TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT HAMILTON
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER GREGORY
COMMISSIONER HARPER-GREENWELL

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2016/23)

Sydney

10.02 AM, FRIDAY, 17 NOVEMBER 2017

PN1

VICE PRESIDENT HATCHER: All right, can I take the appearances, please. Mr Crawford, you appear for the AWU?

PN2

MR CRAWFORD: Yes, seeking permission, I guess, your Honour.

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VICE PRESIDENT HATCHER: All right. Mr Maxwell, you appear for the CFMEU?

PN4

MR S MAXWELL: Yes, your Honour.

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VICE PRESIDENT HATCHER: Mr Nguyen, you appear for the AMWU?

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MR M NGUYEN: Yes, your Honour.

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VICE PRESIDENT HATCHER: Mr Schmitke, MBA?

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MR S SCHMITKE: Yes, with Ms Sostarko.

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VICE PRESIDENT HATCHER: Sostarko. Ms Adler for the HIA?

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MS M ADLER: Yes, thank you, your Honour.

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VICE PRESIDENT HATCHER: Mr Angelopoulos for the Civil Construction Federation.

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MR ANGELOPOULOS: Contractors Federation.

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VICE PRESIDENT HATCHER: Contractors Federation, thank you.

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MR T ANGELOPOULOS: Yes, your Honour.

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VICE PRESIDENT HATCHER: And Ms Paul for the AIG Group.

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MS V PAUL: Yes, your Honour.

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VICE PRESIDENT HATCHER: All right. Have the parties got any agreed order of submissions, otherwise, we might just hear employees first, unions second. All right, do you want to start, Mr Schmitke?

PN18

MR SCHMITKE: Thank you very much, your Honour. Master Builders Australia appreciates the opportunity to address the Commission today. With the Commission's permission, it was our intention to make some short remarks that will highlight and contextualise some of the key aspects in our submission of 15 September. And in doing that, we thought there could be some use or utility if we were able to perhaps concurrently address some of the matters raised by the other parties with respect to the same clauses that we'll address in their respective submissions.

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VICE PRESIDENT HATCHER: Yes.

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MR SCHMITKE: Thank you. Can I just indicate, first off, that Master Builders Australia regards the process that the Commission has adopted here as quite a favourable process. The matters canvassed in the statement of 17 August cover complex items that generated much debate during earlier stages of the proceeding and we believe and those instructing us as well consider the expression in the statement of provisional clauses is quite a useful approach and we would like to place that on the record. I, of course, should also just note the position we advanced earlier in these proceedings more generally regarding the interaction of work health safety and modern award instruments and obviously to the extent necessary our submissions today are made without prejudice to that overall position.

PN21

I will first deal with the tool and employee protection allowance and do so in the order perhaps as per the Commission's statement. Master Builders Australia considers that the provisional clause is expressed and structured in such a way as to better meet the objectives of section 134. Our submissions does raise two concerns about the provisional clause, being firstly that the clause could be read so as to expand eligibility beyond trades people and, secondly, the use of the phrase: "Standard tools of trade." I would understand that these concerns appear to be shared by the other employer parties, albeit their proposed views as to how they could be addressed slightly differ.

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VICE PRESIDENT HATCHER: So on the first concern, what's the language which gives rise to the concern?

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MR SCHMITKE: Sorry?

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VICE PRESIDENT HATCHER: On the first matter, that is potential expansion of coverage, what's the language in the draft clause which gives rise to the concern?

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MR SCHMITKE: It is the use of the word - it's subclause (b): "Where any other tools are required for the performance of work by a trades person covered by paragraph (a) or where in the case of any other employee, any tools are required for the performance of work.

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VICE PRESIDENT HATCHER: So it's the word "employee" rather than "trades person".

PN27

MR SCHMITKE: Yes, yes, yes. And I would indicate that attachment A to our submission, we proposed a redrafted clause which contains some minor alterations to address our concerns and, of course, those alterations are to remove the words "all other employees" to retain the scope as we interpret it currently. And we have replaced the words "standard tools of trade with the phrase not conventionally or commonly associated with. I will indicate to the Commission that the intention of that second change is to inject into the provisional clause a degree or a higher - greater capacity for it to have practical application both now and also into the future whilst retaining it as a core condition.

PN28

Now, we make that observation partly having regard to the list of items in the current clause that details the list of what the tool allowance does not cover which is deleted from the provisional clause. Now, the deletion from the provisional clause is an approach with which we agree and at earlier stages of the proceeding, we have indeed noted the dangers of being too prescriptive in terms of things like tools and practices that naturally evolve and change over time. And I do recall, in fact, that we might have even referenced items in that list now deleted as an example indicating that they were either commonly held and conventionally provided by particular trades or conventionally provided by the employer or in some circumstances were outmoded. So our suggested change is intended perhaps to better accommodate the various approaches that are taken to the provisional of tools.

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DEPUTY PRESIDENT HAMILTON: Do you think there will be disputes about what is conventional?

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MR SCHMITKE: Your Honour, no. The answer is "No". We believe that the industry understands that there are various practices depending on various subsectors.

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DEPUTY PRESIDENT HAMILTON: Thank you.

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MR SCHMITKE: Yes. And, in fact, on that point, it is of course the case that there are - you know, some people are very particular about their tools or the brands. Some people only want to work with their own tools, those that they're familiar with. Others take their tools from job to job. Others use the tools that employers provide, obtain news tools when they start at a new particular site. There's some specialist subsectors, perhaps, where there's an expectation that the trades people will always provide the tools, and in others, there is not an expectation that they will be provided except by the employer. So given that, that change that we have proposed seeks to ensure that the clause can accommodate all the various ways in which the industry actually applies and interprets this provision on the ground.

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Now, in this regard, the change could perhaps also represent an alternative solution to those that have been proposed by some of the other employer parties in their submissions. It might, in fact, be an alternative to a proposition that we need to define what are standard tools of trade and at the same time, it might in fact anticipate the matter that I think the HIA has raised with respect to consultation before the purchase of tools as the words create a common - or a trigger for circumstances that are not conventional and common.

PN34

In other words, people on the ground understand exactly what this means. They understand who provides the tools, the circumstances within which they are provided. The provisional clause obviously goes a long way to improving the operation of that clause, but we think that the wording change proposed would better reflect - - -

PN35

DEPUTY PRESIDENT GOSTENCNIK: Mr Schmitke, can I just ask you this, that you're not proposing an alternation to paragraph (a) of 20.1 which uses the term: "The provision of standard tools of trade." So that's the benchmark for which the allowance is paid. And (b) talks about other tools that are required.

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MR SCHMITKE: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: So if, presumably, standard tools of trade are well understood in the industry, what do the words "not conventionally or commonly associated" mean?

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MR SCHMITKE: Well, these are the additional tools. So when there are other tools required for the performance of work - - -

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DEPUTY PRESIDENT GOSTENCNIK: Which is what currently (b) says.

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MR SCHMITKE: Yes, "Which are not conventionally and commonly provided."

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DEPUTY PRESIDENT GOSTENCNIK: What's wrong with the word "required"? Doesn't that do the same job?

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MR SCHMITKE: Your Honour, no, we would say it might not.

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DEPUTY PRESIDENT GOSTENCNIK: What I mean is, it has to be required.

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MR SCHMITKE: Yes, it does, but our alterations seek to accommodate a situation where it's conventional or common that they're, in fact, provided by the person involved.

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VICE PRESIDENT HATCHER: But the problem is you've introduced a second test. So (a) works on the basis that they're standard tools of trade and you say that's well understood. (b) works on the basis to say, if it's something in addition to the standard tools of trade, then something different applies. But you've introduced a second test.

PN46

MR SCHMITKE: Well, those additional tools are if they're not commonly or conventionally provided.

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VICE PRESIDENT HATCHER: But you've kept (a). So (a) is based on the standard tools of trade. (b) is in addition to standard tools of trade.

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MR SCHMITKE: Yes, that's right.

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DEPUTY PRESIDENT GOSTENCNIK: Are the two the same? "Are conventionally required" the same as "standard tools"? They are, aren't they?

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MR SCHMITKE: "Conventionally required", Yes.

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DEPUTY PRESIDENT GOSTENCNIK: In (a), it says "standard tools".

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MR SCHMITKE: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: And then you have the same test in (b), "conventionally required."

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MR SCHMITKE: And "commonly", yes.

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DEPUTY PRESIDENT GOSTENCNIK: Which is the same thing as "standard", isn't it?

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MR SCHMITKE: Your Honour, I would say that there is, perhaps, a slight distinction, but what I was going to note - - -

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VICE PRESIDENT HATCHER: So what's missing in between? There must be something missing if there's a slight distinction.

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MR SCHMITKE: It's the capacity to recognise and accommodate the situation where it's common or conventional that somebody provides additional tools associated with the particular type of work being performed.

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VICE PRESIDENT HATCHER: So they're not standard, but they provide them anyway.

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MR SCHMITKE: Yes, that's right, or it's commonly or conventionally accepted that they will provide them. So, for example, if it's a particular type of specialist craftsman type work where it's not commonly accepted that the employer might even have access to those tools, there's limited availability. If the employee is providing those additional tools because it's common and conventional that they would have those tools to do that type of work, then it would accommodate that situation. But I do indicate to the Commission that if, as the Commission's questions might suggest, you are not with us on these changes, then the provisional clause as it stands is one that we would certainly not have any opposition subject to that issue of scope being clarified.

PN61

DEPUTY PRESIDENT GOSTENCNIK: In relation to your paragraph (b), is what you're trying to get that where an employer, even though they're not standard tools, if an employer commonly and conventionally provides those tools, they shouldn't be caught. Is that the gist of what you're - - -

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MR SCHMITKE: That is in addition, that's right.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, and wouldn't it better then to, taking your clause, you'd be suggesting that where other tools not commonly or conventionally provided by the employer associated with the performance of work are required, the employer shall provide them? Because that's what you're getting at, really, isn't it?

PN64

MR SCHMITKE: Yes, your Honour. That would be another way of achieving the same outcome.

PN65

DEPUTY PRESIDENT HAMILTON: Do you think it's workable to have two tests which look almost identical and ask the workplace parties in the construction industry who are adept at creating disputes over any point, to apply that sort of two tests in any sort of sensible manner, is that really what you're proposing?

PN66

MR SCHMITKE: Your Honour, what I would say is in relation to the issue of tool allowance, my instructions are that this is not one, it's not a clause that is necessarily the subject to much dispute on a day to day basis for two reasons. The first is that the clauses generally are tied up in some other arrangement, perhaps, under an enterprise agreement where you have a site allowance and so forth. Or to the extent that you don't have an enterprise agreement, it tends to be in smaller business employers and, generally, in industries, perhaps residential housing, for example, where there is an understanding about the way in which tools are provided and who provides them and when they're required, what you're conventionally and commonly expected to have and what you might not have.

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DEPUTY PRESIDENT HAMILTON: I'm not sure there is a difference between the tests or a difference that's readily apparent.

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MR SCHMITKE: And this is why we see this as a suggested improvement to the provisional clause, but in the event that's not viewed that way, then we have no quibbles with it as it stands. In terms of the - if I might just quickly on this point address the union's submission, that of the CFMEU, it's Master Builders' view that we don't think it's appropriate to retain the mess personnel matter in the existing clause 20.1(iv). In fact, I think we recall that in earlier submissions, counsel for the CFMEU submitted that the items in that subclause were not protective equipment and certainly that is a position that we agree with and ought not to be in that particular clause.

PN69

Of course, it will be no surprise that our position with respect to the (indistinct) clause, also dealt with by the CFMEU, remains as per our earlier submissions. The alternative that has been advanced by the CFMEU in their submission of 22 June should be resisted.

PN70

In terms of the safety boots with another matter that the CFMEU raise, I can indicate that the Master Builders supports the Commission's provisional approach. Contrary to the CFMEU submission, we say there is a distinction to be made between general construction and refractory brickwork. And as a result, the wear and tear on the boots provided and used in those particular sectors are different. We don't agree with the contention that this is merely a hangover from the previous NBCIA and we say it is there for a genuine reason to make a

distinction between the different types of work being performed and we would urge the Commission to resist the alteration sought to combine those two distinct allowances or clauses, my apologies. I might turn to the issue of allowances and ---

PN71

VICE PRESIDENT HATCHER: Well, can you just pause there for a second, Mr Schmitke?

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MR SCHMITKE: Yes.

PN73

VICE PRESIDENT HATCHER: Mr Schmitke, contrary to what I indicated before, I think it might be easier for us to follow this if we ask each and every part to address us topic by topic.

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MR SCHMITKE: Yes.

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VICE PRESIDENT HATCHER: So we'll finish with the tool and protection allowances, hear every party, then we'll move onto the industry allowances and other allowances. So, Ms Adler.

PN76

MS ADLER: Thank you, your Honour. Just briefly in opening, we would also thank the Bench for their engagement on these issues and for putting a preliminary view to help start some hopefully constructive dialogue around how to resolve some of these issues for the industry. In relation to the tool and employee protection allowance, we obviously made some written submissions dated 15 September and only have some very brief comments. We're generally supportive of the proposal put by the Bench, but would highlight our concern that we raise in the written submission around the question of reimbursement and requiring some sort of discussion or agreement between the employer and the employee where that option has been selected to prevent any sort of disputation about, you know, the amount that will be reimbursed if that option is selected. And we would also agree with the views put by other employer groups that thee provisional view mainly to a broadening of the application of a clause but note the discussion with Mr Schmitke about replacing the word "employee" with "tradesperson" which may go to solving that issue.

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VICE PRESIDENT HATCHER: Well, 20.1(b), the current provision, where it refers to the additional tools doesn't have any provisions about cost or agreement about cost or anything, does it?

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MS ADLER: No, but our view is that the list specified removes any uncertainty about what items form part of those other tools. If you remove that list, then we wouldn't want to see a situation where an employee would think that they need a

tool, aside from the standard tools of trade, and the employer may not agree, but the employee goes out and purchases the tool and expects a reimbursement.

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VICE PRESIDENT HATCHER: Isn't the real point that it has to be clear that the employer requires its use?

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MS ADLER: Well, yes.

PN81

VICE PRESIDENT HATCHER: I mean, I think we have changed the drafting so that (b) refers to: "Where any other tools are required." I mean, if it says "required by the employer", would that make it clearer?

PN82

MS ADLER: I guess it may go somewhere to that. I guess the concern is still that the employer says, "You need X tool", and the employee goes out and purchases that and there could be a change of different types of that.

PN83

VICE PRESIDENT HATCHER: There's a Rolls Royce version and a cheap version.

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MS ADLER: Well, I'm not commenting on what any particular employer in the industry might prefer, but I just can see some disputes arising over those issues.

PN85

DEPUTY PRESIDENT HAMILTON: Would you put the list in as well? For example, you could just have another clause, which is the existing list, and then refer to that and incorporate it as a general concept?

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MS ADLER: I think we broadly support - - -

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DEPUTY PRESIDENT HAMILTON: I'm just trying to take up your point.

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MS ADLER: - - - a way of solving it. I think, we are broadly supportive of removing the list, I think.

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DEPUTY PRESIDENT HAMILTON: Right.

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MS ADLER: So in lieu of the list, some other mechanism to mitigate any potential disputes.

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DEPUTY PRESIDENT GOSTENCNIK: What if we removed (ii)? That gets over your Rolls Royce problem because, you know, the employer will go to Bunnings instead of Mitre 10.

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MS ADLER: I think our view would be that having the options is a positive - is a flexibility that employers would seek to preserve.

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DEPUTY PRESIDENT HAMILTON: Or you could add to two where there is agreement.

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MS ADLER: Yes.

