



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT SAMS
COMMISSIONER CAMBRIDGE**

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2016/26)**

**Rail Industry Award 2010
[MA000015]**

Sydney

9.59 AM, FRIDAY, 3 FEBRUARY 2017

PN1

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, could I have the appearances, please?

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MR M DIAMOND: Diamond, initial M, from the Australian Rail, Tram and Bus Union.

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MR M RIZZO: Your Honour, Rizzo, M, on behalf of the ASU.

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MR M NGUYEN: May it please the Commission, my name is Mr Nguyen, initial M. I appear for the Australian Manufacturing Workers' Union.

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MR A WOODS: Woods, solicitor, appearing on behalf of Aurizon and others, otherwise as known as the Rail Employers for the purpose of the application. I seek permission to appear.

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SENIOR DEPUTY PRESIDENT HAMBERGER: There's no objection to granting permission to Mr Woods, I assume?

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MR DIAMOND: No, your Honour.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so permission is granted. Just in terms of the way we do this, there are two issues. Should we deal with them separately, just deal with let's say the Saturday rates, deal with that and then come back and deal with the grade 9 classification? I don't really care either way. Has anyone got any thoughts on the subject?

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MR RIZZO: I think that would be a reasonable way forward.

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SENIOR DEPUTY PRESIDENT HAMBERGER: All right, well let's do it that way.

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MR WOODS: One of two, I think that might have come up heads.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Because they're very distinct. I mean, there's no crossover, is there, really. Are you happy to start with Saturday rates?

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MR RIZZO: Yes.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Also, we've read your written submissions, so take that as given. So Mr Diamond - well - who's going to go first?

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MR DIAMOND: Mr Rizzo?

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SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Rizzo.

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MR RIZZO: Thank you, your Honour.

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MR WOODS: Sorry, there might just be one evidentiary point to deal with. Are you still requesting that affidavit?

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MR DIAMOND: Yes, but that's about the other matter, isn't it?

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SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, that's on the grade 9.

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MR WOODS: Sorry - yes, sorry. I suppose there is one matter, just as evidentiary, because I filed an affidavit in relation to the Saturday rates clause.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Did you?

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MR WOODS: I haven't had any comment back in relation to that so I assume there's no objection, but perhaps we're doing the Saturday rates and going to evidence before submissions.

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SENIOR DEPUTY PRESIDENT HAMBERGER: It's actually your affidavit?

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MR WOODS: Yes, it's actually my affidavit.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Are you going to cross-examine?

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MR RIZZO: No, your Honour.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Okay, well I think we'll just accept that when we get to it. So Mr Rizzo?

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MR RIZZO: Yes, thank you, your Honour. Your Honour, given that the Bench has already read the submissions, et cetera, I'll try to be as succinct as possible. The issue is fairly straightforward. It's about the issue of payment of overtime on Saturday concerning clause 23.2 of the Rail Industry Award. The current clause, your Honour, we say is an anomaly, or an abnormal clause in the sense that it does not compensate for people who work on Saturdays. In fact, it's the reverse, that if you work between Monday and Friday you get a higher overtime rate, but if you work on Saturday you get a lower overtime rate. We see this as, as I say, an aberration, an abnormality. The Bench is well-aware that if one works on Saturday or on Sunday or public holidays and the like that one is always compensated at a greater rate as opposed to any compensation regarding overtime from Monday to Friday. So we think, back in 2008, and we appreciate that in 2008/2009 the Commission had to deal with thousands of awards, and while I wasn't personally present at that time I certainly was aware that there was a whole lot of awards being reduced to the current 122 that we have. We submit to the Bench that this is an opportunity for the Bench to correct this anomaly that arises from the award being made in 2008/2009.

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We, in our submission, your Honour, have pointed out to at least a dozen pre-reform awards where the normal overtime provision provides that either the overtime kicks in after two hours or three hours that it goes to that double-time rate after two or three hours. It does vary between two and three hours, but even in a situation where the overtime doubles after two or three hours, even the norm there is usually after two hours that the overtime rate increases. So we say that the current overtime provision in the Rail Award is anomalous, as opposed to the norm, which the Bench would be well-aware.

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I also point out that in the AMWU submission they point to at least 20 awards and/or agreements where we have what I would call as the normal provision where the overtime rate on Saturday is increased, and we point out to about a dozen in our submission. The employer submission says that we present a lack of evidence in relation to this matter. I beg to disagree on this score. In our submission, as I say, we presented at least a dozen awards that provide for the correct Saturday overtime rate. The metal workers present close to 20 examples of where that's the case. So I don't accept that there hasn't been enough evidence put to the Bench as to what is the normal Saturday overtime rate.

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Also our research, your Honour, on the 122 modern awards informs us that hardly any awards in those 122 modern awards replicate what's in the Rail Award. In fact, we could only find two awards that are the same as the Rail Award, and they are the Port Authorities Award and the Ports, Harbours and Enclosed Water Vessels Award. They are the only two awards which are similar to the Rail Award. The other 120-odd awards have what we would call the normative overtime for Saturday, where it increases as opposed to the Monday to Friday rate.

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The employer submission quite conveniently at paragraph 5.1 and 5.2 says that our reference to the pre-reform awards and the enterprise agreements are irrelevant. To quote from the submission at 5.1, the employer submission says:

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The Commission made its decision with respect to overtime clause with this information before it. In our submission, the pre-reform awards are irrelevant to the current proceedings.

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Further it says in 5.2:

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In response to the AMWU's submissions at 9, the manner in which overtime is provided for in the various enterprise agreements of the rail industry is irrelevant to the formulation of the award.

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And then at the last sentence it says that somehow this is irrelevant. We reject the notion that somehow the pre-reform awards, the normal awards and agreements that apply in the rail industry can be conveniently dismissed as irrelevant when in fact they are completely in contradiction to the type of provision that we see in the current Rail Award at 23.2. So I think it's convenient and somewhat cynical to dismiss that weight of evidence which suggests that, as I said at the outset, your Honour, that the current provision of the Rail Award is an anomaly and is abnormal.

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DEPUTY PRESIDENT SAMS: Apart from being the modern award, the Rail Industry Award, isn't it correct that most of the industry is covered by enterprise agreements?

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MR RIZZO: Yes.

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DEPUTY PRESIDENT SAMS: In fact probably all of it.

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MR RIZZO: It is correct, yes, and those enterprise agreements would have what we could the normative clause, your Honour, where Saturday overtime rates are of course at a much higher rate than the Monday to Friday rate, as opposed to the Rail Award which is the reverse. That's why we say it's anomalous. But you're right, I mean, 99 per cent of the industry is probably covered by enterprise agreements.

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SENIOR DEPUTY PRESIDENT HAMBERGER: I mean, the main argument the employer's put is that well but all this was considered when the modern award was created, and they pointed to - well I don't there's a written decision that specifically addresses this issue.

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MR RIZZO: No.

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SENIOR DEPUTY PRESIDENT HAMBERGER: When you look at the history of the drafting of the exposure draft and then the production of the modern award, what they say is this was an issue that was considered and now it's not appropriate to go back as part of the 4-yearly review, and nothing's changed: the circumstances haven't changed, you haven't suggested that anything's happened in the last four years, and it was a matter that was dealt with; your position wasn't accepted, the employer's position was; why should we change that now.

