TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT HAMPTON
COMMISSIONER DURHAM

C2019/5259

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

Review of C14 and C13 rates in modern awards
(C2019/5259)

Sydney

10.06 AM, MONDAY, 18 DECEMBER 2023

Continued from 13/12/2023

PN152

JUSTICE HATCHER: I'll take the appearances. Ms Bhatt you appear with Mr Chang for the AI Group?

PN153

MS R BHATT: Yes, your Honour.

PN154

JUSTICE HATCHER: And Mr Scott you appear for Australian Business Industry and New South Wales Business Chamber?

PN155

MR K SCOTT: I do, your Honour.

PN156

JUSTICE HATCHER: All right. So you first Ms Bhatt?

PN157

MS BHATT: I have had discussions with Mr Scott. We have agreed I would go first in this Commission - - -

PN158

JUSTICE HATCHER: Right.

PN159

MS BHATT: As the Commission knows AI Group has filed two written submissions in this matter dated 6 November and the 1 December. We continue to rely on those written submissions. In those written submissions we articulate the bases upon which we oppose the Commission's provisional view and various claims that have been advanced by the unions in this matter.

PN160

For the purposes of today's proceedings I really intend to deal primarily with various matters of principle or certain themes that have emerged from the written material that's been filed. And I intend to do that at least in part by reference to a document that we filed on the 14 December. It's a three-page document that contains a table with some analysis.

PN161

Can I confirm that members of the Full Bench have access to that?

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JUSTICE HATCHER: Yes.

PN163

MS BHATT: For any parties that don't I have printed copies if that's required.

PN164

JUSTICE HATCHER: Yes.

PN165

MS BHATT: Thank you. In essence that analysis identifies the nature of the various classification structures that are found in various awards that are the subject of union claims in this matter about which AI Group has filed submissions.

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And if the Commission were to turn, to cast its eyes firstly over the fourth column from the right which is headed 'Competency/skills based' and if we were to skim through the table it identifies in summary that the overwhelming majority of awards that are the subject of these claims operate by reference to the competencies or the skills that are required to be demonstrated by an employee.

PN167

That is the determinative factor in those awards for assessing an employee's classification level. Now, in our submission, as a broad matter of principle, classification structures of this nature reflect an inherent connection between the attainment of additional skills and increased work value.

PN168

There is in those awards a direct relationship between the development of skills and increasing wage rates. Some awards go further. They, in fact, require that an assessment is undertaken of an employee's competency in order for them to be classified at a higher level. And I will just provide two brief examples of that. One relates to the Joinery Award, which in respect of Level 2 at clause A.1.2(a) reads –

PN169

'In all cases the employee will be required to satisfactorily complete a competency assessment to enable the employer to perform work within a scope of this level.'

PN170

And a similar concept can be found in the Wine Award. I think there's a number of classification streams. But, uniformly, in each case at Level 1 the award indicates, firstly, that an employee at that level is a trainee undertaking induction training, followed by training in the modules essential to the Grade 2 level. And then goes on to indicate that –

PN171

'Such training will be completed and assessed within 12 months. The employee will automatically appointed to Grade 2 on passing an accredited assessment for progression from Grade 1 to Grade 2.'

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JUSTICE HATCHER: If you just go to the Joinery Award?

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MS BHATT: Yes, your Honour.

PN174

JUSTICE HATCHER: Isn't the effect of A.1.1 the person can only be classified at Level 1 if they're undertaking 38 hours or less induction training?

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MS BHATT: That's not our interpretation of that classification structure. We'd say that - - -

PN176

JUSTICE HATCHER: I mean that, now you've raised that, is contrary to the position as I understand it, put forward by both the unions and the union employee groups with respect to that award.

PN177

MS BHATT: Yes, it is, your Honour. As we understand the operation of that particular classification level an employee undertaking 38 hours of induction training would, indeed, be classified at that level. But it doesn't follow that once that induction training is followed the employee must necessarily immediately progress to Level 2.

PN178

As we understand it, an employee undertaking the types of duties that are described at sub-paragraph (b) indicative tasks that are described at sub-paragraph (c) or if they're engaged in the occupations described at sub-paragraph (d) could be engaged at that level on an ongoing basis.

PN179

If one looks to the Level 2 classification definition it identifies – I'm reading from paragraph A.1.2(a) –

PN180

'An employee to be classified at this level will have completed a required training or will have the equivalent skills gained through work experience in accordance with the prescribed standards for this level.'

PN181

And so it goes on. So an employee can't move to Level 2 until they have, in fact, acquired those competencies and undertaken whatever the relevant training is. That's as we understand it.

PN182

It's our position that progression through classifications of this nature is generally based on the genuine acquisition of additional skills and competencies. It's illustrated the point in relation to the Joinery Award. And for the purposes of these proceedings it's our submission that variation should not be made, that will in effect result in automatic pay rises that are based on time served, rather than the existing position which relates to those competencies.

PN183

We say that one of the consequences of such variations would be the compression of internal wage relativities which would distort the relationship that currently

exists between classification rates and relative work value and it would potentially diminish the incentive for upskilling.

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Now, it's notwithstanding our submissions in relation to this matter, we have dealt with this in more detail in our written submissions, the Commission concludes that it is appropriate to introduce some time based parameters in a relevant classification structures, then they should reflect the period of time that is in fact required to develop the relevant competencies. And that's an assessment that will necessarily need to be undertaken on an award by award basis.

PN185

We don't think that any such assessment would be free from difficulty because, of course, that question might differ between employees based on prior experience in the industry or their capability more generally. But at the very least, we say, that there would need to be a detailed examination of what is required for an employee to attain the requisite competencies, including a consideration of any structured training that is required to be undertaken and how long that typically requires.

PN186

Now, of course, in these proceedings there is very little material of that nature that has been presented in support of the variations that have been filed.

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JUSTICE HATCHER: Well, parties were at liberty to provide that information if they thought it relevant and in respect of some orders that information has been provided.

PN188

MS BHATT: In respect of some awards it has been provided. There is some evidence that goes to, in the context of particular awards, the nature of training that is required or that is undertaken upon commencement, under a particular award in certain contexts. But by and large that evidence is limited in its scope.

PN189

And, indeed, in respect of some of the awards that are the subject of the union claims there is nothing more than a couple of paragraphs of submissions that has been filed. I have a note here that just by way of example the first award that appears on our list as having a classification structure that is competency and skills based is the Cement Lime and Quarrying Award which specifically requires that all training will be structured competency based training.

PN190

I don't think there's any material before the Commission in this matter as to precisely what that entails or what that requires, how long that takes. It goes on to say that an employer will prepare a training program setting out, amongst other things an indicative timetable for acquiring them. Again, I don't think there's so much as any submissions, really, about what that process ordinarily looks like.

PN191

There's a number of awards, albeit a smaller number, that contain classification definitions that we say refer to or relate to undertaking training or obtaining qualifications which is perhaps, in some cases, at least subtly different from the first category of awards that we've identified. And they, too, are marked in this analysis that we filed.

PN192

For similar reasons, we would say that it's inappropriate to introduce any time-based requirements to reclassify employees in these awards. I mean an obvious example that comes to mind is the Nurses Award. A student enrolled nurse in that award is defined as a student undertaking study to become an enrolled nurse and an employee can't be reclassified as an enrolled nurse until they've undertaken the relevant training and have obtained the relevant qualifications which are, to some extent, described in the Award.

PN193

Clearly, it would be impracticable to introduce a time-based requirement that an employee be reclassified as an enrolled nurse after a specified period of time. Particularly in circumstances where, again, there's no evidence in relation to that award as to what that requires, what that training requires and what is entailed in obtaining the relevant qualification.

PN194

JUSTICE HATCHER: Well, an enrolled nurse, as I understand it, needs to have a diploma.

PN195

MS BHATT: That's my understanding, your Honour, yes without turning to the award. My recollection is that the classification description contemplates that you might be classified as an enrolled nurse if you have some other equivalent training or experience in the sector as well, or in the relevant sectors, as an occupational award.

PN196

There are some awards then that we say are task based. That is the classification structure is based on the tasks undertaken by the employees. They're identified in the final column of that table and some of these examples include the Electrical Electronic and Communications Contracting Award as well as the Meat Industry Award. Clearly, in our submission, these proceedings should not result in the imposition of time-based requirements for reclassification in these awards. Because it might result in employees requiring to be reclassified to a higher level in circumstances where they're not in fact able or required to perform the relevant tasks. And that's plainly an unworkable an anomalous outcome. There are a very - - -

PN197

JUSTICE HATCHER: Although in respect of the Meat Industry Award the meat industry employees, as I understand it, would be content with a six-month maximum period.

PN198

MS BHATT: Yes, that's the addition that I think has been advanced by the Australian Meat Industry Council. Our submission in relation to that position is that it would at least allay many of the concerns that we've advanced in relation to the proposal that's been put the AMIEU in these proceedings.

PN199

I think their primary position is that the C14 equivalent classification level should simply be removed from the award which we say would result in obvious anomalous outcomes or that it should be limited to one week.

PN200

I think on the union's own evidence there is some material that's been advanced that one week would not be a sufficient period of time or that at least some employees would need more than one week to attain the relevant level of proficiency that is required to be able to perform the tasks that are described in Level 2 or 3. And this evidence obviously goes much further and establishes that there is a significant amount of training that is undertaken in some operations covered by that award after six months.

PN201

JUSTICE HATCHER: Just going back to the Nurses Award.

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MS BHATT: Yes, your Honour.

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JUSTICE HATCHER: I don't know if you've got access to it but - - -

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MS BHATT: I do.

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JUSTICE HATCHER: - - -the rate which may be increased in – just excuse me for a second.

PN206

MS BHATT: If it assists, your Honour, my understanding is that it's the student enrolled nurse.

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JUSTICE HATCHER: Was the student enrolled nurse less than 21 years of age?

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MS BHATT: That's right. Yes.

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JUSTICE HATCHER: I mean on one view that's a junior rate. It's not an adult rate.

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MS BHATT: Yes, I think the Commission's analysis that was previously published characterised it as such that on one view it is a junior rate. But my

understanding is that that age-based distinction in respect of student enrolled nurses has existed in, at least, some pre-Modern Awards for some time. We tried to ascertain precisely how it came to be and were not able to – just for the purposes of seeing it shared some light.

PN211

JUSTICE HATCHER: But the point is if that's the correct characterisation it's not inconsistent with the provisional period and nothing needs to change.

PN212

MS BHATT: The provisional view, as I understand it, is confined to adult rates, yes. It seems to us, that to some extent, the difficulties that we have raised about introducing time-based restrictions in these classification structures is acknowledged, at least, implicitly by the unions because some, for example, the UWU and the AWU attempt to sort of sidestep some of these complexities by arguing that it would be 'simplest', to instead increase the wage rates payable to employees in order to give effect to the Commission's provisional view.

PN213

But, of course, that runs into an obvious limitation which we have dealt with, in detail, in our written submissions but the short point is that the Commission only has power to make such a variation if it can be justified by work value reasons.

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In most instances, there's virtually no material before the Commission that goes to this issue and even where there is some evidence before the Commission about, for example, the nature of the work there's really no detailed analysis that has been undertaken as to whether the existing wage rates properly reflect the value of the work.

PN215

Some unions appear to rely on the Annual Wage Review decision that was issued this year to suggest that the need to consider whether there are work value justifications in the context of a particular award in these proceedings has somehow been supplanted. And, really, that's a reference to the Commission's decision to equate the National minimum wage with the C13 rate.

PN216

And, in particular, I would refer – just by way of an example to a submission made by the AWU in reply at paragraph eight. For the Commission's reference that's page 367 of the digital hearing book.

PN217

The AWU says at – I'll read paragraph five first. They say, 'The expert panel concluded that the C14 rate does not constitute a proper minimum wage safety net for award or agreement free employees in ongoing employment.'

PN218

And then at paragraph eight, they say, 'In the AWU's submission the clear implication of the Annual Wage Review 2023 decision is that all ongoing productive work is of a value that justifies payment of at least the C13 rate.'

PN219

I think a similar submission is made by the CFMEU manufacturing division in its reply material. I think what we would say about that, firstly, is that in setting the National minimum wage the expert panel was not required to consider work value. And, in practice, it did not do so. In fact, in its decision it observed that it was difficult to identify in practical terms any occupations or industries in which National minimum wage relied employees are engaged. That's from paragraph 47 of the expert panel's decision.

PN220

JUSTICE HATCHER: Well, that's a different point and that's about the National minimum wage, not about C14.

PN221

MS BHATT: Yes. And I mean as we – so we agree, of course, your Honour. The trouble seems to be that the unions have sought to draw some connection between any need for the Commission to assess work value considerations by reference to the Commission's decision in the annual wage review.

PN222

As we read the expert panel's decision its decision to discontinue the alignment between the National minimum wage and the C14 rate ultimately turned, not on considerations of work value, but really an assessment, at least in large part, of the relative living standards and the needs of the low pay, which it was required to do by reference to the minimum wages objective.

PN223

And that's demonstrated by an extension discussion in the expert panel's decision. So the short point in response to the union's submissions in this regard is that that decision does not reflect an assessment of the value of work undertaken by employees who are entitled to the National minimum wage and it shouldn't – to the extent that the union seek to extrapolate that, to rely on it, as a decision that is somehow a reflection of the nominal value that must attach to all forms of work which, I think, is some of the phraseology that's been used, we say that that argument should simply be rejected.

PN224

We also say that it's relevant that in making its assessment, the expert panel expressly differentiated the circumstances of award covered employees. And it did so in part by making reference to the fact that such employees may be entitled to various additional amounts to their base rate of pay, such as weekend penalty rates, shift loadings, overtime and the like. We advanced that position in our initial submission and in response one of the unions have said that such entitlements are not relevant to this review because they are designed to compensate employees for particular disabilities or disutilities.

PN225

Of course we acknowledge that those premiums are generally directed towards compensating employees for working in particular circumstances or for particular

disutilities. But, in our submission, they nonetheless can and do play a part in improving the relative living standards and satisfying the needs of the low pay.

PN226

So to the extent that the Commission's decision in this matter turns on that consideration of the Modern Award's objective we say that that is a relevant consideration and it's one that distinguishes the consideration in this matter from that which was given to the National minimum wage by the expert panel.

PN227

Finally, on this point, we'd say that the absence of a requirement, an Award derived requirement that employees must receive a higher rate after a finite period of time does not of itself mean that employees won't progress to a higher rate.

PN228

As I have mentioned earlier the vast majority of these awards that are the subject of union claims contain competency based wage, competency based classification structures that provide pathways to improved wages, subject to the acquisition of additional skills. And there doesn't seem to be any serious assertion from the unions but in practice that's not happening. It's certainly not made out in the evidence that's been filed.