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DEPUTY PRESIDENT HAMILTON: Add the words, "where there is agreement" to (ii) in each case.

PN96

MS ADLER: Yes, well, it's almost about where there is agreement to the amount that will be reimbursed.

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DEPUTY PRESIDENT HAMILTON: It might be beyond the amounts. It could be the nature of the tools. It could be anything. It can't be specific like that. If you add "where there is agreement" to each of the Roman numerals, that would deal with your issue, wouldn't it? There's not going to be reimbursement unless the employer agrees.

PN98

DEPUTY PRESIDENT GOSTENCNIK: Your concern is that the tool or equipment might cost $500, but it would be a single use and the employee gets the benefit on other projects of that. Is that the issue?

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MS ADLER: I guess that's part of it, but the other part of it again is, I guess, the Rolls Royce issue, for lack of a better word. The employer might - I mean, and again, you know, maybe the employer should be required to specific which tool they want without having - - -

PN100

DEPUTY PRESIDENT GOSTENCNIK: Well, the Rolls Royce issue is resolved if the employer goes out and buys the tool and buys it.

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MS ADLER: Well, it is, it is, which is (i), so - but I - - -

PN102

VICE PRESIDENT HATCHER: And it's the employer's election, so the employer's capacity to provide the tools operates as a discipline upon

reimbursement, that is employees - if it costs too much to reimburse an employee, the employer can just go out and buy them.

PN103

MS ADLER: Well, yes, your Honour.

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DEPUTY PRESIDENT HAMILTON: It says: "The employer shall, in each case, the employer shall."

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MS ADLER: Well, yes, but again, I guess, our concern is that if the employee just goes out and buys the tool, then comes back and says: "Well, you said I can go and get whatever I want."

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DEPUTY PRESIDENT HAMILTON: Again, isn't that met if you add to (ii): "If the employer agrees" or "If there is agreement." Doesn't that do it? It's three simple words - or four.

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MS ADLER: It may well. It may well, your Honour. That's all I have to say unless there's any questions, thank you.

PN108

VICE PRESIDENT HATCHER: All right. Mr Angelopoulos.

PN109

MR ANGELOPOULOS: Thank you for the opportunity. Again, I don't want to labour the issues. We have actually put in our written submissions and the only issue for us was the issue about the abolition of (b) which listed the particular tools and the replacement of a more generic statement. Our view, as we have presented in our submissions, is that (b) lists the categories of tools which do not generally fall under (a) and if there are other categories of tools which may be used and it would be appropriate, then perhaps the award to be expanded to include those tools. Or if there is a dispute on site about that particular thing, it could be dealt under the dispute notification clause because the concern is that you don't want to have a variable list of tools applying to different work sites.

PN110

I understand the comments made by the Bench, in particular, the comments made about if the employer agrees. Now, an agreement could be about the particular tool. The issue will be, as I take what Ms Adler said about the Rolls Royce, it may not necessarily be an agreement about, you know, whether it's Rolls Royce or more basic. But he says: "I need you to use tool X." The employee must still go out and buy, you know, a version which is more high end than the one which can be used. You would then need language to actually, say, have more detailed language about the specific type of tool or the category or the - - -

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DEPUTY PRESIDENT HAMILTON: Then you could say if there is prior agreement before the purchase, if there is prior agreement.

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MR ANGELOPOULOS: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: And the time taken to negotiate this could have been offset by the employer Googling the tool and going out and buying one.

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MR ANGELOPOULOS: Yes, that is if the employer does provide it, yes.

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VICE PRESIDENT HATCHER: And it might be a different situation if an employee already has the tool.

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MR ANGELOPOULOS: Yes.

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VICE PRESIDENT HATCHER: Then it's a question of what's a fair reimbursement for providing that tool on a specific job.

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MR ANGELOPOULOS: A tool when it's already existing, yes.

PN119

VICE PRESIDENT HATCHER: It might only be for a few days.

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MR ANGELOPOULOS: Yes, and how do you assess that as a reimbursement if it's already existing. That's my only submission on that point

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VICE PRESIDENT HATCHER: All right, thank you. Ms Paul.

PN122

MS PAUL: Your Honour, again, I reiterate the comments already made and thank for the Commission for allowing us this opportunity. Our position is slightly different. Our view is that the terminology used in paragraph (b) does broaden the scope, particularly to include the other employees component which I think your Honour has already picked up from the MBA submission. But our preference would be to retain the list in some form. I don't know that the suggestions put forward would actually rectify the problem of either the Rolls Royce version of an employee, for example, that already has a particular tool and how that is catered for.

PN123

The current provision of the clause provides that option which is: "Where the following tools or protective" - sorry, subclause 20.1(b) says: "Where the

following tools or protective equipment are provided by the employee, then the employee must be reimbursed for the cost of such tools or protective equipment. Or, alternatively, the employer may elect to provide such tools or protective equipment." It doesn't give rise to an issue for an employer to then have - the question about this Rolls Royce stuff is not in the current award because there is a list that allows the employer and the employee and creates less disputation. Our suggestion - - -

PN124

VICE PRESIDENT HATCHER: But in any given case, there may be different cost versions of specified tools.

PN125

MS PAUL: Yes, your Honour, but without the specificity of those tools, there is the possibility for an argument of something of whether or not something is a standard tool or whether it's a tool that's excluded by the provision of the allowance.

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VICE PRESIDENT HATCHER: It's already the case that (a) doesn't specify what the tool allowance is actually paid for.

PN127

MS PAUL: Well, it does by virtue of (b), your Honour, because identifies that, "The above allowance does not include the provision of the following tools or protective equipment", and thereby then create the reimbursement requirement.

PN128

VICE PRESIDENT HATCHER: I mean, I think we did this before, but what does a bricklayer have to provide then?

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MS PAUL: Your Honour, I'm not in the position to be able to answer that particular question.

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VICE PRESIDENT HATCHER: Well, that's what everyone said last time. Nobody knows.

PN131

MS PAUL: But the issue, your Honour, is we believe that the retention of the list in some form, whether it's by an appendix, allows the parties to have more clarity.

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VICE PRESIDENT HATCHER: All right.

PN133

MS PAUL: Thank you, your Honour.

PN134

VICE PRESIDENT HATCHER: Mr Maxwell.

PN135

MR MAXWELL: Thank you, your Honour. Your Honour, in our written submission of 15 September, we generally supported the clause that's been put forward by the Full Bench. There are three items that we express concern about. One, in regard to the issue of the clothing for mess personnel, it wasn't the provision of the clothing that we our comment was directed at. It was the removal of the laundering of the clothing.

PN136

VICE PRESIDENT HATCHER: So what current provision is that?

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MR MAXWELL: This is in 20.1(b)(vi).

PN138

DEPUTY PRESIDENT HAMILTON: "Mess personnel who are civil construction employees."

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VICE PRESIDENT HATCHER: What are mess personnel?

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MR MAXWELL: Mess personnel are people that work in the - - -

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VICE PRESIDENT HATCHER: Mess.

PN142

MR MAXWELL: Yes, cooks and people that work on a construction site where there is the provision of meals. So on major large construction sites on the north west shelf, there will be an accommodation block which will then have a restaurant. It will then have people that prepare the meals and clean up afterwards.

PN143

VICE PRESIDENT HATCHER: And they're covered by this award.

PN144

MR MAXWELL: Yes.

PN145

VICE PRESIDENT HATCHER: This is, what, chefs and things, are they or - - -

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MR MAXWELL: Yes.

PN147

MR CRAWFORD: Yes, the definition of the civil construction industry.

PN148

VICE PRESIDENT HATCHER: Are there classifications for any of this?

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MR MAXWELL: Yes, your Honour, I'm just trying to - bear with me. Under the CW1 it includes mess - - -

PN150

VICE PRESIDENT HATCHER: Sorry, just slow down. All right. So this is - - -

PN151

DEPUTY PRESIDENT HAMILTON: It's a very specific and - - -

PN152

VICE PRESIDENT HATCHER: So there's a mess attendant. I can see that and a camp attendant.

PN153

MR MAXWELL: Yes.

PN154

VICE PRESIDENT HATCHER: And does it go like higher skill levels, does it, or - - -

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MR MAXWELL: I think the chef is in the CW3, I thought. Yes, there is a qualified trade cook under the CW3.

PN156

DEPUTY PRESIDENT HAMILTON: Is there any evidence about this or is there none?

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MR MAXWELL: There is no evidence before the Full Bench in regard to that.

PN158

VICE PRESIDENT HATCHER: Yes, all right.

PN159

MR MAXWELL: The second issue that we had was the x-rays issue and I won't labour the point. We have made our submissions during the proceedings and we stand by them. And the third issue was about the boots that we raised and that was in our submission of 26 June 2017 and we say, well, there isn't any difference between the boots required to be worn by refractory bricklayers and, therefore, you don't need the separate provision that applies to them. And to be honest, I must admit, I'm surprised that the MBA are making any comments in regard to refractory workers because in my experience in dealing with refractor companies through enterprise agreements, I can't recall the MBA ever representing any of the refractory companies.

PN160

VICE PRESIDENT HATCHER: I would suggest there might be some difference in wear and tear which is reflected in the provisions.

PN161

MR MAXWELL: Well, as I say, your Honour, in my experience, there is no difference between the boots worn by refractory bricklayers and other construction workers and the amount of the wear and tear on them. So our proposal is there just be one provision that deals with the provision of boots. That's right, sir. So, essentially, what we are saying is that the 20.1(d) proposed by the Full Bench could apply to all employers.

PN162

VICE PRESIDENT HATCHER: Mr Maxwell, if you just go back to the mess personnel.

PN163

MR MAXWELL: Yes.

PN164

VICE PRESIDENT HATCHER: Where the clause otherwise requires protective equipment or clothing or stuff of that nature be supplied by the employer, what happens in terms of laundering and maintaining that? Is it implicit that the employer does all that?

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MR MAXWELL: Well, the general practice would be that that would be the responsibility of the employees to do that and they would then - - -

PN166

VICE PRESIDENT HATCHER: The employees do it?

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MR MAXWELL: Yes, sir.

PN168

VICE PRESIDENT HATCHER: Except in mess attendants where the employer does it?

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MR MAXWELL: Well, my understanding is that there would probably be a - my understanding is that there will be laundry facilities, so when they wash the uniforms of the mess personnel in terms with any other napkins or whatever that are reused on the site, they just go in the general laundry.

PN170

VICE PRESIDENT HATCHER: Right.

PN171

DEPUTY PRESIDENT HAMILTON: This is all rather ad hoc, isn't it? You're making a distinction which whose purpose is not readily apparent?

PN172

MR MAXWELL: Well, your Honour, we are seeking to maintain the existing condition that's - - -

PN173

DEPUTY PRESIDENT HAMILTON: Well, perhaps the existing award is ad hoc. You see, all these provisions aren't the result of a test case. They're the result of endless industry agreements which have somehow transformed into award provisions and that's why we have many of these problems.

PN174

MR MAXWELL: I understand that, your Honour, and, you know - - -

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DEPUTY PRESIDENT HAMILTON: It's kind of ad hoc to single out mess employees as opposed to others, isn't it?

PN176

MR MAXWELL: Well, it's ad hoc, but that was the provision. I suppose there are a lot of examples in the awards where there are certain provisions that only apply to certain employees.

PN177

DEPUTY PRESIDENT HAMILTON: And most of them have now gone because it's a safety net, not an enterprise agreement. The whole process of reform of awards has been removing all of that sort of very specific occupational specific material and replacing it with general safety net provisions.

PN178

MR MAXWELL: Well, all I can say and argue is that safety net would include the laundering of mess staff.

PN179

DEPUTY PRESIDENT HAMILTON: Thank you.

PN180

VICE PRESIDENT HATCHER: I'm just trying to understand this clause. So if the mess personnel can - if they purchase the clothes themselves, they're reimbursed for the cost and it's laundered by the employer. But what happens if it's supplied by the employer?

PN181

MR MAXWELL: Sorry, your Honour, just bear with me for a second.

PN182

VICE PRESIDENT HATCHER: It goes on to say the provisions of clause 21.1(b)(vi), which I assume means this paragraph, do you apply where they're provided by the employer, so the employer doesn't have to launder them if they supply it.

PN183

MR MAXWELL: That's correct.

PN184

VICE PRESIDENT HATCHER: It doesn't make a lot of sense, does it?

PN185

DEPUTY PRESIDENT HAMILTON: Well, the word is, mess personnel will be "reimbursed" which suggests there has been a purchase. Is that how you reconcile the two sentences? Reimbursed, i.e. the employee has bought something and is reimbursed for it, and that's how you reconcile it with the later sentence, is it?

PN186

MR MAXWELL: Well, no, I think if you read the first sentence, it says, first of all, they're reimbursed for the cost of purchasing the appropriate clothing. But then it says such clothing will be laundered and maintained by the employer.

PN187

VICE PRESIDENT HATCHER: So the employee buys it and the employer launders it.

PN188

MR MAXWELL: That's right.

PN189

VICE PRESIDENT HATCHER: But where the employer provides the clothing, it doesn't have to launder it, which is weird.

PN190

MR MAXWELL: It would appear to be that way, your Honour. As I say, this isn't necessarily a clause that - - -

PN191

COMMISSIONER HARPER-GREENWELL: But is it not the case, Mr Maxwell, on some construction sites that the uniform is taken and provided clean uniform each day?

PN192

MR MAXWELL: To be honest, I don't have the detailed information of what happens on some of the major remote construction sites where that may be the case. But in the general day to day city construction sites, the laundering is done by the workers.

PN193

DEPUTY PRESIDENT GOSTENCNIK: I would imagine just families for hygiene reasons if no other that the mess employees would have fresh clothes each day.

PN194

MR MAXWELL: Yes.

PN195

DEPUTY PRESIDENT HAMILTON: In any event, you want to retain the clause.

PN196

VICE PRESIDENT HATCHER: Otherwise, I won't be eating there.

PN197

DEPUTY PRESIDENT HAMILTON: Sorry, my apologies.

PN198

VICE PRESIDENT HATCHER: It's all right.

PN199

DEPUTY PRESIDENT HAMILTON: In any event, you want to maintain the clause in its existing form exactly. That's your submission.

PN200

MR MAXWELL: The issue that we are raising is that we wish to maintain the payment for the laundering by the employer.

PN201

DEPUTY PRESIDENT HAMILTON: In some way?

PN202

MR MAXWELL: Yes.

PN203

DEPUTY PRESIDENT HAMILTON: Of an uncertain nature.

PN204

MR MAXWELL: That's the point we were making.

PN205

VICE PRESIDENT HATCHER: All right.

PN206

MR MAXWELL: If I can then briefly respond to the employer submissions. Just in regards to this issue about the standard tools of trade, we believe that that matter is easily addressed because under the competency standards and training packages for the various - to the various apprenticeships, they have competencies that deal with the tools and equipment, say of a carpenter, and in those competency standards, they will list the tools that are required. So we believe the issue of the standard tools of trade is easily determined and there are documents that are used in the training system that can identify what those are. So it then comes down to what other tools are required.

PN207

In terms of the discussion that's gone on between the Bench and the other employer parties, the suggestion by adding the words "by agreement" to the second dot point in D2, we would have no opposition to that. The main issue we have with the employer submissions is this suggestion by the MBA, 20.1(b) only applies to trades people. the MBA make the outrageous claim that it's historically been read to only mean trades people. That is incorrect. The MBA provided no evidence of any decisions of the Commission that referred to that and to, I suppose, slightly labour the point, I would refer the Full Bench to the National Building and Construction Industry Award 1990 which is found in Print J4733 which was, I think, No.8 in the list of authorities that were provided by the CFMEU and filed in these proceedings. Clause 34 of that award deals with

special tools and protective clothing. One deals with the tools and protective clothing in (a) for bricklayers (b) for carpenters and joinders (c) for stonemasons.

