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Fair Work Act 2009

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COMMISSIONER ROE

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Four yearly review of modern awards

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Banking, Finance and Insurance Award 2010

Melbourne

2.04 PM, FRIDAY, 29 APRIL 2016

PN1

THE COMMISSIONER: Good afternoon. Let's just identify who is participating. We have got Mr Rizzo from the ASU here in Melbourne with me. Who have we got in Sydney?

PN2

MR K BARLOW: If it please the Commission, Barlow, initial K appearing for the CPSU.

PN3

MR FERGUSON: Mr Ferguson and Ms Bart from the Ai Group.

PN4

MS LIDDELL: Ms Liddell, from the Australian Federation of Employers and Industries.

PN5

MR S FORSTER: It is Forster, initial S, appearing in relation to the Commercial Sales Award only again on behalf of News Corp, Bauer Media Limited, Pacific Magazines Limited, Seven Network Operations Limited and its related entities, Network Ten Pty Ltd and its related entities and the Nine Network and its related entities, thank you, Commissioner.

PN6

THE COMMISSIONER: Thank you, Mr Forster. And in Adelaide?

PN7

MS K VAN GORP: Van Gorp, initial K for Business SA and with me is Mr Chris Klepper from Business SA.

PN8

THE COMMISSIONER: Do we have Mr Cameron from ABI in Brisbane?

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MR CAMERON: Yes, Commissioner.

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THE COMMISSIONER: Anyone else there with you?

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MR CAMERON: No, Commissioner.

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THE COMMISSIONER: Have we got anyone from Adelaide?

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MS VAN GORP: No one else from Adelaide, sir.

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THE COMMISSIONER: I think that is everybody, thank you. There are some matters listed directly arising from the statement that we put out on 22 April just

to assist the parties and there are a couple of additional matters that have either come up in the correspondence that we have received since then or arise from the summary of submissions that we provided a bit later.

PN15

I thank everybody for looking at these matters in a tight timeline, I am very appreciative of the fact that everyone is busy and doing a lot of things, but I think this has been helpful. I am reasonably confident that through the process that we conducted the other day and will continue today, we will hopefully reduce the number of matters that need to be dealt with by hearing in respect of these awards to a relatively small number and I think that is probably in the interests of the Commission and all parties.

PN16

I just want to start with the Business Equipment Award matter. We will come back to the general matters at the end. But if we just start with the Business Equipment one. The first matter is the issue of the definition of "country territory" and Business SA have made a suggestion and the ASU have made a suggestion and Ai Group have made a comment that they believe the ASU's definition may make the definition wider than they think is appropriate and they want the opportunity to investigate the history of the provision and relevant industry practice before advancing a position as to whether a definition is required and, if so, whether any of the specific proposals would be appropriate.

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I think what Australian Industry Group is saying is they want a bit more time to consider this. I think that the suggestions made by both Business SA and the ASU are helpful for the consideration but I think, given the Australian Industry Group are saying they want more time, we should list this as an outstanding matter and give the parties a bit more time to put in further suggestions about this matter and see if that can get us closer to a resolution.

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MR RIZZO: Commissioner, if it assists, Rizzo M from the ASU. I am actually somewhat sympathetic to the Business SA definition. So, I think it might be a workable one.

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THE COMMISSIONER: Yes, all right. What does the Australian Industry Group think about the Business SA proposal?

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MR FERGUSON: Ultimately the position would probably be the same in the sense that we just need to speak to - we, as you appreciate, Commissioner, have some major employers in this section, we do just want to consult with some of them about what they do. At first glance I think internally there was some concern about the Business SA proposal because it was being read, I think, as though it was just a reference to a certain number of kilometres outside of a capital but as I look at it again more closely it is outside a capital or a town, if you will. So, it may be that it is more workable than I think we thought at first. So, we would want to think about that as well.

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Obviously, the concern from our perspective is just not to expand the obligation in a manner that is consistent with what members are doing, but we would certainly have a look at that, Commissioner.

PN22

THE COMMISSIONER: All right. Can I ask is there anybody at this stage who thinks that the Business SA proposal is outside the ballpark of proper consideration? Well then, I think what we will do is we will ask people to consider the Business SA proposal and provide any response to the Business SA proposal within a specified period and see if that can lead us to a consensus.

PN23

Mr Ferguson, how long before you would be in a position to respond to the Business SA proposal?

PN24

MR FERGUSON: I don't mean to be difficult, but it is one there is a genuine attempt to go to a few members, I just don't know how many because I'm not as close to this sector as some of my colleagues. The history of it was it wouldn't take too long but it's the engagement with the membership that might take a little bit longer. But if we were to say three weeks - I know you've got other timetable constraints, Commissioner.

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THE COMMISSIONER: Yes.

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MR FERGUSON: I just don't want to say a week and then not be able - one week is not going to be doable.

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THE COMMISSIONER: All right, so two weeks?

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MR FERGUSON: We could try for that, Commissioner. We can let you know if we have a difficulty.

PN29

THE COMMISSIONER: Thank you. Is there any objection to that approach? All right, we will take that approach.

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The next issue which is the issue of the exemptions in clause 10.2 for the higher paid in the clerical stream. The only response I think that we received specifically to that matter was from Business AS and they are saying that any change to the current provision would be a substantive change and they would need to consult, so I understand that point, but I want to see if we can progress it further.

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Are there other comments about this issue that we posed at the last conference?

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MR FERGUSON: Commissioner, we started to look at the issue and obviously we were approaching in some ways in the same respect as Business SA in that we wouldn't necessarily want to see this result in changes in substantive obligations being posed on parties, but equally we are sympathetic to the point that if there is a technical issue then it should be addressed. But it seems that it is perhaps not as straightforward as we assumed it might be. As you look through the Act, for example, it is not immediately clear to me that just because a clause doesn't apply to certain employees that there is any technical problem. As long as it is included in the award itself, the Act itself might not require that each clause necessarily of those mandatory clauses actually apply to everyone.

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THE COMMISSIONER: In the award?

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MR FERGUSON: It just seems that it might be a slightly more complicated matter than we first thought and then when you look through some of the clauses, I initially thought it would be a very easy task to just point out well, these are stock-standard clauses and have them apply. But sometimes they interact with other provisions or they might have some obligations in them. I think what I'm coming to is if we wanted to go down this path we definitely have to think about it much more in terms of how we tackle it and it may be that the answer isn't to expand or shorten the length of the list of clauses but to change the way that the exemption was drafted. I haven't fully thought it through - but to make it clear that only those clauses create obligations, if you will.

PN35

I suppose what I'm coming to, Commissioner, is that perhaps we just want to think about further if the Commission does want to go down this path. We are not pushing you to.

PN36

THE COMMISSIONER: No, I understand that. I think the Commission does want to go down the path of looking at it, because we do think that there is a problem, notwithstanding I note your point, Mr Ferguson, there is some force in that. But I think we do think there is a problem and that it needs to be looked at further.

PN37

What we might do in order to focus people's attention is we might have a look at what machinery clauses (if I could put it that way) we believe should apply and put that forward so that you have got something concrete to respond to. I think that might be the most efficient way to do it and it may be, as the ASU said last time, that they want to propose something which is about listing the clauses that are exempt rather than the ones that apply. But it is open to the parties to respond in any way they want to, but I think if we put forward a proposal that might assist the process.

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MR RIZZO: The ASU thinks that is a good suggestion, Commissioner.

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MR FERGUSON: If a proposal was put forward we would consider it and in all likelihood come up with an alternate proposal. It is just in the timeframe as much as anything else it became clear that it was a bit of a bigger task than I first anticipated.

