



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**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)  
General Retail Industry Award 2020**

**Melbourne**

**9.37 AM, FRIDAY, 5 FEBRUARY 2021**

PN1

JUSTICE ROSS: Good morning, can I just check who I've got on line? In no particular order, Mr de Bruin, from the Master Grocers, Mr Ferguson from Ai Group, Mr Izzo and Mr Arndt from ABI, Mr Tindley from the ARA, Mr Millman from the NRA, Ms Durbin from the Department and Mr Booth from the Newsagents Association, Mr Strong and Mr Harris from COSBOA, Ms Lawrence ACCI, Mr Friend and others from the SDA, Mr Cullinan from RAFU, Mr Crawford from the AWU and Mr Kemppe from the ACTU. Have I missed anybody?

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MR IZZO: Your Honour, it's Mr Izzo here. It's Mr Izzo and Ms Jess Issa(?) from ABI, Mr Arndt is not appearing, Ms Issa is instead.

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JUSTICE ROSS: Look, I thought what we might do or begin with is I have a number of questions about the various claims. I was going to start with ABIs, Mr Izzo. I thought once I've asked the questions if there are any questions from any other party.

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Mr Strong, can you put yourself on mute?

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If anyone hasn't, just put yourself on mute if you're not speaking because otherwise we end up with a bit of feedback.

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So I'd ask some questions to seek to clarify some issues. I'd then invite questions from any other party. I'll then seek a preliminary view or response from the other interested parties to each of the three sets of proposals.

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In those responses I don't want this to - it's just a conference to seek to explore where the parties might ultimately land and the claim that they might be pursuing. So I don't want it to start to move into a de facto hearing, so you don't need to advance any submissions, particularly, in support of your proposal, or against it. At this stage we're just asking questions to seek clarification and to seek an initial response.

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I should also say that I've got a croaky throat this morning, so if anyone can't hear me, or I start to degenerate into a coughing fit, rest assured, I don't have COVID, I've just got a persistent dry throat issue.

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So if I can go to you then, Mr Izzo, and let me just - so look, the first broad proposition that I want to put to you is that the proposed amendment that you're putting forward is to the award itself, that is you're not proposing a schedule to the

award, you're proposing to replace the current part-time work provisions with the proposal you're advancing.

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I know that it's not expressed to operate for a fixed period of time and what I'm seeking clarification about is given that at least part of the rationale that is relied on, in support of all of these proposals is to assist the retail sector to adapt to the present circumstances that have resulted from the pandemic and the restrictions imposed in response to it, whereas yours seems to be an enduring change.

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The same observation applies to each of the proposals before us, but I suppose the short question is, is that right?

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MR IZZO: It is, your Honour, and, in short form, the reason why is because we think this measure has two features. One is it will assist the retail industry recover from the pandemic and it does serve the retail industry in the short term. However, we think there is longer term benefit in the revision, as well. We think the merit case that we will put forward actually has more enduring attributes to it that warrant an enduring change.

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A way of perhaps dealing with your query is naturally it could be a change that is subject to review and we would be more than willing to have that feature added, if you like, but at this stage we are seeking an enduring change. We see it appropriate to have the claim considered in these proceedings because it will have short term benefits, as well, which will help in the recovery from the pandemic.

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JUSTICE ROSS: All right. Can I just put some other broad propositions before I go through and seek clarification about some of the specific elements of what you're proposing. The NRA is advancing a proposal in relation to part-time employment. Are there differences between the two?

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MR IZZO: There aren't. We spoke with the NRA in detail before the filing of the determination and my understanding is that the provisions are aligned and (indistinct).

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JUSTICE ROSS: I might put you on notice, Mr Ferguson. That doesn't seem to be the case with your proposal. There are differences between your proposal and the NRA's.

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MR FERGUSON: I understand that, your Honour, and - - -

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JUSTICE ROSS: No, that's fine. I don't want to deal with it now. I just wanted to let you know that at some point you will need to outline a way forward,

because I don't think it's going to be productive at the end of the day to focus on two proposals that are broadly the same but have some differences.

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MR FERGUSON: I agree.

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JUSTICE ROSS: Mr Izzo, the other two sort of questions that arise about the proposal generally, the first is - and this is something that I want you to consider rather than to respond to now - the proposal appears to have some elements that are common with a proposal that was dealt

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with by the Commission in the Fast Food Award and rejected for a range of reasons in that award. At some point I'm going to want you to identify what are the differences between what you're advancing and what was considered and rejected in that case, and why you say the circumstances here are different; warrant a different outcome. Okay?

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MR IZZO: Understood. We'll take that on notice, your Honour.

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JUSTICE ROSS: Look, the other perhaps more delicate issue is that there appear to be some features in your proposal that are also matters that are currently in the bill before parliament. Am I right about that?