PN208

VICE PRESIDENT HATCHER: Well, I mean, I think it's reasonably clear in the current award that (b)(vi) and (vii) and (viii) aren't confined to trades people.

PN209

MR MAXWELL: That's correct, your Honour, and so that's the point we made that the provision of gloves, overalls and boots and steel tapes, et cetera, that clearly applied to all employees.

PN210

DEPUTY PRESIDENT HAMILTON: But, surely, there are limits, aren't there? It's not surely the limits of all employees. Is that any employee anywhere?

PN211

MR MAXWELL: Any employee that is required to use those tools that were identified that that provision applied.

PN212

DEPUTY PRESIDENT HAMILTON: Yes, but the list of tools has now gone, you see?

PN213

MR MAXWELL: Yes.

PN214

DEPUTY PRESIDENT HAMILTON: So you have to have another limitation. So they have proposed "trades person". What's your proposed limitation, if there is one?

PN215

MR MAXWELL: Well, we say there isn't one because if you look at 20.1(b)(vi) of the current award, it says "civil construction employees" and it lists a whole range of protective clothing, et cetera, that's required to be provided to them. That clearly isn't limited to trades people and in (vii) it says - - -

PN216

DEPUTY PRESIDENT HAMILTON: No, I can see the point. If the list is gone, you need another limitation to replace it, perhaps, and what would that be if you can think of one?

PN217

MR MAXWELL: Well, I suppose the only alternative would be, sir, to retain (vi) and (vii).

PN218

DEPUTY PRESIDENT HAMILTON: Thank you.

PN219

MR MAXWELL: That would be one way of resolving it.

PN220

DEPUTY PRESIDENT GOSTENCNIK: The limitation is the tool required by the employer.

PN221

MR MAXWELL: That's correct.

PN222

DEPUTY PRESIDENT GOSTENCNIK: If we were to insert that provision.

PN223

MR MAXWELL: Yes, yes. I don't think there is anything else, really, in the employer submissions on this particular issue that I wish to take the Full Bench too.

PN224

VICE PRESIDENT HATCHER: Thank you. Mr Crawford.

PN225

MR CRAWFORD: Thank you, your Honour. We support the submissions of the CFMEU. Obviously, we're concerned about the mess personnel issue given it applies it applies in the civil construction industry which is the concern of the AWU.

PN226

VICE PRESIDENT HATCHER: This sounds like it's something that would arise in large distant construction projects.

PN227

MR CRAWFORD: Correct.

PN228

VICE PRESIDENT HATCHER: Which would be unlikely to be award covered employers.

PN229

MR CRAWFORD: Well, I mean, our view is, your Honour, there is no evidence on this issue. I mean, the Deputy President did make that point. But we say in that context that the assumption is that the modern awards objective is being met by the current term and you wouldn't remove an existing entitlement unless there's, you know, a merit argument to do so. And, your Honour, we would also say that the point you made about the clause referring to the subclause not applying whether the clothing is provided free of charge by the employer. Presumably, that could include laundering of the uniforms as well. So that would apply to where the employer not only provides the clothing but also pays for the laundry as well.

PN230

VICE PRESIDENT HATCHER: Well, perhaps, but it actually says the provisions of clause 20.1(b)(vi) do not apply where they're provided free of charge.

PN231

MR CRAWFORD: Yes, but we would say providing the clothing free of charge constitutes not only providing the clothing but also laundering.

PN232

DEPUTY PRESIDENT HAMILTON: To continue that provision, we'd have to rewrite it fundamentally, wouldn't we?

PN233

MR CRAWFORD: No, I'm not sure I'd agree with that.

PN234

DEPUTY PRESIDENT HAMILTON: All right, okay. Thank you.

PN235

VICE PRESIDENT HATCHER: If that's right, then, yes, they're now simply saying that the employer can provide the clothing or equipment would mean it also has to launder it.

PN236

MR CRAWFORD: Yes, and we would say that's the current intent.

PN237

VICE PRESIDENT HATCHER: That's what our clause says as well. I'm looking at (c). There might be a question about whether protective clothing actually describes what mess personnel have, but - - -

PN238

DEPUTY PRESIDENT HAMILTON: It says the employer provides it. That's enough, isn't it? It provides mess personnel with protective clothing. Isn't that sufficient?

PN239

MR CRAWFORD: Yes, I guess the issue is the laundering of that clothing. But, I mean, our submission is currently there is no doubt whatsoever that the employer has to pay for laundering if the employee provides the clothing and we say even if the employer provides the clothing, because the employer has to provide it free of charge, they also have to launder it. So we say - - -

PN240

DEPUTY PRESIDENT HAMILTON: It says: "The provisions this subclause do not apply where the items of clothing are provided free of charge by the employer." So if the employer provides the clothing, the employer doesn't launder it.

PN241

MR CRAWFORD: We say those words can go further than that. I mean, to provide the clothing free of charge includes the initial provision and providing laundered clothing on each occasion as well. I mean, I agree, it's obviously not as clear as the initial part of the clause, but -- -

PN242

DEPUTY PRESIDENT HAMILTON: It's as clear as mud.

PN243

MR CRAWFORD: Arguably, Deputy President, but - - -

PN244

DEPUTY PRESIDENT HAMILTON: Sorry, but - - -

PN245

MR CRAWFORD: No, it's a reasonable point. But, I mean, our position is there is clearly at least some degree of current entitlement there.

PN246

DEPUTY PRESIDENT HAMILTON: Of some sort.

PN247

MR CRAWFORD: Yes, and the award review is meant to proceed on the basis that you the current terms do meet the modern awards objective unless there's evidence to the contrary. There isn't. So we say that some entitlement about laundering needs to remain. We think, arguably, it will be keeping the current entitlement if there is reference to the employer laundering the clothing in all circumstances.

PN248

DEPUTY PRESIDENT HAMILTON: You may your point.

PN249

MR CRAWFORD: Thank you. Nothing further.

PN250

VICE PRESIDENT HATCHER: Mr Nguyen.

PN251

MR NGUYEN: Your Honour, I just have two brief comments to make. The point that was put by the Deputy President from the Bench that the process of the award review is about removing occupational specific provisions in favour of general safety net provisions. We don't support that proposition. There's clear provision in the Act for industry and occupational awards. If we were to follow the logic of that position to its end, then there wouldn't be.

PN252

DEPUTY PRESIDENT HAMILTON: I don't think that's quite what I said, but never mind, you have made your point. It was more qualified than that.

PN253

MR NGUYEN: Thank you.

PN254

DEPUTY PRESIDENT HAMILTON: It's a matter of detail rather than what you just said.

PN255

MR NGUYEN: Thank you, your Honour. In relation to the qualification of (b), we would agree with the position put that the qualification is that the employer is requiring the employee to provide the tool. We don't agree with any position which shift the cost of required tools to be put onto the minimum award reliant employees. Other than that, we support the CFMEU and the AWU's submissions.

PN256

VICE PRESIDENT HATCHER: All right, thank you. So, Mr Schmitke, we move to the next topic.

PN257

MR SCHMITKE: Thank you, your Honour. This is the allowances clause and I indicate from the outset, as per our submission, that we do not support the Commission's provision approach to abolish certain disability allowances in lieu of an increase to the industry allowance and the basis for that position is set out within our submissions. I just would like to note that the provisional clause as expressed might also exacerbate a problem that Master Builders identified with respect to the industry allowance as it stands earlier in these proceedings being that it appears that the existence of some of the specific disability allowances payable are payable in circumstances that we say are already canvassed in the general disability allowance which compensates for the disability associated with construction work generally. Now, one example of this was with respect to dirty work. Now, we say that's a type of work already referenced in the general disability allowance and for which there is now or in the current award there's an additional allowance separately contained.

PN258

DEPUTY PRESIDENT GOSTENCNIK: Mr Schmitke, that's an argument how one calculates consolidated allowance, not an argument against having one.

PN259

MR SCHMITKE: That might be the case, your Honour, but I would indicate that one of our draft determinations is sought to address it a different way and that is to clarify that the allowance be payable in unusually dirt work so as to perhaps put some greater definition around the circumstances within which it's payable as opposed to the current situation which we believe creates a situation of confusion, potential double-dip, et cetera.

PN260

DEPUTY PRESIDENT HAMILTON: Mr Schmitke, you put a general position of opposition and I understand. Assume for a moment that that position you put is not accepted. Do you then wish to seek to calculate what these industry allowances would be or should we just do it?

PN261

MR SCHMITKE: Thank you for that question, your Honour. I can indicate that this was a matter that was raised with those instructing me and my instructions are as per the position set out in our submissions. Now, that said, of course, in the event that I'm required to do so, I certainly will seek instructions on that particular proposition. I have sought them, but I was instructed to -- -

PN262

DEPUTY PRESIDENT HAMILTON: So one way of doing it would be to give you two weeks to put a view. If you didn't, the Commission could just do it.

PN263

MR SCHMITKE: Yes, yes, I would be happy to take that period of time. But I would also indicate that in respect to - I can say in respect to the CFMEU's position in respect of the CFMEU's position regarding what an allowance increase might be, that is something that we would not support.

PN264

VICE PRESIDENT HATCHER: I think we had hoped that the parties might have had some discussions about this, but obviously they haven't.

PN265

MR SCHMITKE: We also obviously would oppose the establishment of an industry allowance that differs by way of subsector. I think that's a view the majority of the parties share and, of course, to the extent we can, we support the reasons advanced generally regarding the practical difficulties with such an approach. I certainly can indicate we have road-tested this proposal with industry. They have indicated it wouldn't be viewed favourably. It's been reported to me the approach might create additional confusion and complexity.

PN266

DEPUTY PRESIDENT HAMILTON: Is there any rational basis for the existing network of allowances or have they just arrived via a long process of award review and industry agreements? That is the case, isn't it?

PN267

MR SCHMITKE: Yes, that is the case, and - - -

PN268

DEPUTY PRESIDENT HAMILTON: It's a completely unsymptomatic - not irrational, but simply an accumulation of past industry agreements. That's it, isn't it?

PN269

MR SCHMITKE: By and large, and the resulting effect, of course, is that you've got clauses spread throughout this document with respect to allowances and the circumstances within which it's payable. So that's why we have been advancing, notwithstanding our work health safety outmoded argument, the provision that there's that benefit in grouping them in terms of skill, disability and expense, and then subsequently that allows and easier identification of those which are cumulative and those which are composite. And we think that would actually go a long way to assisting award users I n terms of their application.

PN270

DEPUTY PRESIDENT HAMILTON: So that's enough, you think?

PN271

MR SCHMITKE: Yes, yes, yes.

PN272

DEPUTY PRESIDENT HAMILTON: Thank you.

PN273

MR SCHMITKE: Now, I note that the CFMEU has referred to a proposition they previously advanced where agreement could be reached to pay consolidated disability allowance. We don't support that. It's our recollection the problem with that proposition earlier was that evidence would need to be obtained so that any consolidated allowance equalled that payable under the conventional award provision and, of course, that would create unnecessary burden and compliance and, of course, that proposition as well, I recall that there was little or no practical connection between the allowances proposed for consolidation.

PN274

Now, at this point, of course, I should note that the Commission is no doubt familiar that a lot of enterprise agreements that exist in the sector adopt the site allowance and the site allowance is conventionally used in circumstances where particular allowances expressed within the award can be grouped up and bundled depending on the specific type of work project or site in which that work is being undertaken. But, of course, there are those who - - -

PN275

DEPUTY PRESIDENT GOSTENCNIK: Usually by reference to value and location rather than any other rationale.

PN276

MR SCHMITKE: I'm sorry?

PN277

DEPUTY PRESIDENT GOSTENCNIK: Usually by reference to value of project and/or location rather than any other rationale.

PN278

MR SCHMITKE: That, I think, is sometimes called the productivity allowance, your Honour, in some enterprise agreements. But you're right, there is a broad range of factors. There's no set matrix, as it were, in terms of how they're calculated. But, of course, I have raised this to note there is, of course, not everybody uses an enterprise agreement and, of course, we're talking about an award and, of course, commonly it's, you know, frequently the case that small business utilise the award rather than having an enterprise agreement. So that's why we put forward that position about the categorisation of the allowances because we think that that would actually allow the parties the opportunity to pursue these types of arrangements without necessarily requiring for them to be adopted.

PN279

Certainly, I know one of Mr Maxwell's suggestions, I think it was at paragraph 25, noted something along similar lines where you take conventional allowances and amounts payable to employees with particular types of work and bundles them up to create, perhaps, a new rate or allowance. Now, we wouldn't support that because that introduces rigidities to the award that otherwise doesn't exist, but you

can get there and it's much easier to do it were they grouped in this way. And at the end of the day, we need to make certain that the award is appropriate as a safety net for the entire sector.

PN280

On this point as well, I can indicate that in terms of the categorisation that the Bench has made with respect to the allowances, we concur with the categorisation except there are three or four in which we indicate should be categorised differently which are pile driving, dual lift allowance, stonemason's cutting tools and second-hand timber. We say that they are respectively a skill allowance, another skill allowance expense and a disability allowance. But, of course, I note there are some of the other parties who have suggested competencies might be of benefit to resolve any differences that exist between us with respect to the way these allowances are categorised and, of course, we would have no problems in participating in those conferences were that considered a way to resolve it.

PN281

DEPUTY PRESIDENT HAMILTON: Sorry, so you're saying that all the parties have a different list and, therefore, a conference will help, will it?

PN282

MR SCHMITKE: I recall that we almost agreed on 90 per cent of the way that they should be categorised, but there were three or four that remained outstanding.

PN283

DEPUTY PRESIDENT HAMILTON: Thank you.

PN284

MR SCHMITKE: Now, I should also indicate that - - -

PN285

DEPUTY PRESIDENT GOSTENCNIK: What stopped you doing that before today?

PN286

MR SCHMITKE: I think, your Honour, we've had a crack at it in the past, but it may well be that we're at a point where a conference might be more (indistinct) than ordinarily it has otherwise been.

PN287

DEPUTY PRESIDENT HAMILTON: Well, it would have to be very rapid, wouldn't it?

PN288

MR SCHMITKE: Yes, yes. And, of course, the other point that I would raise is that this categorisation deals with that issue that some of the other employer groups have raised saying that they might support a subsector industry allowance. Now, again, categorising them more appropriately in the award enables the award user and gives them a capacity to make that much easier and there's a benefit without creating any necessary restriction. Otherwise, the view of Master Builders with respect to the provision is that it wouldn't necessarily have most of

our support other than the matters we have set out in our submissions. That's all we'd have to say on that matter.

PN289

VICE PRESIDENT HATCHER: All right. Ms Adler.

PN290

MS ADLER: Thank you, your Honour. So there's just three comments I'd like to make in response to the Commission's preliminary view and then two in response to the review put by the CFMEU. Firstly, in relation to the categorisation of allowances, we support the categorisation proposed. Again, as Mr Schmitke has already mentioned, there might be some differences around which belongs in skill expense or disability, but I think we can probably get there on those ones. In relation to the conferences the parties had prior to the hearings on the allowances issue, I think my recollection anyway was that we got to a point and we needed to - well, it was decided that we should wait until we had a decision in substantive proceedings given the work health safety claims to see what was left, you know, if there were any changes to come back to where we ended up and there was only a handful that we disagreed on, particularly around the all-purpose question as well as to whether the allowance was all-purpose or not. So my understanding, anyway, was that that was sort of put on pause until we had a decision and there was any other changes made to the award that we could come back to.