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THE COMMISSIONER: I agree. It is something that needs a bit more time, I think you are correct.

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Is there any disagreement with that that the Fair Work Commission will come up with a suggestion in order to give the parties something specific to respond to?

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MS VAN GORP: Commissioner, Business SA would appreciate the Commission giving us some guidelines and we were in the same position as AiG in that once we started looking it was not clear what could easily be brought in and then we came to the stage of this is going to have a flow-on effect and we really need to talk to our members about it, anyway.

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THE COMMISSIONER: Yes, all right, thank you.

PN44

The next issue is the question of clause 11.4(c) which is the question of the state workers' compensation reference. We received responses from employer organisations reaffirming their view that it shouldn't be included and suggesting that its inclusion is not consistent with the legislation.

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I suppose my view is that given that the unions indicated that they don't support the deletion and that it is an existing provision, I think that we will need to flag this matter as being a contested matter that will have to be determined. It may be that given that this is really a question of whether it is something that is permitted by the legislation or not; that it is something that could be dealt with on the basis of written submissions, because it doesn't seem to me that it is a matter - it is not like a substantive entitlement matter where evidence is likely to be of much use, so my suggestion would be that it is a matter that needs to be determined and that it should be done so on the basis of written submissions and I would ask if there is any disagreement with that approach.

PN46

MR FERGUSON: We are only - you can see from our material - only raising an technical issue about whether or not it is capable of being included, we are not lobbying for it one way or another on merit grounds. If the unions are able to point us to a basis upon which it could be included. When I say that I am only really talking about the last part of the clause, in any event. We wouldn't try to take away the rest of it. But if they could just point us to a power upon which it could be included, our objection will evaporate if we think it is right.

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MR RIZZO: Sorry, Mr Ferguson, when you say "the last part" which part are you talking about?

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MR FERGUSON: And for the purposes of all relevant state workers' compensation legislation, because I understand the clause has work to do as an existing entitlement in relation to purposes under the award, but I just had a concern about how it could possibly - an award could operate to impact on the operation of state workers' compensation legislation.

PN49

THE COMMISSIONER: Putting it another way, Mr Ferguson, essentially you might be arguing that an award cannot really determine what state workers' compensation legislation covers or doesn't cover because that is really a matter that is determined by the state workers' compensation legislation.

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MR FERGUSON: That is right, Commissioner.

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THE COMMISSIONER: So, in that sense it is not really - I'm sorry, I'm sort of thinking aloud here because I hadn't actually quite - I have been looking at the point from the perspective of you raising it as to whether it is a permitted matter within the list of permitted matters.

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MR FERGUSON: Sorry.

PN53

THE COMMISSIONER: And I'm thinking now that it is perhaps more a point of well, how can an award change the impact of state workers' compensation legislation.

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MR FERGUSON: I think both issues arise, Commissioner, because the first point was the point I started from, but I think - it is not like an accident pay provision that gets in under as an allowance. I just can't find a home for it in any of the parts of the legislation which say matters about which awards can include terms.

PN55

THE COMMISSIONER: I can conceive ways in which you could bring it in under the list of allowable matters, that it is incidental, for example. There are different ways of looking at it necessary for the purpose. But I think the second problem, which is the one I have just raised, I think it is a bit stronger, I just don't see how the award can change the state compensation legislation.

PN56

MR RIZZO: Commissioner, does this go with the section 109 issue in the Constitution about federal and state legislation (indistinct)?

PN57

THE COMMISSIONER: Not really. I think it just goes to the fact that what is covered by state workers' compensation legislation determined by state workers' compensation legislation and nothing - you can't say in an award we are varying state workers' compensation legislation, do you follow my point?

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MR RIZZO: Yes.

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THE COMMISSIONER: I just think that the award just physically can't do it.

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MR FERGUSON: There may also be complexities around the way the interaction - the way the Act contemplates the interaction between award regulation and state workers' compensation legislation, which I haven't really fully thought through.

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THE COMMISSIONER: Although I think in that area it is pretty similar to apprenticeship.

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MR FERGUSON: Is it?

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THE COMMISSIONER: Yes, I think the Federal Act - you do have the power to do things.

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MR FERGUSON: It just doesn't cover the field.

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THE COMMISSIONER: Exactly. You could, for example, in an award have a provision that - just as you can in an agreement about drug testing, for example. I'm not quite sure which heading it would come under in the allowable matters but in terms of the state I think you can. So, I don't think that is the barrier.

PN66

MR FERGUSON: And I haven't thought through that, Commissioner, to be honest.

PN67

MR RIZZO: Commissioner, if we were to exclude the last part it simply would read "would be regarded as being on duty for all the purposes of this award" (full stop).

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THE COMMISSIONER: Correct.

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MR RIZZO: Right now I can't think of where an award refers to a state workers' compensation in other awards, is that true? Are there other awards that have a similar provision?

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THE COMMISSIONER: I am certainly aware of any, but it is possible. But I'm just making the point: this particular provision I can't see how it actually can be enforceable.

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MR RIZZO: Yes. I think we will agree with that, Commissioner.

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THE COMMISSIONER: So we will delete it from the exposure draft.

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MR RIZZO: Yes. So it is for the purposes of this award and not for the legislation.

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THE COMMISSIONER: Yes.

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MR RIZZO: I think we would be hard pressed to argue this point when I think about it.

PN76

THE COMMISSIONER: The next issue is item 36 and this comes out of the general matters. This is the Ai Group's proposal to replace penalty rates with allowances in the heading of clause 14. I think the grounds on which the Australian Industry Group are pursuing this matter is twofold: one is a general point that the Australian Industry Group is raising about that they don't like the use of the term "penalty" because of its potential implications and they have made that out in their general submission. Secondly, because they say the word "allowance" is the word that is actually used in the clause. I have summarised that correctly, Mr Ferguson?

PN77

MR FERGUSON: I think so, Commissioner. In essence, we have just identified that there might be a distinction when you change the word "allowance" to "penalty" in the character of the actual entitlement and that that can have flow-on effects either within the award or for the purposes of other legislation where certain penalties might be excluded but certain allowances aren't.

PN78

I am not suggesting that this is necessarily beneficial to employers or employees, it is probably swings and roundabouts, but it is a chance and unintended and when we have looked at it through some awards - and I won't suggest that we have done a comprehensive job on every award - but it can have flow-on effects to the calculation of annual leave entitlements and all sorts of things. So, we are not

trying to change to get ahead here but we're just pointing out that issue you have raised.

PN79

THE COMMISSIONER: The issue from our perspective as to the Fair Work Commission perspective is we have tried to have a degree of consistency in the way in which we have approached this matter in awards and we believe that - we have been using a consistent terminology in order to help the awards be clear and easier to understand from a lay point of view and that is why we prefer to use the term "penalty" in a fairly consistent way across the awards.

PN80

I think in this particular case, because it actually says "allowance" next to the particular entitlement, I suspect that the concern that you would have about the flow-on effects to other legislation elsewhere is not going to be as great. In other words, what is in the heading doesn't really matter so much because it actually says "allowance" against what the actual entitlement is.

PN81

MR RIZZO: Commissioner, is the proposal from the AiG that we remove the word "penalty rates" in the heading and call it "allowances"?

PN82

THE COMMISSIONER: Correct, that is what they are proposing and what I am saying is that from our point of view, that is from the Fair Work Commission point of view, we don't want to do that because we have been doing this in a consistent way, we believe, across awards and if we can do it here well then we are a bit worried about the workload and the implications of that.

PN83

MR FERGUSON: As am I.