PN229

If I can return very briefly to this analysis that we've filed? The first – well, the second column that's headed 'Satisfies provisional view'. That identifies that although those awards prescribe the rates that is less than the C13 rate they are clearly payable on a transitional basis for a period that is less than six months. That is those awards are already consistent with the Commission's provisional view.

PN230

So if the Commission's provisional view is confirmed then, in our submission, those awards fall beyond the scope of these proceedings and they should simply be disposed of in that way.

PN231

The third column – or the fourth column, I apologise, hourly rate exceeds the C13 rate. We've made a submission in writing about the extent to which in some awards all purpose allowances that are payable to all employees covered by an award result in the hourly rate, in fact, exceeding the C13 rate. And, again, even though those all purposes allowances may be directed at compensating employees for certain factors associated with work covered by the award, we say that that does not render the payment of those allowances irrelevant to the Commission's consideration in this matter.

PN232

JUSTICE HATCHER: Well, if you look at the first one – the Cement Award.

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MS BHATT: Yes, your Honour.

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JUSTICE HATCHER: The allowance is described as a disability allowance, isn't it?

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MS BHATT: It is.

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JUSTICE HATCHER: So why would we take that type of allowance into account?

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MS BHATT: I think the submission is simply this your Honour. And we have been quite careful about which awards we have identified in this category. Some awards contain all purpose allowances that are not payable to all employees covered by the award or they're only payable in certain circumstances where you undertake a certain type of work or you're given certain responsibility for example.

PN238

However, there are a raft of awards in respect of which an all purpose allowances is payable for all purposes at all times to all employees covered by it. Those are the awards in respect of which we say that quite simply the allowance forms part of an employee's earnings for all purposes under the award and it results in the hourly rate exceeding the C13 rate.

PN239

If one looks to the definition of 'all purpose' which is defined as a product of the four-yearly review proceedings it states quite clearly that that is an allowance that is included in the hourly rate, even for the purposes of calculating penalty rates and the like. And I think it's also payable under all awards during the period of annual leave. It is payable for all purposes under the award.

PN240

The last thing I would say about this document is that some of the variations that have been proposed by the unions extend beyond the scope of the provisional view and they're identified in the third column. If accepted those proposals would either - - -

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JUSTICE HATCHER: So I'll just – yes, sorry go on.

PN242

MS BHATT: If accepted they would result in the restriction of the application, the C14 classification level to a period that falls well short of six months or it will, in some cases, result in the abolition of the C14 rate because some unions have argued – I think the AWU in particular has advanced of its primary position – that in all awards the C14 rate should simply be uplifted to the C13 rate.

PN243

In our view, there's nothing in the provisional view alone that suggests that this is necessary and more relevantly the material that's been filed doesn't make out a case for those sorts of quite significant changes.

PN244

Can I just deal with two final points in conclusion? The first is that there are a number of awards that have been identified in analysis previously published by the Commission as not conforming with the provisional view but no party has filed a proposal to vary those awards. We say that if the Commission confirms its provisional view, and it proposes to vary those awards that parties should first be given an opportunity to be heard, particularly about how the Commission proposes to implement the provisional view in respect of those awards so that the form of the variation that is proposed.

PN245

And a final point is really just a procedural one. Your Honour, our intention for the remainder of the day is to remain present throughout the course of the hearing. If there are matters that are raised by any of the other parties that haven't been dealt with in our written submissions we may seek a short opportunity to respond. But, otherwise, those are our submissions.

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JUSTICE HATCHER: Yes, that's perfectly appropriate Ms Bhatt.

PN247

MS BHATT: Thank you.

PN248

JUSTICE HATCHER: Mr Scott?

PN249

MR SCOTT: Thank you, your Honour. For the purposes of today I was proposing to simply summarise our position on the issues of principle and then address a couple of matters that were raised in other parties' submissions and I think they're reply submissions your Honour.

PN250

For the purposes of today I was not proposing to make any submissions in respect of individual awards and we have dealt with quite a number of individual awards in our reply submission of 5 December so I was proposing to rely on those submissions unless there were questions in respect of individual awards.

PN251

I suspect there's a fair degree of alignment between what I am about to say and what my colleague's just put but some starting propositions. It's, of course, open for the Commission to undertake a review of the classifications of awards which provide for rates that fall below the C13 rate.

PN252

We have expressed our views in relation to I think there were three elements of the Commission's provisional view, in our submissions in chief of 3

November. But at a level of principle the statutory scheme contemplates and allows for a Modern Award to contain classifications and rates of pay that sit below the National minimum wage. That proposition was acknowledged by the expert panel in the Annual Wage Review decision of 2023, and that's at paragraph 172.

PN253

Starting from that proposition, your Honours, it naturally follows that the fact that a Modern Award might contain a rate that sits below the National minimum wage or the C13 rate is not of itself a sufficient basis to justify an increase to that rate of pay.

PN254

That said, we accept that the C14 classification is an entry level classification across the Modern Award system and in most cases it is expressed to apply on a transitional basis. Given the Modern Award's objective and the minimum wages objective the Commission might form the view that it's appropriate that all classifications sitting below the C13 level or the C13 rate should be transitional in nature. We'd also accept at a level of principle that there might be a desire for Modern Awards to contain classification structures that allow employees to progress upwards as their level of skills and experience develop.

PN255

The key issues here, really, are whether certain Modern Awards should be varied to make the C14 classification transitional and, if so, how that should be done. And perhaps an often an overused phrase by me I think this is a matter where the devil is in the detail.

PN256

I am just going to put six propositions which I think summarise my client's position. The first one is that each award should be considered individually and in its own context. The second is that all purpose allowances should be taken into account in that analysis, given that many of them are paid for reasons that will collect the nature or value of the work.

PN257

And I heard your Honour's question to my friend. In respect of all purposes allowances many of those are expressed to apply to circumstances that have a strong parallel to the definition of work value reasons at 157(2)(a). So those all purpose allowances are paid, having regard to either the nature of the work and more particularly the conditions under which that work is done.

PN258

So we say where allowances are paid for all purposes and where they reflect, effectively, the value of the work then they cannot be ignored in the consideration of what the rate is and whether or not it falls below or above C13.

PN259

The third proposition is that when determining how a classification should be varied to make it transitional if the Commission is minded to do that it's important that regard is had to how the overall classification structure operates and how each

classification level interacts with the next in terms of providing an appropriate path for progression.

PN260

And so that reinforces the first proposition which is that awards need to be considered on an individual basis. The fourth is that where the work captured within the classification is not an entry level training role but instead is intended to or capable of capturing work or jobs that are performed on an ongoing basis. There needs to e some caution before simply imposing a time-based limitation or progression period at which point the employee moves up.

PN261

So, clearly, the employee should be capable of performing the work caught in the next classification level before being moved off their current level. And we'd say in that respect the focus should be on the competence, not purely on the time served by a particular employee.

PN262

The fifth proposition is where it's proposed that the rate of pay is to be increased there would need to be work value reasons justifying that increase. Now I might come back to that because I have seen what some of the union parties have put and our submission is simply that that is a statutory requirement.

PN263

And I note that the Commission's provisional view does not necessarily explicitly or directly propose to increase minimum wages but there's certainly union proposals on foot that say that's what the Commission should do. So I might come back to that in a moment.

PN264

The sixth proposition is there then needs to be some consideration of the relativity between classifications if rates are proposed to being increased. So one level should not simply be looked at in isolation.

PN265

Now, just coming back to the work value issue because I have seen the submissions or the reply submissions of the CFMEU Manufacturing Division. I think Ms Bhatt referred to those submissions earlier.

PN266

I think at paragraph 19 of their submission they respond to some submissions that we made in our original submissions. And I think it goes to the point of whether or not the statutory requirement for work value reasons to justify a change are whether that the scope of variation and whether it falls within a variation to Modern Award minimum wages as defined.

PN267

So what we say is there may be some doubt as to whether subsection 157(2) would apply where the Commission is proposing to amend classification descriptors and not the actual quantum of minimum wages themselves. And I note the meaning of Modern Award minimum wages at subsection 284(3). But

what we do say is if the Commission is proposing to amend a classification descriptor that would have the likely effect of moving certain employees from one level to another that variation quite clearly has the practical outcome of increasing that employee's minimum wage.

PN268

And so we say the work value principles in the Act are clearly relevant. Subsection 157(2) may not strictly apply in those scenarios and it may not strictly require that such a variation be justified by work value reasons but notwithstanding that we say the principles are there for a reason and there's good reason for the Commission to have regard to those principles when considering a variation that has the effect, indirectly, if you like, of increasing minimum wages.

PN269

JUSTICE HATCHER: Just to be clear what principles are you talking about?

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MR SCOTT: It's the subsection 157(2), that statutory test and then I'm using that phrase loosely to reflect 157(2)(a). So work value reasons.

PN271

JUSTICE HATCHER: Yes.

PN272

MR SCOTT: Sorry, your Honour, you've spoken – it sounded – it came from behind me. I almost turned around. I'll just touch on the AWU reply submission and I think at paragraph two of their reply submission they say something to the effect of additional entitlements, such as all purpose allowances are fundamentally not relevant to the review of C14 classifications or rates of pay. And they also say, and I think on the basis that they are typically contingent entitlements.

PN273

And so I think our position is we agree in part with that submission. We accept that contingent entitlements like overtime, penalty rates, et cetera are or maybe of limited relevance in this matter when considering setting or varying Modern Award minimum wages. However we would disagree with that submission in so far as it's intended to apply to industry allowances and similar type allowances that apply for all purposes.

PN274

And, again, I note the similarity in language between the definition of work value reasons at 157(2)(a) and some of the stated purposes or rationales for the payment of all purpose allowances in Modern Awards. Some of the language is strikingly similar as to why those allowances are paid. And so we say that they're clearly of relevance and should be taken into account.

PN275

And so what the upshot of that submission, your Honours, is that where an award contains an all purpose allowance that has the effect of an employee at a classification level below C13 receiving, effectively, their normal hourly rate that

is above the C13 rate we say that that award then operates harmoniously with the provisional views and there's no need for that award to be varied.

PN276

Just in conclusion I make the observation that in many cases the union parties in these proceedings appear to be taking the opportunity to advocate for outcomes that go beyond what would be necessary for a particular award to conform to the provisional views. Many of those proposals are simply for rates to be increased, rather than for the amendment of classification descriptors. We make the obvious point that those variations would need to be justified by work value reasons and we'd also observed that there's very little evidence put forward by the union parties to justify those proposals.

PN277

Unless there are any questions, your Honours, those were my submissions.

PN278

JUSTICE HATCHER: Mr Scott in relation to your fourth proposition can you identify specific awards that relate to that proposition? I think the Travelling Shows Award might be one of them but are there others?

PN279

MR SCOTT: Is this the proposition that there are classifications at that – well, under a C13 rate where - - -

PN280

JUSTICE HATCHER: It's an ongoing - - -

PN281

MR SCOTT: It's an ongoing.

PN282

JUSTICE HATCHER: It's not a transitional rate.

PN283

MR SCOTT: Yes. So I'd say, your Honour, I think there's quite a number of them. I suspect that our submissions call out some of them but perhaps not all. So it might be that I can take that on notice at least in respect to the awards that my clients have an interest in we would be able to identify those.

PN284

JUSTICE HATCHER: All right. Thank you. All right. Well, is that all we need to deal with at this stage of the proceedings? Well, we'll now adjourn and resume with the AWU, the NFF, the Australian Fresh Produce Alliance and the Showman's Guild at 11.30 am.

SHORT ADJOURNMENT **[10.46 AM]**

RESUMED **[11.31 AM]**

PN285

JUSTICE HATCHER: I'll take the appearances, Mr Giordano you appear for the Australian Workers' Union?

PN286

MR A GIORDANO: That's correct, your Honour.

PN287

JUSTICE HATCHER: Mr Houlihan, you appear for the Showman's Guild of Australasia?

PN288

MR D HOULIHAN: Yes, your Honour.

PN289

JUSTICE HATCHER: And Mr Amendola you appear for the Australian Fresh Produce Association?

PN290

MR AMENDOLA: Alliance, your Honour. But, yes I do.

PN291

JUSTICE HATCHER: And Mr Rogers? Where's Mr Rogers?

PN292

MR B ROGERS: I'm online your Honour.

PN293

JUSTICE HATCHER: Can we put him on the big screen, please? Yes. And you appear for the National Farmers Federation.

PN294

MR ROGERS: I do, thank you, your Honour.

PN295

JUSTICE HATCHER: Yes. All right. Well, who would like to go first? Mr Giordano?

PN296

MR GIORDANO: If that's suitable, your Honour?

PN297

JUSTICE HATCHER: Yes.

PN298

MR GIORDANO: So your Honours we rely on our submissions and our submissions in reply. We have made submissions about 35 of the awards that are subject of the review and we would seek to tender several signed witness statements from AWU officials.

PN299

JUSTICE HATCHER: Yes. Just give me a second. All right. So you wish to tender all the statements that you've filed is that right?

PN300

MR GIORDANO: We do.

PN301

JUSTICE HATCHER: The witness statement of Shane Roulstone dated 3 November 2023 will be marked Exhibit AWU1.

EXHIBIT #AW1 WITNESS STATEMENT OF SHANE ROULSTONE DATED 03/11/2023

PN302

JUSTICE HATCHER: The witness statement of Anthony Beven dated 2 November 2023 will be marked Exhibit AW2.

EXHIBIT #AW2 WITNESS STATEMENT OF ANTHONY BEVEN DATED 2/11/2023

PN303

JUSTICE HATCHER: The witness statement of Steven Carter dated 2 November 2023 will be marked Exhibit AW3.

EXHIBIT #AW3 WITNESS STATEMENT OF STEVEN CARTER DATED 2/11/2023

PN304

JUSTICE HATCHER: The witness statement of Danny Mundey dated 2 November 2023 will be marked Exhibit AW4.

EXHIBIT #AW4 WITNESS STATEMENT OF DANNY MUNDEY DATED 2/11/2023

PN305

JUSTICE HATCHER: The witness statement of Travis Phillips dated 2 November 2023 will be marked Exhibit AW5.

EXHIBIT #AW5 WITNESS STATEMENT OF TRAVIS PHILLIPS DATED 2/11/2023

PN306

JUSTICE HATCHER: And the further witness statement of Shane Roulstone dated 29 November 2023 will be marked Exhibit AW6.