PN291

DEPUTY PRESIDENT HAMILTON: There is nothing stopping you doing it this week if you're able to do it. The question would be, are you actually able to do it because there's not a great history of agreement.

PN292

MS ADLER: No, there's not.

PN293

DEPUTY PRESIDENT HAMILTON: So is it pointless or can you do it this week and prove us wrong?

PN294

MS ADLER: Well, I guess, I'm in two minds about it, your Honour, and I guess if there are changes to the allowances as a result of the decision of the Bench, that may influence how those discussions go. So aside from that, yes, I don't know if the allowances, particularly, as I said, the all-purposes one, if we could reach agreement on them. Yes, I'm in two minds about it.

PN295

DEPUTY PRESIDENT HAMILTON: Thank you. Thank you.

PN296

MS ADLER: The second comment on the Commission's proposal is in relation to the rolling up or abolition of all the disability allowances and includes an industry allowance. We would oppose that and we would oppose it based on two reasons. Firstly, the industry allowance is an all-purpose allowance and most of those

disability allowances are not, so you end up with an automatic increase in the all-purpose rate of pay under the award.

PN297

VICE PRESIDENT HATCHER: Well, yes, but that's again a valuation purpose, a valuation exercise, isn't it? That is if there was some sort of mathematical calculation, it would take into account that effect and, as it were, apply a discount to the value of the allowance.

PN298

MS ADLER: If that's possible, I guess, the concern is then that - well, the second reason and the concern is that those disability allowances only arise in certain circumstances, so only payable in those circumstances if you roll it - - -

PN299

DEPUTY PRESIDENT HAMILTON: I view the people who can put a sensible submission very briefly which satisfactorily deals with those issues - or do you want us to do it?

PN300

MS ADLER: Well, I guess on that point, your Honour, you know, we being the party that said that we would support a sector by sector approach, we think residential construction is different and we would say that the current industry allowance is appropriate for the residential sector. You don't need to increase it. So, from our perspective, you don't need to do that next calculation.

PN301

DEPUTY PRESIDENT HAMILTON: Given that the none of the additional allowances are payable, is that it?

PN302

MS ADLER: That would be our argument, yes, and I know others would disagree with me, but we would say that that existing industry allowance is appropriate to cover the circumstances.

PN303

DEPUTY PRESIDENT HAMILTON: So you have put a number, in other words?

PN304

MS ADLER: No, no, because we say that what's in the award currently is appropriate for the residential construction sector as we have defined it in our submission.

PN305

DEPUTY PRESIDENT HAMILTON: That's the number.

PN306

VICE PRESIDENT HATCHER: So the number is zero.

PN307

MS ADLER: The number is zero. I wasn't so bold to say that against it.

PN308

DEPUTY PRESIDENT HAMILTON: Well, you have put a number.

PN309

MS ADLER: I have put a number, yes, your Honour.

PN310

DEPUTY PRESIDENT HAMILTON: Thank you.

PN311

MS ADLER: And I guess that covers up on my final point and, as I said, we had an attempt at defining it and we put that definition of the residential construction sector in the submission noting that we don't believe that the multi-rise residential construction falls within the single-dwelling, you know, cottage industry definition.

PN312

VICE PRESIDENT HATCHER: So what paragraph is your definition?

PN313

MS ADLER: It's on page 5 at paragraph 2.2.10, and it calls up the existing definition in the award of multi-storage building which I believe is five storeys are put to the bundle.

PN314

DEPUTY PRESIDENT HAMILTON: What clause is that?

PN315

MS ADLER: I thought I had in the submissions.

PN316

DEPUTY PRESIDENT HAMILTON: Don't worry.

PN317

VICE PRESIDENT HATCHER: I see.

PN318

MS ADLER: 21.4(c).

PN319

VICE PRESIDENT HATCHER: It's a big house.

PN320

MS ADLER: It's a low-rise construction. Well, I mean, you can have a different reference point, but I thought it made sense. If there's an existing provision, a definition in the award to call that up, yes. I'm not necessarily, you know, committed to that number. It just makes sense to us.

PN321

DEPUTY PRESIDENT HAMILTON: Again, it simply appears and I'm not sure we can take it much further if we don't know the basis of that definition. It's appeared through history, hasn't it?

PN322

MS ADLER: I mean, the definition - - -

PN323

DEPUTY PRESIDENT HAMILTON: A long involved history.

PN324

MS ADLER: Well, yes, of the multi-storey allowance. Yes, I don't know the origins of that. But it wouldn't - you know, we could come up with another definition of what the level of construction is that we would say is residential.

PN325

DEPUTY PRESIDENT HAMILTON: Would you support that definition or do you want to change it?

PN326

MS ADLER: Of the multi-storey allowance? I might have to take that on notice, your Honour. I mean - - -

PN327

DEPUTY PRESIDENT HAMILTON: Okay.

PN328

MS ADLER: Yes, but for the purposes of the definition we propose in relation to the residential construction sector, we would say that it's workable.

PN329

DEPUTY PRESIDENT GOSTENCNIK: So, effectively, you would retain a cottage style distinction by reference to the single two-storey dwelling construction?

PN330

MS ADLER: Well, we would come to a different kind of scope if five storey was - - -

PN331

VICE PRESIDENT HATCHER: That would cover that, sort of, it might be obsolete now, but the old, sort of, three-storey walk-up apartment block.

PN332

MS ADLER: Yes, your Honour, yes, and the row of townhouses, those sorts of things, duplex manner home type construction. And the wording, you know, is consistent with what's already in the award. I didn't try and stray too far from terms used existing, but it doesn't seem to have much force with other parties. Just two comments in relation to the CFMEU's proposals and I would echo the MBA's comments. The percentage proposed, I mean, we oppose the consolidated rate put in the substantive proceedings by the CFMEU. We didn't see much utility in it given that the clause, from my understanding, is premised on an exclusion. So you still have to pay those allowances anyway. So you still have to go through the exercise of going through all of them to work out which ones apply, which ones go and then, you know, which is better or which you're better off paying or

not. And the figure, I think, in the CFMEU's submissions of 12.55 per cent in the alternate, I don't know how they got to that number. I don't know how they got to the number originally either and there didn't seem to be an explanation in the submission either, so - - -

PN333

DEPUTY PRESIDENT GOSTENCNIK: On the same basis that you got to your zero.

PN334

MS ADLER: My zero?

PN335

DEPUTY PRESIDENT GOSTENCNIK: Yes, it was the vibe.

PN336

MS ADLER: Well, I think, you know - - -

PN337

DEPUTY PRESIDENT HAMILTON: Do you have any basis for saying the allowances aren't paid or is that simply your industry experience?

PN338

MS ADLER: We have developed a list and formed a view about each allowance and their applicability or not and, obviously, at this point, not something that we have provided more fully, but it is something that we could if it was of use. But, again, you know, there's no evidence. We haven't provided any evidence on each one of those allowances, so it is predominantly based on industry experience of the sector.

PN339

DEPUTY PRESIDENT HAMILTON: Or of the vibe, as my colleague said.

PN340

MS ADLER: Sorry, your Honour?

PN341

DEPUTY PRESIDENT HAMILTON: No, don't worry about it.

PN342

MS ADLER: That's all I have to say, thank you.

PN343

VICE PRESIDENT HATCHER: Yes, Mr Angelopoulos.

PN344

MR ANGELOPOULOS: Very briefly, again, we support the categorisation of the allowances. Our primary submission, the rolling up of the various disability industry allowance, we don't support that. We do know that the CFMEU's position of having a single industry allowance indicates that if they don't get that, they would prefer to just maintain the current situation which is basically the position we're at at the moment. I do note that in our submission that if the

Commission is of the view that there should be some sort of rolling up of the various disability allowances into industry allowances that a conference may be an appropriate mechanism. I certainly wasn't involved in prior conferences. I have just heard from my colleagues, to some extent read the transcript, and there has appeared to be at least a significant movement and it may be that we just (indistinct). We may or may not agree on some of those of issues and maybe the opportunity should be given to us to see if we can before the Commission makes any decision, thank you.

PN345

VICE PRESIDENT HATCHER: Ms Paul.

PN346

MS PAUL: Your Honours, the AI Group position is that we are quite happy looking at the categorisation of the various allowances and I think I agree with the employer parties on this, we have come pretty close to doing that. We are in vehement disagree with the parties in relation to the issue of somehow creating a consolidated version of payment and in whatever form, we believe that particularly disability allowances because some are paid daily, some are paid hourly and some are paid in a weekly basis, the mathematical exercise are potentially swings and roundabouts, but the end result is likely to be that employers will end up paying more by having one consolidated allowance as opposed to having a number of disability or a number of allowances that they then have to pay because those disabilities or those events effectively occur.

PN347

VICE PRESIDENT HATCHER: Why is that the likely result?

PN348

MS PAUL: Well, your Honour, it's just the fact of not being able to look at whether an individual might be able - is working in a particular week or particular day and not having the ability of getting that level of data, that the parties are going to be relying on their historical knowledge as opposed to how employers are actually practising at the moment and how employees are actually working. And the fact that the industry is actually moving from employers - not necessarily in the domestic sector, but if you look at the construction and the civil construction work, there are now employers entering the marketplace that are actually servicing both sectors and they're employees are doing that work in a variety of manners and to restrict that process by having a consolidated version, we see as a risk and I would go so far as to say a high risk that cost will be borne by the employer.

PN349

DEPUTY PRESIDENT HAMILTON: I suspect we will hear from the CFMEU that employees will lose out.

PN350

MS PAUL: In the opposite, yes, your Honour, and hence the position.

PN351

DEPUTY PRESIDENT HAMILTON: Wouldn't that be the case?

PN352

MS PAUL: And that is entirely possible. We say from our position that it's likely that it will be the employers that end up having more cost. It is far more cost-effective for an employer to know what they have to pay when that disability effectively occurs. I understand the complexity that goes to some of the smaller employers that may not be able to go through the volumes of pages to go through that, but we think that's an administrative task that is able to be fixed by categorising it appropriately as opposed to consolidating it and making it a cost issue for them.

PN353

VICE PRESIDENT HATCHER: If an employer currently quotes for a job - - -

PN354

MS PAUL: Yes, your Honour.

PN355

VICE PRESIDENT HATCHER: - - - they need to do some calculation about what disabilities might arise on the project.

PN356

MS PAUL: Yes, your Honour.

PN357

VICE PRESIDENT HATCHER: Wouldn't it be easier to say that there is a known industry allowance they have to pay regardless?

PN358

MS PAUL: It's only if that known industry allowance is going to take into consideration the relevant disability that may occur. So at the point at which they're going to quote for the job, they do that exercise looking at the award and identifying the disabilities that may occur for that particular circumstance. Hence, my point around by consolidating it, there is actually a risk that there is going to be additional payments made.

PN359

DEPUTY PRESIDENT HAMILTON: You're making the assumption that the industry allowance won't be properly calculated which you can't make.

PN360

MS PAUL: No, and - - -

PN361

DEPUTY PRESIDENT HAMILTON: Because, first of all, the industry parties haven't endeavoured to help us to calculate it.

PN362

MS PAUL: Yes, your Honour.

PN363

DEPUTY PRESIDENT HAMILTON: And, secondly, you're in a position perhaps to put a number on it based on industry knowledge or whatever resources you have.

PN364

MS PAUL: And, your Honour, that is where we sit. We would see that is a problem in that, again, it is coming down to the very issue you raised earlier that the award clauses, particularly in the allowance space, has been by virtue of the industry parties and without any particular analysis being done about it from the specific employers point of view. So we are trying to collectivise this concept of a disability allowance when the concept of a disability allowance is really when the person suffered the disability.

PN365

DEPUTY PRESIDENT GOSTENCNIK: But if the consolidated allowance in relation to disabilities were paid on other than an all-purpose basis, would that change your view?

PN366

MS PAUL: That would certainly alleviate one concern. We still that from the AI Group position we have always objected to this and the logic around it is that disability allowances really are going to lead to the fact that the disability is suffered before they are paid. The general industry allowance already takes into consideration general disabilities. This specificity of taking specific disabilities and then converting all of that in some amalgamated amount.

PN367

DEPUTY PRESIDENT HAMILTON: In any event, you're given the opportunity to comment on a draft number.

PN368

MS PAUL: Absolutely, your Honour.

PN369

DEPUTY PRESIDENT HAMILTON: All of your submissions will be properly dealt with by the Commission, one would assume.

PN370

MS PAUL: Yes, your Honour.

PN371

VICE PRESIDENT HATCHER: I mean, how do you cost in advance whether there's water dropping on clothing?

PN372

MS PAUL: Sorry, your Honour, I didn't hear that.

PN373

VICE PRESIDENT HATCHER: I'm looking at the wet work allowance. How do you cost on a job in advance whether there's water continually dripping on clothing or whether it's going to be unusually dirty?

PN374

MS PAUL: And in some circumstances, your Honour, an employer makes that decision about how they cost that and sometimes they carry the loss in relation to it on the hopes that you might not get a major downpour occurring or a major event occurring and that allowance may not be a problem. But that is for the employer to make that call in relation to the tender they do and, as quite often in the industry and particularly across the industry, they do make tenders with a couple of fingers crossed that some of these things won't occur and it's a low margin level and particularly as you get to the subcontractor and certain types of subcontractors. We are saying this allows the provision of actually having the disabilities available separately as opposed to consolidated means the employer is actually making that choice and taking that risk as opposed to it being imposed on the employer.

PN375

DEPUTY PRESIDENT HAMILTON: And it is a risk, isn't it?

PN376

MS PAUL: Absolutely, your Honour.

PN377

DEPUTY PRESIDENT HAMILTON: There's a high possibility of non-compliance on occasion, particularly a small business.

PN378

MS PAUL: Yes, your Honour, but it is a non-compliance that's able to be - that is something that the employer is able to rectify. The non-compliance occurs when the payment doesn't occur, not at the point of tendering.

PN379

DEPUTY PRESIDENT HAMILTON: Thanks.

PN380

DEPUTY PRESIDENT GOSTENCNIK: But doesn't the known factor of the consolidated allowance assist the employer both in tendering and in the risk-taking in relation to low margin industries?

PN381

MS PAUL: The balance, I guess, your Honour, is whether or not we're trying to - whether in doing that, it does increase the cost for an employer overall.

PN382

DEPUTY PRESIDENT GOSTENCNIK: I accept that and that's an argument about number.

PN383

MS PAUL: Yes, and I don't have an argument that says that isn't the case, but for us that is a stronger argument. The balance should be on the fact that the current award provides for employers to actually make that, take that risk and make that determination and at the point at which they actually incur the - they might tender on a lower figure of what they believe that they are going to pay, that's the risk

they take, that's the cost for them to do business. And that's not suggesting they shouldn't pay the employee the disability. That's the cost when they do the tendering early. They bear that cost in every aspect of construction, so this is not new for them in terms of bearing a risk of actually under-quoting, but that doesn't take away their obligation under the award to pay it.

PN384

DEPUTY PRESIDENT HAMILTON: But, again, if the number is at an appropriate level, it won't be a problem for you.

PN385

MS PAUL: Our concern is how to get to that appropriate level in a manner that doesn't increase costs for employers. And the other side is I am sure going to say in a manner that doesn't increase costs for employees.

PN386

DEPUTY PRESIDENT HAMILTON: Thank you.

PN387

MS PAUL: Thank you, your Honour.

PN388

VICE PRESIDENT HATCHER: Mr Maxwell, it seems this proposal gives all your members a pay rise, so why are you against it?