PN84

MR RIZZO: Regardless of the heading, the whole reference is to allowances in all three instances.

PN85

MR FERGUSON: Commissioner, can I say - taking on board what you said - this clause probably isn't the most difficult - or this award isn't the most difficult, it is probably more those awards where, for example, what was previously an allowance or a loading has been converted into an overall higher rate that then characterises a penalty.

PN86

THE COMMISSIONER: Yes, I understand.

PN87

MR FERGUSON: Whereas this is still a separate small discrete amount and it is still called an allowance. On the fact of it, Commissioner, what you are saying has some force: it might not be an issue when you weigh it up against trying to

keep them simple and easy to understand. We want them to be simple and easy to understand, too, but not at the cost of substantive changes.

PN88

THE COMMISSIONER: We appreciate that, too. My suggestion is we leave this matter.

PN89

The next one is item 2, which is clause 5.2. The only reason I'm raising this one, it is not in the list, because we discussed it last time. This is the Australian Industry Group suggesting that the facilities provision be changed and we decided at the last meeting that we wouldn't change it at this stage. If the Australian Industry Group wants to pursue that matter further we would ask that they do make that clear in their reply submissions.

PN90

MR FERGUSON: Yes. If I could just discuss it for one minute with the parties though, Commissioner. We will give thought to that. Obviously, this all arises out of the fact that the substantive clause - the public holidays clause - just talks about the substitution being between the employer and employees without specifying majority or individual. Obviously, we will give thought to it and make whatever submissions we have to make.

PN91

But it just occurred to me that in many awards they have both, they say the majority and the individual and it may not be an issue that in substance the parties necessarily would disagree with it being by individual agreement. I know that there is that whole collective versus union individual thing that objection some unions may take for some issues, but public holidays seems to be the sort of subject matter that I think perhaps everyone would agree that there might be circumstances where individuals would want a day substituted because they want to recognise a different religious holiday or whatever it might be.

PN92

So what I am trying to get to in a roundabout way is to see whether the parties would agree to the award perhaps being clarified to make it clear that it could be either majority or individual.

PN93

THE COMMISSIONER: I think that is a constructive suggestion, Mr Ferguson. What do the unions think about that? Just to clarify: in clause 21 it says that

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An employer and the employees may by agreement substitute another day for a public holiday.

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And that clause has been characterised in clause 5.2 as a substitution by the majority of the employees. What Mr Ferguson is suggesting is that that be changed to an individual or the majority of employees.

PN96

I think there is some force in what Mr Ferguson says. Is there any opposition to that?

PN97

MR RIZZO: Are we talking about just in relation to public holidays, Commissioner?

PN98

THE COMMISSIONER: Yes. Where it says 21.2 in the table at 5.2 it would just be altered to say "an individual or the majority of employees".

PN99

MR RIZZO: If it is confined to that 21.2 we would be okay with that, Commissioner.

PN100

THE COMMISSIONER: Has anyone else got a concern about that?

PN101

MS VAN GORP: No, Commissioner. The point at 5.2 is incorrect, it doesn't reflect what 21.2 says, so that does need to be changed and I have no objection to the AiG's suggestion.

PN102

THE COMMISSIONER: I must say I don't agree with your point. That is why we discussed it last time. I don't think it is clear. Item 21.2 can easily be interpreted as simply meaning the majority. I accept it is not crystal clear and I think what we have come to is the parties are prepared to clarify it as meaning either and I think that that is a good solution. That is the way we will do that.

PN103

The next issue is the annual leave loading issue. There are two annual leave loading-type issues that Australian Industry Group have raised: one is this specific one in respect of clause 17.2(b) which is whether it should be the ordinary hourly rate or not for the loading. The other is an issue raised in respect of two awards which is about what you will find in 17.2(a) which is about the - sorry - the other is more generally about what is taken into account. We will see that, for example, in respect of the Contract Call Centres Award and the Australian Industry Group have proposed some words there.

PN104

In respect of this one, if you look at the existing award, the Business Services, the current provision is found at clause 31 and it says - point (a) is basically the same as in the exposure draft, that is the loading is calculated on the rate of pay prescribed in the minimum wages clause and annual leave loading payment is payable on leave accrued. And then in respect of day work it says:

PN105

Employees who would have worked on day work only had they not been (indistinct) 17.5 per cent or the relevant weekend penalty rates, whichever is greater.

PN106

In the exposure draft we have said:

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17.5 per cent of the ordinary hourly rate or the relevant weekend penalty rates, whichever is greater but not both.

PN108

The Australian Industry Group's proposal is there saying it shouldn't read "ordinary hourly rate", they are saying it should read "minimum hourly rate". That is my understanding of the issue.

PN109

MR FERGUSON: That's right.

PN110

THE COMMISSIONER: Generally speaking, in many of the other awards the first part defines the payment for annual leave as being based on the ordinary hourly rate in which case, of course, that is what would flow through to the loading. But in this case it doesn't - this is not an award - I will put it a different way.

PN111

What a lot of the awards do is they have a provision in respect of payment for annual leave that makes it clear that the annual leave is on the wages that we normally earn and then the leave loading clause flows from that, so therefore it is clear that it flows through. In this case there is no such clause, so I think that having ordinary hourly rate in this case in fact is a change to the entitlement and that therefore we should either delete "ordinary hourly rate" and just leave it as it is in the current award, just have 17.5 per cent and not say "of what" because that is defined in (a) above or we need to adopt Ai Group's proposal.

PN112

MR RIZZO: But, Commissioner, as you say, usually it is on the ordinary hourly rate because it flows from the annual leave payment.

PN113

THE COMMISSIONER: Exactly.

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MR RIZZO: We are dealing with a deficiency upon a deficiency now, so we are going to deny people that benefit because the current award is sufficient.

PN115

MR RIZZO: Can I say - sorry, I didn't mean to cut you off, Mr Rizzo.

PN116

MR RIZZO: No, that's all right. The current award is deficient and therefore because the current award is deficient we are going to replicate that deficiency by just advantaging the employee from what is normally the case where, as you have described, it usually flows on from the annual leave provision. I am just a bit hesitant to reinforce an existing deficiency with another deficiency.

PN117

THE COMMISSIONER: Yes, which is why I would be inclined to leave it silent, because it seems to me that there is - - -

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MR FERGUSON: I'm not sure it necessarily always follows that a leave loading flows from the definition of how much you get paid for annual leave but I think - - -

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THE COMMISSIONER: It doesn't always.

PN120

MR FERGUSON: No, it doesn't always. But you're right, there's two different models of leave, if you will, where some awards prescribe a different amount to the ES and they are usually defined in a way to capture amounts that would be otherwise excluded by the definition of "base rate pay", so you might include certain allowances, for example, which wouldn't be payable pursuant to the Act.

PN121

But in this I think the starting point is we are not changing the existing entitlement. If you look to 31.2(a), I mean it makes it very clear that it is calculated on the rate of wage prescribed in clause 20 classifications, so there is really no doubt that the loading is calculated on the minimum award rates, if you will, excluding any other separately identifiable amounts.

PN122

Admittedly, in (b) it doesn't say 17.5 per cent of what, but one would rather assume you would read it in the context of the immediately preceding clause, which says how you calculate it. The purpose of (b) is really to provide the alternate that the penalty rates may apply if they are greater. The difficulty we have is if it is going to be left silent, if the parties around this table think that 17.5 per cent means anything other than the minimum rate, that is a problem.

PN123

That is generally the approach that the Commission has been taking in terms of identifying where penalties and so forth are payable and they say time and a half but not of anything in particular. You link it to the award derived entitlement at the very least so that it couldn't be argued to include any over-award component.