EXHIBIT #AW6 FURTHER WITNESS STATEMENT OF SHANE ROULSTONE DATED 29/11/2023

PN307

MR GIORDANO: Thank you, your Honour. So the AWU has got two positions. The first and the second. The first is that we think notwithstanding the provisional view that the Full Bench should give at least some continued consideration to lifting all C14 rates to the National minimum wage rate across awards. The secondary position is one of strong support for the provisional view

set out in the Full Bench's statement that awards should be amended so that all (indistinct) rates become very clearly transitional.

PN308

There's some overlap between those two positions and the arguments that we would put forward in respect of both of them but we start primarily with the first position. It does hinge, in our submission, from the 2023 Annual Wage Review decision. In that decision you've got a recent finding of an expert panel but the C14 rate no longer constitutes a proper minimum wage safety net for award agreement free employees.

PN309

And what we say is that despite some of the differences between Modern Awards and the National Minimum Wage and their coverage, the additional entitlements that we've heard referred to this morning we say that in and of itself that finding in the '23 Annual Wage Review is a very compelling reason to lift C13 rates to the National Minimum Wage.

PN310

It's attractive in its simplicity because it would avoid the need to alter longstanding classification structures across awards. And we say that it's particularly apparent where you have got in an award two rates that are sub-C13. So we've got an example that we've provided but there are several instances. One is the Aquaculture Award, another is the Seafood Processing Award where you have two sub-C13 rates. We would say at a minimum, in those instances, the second from the bottom rate should be lifted to C13.

PN311

So we've heard from – well, many of the employer groups and we heard from Ms Bhatt this morning that, in some instances at least, there's arguably a lack of analysis or probative evidence or information going to specific awards. And some of that, or a lot of that criticism is about the absence of any submissions going to the work value issue.

PN312

If I just take your Honours to page 89 of the hearing book? This is just an example but the Australian Fresh Produce Alliance have referred at paragraph six on page 89 to the AWU's submissions and just said at paragraph five of the AWU's submissions it's suggested that such an approach is necessary in accordance with section 157(1) of the Fair Work Act. With respect, this is incorrect.

PN313

So, your Honours we don't want to quibble too much with this but to avoid any implication that we have misunderstood the statutory requirements here because if you go to that paragraph of the AWU's submission you would find that it's about both the AWU's option one and option two. Not just option one.

PN314

The first sentence in the paragraph refers to that subsection – section 171. The very next sentence goes on to address 157(2) – work value reasons and the

minimum wages objective. So there may be some overlap but I just want to make clear that we do understand that 157(2) comes into play whenever you're varying wages, as opposed to a classification structure.

PN315

So, what we would say about work value is that 157(2) and (2)(a), on their face appear to be highly prescriptive and they could warrant an approach where you certainly have to go award by award and consider specific kinds of work. But in the AWU's submission it's open to the Full Bench to take a broader and less detailed approach as part of the C14 review. And that's because of the finding of the 2023 Annual Wage Review decision.

PN316

So we have got a finding in that decision that the C14 rate doesn't constitute a proper minimum wage safety net. That's at paragraph eight. It was broadly based on a significant portion of single income families who rely on the C14 rate not being able to achieve the minimum outcome for a healthy living standard.

PN317

When the expert panel arrived at its conclusion about the National Minimum Wage it was clearly performing the statutory task. And looking at all of the factors in section 284(1) and we just note that there is some considerable overlap between those types of factors in the minimum wages objective and the Modern Awards objective.

PN318

Both refer to living standards and the needs of the low paid. Both have a range of economic and business considerations. And a core consideration of both is fairness.

PN319

So the expert panel didn't have regard to the value of any specific kind of work when it decided to realign the National minimum wage with the C13 rate. We understand that there's no statutory obligation for it to have done that and it may be difficult to even discern who the National minimum wage applies to or what cohorts of employees, particularly in light of the breadth of the Miscellaneous Award. But what we say is that an implication from the decision can be drawn that, in fact, any productive work is now of a value that justifies payment of the C13 rate.

PN320

So that might beg the question well what if you're undergoing a brief induction period or initial training? Or you're being closely supervised. We would just point out, your Honours, that the National minimum wage doesn't include any provisions for induction or training. There's a trial period that's referred to as part of the Special National Minimum Wage too that applies to employees with a disability and there's the various special National minimum wages. But if you're squarely an award agreement free employee relying on the National minimum wage you're entitled to the C13 rate immediately plus the casual loading.

PN321

So, in our submission, your Honours given that there's an ill-defined group of employees out there who receive the C13 rate immediately that that should be a good argument for also providing that rate across Modern Awards. And we point your Honours to fairness and relevance in that sense being a core part of the various statutory tests. It's in the objects at section 3(b). It's in the Modern Awards objective and fairness is also a fundamental consideration in the minimum wages objective.

PN322

There has been submissions made and we also heard a couple of different views from AIG and New South Wales Business Chamber about this this morning about the relevance of the additional entitlements, overtime, penalties, allowances and loadings and the like and I think that ABI has taken a more relaxed view but still is pushing or making the submission about the relevance of all purpose allowances.

PN323

So in the AWU's submission we say all of the additional entitlements are fundamentally not relevant. They're contingent entitlements. They relate to particular disabilities of employment or expenses. And we'd also say that industry allowances fundamentally about disabilities of employment that apply across the industry.

PN324

For overtime, penalties and shift rates, we just point out that there is a specific matter in the Modern Awards objective at 134(1)(da). So it requires the Commission to take into account and it assumes that there's a need to provide additional remuneration in respect of overtime, working unsocial, regular and unpredictable hours, working on weekends and public holidays and working shifts.

PN325

So, in our view, your Honour – all of those – there are matters about the needs of the low paid. There are matters about business objectives, the economy, and productivity and there's a separate stand-alone consideration about those additional entitlements.

PN326

So we say that's a good reason for the Full Bench to give – you know – either no weight or very limited weight to additional entitlements are under awards.

PN327

DEPUTY PRESIDENT HAMPTON: Mr Giordano, at least, in submissions today the two employer groups only relied, as I understand, on payments that are made for all purposes to all employees all the time. So I don't understand, at least, this morning the proposition anyone's relying on penalty rates or overtime payments.

PN328

MR GIORDANO: I might have misunderstood that, your Honour. I thought the AIG was continuing for - - -

PN329

DEPUTY PRESIDENT HAMPTON: Ms Bhatt, is that correct?

PN330

MS BHATT: I think that the union's understanding is correct, that we continue to press the argument that other amounts, such as penalty rates, overtimes and shift loadings remain relevant. Mr Scott's position might be a little different I think.

PN331

JUSTICE HATCHER: I thought that was about a different point, namely that those entitlements applied at first instance covered by awards but not just somebody to whom the National minimum wage applies - - -

PN332

DEPUTY PRESIDENT HAMPTON: Yes. That's a different issue.

PN333

JUSTICE HATCHER: And therefore when you do a comparison between say a C14 under an award and the National minimum wage. You need to take into account the National minimum wage employees don't have any of these entitlements.

PN334

DEPUTY PRESIDENT HAMPTON: Which is a point made by the Minimum Wage Bench.

PN335

JUSTICE HATCHER: Yes.

PN336

MR GIORDANO: We can't quibble with that, your Honour. That's a fact. We've made, in our submissions, we've made more detailed points about the Horticulture Award and the additional entitlements under that award. So we say that the availability of penalties and overtime in that particular award is highly limited. Casuals are only entitled to overtime or penalties if they work between 8.31 pm and 4.59 am or for more than 12 hours in a shift or for more than 304 hours averaged over an eight-week period.

PN337

And then the award also provides for various arrangements or facility mechanisms in respect of permanent employees. And there's an ongoing practise, whether it's under an award or an enterprise agreement that permanent employees also won't receive overtime for working on Saturdays or between eight and 12 hours in a shift.

PN338

And then we've also made submissions about the allowances under that award has been very tightly constrained. So whether it's the wet work allowance, first aid, various expense related allowances. They're all very narrowly confined. There's just as one further example, in this matter, for the Pastoral Award we've got one of the National Farmers Federation witnesses, Narelle Burke, and it's page 512 of the

hearing book, has said that the award doesn't have weekend – this is referring to the Pastoral Award. It doesn't have weekend penalty rates.

PN339

Could I just move on to another point? There's also been heavy criticism of some of the submissions made by the AWU that would involve splitting the difference. So if you have the bottom rate in the award has been lifted to the C13, what then becomes of the Level 2 rate? And in some instances we've said you should split the difference between Level 3 and Level 2 and also raise the Level 2 rate.

PN340

JUSTICE HATCHER: Well, that sort of diminishes the simplicity of your proposal doesn't it?

PN341

MR GIORDANO: Diminishes the simplicity?

PN342

JUSTICE HATCHER: Well, you described your proposal as having virtue of simplicity but those sort of propositions diminish the virtue doesn't it? If you have to start adjusting things further up the scale.

PN343

MR GIORDANO: Well, they might certainly do in terms of the justifications for it, your Honour. Yes. I accept that. So part of the criticism is that we haven't made any submissions about work value or the statutory requirements when we've asked for that splitting the difference approach.

PN344

We just say for the Horticultural Award we did briefly refer to work value reasons in the submission. It's at 282 of the hearing book and it's just by reference to the classification descriptors and the labour intensive nature of that industry.

PN345

And the only other thing to just raise is that in some of the consent or conditional consent positions that have previously been arrived at they involve the splitting the difference approach fortunately or unfortunately. So that was in respect of the Concrete Products Award and the Sugar Industry Awards. We had a conditional consensus with the AWU, the AIG, ABI and New South Wales Business Chamber. And then there's another example is the preliminary consent position for the Funeral Award.

PN346

So in terms of the AWU's first position that the last point is just about the possible impact of the changes on the broader economy. If I could just draw your Honours attention to the Annual Wage Review decision at paragraph 103. And the expert panel has observed that National minimum wage reliant employees constituted 0.7 per cent of the Australian workforce and that C14 rate was said to apply to a further 0.8 per cent of the workforce. And then it's accepted that where the C14 rate applies, in some instances, that might already be transitional.

PN347

So if I read that correctly it appears that the impact in terms of the number of employees out there that would be affected by these kind of changes is very similar to the number of employees that were affected by the realignment of the National minimum wage.

PN348

It's in the submissions but we're just to reiterate the point that we've also referred to some information about the general good health of the horticulture industry. And that was recently published information, published on 5 September 2023. It came from the Australian Bureau of Agriculture and Resource Economics and Sciences. And the takeaways from it and it's attached to Mr Roulstone's second witness statement, includes that the gross value of production is expected to rise six per cent in the '23-'24 financial year. Exports are set to rise nine per cent and drier conditions are unlikely to have a major impact on Australian horticultural production.

PN349

Could I just move to the second position of the AWU which is that we give strong support to the Full Bench's provisional view, that all of the sub-C13 rates should become very clearly transitional with a maximum fixed period and automatic transition beyond that period.

PN350

One them throughout the submissions that we have made is that we say that the fixed period should be based on experience in the industry, rather than a particular employer. The only exception to that maybe if the period is just a brief induction. For example, 38 hours under the Asphalt Industry Awards, just by way of example.

PN351

Another them of the position that the AWU has taken across the awards is that the upper limit should be three months. We certainly say that should be a default position and I refer your Honours to the Miscellaneous Award in support of that proposition. So under the Miscellaneous Award you've got Level 1 employees on the C14 rate for no more than three months. There's an automatic transition. There's no competency requirements for getting there at three months you go to Level 2 which is an above C13 rate of $24.08.

PN352

That award – we're going back to the discussion about additional entitlements – it has the additional entitlements or it has various of them. So it's got allowances, it's got overtime, it's got penalty rates. So, in our submission, the fact that we have got this default Miscellaneous Award that fills the gaps in award coverage and there's an automatic transition from at three months should serve to support a position where three months is the default period.

PN353

Unlike for the AWU's first position for the second position in line with the provisional view we say that the tasks of the Full Bench is fairly narrowly confined and that work value considerations in the main don't apply. We'd take

your Honours to the definition of Modern Award Minimum Wages in section 284(3). It's a fairly specific definition. It refers to rates of minimum wages in Modern Awards. It includes rates for certain employees, like juniors, trainees and employees with a disability. It includes casual loadings and piece rates.

PN354

And then section 284(4) provides the definition of varying Modern Award minimum wages which means varying the current rate or one or more Modern Award minimum wages. So, in our submission, there's no reference there to varying classification structures. And work value isn't necessarily going to arise in the main in implementing the Full Bench's provisional view.

PN355

So I will just address some of the specific submissions in reply. Page 94 of the hearing book, paragraph 34 – it's just a broad point – but this is the AFPA's alternative position. It primarily doesn't want any variations but as an alternative proposed a period of transition for the Horticulture Award of three months' experience with the employer performing the task.

PN356

So, in our view, that's going to lead to gaining of the classification structure in that award. Put at a less cynical way it's going to provide a lawful means of avoiding employees moving to the Level 2 rate.

PN357

We'll refer your Honours to a decision that sets out the nature of the horticulture industry. That's [2021] FWCFB, 554 – paragraphs 33 to 41. It sets out what's well established which is that the work is seasonal. It's typically short-term. There are picking seasons that can be as short as two weeks. The industry involves high dependence on casual and contract labour, temporary migrant workers comprise over half of the seasonal harvesting workforce and there are particular features of that industry which expose employees to exploitation.

PN358

There's also a long history in the horticulture industry of employees being very adept at using lawful means to avoid paying additional entitlements. And examples of that are piece rates which prior to the decision to create a floor with minimum wages beneath piece rates, employees were routinely being paid less than the base minimum wages. And then the other example which we've referred to is the various averaging and facilitative arrangements in that award are used throughout the industry to routinely ensure that employees don't get paid overtime or penalties.

PN359

JUSTICE HATCHER: But Mr Giordano, in relation to the proposal that it would be three months expense for the employer performing the task. What specifically might that give rise to in terms of what you're complaining about? As you say that could be gains how might that happen?

PN360

MR GIORDANO: So before the three-month point you can shift an employee to another entity or you can shift the employee to another task. And I think even in some of the evidence that's tendered in these proceedings you've got explanations from Costa about it being quite common for employees to move from picking one kind of produce to another. So that's the submission your Honour.

PN361

JUSTICE HATCHER: But would that be part ameliorated if it was changed from employer experience to industry experience?

PN362

MR GIORDANO: Yes. And I suppose we'd have to be clear about what was meant by the word 'task'. So if task was, I don't know, picking all berries as opposed to picking one form of berry rather than another – issues of that nature – your Honour.