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MR IZZO: You are in some senses and you're not in some senses, your Honour. I certainly agree that some of the overarching - the outcome we're trying to achieve is similar, but to be blunt about it our view is that what is proposed in the bill currently does not achieve the outcome that we think the retail industry needs in terms of flexibility for part-time employment. The bill's features we do not think will have the benefit or remove the administrative burden on employers sufficiently in order to achieve material (audio malfunction) that's why we - - -

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JUSTICE ROSS: You just broke up - - -

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MR IZZO: I certainly don't want to be - - -

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JUSTICE ROSS: Yes. Your screen keeps - - -

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MR IZZO: I'm saying that we are (audio malfunction) just one moment, your Honour. Sorry, I've got an issue in the background. I might kill the video, your Honour. We wouldn't want to be seen to be in any way opposed to the bill. We do think the bill achieves some benefits for employers, but our view is that the provisions in the bill will not achieve the outcomes that we're trying to seek in

terms of flexibility for employees and employers with respect to the needs of the industry.

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The measures that we are seeking we think are needed in order to meet the modern awards objective and to ensure a safety net that promotes employment and the very real needs to both employers and employees when it comes to engaging part-time employment - - -

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JUSTICE ROSS: Yes, that's fine. I would sort of encourage each party - you don't need to drift into submissions about the position in detail in these conferences. I just want to get a brief understanding of the position. The bill also deals with the interaction of the statutory changes that are proposed in respect of the cohort of awards which includes general retail and the current award provisions, so there is that interplay, as well.

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I will be similarly blunt, Mr Izzo, and the difficulty that I apprehend is not about the merits or anything like that, but it may affect the timing of the hearing of this aspect of the matters in the retail industry. If, for example - and I'm not suggesting this is a timetable - this matter was to go on and be the subject of proceedings at the same time as the bill is being debated in parliament, then it seems to me there is a real risk that even any questions from the Commission about aspects of the claim may be translated into the political arena and be used by one group or another in relation to the debate on the bill.

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Even your comments that you don't think the bill - look, I understand the full context in which you put your remarks. I understand that you're not opposing the bill or anything like that, but that won't be how it's reported. There is a risk as you run the parallel proceedings that people - we have already seen this in the debates around the legislation.

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I, for myself, am pretty reluctant to sort of jump into a political process and nor do I want to be in a position where the questions that I might put to you or provisional views, or however you frame it, then get used as a club to beat someone on some side to death with. It sort of drags us into that process. Look, I just wanted to raise that. I mean, we'll see how this develops, but I didn't want you to at least, you know, not be aware of that concern.

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Can I just get perhaps some assistance from Ms Durbin. I wondered whether the department could give - you could take this on notice - the parties some sort of indication as to likely debates on the bill. You know, the timing is really what I'm interested in. Ms Durbin, I readily appreciate that, you know, there is necessarily a lack of precision about - I'm not asking you when do you think the bill, if it's passed, will be passed or anything like that, but if you can give us your best indication as to at least planned timing on those issues, then that would be of

assistance and we can circulate that to all the parties. That might be something you take into account, Mr Izzo, when we come to it. All right? Ms Durbin?

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MS DURBIN: Your Honour, there is probably not a huge amount, as you foreshadowed, that I can add. In terms of circulating, I'm not sure that will have much utility. What I can say is, as you know, the bill is currently before a Senate committee that is due to hand down its report on 12 March and there will be hearings scheduled in the interim. Really, you know, beyond the interim period that is a matter for government so, I'm sorry, but I really don't think I'm in a position to add much else.

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JUSTICE ROSS: That's fine. I'm not sure how these things work, but has it been formally listed for debate in the Senate after 12 March?

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MS DURBIN: No, it hasn't, your Honour.

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JUSTICE ROSS: All right. I'm sorry, Mr Izzo, you were saying?

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MR IZZO: Yes, your Honour, I certainly think those concerns warrant a delicate approach in consideration. If I could say this to address them in part. One of the matters I said at the beginning of this directions hearing is that we do think these changes have merit in terms of the response to the COVID-19 pandemic. So we think there is still a need to be moving with a level of promptness in relation to the claim, and one way that that can be achieved is there should perhaps be less concerns with the parties filing submissions, perhaps evidence, in support of the claim whilst the bill process continues to be underway.

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Now, if the Commission does have questions about the interaction between the bill and the claim and if there are matters that need to be raised in any hearing then naturally the hearing might need to take place after the bill is passed or addressed by parliament. I think what we wouldn't want to see is everything being delayed pending the passing of the bill. We could probably do some steps short of having the hearing.

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JUSTICE ROSS: Yes. No, I follow that. In any event I think at this point of the process we are still, I guess, in the discussion facilitative stage at some point we will move to the formal application and directions stage. Can I go to some questions about the specific proposal. If you - and I am working here off your draft determination. Clause 10.4, the setting of guaranteed hours and the agreement in writing, is it intended that that would be retained as an employee record, and is it intended that the employee would be given a copy of it?

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MR IZZO: The short answer is we hadn't turned our attention to that, but it's probably something, my preliminary view is that could be accommodated, and so we probably need to take that away. We didn't specifically turn our mind to that, but my first reaction is it's not something that would be - I don't think we would be opposed to adopting that course, so we can look at that, your Honour.