PN124

THE COMMISSIONER: Mr Ferguson, I agree with that as a general proposition, but it does seem to me that the (a) does clearly define that says:

PN125

During the period of annual leave an employee will receive a loading calculated on the rate of pay prescribed in clause 9 - minimum wages.

PN126

So then if it (b) it says "the loading is as follows" it is quite clear that it is calculated based on the rate of wage prescribed in clause 9.

PN127

MR FERGUSON: If it is the end of the world, we're not going to die in a ditch over it, Commissioner, but because it is so clear it seems that - well, I was just going to put the cross reference - but you are right.

PN128

THE COMMISSIONER: But I'm - - -

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MR FERGUSON: No, you are right.

PN130

THE COMMISSIONER: I'm just saying I think it is very clear we probably don't need to say anything more. But I understand Mr Rizzo's point and all I am saying is that I think if we want to - it would be a substantive variation to the award to change that provision.

PN131

MR RIZZO: I appreciate that, Commissioner. I suppose I don't want to diminish an already diminished clause.

PN132

THE COMMISSIONER: And that is why I am suggesting take out the words "the ordinary hourly rate", leave it silent then it doesn't change anything.

PN133

MR RIZZO: All right, I can cop that.

PN134

THE COMMISSIONER: My suggestion is we delete the words "of the ordinary hourly rate" in 17.2(b)(i) and (ii) and that effectively restores the status quo.

PN135

MR RIZZO: All right, but can I put this caveat on it, Commissioner. This issue comes up in a different form I think in the Contract Call Centre clause.

PN136

THE COMMISSIONER: It is a different issue there.

PN137

MR RIZZO: A different issue, yes. So, I am not going to - - -

PN138

THE COMMISSIONER: You are not conceding it there?

PN139

MR RIZZO: Yes.

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THE COMMISSIONER: I understand.

PN141

MR RIZZO: I'm specifying that my consent here is not an overarching one.

PN142

THE COMMISSIONER: I totally understand that.

PN143

Any objection to proceeding the way I have suggested?

PN144

MR FERGUSON: No.

PN145

MS VAN GORP: No objection, Commissioner.

PN146

THE COMMISSIONER: The next one is clause (b) - 3.2 which is about the 200 per cent on Sunday. I think what this really amounts to is a disagreement about what clause 28.2 of the current award means. The Australian Industry Group are saying that clause 28.2 as a whole only relates to ordinary hours of work, whereas I think that it is at least arguable that 28.2(a) clearly advised ordinary hours of work as does (b) and (c) but - maybe (c) - (e), I don't think there is anything that makes it clear that (e) is confined to the issue of ordinary hours.

PN147

If it wasn't that then you would have what seems to me to be a very strange situation and, of course, strange situations do exist in awards so I don't completely rule it out, that somebody would be paid double time if the work on Sunday is ordinary hours but only time and a half for the first three hours if it is overtime. That does seem to me to be rather counterintuitive. As I say, it is possible. So, that is why I think that the exposure draft does in fact reflect the award in a fairly - in a more concise way.

PN148

Does anyone want to comment on that?

PN149

MR FERGUSON: I think we probably just need to think about it a little further. I understand what you have put about (e) because I think there is probably clear indicators in the text of some of the other provisions that it is about ordinary hours and you probably succinctly put the position that we are advancing that the whole clause was about ordinary hours and obviously we are suggesting that the overtime rates provisions of the award regulate overtime for shift workers given there is a reference to shift workers. But perhaps we should just think about that and indicate what we want to press in the reply submissions.

PN150

THE COMMISSIONER: I think that is a good way to approach it. If you want to press it that's fine. I'm not saying there isn't an argument there. What I have tried to explain is why I think the exposure draft at this stage is a reasonable way to proceed. Is there anyone who objects to that? We will see what the Ai Group says if they wish to pursue this in their reply submission.

PN151

The next one is item 15.4 which is the daylight saving. The Australian Industry Group has responded by saying that they think this is a substantive change and they are opposed to the change. In my view, unless there is something that somebody wants to say contrary to this, it seems to me that this is a matter that if the ABI want to pursue it, then they'll need to indicate that in their reply submission and the matter will then need to be added to the outstanding matters to be dealt with by a Full Bench. Because it seems to me, if there's a major voice saying this is a substantive change and there's opposition to it, then we really don't have much choice.

PN152

MR RIZZO: But if someone works at the start and at the end of daylight savings, they won't be affected though.

PN153

THE COMMISSIONER: Correct.

PN154

MR RIZZO: Yes. But obviously someone who only works one or other end will be.

PN155

THE COMMISSIONER: Correct. I suppose my point is this, that there is no doubt that the exposure draft reflects the current award. ABI, I think, and it's totally appropriate that they have, is they've identified that there may be some issues with that and there may be a better way of handling it - ABI's put that forward. And if there was some consensus or reasonable degree of consensus that the ABI proposes a good one, well then we'd be able to deal with it in an easier way.

PN156

But if we've got a party who are saying that they don't agree with it, they think it's a substantive change, I think we've got no choice but to say well, ABI now have to make a decision, do they want to pursue it or they don't, and if they do, then it'll have to be determined.

PN157

MR RIZZO: Sorry, Commissioner, what is the ABI position again then?

PN158

THE COMMISSIONER: The ABI's position is, it should be based on what you work rather than what the clock says.

PN159

MR RIZZO: Right, yes.

PN160

THE COMMISSIONER: Whereas the current award says it's based on what the clock says.

PN161

MR RIZZO: Yes.

PN162

THE COMMISSIONER: That's correct, isn't it, ABI? That's a reasonable summary of what you've said?

PN163

MR FERGUSON: That's correct, Commissioner.

PN164

THE COMMISSIONER: Yes. All right. So any disagreement with that proposal, so that ABI will advise in their reply submission if this is a matter they want to pursue, and if it is, then it will have to be added to the outstanding matters to be determined by a Full Bench. Right- - -

PN165

MR FERGUSON: But it's just a substantive change, it's not what this process and these proceedings are really apt to deal with it. But perhaps we can have some discussions at ABI anyway.

PN166

THE COMMISSIONER: If ABI want to pursue it, then it's going to be a variation that's substantive and it will have to then be dealt with through the Full Bench process.

PN167

MR FERGUSON: Yes.

PN168

THE COMMISSIONER: All right. Now, could I just raise two other matters? Sorry, clause 2, the ASU proposal not being included in the exposure draft, and ASU will respond in reply submissions if they wish to, so I don't need to deal with that further. I must point out though that we have checked, Mr Rizzo, since the last conference, and this is a provision that's been determined by a Full Bench.

PN169

MR RIZZO: It is.

PN170

THE COMMISSIONER: Yes. So- - -

PN171

MR RIZZO: Well, we had some very modest wording. It's not the sheep station clause, this one.

PN172

THE COMMISSIONER: No, it's not a sheep station clause.

PN173

MR RIZZO: Yes.

PN174

THE COMMISSIONER: But I'm just making the point that there's been a Full Bench decision determining this particular wording.

PN175

MR RIZZO: About the exposure of the awards?

PN176

THE COMMISSIONER: Yes, exactly.

PN177

MR RIZZO: Okay. So you're saying we're on a hiding to nothing?

PN178

THE COMMISSIONER: I suppose that's a good way of putting it.

PN179

MR RIZZO: Yes. Look, this is not sheep stations, Commissioner, and- - -

PN180

THE COMMISSIONER: No, I agree.

PN181

MR RIZZO: - - -and if we're on a hiding to nothing, well we'll just withdraw it. I can't see the point in spending too much energy on it.