PN363

So we've got page 90 of the digital hearing book at paragraph 16. The AFPA has asserted that the evidence of Mr Carl Phillips is the Chief People Officer at Costa Group Holdings should be preferred over the AWU official's evidence specifically on the issue of how long it takes to pay fruit or vegetable picker to become a proficient picker.

PN364

So we obviously dispute that and the various statements that have been tendered do set out the credentials of the AWU union officials and their experience in observing the industry and speaking with employees on a regular basis. I take you to page 87 of the hearing book. That's Mr Phillips' evidence about how long it takes to become proficient.

PN365

So paragraph 32 it generally takes a fruit picker anywhere between three to 12 months to become proficient. That includes the time it takes for a worker to obtain a level of physical fitness. And then berry picking is three to 12 months to become proficient. Citrus picking three to six months and then mushroom picking is described as the most technical, and that would take 12 months.

PN366

And then paragraph 33, Mr Phillips describes what he means by 'proficient' as being that it's the produce is picked correctly and that it's also quick, sufficient speed. And at paragraph 34 again there's a reference to fruit picking being very physical work and it generally taking up to three weeks to acquire the level of fitness that's needed.

PN367

So the first point that we'd raise in relation to that evidence is it kind of begs the question what then happens whether it's three months or 12 months, when you become a proficient picker what then occurs. And then on Costa's own evidence you've got employees, generally, in that industry being engaged for between six and nine months.

PN368

So one issue is that you're unlikely to be employed by the time you reach proficiency perhaps. And then the other is that the Level 2 rate doesn't deal with fruit picking. And we've got, I think, the common position from the employer awards in the horticultural space that you don't progress to Level 2 after reaching proficiency as a fruit picker. You need to be trained to perform some other role.

PN369

Another observation about that evidence from Mr Phillips is that we say it's difficult to understand the various references to physical fitness. We think that at least some workers are going to be physically fit to begin with when they take up the job and that others are going to be so unfit that a period of three weeks picking fruit is not going to be sufficient.

PN370

If I take you to page 96 of the hearing book? That's Mr Phillips' second witness statement. There he's referring to statements from AWU officials about usually undertaking productive work from the first day or two of employment and induction training being of not more than a day. And then receiving no structured training as a fruit or vegetable picker.

PN371

Mr Phillips says that those statements are not accurate. And what we say is telling is that Mr Phillips then doesn't – he says that comprehensive induction training is provided at Costa but he doesn't say how long it goes for in order to contradict the union's evidence.

PN372

He then pretty quickly talks about ongoing training and coaching in the field which is not structured training. And says that at paragraph nine, 'In my experience workers are usually not fully capable of picking fruit immediately after completing induction training. These skills often require refining which is done through coaching and mentoring once they start in the role.'

PN373

In the AWU's submission that actually reads like a very significant concession and departure from what Mr Phillips has said in his previous statement. And he's, effectively, saying that for at least some fruit pickers they're going to be fully capable following induction training of a unspecified duration.

PN374

Paragraph 11 Mr Phillips refers to Costa not having an expectation that workers will operate at maximum productivity immediately following their induction. He says, 'As I set out at paragraph 32 of my November statement it can take anywhere between three to 12 months for a worker to become proficient in picking any one type of produce.'

PN375

So, we say that across the two statements Mr Phillips appears to be conflating proficiency with maximum productivity. And then there's also a concept that creeps in of high proficiency. We say that's fairly confused evidence and that the

AWU's witness statements should be preferred. Just one further point about that evidence – at the end of paragraph 11 – Mr Phillips provides an example that, 'Costa does not consider a mushroom picker to be highly proficient until after a period of 12 to 18 months.'

PN376

In his previous statement we've got mushroom pickers reaching proficiency at 12 months. We're not really sure why the reference has moved from 12 to 18 months but, again, there's confusion about proficiency, high proficiency, maximum productivity, how long the comprehensive induction period is. And, again, we say that the AWU witness evidence should be preferred.

PN377

We've relied in our submissions about the Horticultural Award and the length of time it takes to reach proficiency on a piece rates decision. So that's [2022] FWCFB 554. And, particularly, the Full Bench's determination to insert a new definition of a term in the Horticulture Award term being piece worker competent at the piece work task. So that's now at clause 15.2(a)(4) and it's defined to mean, 'A piece worker who has at least 76 hours' experience performing the task. For example, picking applies, picking strawberries or pruning the grape vines.'

PN378

So the AFPA at page 91 of the hearing book, paragraph 20 has referred to our reliance on that matter and the variation and definition of a piece worker, a competent piece worker. And the AFPA goes on to make numerous observations.

PN379

The observations are broadly about the FWC having inserted that in definition of its own motion. The variation having been made because it's conceded that seasonal horticulture work is vulnerable to exploitation.

PN380

The difference between setting piece rates versus guaranteeing the minimum rate of pay, issues of non-compliance in the industry, particularly with respect to setting piece rates. And then the definition was about making the clause simpler and easier to understand and to apply.

PN381

So the AWU's submission is just that we don't see how any of those observations detract from our reliance on the conclusion of the Full Bench in that matter and that new definition. So the conclusion appears to us to be that fruit and vegetable pickers have generally achieved competence at a task after 76 hours. And we say that sits uneasily with Costa's evidence, in particular, that it takes between three and 12 months to reach whatever it is maximum productivity or proficiency.

PN382

At page 93 of the hearing book the AFPA says, 'The AWU purports to rely on a finding of the Commission in the first piece rates decision by reference to paragraph 415 of that decision. Paragraph 415 is simply a summary of the submissions made by the AWU in that matter in relation to the issue of payments below the minimum hourly rate for work.'

PN383

So, just to make clear, what's being referred to at paragraph 415 is evidence from multiple growers that was led by the National Farmers Federation. The evidence was that it can take as little as a day or two to three days for a picker to start picking at the rate of a competent worker.

PN384

We have attached that evidence to Mr Roulstone's witness statement. The pertinent excerpts of the evidence are included from paragraphs 22 to 26 of the AWU's submission. So it's at page 284 of the hearing book. We've got evidence from Anna Reardon, a farmer in Tasmania dated June 2021 that it usually takes a cherry picker about a day to start picking at the rate of a competent worker, and it takes an apple picker about two days to start picking at the rate of a competent worker.

PN385

And we have got evidence from Brent McClintock, a senior orchard manager in Tasmania. 'Fruit picking is certainly not an unskilled role. It is possible to become highly proficient through experience, fitness, and practise technique. I expect most pickers will reach competent skill level within about a week.'

PN386

And we have got evidence from Mr Anthony Kelly, Chief Financial Officer for the N&A Group, a growing and distributing wholesale and exporting business with operations growing apples and berries in New South Wales, dated June 2021. 'Our casual pickers reach competency within a few days and our pruners are generally competent within a day. Pruning is a skill that you learn to a reasonable level of competence and productivity within a day.'

PN387

Mr Richard Eckersley, farmer in Western Australia. His evidence dated 9 June 2021. 'It takes two to three days for a picker to become competent.' And then, finally, we've got the evidence of Ms Michelle Distell, in an orchard in Spreyton, Tasmania. And she says, 'They inducted on site at the same time and start work that day.'

PN388

So there's also some criticism of that evidence from the National Farmers Federation at page 490 of the hearing book. The NFF has said that, 'We've referred to evidence which describes the experiences of a particular witness at a particular farm in relation to a particular task.' Which, I suppose, on some level is true but we would point out that it's five witnesses. One of them was a DFO at the NNA Group. It's a growing and distributing wholesaling and exporting business deals with apples and berries and that the witnesses spanned Tasmania and New South Wales and WA, and covered apples, cherries or berries and citrus fruit.

PN389

So, in our submission, your Honour, it's telling that farmers have appeared to agree with the AWU witness statements in a previous matter, admittedly a different context with a different purpose in setting piece rates. But, effectively, the same issue about how long it takes a proficient fruit or vegetable picker.

PN390

There's also, I don't want to labour the point too much but there is also further evidence that's been led in this matter by NFF witnesses which we say is consistent with the AWU's view about gaining proficiency. So page 505 of the hearing book we have got a witness statement from Brett Guthrey, he's got a small family farm in New South Wales and at paragraph nine Mr Guthrey says, 'Full training' and I think that this is referring to packing and sorting, 'Full training is around two days'. He then explains that where workers are later deemed not suitable they may be reassigned to other tasks where possible.

PN391

And I take your Honours to page 509 of the hearing book. There's another National Farmers Federation business, Matthew Clane who owns five avocado farms and at paragraph 14 he states, 'Avocado picking is not rocket science but there is skill involved. Avocados have to be picked carefully as they are easily damaged and to ensure they meet strict criteria are set by retailers allowing for packing and transport time.' And then at paragraph 16, 'Workers who are not productive enough are simply moved on.'

PN392

I think we have already canvassed the point, your Honours, that currently under the Horticultural Award there's no fruit and vegetable picking doesn't come under Level 2 and there's no – it falls into Category 5 – there's no automatic transition. I think it was Category 5. So the references or some references for that at page 85 of the hearing book you have got Mr Phillips of the Costa Group saying where the workers are employed under the Horticulture Award they are always engaged at the Level 1 classification and are paid in accordance with this level. Unless the worker changes roles or is actively training in a skill which would see them moved to the Level 2 classification fruit pickers remain at Level 1.

PN393

The NFF – so at page 480 of the hearing book also accepts that Level 1 – for Level 1 under the Horticulture Award there's no automatic time based transition. So in the AWU's view all of that lends very strong support that they should get off a sub-C13 rate. Nothing happens when they achieve proficiency, whether it's in a day or two days or 76 hours or 12 months. They remain on Level 1 and that seems to be conceded by the employer groups.

PN394

Just a final point, page 74 of the hearing book, the AFPA says that in order to implement the provisional view by making Level 1 transitional that would require a further review and it states, 'This requires further consideration of the classification definitions beyond the simple inclusion of a transitional period, given that the duties that are relevant to employees that are presently correctly classified as Level 1 are not expressed as being less proficient or competent than a Level 2 employee for the reasons set out above.'

PN395

So we dispute that submission. We have included proposed variations to implement the provisional view based on the 76 hours, rather than the three months admittedly but they're at annexure 'A' to the AWU's submission. They're

at page 299 of the hearing book. And we say that they are fairly straightforward changes, that you would make – you introduce a mandated transition period after, for example, 76 hours' experience in the industry.

PN396

And then the only other change that's needed is that you take duties that are described at Level 1, general labouring duties, fruit or vegetable picking, thinning or pruning and performing housekeeping tasks in the premises and grounds and move them to the Level 2 classification so that they sit under both.

PN397

So unless there's anything else there they're the AWU's submissions.

PN398

JUSTICE HATCHER: Thank you, Mr Houlihan?

PN399

MR HOULIHAN: Thank you, your Honour. Your Honour, we did not file any additional material to the material that was filed on the 8 June which was the application for the variation of the Travelling Shows Award for the insertion of the transitional period of three months so we have not engaged in any of the discussion about the merits of this process or otherwise. I note that the only mention of the Travelling Shows Award in the material that was filed in accordance with the directions Commission in September were from the AWU. That's at page 289 of the Bench book and that basically supports the Showman Guild's position that the transitional period of three months be introduced for the Level 1.

PN400

Your Honour, that's the limit of the submissions that we wish to make in respect to this. The application was responsive to the Commission process and we'd ask that the Commission approve those variations so that my client can continue with its operations in accordance with the Act and its award. If it pleases the Commission.

PN401

JUSTICE HATCHER: So basically you say that that proposed variation would cause the award to be consistent with the provisional view?

PN402

MR HOULIHAN: That's correct, Commissioner – that's correct, your Honour. It meets all three requirements. It's less than six months, et cetera, and it's on the basis of experience within the industry rather than experience obviously with the particular employer.

PN403

JUSTICE HATCHER: Right. Thank you.

PN404

MR HOULIHAN: If it pleases the Commission.

PN405

JUSTICE HATCHER: Mr Giordano, are you tendering the two statements you filed?

PN406

MR GIORDANO: I would seek to tender them, your Honour.

PN407

JUSTICE HATCHER: That's all right. So the witness statement of Carl John Phillips, dated 10 November 2023 will be marked Exhibit AFPA1.

EXHIBIT #AFPA1 WITNESS STATEMENT OF CARL JOHN PHILLIPS DATED 10/11/2023

PN408

JUSTICE HATCHER: Witness statement of Carl John Phillips dated 1 December 2023 is marked Exhibit AFPA2.

EXHIBIT #AFPA2 WITNESS STATEMENT OF CARL JOHN PHILLIPS DATED 1 DECEMBER 2023

PN409

MR AMENDOLA: Thank you. The submissions that we're going to put, if the Commission pleases, only relates to the Horticultural Award and the reason we say that is because when one looks at the Nursery Award there is a transitional classification in 1(a). And so if the Commission was minded to accept or to adopt its provisional views as the views, then it would be compliant with that view.

PN410

We adopt the submissions of the AIG and ABLA in relation to whether or not the provisional view ought to be accepted. But we wouldn't say anything more on that. If the Commission were minded to adopt its provisional views finally we do have some submissions we want to make and we will put a primary position and an alternative position if the Commission pleases.

PN411

In respect of what we say in terms of our primary position I'd like to refer the Commission to an excerpt out of the four-yearly review of Modern Awards, preliminary jurisdictional issues, which is 2014 FWCFB 1788. I'm sorry but I've only got hard copies but I am happy to hand those up. Just give me a moment and I'll give a copy to my friend from the AWU.

PN412

I'd like to take the Commission and what we have done with what we've handed up, if the Commission pleases, is put the front of the decision and then the relevant parts of the decision that we seek to refer to.

PN413

So if one can go – having said that I think it's two pages are things we want to refer to – but if one goes to - - -

PN414

DEPUTY PRESIDENT HAMPTON: The context I think.

PN415

MR AMENDOLA: It's page eight, and paragraphs – it's paragraphs 33 and 34 that we want to refer to. And this was within the context of the four-yearly review but it says, 'There's a degree of tension at paragraph 33 between some of the section 1341 considerations, the Commission's task is to balance the various 1341 considerations and ensure that Modern Awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in section 134(1) and the diversity in the characteristics of the employers and employees covered by different Modern Awards means that the application of the Modern Awards' objective may result in different outcomes between different Modern Awards.'

PN416

And then in paragraph 34, 'Given the broadly expressed nature of the Modern Award's objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the Modern Awards objective.'