PN389

MR MAXWELL: Your Honour, we have suggested a proposal in paragraph 24 of our submission of a rise of our new industry allowance, but I think the employers haven't agreed to it, surprise, surprise. I should, perhaps, explain how we arrived at the figure of 12.55 per cent. We took, as the Bench will be aware, joined the main proceedings, we proposed a consolidated disability allowance of 7.9 per cent which is to be paid in lieu of a range of special rates except a number that we have identified that we say should remain separate because they tend to be applied to work that it doesn't apply more generally. So, for example, the multi-storey allowance, we say that should be separate.

PN390

So, we took the 7.9 per cent. We then added the 3.9 per cent which is the existing allowance and we also added in the special allowance of 770 in the award which is probably one of the most historical allowances that is ripe to removal from the award by way of an increase in the industry allowance because it's an amount that's just not adjustable, it's just been fixed at 770 since, I think, the making of the minimum rates award back in the 1970s. So that is perhaps one allowance that could easily be incorporated into the industry allowance.

PN391

VICE PRESIDENT HATCHER: But that's not all-purpose.

PN392

MR MAXWELL: That is all-purpose.

PN393

VICE PRESIDENT HATCHER: It is all-purpose.

PN394

MR MAXWELL: That is all-purpose. So we added the 7.9 per cent, the amount for the 770 allowance the 3.9 per cent of the industry allowance that is how we arrive at the 12.55 per cent. Now, people may argue that the 7.9 per cent, how do you arrive at that figure? Well, we looked at the range of allowances that are payable and they range between four per cent of the standard rate to 2.9 - - -

PN395

DEPUTY PRESIDENT HAMILTON: Sorry, which sector would that apply to ?

PN396

MR MAXWELL: Well, we would say that would apply to all sectors.

PN397

DEPUTY PRESIDENT HAMILTON: All sectors, including housing.

PN398

MR MAXWELL: Including housing because I disagree with Ms Adler that none of the special rates apply. I mean, if you go to the special rates in clause 22, we find that special rates include explosive power tools, rec work, you can have rec work on a residential building site when there is a heavy period of rain and then workers are required to then go and work on the site, because it talks about where there is water under foot. If you go to - there's the issue of asbestos and asbestos removal. That is going to be an increasing issue especially in regard to maintenance work.

PN399

DEPUTY PRESIDENT HAMILTON: Well, some wouldn't apply. Height work.

PN400

MR MAXWELL: Yes, the height would apply. There are the - slushing would apply.

PN401

DEPUTY PRESIDENT HAMILTON: Suspended perimeter work wouldn't apply.

PN402

MR MAXWELL: The roof repairs would apply. Computing quantities would apply. The certificate allowance would apply.

PN403

DEPUTY PRESIDENT HAMILTON: You accept that there are differences by sector, aren't there? So, for example, a very project, multi-storey in the city would attract a whole range of allowances which would not apply to a small residential building in outer Melbourne, isn't that right, or not?

PN404

MR MAXWELL: No, it's a general statement that you can't make because there are certain factors that would apply to certain trades that would apply whether you're in housing o whether you're on a multi-storey building.

PN405

DEPUTY PRESIDENT HAMILTON: I'm not saying there won't be some. What I'm saying is the two are not identical, are they?

PN406

MR MAXWELL: They are not identical, no.

PN407

DEPUTY PRESIDENT HAMILTON: In terms of the application of allowances, there's very big differences between the two.

PN408

MR MAXWELL: There are different - - -

PN409

DEPUTY PRESIDENT HAMILTON: In terms of the application of allowances.

PN410

MR MAXWELL: There are some that are different, yes.

PN411

DEPUTY PRESIDENT HAMILTON: Thank you.

PN412

MR MAXWELL: But our argument is that we don't believe there should be separate industry allowances for different sectors because then if you are seeking to have an award and provide for a schedule of rates in the award, if you then have separate industry allowances, that schedule is going to run out to - well, in our example, if you take that there are about 30 different wage rates currently under the award, if you then have four different industry allowances, you're then increasing the number of rates to 120.

PN413

DEPUTY PRESIDENT HAMILTON: Mr Maxwell, assume for one minute that in some areas of residential building, few allowances will be paid. And then assume that in some areas of general construction, a great many would be paid a great amount of money. Now, there are obvious differences between the two, aren't they?

PN414

MR MAXWELL: There are differences between the two, but the main difference in allowances that would apply would be things like the multi-storey allowance. A number of the other allowances would apply no matter what and that's why our suggestion is you take out those allowances that don't generally apply, such as the underground allowance, the multi-storey allowance, the carpenter-diver allowance, the electrician's licence allowance, the in charge of plant allowance, swing scaffold, asbestos, suspended perimeter work platform, et cetera. So we

can identify those allowances that just don't have general application and take those out.

PN415

DEPUTY PRESIDENT HAMILTON: All right.

PN416

MR MAXWELL: But then you then say which allowance encompasses the rest.

PN417

DEPUTY PRESIDENT HAMILTON: Sorry to interrupt you, you made your point.

PN418

MR MAXWELL: The other point I should make is that I disagree with Mr Schmitke's suggestion of what our position was on the option of consolidated disability allowance. We weren't saying that people then have to keep a reconciliation to say whether people are better off with the consolidated disability allowance compared to allowances under the award. We changed our position in these proceedings, in this four yearly review. That was our position in the two-year review, but we have changed our position in the four-year review and we said that there is an opportunity of the employer paying the consolidated disability allowance and if they paid that allowance none of the special rates that aren't included in that don't have to be paid.

PN419

In regard to the CCF submission, we just note at 3.4 that they refer to paragraph 15 of a Federal Court decision. We just point out that the paragraph that they refer to, the Full Bench wasn't dealing with disability allowances as such, they were dealing with location allowances and it was a total. So I don't think that the definition that they refer to is appropriate. Just in regard to the definition of the residential building industry, of course, we are opposed to that because, one, we say that anything over - well, we disagree with their distinction between what is the residential construction industry and commercial construction.

PN420

Clearly, you can have a multimillion-dollar retirement home development which comprises of two-storey buildings which would be taken as a commercial construction site and would not be deemed as being in the residential or cottage industry. Cottage industry is mainly seen as one single house being built.

PN421

DEPUTY PRESIDENT HAMILTON: That's your definition, is it? One single house being built?

PN422

MR MAXWELL: That's what we say is generally the cottage industry, yes.

PN423

DEPUTY PRESIDENT HAMILTON: Okay, thank you.

PN424

VICE PRESIDENT HATCHER: So it's a free-standing house?

PN425

MR MAXWELL: A free-standing.

PN426

DEPUTY PRESIDENT HAMILTON: That's a very limited definition.

PN427

MR MAXWELL: Yes, because as soon as you go wider than that, it just opens up whole different types of projects. I mean - - -

PN428

DEPUTY PRESIDENT HAMILTON: What about the existing award definition, shouldn't we adopt that?

PN429

MR MAXWELL: Well, in the existing award there is no differentiation. Residential is part of general building and construction. So the only difference is differences in the award sectors, general building construction, civil construction and the metal engineering construction.

PN430

DEPUTY PRESIDENT GOSTENCNIK: The cottage aspect is usually excluded in enterprise agreements by reference to the - - -

PN431

MR MAXWELL: Yes, there is a definition of the differentiation between the cottage industry and - - -

PN432

DEPUTY PRESIDENT GOSTENCNIK: Single two-storey, et cetera.

PN433

MR MAXWELL: In our Victorian patent agreements and we accept that. But we disagree that it would include site clearance. I mean, at the end of the day, if you've got a civil contractor doing site clearance, it doesn't matter whether it's for a housing development or whether it's for a major project or for a building, the earthmoving side of it is the same.

PN434

DEPUTY PRESIDENT HAMILTON: Your definition would exclude very large residences.

PN435

MR MAXWELL: That's correct.

PN436

DEPUTY PRESIDENT HAMILTON: Such as a mansion.

PN437

MR MAXWELL: Yes.

PN438

DEPUTY PRESIDENT HAMILTON: All right, thank you.

PN439

DEPUTY PRESIDENT GOSTENCNIK: Not a two-storey mansion, only a three-storey mansion.

PN440

MR MAXWELL: Well, it depends whether it's a McMansion or not, to use some of the vernacular that is being these days.

PN441

VICE PRESIDENT HATCHER: I think the Deputy President's particularly concerned about this issue.

PN442

DEPUTY PRESIDENT GOSTENCNIK: I only have a two-storey and it's not that big.

PN443

VICE PRESIDENT HATCHER: It's going to cost him a packet to add the third.

PN444

MR MAXWELL: Your Honours and Commissioner, I don't think there's anything else I would wish to add at this stage.

PN445

VICE PRESIDENT HATCHER: Thank you. Mr Crawford.

PN446

MR CRAWFORD: We support the submissions of the CFMEU. In particular, we think if there is going to be a rolled up rate, there should be just one rate. I think the discussion that's just occurred reveals the complexity of trying to define different industries. It will be quite difficult to arrive at a mathematical calculation for one rate. Obviously, that task is even harder if you're looking at a number of different rates and, obviously, if the Commission determines the process going forward is further submissions or a conference, we will fully participate in that process and come up with proposals. But our firm position is there should only be one rate.

PN447

VICE PRESIDENT HATCHER: So you don't see any difference there between civil construction and commercial construction?

PN448

MR CRAWFORD: There are obviously some differences, but we don't think the process of simplifying things will be served by creating different rates for different industries. We just think there won't be work for them. I mean, there will be swings and roundabouts inevitably, but obviously it will be a mathematical process and I think once you - - -

PN449

DEPUTY PRESIDENT HAMILTON: If you were given the opportunity, would you put a number or would you just prefer the Commission to do it?

PN450

MR CRAWFORD: I think we have put a number. Nothing further at this stage.

PN451

VICE PRESIDENT HATCHER: Thank you. Mr Nguyen.

PN452

MR NGUYEN: I don't have anything to add, your Honour. We support the CFMEU and the AWU submissions.

PN453

VICE PRESIDENT HATCHER: So I thought you had a particular concern about the lift industry allowance.

PN454

MR NGUYEN: We do. If you would like me to deal with that now, I'm happy to deal with that issue.

PN455

VICE PRESIDENT HATCHER: All right. We might take a short morning tea adjournment and then we will return to that issue.

SHORT ADJOURNMENT **[11.26 AM]**

RESUMED **[11.43 AM]**

PN456

VICE PRESIDENT HATCHER: Mr Nguyen.

PN457

MR NGUYEN: Your Honour, we have provided written submissions about our support for retaining the lift industry allowance, but for the purpose of today, I will just identify the four key reasons why we oppose the Commission's proposal to abolish the lift industry allowance. The first is that the lift industry allowance has been and continues to be a feature of the safety net of entitlements for workers in this industry. We track, in our submissions, the history of the lift industry allowance which was first created by the predecessor to the Commission as a condition in the Metal Trades Award 1952.

PN458

The decision was given on 26 April 1967. The clause continued to exist in various iterations of the Metal Trades Award 1952. It was retained when the award became the Metal Industry Award 1971 and also retained when the award changed to the Metal Industry Award 1984. In 1989, there was a split in the award and a separate award was granted for the metal, engineering and trades working in the construction industry with the National Metal and Engineering Onsite Construction Award 1989 being granted, and that award is commonly

referred to as the MECA. The MECA retained the lift industry allowance in the same form.

PN459

DEPUTY PRESIDENT HAMILTON: We have read this, sir. There is no point, no need to read it all out word by word. I was following you as you read it.

PN460

MR NGUYEN: Sure, thank you.

PN461

DEPUTY PRESIDENT HAMILTON: We have read it. So make that assumption.

PN462

MR NGUYEN: Thank you, Deputy President. So the second reason is that the reasons which were included in the original decision for the inclusion of the lift allowance hasn't changed. In fact, looking at the buildings outside, there's an influx or increase in buildings which do have lifts. The third reason is that there is going to be a potentially significant reduction in the comparative value of award entitlements for these workers as compared to average wages if the lift industry allowance is reduced. The current rate is $119.75 per week.

PN463

VICE PRESIDENT HATCHER: Sorry, Mr Nguyen, what is the current allowance?

PN464

MR NGUYEN: 41, from my recollection. I don't have it in front of me.

PN465

VICE PRESIDENT HATCHER: 42, yes.

PN466

MR NGUYEN: Sorry, 42. Yes, so the current allowance is at clause 42 which indicates at 42.2 that it should be paid at the amount of 14.8 per cent of the standard rate per week. We calculated that to amount to $119.75 per week. So removal of an entitlement of that size would be a significant reduction in wages for those workers in the lift industry.

PN467

VICE PRESIDENT HATCHER: Sorry, in clause 40.2A it's expressed as a dollar amount.

PN468

MR NGUYEN: I'm not sure which version. I'm just referring to the version which is on the Commission's website.

PN469

DEPUTY PRESIDENT HAMILTON: It's 14.8 per cent.

PN470

DEPUTY PRESIDENT GOSTENCNIK: That's the exposure draft.

PN471

VICE PRESIDENT HATCHER: I see.

PN472

DEPUTY PRESIDENT HAMILTON: It's 14.8 per cent.

PN473

VICE PRESIDENT HATCHER: Yes, I was looking at the exposure draft, Mr Nguyen, sorry.

PN474

MR NGUYEN: Thank you, your Honour. And the final reason is, I mean, I accept that the AMWU wasn't present for the entirety for the hearings which were conducted earlier, but we did do a search of the transcript to identify if there had been any discussion about the lift industry allowance or why it was being proposed to be deleted. But we haven't been able to identify anything on the public record about why this was being proposed or what the merit arguments might be. So we do respectfully suggest that if it is to be deleted that the Commission should disclose for comment by the parties the merit arguments or the underlying basis for the proposal to delete the allowance which is a very significant amount.

PN475

VICE PRESIDENT HATCHER: Well, it's about simplification.

PN476

MR NGUYEN: I think in the context of it being about simplification, I would just put that it is a very significant amount to be reducing from an award (indistinct) employees' wages per week without actually knowing what the proposed change would be with the compensation that might be given to employees as a result of removing the lift industry allowance. If it's about pushing the parties to come together to discuss in the context of allowances being rationalised what the dollar figure should be, all I can submit is that there's a lot of sleeping dogs in this industry and I can only see the way forward for the Commission rationalising this significant amount of awards to actually conduct a review by visiting work sites and reviewing individually each disability allowance in the context of the current environment. I don't see that there's going to be a consensus between the parties about what might be an appropriate consolidated amount for a general industry allowance. And the only way for the Commission to get access to the evidence that it needs to support such a proposition would be to do a review of the industry conditions.

PN477

VICE PRESIDENT HATCHER: Mr Nguyen, is this allowance paid in substitution of the general industry allowance or in addition?

PN478

MR NGUYEN: Your Honour, I understand that it is in addition if you're in the lift industry allowance, but I can just check that with our organisers to confirm whether that's the case.

PN479

VICE PRESIDENT HATCHER: All right.

PN480

MR NGUYEN: If it's proposed that that's not the case, I can just check that proposition.

PN481

VICE PRESIDENT HATCHER: So does this award apply to the maintenance of a lift in an existing building?

PN482

MR NGUYEN: There's a specific definition at 42.2A which identifies that it's associated with the installation, major modernisation, servicing, repairing and/or maintenance of lifts and escalators and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform any such work. And at paragraph (c), it identifies that an employee in respect of the lift industry allowance prescribed by A, will not be entitled to any of the special rates prescribed in clause 22.

PN483

DEPUTY PRESIDENT HAMILTON: That means it's an alternative to the industry allowance.

PN484

MR NGUYEN: Yes.

PN485

DEPUTY PRESIDENT HAMILTON: And that both are not paid.