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MR RIZZO: Yes, it's a fair point, your Honour. I make two responses to that: one, when the exposure draft was released back in 2008 - and you'll see this at paragraph 4 of our submission - it did talk about - (i) said:

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50 per cent of ordinary base rate for the pay for first three hours, and 100 per cent of ordinary base rate thereafter for overtime worked Monday until noon Saturday.

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And then at (ii) it says:

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100 per cent of ordinary hourly base rate for overtime worked after noon on Saturday and any time on Sunday.

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And then:

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150 per cent on the public holiday.

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So when the exposure draft was actually first released it was more akin to the normality that there's a penalty for Saturday. Mr Woods, in his submission on behalf of the employers, tries to score some points in that the unions didn't explicitly make submissions about overtime in the transcript from 2008. That may be true, and while I wasn't personally present there I think the union position was that we were fairly satisfied with what had been in the exposure draft, which was more akin to the norm. But it is true, as your Honour says, that the end results was something that we see as abnormal. The decision of the Bench at the end of the day was completely removed from what happened from the initial exposure draft.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Sure, but the employer's made submissions about that, and as I understand it what we've now got in the modern award reflects what the employer's put at that time.

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MR RIZZO: Yes, I agree with that, your Honour.

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SENIOR DEPUTY PRESIDENT HAMBERGER: And the inference would be, and the argument is, well the Commission considered the employer's submissions and that's what the Commission at the time decided.

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MR RIZZO: Yes, I understand that. The second part of your question was had anything changed since that, and things have changed since that.

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SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

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MR RIZZO: There was a 2013 amendment, your Honour would know.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Right.

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MR RIZZO: Which referred to: the Commission must take into account correct compensation for people who work, you know, extraordinary hours - weekends and public holidays and the like. That was the amendment to the modern objective at section 134DA. Ms Young, in fact, at the Metal Workers makes this point quite strongly in her submissions. So things have changed since 2008, so our response is twofold; one, we think in 2008, in the hurly-burly of reducing 4000 awards down to 122 awards, there were mistakes made. I think we can all attest to that. I think no one on the Bench and no one addressing the Bench would say that people did not mistakes. And we didn't do a thorough job. That's why we had the 2012 review. That's why we're having the 2014 review, your Honour. The whole point of these reviews surely is to go back, visit the hurly-burly of 2008/2009 when we had to do a massive job and there were submissions flying hither and thither, and now in the cold light of day we'll look at those things more closely.

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What we say to the Bench, and the Bench knows this from their own varied experience, is that this clause in the Rail Award isn't normal. It's really weird, that somehow on Saturday you will penalise as opposed to Monday to Friday. This goes against the norm, what happens in enterprise agreements, and what happens in about 119 or 120 of the modern awards.

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DEPUTY PRESIDENT SAMS: It's not quite you get penalised. You just don't get the same penalty that you otherwise would get if you apply your proposition.

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MR RIZZO: Okay, your Honour. Well, you're penalised in the sense that you work what are considered unsociable or extraordinary hours.

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DEPUTY PRESIDENT SAMS: Well, it's 50 per cent, isn't it?

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MR RIZZO: Yes, it's 50 per cent, but it doesn't go to the double rate after two or three hours.

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DEPUTY PRESIDENT SAMS: Yes, I understand that.

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MR RIZZO: Again in the employer submissions, Mr Woods on behalf of the employer seems to suggest that the transcript tells us that somehow the unions agreed with the employers, or were not explicit about their objection or implicitly agreed with the employer position. I put it to the Bench - and again I emphasise I was not present and I know Mr Woods was and he signed a stat dec to that effect, so I understand that - but the Bench would know that it would be very difficult for a bunch of unions like the ASU, the Metal Workers, the RTBU, the AWU and others to agree to an overtime provision on Saturday which does not compensate people. I find that incredibly difficult to accept, that somehow four unions sat at the Bench and sat in negotiations and accepted a lesser provision for Saturday, which would go against all the weight of evidence and all the things that unions usually try and rally for when negotiating awards or agreements, and I think the transcript doesn't illuminate - doesn't help us much at all in terms of the intention of the parties at that particular time.

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Your Honour, the employer submission then says that somehow the award objective was met at the time and it meets the award objective now, and in response to that, as I've already outlined, we would say that things changed with the 2013 amendment, and the Bench does have to take consideration compensating people who work extraordinary hours.

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Our submissions are fairly simple, your Honour. We say the current provision 23.2 is anomalous. We say it is completely against the grain compared to the other modern awards, or other awards and agreements in this industry, let alone other industries. We say that the exposure draft in 2008 actually was more akin to what we're putting where Saturday was compensated at a higher rate. We do accept that the end result was not like to the initial exposure draft, but certainly was the intention of the Commission at that time to have a more normative overtime provision, and therefore it's an opportunity for this Bench to revisit this in light of what happens normally within this industry and with other industries, what happens normally with awards and agreements in this industry, and what happens normally within the other modern awards that the Commission has made in the modern era, particularly in relation to the overtime clause. And our submission would be to the Bench that we would submit to the Commission that they adopt our variation so that Saturday is compensated at the correct rate. This would bring the Rail Award in line with other modern awards and would do justice to those members of ours who work in this industry who are not being paid

at the correct overtime rate when they work on Saturday. If the Commission pleases.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much. Mr Diamond, did you want to add anything?

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MR DIAMOND: We support the ASU's position.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Nguyen, do you have anything to add?

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MR NGUYEN: Your Honours, Deputy President, Commissioner, I just have a few things to add. I support the submissions of the ASU. In relation to your question, I think I'll just answer that question about whether or not this issue was considered in the Part 10A process. As someone that was involved in the Part 10A process I can comment on the fact that it is very well-known that that was a very voluminous process in terms of the material that churned through, and it was impossible for both the AIRC and also for parties to go through every single piece of material that went through those proceedings. In general terms, the process of the Part 10A award modernisation wasn't about gaining new entitlements on the part of employers or employees. It was about finding the balance of entitlements where they existed in the safety net across the pre-reform awards and the NAPSAs, and in some circumstances enterprise awards, if those enterprises were significantly large enough to be a significant part of the industry.

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So we can see if we look at the Part 10A process from that perspective, and the history, which is sort of traversed in the submissions, it's obvious that the Commission didn't consider adequately the change which was finally made to the award that was made to the Rail Industry Award that was finally made. Between the exposure draft and the award that was made there wasn't adequate consideration of why that change should be made, and no reasons were given about why that change was made.

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The only thing I would like to add in terms of a precedent is there has been consideration in this 4 yearly review about how to decide what a modern award entitlement should be where the issue wasn't properly canvassed in the Part 10A award modernisation process. In AM2014/190, in the transitional provisions common matter, the Full Bench when looking at the accident make-up pay provisions re-adopted the process which was to be conducted in the Part 10A process in determining whether or not accident make-up pay should be included in various awards across the modern award system, and that process was to look at, okay, let's do the process again, what is the safety net that existed at the time of the Part 10A process, and looking at all of the awards that were supposed to be considered in that process - pre-reform awards, NAPSAs, enterprise awards, et cetera. In that decision, which is: *4 Yearly Review of Modern Awards* -

Transitional Provisions [2015] FWCFB 3523, the Full Bench decided that the awards where the status of the award safety net included an accident make-up pay entitlement for all employees or a significant proportion employees, then the entitlement would be included in the modern award, and we submit respectfully that that should be the test that's adopted in these proceedings. Thank you.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks. Mr Woods.