PN417

I will refer the Commission then to paragraph 60 and points six and seven which, in effect, repeat those – or what is said in those two paragraphs. So if I can then take the Commission to its statement of 22 September, and particularly paragraph eight of that statement. And it says, and I'm sorry to be reading the decision that you've actually made back to you but it won't take terribly long. 'The expert panel's conclusions in the AWR 2023 decision that necessarily required a refocusing of the objective of this review. Consistency with the proposition stated in that decision would suggest that where a Modern Award contains a C14 rate.' I'll just skip over what the rate is. 'It should only operate for a defined transitional period and the lowest rate applicable in any Modern Award and I emphasise the words to 'ongoing employment' should be at least the C13 rate.'

PN418

And then, 'Accordingly, our provisional view is that the following principles should guide the completion of this review. (1) the lowest classification rate in any Modern Award applicable to outgoing employment should be at least the C13 rate.'

PN419

Now, Mr Giordano, from the AWU, made reference to what we describe in our submissions as the first piece rates decision and we urge the Commission and I think we have copies of that to hand over as well. We've put in the excerpt. What the Commission had to say about the nature of the industry when it related to picking and also the nature of the workforce.

PN420

So if one goes to 3.1, paragraph 33, in the horticultural industry crop growth is seasonal and each crop has its own distinct picking season. Paragraph 35, 'Due to

the seasonality and picking windows the size of the workforce at a particular site can vary throughout the season and demand for picking labour increases as the season progresses and then tapers off affecting changes in crop yield.'

PN421

Paragraph 36, 'Work across the horticulture industry is labour intensive and predominantly seasonal.' If I can ask the Commission to go then to paragraph 38 over the page? 'Horticulture farms tend to use relatively large amounts of casual and contract labour at key times of the year and the incidence of short term, seasonal and casual employment is high. About 30 per cent of the industry is employed on a casual basis and 38 to 47 per cent employed on a contract basis.'

PN422

The Commission, then, in paragraph 39 - - -

PN423

JUSTICE HATCHER: So when it says 'contract basis' that's labour hire, effectively, is it?

PN424

MR AMENDOLA: Or the PALM Scheme. As you can see from paragraph 39.

PN425

JUSTICE HATCHER: Right.

PN426

MR AMENDOLA: Yes. Labour hire, yes. But maybe not just labour hire. Paragraph 39 makes the point that the Australian Horticulture workforce is comprised of local workers and temporary migrant workers. The temporary migrant workers comprise the following cohorts, working holiday makers, temporary workers from what is now consolidated into one PALM Scheme. International students. And it says then, 'undocumented migrants'. But what you've got is a workforce that is casual or on temporary contracts that is either 68 to 77 per cent of the workforce and where more than 50 per cent of that are people who aren't Australian workers, though they might be working in Australia.

PN427

And from that we say and I think everyone is in agreement with this that the Horticulture Award, in terms of its classification structure does not have a transition from Level 1 to Level 2. And that Level 1 is predominantly – almost exclusively dealing with fruit picking and vegetable picking.

PN428

And the reason it's not transitional is because it is seasonal and whilst some people may come back from season to season it is effectively, predominantly, overwhelmingly a seasonal workforce. And so that if one then looks at the provisional view that's been expressed that the lowest classification rate in any Modern Award applicable to ongoing employment should be at least the C13 rate. In respect of Level 1 it is not generally relating to almost exclusively not relating to ongoing employment. It is relating to seasonal employment.

PN429

And therefore that would suggest that there should be no change or, at the least, something that makes it clear that Level 1 is there to deal with seasonal employees. So you might say that Level 1 applies to seasonal employees. And you might then tweak Level 2 so that it can have regard to fruit picking et cetera so that those people who are in ongoing employment even though they're not many of them would then fall within that classification structure and get that C13 rate.

PN430

JUSTICE HATCHER: In the classification definition at A.1.2.

PN431

MR AMENDOLA: Yes.

PN432

JUSTICE HATCHER: It starts off by saying, 'An employee at this level undertakes induction training which may include' and has various things.

PN433

MR AMENDOLA: Yes.

PN434

JUSTICE HATCHER: Does that imply that to be in that classification you must be undertaking induction training?

PN435

MR AMENDOLA: Not necessarily.

PN436

JUSTICE HATCHER: I mean otherwise what work does that reference to induction training do if you say this is, in effect, the ongoing classification for fruit and vegetable picking?

PN437

MR AMENDOLA: Well, your Honour, it doesn't say it's mandatory if they have induction training, though it may involve induction training. But in terms of the indicative duties it's the sort of duties that's carried out seasonally by people who are pickers.

PN438

So our primary position, if the Commission pleases, is that either there's no change because the circumstances of this sector is that it is a seasonal industry in relation to picking and that the overwhelming majority are seasonal workers which is why, as my friend says, they come back and they're on Level 1 and they're on Level 1 but they're seasonal casuals or temporary employees.

PN439

If one wants to deal with that so that it's cleaner and more clearer then one would insert the words, 'Seasonal employee' and then if you're not seasonal to have something that relates to what's in Level 1 in terms of fruit picking in Level

2. And so that's our primary position. If the primary position isn't accepted like we think it ought to be there is an alternative position that is set out in our submissions.

PN440

I don't want to go through the length and the detail of what my friend did in referring to what we had to say but there are three elements to it. One is the temporal element and we say three months. The union says 76 hours and whilst we've criticised putting forward the context of why it was 76 hours in the piece rates case, I notice my friend's said that was in a different context and for a different purpose.

PN441

Apparently it wasn't for a different context and for a different purpose. Moreover, in relation to that three months we say that there's a difference between competence and proficiency which is something that has been referred to in a decision of Justice Rangiah in the Marland Mushrooms case. Merely, I might say, if the Commission pleases setting out the definitions of competence and proficiency but saying that there is a difference in relation to that.

PN442

And I note that my friend said in his submissions that three months should be a default position. But that's not where we're at at the moment. We also put forward a proposition about it being experience with an employer. I hear what my friend says. I also hear what your Honour said because it will lead onto a proposition that I want to put that if our primary position is rejected which we say it ought not to be and one was to deal with the alternative position, it may well be useful to have a conference between the interested parties in respect of the Horticulture Award to see if one can narrow the ambit of argument in relation to those moving parts.

PN443

JUSTICE HATCHER: So, in relation to your proposal though, when you say service with employer would that encompass somebody who comes back for repeat seasons? Do they start again every time?

PN444

MR AMENDOLA: No.

PN445

JUSTICE HATCHER: Or do they let it all count?

PN446

MR AMENDOLA: Well, I mean off the top of my head, your Honour, I would think not. But when your Honour was engaging with my friend about experience in the industry, as opposed to experience with employees and how one might deal with tasks. Those are the sorts of things that rather than having a long argument in front of yourselves we might be able to deal with in conference so as to narrow the issues. I'm not saying it will necessarily narrow but it may well narrow those issues.

PN447

So those sorts of things where the devil is in the detail can be dealt with in a way just to try and narrow the ambit of what – of how the alternative position may look. There has been lots of statements that are made about the evidence of Mr Phillips apparently inconsistently. He's talked about three to 12 months. I'd say consistently in his statements. But we've landed on three months as an alternative position to try and be practical and having regard to the third part of the provisional view that the Commission has put.

PN448

In terms of the evidence that has been put forward by the AWU whilst that qualified the individual office holders or organisers what they haven't qualified is when they spoke to these people, how many people they spoke to, which parts of the regions these people may be located. It's a dump of – I have spoken to someone and they've said 'x'. It's hard to sort of suggest what weight might be given to something like that.

PN449

JUSTICE HATCHER: Well, if one took competency, rather than efficiency as the criterion, I think the organisation submitted in the piece workers' case that, 'Picking is not rocket science. It does require some experience to achieve level of competence and depending on the type of produce it takes a novice several weeks of experience to become a competent picker and it can take longer than that to achieve an average level of competence.'

PN450

MR AMENDOLA: Yes.

PN451

JUSTICE HATCHER: Is that a reasonable proposition? If we take competence as the test, rather than - - -

PN452

MR AMENDOLA: Than proficiency. Perhaps, your Honour, though query - they're not interchangeable terms – but query whether in the context of what was being put. Competence might have been relating to something more than that. But it probably wouldn't have been but would it be reasonable, your Honour? Yes, but it's something I think that perhaps is best dealt with.

PN453

JUSTICE HATCHER: For completeness that was at 378 of the decision.

PN454

MR AMENDOLA: Yes. So we'd say where there are areas of disagreement and there are areas of disagreement in that alternative proposal. We think the best way of dealing with that is to convene a conference of the interested parties because it seems that the Horticulture Award seems to have attracted a fair level of commentary.

PN455

JUSTICE HATCHER: So would you want us to rule on your primary submission before we do that? Or - - -

PN456

MR AMENDOLA: Yes, your Honour. Because, of course, if our primary submission is accepted then one doesn't need to do that. One might need to look at adjusting Level 1 and 2 in any event but we wouldn't need to do any more of that. And our view is that our primary position is what should be accepted.

PN457

Because of the conditionality of everything that I am putting, in terms of implementation we think that that ought to be parked until there is a decision one way or the other.

PN458

And then, finally, your Honour, because I'm seeking to be brief here. In terms of the AWU's submissions they've put forward two options. Option one and option two. Option one has really just raised the rate to C13. They can't escape the terms of 157(2) of 157(2)(a). What they say as being submissions in respect of work value reasons are about four lines. They're barely work value reasons.

PN459

Yes, the Wage Review said what it said in respect of a National minimum wage. You were not bound to take work value reasons into account but in this instance we say you are bound to take work value reasons into account. And to the extent that it's asserted that there's evidence before you to permit the variation that is sought we just say there is no evidence and it just has to fail.

PN460

In respect of option two, I can see how if one just dealt with the classification structure which meant that people who were in Level 1 went into Level 2 but that wouldn't be varying a rate and therefore wouldn't be necessarily engaging 157(2) and (2)(a) when you look at what varying a Modern Award minimum rate and how it's set out in the Act. But in relation to option one they're just caught by it and they produce nothing.

PN461

Unless there are any other questions those are the submissions of the Australian Fresh Produce Alliance.

PN462

JUSTICE HATCHER: Thank you. All right, Mr Rogers. First, do you tender all the statements which the NFF is filing?

PN463

MR ROGERS: I do, thank you, your Honour.

PN464

JUSTICE HATCHER: Yes. All right. Well, I mark those. So the witness statement of Andree Rowntree dated 5 December 2023 will be marked Exhibit NFF1.

EXHIBIT #NFF1 WITNESS STATEMENT OF ANDREE ROWNTREE DATED 5/12/2023

PN465

JUSTICE HATCHER: The witness statement of Benjamin Grubb dated 30 November 2023 will be marked Exhibit NFF2.

EXHIBIT #NFF2 WITNESS STATEMENT OF BENJAMIN GRUBB DATED 30/11/2023

PN466

JUSTICE HATCHER: The witness statement of Brett Guthrey dated 1 December 2023 will be marked Exhibit NFF3.

EXHIBIT #NFF3 WITNESS STATEMENT OF BRETT GUTHREY DATED 1/12/2023

PN467

JUSTICE HATCHER: The witness statement of Kate Munro dated 1 December 2023 will be marked Exhibit NFF4.

EXHIBIT #NFF4 WITNESS STATEMENT OF KATE MUNRO DATED 1/12/2023

PN468

JUSTICE HATCHER: The witness statement of Matthew Kleyn dated 1 December 2023 will be marked Exhibit NFF5.

EXHIBIT #NFF5 WITNESS STATEMENT OF MATTHEW KLEYN DATED 1/12/2023

PN469

JUSTICE HATCHER: The witness statement of Narelle Burke dated 30 November 2023 will be marked Exhibit NFF6.

EXHIBIT #NFF6 WITNESS STATEMENT OF NARELLE BURKE DATED 30/11/2023

PN470

JUSTICE HATCHER: The witness statement of Rachael Finch dated 1 December 2023 will be marked Exhibit NFF7.

EXHIBIT #NFF7 WITNESS STATEMENT OF RACHAEL FINCH DATED 1/12/2023

PN471

JUSTICE HATCHER: The witness statement of Renata Cumming filed on 5 December 2023 will be marked Exhibit NFF8.

EXHIBIT #NFF8 WITNESS STATEMENT OF RENATA CUMMING FILED 5/12/2023

PN472

JUSTICE HATCHER: The witness statement of Stephen Tully dated 1 December 2023 will be marked Exhibit NFF9.

EXHIBIT #NFF9 WITNESS STATEMENT OF STEPHEN TULLY DATED 1/12/2023

PN473

JUSTICE HATCHER: Mr Rogers?

PN474

MR ROGERS: Thank you, your Honour. I don't intend to be very long. I will be brief. You've heard from a number of employer interests and their submissions are largely consistent with the submissions that we would make in relation to this matter. If I could just touch on a couple of points specifically in relation to the Agricultural Award, sorry the Pastoral Award and the Horticultural Award. And I guess in respect of the Horticultural Award you've heard at length from my friends at the AFPA I join with their submissions in relation to that award.

PN475

Just responding to a couple of matters which were raised by my friend at the AWU, in particular, the AWU tries to make a lot out of the evidence which was filed in the piece rate case. They say, 'It is right for strong implication that workers in the horticultural industry become competent at their work after 76 hours performing the task.' And they have referred to just five witness statements covering just – I think it's just three crops, your Honour.

PN476

The horticultural industry is much broader than that. And so I guess it might depend on how you want to frame any transitional arrangements but if they are in relation to a particular crop or a particular – if they weren't in relation to a particular crop or a particular farm then that evidence isn't going to be much assistance to you because it's so limited in what it speaks to and the competencies which those workers would develop within that relatively brief timeframe.

PN477

We would also say that the evidence filed in this matter demonstrates that Level 1 needs to be flexible enough to accommodate a variety of tasks across a variety of farms, commodities and production systems. There's been a lot of talk this morning and in the submissions about picking, but that's just one task which is performed as a Level 1.

PN478

And, in our submissions, we make the point that it covers a number of tasks, including packing, sorting, grading, pruning, recording, cleaning, loading, et cetera. So it's of limited assistance to you, your Honour, to form a view as to how long it takes a worker to become competent at picking.

PN479

In our view, at best, that's just a small part of the whole picture and it can't be extrapolated more broadly to apply across the entire sector to all the tasks of all workers in the horticulture industry.

PN480

The AWU also made reference to the witness statement of Brett Guthrey. Again, that statement was made particularly in relation to training and in relation to packing. So, again, only one small component of the entire duties as a Level 1 horticulture worker.

PN481

In relation to Matt Kleyn, I am not quite sure what we were supposed to include, based on the reference to that statement. So I guess I'd leave that with your Honour.

PN482

In relation to the Pastoral Award I note there hasn't been a lot of comment from the AWU about either in the written submissions or orally about the way the classification systems operate. But out position is that the current arrangements are informed by the history, practise and experience of the industry.