PN486

MR NGUYEN: Yes.

PN487

DEPUTY PRESIDENT HAMILTON: So it's just another form of industry allowance.

PN488

MR NGUYEN: Yes, yes, yes, your Honour. Sorry, it's in addition. Sorry, I retract that.

PN489

VICE PRESIDENT HATCHER: So clause 22 are the special rates, but the industry grounds are somewhere else, isn't it?

PN490

MR NGUYEN: Clause 22 are the special rates, that's correct. The industry allowance in a separate clause which is 21.2 which is outside of clause 22. The

special rates are insulation, hot work, cold work, confined space, swing scaffold, et cetera, 22.

PN491

VICE PRESIDENT HATCHER: If you go back to my question, this award does cover, does it, the maintenance of a lift in an existing building?

PN492

MR NGUYEN: That's my understanding, your Honour. There's a corresponding lift industry allowance in the Manufacturing Award which would apply in the circumstances where the Building Award wouldn't apply.

PN493

VICE PRESIDENT HATCHER: Right. So under the Manufacturing Award, you obviously wouldn't get a general construction industry allowance, you just get the lift industry allowance of the same amount. Is that the way it works?

PN494

MR NGUYEN: I would need to take that question on notice, your Honour, but I did understand when I had looked at the issue that there were issues in relation to the scope between the two awards where there may be lift maintenance provided under each, but in terms of the specifics of what might apply, I have to take that question on notice.

PN495

VICE PRESIDENT HATCHER: Anything further?

PN496

MR NGUYEN: No, your Honour.

PN497

VICE PRESIDENT HATCHER: All right, thank you. All right, Mr Schmitke, the next issue is living away from home and distant work entitlements.

PN498

MR SCHMITKE: Yes, thank you, your Honour. If I might just beg the indulgence of the Commission for one moment, I just would like to reiterate that from Master Builders' perspective it has been our submission and position through the entire proceeding that we consider that the categorisation of allowances by type, e.g. skill, disability, expense, would be of value and a significant improvement to the award as it currently stands. We haven't gone any further to suggest that there should be a subsequent consolidation of those particular allowances because as, I think, all of the parties have identified, there's potential pitfalls, swings and roundabouts, losers, winners, with all of those.

PN499

VICE PRESIDENT HATCHER: I think we understand that perfectly, Mr Schmitke.

PN500

MR SCHMITKE: Yes. But, I suppose, the point, and the reason I make this brief submission, is to suggest that the grouping facilitates that outcome if the award users so desire it without necessarily imposing it upon those covered by the award. That is the only comment I'd seek to make. In relation to the living away from home distant work provisional provision, we would rely on our submissions as to this clause as previously filed. We would simply just highlight the problem that we have noted in those submissions regarding the change of address by agreement and a second item which is the limitation that the provisional clause imposes on the employer's abilities to determine whether or not information provided is fraudulent.

PN501

We have advanced a slight alternative to overcome those issues and that alternative is attachment B to our submission. I also would perhaps ask the Commission to note that the CFMEU's submissions at paragraph 30, they do concede that the provision clause goes some way to addressing their concerns about gate start. But, of course, they suggest an alternate wording. It is in our recollection that the employers conceded there was a problem about this issue in the first instance, but should the Commission find otherwise, we would submit that it's not necessary to adopt the CFMEU's proposed change to that clause.

PN502

We also disagree with the CFMEU's contention that the interpretation of the phrase "contemporary community living standards" within the provisional clause would give rise to any dispute. In fact, to the contrary, we take the view that it would address the need to ensure appropriate accommodation is required and provided without the rigidities and impracticalities and the cost associated with the claims originally advanced by the CFMEU, whilst also ensuring the award retains the safety net provision, that is contemporary now and can retain contemporary.

PN503

VICE PRESIDENT HATCHER: So with your attachment B, so what's different in that to the proposed clause?

PN504

MR SCHMITKE: The differences are that we have retained at 24.2A, the last sentence: "No subsequent change of address will entitle an employee to the provisions of this clause unless an employer agrees."

PN505

VICE PRESIDENT HATCHER: Yes.

PN506

MR SCHMITKE: And in terms of establishing whether or not the information provided by an employer or, sorry, by an employee to an employer is correct. There is a limitation in terms of the provisional clause regarding whether or not the employer can seek to ascertain or ask for information from the employee. That questions the veracity of the documents they originally provided and, therefore, it would be impossible under the provisional clause for an employer to actually demonstrate that the information initially provided had been provided in a

fraudulent manner and, therefore, the 24.2D, in our suggested amendment, encompasses an alternative which is the employer is not liable to pay. If the employees fail to provide documentary proof or that documentary proof is false then it removed the restriction on the employer seeking or having the capacity to question the veracity of the documents so provided.

PN507

VICE PRESIDENT HATCHER: All right, thank you. Ms Adler?

PN508

MS ADLER: I have nothing to add, your Honour.

PN509

VICE PRESIDENT HATCHER: Mr Angelopoulos?

PN510

MR ANGELOPOULOS: Nothing really, just to point out that the proposal really refer to as a whole that the way the living away from home allowance in total operates in terms of the documentation in the evidence, but that's all in our submissions.

PN511

VICE PRESIDENT HATCHER: Thank you, Ms Paul.

PN512

DR PAUL: We have no objections to the clause as drafted, your Honour. We just, on reflection of the comments made by the MBA, we do agree that there might be some clarity that could be gained by including the words around subsequent change of address. We see that as not - when I initially read that, your Honour, I thought that that was already taken care of. It was only at the point of engagement, but certainly on reviewing the MBA's submission, we see some utility in adding those words or words similar to that characteristic. We are opposed to the CFMEU's position regarding the inclusion of the words "undue pressure". We say that's unwarranted. I think they have lowered the standard of what's to be - in terms of this issue about employees somehow being pressured or otherwise, you know, forced into positions of providing false information, et cetera.

PN513

We say there is insufficient evidence to demonstrate that occurs in the first place, but it should be at a fraudulent standard which is where the employee is held bound to. And the issue about undue pressure we say is unwarranted and seek that the Commission doesn't accept those provisions. And, further, in relation to the AWU alternate provisions, that alternate clause that they have proposed at their clause 12, we again say that we have no objection to the Commission's proposed wording in this regard and say that theirs doesn't meet the appropriate requirements.

PN514

VICE PRESIDENT HATCHER: Thank you.

PN515

DR PAUL: Thank you, your Honour.

PN516

VICE PRESIDENT HATCHER: Mr Maxwell.

PN517

MR MAXWELL: Thank you, your Honour. Your Honour, we have dealt with the issue in our written submission of 15 September. I don't think there's much that I can really add. We do have some concerns about the wording in proposed 24.1 and 24.2 which we have addressed in our written submission. Our main issue, really, with the proposed clause is in regard to 24.3 and the entitlement and we believe that does address the issues that we have raised in our major submissions that we have made in the main proceedings. And so we rely on those submissions.

PN518

VICE PRESIDENT HATCHER: Thank you, Mr Crawford.

PN519

MR CRAWFORD: We support the CFMEU's submissions, your Honour. We have, as the AIG indicated, provided some proposed amended wording for clause 24.3B. Sorry, the concern that we have identified was whether the reference to contemporary community living standards was intending to be living standards in a particular area which, obviously, might be quite remote, or whether the intent is that the - - -

PN520

VICE PRESIDENT HATCHER: Well, we don't mean a lean-to.

PN521

MR CRAWFORD: Sorry?

PN522

VICE PRESIDENT HATCHER: We don't mean a lean-to.

PN523

MR CRAWFORD: In any event, we understood the idea would be the facilities are in accordance with contemporary living standards but you have some regard to the isolation location as opposed to facilities being in accordance with the living standards that might exist in that particular remote area.

PN524

VICE PRESIDENT HATCHER: So how do we rectify that?

PN525

MR CRAWFORD: Well, I mean, I considered the amended wording that we included made that issue clearer.

PN526

VICE PRESIDENT HATCHER: Now, just remind me what that is.

PN527

MR CRAWFORD: So it's our submission dated 15 September, paragraph 12.

PN528

DEPUTY PRESIDENT HAMILTON: 18 September.

PN529

MR CRAWFORD: So we just made a minor change so the wording was - - -

PN530

VICE PRESIDENT HATCHER: You took out "community". I mean, you've reordered it, but on that issue you have just taken out the word "community".

PN531

MR CRAWFORD: I think the critical change is: "In accordance with contemporary living standards taking account of limitations arising from the location."

PN532

DEPUTY PRESIDENT HAMILTON: You prefer "general living standards" or living standards having regard to the problems of the area which may be special, such as heat. It may not help you.

PN533

MR CRAWFORD: I don't know. I mean, general living standards mean accommodation is pretty - I mean, sorry, air-conditioning is pretty prevalent, I would say, in contemporary Australia, generally.

PN534

VICE PRESIDENT HATCHER: Yes, all right.

PN535

MR CRAWFORD: Nothing further, thank you.

PN536

VICE PRESIDENT HATCHER: Anything from you, Mr Nguyen.

PN537

MR NGUYEN: No, your Honour, we support the CFMEU and the AWU submissions.

PN538

VICE PRESIDENT HATCHER: All right. And the final issue is hours of work, Mr Schmitke.

PN539

MR SCHMITKE: Thank you, your Honour. As our submission outlines, we consider that the provisional clause to be one which is structured in such a way as to be far less complex than the current provision. It removes existing confusion and provides an interpretation that minimises the chances of dispute and addresses a large number of the other range of matters that we identified during earlier stages of the proceeding. We have in our submission highlighted one matter

which is that requiring 48 hours' notice to be provided to work an RDO when unforeseen or emergency circumstances.'

PN540

VICE PRESIDENT HATCHER: Sorry, where is that in the clause?

PN541

MR SCHMITKE: That is in clause 33A(v), capital A.

PN542

VICE PRESIDENT HATCHER: (v), capital A, yes, all right.

PN543

MR SCHMITKE: Now, our submissions set out that it's perhaps inconsistent to have an emergency or an unforeseen delay known 48 hours' in advance. It's our view that - - -

PN544

DEPUTY PRESIDENT GOSTENCNIK: That might be right where we now in the draft propose that an RDO can be rostered on any particular day. But as things presently stand, when RDOs are rostered on a Monday, the reality is that 48 hours' notice would be given, wouldn't it?

PN545

MR SCHMITKE: I'm sorry, I missed that last part, your Honour.

PN546

DEPUTY PRESIDENT GOSTENCNIK: The present circumstance under the award where RDOs are required to be rostered on a Monday, the reality is that 48 hours' notice would be given as a matter of - - -

PN547

MR SCHMITKE: Yes, yes, yes, that's the case.

PN548

DEPUTY PRESIDENT GOSTENCNIK: And the problem arises because we have endeavoured to accommodate the request for flexibility of rostering.

PN549

MR SCHMITKE: Well, that might well be the case, your Honour. What I would say, though, is that we have indicated in our submission at paragraph 5.5 that perhaps the 48-hour caveats only apply to the circumstances in the proposed subclause 33A(v)A - - -

PN550

VICE PRESIDENT HATCHER: Sorry, 33 what? 33A(v)?

PN551

MR SCHMITKE: Capital A, subclause 3 and 4. Sorry, 1 and 2, and not apply to 3 and 4.

PN552

VICE PRESIDENT HATCHER: I see.

PN553

DEPUTY PRESIDENT HAMILTON: Is that the only issue you seek to raise?

PN554

MR SCHMITKE: It is. If I might - - -

PN555

DEPUTY PRESIDENT HAMILTON: Orally, I mean, orally, yes.

PN556

MR SCHMITKE: Yes, orally. I might just address some of the CFMEU's submissions while I'm on my feet. I would urge the Commission to reject the submissions that they have made in this respect. One of their arguments, for example, is that the provisional clause removes the certainty of when RDOs are to be taken and what we would say is that that argument and the basis for it, the evidence is our earlier submissions insofar as the complex nature of the existing clause and the problems arising from the interpretation of that clause on the ground.

PN557

It contradicts some of their other arguments including that employees shouldn't be able to determine RDOs by giving seven days' notice in writing before a 20-day cycle even commences. The effect of that provision clause, if I'm to think of next year, would mean that in the second-last week of January of next year, you could be told that you're having an RDO on 2 March. We would say that that provides ample certainty as to when an RDO might be taken. And we would urge the Commission to resist their submissions. We would say that the provisional clause goes a long way to far better meeting the objects expressed in section 134 and that's all that we would like to say on that matter.

PN558

VICE PRESIDENT HATCHER: Thank you. Ms Adler.

PN559

MS ADLER: Thank you, your Honour. We support the proposed provision. We made an application in relation to fixing the scheduling of RDOs and the banking of RDOs, so we welcome the proposed provision. We do in our submission go into a little bit of detail about how the entitlement to the RDO might be paid either on termination or where a four-week cycle is not worked. Our view is that we prefer the current provision which talks about pro rata entitlements. And I won't go into it because we have put it in our written submission, but we have also got the payment of wages Full Bench dealing with payments on termination. So some elements of that may be better dealt with in some part of those proceedings or subsequent to those proceedings the issues overlap and this Bench might be able to look at, I think it's just the first scenario that I have outlined in the written submission which basically just deals with pro rata accrued entitlements while the employment relationship continues on.

PN560

DEPUTY PRESIDENT GOSTENCNIK: But, Ms Adler, if, as is set out in 33A(1), 0.4 of one hour worked on each day accrues to an RDO, why is it necessary to say that there will be a pro rata entitlement paid out on termination? What's paid on termination is that which is accrued?

PN561

MS ADLER: That would be our view, your Honour.

PN562

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN563

MS ADLER: But the provisional view does attempt to address - well, my understanding of that, of the subclause 7 of the provisional view.

PN564

DEPUTY PRESIDENT GOSTENCNIK: (vii).

PN565

MS ADLER: (vii), yes, sorry, apologies.

PN566

DEPUTY PRESIDENT GOSTENCNIK: That's right.

PN567

MS ADLER: Attempts to deal with how particularly, I understand, in circumstances of a banked RDO not having been worked and how you pay that on termination. But it would seem to attempt to address existing clause 33.1(v) which deals with a pro rata entitlement.

PN568

DEPUTY PRESIDENT HAMILTON: It may well cover it, I'm not sure.

PN569

VICE PRESIDENT HATCHER: Sorry, (iv) you meant, not (v), was it, sorry?

PN570

MS ADLER: So my understanding of - - -

PN571

VICE PRESIDENT HATCHER: This is the RDO banking clause?

PN572

MS ADLER: Well, of the provisional view.

PN573

VICE PRESIDENT HATCHER: Yes.

PN574

MS ADLER: It seems to be a general provision that would apply to an entitlement on termination to RDOs, broadly speaking.

PN575

VICE PRESIDENT HATCHER: Yes, sorry, I'm just trying to find which particular paragraph of RDO banking you're taking issue with.

PN576

MS ADLER: I'm not necessarily taking issue, your Honour. I'm just suggesting that the proposed provision is more complex than what we currently have now and that it is taken that if you are terminated and haven't worked the RDO, you are paid out whatever you have accrued and that I have identified four, I guess, scenarios of potential circumstances in which there may be a situation where there will be either banked RDOs that need to be paid on termination or a full four-week cycle hasn't been paid, so there's a certain number of hours accrued and what to do with those on termination, as opposed to the situation where a part-time employee may be accruing hours towards RDOs and that's just paid on a pro rata basis then. Not to overcomplicate the issue, but, you know, I guess our view is that the current provision deals with a big issue raised by subclause (7) of the provision view.