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MR WOODS: Yes, your Honours and Commissioner, as the question from the Bench elucidated, our primary submission is that the hurdle that was established in the original decision in respect of these matters in *4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues* [2014] FWCFB 1788 about the approach in the modern award review process, and the hurdles that are set out at paragraph 60 and enumerated, which we've referred to in our submission, just haven't been met. I've drawn an assumption that the Bench, because of this process, a 4-year review that's gone on for such a long time, that you're well-aware of that, and the comments that have fallen from the Bench reflect that. But it's really set out at items 3 and 7 in paragraph 60 of that decision that are relevant. I can remind the Commission of it, or I can leave you to take another time, if you like. I think you're well-aware?

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SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

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MR WOODS: Yes, that's fine. It takes a lot to change what is in an award based upon the principles the Full Bench is approaching in this review. The comments that Mr Nguyen raises, I haven't gone back to re-look at that decision recently but my recollection is that it was a finding that the issue was just not addressed, and here our position is that this issue was addressed. It clearly was addressed because of the changes between the exposure draft in the final, the submissions that were put forward; so clearly it's not a matter that wasn't there. The question of what should be the overtime clause and what should be the rate of pay for work on Saturdays was clearly before the Commission. So I suggest that the submissions to say that it was overlooked is somewhat embarrassing, because the Commission clearly addressed all of that and the issues in terms of the submissions during the oral hearing in respect of it, and the exposure draft and the decision demonstrate that these issues were looked at.

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It's true that the particular clause as presented in the final award was not addressed in the final decision; that's true, but if you look at that decision, which is [2008] AIRCFB 1000, then when it comes to deal with the issue of the Rail Award, the questions of hours of work are dealt with from paragraph 259, and the question of the overtime and penalty rates are dealt with at paragraph 268. So while I acknowledge that the reasons to why the final proposal for this clause was adopted are not addressed, but it's clearly part of what's been looked at, so we don't get to a situation where it would be a matter of going back and looking at things again.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Right, but be that as it may, you say that the way the clause operates properly addresses the nature of work in the rail industry as a 24/7 business and the way in which work is actually performed. Can you elaborate on that? I mean, you presumably would accept that it is true that it's a relatively unusual clause. Precisely how unusual I could argue about, but it's certainly not, if you like, the norm, this type of clause in this context, so what would be the justification for having a clause like this?

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MR WOODS: Can I take part of the justification to delve back in a little bit of the history as well?

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SENIOR DEPUTY PRESIDENT HAMBERGER: Mm-hm.

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MR WOODS: And it's really to make one point in terms of how Saturdays have been dealt with. I've extracted from the Commission's website the research document that was usefully prepared and helped guide everybody back in 2008 in respect of it, and while it's small print there's a very simple point that I wish to draw to your attention. So this is the part that deals with the overtime rates clause, and the first page has overtime rates and it details what all the various differences were in a concise form, and then on the second page it deals with Saturday work, and it identifies what has been identified for payments for Saturday work. So when we look at what's happening in the industry, as anybody using public transport - heavy rail public transport - it's known that it works 24/7, apart from sometimes a few hours of shutdown in the middle of the early hours of the day, but it's a 24/7 operation, and when you look at the Rail Award, when you look at the ordinary hours clause, it acknowledges that ordinary hours can be any day of the week. So it picks up this difference between what's ordinary hours and how it's rostered, and then deals with matters as to how things are addressed.

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What I raise in respect of the Saturday work clause is that you will see that for the first award, which is the Locomotive Operations Award, there's no mention about what's to happen on Saturday pay. There is in respect of the next award, that is, the Victorian Award, it's only about excess shifts and how it's dealt with. If you look at the next award again, there's silence in respect of what's happened. You then get a call out provision in the next award, and that's addressed in the modern award. You then get a time-and-a-half rate for the Railway Metal Trades Award. The next provision again in the Railway Miscellaneous Award talks about time-and-a-half, and then it throws in a maximum of double ordinary rate which, looking at it, really I expect a combination with the overtime provisions. But you then get others, perhaps like the Salaried Employees (Victoria) Award, two across, which has got double time for Saturdays. White Collar Salaried Staff, probably generally unlikely to be working on Saturdays. They are a Monday to Friday - - -

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COMMISSIONER CAMBRIDGE: This is the blending of the different areas of the operation?

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MR WOODS: You've got it, Commissioner. In terms of that task and what's to happen, and we'll just also provide a copy of the original direction from the minister and the variation - again of course it's on the website - but it picks up in terms of the section 134 issue, which I'll come to. But in terms of what's required, when you remember back in the direction, if you just go to the first page of the objects, you get in (1)(b) that issue of providing a minimum safety net, so there's an obligation to try to do that. It then became an enormous balancing exercise. You then get in item 2 what's not intended to do, and from my side of the negotiating and advocacy table you'll see in (2)(d) not to increase costs for employers. The Full Bench in its 2014 decision recognised that the process meant that you were pulling a lot of things together and you were coming to it, and the Benches in their decisions back in 2008 through to 2010 dealt with that, and what we see in effect in the final outcome of the clause that we've got is, well, we've introduced a Saturday rate of pay for all classifications that is time-and-a-half. Some classifications in some awards that pre-existed didn't have it. So you've got an upside and you've got a balancing side.

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We don't pick up effectively after the 11 hours going to double time in terms of overtime, because if you took away the clause as written, it assumes an eight-hour shift, then time-and-a-half for three, and then double, and that - you can see back in some of the old awards, you see references back to 11 hours turning to double time. Some of them have double time as a flat item. But you've got that melting pot and that mixing, and that was the task that was required; that was the task that was addressed, and it was a complex, difficult process for the AIRC back in those days, as many of the questions that have come before the Fair Work Commission in this review and the last review in terms of complex questions. But that ultimately is why when the 2014 decision by the Commission realised - and I'll just take you to paragraph 60(7) where in talking about all of these principles it comes down to say:

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The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objectives may result in different outcomes between different modern awards.

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So that's what we've got, and that's where we landed with the Rail Industry Award when made. That's where we are still. And to come back then to the question from your Honour: what is it about the rail industry; it is a 24/7 for the benefit of commuters. It's predominantly a Monday to Friday job for the white collar, clerical, admin professional, though some do work on weekends - there's no question about that - and it is - - -

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DEPUTY PRESIDENT SAMS: Just stopping you there, their ordinary hours are set out at 20.4, which are between 6 and 6.30 pm.

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MR WOODS: Yes, that was addressed for them.

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DEPUTY PRESIDENT SAMS: Right, so if they worked on Saturday they'd get the 50 per cent for all hours worked, is that right?

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MR WOODS: Yes, they will, because it says all hours worked on a Saturday gets 150 per cent.