PN483

We note there is one set of classifications, station cooks, and off-siders which does not contemplate a transition to a higher role or pay structure. With that exception aside all classifications have transitional pathways. In some cases, those pathways are consistent with the provisional view so that is the FLH1 feedlot employees which transitioned FLH2 after three months.

PN484

Some of those transitions are time based but are for a longer period than the provisional view contemplates. And, in particular, we refer to the FLH1 station hand transition to FLH3 – not 2 – it's important to note to FLH3 after 12 months. The same is true of the dairy operator assistant and the poultry farm worker. They transitioned from Level 1 to the next level which is higher than C13. FLH3 or the equivalent in the poultry worker classifications after 12 months.

PN485

In our view, that transitional timeframe is appropriate because it speaks to the full production cycle on a farm and it allows the workers an opportunity to experience the full range of tasks in what is a seasonal industry.

PN486

The other category of transition within the Pastoral Award is duties based and depends on the skills and the capabilities, accountabilities and autonomy of the workers. The example there is the PA attendant – PA1 which transitions to PA2 when they developed or are assigned the appropriate skills.

PN487

Again, in our view, these arrangements are all based on historical experience and practise, economic considerations and needs of workers, farmers and production

assistants. Prima facie they satisfy the legal framework in the current State and, in our view, an argument for change hasn't been advanced by the AWU or otherwise.

PN488

JUSTICE HATCHER: Sorry, you might have already covered this but how at all does a station cook and a station cook's offsider progress?

PN489

MR ROGERS: That's the one exception, your Honour. So yes, they are classified a Level 1 and they remain at Level 1. We would say that that's based on the historical experience. You're effectively talking about someone who opens a can of baked beans or cooks up some sausages. So it's based on duties and capabilities. I guess they're my submissions on that point, your Honour.

PN490

JUSTICE HATCHER: Well, what does a station hand do?

PN491

MR ROGERS: A station hand does everything on the farm, your Honour. So then there's evidence that goes to that point. So if I can just take you to Kate Munro's statement? Paragraph four?

PN492

JUSTICE HATCHER: What page of the court book is that?

PN493

MR ROGERS: Sorry, your Honour. I haven't – just bear with me.

PN494

JUSTICE HATCHER: 506 I'm told.

PN495

MR ROGERS: I apologise your Honour. I'm caught flat-footed. Sorry, your Honour. So it's paragraph eight on page 506, 'Tasks generally performed by Level 1 workers include basic labouring duties, cleaning, irrigation work, moving and starting and stopping water cycling, ploughing which are performed under supervision.' And I don't want to waste your time trying to find the reference in the other witness statements but all of those witness statements or a number of those witness statements go into the duties which were performed at the FLH1 classification.

PN496

Sorry, your Honour. I've lost my place. So we say that the statement which was filed in relation to Pastoral Award describe the duties. They also speak to the fact that 'The existing transitional arrangements reflect the nature of farming and allow workers an opportunity to experience the full production cycle on the farms.

PN497

They also show that Level 1 workers work under direct supervision and/or with the assistance of more senior workers. And that expecting a Level 1 worker to perform without adequate oversight and assistance would create serious risk for

themselves, other workers, livestock, plant, the farm and business obviously. Your Honour, they're working with, on occasions, heavy machinery or unpredictable animals. If they didn't have a more senior worker with them they would be a danger to themselves and to the other workers.

PN498

And, finally, your Honour, we join with in particular the AI Group and the ABI in observing the fact that Level 1 workers are frequently paid in excess of the base rate, in addition to the loadings and penalty rates. They receive a number of non-wage bonuses and our witness statements, again, go into that in some detail.

PN499

So, in summary, your Honour they believe a case of changes be made at this point and prima facie the existing transitional framework is appropriate. Those are our submissions, your Honour.

PN500

JUSTICE HATCHER: Thank you. Ms Bhatt, did you want to contribute?

PN501

MS BHATT: Very briefly, your Honour. Just to respond to two matters that were raised by the AWU. The first relates to a reference that was made to the conditional consent position that was reached between the AWU, AI Group and ABI in respect of two awards that would have involved splitting the difference as it were. And I think that the fact that that consent had been reached appeared to have been relied upon in support of the arguments that the AWU is now more broadly making in a number of awards. So the Commission ought to split the difference as it were.

PN502

Obviously, the position reached in respect of those awards should not be relied upon for that purpose. It was in a confined number of awards. And more to the point the position that was reached between the party in relation to those awards was very different. Quite critically, the C14 rate would have been payable for as long as it took the relevant employee to obtain the relevant competencies.

PN503

And, also the parties had agreed that there would be a delayed operative date by some six months. So I think that context needs to be understood.

PN504

The second point relates to this idea that it's the experience gained by an employee in a particular industry that ought to be of relevance, rather than a given employer. I would just say that as a general proposition that is not something that should be accepted naturally. The experience that is developed by an employee with a particular employer is more likely to be of relevance in the context of a particular role.

PN505

But the other observation I would make is that some industry awards cover an industry that involves a diverse range of operations, or indeed a number of sectors that form part of the industry as defined for the purposes of the award.

PN506

It might not be that experience gained in one part of the industry is really of any relevance or utility when work is performed in another part of that industry. I think that's something that needs to be considered on an award by award basis.

PN507

I just raise one other matter. Your Honour asked Mr Scott earlier in the proceedings to prepare a list or to identify awards that the C14 level contemplates ongoing employment. Because of the differing positions taken by some of the parties about how the C14 level ought to be interpreted and applied it might be that we have a different view about what that list should look like.

PN508

So later in the day it might be that we seek to supplement Mr Scott's list or to offer an alternate. But we'll come back to that later in the day. That's still a work in progress.

PN509

JUSTICE HATCHER: All right.

PN510

MS BHATT: Thank you.

PN511

JUSTICE HATCHER: Mr Amendola?

PN512

MR AMENDOLA: Your Honour, could we and my client be excused in terms of the remainder of the proceedings?

PN513

JUSTICE HATCHER: Yes.

PN514

MR AMENDOLA: Thank you.

PN515

JUSTICE HATCHER: All right. Well, we'll now adjourn and resume at two o'clock.

LUNCHEON ADJOURNMENT **[12.56 PM]**

RESUMED **[2.06 PM]**

PN516

JUSTICE HATCHER: We'll take appearances. Mr Maxwell, you appear for the CFMEU?

PN517

MR S MAXWELL: That's correct, your Honour.

PN518

JUSTICE HATCHER: Ms Sostarko, you appear for Master Builders Australia?

PN519

MS R SOSTARKO: Yes. Thank you, your Honour.

PN520

JUSTICE HATCHER: Ms Adler, you appear for the Housing Industry Association?

PN521

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

PN522

JUSTICE HATCHER: All right. Who wants to go first? Mr Maxwell?

PN523

MR MAXWELL: Your Honour, I don't mind going first. Your Honour, The CFMEU C&G filed a submission on 3 November 2023, which is document number 34 in the digital book. That submission set out our position supporting the provisional view of the Full Bench contained in the 22 September 2023 statement.

PN524

That submission also commented on the accuracy of the table at attachment D to the statement pointing out that the industry allowance was not part of the minimum weekly classification rate. Our submission also suggested variations to the Joinery and Building Trades Award 2020 to remove any ambiguity about the transitionary nature of the level 1 minimum classification rate. The CFMEU C&G filed a reply submission on 1 December 2023, that is document number 35, in response to the initial submissions of the API, which is document number 3; AiG, document number 9; HIA, document 41; NBA, document 43.

PN525

We responded to their respective positions on the provisional view of the Full Bench and the accuracy of attachment D, and any comments they made in regard to the Joinery and Building Trades Award 2020. The CFMEU C&G relies on both of those submissions filed. The CFMEU Manufacturing Division also filed a reply submission, which is document number 36, which touched on the Joinery and Building Trades Award 2020 and which responded to the specific issues of work value and industry allowances. The CFMEU C&G supports those submissions.

PN526

The employer organisations, the ABI, AiG, HIA and MBA, filed reply submissions which we now briefly respond to. The ABI reply submission made no reference to the Joinery and Building Trades Award 2020, nor did it directly

respond to the CFMEU C&G's 3 November 2023 submission. Therefore, there are no specific issues for us to respond to.

PN527

The HIA and MBA reply submissions oppose the variations proposed by the CFMEU, but do not take issue with the CFMEU C&G position that the level 1 rate is transitional. Both the HIA and MBA disagree with paragraph 15 of the CFMEU C&G's 3 November submission which stated that not all employees under the Joinery and Building Trades Award 2020 are entitled to an industry allowance. They suggest that this claim is unsubstantiated and no evidence is provided.

PN528

The CFMEU C&G are surprised at these employer submissions which in our view demonstrate an alarming inability of both the HIA and MBA to comprehend the plain wording of the award. The industry coverage of the Joinery and Building Trades Award 2020 is set out in clause 4.2(a) and that says the joinery and building trades industries are the following:

PN529

(i) joinery work; (ii) shopfitting; (iii) prefabricated building; (iv) stonemasonry; (v) glass and glazing contracting; and (vi) glass and glazing work.

PN530

As set out in paragraph 21 of the CFMEU C&G's 1 December 2023 reply submission, an industry allowance is payable under clause 21.3(b) of the award to employees -

PN531

engaged on joinery work, shopfitting, stonemasonry or outside work -

PN532

or:

PN533

A glazier or an apprentice glazier, engaged other than on factory glazing.

PN534

'Outside work' is defined in clause 2 of the award and means:

PN535

Erection or assembly work performed at the employer's premises but outside of enclosed factory buildings on the prefabricated sections, modules or panels of any building principally made out of timber or similar material.

PN536

Comparing the wording in clause 4.2(a) and clause 21.3(b) of the Joinery and Building Trades Award it is readily evident that employees not entitled to an industry allowance include all level 1 and level 2 employees, and high level employees engaged on prefabricated building work that is performed inside a

factory, glass and glazing work performed in a factory and glass and glazing work performed elsewhere by employees that are not glaziers or apprentice glaziers.

PN537

For completeness, your Honour, I just add that because that award is also an occupational award the people in the occupations that aren't in industries in 4.2(a) would also not be entitled to the industry allowance, but they are not part of these proceedings. In the current matter before the Full Bench, however, whether or not the industry allowance is paid to an employee is, we submit, irrelevant as this review is dealing with minimum classification rates and not ordinary time rates; an issue I will return to later.

PN538

The AiG reply submission in paragraph 3 repeats their primary submission opposing the provisional view and in paragraph 4 it repeats their position that consideration of any variation should have regard to the terms of the award and other factors. In regard to the Joinery and Building Trades Award 2020, the AiG does recognise that it describes a minimum hourly rate that is less than the C13 rate in respect of employees classified at level 1 and that is found in paragraph 107.

PN539

Their submission goes on to claim that an employee can be classified at level 1 on an ongoing or indefinite basis, that is paragraph 108; oppose the union's proposed variations, that's paragraph 111; and say that changes should only be made if justified by work value reasons, that's paragraph 112. In paragraph 108 of the AiG's submission the proposition is put forward that the references in clause A.1.1 of the award to the occupations of general hand and factory hand, the nature of the duties that can be performed and the indicative tasks, all indicate that an employee can be classified at the level 1 on an ongoing or indefinite basis.

PN540

We say this is incorrect; it ignores the reference to up to 38 hours' induction training in A.1.1(a) and is plainly divorced from the workplace reality of the factory floor. The CFMEU C&G would point out that a new employee would still be expected to perform some useful work during the induction training period. It is unrealistic to expect that a new employee would spend the whole of the first week of employment just reading documents, meeting fellow workers and supervisors, and having a guided tour of the factory. The induction process would have some gaps during the day where a new employee would perform work, but this work would be limited in nature and the purpose of clauses A.1.1(b) and A.1.1(c) is to set the parameters of the work that can be performed at this level.

PN541

The CFMEU C&G also notes that despite all its resources and claimed interest in this award, the AiG have failed to provide any evidence of workers at the level 1 classification of the Joinery and Building Trades Award 2020 being engaged on an ongoing basis.

PN542

JUSTICE HATCHER: Can I just pause there. I thought you were advancing your proposed variations on the basis that there was some doubt or ambiguity about this.

PN543

MR MAXWELL: Your Honour, we don't think there is any ambiguity, but clearly from the submissions of the AiG that would appear to be the case.

PN544

JUSTICE HATCHER: I mean, on one view the AiG's submissions support your position that some variation should be made to make it clear.

PN545

MR MAXWELL: I think it does. Your Honour, in paragraph 109 the AiG suggests that the CFMEU C&G, in paragraph 12 of our 3 November 2023 submission, seeks to rely on the Metal Industry Award 1984. This is not the case. All paragraph 12 does is inform the Commission that the level 1 classification in the National Joinery and Building Trades Product Award 1993 was a modified version of the C14 classification in the Metal Industry Award 1984.

PN546

The significant difference carried through to the Joinery and Building Trades Award 2020 is that there is no reference to -

PN547

undertaking structured training so as to enable and to work at the C13 level -

PN548

which is found in the Manufacturing Award. The AiG's suggestion that any variation needs to be justified on work value grounds is nothing more than a furphy or intended diversion. This Full Bench is not varying modern award minimum wages in the award. Those have already been set by the expert panel in the 2022/2023 annual wage review decision. I refer to paragraphs 178 and 209 of that decision.

PN549

This is in accordance with section 285 of the Fair Work Act which requires the Commission in an annual wage review to review modern award wages, which is found in section 285(2)(a)(ii), and make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages and that is found in section 285(2)(b). Under section 258(3), in exercising its power in an annual wage review, to make determinations referred to in paragraph 2(b) the Commission must take into account the rate of the national minimum wage.

PN550

As noted in paragraph 7 of the September 2023 statement, it was the decision of the annual wage review who decided to align the national minimum wage with the C13 classification. In that decision they decided that this was an interim step and that a wider review would be necessary once other matters were completed, including this C14 review which would result in all C14 award classifications

becoming genuinely transitional in nature. When this is properly considered, the AiG submission that some C14 equivalent rates are not transitional only highlights the need for this current review.

PN551

As noted in the September 2023 statement, in paragraph 1, the Commission initiated this review to consider modern awards with classification rates at the C14 level which were either not transitional or where the transition period was not specified. A need to expand the review was explained in paragraph 8 of the September 2023 statement. I won't read that back to the Bench because Mr Amendola did that prior to the lunch break. Critically, the expansion of the scope of this review was limited to the following matters: (1) further consideration of awards to ensure that -

PN552

all award classifications at the C14 level are genuinely transitional in nature consistent with the Expert Panel's statement in the AWR 2023 decision.

