. I take your point about the coverage of the hospitality award. But there may be different ways of dealing with that. I'd be interested, Ms Durban, if we're able to get some data on employment size in the particular sectors of the hospitality industry. It may be, for example, Mr Redford, that you may conceivably come up with a loaded rate for cafes, for arguments' sake.

PN68

Rather than trying to conceive of a loaded rate that - and it might be for cafes that operate Monday to Friday, particular times, or for cafes that operate on the weekend. So I think one of the issues is to find out, well, where do small business predominantly operate in the awards covered under this discussion and then look at, well, what could be done? Rather than trying to come up with - I think if the idea is that we're going to somehow - if you start at the area of maximum ambition and maximum complexity, some loaded rate that is going to cover seven-day-a-week operations throughout the award, it's going to be a very complex provision. It may be a case of a sledgehammer being used to crack a walnut so I think we need at this stage to find out a bit more about what's going on in these sectors and a bit more about some of the issues. And, look, it may be that we move in small, incremental steps. If we take the issue that Ms Lawrence raised that it may be the titles of the classifications, even if we put in brackets after the current award title, what is currently understood to be a worker in that classification level for a relatively small hospitality business then that might improve compliance without doing any great violence to the award provision.

PN69

So think we'll see how it goes. I can understand your concerns at this stage, and obviously the devil will be the detail. But I think at this stage we just need to start to gather some information to see what sort of concrete proposals can come forward, and then each party to make an assessment of their position in respect of those. Thank you for that, Mr Redford. Can I go to you, Mr Crawford? And then to Mr Kemppi.

PN70

MR CRAWFORD: Yes, thank you, your Honour. We largely support the position articulated by the UWU today. We are not planning to bring forward any proposals ourselves but we would consider any proposals with an open mind, but I guess subject to the critical proviso that there's no disadvantage for employees. I think that'd be our position at this point.

PN71

JUSTICE ROSS: All right, thanks, Mr Crawford. Perhaps I should go to you, Mr Cooper, before I go to the ACTU. Was there anything you wanted to add?

PN72

MR COOPER: Just that we've got a final award to start to apply from 21 December and I think the industry is fatigued, to say the least, about what's been happening with the Clubs Award over the last four or five years. So I think that

with some certainty we were looking forward to the award being bedded down. The exemptions for managers classifications have worked extremely well over the years, at 20 and 50 per cent. We don't have any interest in the loaded rates but we do have an open mind about maybe the club employees, generally, classifications. But I'd like to think that Clubs Australia and the CMAA would be involved in some dialogue to those tidying up process. Thank you.

PN73

JUSTICE ROSS: I can share your observation about fatigue, Mr Cooper. And it may be that we do this as a sequencing exercise and I must admit, I hadn't anticipated clubs being the first on that list because of the exercise you've been going through for some time now. But look, I make this observation more generally, that I would encourage bilateral discussions of the type you've identified with Clubs Australia, and Mr Redford, you with the AHA. If there are some tidying up exercises that can be done then I think we should pursue them. And you don't need to come back to this forum to have those conversations. I think the sooner they get underway, the better.

PN74

Can I go to the ACTU and Mr Kemppe?

PN75

MR KEMPE: Thank you, your Honour. I'll keep my comments relatively brief. We support, of course, what Mr Redford and Mr Crawford said.

PN76

JUSTICE ROSS: Yes.

PN77

MR KEMPE: As indicated by Mr Crawford our fundamental approach in this is going to somewhat, unsurprisingly, be the principle that no worker should be left disadvantaged or worse off as a result of any changes. We note that any particular proposal is likely to be quite complex in terms of how it plays out across an entire industry. With loaded rates, for example, we know that it's a much simpler exercise mathematically and a much more (indistinct) exercise to look at that at the enterprise level than it is to try to cascade those loaded rates across an entire industry. But that said, we're not going to, of course, try to anticipate what proposals might be put. I think a more sensible course is, as has been said, to look at any proposal that might come and then have a look at whether or not there's a threshold case for change, at all, and then in fact whether or not that proposal meets that case.

PN78

We are going to be somewhat interested in what safeguards will be put in place or confinements of any of the proposals to make sure that none of them do in fact have unwitting or unintended, or perhaps even intended consequences in particular pockets of industries. And we're in your hands on this point, your Honour. There are some things we'd like to say about the information but we're happy to leave those to the point when we talk about directions and programming instead, and it just goes to proposals that need to be dealt with.

PN79

JUSTICE ROSS: No, no, certainly. Are there any other general comments? Can I just go to you, Ms Durbin, just to make sure that you picked up the point about, in hospitality, the various subsectors and whether the Department is able to provide the information about - or the short point is, where do we find small business, predominantly in the various components of the Hospitality Award, in particular?

PN80

MS DURBIN: Yes, your Honour, we are happy to have a look at that. I'm probably not over optimistic in terms again of the level of granularity, given again we're reliant on the ABS and their data collection but we'll see what we can find and certainly talk to the ABS and see if they can just segregate anything further for us.

PN81

JUSTICE ROSS: All right. We might ask you to have a look at that too, Mr Strong, from your membership. And, look, it's unlikely you've got - you know, to make sort of a simple point would be, I don't think focussing our attention on casinos is going to be particularly beneficial. There is a higher likelihood they'll be covered by enterprise agreements. They're usually larger businesses. But at the other end I would expect there would be more of your members amongst cafes, for example, and some other sectors. But if you can have a look at that

PN82

And if we look at the next stage I think it would be useful if we can get some elaboration on some of the ideas that have come forward and that I would look to get that information - bear with me for a moment and I'll just - and we'll also get the additional material from the Department, but what I had in mind was to get that material by no later than Friday, 29 January. What I'd be looking for here, and all of this is on a without-prejudice basis at this stage, I think we're looking for ideas. I'm particularly looking for material from which I can try and draw some broad principles. For example, even on the discussions that have taken place today, well, I'll chance the arm of the proposition that if there's to be a loaded rate it may be more than one rate. A range of options might be available, both Monday to Friday; different times on a Monday to Friday; weekends.