PN577

So just moving on to some elements of the provisional view that we have raised as having concerns with, the first is the deletion of current clause 33.1(7) which allows for an agreement to work other than on a rostered day off cycle. So my understanding of the provisional view is they have been removed, so there is no option then to work and be paid for a 38-hour week. The second concern we have, and we have outlined in our submission, is the introduction of the new requirement for a written roster to be provided. The 48 hours' notice has already been dealt with. And then we did raise in our written submission a concern with the use of the word "averaged" in brackets. So in the proposed provision at - - -

PN578

DEPUTY PRESIDENT HAMILTON: It's normal for rosters to be required in awards, isn't' it?

PN579

MS ADLER: Well, I mean - - -

PN580

DEPUTY PRESIDENT HAMILTON: You're replacing the calendar system with something else, so you need something that provides some sort of certainty in the approach across awards usually is a roster.

PN581

MS ADLER: I take your point, your Honour. I guess for our members in the residential sector covered by the award, you know, the - - -

PN582

DEPUTY PRESIDENT HAMILTON: I take it you don't prefer the calendar, do you?

PN583

MS ADLER: No, we don't, no, and that would not necessarily apply to our sector.

PN584

DEPUTY PRESIDENT HAMILTON: Well, then that can't be an alternative.

PN585

MS ADLER: Well, the alternative would be the fixing of the RDO in accordance with the award and we would say, you know, obviously an employee needs to know when they need to work. But, you know, where you are working the same roster all the time should it need to be provided every cycle, seven days before the cycle where it is always going to be the same. For the residential construction sector there's not, you know, hours wouldn't vary that much. There's the RDO, if it's used, wouldn't be that.

PN586

DEPUTY PRESIDENT HAMILTON: Well, the part-time work clause of the contract is supposed to state the regular hours.

PN587

MS ADLER: Yes.

PN588

DEPUTY PRESIDENT HAMILTON: So is that the sort of approach you might support?

PN589

MS ADLER: I guess it would depend on the wording. But I take the point about employees obviously knowing when they're expected to work. The concern is the particular, you know, requirement, seven days that, you know, does published include being able to send it by email to employees? Does it have to be put on a noticeboard somewhere? Does it have to be physically handed to them? You know - - -

PN590

DEPUTY PRESIDENT HAMILTON: Well, all those are a problems that are dealt with across the economy.

PN591

MS ADLER: Yes, I understand, yes.

PN592

DEPUTY PRESIDENT HAMILTON: There is nothing unusual about it.

PN593

MS ADLER: No, but I guess the term used in the provision is "published". I don't know if that's a term that would be used more broadly in other sectors in relation to these sorts of things. So, I guess, it's just from a practical small business perspective where you might only have a couple of employees, you know, what's practical, I guess, is the question we ask ourselves.

PN594

DEPUTY PRESIDENT HAMILTON: Thanks.

PN595

MS ADLER: So the use of the word "average" in clause 33A of the proposed provision, we wouldn't want any confusion to arise where there might be an impression that you can actually have an averaging of hours option. My reading of that is that that's not what is being put. We proposed a provision to average hours and, you know, I don't know that it necessarily adds anything to the clause. Obviously, we have a different view. So we just raise it as more of a drafting issue than anything else.

PN596

DEPUTY PRESIDENT GOSTENCNIK: Well, how else does one describe what actually happens?

PN597

MS ADLER: Well, I think it does it without those words or even just removing the word "average". It would be 38 per week over a 20-day four-week cycle to allow for the accrual and taking of rostered days off worked between 7 am and 6 pm. Finally, just to respond to some of the comments raised in the CFMEU submission, they claim that what is being proposed is a significant change, but as we discussed during proceedings, distant work employees have been able to do this for I don't know how long, so it's not a hugely foreign concept to the industry.

PN598

Then, you know, claims that it would give absolute powers to employers to set whatever hours and whatever RDO cycle they want, I mean, clearly, the provision doesn't do that. Clearly, there are safeguards to ensure that employees have notice of when they're required or what their working hours are and, you know, on the proposed provision that that be provided in writing. So I think that the notion that the employer is going to, you know, it doesn't benefit the employer for the employees to not know or understand what the expectation is in relation to working hours and when those RDOs are. That's all the comments I have, thank you, your Honour.

PN599

VICE PRESIDENT HATCHER: So, Ms Adler, just about the roster requirement, so are you reading the clause as if it requires a roster to be published for each pay cycle?

PN600

MS ADLER: Yes, well, before the commencement of each and every 2-day four-week cycle.

PN601

VICE PRESIDENT HATCHER: Cycle, yes. I mean, it seems to me that, for example, if you had an annual roster or a permanent roster, as long as it's covering every single pay period, as long it's issue seven days before any particular cycle, that would answer the requirement.

PN602

MS ADLER: Yes, yes.

PN603

VICE PRESIDENT HATCHER: That means you don't have to do a roster every pay cycle.

PN604

MS ADLER: Keep doing it, no.

PN605

DEPUTY PRESIDENT GOSTENCNIK: But you do when you're varying as you wish to vary the days on which the RDO is taken.

PN606

MS ADLER: Yes, yes.

PN607

DEPUTY PRESIDENT GOSTENCNIK: And that's its purpose.

PN608

MS ADLER: You would need to advise the employees you are going to change whatever that roster was that you put out in January that year and you get to halfway through and things change.

PN609

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN610

MS ADLER: But the concern was that irrespective of the fact that it was the same, you would need to be issuing rosters before the commencement of each cycle.

PN611

DEPUTY PRESIDENT GOSTENCNIK: But if the same roster applied each 20-day cycle, then putting it out once and saying it will apply for the year would - - -

PN612

MS ADLER: Or unless otherwise advised or something.

PN613

DEPUTY PRESIDENT GOSTENCNIK: Well, then you'd have to put out another one seven days before it came into operation.

PN614

MS ADLER: Well, I guess, I'm sort of suggesting that by exception, you would need to publish any roster if there was a change.

PN615

DEPUTY PRESIDENT GOSTENCNIK: That's what I'm saying.

PN616

MS ADLER: Yes.

PN617

DEPUTY PRESIDENT GOSTENCNIK: Seven days before it came into effect.

PN618

MS ADLER: Yes, yes, I understand, your Honour.

PN619

VICE PRESIDENT HATCHER: I mean, the point is if you published your 2018 roster now and it never changed, you do it once and you've satisfied this requirement.

PN620

MS ADLER: Yes, that would be our preferred approach, your Honour.

PN621

VICE PRESIDENT HATCHER: Well, I think it already says that. That's what it says. Doesn't it?

PN622

DEPUTY PRESIDENT GOSTENCNIK: If you publish it in January and it operates in February, March, April, May, June, July, August, September, then you have satisfied the seven-day requirement, haven't you, by publishing it in January?

PN623

DEPUTY PRESIDENT HAMILTON: You can, in effect, your own calendar.

PN624

MS ADLER: Yes, your Honour, and we support that.

PN625

DEPUTY PRESIDENT GOSTENCNIK: Without the CFMEU logo.

PN626

DEPUTY PRESIDENT HAMILTON: Or with it, if you wish

PN627

VICE PRESIDENT HATCHER: The HIA (indistinct).

PN628

MS ADLER: I guess our concern is that on the face of it that's not absolutely clear.

PN629

VICE PRESIDENT HATCHER: All right.

PN630

MS ADLER: Thank you, your Honour.

PN631

VICE PRESIDENT HATCHER: Thank you. Mr Angelopoulos.

PN632

MR ANGELOPOULOS: I don't want to rehash all the issues. We support the flexibility. The issue about written rosters, I think the exchange that has just happened has actually clarified similarly our concerns. The issue about the

emergency - when the emergency system pointed out hours within notice, of course, if it's done on the Monday then 48 hours is practical, but if it's not fixed on the Monday every time then it becomes a bit more problematic. In terms of the operating under the non-RDO system, I support what Ms Adler says because we do have members that do operate under the non-RDO system. And, finally, just on the banking of RDOs, I suggest that if there's more than two RDOs, there can be two or more RDOs are going to be taken, then there needs to be some agreement reached about, you know, when they're taken because it may have an impact on the business. That's all.

PN633

VICE PRESIDENT HATCHER: Thank you. Ms Paul?

PN634

MS PAUL: Your Honour, in respect of our two major issues was really about the 48 hours, I believe that's already been addressed. The other issue, we agree with the submissions that have been put regarding the reinsertion of the terms from the current award without agreement on working other than a rostered day off cycle to facilitate a process of an employer that doesn't - and employees that don't choose to utilise the rostered day off mechanism in terms of the hours of work. And, finally, your Honour, we say that the detrimental submission - the submissions regarding detriment to employees raised by the CFMEU in their submission is really unwarranted and I think the terms absolute power isn't actually provided to employers in terms of the proposed clause. We are otherwise quite happy with the approach. Thank you, your Honour.

PN635

VICE PRESIDENT HATCHER: Thank you. Mr Maxwell.

PN636

MR MAXWELL: Thank you, your Honour, your Honours and Commissioners, we deal with the issue of hours of work in our 15 September submission. We are opposed to the provisional clause that has been put forward by the Full Bench. As the other parties have indicated, we believe that the proposal will be detrimental to employees and that their ability to plan for the year in terms of when they are working and what days they can spend with their families will be affected by the proposal clause. So it will be subject to a seven-day notice by the employer of what days they will be working in the next four-week period and that may change from a day where everyone takes the day off or a day which is where the individual may be rostered to take a separate day off.

PN637

Can I say that overall our view is that the proposed clause adds - is perhaps more complex than the existing provision and that there may be an alternate way of dealing with a number of the concerns with minor modifications to the exhausting clause. My understanding is that the employers' main complaint is that they don't want a fixed RDO system. They want the ability to allow for some flexibility. Our position is that any such flexibility should require agreement between the employer and the employees.

PN638

Currently, the award clause in 33.1A(2) allows for agreement on alternate RDOs and it currently has a requirement for majority agreement. A simple way of addressing the individual agreement would be by varying that clause to also allow by agreement by an individual employee. That may address a number of the concerns that have been raised by the employers in these proceedings. And then you then have, if you retain 33.1A(vii) the agreement on working other than the rostered day cycle, that allows for other arrangements to be made, to be worked by agreement with the employees.

PN639

So we say that if the Full Bench is against us and decides they want to vary the clause, our suggestion is that there are changes that could be made to the existing clause that have minimal changes but which address a number of the concerns that have been raised. And, I mean, currently under the award, if the employer requires an employee to - - -

PN640

DEPUTY PRESIDENT HAMILTON: So you're proposing a clause which is just as flexible as this clause.

PN641

MR MAXWELL: That's correct.

PN642

DEPUTY PRESIDENT HAMILTON: You think.

PN643

MR MAXWELL: Yes, because currently the award says if the employer requires you to work on an RDO, they don't have to give the 48 hours' notice. They can notify you the day before that they require you to work the RDO. Now, currently under the award, if the employer reaches agreement with the employee, then the payment is for their normal ordinary hours of work and they get a substitute day. Under the award currently, if the employer requires you to work the RDO and you have to work the RDO but you don't reach agreement, well, then in addition to your accrued entitlements, which you have already accrued over the hours you worked, you are then paid penalty rates for being required to work on that day. And that part is not reflected in the model clause because there's no mention of the accrued entitlements. But we believe with some minor modifications - - -

PN644

DEPUTY PRESIDENT HAMILTON: Well, you have already made that point, Mr Maxwell.

PN645

DEPUTY PRESIDENT GOSTENCNIK: Mr Maxwell, what is wrong with an employee particularly in the small business sector of having the flexibility of rostering its workforce across a 20-day cycle in a manner that allows the employer to operate on each of the 20 days and gives the employee a day off with a significant period of notice? What's inherently wrong with that? The employee gets the day off. They work a 38-hour week. The employer gets to operate across 20 days, instead of 29.

PN646

MR MAXWELL: Our view on that is, well, that should be by agreement between the employer and the individual employee as to what those days will be.

PN647

VICE PRESIDENT HATCHER: So to be clear, absent agreement with employees, you want a clause which effectively requires the employer to shut down every fourth Monday?

PN648

MR MAXWELL: Well, that is the way the industry currently operates. I mean, I suppose I am having difficulty in applying what is being suggested to my experience of the industry because we are not talking about a fixed establishment where an employer may keep production - want to keep production going six days a week. We are talking about construction sites. Most of the employers when they go to the construction site, they don't dictate the hours of work. They're dictated to by the person who has control of the site.

PN649

DEPUTY PRESIDENT GOSTENCNIK: That's not going to change in the construction sector, most of which is governed by enterprise agreements, the owner or occupier or the project manager, the principal contractor, will decide the working hours. But in a sector where the employer is award reliant and where there aren't enterprise agreements, why should there be a limit on an employer's capacity to operate its business across 20 days in circumstances where each of the employees employed will still be entitled to an RDO once every 20 days, just not together. What's inherently wrong with that?

PN650

MR MAXWELL: Well, the solution that we put forward doesn't preclude that happening.

PN651

DEPUTY PRESIDENT HAMILTON: There has to be agreement.

PN652

MR MAXWELL: There has to be agreement, yes.

PN653

DEPUTY PRESIDENT GOSTENCNIK: Under your proposal.

PN654

MR MAXWELL: Under our proposal, yes.

PN655

DEPUTY PRESIDENT HAMILTON: If there's no agreement, then it doesn't provide flexibility, does it?

PN656

MR MAXWELL: It doesn't provide the flexibility, but it removes a current protection for employees, but that they have certainly as to what days they have off.

PN657

DEPUTY PRESIDENT GOSTENCNIK: But it is also a productivity inhibitor. It's a productivity inhibitor. It prevents a significant sector of the small business population operating in small construction areas from operating its business to its full capacity. It just doesn't make a lot of sense.

PN658

MR MAXWELL: Well, your Honour, I disagree, and my concern is that this removes any certainty for employees as to when they will take RDOs.

PN659

DEPUTY PRESIDENT HAMILTON: Have you seen the roster provisions?

PN660

MR MAXWELL: Yes.

PN661

DEPUTY PRESIDENT HAMILTON: They are similar to what applies in other sectors. They provide certainty.

PN662

MR MAXWELL: Well, I don't know, but I am aware that in other sectors that there are disputes in regard to rosters and how rosters are arranged and what notice people get given. I would hate to see the situation that I see in people that work in hospitality where people are given a day's notice of the change of their roster or - - -

PN663

DEPUTY PRESIDENT GOSTENCNIK: Well, imagine in hospitals if they shut down every 20th day because all of the nurses at the place needed an RDO. I mean, it doesn't make - and large contractors who have enterprise agreements and they want to run their sites a particular way, that's a matter for them, they reach an agreement and so forth. But here we're talking about something that's imposed by an arbitral tribunal which principally affects a small proportion - the small businesses of this sector. I can't see how we should impose a limit which doesn't take away a right of an employee to have an RDO, but gives the employer sufficient flexibility to run its business for 20 days in a four-week cycle instead of 19.

PN664

MR MAXWELL: Well, I'm sorry, but I fail to see anything in this clause that gives an employee a right to refuse on a day that the employer wants them to work.

PN665

DEPUTY PRESIDENT HAMILTON: Why did you say that your proposed clause was as flexible as this one when it obviously isn't it? You told me that it provided the same flexibility, but you don't, do you? That's not true.

PN666

MR MAXWELL: We don't provide - well, we don't provide the flexibility for the employer to dictate what days the employees can have off. Yes, we accept that.

PN667

DEPUTY PRESIDENT HAMILTON: So you accept that.

PN668

MR MAXWELL: But our view is that employees should have a say in what that day is going to be.