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DEPUTY PRESIDENT SAMS: All right.

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MR WOODS: That's trying to address the nature of the industry and trying to come up with an outcome that if we were in any way revisiting what happened in 2008, I say it's been addressed; it's been thought about - there's been a balancing exercise, and the Commission did its job, and simply saying now it's not the outcome we would have liked or what we argued for is not a reason to say that it's time to play with it and put it back to what we wanted, or what we would have wanted if we'd said more. That's just not an argument that justifies this Bench interfering with what has otherwise been a stable award for the now six years - over six years in terms of this has been applied.

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SENIOR DEPUTY PRESIDENT HAMBERGER: I presume nobody actually works under the award?

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MR WOODS: Yes, so that question has arisen in other proceedings, and there are some. I'll say the name Aurizon. I'm ignoring the Queensland historical issues, but there are particularly some parts of that business, in WA in particular, that deals with that.

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SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

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MR WOODS: There are other employers in WA, so there are pockets. But in terms of the proportion, I haven't got a number, but by and large employers and employees are bound by enterprise agreements in this industry, and that was specifically addressed during the course of the hearings - I haven't got it; I think it's in the transcript - that that question: isn't that the case; and the answer was yes. And part of the process, Harrison SDP was allocated the role of guiding the Rail Industry Award, and there is a comment that the awards had not been touched for a long time because people had enterprise agreements and it had become largely functionally irrelevant. But the fact that it's functionally irrelevant doesn't

raise enterprise agreements to an issue for the award. That's contrary to the modern award direction at the time. It's contrary to section 134 now, yet it's about the minimum conditions. What do enterprise agreements represent? They represent negotiated agreements between employers and employees that through various guises of test have to be better than what is in the award. So as a matter of what they are and how they're constructed, you can't go to say well that's what's happening elsewhere in an enterprise agreement so that's what should be in a modern award. They're totally different documents, serving totally different purposes.

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DEPUTY PRESIDENT SAMS: Well there is a link, of course, because if you're assessing the BOOT and you have the Rail Industry Award, then a benefit will be to have the standard provision.

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MR WOODS: Yes, you get that, and you've also got the tests in terms of what's better off overall in its various forms over the years in terms of that comparison, so the modern award, even if there are very few employers and employees who work to it, forms a very important minimum entitlements that meets the objectives. There's no question about that.

PN102

Going to that point and the matter that's raised by the AMWU and Mr Nguyen, I go back to the objective at the time, and while we have different words now in section 134 to what we might have had in the words of the direction at the time, in my submission there is not a lot of difference that should be drawn from that. Certainly when you look simply at the objects and look at object (1)(b) in the original minister's direction, it talked about providing a fair minimum safety net of enforceable terms and conditions of employment for employees. No one would say that the minister, Minister Gillard at the time, was not aware of overtime and the industry wasn't aware of overtime and Saturday work as part of fair minimum conditions, so to the fact that section 134(1)(da) of the current Act specifically draws it out doesn't, in my submission, raise anything because no one would say they didn't know about these things back at the time and what they're being addressed.

PN103

At the same time, the other point that I drew attention to in the initial direction in (2)(d) about increasing costs of employers, we find that in section 134(1)(f) in terms of employment costs. So you can go through those provisions and look at the way that they're described, but in my submission there is nothing that's earth-shatteringly new in terms of the way things look at it, in terms of the reviews and the approach in terms of the reviews and identified by the Full Bench. A lot of things will we looked at, but you can't just look at it simply because the outcome wasn't what you liked.

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DEPUTY PRESIDENT SAMS: Well section 134(da) speaks only of providing additional remuneration.

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MR WOODS: Yes.

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DEPUTY PRESIDENT SAMS: And in this case there is.

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MR WOODS: There is, yes. So it doesn't say that it's got to be additional and additional in terms of moving from a plus 50 to a plus 100 per cent. In terms of those points, and as I have identified I've got an affidavit that just deals with that historical context in terms of where the wording that's in the award came from as being a tabled submission at that meeting, but that I think has addressed the issues that I need to draw to the Full Bench's attention.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you very much, Mr Woods. Anything in response?

PN109

MR RIZZO: Yes, your Honour. Thank you. Just a couple of things, your Honour. Minister Gillard at the time, as the Bench will recall, set an impossible task for the IRC, where the catchcry was that no employee should lose a dollar and no employer should pay a dollar more, with all apologies to Ms Gillard, a ridiculous and impossible task when you have to deduce 4000 awards into 120-odd. Obviously there were winners and losers, and obviously, as I said in my introduction, your Honour, there was a mountain of work to do and of course we could not, as participants in the process, be it the Bench or employers or unions, look at every single clause in 4000 awards and get it all right. Therefore the Act provides for reviews. And while I appreciate the 2012 review had some limitations, the 2014 review is a more extensive review; we understand that, so it is an opportunity for the Bench to correct what we say is an anomaly. I don't think Mr Woods denies that it is an anomaly. I don't think he denies that - - -

PN110

SENIOR DEPUTY PRESIDENT HAMBERGER: I think he does. I think he's not suggesting that it's not rational.

PN111

MR RIZZO: No, well anomalous in the sense that it's unusual.

PN112

SENIOR DEPUTY PRESIDENT HAMBERGER: Well it's not the norm, I suppose.

PN113

MR RIZZO: It's not the norm, no. I don't think he would deny that, and the evidence, you know, be it modern awards or enterprise agreements, or other awards relevant to this industry and others, are overwhelming. And then Mr Woods puts up an argument that somehow the rail industry is special because it's a 24/7 industry. As the Bench knows we have many 24/7 industries, and a few that the ASU is intimately involved with, the Electrical Power Industry Award, for

example; obviously a 24/7 industry, 365 days a year. Its overtime provision in clause 26.1 simply says:

PN114

Monday to Saturday day workers and non-continuous shift workers, time-and-a-half for the first two hours and double time thereafter. Monday to Saturday continuous shift workers, double time.

PN115

So it simply says time-and-a-half for the first two hours and double time thereafter for people working Monday to Saturday in the Electricity Award. In the Water Award, which we're intimately involved with, your Honour, again a 24/7 industry, at 26.2(a) it says:

PN116

(a) Except as otherwise provided, overtime will be paid at the rate of time-and-a-half for the first two hours and double time thereafter.

PN117

(b) Overtime worked on a Saturday will be paid at time-and-a-half for the first two hours and double time thereafter.

PN118

It's very clear that the double time on a Saturday comes after two hours, and the Local Government Industry Award, while I acknowledge is not necessarily a 24/7 industry, although it's almost a 24/7 industry because it provides various services, at least for most parts of the day, at clause 24.2(a):

PN119

(a) Except as otherwise provided, overtime will be paid at the rate of time-and-a-half for the first two hours and double time thereafter.

PN120

(b) Overtime worked on a Sunday will be paid at the rate of double time.