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JUSTICE ROSS: I want to make it clear that the issues I am raising are not - I am not wanting to suggest that if somehow all these things are addressed I am going to be deliriously happy and all the rest of it. It's just I have noted the changes between what you're proposing in the current provision, and currently in 10.7 of the award it says that it will be retained and a copy will be given to the employees. I am just trying to understand if there was a reason for not picking that up, rather than expressing a view one way or the other about whether it is a problem that needs to be fixed or however else you might characterise it.

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MR IZZO: Thanks, your Honour, and perhaps to explain the rationale it certainly wasn't deliberate, but what was deliberate is that we have effectively taken this clause from the existing part-time models that exist in the hospitality and restaurant awards. There is a high degree of similarity between this clause and those clauses, and part of the reason is because this clause was already in the safety net elsewhere, and so that's why we have adopted this form of drafting. So we hadn't specifically turned our mind to the issue you raised, and we will, but that explains how we have ended up with the draft that we have.

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JUSTICE ROSS: Look, the other similar question is in 10.5D of the current awards the agreement that's reached between the part-time employee and the employer also covers when meal breaks may be taken and their duration, and I note that's not a feature of your proposal and was wondering if that was deliberate or does it follow from your earlier comments that you picked up and adapted a bit a provision in another award and so that change may not have been intended.

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MR IZZO: It's the latter in the sense we have picked it up from another award, the drafting. We haven't specifically turned our mind to the meal breaks issue. We can, and we can reconsider it, but, yes, it's more because we have taken the clause from another award.

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JUSTICE ROSS: All right. In 10.11 why would an employee need to justify a change to their availability? If it's not reducing the number of guaranteed hours - so as I understand it the system might work that they're guaranteed eight hours work, but they say their availability is any time Monday to Friday between 8 am and 6 pm. So they are available effectively for 38 hours but paid for eight, and 10.11 then puts a constraint on if they have to organise an appointment for a doctor or whatever, that they would need to provide 14 days notice of that change. I mean I can readily understand the guaranteed number of hours, et cetera; that's an agreement and everything else, but am I right that that's what's intended, that they would specify their availability over an entire week and they

couldn't change that unless they persuaded the employer it was a genuine and ongoing change. So there would be no capacity for short term changes. A student might have an exam period. There are a myriad of possible scenarios.

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MR IZZO: I think the short answer to that is two fold, your Honour. Firstly there may be circumstances where other forms of leave are available. So that's when you talk about carer's leave or annual leave or compassionate leave, those matters, which would prevail over that clause because it's a special type of leave. The second is that again this is a scenario where the drafting has been lifted from the hospitality and restaurant awards and taken as part of this determination, because we were trying to ensure a level of similarity with something that's already in the safety net. I think we can revisit the drafting again when it comes to filing of any claim or as the matter develops. But the reason it's in there is because it's part of the existing drafting of other awards.

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JUSTICE ROSS: Yes. I am just trying to understand the way it would operate. You have got a dispute resolution mechanism. What sort of disputes do you envisage being dealt with through that?

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MR IZZO: The disputes that we thought may arise would be any disputes about whether the clause has been applied properly. So whether there has been some level of disputation about what the availability was communicated or wasn't, whether the rostering provisions that are still in there are being complied with; any kind of non-compliance with the award provisions was our primary thinking in terms of what might give rise to a dispute. We obviously can't think of all the types of circumstances that might arise, but we're conscious of the need to ensure that as part of ensuring an appropriate safety net the parties are agreed they can bring disputes about the award, the application of the award provisions to the Commission.

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JUSTICE ROSS: And that would be dealt with under the dispute resolution provision in the award?

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MR IZZO: Yes.

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JUSTICE ROSS: Look, those were the preliminary observations I had, Mr Izzo. Perhaps if I can ask if any other party has any questions, and then if I can go to - I understand that what's proposed would be supported by the other employer organisations, but I will then go to the unions to get their view on the proposal. But there are any questions firstly for Mr Izzo?

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MR IZZO: Your Honour, sorry to interrupt. One final comment if I may before you hand over to questions.



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JUSTICE ROSS: Yes, certainly.

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MR IZZO: And I think Mr Booth is probably going to raise this himself. Mr Booth contacted me yesterday about two types of concerns he had with the drafting and determination, and what I said to Mr Booth who represents the newsagents was that I saw the merit in the matters that he raised with me and I had undertaken that in the next week or so we would look to discuss those matters with him and seek to see if we could resolve them and perhaps end up filing an amended draft determination. I think that course of action commends itself even further now, because you have raised a number of questions yourself that probably warrants specific consideration, and so what I think would be of merit is if we could work with Mr Booth and the other employers and also consider your questions and have a timeframe for the filing of the revised determination, because that period may allow us to come to a landing of consensus with Mr Booth, I'm hoping. If not, then the Newsagents could obviously express our own opinion, in due course. But that's the course of action we were going to seek and I just wanted to raise that up front because he'd raised some matters with me yesterday.