PN669

DEPUTY PRESIDENT GOSTENCNIK: Well, that's so now, under the award, they're told it's the Monday. They don't get a say. We determine that by making the award.

PN670

MR MAXWELL: Well, and that is the way that the industry wanted it to work when the 38-hour week was introduced. But it also allowed for agreement to work the RDO. Yes, it used to be a majority. Well, sorry, it's currently the majority agreement to change the day, but it's also the majority agreement to change to a different system of working the hours non-RDO.

PN671

DEPUTY PRESIDENT HAMILTON: We're not bound by the 38-hour week decision of 30 years ago, Mr Maxwell.

PN672

MR MAXWELL: Sorry, your Honour?

PN673

DEPUTY PRESIDENT HAMILTON: The 38-hour week was introduced a long time ago.

PN674

MR MAXWELL: Yes.

PN675

DEPUTY PRESIDENT HAMILTON: We are not bound by the decision of 25 years ago.

PN676

MR MAXWELL: You are not bound, but our position is that we believe that there needs to be a proper merit based reason to move away from that system.

PN677

VICE PRESIDENT HATCHER: I would have thought the merits based reason is that we shouldn't be requiring businesses to shut down every four weeks.

PN678

MR MAXWELL: Well, all I can say, your Honour, is that there is requirements under the Act to take into account fairness to both the employer and the employees. Our view is that removing any requirement on employers to reach agreement with their employees on what their normal rostered day off will be is an unfairness to employees.

PN679

VICE PRESIDENT HATCHER: Just so I am clear, so the proposed clear requires there to be a roster so that you will know when your RDO is on and then there is some capacity to call people in on RDOs, but there's a penalty rate that's applicable when that occurs. Sow hat's unfair about that?

PN680

MR MAXWELL: Well, there is two things that unfair with that. That again means that there is nothing in here that gives the employee the right to refuse it. And there is a removal of the accrued entitlements.

PN681

VICE PRESIDENT HATCHER: Removal of the accrued entitlements?

PN682

MR MAXWELL: Yes, because if you look at the proposed 33A(v)(b), it just says that: "An employee who works on an RDO is required by" - - -

PN683

VICE PRESIDENT HATCHER: Wait a minute. Sorry, I think one thing I'm persuaded about is we will have to improve the numbering of this clause.

PN684

COMMISSIONER HARPER-GREENWELL: Yes.

PN685

VICE PRESIDENT HATCHER: 33, what?

PN686

MR MAXWELL: 33 - - -

PN687

DEPUTY PRESIDENT GOSTENCNIK: Page 6.

PN688

MR MAXWELL: Yes, page 6, (v) and B, (B).

PN689

VICE PRESIDENT HATCHER: Yes.

PN690

MR MAXWELL: "An employee who works on an RDO is required by the employer to be paid penalty rates to prescribe (indistinct) work in clause 37 penalty rates."

PN691

VICE PRESIDENT HATCHER: Yes.

PN692

MR MAXWELL: There is no mention of the accrued entitlements. It doesn't say that employees are entitled to a substitute day off in that situation and it doesn't mention what happens to their accrued entitlements. Currently, under the award, it says: "In addition to their accrued entitlements, they are paid the penalty rates."

PN693

VICE PRESIDENT HATCHER: Just remind me, what's the Saturday penalty rate?

PN694

MR MAXWELL: Saturday penalty rate is time and a half for the first two hours, then double time, except if the work is after 12 o'clock, it's all double time.

PN695

VICE PRESIDENT HATCHER: But, effectively, that means it's paid as overtime.

PN696

MR MAXWELL: It's paid as overtime, yes.

PN697

VICE PRESIDENT HATCHER: So if you were called in to do additional work and it's paid as overtime, why do you get another day as well?

PN698

MR MAXWELL: Well, because you have already accrued that time.

PN699

VICE PRESIDENT HATCHER: Yes, all right.

PN700

MR MAXWELL: Because otherwise it means you're being paid at single time.

PN701

VICE PRESIDENT HATCHER: Yes, all right, I get that.

PN702

MR MAXWELL: Your Honour, I don't think I can take it any further. I think the position of the CFMEU is well known in regard to this clause.

PN703

VICE PRESIDENT HATCHER: All right, thank you. Mr Crawford.

PN704

MR CRAWFORD: Your Honour, just on the payment for an RDO issue, I mean, in our submission at paragraph 16, we provided some calculations that I think clearly demonstrate the problem with the provisional clause. So with the RDO, the employee has already worked those additional hours. They haven't yet been

paid for those hours, so they've actually worked 7.6 hours which they haven't been paid for. When they work on the RDO, they presumably, for example, work another 7.6 hours. So they're actually working a total of - my maths is a bit slow - 15.2 hours. If they're only paid at time and a half for the 7.6 hours they worked on the RDO, for that total of 15.2 hours that they've worked, they've actually ended up earning rate that is lower than their ordinary time rate.

PN705

DEPUTY PRESIDENT GOSTENCNIK: But an employee who is required to work on an RDO is paid the penalty. The accrual doesn't disappear. The accrual is still there.

PN706

MR CRAWFORD: If that is correct, then we are fine. But we didn't think that was - --

PN707

DEPUTY PRESIDENT GOSTENCNIK: So it's just a matter of - I mean, the accrual doesn't disappear. The issue is that paragraph (B) of (v) doesn't explicitly tell us what happens to that RDO. On one view it disappears, but the accrual is still there. The RDO is accrued, presumably. So that's a question of drafting. It's not intended that the RDO disappear.

PN708

MR CRAWFORD: Okay, yes, your Honour, that's precisely the issue I'm raising.

PN709

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN710

VICE PRESIDENT HATCHER: Or providing a mechanism by which can be determined when the alternate day is then taken.

PN711

MR CRAWFORD: Or banked.

PN712

COMMISSIONER HARPER-GREENWELL: Or banked.

PN713

MR CRAWFORD: Well, the current award makes it quite clear that the penalty rate is in addition to accrued entitlements, so you don't lose the RDO. And it's very important that something to that effect goes in because otherwise you're disadvantaged. That aside, on the last page of the - or not the last page, the last page of draft clauses, there is the work in compressed air clause. Now, this issue was agitated during the hearings earlier this year. The Australian Standard referenced in that clause is actually outdated. Now, in our submission at paragraph 20, we provided some amended words which we did discuss and I understand they're probably agreed.

PN714

DEPUTY PRESIDENT GOSTENCNIK: That was not contested.

PN715

MR CRAWFORD: Okay, so that's - - -

PN716

DEPUTY PRESIDENT GOSTENCNIK: As I understand, that's not contested.

PN717

MR SCHMITKE: That's correct, yes.

PN718

COMMISSIONER HARPER-GREENWELL: Yes.

PN719

MR CRAWFORD: Yes, thank you, your Honour. And the other point was in relation to underground work. Again, this was an issue agitated during the earlier hearings. Underground work is dealt with in (iv). Our concern is the last subsection (C). In our view, there's currently a drafting error in the award and the three types of work listed as one, two and three, are actually meant to have lower working hours because those types of work constitute or involve more difficult working conditions in that, you know, working at great depths - - -

PN720

DEPUTY PRESIDENT GOSTENCNIK: So does that mean that the word "except" needs to disappear?

PN721

MR CRAWFORD: Sorry, that's our submission, your Honour. And just finally, there is an additional issue that we would like to raise in relation to casual employees and whether their ordinary hours of work and overtime entitlements are currently clear. This is an issue that AWU officials have dealt with or it has arisen as an issue on the ground for the AWU. There has been some disputation about how ordinary hours worked for casual employees and how the RDO system works as well. There may be scope to address the issue relatively easily by adding reference in the current provisions.

PN722

There's currently a specific section for part time employees that deals with how the RDO system applies for part time employees. There may be scope to add reference to casual employees in that clause, but I would put on record that the AWU's clear view is that casual employees can accrue an RDO and that casual employees are entitled to overtime if they work in excess of eight hours on a day or shift outside the relevant span of ordinary working hours and in excess of 38 hours per week. We think that is clearly what the award currently provides and it is an issue that our officials have raised that should be clarified as part of this award review process. I did want to bring that matter to the Bench's attention.

PN723

VICE PRESIDENT HATCHER: So how conceptually does a casual accrue and RDO?

PN724

MR CRAWFORD: There's obviously complexities in terms of legally the contract terminating at the end of the day. But I guess the idea is if the casual employee works eight hours and they're only paid for 7.6 and they have an accrual bank sitting there, you know, going towards it, in the future they will be paid for but they won't actually have to work, well, there is no - - -

PN725

VICE PRESIDENT HATCHER: But the problem is there is no guarantee they will ever be employed again.

PN726

MR CRAWFORD: Well, if they have accrued that amount, 0.4 hours per day, presumably if they never work again they should be paid for that.

PN727

VICE PRESIDENT HATCHER: But when is the problem. That is you might employ someone for a few days and say, "We might need you back in a couple of weeks", it turns out they're not needed, they're forgotten about, where does the (indistinct) arise to either you have got to give them an RDO or you have got to pay them out, I mean - - -

PN728

MR CRAWFORD: Well, I mean - - -

PN729

DEPUTY PRESIDENT GOSTENCNIK: Isn't the answer that if a casual employee works eight hours, they get paid for eight hours?

PN730

MR CRAWFORD: Well, that's if it's not actually desired that the casual employees, I guess, for part of the RDO system because presumably everybody works together.

PN731

DEPUTY PRESIDENT GOSTENCNIK: Well, technically if they're accruing an RDO on each engagement, they will be paid out 0.4 which is the same as working eight hours and getting paid for eight hours, isn't it?

PN732

MR CRAWFORD: But I mean it may be not an issue for the parties. It might be in everybody's interests if they can accrue and then the whole - you know, all workers, whether they're full time, part time, casual, can work together which - - -

PN733

DEPUTY PRESIDENT GOSTENCNIK: But then there would need to be an exception that they not be paid out the accrual on termination because they're terminated one each engagement.

PN734

MR CRAWFORD: Well, other issues about whether it's the employment relationship that terminates or the employment contract and at what point does the casual employee's employment relationship actually - - -

PN735

DEPUTY PRESIDENT HAMILTON: So you're proposing an extension of the RDO - - -

PN736

DEPUTY PRESIDENT GOSTENCNIK: That's a problem for another Full Bench.

PN737

DEPUTY PRESIDENT HAMILTON: That's right. You're proposing a major change to the employment of casuals in the application of the RDO system.

PN738

MR CRAWFORD: Not at all, no, no, we don't describe what we're saying as a change at all.

PN739

DEPUTY PRESIDENT HAMILTON: Well, it is a change. You think it applies now, do you?

PN740

MR CRAWFORD: Absolutely. What I'm saying that it has been - - -

PN741

DEPUTY PRESIDENT HAMILTON: No, I heard you.

PN742

MR CRAWFORD: Thank you. Nothing further.

PN743

VICE PRESIDENT HATCHER: Does any employer party take issue that if, leaving aside casuals, that if employees are called in on their rostered day off, in addition to the penalty rate they retain the accrued date to be taken at another time or banked?

PN744

MR SCHMITKE: Your Honour, I certainly will take that question on notice. I would say that I'm aware that there has been some confusing about this issue in the past, but to the extent that it poses a practical difficulty in application, we would say that there hasn't been too much of a problem in that regard.

PN745

DEPUTY PRESIDENT GOSTENCNIK: Well, the current clause says that and ours doesn't.

PN746

MR SCHMITKE: Well, it can be read that way, that's exactly right, yes. But to the extent - - -

PN747

DEPUTY PRESIDENT GOSTENCNIK: But as a matter of principle, it's not suggesting that the payment of the additional - of the penalty, is sufficient to wipe out that which was accrued. The accrual stays.

PN748

MR SCHMITKE: Yes, yes.

PN749

VICE PRESIDENT HATCHER: All right. Does any other party take a different view to that? Mr Nguyen, did you want to say something?

PN750

MR NGUYEN: If there's nothing else about that issue, I just wanted to correct something that I said earlier about the lift allowance in the Manufacturing Industry Award. For the lift industry in the Manufacturing Award that special rates apply, there's no specific lift industry allowance. I just wanted to correct that.

PN751

VICE PRESIDENT HATCHER: But the maintenance of lift in an existing building would surely be under the Manufacturing Award, not the Construction Award?

PN752

MR NGUYEN: Not if it's on site. What I understand is that if there are like relevant parts of the lift - - -

PN753

VICE PRESIDENT HATCHER: If our lift breaks down in this building, which it often does, that's surely not the construction award, that would be the Manufacturing Award.

PN754

MR NGUYEN: My understanding is that the Building Award would apply in that circumstance.

PN755

VICE PRESIDENT HATCHER: The Building Award would apply.

PN756

MR NGUYEN: That's what I understand is applicable.

PN757

MS PAUL: If I may, your Honour, our understanding would be that would be the Manufacturing Award. We see that as part of the maintenance.

PN758

DEPUTY PRESIDENT GOSTENCNIK: That's probably why it takes so long to get someone out here to fix it.

PN759

MS PAUL: I won't make any comment about our members in relation to that. But, your Honour, and there is a specific exclusion for those employees that are covered under manufacturing so that there is a clear distinction in terms of the work that is building which we say is more when you are going on site as opposed to work in a building of this nature if someone had to come in and just fix up the lift up here.

PN760

MR NGUYEN: In general terms, what I understand is that employers who are maintaining lifts of already established buildings are applying the lift industry allowance and providing the lift industry allowance to those employees.

PN761

VICE PRESIDENT HATCHER: They might be, but it doesn't mean they're covered by this award. All right. Well, if there is nothing further - is there something further, Mr Schmitke?

PN762

MR SCHMITKE: I'm very sorry, your Honour. I would just like to clarify, and it might assist actually more broadly in terms of the exchanges between the Bench and the HIA regarding the publication of a roster. I just would seek to clarify the provisional clause 33A(iii), A3 - - -

PN763

DEPUTY PRESIDENT GOSTENCNIK: What page, Mr Schmitke?

PN764

MR SCHMITKE: Sorry, page 5.

PN765

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN766

MR SCHMITKE: There is a provision there that appears to us to allow any other method agreed and recorded in writing and then the subsequent provision talks about a roster published in accordance with the previous clauses A1 and A2, but it doesn't mention A3. So perhaps that may well accommodate some of the issues that were the subject of the exchange with the HIA. And in the event that it does not, and I'm wrong on that reading, then that might affect the submission I made earlier.

PN767

VICE PRESIDENT HATCHER: Well, I mean, I think three is referring to another method of taking the RDO. It's not necessarily talking about another method of communicating the roster, but the point is taken.

PN768

MR SCHMITKE: Well, your Honour, it does mention "recorded in writing".

PN769

DEPUTY PRESIDENT GOSTENCNIK: Yes, but it's: "The accrued RDO will be taken in one of the following ways. (1)" - so it's "by any other method" is referable to the accrued RDO being taken.

PN770

MR SCHMITKE: The subsequent clause, though, talks about a roster published in accordance with one and two.

PN771

DEPUTY PRESIDENT GOSTENCNIK: Yes, because one and two talk about a roster. Three does not.

PN772

MR SCHMITKE: Okay.

PN773

DEPUTY PRESIDENT GOSTENCNIK: But there obviously needs to be some clarity about "published". I mean, the intention is that the employees are notified in a manner that's verifiable.

PN774

MR SCHMITKE: Thank you.

PN775

VICE PRESIDENT HATCHER: All right, well, if there is nothing further, we thank the parties for their submissions. I think it's sufficient to say that we will simply advise the parties of what are the next steps in the review and we will now adjourn.

ADJOURNED INDEFINITELY **[12.46 PM]**