PN121

So again, Saturday, there's that normal provision about the double time kicking in after two hours. I put to the Bench that there's nothing special about the rail industry because the work's 24/7. In fact, it doesn't quite work 24/7, but certainly the electricity industry, the water industry and other industries that do have what we call the normative provision. And I think it's also somewhat disingenuous to just miss the 2013 amendment. I appreciate the comment made by your Honour that you only have to add to the compensation. I understand that that's what it says. But nevertheless, I think the Bench should take into consideration that that 2013 amendment was looking at something very specific about compensating those people who work extraordinary hours or unsociable hours, and I think the way that 23.2 in the Rail Industry Award is expressed at the moment does disadvantage, albeit those few people covered by the award, but it does disadvantage those people, compared to their colleagues who are covered by enterprise agreements or other awards that express the normative overtime rate for Saturday.

PN122

We say that this is an opportunity for this Bench; it has the power in this review to correct an abnormal situation and assist those workers who are not compensated properly and uniformly as compared to other workers in this industry and beyond. If the Commission pleases.

PN123

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much. Mr Nguyen didn't - no, okay. I think that's everything on that, so we might then move on to the next matter, which is the classification - is it grade 9? Okay. I think probably in this case, Mr Woods, probably you go first, I think.

PN124

MR WOODS: Yes. From an evidentiary front, there is a statement that's provided by Greg Cameron from the RTBU.

PN125

SENIOR DEPUTY PRESIDENT HAMBERGER: Is he being cross-examined?

PN126

MR WOODS: No, he's not being cross-examined, but we object to the statement.

PN127

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN128

MR WOODS: The objection to the statement is that it's not evidence; it's just submissions. In terms of that, you just need to read - ultimately it's paragraph 4, and paragraph 4.1 talks about what is an amendment, which is an attempt - have you got that?

PN129

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes - sorry, yes, I've got it.

PN130

MR WOODS: In terms of the substantive issues, you go to paragraph 4, paragraph 4.1, talking about the proposed amendment being an attempt to remove positions from the award. It's not evidence. It's submissions, and it's replicated in paragraph 4 of the RTBU's submissions. Paragraph 5 has the same thing when it talks about deliberate attempts. At 4.2, it's replicated in paragraph 5(a) of the submissions. 4.3, again, talks about limiting scope, and it's a submission; it's replicated in 5(b). 4.4, same issue, replicated in 5(c) of the submissions. 4.5 is replicated in 5(d) of the submissions.

PN131

SENIOR DEPUTY PRESIDENT HAMBERGER: I just wonder whether the way to deal with this is that rather than deciding whether to allow it in or not allow it in, we just treat it as essentially in conjunction with submissions. So in other words, I'm not saying you shouldn't address the issues that are raised, because they're essentially matters that can be raised in submissions, so that would be the easiest way I think to deal with it.

PN132

MR WOODS: Yes, and I accept that, and having drawn the Commission's attention to the 2014 decision and the issues for changing, which are in the same context, the only point is that in terms of evidence to support no change, which is what that is, that if it's treated as part of just the submissions, then I'm content to deal with that as opposed to if there is a technical question of meeting that evidentiary tick it doesn't do so. But I'm content to proceed on that basis, if that's accepted.

PN133

SENIOR DEPUTY PRESIDENT HAMBERGER: Did you want to say anything about that?

PN134

MR DIAMOND: Just very quickly, your Honour. I understand the comparisons that my friend has drawn with the submissions, but the particular comments that have been provided in here by Mr Cameron are comments based entirely on his expertise in regards to his history in the industry and his current role as a relief organiser and go to those. That's really all I have to say in regards to that.

PN135

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. I mean, a lot of it is opinion - I mean, it may or may not be right opinion, but a lot of it is opinion, and some of it's things that, you know, attributing motives to other people without any obvious basis for being able to say that that's correct. I'm not suggesting that we exclude it altogether. What I'm suggesting is we treat it as essentially part of your submissions. That means that really, if you like, we'll have regard to what's said in the statement - in the affidavit - and I would expect Mr Woods has to deal with those issues that are raised. On that basis, I think that's the way we'll deal with it. Mr Woods?

PN136

MR WOODS: Thank you, your Honour. So what is the application that we bring before you seeking to do? We're seeking to add some words to the classification description, and I accept that we don't have an affidavit dealing with the classifications and how they work, and the issue that we seek to address is to actually try to provide in the items that we've identified some guidance for parties to understand what the level 9 position is. In that context there have been very few challenges that draw up the question of what does level 9 mean in its two sentences. I've identified the decision of *Oliver v Queensland Rail Limited* [2013] FWC 2583. In that decision, Simpson C was looking at the question of whether or not a particular employee was covered by the award, and the Commissioner took the purposive approach, went through it, looked at the role and decided, as set out in his conclusions in paragraph 43 through to 49, that the particular person was beyond the scope of the award because of the roles and duties. It's clear that when you look at the description in level 9 it doesn't seek to call out achieving the most senior managers, so there is a point at which it stops, and that decision just reflects one case.

PN137

In terms of the proposition for getting guidance, the proposition I put is two sentences are very hard to try to decide what it means.

PN138

SENIOR DEPUTY PRESIDENT HAMBERGER: In terms of a - I mean, I don't know if they're all very similar - but in terms of a management structure that you would have amongst the people you're representing, are you able to - I'm not really asking for evidence - but I mean, essentially - I assume these facts are probably relatively straightforward, if you know what they are - what would be the management structure, if you like, the pyramid, and where would you see what you're proposing that grade 9 cut in at? I suppose, in particular, how many levels of management would be above what you see as where the grade 9 should be?

PN139

MR WOODS: There are an enormous number of levels ultimately in the terms of the management structure, and it is difficult, but I'll give it a go, because there are organisations that get a greater pyramid, then organisations that flatten the pyramid, and it's quite a broad industry when you compare people like Aurizon or Sydney Trains.

PN140

SENIOR DEPUTY PRESIDENT HAMBERGER: Do you know Sydney Trains, for example?

PN141

MR WOODS: Yes.

PN142

SENIOR DEPUTY PRESIDENT HAMBERGER: Can you just outline Sydney Trains as an example?

PN143

MR WOODS: Yes. Sydney Trains, you would probably be down about - there's obviously chief executive, there's executive directors, there's directors, there's general managers, there's some principal managers - so you're getting through about that five or so levels, we would say - and some specialist roles - that would be outside the scope of the award and without question because of those things. And when you look at, for example, the way in which Simpson C looked at it in Oliver, you're looking at that person - they had strategic roles, they were responsible for a high level of direction; it wasn't, and I use the word "operational" in the context of delivering the business as opposed to the operations division, which is generally known in Sydney Trains and in other industries as being those who, as reflected in the conversations around driving trains and doing day-to-day operations of the networks, which is what generally falls into the operations classification. So you're getting down that sort of range.

PN144

Then in terms of what we've done in our submission is also to look up, and I accept that there are - apart from I think calling out train drivers and loads for classifications for train drivers in the award - there's generally no other positions

that are called out to try and give guidance to the reader of the award to know where people sit. In our proposition we've tried to give some guidance and tried to draw that distinction.

PN145

DEPUTY PRESIDENT SAMS: How will this interact with enterprise agreements? And I can't recall, but just take Sydney Trains, for example, if you have a more expressly set out provision here at level 9, does level 9 correlate to what level 9 is, if there is under the agreement, and if so, what does it say there, and which then do you apply?