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JUSTICE ROSS: That's fine. I probably won't put a timeframe for you to file that. I think it's best for you to do that when you're in a position to do so. It may be that the unions have some issues that you're able to address as well, perhaps short of agreement but nevertheless.

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There was one general matter I neglected to mention, Mr Izzo, I note that your proposal has the effect of restricting part-time employment to those instances where someone's engaged to work at least eight hours a week. Under the current award there's no minimum.

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Can I draw your attention to, there are some observations in the part-time and casuals Full Bench where they considered imposing a minimum number of hours in various awards. My recollection is, for the reasons they gave, they decided not to adopt that course. I think we took a similar view in fast food, though I could be corrected about that.

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But really the point was that that is a restriction that isn't there at the moment and that would mean that if there are any part-time arrangements for less than eight hours well they wouldn't be part-time any more, they'd have to be paid as casuals.

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Now, I know - that's really what alerted me to the alignment with the bill, the eight hour proposition. So, look, I just draw your attention to that, you can deal with it in whatever way you see fit, Mr Izzo.

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Can I go to - firstly, any questions from any party before I seek the views in response from the unions? I think I understand your position, Mr Booth. Did you want to say something, Mr Booth?

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MR BOOTH: (Indistinct) comments - - -

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JUSTICE ROSS: I'm sorry, you need to speak into your microphone Mr Booth, we're having trouble picking you up.

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We'll wait until he comes back on and I think I'll try and summarise the - yes. Mr Booth, can you hear me? Mr Booth, can you hear me? Mr Booth? Mr Booth, can you hear me? Look, I'm sorry, we don't really have time to do this.

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SPEAKER: I think he's logged out, Justice.

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JUSTICE ROSS: No, no, he's come back on, but he's talking. Look, we just don't have the time to fiddle around with this.

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We understand his position, he's going to have discussions with ABI. I think we'll move on.

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Are there any other comments or questions or issues from any party, before I turn to the unions?

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Who's speaking?

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SPEAKER: (Indistinct).

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JUSTICE ROSS: Mr de Bruin?

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MR DE BRUIN: Thank you, your Honour. Just in regards to the part-time employment matter that we've been discussing, we would certainly like to look into Mr Izzo's proposals more closely. As far as family and privately owned businesses are concerned, in our industry sector and throughout COSBOA, what we're looking for is a very, very simple approach to part-time employment that allows us flexibility, that allows us to offer additional hours without the burden of administration. We'd certainly like to have a look at what Mr Izzo has proposed, but we would certainly like to avoid complexity.

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JUSTICE ROSS: So, Mr De Bruin, do I understand your position that you're looking - let's leave aside the drafting or any issues associated with that, for the moment, but the outcome that you seek is one that where you've engaged a part-timer, under the award, and let's say you've got the guaranteed hours, they work four hours on a Tuesday and four hours on a Thursday for you. You're looking for an arrangement that if you require them, you've got a position where, perhaps the owner of the business has to be away on another day of the week, a Wednesday, for a morning, you want to be able to approach the part-timer to say, 'Look, would you mind - are you available to do the morning next Wednesday?', for example. If they are then they could do those as additional hours that would be regarded as ordinary hours rather than overtime hours. Is that basically the - you want a mechanism where that could work, in a practical way, is that it?

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MR DE BRUIN: Your Honour, that's absolutely (indistinct).

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JUSTICE ROSS: You've done something, Mr De Bruin, you've upset the system. Look, I understand the - what's that noise, is someone not on mute? Right. Okay.

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MR DE BRUIN: Your Honour, that is precisely the correct example. And in regards to any administration being minimised, we would offer that perhaps a pre-commitment could be made between an employee and the employer to suggest that if such an arrangement was put forward and offered and agreed to, that that would be okay.

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JUSTICE ROSS: All right. Thank you, Mr De Bruin. Any other employer comments or questions?

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Then can I go to the SDA? Mr Friend, what's your - look this is, as I mentioned before, I want to avoid everyone launching off into the travails as to the problems they see with a particular proposition. At this stage I want to get the thrust of what your position is and any concerns you might have.

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MR FRIEND: Well, the general thrust at the moment, your Honour, is that we don't support the proposed change. We would, however, be interested in seeing the proposal as it's refined. I mean, it has been made clear this morning that there is a fair bit of work to do before the employers have refined exactly what they want and we'll look at that, but at the moment we're not supporting what was said.

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JUSTICE ROSS: Have you had an opportunity to have discussions with the proponents of the proposal?

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MR FRIEND: Not that I'm aware of, your Honour.

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JUSTICE ROSS: All right.

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MR FRIEND: Obviously the parties can explore that.

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JUSTICE ROSS: Yes.

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MR FRIEND: Rather than doing it here. The answer to that is no.

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JUSTICE ROSS: All right. Thank you. Well, that might be a course of action that commends itself to you, Mr Izzo. Certainly speaking for myself it would assist if - we've got the draft determination. As I've said, I'm not looking for a large submission, but I guess what I would look for to accompany a revised proposal is sort of a statement about what it's trying to do; how do you see this would work in practice.