PN182

THE COMMISSIONER: I can't either, but if you want to, you can.

PN183

MR RIZZO: No, I think I'll expend it elsewhere.

PN184

THE COMMISSIONER: Yes. So there are just two other points I would like to raise in respect to business equipment. One is that in item 5 of the summary submissions, we refer to 6.4(c) and we have not, as we discussed last time, we haven't included any change there and if the Ai Group want to pursue that matter, they'll need to let us know in the reply submissions - just because I did go back and have another look at that clause, and that's why I wanted to emphasise that.

PN185

MR FERGUSON: I'll have a look at that.

PN186

THE COMMISSIONER: All right. And then finally, in terms of variations, I apologise for doing this. I think this is the only point where us going back and

having a look at it has produced a change from what was discussed last time. So this is the only one of this sort. In respect of schedule B, the summary of hourly rates, as a result of the issue that was raised by the Australian Industry Group last time, we've changed ordinary hourly rate to minimum hourly rate in the first table, which is B2.1.

PN187

When we go back and have a look at it, what we've noticed is that you'll see B1.1 has got nothing next to it.

PN188

MR FERGUSON: Yes.

PN189

THE COMMISSIONER: Right? And the standard provision in all of the awards, in terms of the exposure drafts, has been to include in B1.1 a provision that – and this is consistent with a Full Bench decision – a provision along these lines. I'll just read it out to you, if I can find it. I'm just trying to find the one that does it. So Contract Call Centre, I think, is an example where it says –no, it's not Contract Call Centre.

PN190

Yes, so in the Telecommunications Award is a good example. It says:

PN191

Ordinary rate of pay is the minimum hourly rate of pay for an employee plus any allowance applicable for all purposes to which the employee is entitled where an allowance is payable for all purposes in accordance with the relevant clause. This forms part of the ordinary hourly rate and must be added to the minimum hourly rate when calculating the penalties and overtime.

PN192

And then the next clause, which is B1.2, says:

PN193

The rates in the tables below are based on the minimum hourly rates.

PN194

So the reason for that is because there's a Full Bench decision which essentially says that, if the award has got all purpose allowances in them, the schedule should make that clear, should define the ordinary hourly rate and make it clear that you've got to include the all purpose allowance when you do the calculation.

PN195

So I came to the wrong conclusion last time because I was misled by the fact that B1.1 isn't here when it should be there. Now, I do think that, you know, there is some – anyway, I'll leave it at that. So we would propose to put B1.1. in, consistent with the Full Bench decision, and consistent with what we've done in the other exposure drafts and to retain ordinary hourly rate in the tables.

PN196

So we'll do that, and if there's any comments that Ai Group or any of the other parties want to make about that, once we've made that correct, then of course you're free to do so. And we apologise for getting that wrong last time.

PN197

MR FERGUSON: But the point to check, Commissioner, is if the rates are actually calculated on the minimum or the ordinary.

PN198

THE COMMISSIONER: They're calculated on the minimum, because the only all purpose allowances in this award are, I think, the leading hand allowance and the leading hand allowance, of course, only applies to leading hands. So you can't- - -

PN199

MR FERGUSON: So the tables – yes.

PN200

THE COMMISSIONER: So the way the table's supposed to be read is, as it says in B1.2, the rates are based n the minimum hourly rates as it will say in B1.1, if there is an all purpose allowance, you'll need to add that.

PN201

MR FERGUSON: Yes.

PN202

THE COMMISSIONER: Right? So that's what we're trying to achieve in the exposure draft.

PN203

MR FERGUSON: Yes. Thank you, Commissioner.

PN204

THE COMMISSIONER: All right. So then there are two – I think there are two outstanding items in the summary of variations document. One is item 2, which is referred to a separate Full Bench, and item 1 which is the country, territory issue. Now, we may be able to resolve the country, territory issue, but we'll see what people say.

PN205

Right, let's move to the Banking and Finance Award. The first thing is the issue of standby or call back and I've had another look at this since the last conference and I now – although I'm now convinced that the Australian Industry Group are correct and that the change is – what's in the exposure draft is a change to the existing award.

PN206

I think it's very much at the margins, because I think it's probably true that in the circumstances which fall outside of the current award, people would probably still be entitled to the allowance. But I think, because there might be some circumstance where they aren't, I think to reflect the current award, we should

make the variation proposed by the Australian Industry Group to effectively restore the status quo.

PN207

Now, the Australian Industry Group's not undoing the sort of simplification that we've done, in terms of formatting, but all they're doing, I believe, is to restore what the effect of the current position. So is there any comment about that? All right, then there is one other matter that I haven't listed there that I wanted to raise, and these are the general points that Ai Group have raised. In item 18 and 27 of the summary of submissions, Ai Group want to use the term "shift loading" rather than "shift penalty" in clause 7.7 and B2.1.

PN208

I've had a look at those, both of those, and I think this is a case where I don't think it makes a substantive change to the status quo. So for the same reasons as we explained earlier, we're trying to be consistent, so we're not proposing to make that change. And if Ai Group want to pursue this - those matters further, then they'll need to indicate that in their reply submission. So is there anything else about the Banking Award?

PN209

Well, the substantive variations that are outstanding are the item 1, which is referred to the Part-Time and Casuals Full Bench and item 4 which is a proposal by Business SA to change the definition of "Afternoon shift" to expand it to - to reduce it effectively to being 7 pm rather than 6 pm, and that's a substantive item. That's a substantive item which will need to be determined.

PN210

All right then Commercial Sales Award, there aren't any outstanding issues there, as we understand it and the only outstanding items are items 1 and 2 in the summary of variations and they've been referred to the Annual Leave Full Bench. So is there anything anyone wants to raise about the Commercial Sales Award?

PN211

Right, then Contract Call Centres Award, has there been any opportunity for discussion about the trainer's proposal in the CPSU?

PN212

MR BARLOW: No, Commissioner, I'm afraid we haven't had a chance to engage in that process with Ai Group yet, but we will endeavour to do so. Obviously we've been working through a lot of these technical drafting issues.

PN213

THE COMMISSIONER: I appreciate that. Okay, so we'll keep that as it is, that is, see if parties can have a discussion about that. If they need any assistance, let us know.

PN214

MR BARLOW: Thank you, Commissioner.

PN215

THE COMMISSIONER: Now, the next one is the Ai Group's proposal about annual leave. Now, this applies to the Contract Call Centres Award and to the Telecommunications Award. Now, I just want to get the clause – just wait a moment. So if we look at clause 15.4 of the exposure draft.

PN216

MR BARLOW: Commissioner, it's the CPSU here in Sydney.

PN217

THE COMMISSIONER: Yes.

PN218

MR BARLOW: I've finally managed to have a little bit of a think about this one and I've had some preliminary discussions with my colleague here with AiG. As I understand it, there are two issues that AiG are concerned about here, one of which the CPSU is potentially minded to fix but not necessarily in the way suggested. And the second, which is a change to essentially 15.3, to clarify that it doesn't operate to include shift penalties, which I agree, it wouldn't be the intention.

PN219

However 15.4, as a slightly separate issue, the updated exposure draft contains the addition of the words, at the end of 15.4(a) there, "of the minimum hourly rate", obviously referring there to 15.3.

PN220

THE COMMISSIONER: Yes.

PN221

MR BARLOW: Now, I'm just a little bit concerned about that insertion, Commissioner, because obviously 15.3 deals with it not being the base rate but rather, as is expressed in a lot of other awards, it's above ordinary rate is - payment for annual leave is not your base rate, it is essentially your ordinary rate. The insertion of 15.4(a) may create a tension then with what is expressed in 15.3(a) and I don't think it is necessarily needed because 17.5 per cent of what's payable under 15.3, which is obviously not your base rate under the NES, but your ordinary rate.