PN146

MR WOODS: In the Sydney Trains [2014] FWCA 6954 agreement, RC is the general classification for clerical and professional employees, and from memory I think there are nine grades within that RC level, and then there's five increments within each of the grades and no guaranteed movement between increments, et cetera, because it can relate to the role that you're at. Otherwise, apart from using an abbreviation and allocating a dollar amount, the enterprise agreement does not otherwise specify things that would fit into each of those nine criteria.

PN147

DEPUTY PRESIDENT SAMS: Based on how much you earn, isn't it?

PN148

MR WOODS: It goes back to the position description, and Sydney Trains nominates on its position descriptions what grade it is, and there was, going back in history, in 2006 a very big process in the day of RailCorp when it arose out of a merger of the State Rail Authority and Rail Infrastructure Corporation, and there was a merging of a whole stack of clerical and other roles. There was a whole process to try to find equivalents to place everybody, and out of that came a number, which is an RC number, for each position description.

PN149

So in terms of where I think your Honour might be going, we would see that these sorts of descriptors that we've got would fit within that process, and if I was wrong, of course the enterprise agreement - you don't have to be covered by the award to have an enterprise agreement. And in terms of in this classification, all those people who have been in an RC classification, I think it would be a task that no one would ever try to take to take out one of those classification levels out of the enterprise agreement, in terms of the process.

PN150

We don't see there's a change in that, but in terms of good management and people who, a) rely upon the award in the small group that do, and otherwise in terms of just providing a better picture in the award, which is why we've put forward the proposition that we have for those criteria, and as I alluded to in opening on this point - -

PN151

SENIOR DEPUTY PRESIDENT HAMBERGER: I wonder if we could just go to - I mean, in the jobs, if you like, that you say would be excluded, I do see there's

some advantage in putting these kinds of indicative provisions in the classification structure. It certainly helps us - usually, not always but usually.

PN152

MR WOODS: Yes.

PN153

SENIOR DEPUTY PRESIDENT HAMBERGER: But what is it that - when you say, “functional responsibility for a regional organisation or functional area e.g. a group of stations, work teams”, and then you’ve got an example, “Payroll Manager”, so a Payroll Manager, capital P, capital M, is that in charge of the whole payroll for the organisation?

PN154

MR WOODS: Yes. Obviously as an example it’s not even going to be binding if a matter came before the Commission with respect to a particular person you looked at and said, you know, that’s - it’s only indicative, and different size organisations, the person who becomes the payroll manager or the general manager of payroll, or the principal manager of payroll could in terms of an organisation that’s extremely large have a very diverse role, as opposed to someone who’s just making sure the payroll goes out each fortnight.

PN155

SENIOR DEPUTY PRESIDENT HAMBERGER: So a depot manager at Sydney Trains, because it seems Sydney Trains - I mean, obviously there are number of employees covered by the award, but that’s the largest, I think, of those ones - one of the largest then - - -

PN156

MR WOODS: It’s certainly one of the largest, because you’ve got Aurizon - sorry, Aurizon’s doing above ground and rolling - - -

PN157

MR DIAMOND: Or just rolling stock?

PN158

MR WOODS: Yes, I think both.

PN159

SENIOR DEPUTY PRESIDENT HAMBERGER: I mean, it’s the one I’m most familiar with, I guess.

PN160

MR WOODS: So, a) it’s large, so in terms of a depot manager - - -

PN161

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so where would a depot manager be, and when you were talking about the senior management structure for Sydney Trains, where would a depot manager fall in that? Because you sort of stopped at some point. You talked about principal manager?

PN162

MR WOODS: Yes.

PN163

SENIOR DEPUTY PRESIDENT HAMBERGER: Are you saying that anything really below principal manager - I don't know if you just stopped - when you stopped at principal manager, are you saying anything below principal manager would be a grade 9 or below?

PN164

MR WOODS: Yes, I'd expect, yes.

PN165

SENIOR DEPUTY PRESIDENT HAMBERGER: So what would a depot manager be at Sydney Trains?

PN166

MR WOODS: Yes, I think that they are at that level of sort of the principal manager-type. One of the things of course, the nature is - the industry's an evolving thing, and I'm continuing a bit of the flavour of evidence from the Bench, which is dealt with on that basis - - -

PN167

SENIOR DEPUTY PRESIDENT HAMBERGER: I well appreciate.

PN168

MR WOODS: Sydney Trains has gone through a reform; it's amalgamated depots, so they've had lots of small depots where there would have been, you know, the work team, a team leader, perhaps a few teams working out of that for different times of day, so there'd be a two or three-level management structure within that, and they've merged to super depots, which obviously draws another layer of management that would sit above that, as opposed to what you might see in a smaller business structure. So that's the context in which we have attempted to identify a way of drawing out of this, and obviously in terms of the examples and exclusions, we're still back to the other four dot points effectively which we've tried to identify.

PN169

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN170

MR WOODS: And in terms of addressing those, you see the first two dot points are the same words as in level 9 currently, so the change is in respect of the next three really. In terms of looking at that, I think it's useful to look back at the classification structures for level 7 and 8, if the Bench has the award there, because if you look at a couple of points about that, the third dot point is: "May contribute to policy development." My friends raised the question of "may" as being something that is designed to exclude people.

PN171

SENIOR DEPUTY PRESIDENT HAMBERGER: Well no, it actually has the opposite effect.

PN172

MR WOODS: Yes.

PN173

SENIOR DEPUTY PRESIDENT HAMBERGER: If they think it through I think they would prefer to say “may”, because otherwise you’d say, well you contribute to policy development - - -

PN174

MR WOODS: If you don’t you’re out.

PN175

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN176

MR WOODS: Where are you? You’re driven down the scale, and that’s my point - someone may or may not in this, because it’s a broad industry, as is the case in many modern awards, and you’re looking at things to try and generate a descriptor. So in respect of the two “mays” that appear there, in choosing that word we’ve chosen it so as to not require it as a compulsory thing but demonstrate that they are leadership roles, and at a level 9 you expect a contribution towards leadership. When you look back at level 8 on this point, then in the third dot point there, there is, “the employee will be liaising with senior managers on complex matters and provide specialised reports on payroll or budgets”, for example, effectively. So again there, in terms of looking at policy things that level does not have a lot of a drive to policy; certainly providing reports could do that. And if we go to level 7, because 8 in effect grows off 7, the second dot point there talks on the policy front about contributing to the determination of objectives. That determination of objectives can be part of policy in a range of different positions. So what we’ve done there, we’ve clearly identified that person is contributing to it, but that inconsistent with the Oliver decision we’re drawing a distinction between the person who’s got responsibility for determining and delivering the policy, because there’s a distinction drawn out because of the word “contribute.” So that’s trying to give a bit more breadth to that issue.

PN177

The third dot point in our proposal is: “May develop training materials and direct training activities.” So where do we find that in levels 8 or 9 to try and see how this sits? In level 8 the first dot point is this type of person may be delivering training to others, so they’re not going to be a compulsory trainer but they’re expected in delivery. There’s a distinction between delivery and developing materials and directing training in particular, so the person who’s got that greater level of control is sitting in a 9, we say. If you look down at level 7 and the third and fourth last dot points: “Able to train and supervise employees in lower levels,” “Able to undertake the delivery of training courses”, so again a distinction that you see at lower than the 8, because you have got an ability to do things but it’s not necessarily part of the role. In terms of picking those two items you see how we’ve looked to try and draw a sequential outcome consistent with the current classifications.