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It really flows from my discussion with Mr de Bruin. I'm trying to understand in a practical sense what it is you want to achieve by it and what the objective is, and how you see it working in practice. We will have the legal construct, but I think it's informed by what is the issue that you're seeking to address. All right, can I go to - - -

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MR FRIEND: Your Honour, can I just raise the point - - -

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JUSTICE ROSS: Yes, sure.

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MR FRIEND: I'm not sure how far along the track we're going with this, but we had anticipated there would need to be evidence.

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JUSTICE ROSS: No, no, sure, yes.

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MR FRIEND: Thank you.

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JUSTICE ROSS: Look, at some point each party will have to decide how they want to prosecute their case and what they want to advance in support of it. I'm not suggesting that all Mr Izzo has to do is a couple of paras explaining what the purpose is and then we're off to the races. Obviously once a formal application to vary is in, in whatever form it ends up in, then the matter will be programmed and it will be a matter for each party to determine what they want to advance in support of that claim. It's just at the moment I think it is an iterative process.

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MR FRIEND: Yes. Thank you.

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JUSTICE ROSS: As was clear from yesterday I think it's much better if proposals can be developed in consideration to the views of the various other parties. Even if we don't end up with an agreed position at least the process will have been shortened ultimately, because it might be closer or address some of the concerns that have been raised. Thank you, Mr Friend. Mr Crawford?

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MR CRAWFORD: Thank you, your Honour. We support the SDA's position at the moment. The only other point I would note is that part-time employment is not a matter, on my reading, that was addressed in the Minister's letter to you that started this process. Presumably that's because it is a matter that is dealt with from the Fair Work Amendment Bill that is before parliament, so I do want to note that point. Yes, aside from that we support the position of the SDA.

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JUSTICE ROSS: Okay. You're right, it wasn't mentioned in the letter, but there is no constraint really on any party making an application and pursuing a particular matter. The issue about the interaction with the bill was one I touched on earlier. We'll need to give some thought to that. Mr Cullinan for RAFFWU?

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MR CULLINAN: Our only point at this stage is that these proposals were rejected for good reason. In the fast food case we don't have any questions. We understand what it's trying to do. We look forward to the evidence.

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JUSTICE ROSS: All right. The ACTU, anything to add?

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MR KEMPPI: Nothing to add, your Honour.

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JUSTICE ROSS: All right. Let's move to Ai Group's proposal. Mr Ferguson, if I could go through the same sort of process. Look, in your submissions you say at paragraph 12 as I read it that the proposal is essentially to assist the retail industry to operate more effectively in the current unprecedented environment. Just to be specific, what unprecedented environment in particular are you referring to there?

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MR FERGUSON: There are probably a number of facets to it, your Honour, but in the context of the pandemic and the change to trading environment that has flowed from that. We think there is merit in greater flexibility in the award. I'm not trying to be comprehensive, but there have been significant changes to trading patterns and so forth, and to the demands upon employers.

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JUSTICE ROSS: No, that's fine. I don't want you to be comprehensive. I just want a sort of short - - -

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MR FERGUSON: That's the crux of it, your Honour.

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JUSTICE ROSS: All right. Look, similar to the point I raised with Mr Izzo, your draft determination isn't time-limited. Does that reflect your view that the sort of unprecedented environment that you're referring to is going to persist?

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MR FERGUSON: Yes, look, I think the unprecedented environment I'm referring to is just one of the arguments we would advance as to why this approach is necessary. I probably can't at this point give you an indication as to our view as to how long it will persist for, but we think it's possible that it will continue for some time.

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I understood the point you raised about the catalyst for these proceedings and whether there should be consideration given to these being time-limited. We would think about that. I think our initial view had been that there was enduring merit to this proposal and, especially given the nature of the proposal, that time-limiting it may not be appropriate dealing with remuneration and so forth.

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JUSTICE ROSS: All right.

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MR FERGUSON: Yes, I can't tell you what will happen in the trading environment conclusively now, your Honour.

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JUSTICE ROSS: Yes. Do you propose that your proposal apply to all employers? That it not be restricted to small, medium businesses, but it will apply to large retailers, as well?

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MR FERGUSON: Yes, your Honour, we would see it applying consistently across the sector.

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JUSTICE ROSS: Just one issue for you to consider - and I'm not suggesting it might impact on your claim, but it will be an issue that will be raised at some point.

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MR FERGUSON: Yes.

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JUSTICE ROSS: Some large retailers are doing quite well during the pandemic.

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MR FERGUSON: Yes.

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JUSTICE ROSS: Their profitability has actually increased and enterprise agreement making in the sector is largely confined to large employers. It sort of raises a question as to, well, if they're doing better than before and if they have a demonstrated capacity for agreement making, why would a proposal necessarily extend to them rather than focusing on small business?

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MR FERGUSON: We anticipate that we will have to deal with that issue.