PN222

THE COMMISSIONER: Yes.

PN223

MR BARLOW: So I'm not minded to agree to that one, Commissioner, but more broadly, the issue, the other issue the AiG are looking to resolve is whether or not the interaction between clauses 15.3 and 15.4 would somehow give a double entitlement, first under 15.3 to your shift penalties and then again, to an annual leave loading under 15.4.

PN224

And what they've proposed in their correspondence of yesterday evening, Commissioner - - -

PN225

THE COMMISSIONER: Yes.

PN226

MR BARLOW: - - - which hopefully I can find in front of me – there it is. Is a clarification, an addition under 15.3 being largely a rewording of 15.3 which I don't think is necessarily needed. However, I do agree that the last line in that, being:

PN227

Provided that subject to clause 15.4, which is annual leave loading of 17.5 per cent or relevant shift penalties which are higher, the employee will not be entitled to any amount calculated by reference to clause 13, being penalty rates.

PN228

So that would clearly say that your rate of pay under 15.3, being not the base rate but it said rather than the ordinary rate, would not include penalty rates. And I think that's a useful exclusion and, in some senses, should resolve this issue that they're concerned about, about double-dipping. And in some ways is analogous to the way this issue was, or a similar issue to this was resolved in the Manufacturing Award last year, Commissioner.

PN229

THE COMMISSIONER: Yes.

PN230

MR BARLOW: Albeit the context there is obviously somewhat different, given that they have a different ordinary rate clause and a different annual leave loading clause.

PN231

THE COMMISSIONER: Yes. Well, I would like to suggest this, that if we use the words in 15.3 – the words proposed by Australian Industry Group for 15.3, but put the words, "Instead of the base rate of pay as referred to in section 91", back in.

PN232

MR FERGUSON: We're fine with that, Commissioner.

PN233

MR BARLOW: Thank you, Commissioner.

PN234

THE COMMISSIONER: All right, so we use the Australian Industry Group's words, but we put back in the words:

PN235

Instead of the base rate of pay, as referred to in section 91.

PN236

Right, so that, I think deals with the issue of 15.3 but I think what the CPSU is saying is that they don't agree with the addition of the words of the minimum hourly rate in 15.4(a).

PN237

MR BARLOW: Yes, Commissioner.

PN238

THE COMMISSIONER: And I think that is also what the ASU was flagging as well. So Mr Ferguson, obviously you're okay with what we're saying about 15.3. Do you want to say anything about 15.4(a)?

PN239

MR FERGUSON: Well B, the second limb, probably deals out largest concern. We obviously we're supportive of the inclusion of the words "of the minimum hourly rate" and on one view, there'd be some merit to confining the loading to the minimum award drive entitlement. But perhaps we'll just think about that and if we want to press that, we will. But I don't think this is the appropriate way forward. We will in our reply submissions, but we may not, given that we've had the resolution to the other issue.

PN240

THE COMMISSIONER: Thank you, Mr Ferguson. So just to summarise, what we'll do is in respect of clause 15.3, we will put the Australian Industry Group's words in, but restore the words:

PN241

Instead of the base rate of pay, as referred to in section 91 of the Act.

PN242

And in respect of 15.4, the words, "Of the minimum hourly rate" will not be included and Australian Industry Group, if they want to pursue that, will let us know in the reply submissions. So then while we're at it, I think the same approach should be taken to item 31 in respect of clause 16.3 of the Telecommunications Services Award.

PN243

All right, now if we go to the next item on the Contract Call Centre list, item B2.3, we've removed the 25 per cent loading for casuals on overtime and if the ASU want to, or the CPSU want to pursue that issue, they'll need to do that in the reply submissions.

PN244

MR RIZZO: Sorry, Commissioner, wasn't there a number 3 there before, 13.2(a)?

PN245

THE COMMISSIONER: Okay, what have I done with that?

PN246

MR RIZZO: Number 3 on your report, 13.2(a) promoted by Ai Group.

PN247

THE COMMISSIONER: Yes, we did consider it. Which item was this one?

PN248

MR BARLOW: Is this is intended to be a reference to 13.1(a)?

PN249

THE COMMISSIONER: Yes, it is. It is, that's correct. And I think we went back and had a look at it and we believe that the – and we dealt with it in the summary submissions. We believe that the reference is correct and it shouldn't be changed, so that's the way we dealt with that. Now, ABI did raise an issue here where they believe that the heading in clause 13.1 was incorrect and I think that, to deal with the AIB – to deal with the concern that ABI has raised, I think we could add a note at the bottom of the table to say that the spread of ordinary hours is defined in clauses 8.6 and 8.8.

PN250

Because the issue that ABI is getting at is that there is the possibility of ordinary hours being worked directly in conjunction with the spread, directly before the spread or after the spread, can count as part of your 38 hours.

PN251

MR BARLOW: Sorry, Commissioner, what's the proposal then?

PN252

THE COMMISSIONER: So we could add a note – you see at the top of the table, it has "Ordinary Hours Worked".

PN253

MR BARLOW: Yes.

PN254

THE COMMISSIONER: We put a number one there and then at the bottom of the table, the note that the spread of ordinary hours worked, we put a number one there. And then at the bottom of the table, the note would be that the spread of ordinary hours is defined in clause 8.6 and 8.8.

PN255

And see that then deals with the issue that ABI have raised, which is 8.6(c) says that:

PN256

Any work performed by an employee prior to the spread of hours which is continuous ordinary hours, regarded as part of the 38 ordinary hours of work.

PN257

MR BARLOW: Commissioner, is this similar to the issue that they raised at 7.8 of their submissions regarding clause 14?

PN258

THE COMMISSIONER: Yes. Except- -

PN259

MR BARLOW: This issue about when overtime is- - -

PN260

THE COMMISSIONER: Except that I think that that is a separate issue because I think the issue that's been raised at paragraph 7.8 of the ABI's submissions is not about the – the clause is about the maximum number of hours. So it's about the length of the shift rather than the spread of hours. So I don't agree. I don't think that there is a problem in respect of clause 14, whereas I agree with ABI that there is a potential problem with clause 13, which is why I was suggesting adding the note.

PN261

MR BARLOW: Yes, Commissioner.

PN262

THE COMMISSIONER: So does ABI understand what I'm suggesting and does that assist ABI's view?

PN263

MR FERGUSON: Yes, Commissioner.

PN264

THE COMMISSIONER: And is there anyone, at this stage, who's got a problem with that? I accept that people might want to, if we correct it in the exposure draft and there's some issue arises from that then obviously you can raise it, but is there any concern with that, that anyone can see at this moment?

PN265

MR BARLOW: It was ordinary hours of work, wasn't it, Commissioner?

PN266

THE COMMISSIONER: Yes.

PN267

MR BARLOW: Yes. No, Commissioner.

PN268

THE COMMISSIONER: All right, so I think that that deals with those ABI issues there and I think that that is all, in respect to the Contract Call Centre Award, unless there's something else people want to raise.

PN269

And what that would mean is, that the substantive variations that will need to be determined is item 1 of the variations, summary of variations, which is referred to a separate Full Bench. Item 2, which I think we've discussed earlier, which is the question of the annual leave loading, and if that resolution we talked about today sticks, then that's the end of that matter. So that won't continue. The trainer proposal, which is obviously still a substantive item, and the issue of annual salaries.

PN270

MR RIZZO: Sorry, Commissioner, just one sec.