PN178

Then in terms of the third of those new dot points, or the fifth dot point in our amendment: “Involved in short-term planning and make independent operational decisions.” So again, that is an issue which we say there’s clearly a planning and operational decision-making process; you look down to the others, and yes, 7s and 8s you would expect to have some decision-making. In the level 7 second-last dot point: “Often exercise initiative, discretion, judgment in the performance of their duties.” You know, they’ve got a responsibility for doing that, and they’re already identified as responsible for supervising others or supervising others who supervise others; that’s identified. While that point is not specifically called out in the dot points for level 8, it sort of flows out of - well I’d say out of - that when you’re trying to look at that distinction. The idea of short-term planning and independent operational decisions is more the, okay I’ve got to deal with this, I might have to plan some works that have got to be done, taking the depot manager - you know, the person’s told here’s our scope of works for the next three months, organise something, give that job to a level 9 to do and do things, because someone from further up the tree has decided that’s what the scope of works is going to be, that’s what they’ve got a budget for, that’s what they’ll liaise in terms of possession of track, for example.

PN179

SENIOR DEPUTY PRESIDENT HAMBERGER: Who does a station manager report to, as a matter of - again, not asking you to give evidence, but just as a matter of fact?

PN180

MR WOODS: As a matter of fact there’s, again, across the industry, there’s a breadth of station managers, but I think it’s reasonably common that there has been a sort of a cluster approach, that every station historically used to have a station manager and a deputy manager and clerical, if you went to any sort of small-scale suburban station. A change that occurred was effectively to merge that station manager/deputy manager so there’s one on-the-ground manager at a suburban station in the Sydney Trains network, for example, and there are managers who are above the level 9 who are a cluster person, so they’ll have a number of stations.

PN181

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, and so you’re saying those people would not be covered by the enterprise agreement for Sydney Trains?

PN182

MR WOODS: No, Sydney Trains are not covered by the enterprise agreement and they’re not covered by the award.

PN183

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, and so this implies that while a suburban station manager would be a level 9, I guess a station manager for let’s say Central or Town Hall or something would be above that?

PN184

MR WOODS: Would be above that.

PN185

SENIOR DEPUTY PRESIDENT HAMBERGER: And again, is that similar to what actually happens in practise at the - - -

PN186

MR WOODS: Yes, that's my understanding.

PN187

SENIOR DEPUTY PRESIDENT HAMBERGER: They wouldn't be covered by the agreement?

PN188

MR WOODS: Yes, the enterprise agreement.

PN189

SENIOR DEPUTY PRESIDENT HAMBERGER: The enterprise agreement, yes.

PN190

MR WOODS: There's a much higher level that's got that responsibility for that. I think that historically there might have been station managers at the City Circle network who were award-covered; I'm not certain about that, but as of now, my understanding is they're not covered by the award, or we would say not covered by the award and not covered by the enterprise agreement. And then you get - in the response my friends say, well, how do you distinguish between a regional station manager and a city station manager. Well, without going into position description detail about it, if you've got a responsibility for, you know, Bathurst to Broken Hill, there's a big difference in running those stations which don't have a lot of passenger traffic as we know but it's a distance, there's a whole range of things that have complexities in dealing with that, and that's different to if you were running Newtown Station, for example, and that was the only station you ran. And for example, in the Sydney Trains example, I think that there is one of those out-of-scope managers who is the person who's responsible for the cluster from Strathfield to Redfern inclusive, because someone else takes Central.

PN191

I acknowledge that in the employer's putting this forward it's not perfect and I think that anybody trying to draft classifications across a broad industry is going to have difficulty in doing so. The intent behind it, contrary to the submissions and Mr Gregory's thoughts, of trying to wipe people out - - -

PN192

COMMISSIONER CAMBRIDGE: Mr Cameron.

PN193

MR WOODS: Sorry, Mr Cameron's thoughts, yes - Gregory Cameron. It's about trying to provide some clarity about what to look at when deciding where a person sits in the award structure, and obviously if someone came before the Commission not covered by an enterprise agreement but wanted to say they're in the award to give some assistance in trying to say whether or not they're covered by an award in an unfair dismissal consideration.

PN194

SENIOR DEPUTY PRESIDENT HAMBERGER: Just looking at some of the specific points that Mr Cameron makes when he says that the reference to short-term planning and refers to long-term decision-makers are not inclusive level 9, and that excludes what he described as second-level managers, e.g. shift managers, what do you - I'm not quite - - -

PN195

MR WOODS: I'm not quite certain what he's identifying in terms of that shift manager, but if we had a maintenance depot and so the person's above the maintenance grades, which are in the award, so they're managing that depot, that depot could have shifts, because there's some maintenance that can be done in daylight hours and a lot of maintenance that is done obviously at night hours, so you might have in that sort of situation a shift manager. I wouldn't have thought that that person who's just managing that is not the depot manager, because they're just running that team and shift, so I'm not quite sure what is identified as second-level managers, but if he is looking at walking up the tier then we can see already in the existing classifications levels of supervision, so if he's saying second-level supervision, so you're going from a worker with no supervision responsibilities to one immediately above and one immediately above that, then you see in level 7, for example, in the second dot point, a reference to those people being accountable for their own work and you work under their control and supervision. So there's clearly a supervision level in terms of that person.

PN196

In level 8 it's not specifically called out in terms of direct employee supervision, but you see in level 9 it is persons who are supervising others who are supervising. I don't see that that proposition, whatever the ultimate descriptor is, actually takes the issue anywhere because I could see that person describing themselves as fitting within the existing classification structure without any additional words.

PN197

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, second-level managers, I suppose, are - if you call them that - are encompassed by your definition of level 9 as they already are, which is guidance and direction to staff, supervising others, so you already could be managing somebody who's managing somebody else.

PN198

MR WOODS: Yes.

PN199

SENIOR DEPUTY PRESIDENT HAMBERGER: That's not excluded.

PN200

MR WOODS: And there might be another manager managing, in going down that tree.

PN201

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN202

MR WOODS: And you'd look at the other aspects to see where that person - so every person that gives guidance to someone else managing somebody would not necessarily be a level 9. They might for other reasons be lower down the tree when you look at the whole scope of their role.

PN203

There is a submission put in terms of the reference to operational decisions in the fifth dot point, and the way I read it, and talking about "operational" is thinking in the rail structure in terms of operations being the operations of rolling stock and those sorts of roles, because the concern that it eliminates support and specialist functions suggests that that's the distinction that's being drawn. If that's the case we see support and specialist functions clearly fitting in with a whole scope of this, but you can even in a specialist function have to make independent, operational decisions and be in level 9. It's just that you're doing it within the concept of a particular specialised function, whether that might be an IT issue or it might be a HR issue, for example. So there's a range of different things that could fall within that position. Then he draws out the question of the examples, and I think in a general way I've addressed that in the way that it's put.