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JUSTICE ROSS: That's fine. As I understand it, there are two different exemption rates proposed. One applies to classification levels 4 and 5.

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MR FERGUSON: Yes.

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JUSTICE ROSS: Which is set at 125 per cent of the level 6 rate, then you get there by multiplying that by 52.14 and that gives you an annual rate. You've got a method for bringing that down to an hourly rate later in the proposal.

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MR FERGUSON: Yes.

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JUSTICE ROSS: Then you have got an exemption rate that applies to classification levels 6, 7 and 8 which is at least 125 per cent of level 8. I understand there are only eight levels, but why the difference in approach? The first exemption rate is set on the next level up at 125 of level 6 and the second group is based on level 8, and it's the same 125 per cent.

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MR FERGUSON: Yes. In part this is a product of discussions with employer associations in trying to strike practical rates. We thought there was merit in striking two levels probably to achieve a balance and ensuring that you strike a rate that is sufficiently higher than the minimum rates in the award so as to result in a real

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benefit to employees that compensates for the removal of the application of other award provisions, but nonetheless is still at a level that it can be utilised by - it will be utilised by employers across the industry in relation to the particular classification levels.

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For example, smaller employers may not have the same capacity as some of the larger employers to pay, you know, simply an amount above level 8 for the relevant classifications.

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JUSTICE ROSS: All right.

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MR FERGUSON: That is something that we anticipate we'll continue to work through with - - -

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JUSTICE ROSS: All right.

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MR FERGUSON: As to balance.

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JUSTICE ROSS: Yes, all right. An employee who is entitled to the exemption rate is not entitled to the benefits of the clauses that are identified in your draft determination at 18.3. I note some of the numbering is a bit out in 18.3, but it's something you can turn your mind to later.

PN132

One of the exempted clauses is clause 16. So the consequence then would appear to be that an employee, the subject of an exemption rate, would have no entitlement to any meal breaks, is that - and nor would they have any entitlement to a minimum break of 12 hours between shifts. Have you turned your mind to the OH&S issues that may arise from that sort of circumstance?

PN133

MR FERGUSON: Look, I think that particular issue, since (indistinct), that's been ventilated with us and we've started to think through that. I don't want to proffer a view as to whether we will amend it, in light of those considerations.

PN134

JUSTICE ROSS: No, no, I'm just drawing your - - -

PN135

MR FERGUSON: I think you're right, I think that they are issues that we'll think about and what solutions - what might be appropriate, in relation to that. We appreciate that.

PN136

JUSTICE ROSS: That's fine. We don't - it will go quicker if we just deal with it in a short way. You've also excluded clause 15 hours and the consequence of that would mean that an exemption rate employee would not have an entitlement to two consecutive days off per week, or three days off per two week cycle, you're aware of that?

PN137



MR FERGUSON: I am. There is some measure that addresses that, in 18.5, where there are some limitations on days off, in a different way and leverages very heavily on the approach, in the high (indistinct), with some amendments to reflect operational, but I appreciate your key points.

PN138

JUSTICE ROSS: Is this exemption rate proposal to apply to part-time employees?

PN139

MR FERGUSON: Part-time employees wouldn't be excluded if they met the requirements of this, but we have not, ourselves, provided a mechanism for pro rataing, that is - there's some consideration that needs to be given to that, to make it workable, and that's something that we might work through with the other employer groups, in a course of action I was going to propose. I think that's a bit complicated.

PN140

JUSTICE ROSS: Because the way it's currently framed it could apply to part-timers, but you'd have to pay full freight.

PN141

MR FERGUSON: Exactly right.

PN142

JUSTICE ROSS: You'd have to pay 125 per cent of the classification rate.

PN143

MR FERGUSON: Exactly right, your Honour. So they're not excluded, but we haven't pro rataed it, and I think the pro rataing requires some careful thought.

PN144

JUSTICE ROSS: Well, let me give you an example when you're discussing if it extends to part-timers and how it might do so. If you look at the - if you've got a part-timer who is employed to - they're agreement is to work an eight hour shift on a Sunday. You work it through and let's say it's - they're a level 4 employee, so they're paid an exemption rate, on my calculations, it's an hourly rate, based on \$60,410.70. So that gives them an hourly rate of, I think I worked - anyway, the short version is that they would get \$30.57 per hour for that work, if they were an exemption rate employee, whereas, under the current award they get \$34.63. So, in other words, they're getting \$4 an hour less.

PN145

That's one of the challenges with part-time work because if they're rostered - they can be rostered at a time when penalties are high but are subject to an exemption rate and they're going to lose. So amongst the things you might need to consider, that would be one of them. One of the challenges with applying exemption rates to part-timers is that. I'm not suggesting there might not be a solution to it, but that seemed to be an issue.

PN146

The other question is whether you're also having discussions with the NRA about their proposal because there are some differences between their proposal and yours.