PN83

There is support for the proposition that employees should not be worse off under the loaded rate arrangements. There should be some degree of protections. It should be on an opt-in basis rather than mandating a particular position. But there may be others that we're able to draw out and to give us a common frame of reference without agreeing to either the concept of loaded rates, itself, without seeing it, or any particular loaded rate. But I think we can try to see what level of consensus there exists around some of those principles.

PN84

If I go to the AHA, look, the Commission can have a look at the two streams of genres and try and understand that problem more and provide it to you. You're looking for some consolidation of those. If you have any thoughts about how that might be done, that would be useful, and also some further information about how

you saw the all-in allowance rate operating. Was it in particular sectors covered by the award, and what allowances did you see that might go into that area.

PN85

Mr Kemppe, you've outlined some principles. You have referred to the idea of how you might sort of operationalise this. That is, is it an agreement amongst all employees; is it at an individual level; how do you withdraw from it. And I think there has to be some mutual protections and safeguards in that arrangement.

PN86

Ms Lawrence, you've mentioned the - I'm a bit apprehensive now that I'm going through each of you and - so you won't be saying anything on the next occasion, but Ms Lawrence, you've mentioned that it may be that by changing the descriptor, or adding to the descriptor of a particular classification, that may improve readability and it may also improve compliance. So I'd be interested in what propositions you have in that regard.

PN87

And from the clubs area, if there's anything in relation to - I wasn't sure whether Mr Cooper was talking about the simplification in the general classifications or were you just saying you had an interest in that area but you didn't have a particular proposal?

PN88

MR COOPER: No, we don't have a proposal in that regard. It's just a concept.

PN89

JUSTICE ROSS: All right. And similarly there was also discussions about the current exemption rates that may operate for other senior employees, and what do the proponents of that idea have in mind and what does that look like. So I'm conscious that we will be getting some information in the Department in the third week which we'll publish and make available to everybody. If you then provide that material by the 29th we'll consolidate it and then aim to meet again on 4 February and advance the discussion at that point.

PN90

If there is, between now and then any further information that you think would assist you, or anything that either we can get or we can ask the Department to obtain then just shoot in an email. Don't wait until the end of January. And as I mentioned before, I'd encourage bilateral discussions to see if there's a way forward on particular issues, particularly those that might be relatively straightforward, and they're a source of current irritation and a proposed change wouldn't alter the legal effect but would make it simpler and easier to understand. So that's the proposition, that you put in the material I've identified by 4 pm on Friday, 29 January. We would consolidate that.

PN91

Just on reflection, just make sure that everyone has enough opportunity to view it. If we make it the Wednesday, the 27th and that way we can consolidate the material by the Friday and you'll have it all well ahead of the conference on the

following Thursday. Is there any other observations of any of those proposals? Is anyone unclear about what's being sought or proposed? Ms Whish?

PN92

MS WHISH: Your Honour, the Restaurant and Catering Industry Association is eager to get this matter moving. And so in light of the fact there'd be additional data that could be provided by the 27th, the Association would be more than happy to take matters offline and see if a consent position could be reached with the United Workers Union. If a consent position in relation to simplification of classifications, exemption rates for senior employees and loaded rates couldn't be reached the Association is more than happy to provide a draft determination or an application quite early in February.

PN93

JUSTICE ROSS: No, that's fine. I would encourage you to have direct conversations. And parties should feel free to advance their proposals at whatever level of detail suits them.

PN94

MS WHISH: Thank you, your Honour.

PN95

JUSTICE ROSS: Any other observations? Mr Kemppe?

PN96

MR KEMPE: One observation or one point that I would make about the directions and the information is that right now, we don't quite - we, the employee representatives - don't quite know what we are bidding against and therefore can't exactly pinpoint what information we might need.

PN97

JUSTICE ROSS: That's all right.

PN98

MR KEMPE: Great - we were just hoping that there's a chance to see the proposals and then an opportunity is provided to identify information - - -

PN99

JUSTICE ROSS: I think it will have to be an iterative process. There will be further data releases as well. Until there is some structure around what's being proposed, I agree. I'm in the same position that you're in. I don't know what I don't know or what I need to know just yet. But, look, I think we will be better informed through January because we'll have a better idea about the Department is able to come up with and I think I definitely encourage you to have a more targeted approach to some of these problems, because I think if we're looking for a one loaded rate that is going to solve all our problems, we might be searching for that for some time.

PN100

It may be that if you take hospitality - if for arguments sake small business is predominantly in cafes, they predominantly, overwhelmingly don't have any

agreements, and we know something about their working, is there something that can make that sector simpler? Taking Mr Redford's point that if you have a loaded rate that applies across all the sectors, it gets much more complicated and you do invite much closer scrutiny of those sorts of proposals because people will be concerned about the unintended consequences, naturally enough.

PN101

Is everybody clear about the next steps? Any questions? All right, if anything occurs to you afterwards, don't hesitate to send me an email. I'm supposed to be holidays at the moment so it won't bother me getting emails over the period. If there is anything, Mr Kemppi, that occurs to you that there is further information you seek or anyone else seeks, don't wait until later in January, get in touch straight away. Okay? Thanks for much for your attendance. I'll see you again in February. I'll adjourn.

ADJOURNED INDEFINITELY

[1.55 PM]