PN271

THE COMMISSIONER: Yes.

PN272

MR RIZZO: Was it in this award, Commissioner, where you struck out that 25 per cent?

PN273

THE COMMISSIONER: Yes. And that is in B2.3.

PN274

MR RIZZO: B2.3. Right, yes.

PN275

THE COMMISSIONER: So essentially we don't believe that the casual loading is payable on overtime.

PN276

MR RIZZO: Okay. So well the Commission has taken the default position?

PN277

THE COMMISSIONER: Well, I think what we're saying is, we think that that is what the current award provides. That we think that's what the current award says.

PN278

MR RIZZO: Yes.

PN279

THE COMMISSIONER: And we understand that if you think there's a strong argument to the contrary, you know, then you need to raise that in the supply submissions which are due next week.

PN280

MR RIZZO: Yes.

PN281

THE COMMISSIONER: And obviously that will then be a substantive matter that would have to be resolved.

PN282

MR RIZZO: But is it also true that some awards do cater for the- - -

PN283

THE COMMISSIONER: No doubt about that, yes.

PN284

MR RIZZO: Yes, for the loading to be on top of the loading.

PN285

THE COMMISSIONER: No question. There are some awards where the loading is payable on top of overtime penalties. There's no doubt about that.

PN286

MR RIZZO: Okay. But in this award- - -

PN287

THE COMMISSIONER: But when we look at it in this award, we don't think that's the case.

PN288

MR RIZZO: Right.

PN289

THE COMMISSIONER: But if when you look at it, you've got a different view and you want to pursue it, then please raise it in the reply submissions.

PN290

MR RIZZO: Okay.

PN291

THE COMMISSIONER: That obviously applies to the CPSU as well, of course.

PN292

MR RIZZO: Yes.

PN293

THE COMMISSIONER: All right, so is there anything else about the Contract Call Centre Award that anyone wants to raise? Right, so then if we move to the Telecommunication Services Award. Now, I presume that the trainer proposal, the same thing applies to that as applied in respect to the Contract Call Centre Award.

PN294

MR BARLOW: Yes, Commissioner, it's a common claim against both awards.

PN295

THE COMMISSIONER: Yes, okay. So we still hope that there can be some discussion about that.

PN296

MR BARLOW: Yes, Commissioner.

PN297

THE COMMISSIONER: Then the next item is how casuals working overtime should be paid. Frankly, I think that this is one issue where the Fair Work Ombudsman is correct. I think it is unclear. And do the parties have any preliminary views about that that they want to express today?

PN298

MR BARLOW: Commissioner, it's previously been the CPSU's position that they are paid in that circumstance, and this is one of those- - -

PN299

THE COMMISSIONER: Yes, how are they paid? So what are they paid? Are they paid ordinary rates, are they paid overtime rates or are they paid overtime rates plus the casual loading?

PN300

MR BARLOW: The latter one has been our position, historically Commissioner.

PN301

THE COMMISSIONER: Okay. And what do the employers believe is the case?

PN302

MR FERGUSON: We don't have a position to put today, Commissioner- - -

PN303

THE COMMISSIONER: Okay.

PN304

MR FERGUSON: - - -but I'm just looking at the words. I'm just trying to see how you think the overtime was payable to include the casual loading.

PN305

MR BARLOW: I don't have the clause in front of me, 6.3. I think we're dealing with making it silent, Commissioner, and thereby it is – as opposed to other awards where the situation is different with those two clauses, as we've just discussed in the Contract Call Centre Award, Commissioner.

PN306

MR FERGUSON: I'm just – and I don't want to put anyone in a difficult position, but the casual loading clause is clearly only payable in relation to ordinary hours.

PN307

THE COMMISSIONER: All right, well I think- - -

PN308

MR FERGUSON: Anyway.

PN309

THE COMMISSIONER: I do think this is a matter that does need to be clarified, one way or another, because at the moment I think it's quite unclear what they get paid. I understand what Mr Ferguson says about the issue of the loading, but I think, if you look at the overtime clause I don't think that makes it particularly clear. Maybe I'm wrong about that, but I think we'd be assisted if the parties were to let us know. Well, I suppose it is fairly clear, isn't it, that 15.1(a) it says, "Full time and casual employees, overtime is anytime worked in excess of the ordinary hours". And then it's got a rate for that, so I think it is fairly clear that casual employees do get overtime.

PN310

I think the issue is, really about the casual loading and Mr Ferguson is saying, it looks fairly clear to him that it doesn't include it. So I think the unions need to have a look at that and address that issue in the reply submissions.

PN311

MR BARLOW: Yes, Commissioner.

PN312

THE COMMISSIONER: All right, thank you. Now, we've dealt with the next item which is the annual leave loading issues. So the variation Ai Group proposes to clause 16.3(a) will be made with the insertion – reinsertion of the issue about section 90 of the Act and the amendment sought to 16.3(b) will not be made, we'll leave that as it is.

PN313

Then the next one is the part-time 10 hour break. Has the Australian Industry Group had a chance to have a bit more of a look at this question?

PN314

MR FERGUSON: A little bit more of a look, Commissioner, in the sense that we did a little bit of work on the history. And as I understand it, the exemption for part-timers was there before the Modern Awards, as I'm instructed. I understand the point the Commissioner was raising about, I suppose in effect, superficially, what's the justification for it. But we're a bit reluctant to just remove that flexibility, if you will, without a proper consideration of all of it.

PN315

I mean, it may be, as it often is with awards, that superficially things seem odd. Like there is a history and a reason for the outcome. It's clearly, I think you identified it, it is a substantive change in the exposure draft, so it would be for a party, in our view, to advance a case for that substantive change, and that this process really should just replicate the existing entitlements, Commissioner. I don't know if anyone is really calling for the change.

PN316

THE COMMISSIONER: No, not that I'm aware of, but they might be now.

PN317

MR FERGUSON: Yes. I mean, and that's the other part of this Commissioner, in that you know, every time something is not apparent why something says something, I don't think we should just start changing it. Which is why, presumably, the general approach in the review has been, the parties want a substantive change, they should run one and then they'll have to explore the reasons why and what the implications might be for the change.

PN318

I know that there's very flexible part-time arrangements in this award. I think you can work up to 38 hours without additional penalties and so forth, and I don't know how they might all interact. But look, maybe we're taking an overly conservative approach, Commissioner.

PN319

THE COMMISSIONER: No, no. Look, I appreciate what you're saying and I think it's sensible what you're saying. On the surface it seems discriminatory, really, whereas it's clearly not discriminatory for a casual employee, because

different circumstances apply to casual employees. But it does seem, on the surface, to be discriminatory that a part-time employee is not entitled to rest between shifts, whereas a full-time employee is.

PN320

MR FERGUSON: I note that, for example, 6.3 and using the exposure draft, there's very flexible provisions for part-timers.

PN321

THE COMMISSIONER: There are.

PN322

MR FERGUSON: They're almost akin to the way, in some respects, a casual might be used - not entirely. But it just seems that – I mean, I haven't fully thought it through, but there may be some interplay between the different clauses as a result and the way part-timers are used. And we wouldn't want to do anything to necessarily discourage the use of part-timers.

PN323

Now, I don't think it's discriminatory in an unlawful or prohibited sense. I mean, it's not unusual for terms to have different – apply differently to different types of employment.

PN324

THE COMMISSIONER: That's correct.

PN325

MR FERGUSON: So it's in part, as much as anything else, when we saw this, I thought well, unless we're going to go and do a lot of work on how it's used in practice, perhaps we should leave it there, unless anyone has any – you know, if it's not causing a problem. But I understand that it's not a usual outcome, but 6.3(b)2 isn't that usual either.