PN147

MR FERGUSON: Yes. So there have been some discussions that already narrow the differences, but I think there is merit, although we're keen for these proceedings to move swiftly, there's merit in the parties having further discussions to refine some of the differences. I'm not sure we will end up with precisely identical clauses, for various reasons, but I think there is merit for further discussions with the NRA. We had proposed to have discussions about that, and the part-time issue, with the other employer groups because there's probably some interplay between new clauses too.

PN148

So the course of action I had going to propose is that while we want to move swiftly to suggest some reasonable window for discussions about - - -

PN149

JUSTICE ROSS: It's really they're your proposals, I'm proposing to give you whatever time you need. I'm not proposing to set a time period within which you need to do those - have those discussions. I would say, from the perspective of someone who's heard cases where there have been multiple employer claims directed at the same issue, it usually ends up in chaos. The focus tends to be on what the differences are between the various proposals. I make the same observation about union claims directed at the same issue and the SCHADS case has been an exemplar of that.

PN150

At the end of the day, you're left trying to sort out what the hell the things are directed at and why would you prefer one to the other. It does soak up a lot of time and energy focusing on what are, on the face of it - there may be good reason for the different positions but, on the face of it, the differences don't appear to be substantial. So I would certainly encourage that.

PN151

Have you had any discussions with any of the unions about this proposal?

PN152

MR FERGUSON: We've had discussions with the unions, over time, about similar concepts, but not this specific proposal, your Honour. I think we were still narrowing the difference with the employers, if you will.

PN153

JUSTICE ROSS: No, no, I certainly think that's a sensible first step. I think once you've got a position on that, then - look, it may meet varying levels of success in that endeavour but it's still worthwhile having those discussions. In that context you might also discuss how the matter might be programmed.

PN154

MR FERGUSON: The intention, and I think certainly the NRA, ARA, ABI and ACCI, there have been some discussions about the desire to coordinate the claims advanced and perhaps coordinate some of the efforts to put evidence before the Commission, to assist with the process and in the programming, so we'll have those discussions.

PN155

With the union point, we'd also be very open and intend to sort of reach out to the unions to have discussions about the clause as well, even if it's just narrow, some of the differences.

PN156

JUSTICE ROSS: All right, thank you.

PN157

Mr De Bruin, I had noticed your hand up on the screen? No. Okay, all right.

PN158

All right, thanks, Mr Ferguson.

PN159

Are there any questions from any of the employer organisations before I go to the unions? No?

PN160

Can I go to you, first, Mr Friend?

PN161

MR FRIEND: Thank you, your Honour. We're in the same position, we're still waiting to see how it turns out at the moment though, with proposing the proposals (indistinct).

PN162

JUSTICE ROSS: Mr Crawford, do I take it you're in a similar position to that you expressed in relation to ABI's claim?

PN163

MR CRAWFORD: Yes, thank you, your Honour.

PN164

JUSTICE ROSS: Mr Cullinan?

PN165

MR CULLINAN: In relation to this proposal, we're opposed to it. We do note that there is probably a wealth of evidence, particularly Woolworths to identify that 25 per cent is going to be nowhere near enough to cover the excised elements.

PN166

There's also a point, as well, about overtime, even though 18.4 specifies 38 hours per week, we know what your Honour has said has said, in relation to meal breaks. Clause 21 is also excluded, which would basically revert back to the Fair

Work Act's arrangements around overtime and reasonable overtime, rather than any rights under the award, limits on overtime, so that's a further concern for us.

PN167

JUSTICE ROSS: All right, thank you.

PN168

The ACTU, anything to add?

PN169

MR MILLMAN: No, your Honour.

PN170

JUSTICE ROSS: All right, thank you for that. We'll move to - look, I'm not seeking to exclude you, Mr Millman, but because your matters overlap with the others I haven't gone and I don't propose to go specifically to your proposal because we've canvassed the issues that we would want to, in relation to the other matters.

PN171

MR MILLMAN: Thank you, your Honour.

PN172

JUSTICE ROSS: Can I also, Mr Ferguson, and others bring your attention to the fact that in yesterday's conference the Department undertook to provide an information note to the Commission that we will circulate on exemption rates, their arbitral history and rationale, and we will send that to you when we get a copy from them. Can I just lastly but not least go to the MGA. Mr de Bruin, I have got a proposal about how this might be dealt with, because you're in a slightly different position on the - I might just get you to mute your - I am just still getting a bit of feedback, sorry about that. You're a slightly different point in the development stage, if I can put it that way, in that you have outlined how you see the proposition working, and what the intent is, and you have foreshadowed the reasons why you see it's desirable. Your intent is that employees not be disadvantaged by the proposal, but you want to capture the administrative simplicity that a loaded rate would provide, and you have got a number of options for it.