PN553

That is found in paragraph 10 of the September 2023 statement. (2):

PN554

To undertake an assessment in the review of all classification rates in modern awards that fall below the C13 level but are higher than the C14 rate.

PN555

That is found in paragraph 11 of the September 2023 statement. (3):

PN556

To include modern enterprise awards and State reference public sector modern awards in the review.

PN557

That is found in paragraph 12 of the statement. Of these three additional considerations, only the issue identified in paragraph 10 of the statement is relevant to the Joinery and Building Trades Award. That is, whether or not the level 1 classification rate is genuinely transitional in nature. We say it is, as do the HIA and MBA, but more importantly so has the Expert Panel in the 2018-2019 annual wage review decision found in [2019] FWCFB 3500.

PN558

The Joinery and Building Trades Award is one of the eight awards where the transition to a higher rate occurs after 38 hours' induction training and this is referred to in paragraph 338 and appendix 1 of that decision. It was the 2018-2019 annual wage review decision that led to the former President initiating this review. I refer to paragraph 2 of the 28 August 2019 statement of Ross J in [2019] FWC 5863.

PN559

As the level 1 classification is transitional, then to address the principles of the provisional view expressed by this Full Bench the award must define the length of

the transitional period and provide a clear transition to the next classification rate. The CFMEU C&G submits that the Joinery Award already sets the length of the transitional period and that's found in A.1.1(a) of up to 38 hours' induction training.

PN560

The CFMEU C&G has, however, taken into account the provisional view that the award must provide a clear transition to the next classification rate and suggested minor changes that remove any ambiguity, and which will clarify how and when the transition from level 1 to level 2 will occur. These proposed changes are set out and explained in paragraphs 16 to 20 of the CFMEU C&G's 3 November 2023 submission. Your Honour, if I can just briefly take you to those just to expand on them. What we propose is in paragraph 8 on page 5 of our 3 November 2023 submission - - -

PN561

JUSTICE HATCHER: So what court book page are we on now?

PN562

COMMISSIONER DURHAM: 393.

PN563

JUSTICE HATCHER: 393. Thank you.

PN564

MR MAXWELL: So what we propose is that in paragraph A.1.1(a) we delete it and replace it with the following - and I've highlighted in red the additional words. So we have added the words in (a) that:

PN565

This level only applies to new employees.

PN566

We have added the last sentence in (a) that:

PN567

Upon completion of the induction training a new employee will transition to level 2.

PN568

Then in paragraph (b) which deals with paragraph A.1.2(a), which is the level 2 classification, that in (a) we should refer to 'the required induction training' and delete the last sentence where it talks about an employee being -

PN569

required to satisfactorily complete a competency assessment.

PN570

We do so on the basis that there aren't any competency assessments at this level. Whilst the parties had all the good intention when the award was made back in 1993 to have years of competency at these levels, there actually aren't any that would apply at the level 2 level in the Joinery and Building Trades

Award. As an aside, I think if you look at the implementation guide for the Metal Industry competency standards you will see there that there are actually no modules aligned to the C14 or the C13 in that award.

PN571

DEPUTY PRESIDENT HAMPTON: Mr Maxwell, in your proposed draft 'new employees' means new to the business, not new to the industry?

PN572

MR MAXWELL: Generally our position will be new to the industry to be consistent with the Construction Award, but in this regard it would be new to the business.

PN573

DEPUTY PRESIDENT HAMPTON: Thank you.

PN574

MR MAXWELL: In regard to the third variation - and the union is not wedded to this third variation given what some parties have raised about work value, but we propose to add the classifications of factory hand and general hand to A.1.2(e).

PN575

JUSTICE HATCHER: So they currently appear in - - -

PN576

MR MAXWELL: A.1.1(d).

PN577

JUSTICE HATCHER: So you're not asking for them to be deleted from there?

PN578

MR MAXWELL: We're not seeking for them to be deleted from A.1.1(d) because that's an indication of what they can do as a new entrant.

PN579

JUSTICE HATCHER: I mean, on one view because currently level 1 has those two occupations and then they don't appear again, that might favour the conclusion that level 1 is not currently transitional.

PN580

MR MAXWELL: That view could be taken, but given that the whole basis of the skill classification structure is that workers can perform a level of skill that's below the one at which they're engaged - and that's why I say the wording may not necessarily, but we think for completeness to demonstrate the transitional nature it would be better to include in there.

PN581

Your Honour, the CFMEU C&G submits that these changes will meet the provisional view of the Full Bench and be consistent with the decision of the Expert Panel to align the national minimum wage with the C13 classification rates in modern awards. Your Honours, that is the submissions of the CFMEU C&G.

PN582

JUSTICE HATCHER: Thank you. Ms Sostarko?

PN583

MS SOSTARKO: Thank you, your Honour. I will be brief today, but noting that we would rely on our submissions of 3 November and 1 December 2023. Mr Maxwell has obviously taken us through the key points under consideration, those essentially being whether the base rate pay to employees engaged under the Joinery Award is more than the C14 rate and, if so, whether it is one that is transitional in nature.

PN584

Now, to summarise our earlier submissions we maintain our position in response to the Commission's provisional analysis with respect to the Joinery Award. In terms of the first point, that position is that the ordinary hourly rate for a level 1 employee exceeds both the C14 and C13 rates when taking into account payment of the industry allowance.

PN585

JUSTICE HATCHER: Ms Sostarko, it's fairly plain, isn't it, that the allowance is not payable to all persons covered by the award?

PN586

MS SOSTARKO: Well, that's an interesting point, your Honour. Specifically I would make reference to the CFMEU's initial submission where this point is raised. However, it was not noted until today which classifications or occupations were, for want of a better word, carved out of that entitlement. That certainly to date has not been our interpretation for application 21.3(b) and on that point, your Honour, we certainly would not be opposed to the Commission giving further consideration to that issue.

PN587

If there are in fact occupations that are not receiving the industry allowance and it was the Commission's intention when those amendments came into force at a conference of the four yearly review that that allowance be payable for all purposes, then we would not be opposed to making further submissions on how or what amendments might be necessary to give effect to that intent.

PN588

I know that Mr Maxwell has just highlighted, for example, that prefab workers don't appear by the way that the award is currently drafted to be entitled prescriptively to the industry allowance. However, that is not the way that our members have been interpreting 21.3(b). In plain English that means that we have been giving advice to our members that those workers should in fact be entitled to the industry allowance, so therefore if amendments are necessary to give effect to that, we would not be opposed to that process.

PN589

On the second point, Mr Maxwell today noted glaziers as also being a category of employees that would not be entitled to the industry allowance. Now, noting that 21.3(b)(ii) provides for a separate allowance for those workers specifically and

when you calculate that allowance which is paid on an hourly rate, that exceeds the industry allowance in any event; so that is a consideration I think that needs to be taken into account. That's what I would say in response to that, your Honour.

PN590

JUSTICE HATCHER: So, Ms Sostarko, that really excludes factory glazing, does it not?

PN591

MS SOSTARKO: Well, that's something, as I say, that before today we haven't been asked to consider. The CFMEU didn't put that proposition in its submissions, therefore we haven't actually looked into that further, but we could certainly do that, your Honour, if that's something you would ask us to inquire - - -

PN592

JUSTICE HATCHER: I'm just looking at this now. So the fact that there is a separate allowance for glaziers other than in factory glazing, suggests they are not covered by the first allowance which applies to joinery work, et cetera, unless you say that they get paid. I assume you don't say that.

PN593

MS SOSTARKO: Obviously, as I said, if I go back to my primary position which is that our interpretation of 21.3(b) is that the industry allowance is payable for all purposes - now, obviously that is with the exception of glaziers, so if there is a category of employees under 21.3(b)(ii) that is neither entitled under the current drafting to the industry allowance or the glaziers allowance, for want of a better word, then that perhaps is something that also needs to be given further consideration, but it would appear on its face, your Honour, that's correct.

PN594

JUSTICE HATCHER: Thank you.

PN595

MS SOSTARKO: Going back to our primary position, which is obviously the proposition that the amount payable is higher than that of the C14 rate, it is our strong view that whether or not the rate is transitional is a moot one on the basis - if the proposition is accepted - that the C14 rate isn't applicable essentially in practice to the Joinery Award. Therefore, we would oppose the CFMEU's proposed amendments on the basis that they would seek to address irrelevant matters and they actually are not supported by any cogent evidence which would support their necessity.

PN596

As I said earlier, your Honour, only in the event the Commission determines that the observations of the Expert Panel - which were such that at paragraph 108 of the most recent annual wage review decision was that an employee classified at the C14 rate under a modern award may in fact be entitled to a range of additional earnings enhancing benefits, including allowances, to which an employee of the national minimum wage will not be entitled. So only on the basis that the Commission determines that that observation is irrelevant we would seek leave to

make further submissions on the second transitional point and what amendments may be required to clarify those arrangements under the Joinery Award.

PN597

Now, noting what I observed earlier in the exchange, your Honour, that we just had about those certain classifications of work there may very well, we would concede, need to be some clarification amendments to ensure that the award is operating as it was intended, noting that the industry allowance is a fairly new addition to the modern award, the Joinery Award.

PN598

JUSTICE HATCHER: So what is your position on the level 1 classification? Is it a transitional rate?

PN599

MS SOSTARKO: As I said, your Honour, we would reserve our position on that point on the basis that we didn't feel that it was one that we needed to make at this point. If it's so bold of me to ask whether or not it should be that the Commission makes a determination in the first instance on whether or not the industry allowance being payable for all purposes pushes that rate above the C14 rate and the parties then should deal with the second limb of that question and determination moving forward, that would be our preference. Whether that's a process that the Commission would want to follow, I suppose it's for the Bench to determine.

PN600

JUSTICE HATCHER: Well, I think you shouldn't assume that we won't decide all the issues in one go, so if you want to make a submission about that question do you want some time to put something in writing?

PN601

MS SOSTARKO: We would appreciate that, your Honour, very much. It would not require as much time - - -

PN602

JUSTICE HATCHER: We already have the AiG's position which says it's not transitional. Anyway - - -

PN603

MS SOSTARKO: What we have said to date, your Honour, in our submissions is that we would not dispute the comment and the categorisation as defined within attachment D of the statement that the Commission circulated, but if you would like us to provide a more detailed position around that, we would certainly be happy to do so.

PN604

JUSTICE HATCHER: All right. Ms Sostarko, it's not a case of us requiring you to make a submission, but if you want to make a submission about that issue how long might you need?

PN605

MS SOSTARKO: That's a good question at this time of year, your Honour. If required we could certainly make a submission before the Christmas break on that discrete point if the Commission is conscious of time. Obviously we would prefer for it not to be prior to that break, but it's understandable that you want to keep this moving along. I'm in your hands, your Honour, but in any event we could certainly get something filed by say COB Thursday, otherwise our preference would obviously be to be able to do that upon the break, return from the break.

PN606

JUSTICE HATCHER: All right. If we give you four weeks is that sufficient?

PN607

MS SOSTARKO: I would appreciate that very much, your Honour.

PN608

JUSTICE HATCHER: Anything else, Ms Sostarko?

PN609

MS SOSTARKO: Not at this point in time. Thank you, your Honour.

PN610

JUSTICE HATCHER: All right. Ms Adler?

PN611

MS ADLER: Thank you, your Honour, and noting the exchange that you just had with Ms Sostarko, which has addressed a number of items I was going to deal with this afternoon. We obviously made submissions in this matter dated 3 November and 1 December and we continue to rely on those. We oppose the variation proposed by both the Construction Division and the Manufacturing Division of the CFMEU in respect of the Joinery Award and the Timber Industry Award.

PN612

We also made our submissions on the basis that the industry allowance was for all intents and purposes captured by the ordinary rate of pay, and on that basis what an employee received in the hand was more than C14 rate. Having said that, and our understanding in practice is the level 1 is a transitional classification, but equally open to the views and submissions made by AiG and ABI in these proceedings and noting the opportunity to make further written submissions on that point if we wish to.

PN613

In respect of the Timber Industry Award we also express an interest in that award, as outlined in our written submissions. Our view is that the level 1 rate appears to be conditional based on the words in the award, that under the general timber stream level 1 they will progress to a level 2 after three to six months, and then an employee under the wood and timber furniture stream level 1 will progress to a level 2 after undertaking up to three months induction and skill development, and on completion of induction and the core units of the furnishing industry training package and demonstrates competency undertake level 2.

PN614

JUSTICE HATCHER: Ms Adler, I can't quite pick up what you're reading from.

PN615

MS ADLER: I was just reading out the wording from the classifications in the Timber Award, which I believe is attachment D to the Commission statement in any case.

PN616

JUSTICE HATCHER: I see. Yes, I understand now. It's 8.1(g); is that it?

PN617

MS ADLER: We have got A.1(f), general timber stream level 1, and then clause B.1 for the wood and timber furniture stream level 1, and that's on pages 26 and 27 of the Commission statement, 22 September.

PN618

JUSTICE HATCHER: Yes, all right. Thank you.

PN619

MS ADLER: They were all the additional comments that I wish to make on the basis of the exchanges had earlier. Thank you, your Honour.

PN620

JUSTICE HATCHER: All right, Ms Bhatt, do you want to buy into this, beyond what you have said already?

PN621

MS BHATT: Very reluctantly. I need to make clear firstly our position in relation to the industry allowance which is reflected in the document we filed earlier this week, that the industry allowance is not payable to all employees covered by the award.

PN622

I only wanted to respond to one other minor point made by Mr Maxwell. To the extent that this is a relevant textual consideration that colours the proper interpretation of level 1 under the Joinery Award, I think Mr Maxwell said words to the effect of the following, that it would be unrealistic to think that an employee undertakes induction training over a period of 38 hours, and during the course of undertaking that training is not also performing some other work or other tasks.

PN623

I merely point out that under the award it's contemplated that that induction training can be undertaken of a period of up to 38 hours, but it's not so prescriptive as to say that the training needs to necessarily take a period of 38 hours. It's conceivable I think under the award that an employee completes their induction training within a relatively short period of time, perhaps one or two days, and then he's performing work under that level on an ongoing basis. In reaching that view we had had particular regard to the occupations identified at sub-clause (d) which your Honour has pointed to. That's all. Thank you.

PN624

JUSTICE HATCHER: All right. If there is nothing further we will adjourn now and resume at 3.

SHORT ADJOURNMENT **[2.41 PM]**

RESUMED **[3.05 PM]**

PN625

JUSTICE HATCHER: I'll take appearances, Mr Keats, you appear for the Maritime Division of the CFMMEU?