PN326

THE COMMISSIONER: Yes.

PN327

MR FERGUSON: So as I said, we may be being cautious, but it doesn't seem to be something we need to attend to.

PN328

THE COMMISSIONER: No. Well, no one's proposing a variation, so I think, to be fair, you're correct, and therefore we should make 15.5(b) in the exposure draft consistent with the current award, which means that the exclusion should be for casuals and part-timers.

PN329

MR FERGUSON: Thank you, Commissioner.

PN330

THE COMMISSIONER: And we've dealt with the daylight saving issue in the same way as with the previous award. Then Ai Group are going to address the

section 147 issue in their reply submissions, so I don't think we can deal with that further at this point. There are a couple of other matters I'd like to just briefly address.

PN331

Item 3, which is the proposal by the ABI, which is about changing the words about when overtime is payable, dealing with this issue of unauthorised overtime, we think that's a substantive change and so we're not going to make that change. So if the ABI want to push that matter further, they'll need to raise that in their reply submissions.

PN332

In respect of item 7, the same issue applies there, as we discussed last time. We've had another look at it. We don't propose to change the exposure draft at this stage. If Ai Group want to pursue that matter further, they'll need to raise that in the reply submission.

PN333

And then in respect of schedule B, we think that schedule B is consistent with the approach that we've been taking in the other awards, so we don't think there's a need to change schedule B further. If there's any specific proposal about that at this stage that anyone wants to raise, we're happy to discuss it.

PN334

As you know we've made some alterations to schedule B which accommodated the issues raised at item 35 and 36 and 33. Right, so we've made those changes, but we haven't – that's the extent of the changes that we've made. So is there anything further about that that anyone wants to raise?

PN335

MR FERGUSON: No, Commissioner.

PN336

THE COMMISSIONER: All right. The outstanding variations would then be the trainer classification, which hopefully the parties will discuss further. The issue about casual's overtime, if that remains an issue and the unions are going to have a further look at that. And the annual leave loading question, I believe, is not resolved.

PN337

All right, so if we could just finally go back to the general matters that were raised in the ABI and Ai Group submissions. We've discussed (a), which is those issues about the use of the word "loading" v "penalty" in those couple of places. The second issue, which is the general submission that Ai Group's raised at section 2.7 of their submissions, we haven't specifically addressed that matter.

PN338

Essentially what Ai Group are seeking there is that the note that's been put in the awards by a decision of the Full Bench which says:

PN339

Employers who meet their obligations under this schedule are meeting their obligations under the award.

PN340

The Ai Group wants that to read:

PN341

*This schedule should be read in conjunction with the terms of the award.
Employers who pay the relevant rates contained in this schedule are meeting the corresponding obligations under the award.*

PN342

Now, I can understand there's some force in what the Australian Industry Group is saying here. It does make sense to me. And that's particularly the case when you consider that issue about the all purpose payments, right, because in a sense, some of the schedules, it's not the actual dollars that are shown in the schedule, it's the dollars shown in the schedule plus something. So I think there's some force in what the Australian Industry Group says.

PN343

But because there's been a Full Bench decision about it, I think it's a matter that will have to be considered further by the Full Bench. So what I'd propose to do is to, in reporting to the President about this, I'll draw the President's attention to this specific submission of the Australian Industry Group so that he can consider how we might best deal with it.

PN344

MR FERGUSON: Well, Commissioner, we'd ordinarily want a consistent approach the awards anyway.

PN345

THE COMMISSIONER: Yes. Well, it is a general point you're raising.

PN346

MR FERGUSON: Yes. So I don't think you can do anything else.

PN347

THE COMMISSIONER: Yes. So hopefully the President will consider how it might be dealt with, all right?

PN348

Then ABI have raised a few general points. Now, in 2.1, ABI have raised a point about the supported wage system and the words, "Because of the effects of a disability". Again, I don't think that's something we can deal with in this specific award and I think I will draw that to the attention of the President if ABI are wanting to pursue that matter. So is that something is wanting to pursue?

PN349

MR FERGUSON: I'd have to get instructions, Commissioner.

PN350

THE COMMISSIONER: Okay. Then 2.3, changing the words "Occupational Health and Safety Legislation" with "Work Health and Safety Legislation", I think ABI's point is correct. That is the sort of new terminology, given the harmonised legislation. So again, that's not something I think we want to just change in this award. If we're going to do it, we do it consistently, so I think we should draw the President's attention to that one.

PN351

And then in 2.11, the change that's been proposed to remove the words, "As varied", I think would be difficult for us to deal with, given that there's a specific Full Bench decision to insert this standard clause. So if ABI want to pursue this particular point, it'll certainly have to be elevated, given it's already been determined.

PN352

And finally, 2.13, again this is a matter which has been determined and is consistently in the exposure drafts. I can see some validity in the point that ABI's raising, that maybe it's better to refer to the regulations more generally, rather than the specific subsection. But again, that is something that we'd have to elevate, if it was something that the ABI wanted to pursue. So does ABI have any view about those matters?

PN353

MR FERGUSON: No, Commissioner.

PN354

THE COMMISSIONER: Okay. All right, so is there anything else that we need to deal with today?

PN355

MR BARLOW: Commissioner.

PN356

THE COMMISSIONER: Yes.

PN357

MR BARLOW: I apologise, it's Mr Barlow here with the CPSU in Sydney.

PN358

THE COMMISSIONER: Yes.

PN359

MR BARLOW: I fear I may keep the parties back a few minutes. We were discussing obviously changes in conjunction with the Contract Call Centre Award and the annual leave loading issues there. And we then dealt with them very briefly in the Telecommunications Services Industry Award.

PN360

THE COMMISSIONER: Yes, we did. Yes.

PN361

MR BARLOW: And essentially you said we'll adopt the approach we took, subject to you rewording the provisions that were provided by the AiG Group, in accordance with section 90 of the Act, etc. I'm just looking at the – I just want to clarify, Commissioner, that what do you mean by "Accept the approach that had been adopted in the Contract Call Centre Award". Obviously the CPSU is content with that approach. It's just, in the correspondence from AiG of last evening- - -

PN362

THE COMMISSIONER: Yes, I made it clear – I might have cut you off. I made it clear, with the change to 16.3(b), would not be included.

PN363

MR BARLOW: Thank you, Commissioner. That's just what I wanted to clarify.

PN364

THE COMMISSIONER: All right, is there anything else that anyone wants to raise?

PN365

MR FERGUSON: No, thank you, Commissioner.

PN366

THE COMMISSIONER: So I think what will happen now is, we'll await the reply submissions and the comments in respect of the country definition and the issue about clause 10.2, these clauses that are exempt, right? So we'll await the responses to those matters in the reply submissions and then, if I consider, having seen those that there are matters that we should further discuss in conference, we'll convene another conference to try and finalise anything that's outstanding that we can.

PN367

Otherwise there'll be obviously a few matters, which we've already flagged, which will end up having to be determined by a Full Bench. But I think it will be a relatively small number of matters in this case.

PN368

So is there any other comments anyone wants to make on that proposed course of action?

PN369

MR FERGUSON: No, thank you, Commissioner.

PN370

THE COMMISSIONER: All right. So I thank everyone again for the hard work that they've put in to at least get us to this stage and look forward to anything that people raise in the reply submissions.

PN371

Right, so that concludes the conference today. Thank you.

PN372

MR FERGUSON: Thank you, Commissioner.

PN373

MR BARLOW: Thank you, Commissioner.

ADJOURNED INDEFINITELY

[3.57 PM]