PN173

Can I suggest this approach to you, and it's a similar one to the one that we landed on for the Hospitality Award in respect of the AHA proposal, and that is that we take what you have got, well what you have advanced, and the agreement triage team will communicate with you about if this sort of thing was in an agreement what would their comments look like. That way you can take that feedback into account in refining your proposal, and then we can work to put it into the form of a draft determination, and at that point when you're at a more concluded stage of your consideration about what you want to pursue then you can get to the circulation of a draft determination, the various other parties can express a view about it, and we can have a conference like this one to - I think that would be a more productive discussion, because I suspect at the moment the unions are likely to say, well we don't know a range of things about this proposal because there isn't

detail about X, Y and Z. So I think it would be productive if we could give you an opportunity to develop that.

PN174

Certainly the idea of loaded rates directed at particular shift patterns is one that is more transparent and it is easier to make an assessment about whether or not an employee would be or wouldn't be disadvantaged under that proposal. So it's got that sort of concept in it similar to the AHA's proposal, and obviously it's a much simpler way of addressing it than simply providing a loaded hourly rate that applies to everyone whenever they work, because that then gives rise to assessments about, well people could be required to work a particular pattern of hours which would mean they would be disadvantaged under that broader proposal. But as I understand your proposal it is much more tailored and specific to the circumstances in your sector and is intended to provide transparency, et cetera.

PN175

One issue when there is that introductory discussion that will be raised with you, you note at the end of your submission that the calculations you have made don't include any incidental allowances which would be paid separately. Once you get the opportunity we would be assisted in that initial exercise if you could identify what allowances you're referring to there. So, look, that was my proposal, Mr de Bruin, if I can get your reaction to that or how you would like to proceed and then we will see where we go.

PN176

MR DE BRUIN: Thank you, your Honour, for your consideration, and we would definitely like to proceed with your recommendation and we will certainly do the homework that you suggested at our end in the meantime. So thank you, your Honour.

PN177

JUSTICE ROSS: All right. I think the most productive way of dealing with the MGAs is to approach it that way. When there is a more specific particular proposal put forward it will be circulated and all of the parties will have an opportunity to comment on it as we have done in this conference. We will work our way through that and we will list a conference once Mr de Bruin's organisation is ready to proceed and to discuss it with the rest of you. That was all I intended to cover. I didn't intend to list the matter for further conference. I was rather going to leave that to the proponents of each of the proposals, because they may move at different speeds, and I think there's a need certainly in relation to Ai Group's proposal to have some further discussions with the various employer interests, including the MGA, so that we don't end up with spending half of our time in any subsequent hearing with a debate amongst one side of the Bar table about what they think of each other's position, and it gives you an opportunity, Mr Izzo, also to - or both you and Mr Ferguson to take into account the issues that have been raised, to settle where you want to go in relation to your proposal, and also to have some at least initial discussions with the relevant union interests. So that when you're through that process if you advise my chambers and then the matter will be listed.

PN178

I know that there are various issues and reasons why the employer parties want to pursue this matter quickly, but I propose to leave that timing in your hands for the moment as to when we would come back for a conference. When you're having those discussions with other employer parties and the unions I also want you to discuss the programming of the matter and any directions and how you see the way forward to see if you can - if you can't reach an agreed position then at least you advise as to what the positions of the respective parties are, and then we can deal with that at a subsequent conference or mention. Okay, everybody clear? Does anyone have any questions or any issues that they want to raise before we adjourn? No? All right. Mr Booth, are you still with us?

PN179

MR BOOTH: Yes, I am, your Honour, and I hope you can hear me now.

PN180

JUSTICE ROSS: I was more worried that you couldn't hear me.

PN181

MR BOOTH: No, I could hear you. It has to do with working remotely and mirroring - anyway that's technology.

PN182

JUSTICE ROSS: Not much point in talking to me about technology, Mr Booth, I assure you.

PN183

MR BOOTH: I just wanted to confirm, your Honour, that we have had discussions with MGA/TMA with Mr Izzo and also with Mr Millman regarding certain concerns we have. We understand that there will be an ongoing dialogue and any concerns we have should be reflected in updated proposals which are put forward to the Commission.

PN184

JUSTICE ROSS: Because - - -

PN185

MR BOOTH: I apologise.

PN186

JUSTICE ROSS: No, that's fine, Mr Booth. Because as you're acutely aware there are specific provisions in the Retail Award in relation to newsagents, and the interaction between some of these proposals and those provisions is something that the parties need to give attention to.

PN187

MR BOOTH: Yes, I agree, your Honour, and those are specific issues which have been addressed so far in discussions. We note your comment, which may indicate an expectation that any of these proposals may be better presented as schedules to the award. We are concerned that the integrity of the plain language award may be disturbed should these proposals proceed. We certainly are not keen to see the

extended ordinary hours, which apply to our sector, removed and we are not keen to see a reduction in the existing flexibility which applies to part-time employees, as you pointed out, with a three hour minimum.

PN188

JUSTICE ROSS: Well, thank you very much. I'll await the advise. We'll be in touch with you, Mr De Bruin, and I'll await the advice from Mr Ferguson and Mr Izzo about once they've included their consultations and when they believe that a further conference will be productive.

PN189

All right, thank you very much for your attendance. I'll adjourn.

**ADJOURNED INDEFINITELY**

**[10.43 AM]**