PN204

DEPUTY PRESIDENT SAMS: Do you know historically, Mr Woods, where this generic level 9 descriptor came from?

PN205

MR WOODS: Yes, I do - Harrison SDP. In the process we had eight levels, and the ASU had eight levels, in looking at the award, and I think that there is a reference in the decision that supports the exposure draft, or it's in the coverage in classifications - yes, so in the 2008 decision, the classifications are dealt with at paragraphs 274 and on, and 275 deals with the cap issues in particular and there's discussion about that. And you go to 277, when we started the process we came up with five levels. That grew in the process, and then the Senior Deputy President said we weren't going to have a dollar value exclusion and makes the statement:

PN206

We've not included a clause that employees over a level 9 rate will not be award-covered. Such provision should be in the exclusion clause and opportunity given to all interested parties to address it. We note in this respect that Rail Awards have traditionally covered senior officers and we assume many of these could be considered to be senior managers.

PN207

So there are some issues that were addressed in terms of that, but in the negotiation process the choice of the words and the suggestion that we move from eight to nine came from her Honour.

PN208

DEPUTY PRESIDENT SAMS: The earlier higher levels that speak of qualifications, tertiary qualifications, is there any reason why you don't refer to that in level 9?

PN209

MR WOODS: Well the - - -

PN210

DEPUTY PRESIDENT SAMS: It's a given, is it?

PN211

MR WOODS: It's a given really, in terms of driving up, so again, not to be prescriptive about long-term industry specialists, you see in level 8, the last dot point talks about post-tertiary qualifications or experience or equivalent to sort of pick that up, and when you look at this I see that as being built up, so you'd expect the person to have that as really a given, because you're not going to get to that far up unless you've been around. I'm sure that I couldn't go in and run a depot or other things without the relevant experience or the right qualifications.

PN212

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you.

PN213

MR WOODS: Yes, thanks.

PN214

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, Mr Diamond?

PN215

MR DIAMOND: Thanks, your Honours. First of all, I'd like to say we find this an unusual sort of request to amend this particular level in the award. My understanding from my friend's comments is that this is obviously to draw some sort of or find some clarification for this particular level 9. There are a few things I'd like to point out before I go further into our submissions, the first being that these classifications are drafted - and I will read out the first sentence of the preamble to the classifications which specifically says that:

PN216

Employees at each level may be required to have the competencies for the level or levels below their level.

PN217

There seems to be some assumption with the new wording that all the requirements of a level 8 will then be imposed on a level 9 and then some additional things there. Well, the preamble already provides for that. I acknowledge the word "may" is used, but that is already there. In regards to these particular suggested changes, the first two dot points are basically just a formatting change on the existing level 9 classification, so it's pretty much everything from the first two "may" dot points down that we see as a change and they were objecting to. My very first question is what's changed in the time period. Since award modernisation, and my friend has mentioned that he's not himself aware of a sizeable amount of disputes, as a matter of fact, and I may be leading evidence from the Bench here, I'm not aware of any disputes on this particular issue.

PN218

SENIOR DEPUTY PRESIDENT HAMBERGER: It's all right, we've been doing that for the last hour.

PN219

MR DIAMOND: In today's spirit or flavour. So where has this become a problem? Why over the period since award modernisation do we now feel the need to make this change, a change which I think, as evidenced in my friend's response about the hierarchy, which I will do no better job in clarifying but I will try and add some dot points to it - which positions are affected or in fact sit within that level 9 classification? We've talked about - my friend touched it being from a CEO level down to about five levels down or so - that kind of makes sense to me as well. Each organisation is different, so we're talking about maybe calling it a mid-level in the organisations, depending on which organisation you're looking at, but that doesn't actually clarify where these exclusions that have been put in here or where these examples that have been put in here, or rather what position this level in particular applies to.

PN220

The one example that has been provided in Mr Cameron's statement is of a shift manager. I will give you one example that I am aware of where a shift manager - and I'm relying on Mr Cameron's statement that a shift manager sits within a level 9 - but in an organisation like the Rail Commissioner in South Australia - the only reason is it's a recent matter I've had - you've got your PSAs, which is sort of a customer service function where they deal with people on the platforms; the next level up is - I think you'll have to excuse me on the title, but it's a form of a coordinator that is kind of like a team leader, gives them day-to-day directions, but that person reports to a shift manager. That shift manager manages people who manage others, so that is a third level up in this particular example.

PN221

That type of person, on my understanding and relying on Mr Cameron's commentary, is involved in long-term planning as well. When we say long-term planning they have a coordinator that sits underneath them that will run day-to-day operations, make short-term decisions; then the level up, being that shift manager, will make decisions, could be on a day-to-day basis, could be on a week-to-week basis, but looking forward as well. We're saying that in regards to the short-term planning commentary, that involving in short-term planning commentary, that this indicates that potentially long-term planning isn't part of a level 9 function. We have concerns that that's actually where it may head.

PN222

We understand that the rail employees are trying to build up on the previous classification levels from 1 to 8, and we're saying well look, it's not required to go any further than it does already. It does draw on those 1 to 8 classifications. The level 9 adds to it that it is a specialist function. Being a specialist may involve, without meaning to put the words there, contributing to policy development, which is actually in the previous classifications - the lower classifications. The development of training materials and the directing of training activities we acknowledge is a step up as far as the requirement to develop or direct, rather than just be involved in, in the earlier classification. But

we're saying once again, that isn't required. To be a specialist and do those things is something that isn't necessarily as spelt out.

PN223

The larger concern then comes with these examples, all these exclusions. The fact is I'm not in a position today to be able to say which positions by providing these examples will be necessarily included or excluded. From my understanding of my friend's submissions, I can't see that he's adequately pointed out which positions may or may not be included as a result of these sort of examples, so it causes us grave concern that in the end it may exclude a position that it's not intended to. If it pleases the Commission.

PN224

SENIOR DEPUTY PRESIDENT HAMBERGER: Anything, Mr Rizzo?

PN225

MR RIZZO: Your Honour, very quickly, one, I rose to support the submissions of the RTBU, and then just make one observation, your Honour. We find ourselves in a curious position now where Mr Woods is advocating for a change to the award, and we - - -

PN226

SENIOR DEPUTY PRESIDENT HAMBERGER: So were you.

PN227

MR RIZZO: And we say - now I'll take Mr Woods' role and say well, it was all dealt with in 2008 and the Commission - - -

PN228

SENIOR DEPUTY PRESIDENT HAMBERGER: Shall we split the difference?

PN229

MR RIZZO: - - - and the Commission did a brilliant job in 2008 and why should we revisit it. So the mantra, I put to the Bench, is a bit absurd, because therefore why are we here in 2014 if it was all, you know, biblical in 2008. That's my observation. So just like Mr Woods would like to change the award, we would like to change the award, and I leave the Bench with that thought.

PN230

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks. Did you want to say anything in reply?

PN231

MR WOODS: No.

PN232

SENIOR DEPUTY PRESIDENT HAMBERGER: Any questions?

PN233

DEPUTY PRESIDENT SAMS: Just reserve.

PN234

SENIOR DEPUTY PRESIDENT HAMBERGER: We will reserve our decision.

ADJOURNED INDEFINITELY

[11.30 AM]