PN626

MR N KEATS: That's correct, your Honour.

PN627

JUSTICE HATCHER: Mr Hodges, you appear for the Motor Trades organisations?

PN628

MR D HODGES: Yes, your Honour.

PN629

JUSTICE HATCHER: And Ms Davis, you appear for the RTBU?

PN630

MS M DAVIS: Yes, that's correct, your Honour.

PN631

JUSTICE HATCHER: Then Ms Buchanan, you appear for Professionals Australia?

PN632

MS M BUCHANAN: Yes, your Honour.

PN633

JUSTICE HATCHER: Ms Wiles, you appear for the Manufacturing Division of the CFMMEU?

PN634

MS V WILES: Yes, your Honour.

PN635

JUSTICE HATCHER: So, Ms Wiles, what award are you interested in?

PN636

MS WILES: Your Honour, we have a plumbing interest in five awards, the Dry Cleaning and Laundry Industry Award - - -

PN637

JUSTICE HATCHER: Okay.

PN638

MS WILES: The Joinery Award - - -

PN639

JUSTICE HATCHER: That's okay. I just want to make clear, we've already had a full debate about the Joinery Award, we're not keen on hearing about that again. All right.

PN640

Ms Abousleiman, you appear for CEPU?

PN641

MS Y ABOUSLEIMAN: Yes, your Honour.

PN642

JUSTICE HATCHER: All right. In that particular order, do you want to start off, Mr Keats?

PN643

MR KEATS: Certainly. We might start by indicating that we rely upon our written submissions that were filed on 3 November and again on 13 December. I note the 13 December ones are outside the actual book that was prepared by the Commission.

PN644

I seek to tender the witness statement of Warren Smith in the proceedings.

PN645

JUSTICE HATCHER: The witness statement of Warren Smith, dated 26 October 2023, will be marked exhibit CFMMEU/MUA1.

EXHIBIT #CFMMEU/MUA1 WITNESS STATEMENT OF WARREN SMITH DATED 26/10/2023

PN646

MR KEATS: Thank you. We then just wish to make two short points.

PN647

The first is in relation to the discussion that's being on about all encompassing allowances. There's two Maritime Awards that we have slightly different. We've got, in the case of the Maritime Offshore Oil and Gas Award, we've got an aggregate wage and in the case of the Professional Diving Industry Industrial Award we've got what's called a total wage.

PN648

So whilst when you look at both those awards you'll find a column that says minimum wage rate, then you'll have the next column that's either overtime or some other description, you then have a final column that's actually the rate that's paid, whether that be an aggregate rate or a total rate, and we submit that that's the final column that you look at when trying to compare it against the C13, not what's put at minimum wage rate.

PN649

So we say, in relation to both those awards, no variation is required in order to make those awards consistent with the provisional view. They apply in all purposes for all reasons at all times and are mandated by the awards to be paid by the employer.

PN650

JUSTICE HATCHER: I'll just looking at the Professional Diving Award, so what - the total weekly rate, how does one get from the minimum weekly rate to the total weekly rate?

PN651

MR KEATS: Well, we add that factorisation that's in that column.

PN652

JUSTICE HATCHER: Factorisation, yes. What does that mean?

PN653

MR KEATS: So you'll see a percentage number there.

PN654

JUSTICE HATCHER: So in the case of the divers attendance - - -

PN655

MR KEATS: I don't have the actual award in front of me but, from memory, the top one is 117 per cent, the very first one that appears in the award.

PN656

JUSTICE HATCHER: Yes. Well, that's way above anyway, but - - -

PN657

MR KEATS: You'd apply 117 per cent to what's on the left-hand column you get what's in the right-hand column.

PN658

JUSTICE HATCHER: I don't know how - so diver's attendant is $864.50 the percentage is 108 and you end up with $1798.16. You mean you're adding another 108 per cent?

PN659

MR KEATS: Correct, your Honour.

PN660

JUSTICE HATCHER: What's that for?

PN661

MR KEATS: It's to represent historical factors that went into the making of the award. So when we had the ROLA Act simplification, that's the way this Commission decided it should be written, to reflect that the award rates would not go down.

PN662

JUSTICE HATCHER: So what purpose does the prescription of the minimum weekly rate so that - why's it there at all?

PN663

MR KEATS: It's served as part of the ROLA Act provision back in, I think it was '96 or '95, to give a comparison across to the then key classification, which was the Tradesman Award classification, for the purpose of doing that process.

PN664

JUSTICE HATCHER: What purpose does it serve now?

PN665

MR KEATS: Only a historical one, because everyone pays what's in the final column.

PN666

JUSTICE HATCHER: So is there any reason why we shouldn't delete those columns?

PN667

MR KEATS: Not for my clients reasons.

PN668

JUSTICE HATCHER: Okay. All right, thank you.

PN669

MR KEATS: The second issue arises from the Marine Tourism and Charter Vessels Award. There's much said about not understanding the position of the MUA Division of the CFMMEU about why there's ambiguity. The ambiguity arises in this regard, that to be a level 2 crew person, not only is there a period of time, that is, the three months, but then there's additional - ongoing things. One is, either you've done a course which is called the Inductory Deckhand Course, or you need to have relevant experience. It's unclear what happens if you've gone past the three months and you haven't done the course and your employer hasn't said to you, 'Well, I think that's enough experience in the industry'. Do you just remain on crew level 1 or not? Presumably you do. So that's why we've suggested that there should be amendments made to this award to make it consistent with the provisional view.

PN670

But on reflection, looking at what was filed by Australian Business Industry, we've suggested that since they have said that after three months they've usually got enough experience, that that would be the relevant period of time. We say that would be consistent with what the AWU has said, in terms of the qualification and competency requirement should be removed from the award.

PN671

JUSTICE HATCHER: So crew level 2, what does that equate to, on a weekly basis?

PN672

MR KEATS: I think it's $942.

PN673

JUSTICE HATCHER: So crew level 1, is that below C13?

PN674

MR KEATS: Yes.

PN675

JUSTICE HATCHER: So we just multiply the daily rate by five, is that the - - -

PN676

MR KEATS: Apologies, it's between C13 and C14. Apologies.

PN677

JUSTICE HATCHER: So we multiply it by five, the daily rate, is that what you do?

PN678

MR KEATS: Yes, we do.

PN679

JUSTICE HATCHER: That's over $900, isn't it?

PN680

MR KEATS: I think the calculation is $860.80.

PN681

JUSTICE HATCHER: Sorry, I might be looking at the wrong part. I see, I'm down there. I was looking at over the mining port. Okay. So if you go to crew level 1, doesn't the definition say that it's for the first three months of employment?

PN682

MR KEATS: It does, but you need to then look down at what crew level 2 defined as.

PN683

JUSTICE HATCHER: So it's about the completion.

PN684

MR KEATS: It's the bit that follows the 'And you either need to complete the deckhand course, or relevant experience', and the lack of clarity as to what happens if you haven't either done the course or got the experience.

PN685

JUSTICE HATCHER: I see. Yes, all right.

PN686

MR KEATS: They're the two points I wish to make, your Honour.

PN687

JUSTICE HATCHER: All right.

PN688

MR KEATS: Might I be excused.

PN689

JUSTICE HATCHER: Are you sure that's a safe course?

PN690

MR KEATS: I am, in the sense that no one else wishes to talk about these awards that's filed any submissions.

PN691

JUSTICE HATCHER: Yes, you're excused, Mr Keats.

PN692

MR KEATS: Thank you.

PN693

JUSTICE HATCHER: Mr Hodges?

PN694

MR HODGES: Thank you, your Honour. MTO's interest in these proceedings is the move to the Vehicle Repair Services and Retail Award 2020 and we rely on our written submissions filed in relation to this matter, on 3 November and 1 December. I therefore intend to limit my submissions today to a brief response to matters arising from the written reply submissions filed by other parties in relation to the Vehicle Award, being the AMWU and Ai Group.

PN695

In relation to the AMWU's submissions in reply, the MTO notes, at paragraph 6, the stated belief that the Ai Group's interpretation of the Vehicle Award is not correct, with respect to the view that an employee may be classified indefinitely at the C14 level, whilst also noting that the AMWU, at paragraphs 3 and 4, state that the classification system is skill and knowledge based and that progression from C14 to C13 does not necessitate formal training or certification, it is based on the acquisition of skills and knowledge relevant to the workplace.

PN696

We would submit that this is consistent with MTO's view that classifications in the Vehicle Award reflect the skills and level of training relevant to the performance of the tasks at a particular classification level, rather than being based on strict arbitrary timeframes. Accordingly, we press our written submissions that the AMWU's broader position that the C14 rate should be limited to a maximum of 38 hours induction only be rejected as being inconsistent with this view.

PN697

Turning to the Ai Group reply submission, the MTO notes that this aforementioned inconsistency in the AMWU's position is also highlighted by Ai Group, at paragraphs 19 through 21 and, again, consistent with the MTO

submission, the Ai Group, at paragraph 13, also submits it untrue, the AMWU's general proposition that the C14 classification is, at best, a placeholder and should therefore only apply for an induction period which, ideally, should be no longer than 38 hours.

PN698

The MTO further notes that, at paragraph 20, Ai Group shares MTO's concerns regarding the effect of an introduction of new arbitrary timeframes that dictate how or when an employee is to be classified or reclassified. We would add, in the context of the current proceedings, that the most obvious effect of such an approach would be the risk of increased churn at the entry level with employees who require a longer period to develop the skills necessary to perform work at the higher classification level effectively being deprived of the opportunity to do so, resulting in loss of continuing employment with their employer.

PN699

Finally, at paragraph 238, the Ai Group shares MTO's opposition to the AMWU's proposed amendments to the level 2 R2 classification of the Vehicle Award. In this regard we continue to press our submission that, firstly, the AMWU's proposal relates to a classification level rate that is not set below the current C13 rate and, secondly, is prefaced on the misplaced concern that the Vehicle Award requires the completion of a three-month training period when, in fact it provides for up to three months structured training to enable an employee to attain or possess the job skills relevant to the task performed at the level 2 R2 classification.

PN700

In summary then, the MTO respectfully submits the Commission should be satisfied that there is no compelling case for a variation to the Vehicle Award with the evidence suggesting that no change is required. Additionally, MTO would further submit that the statutory framework has not been addressed in the context of any such variation and that there is no probative evidence in support of such a change.

PN701

Accordingly, it follows, in our view, that no change should be made to the Vehicle Award and that it should be removed from the scope of the current review. If the Commission pleases.

PN702

JUSTICE HATCHER: So just so I understand that, do you agree or disagree that the award, in its current form, would not be consistent with the provisional view we expressed in our earlier statement?

PN703

MR HODGES: I think it's how strictly you interpret it, because it is quite a nuanced award.

PN704

JUSTICE HATCHER: Sorry?

PN705

MR HODGES: It is quite a nuanced award so it depends how strictly you - - -

PN706

JUSTICE HATCHER: You tell me, how strictly should we interpret it?

PN707

MR HODGES: Well, I would say that it is a competency skill based award. Progression relies upon development of skills required at - required to perform work at a higher level so, therefore, there'll be instances where that's within 38 hours. It's be instances where that's within three months and there will be instances where it may take a longer time to develop those skills.

PN708

JUSTICE HATCHER: Well, is it possible to employ someone indefinitely at level 1?

PN709

MR HODGES: It would be theoretically possible, yes, assuming that they did not develop the skills to progress to a higher level.

PN710

JUSTICE HATCHER: The level 2 requires the employee to have completed up to three months structured training. Is there any obligation for the employer to provide that structured training to allow for progression?

PN711

MR HODGES: Well, I think structured training would be specific to the particular roles within it, so I think it would be - it's more of an informal company based training, so if they're providing that training the expectation is - and it's required for the role, then it would be paid, yes.

PN712

JUSTICE HATCHER: All right. Thank you. Ms Davis?

PN713

MS DAVIS: Thank you. The RTBU relies on submissions that were filed on 3 November. I also seek to tender the statement of Mr Gary Talbot(?).

PN714

JUSTICE HATCHER: All right. The witness statement of Gary Talbot, dated 3 November 2023, will be marked RTBU1.

EXHIBIT #RTBU1 WITNESS STATEMENT OF GARY TALBOT, DATED 03/11/2023

PN715

MS DAVIS: Today the RTBU will just like to make a brief oral submission in regards to matters arising.

PN716

Firstly, the RTBU clearly has an interest in the Rail Award and two classification streams have been included in this review. Level 1 rail operations and level 1 technical and civil infrastructure. Both of these levels are competency skill based classifications which provide the ability for workers to progress to higher skills and knowledge in the workplace as they progress through.

PN717

As they progress through they're adding value to the workplace with their increase of skills and knowledge and then this should be reflected in the classification enabling them to earn higher wages.

PN718

Australian Industry Group has made an assertion that the employees can indefinitely remain at the C14 level, performing unskilled tasks, and this statement is fundamentally at odds with the intent of the Rail Award that provides for workers to progress to higher levels of pay through acquisition of skills and knowledge. The award system shouldn't be a mechanism for allowing people to remain on this task.

PN719

The RTBU says this is because while work may be considered low skilled, it does not mean that an employee hasn't acquired skills or knowledge, while completing those tasks that have added value and subsequently should be reflected in their classification.

PN720

We can see, in higher levels of the Rail Award, in both classification streams, that they speak of either acquiring certain certifications in trade 1, 2 and 3, or through the acquisition of skills and knowledge, through the progress. The RTBU says that this is an inference that can be made that it was always the intention that, in particular, the classifications in the Rail Award that the intention was that someone was to join the industry, gain some skills and move up through those ranks. To allow someone to indefinitely remain at the C14 level, performing these tasks and, essentially, blocking them from moving up, is not allowing for the modern award to take into consideration the needs of the low paid.

PN721

Ai Group has also made no attempt to provide any evidence, witness or otherwise, to support its statements that it's a possibility that employees can actually remain on the C14 rate, as an ongoing basis. They've had this opportunity, we submit, since 2019 when this review commenced but again, in their most recent submission, they serve their case on a hypothetical basis. I suspect that they've done this due to the fact that there is no employer who allows employees to remain at this rate of pay or that it's actually not possible for this to occur.

PN722

The RTBU does, however, agree with Ai Group's assertion that the review is inherently connected to the nature of each industry. This is why the RTBU has proposed something different than the provisional view that the Full Bench has put.

PN723

We assert that it's more appropriate that a maximum of one month period is allowed. The reasons that we say this, it can be seen in the statement of Mr Gary Talbot, where Mr Talbot has provided that the level 1 in either standard or structured training can actually be completed in a day. However, we appreciate that someone might be employed as a casual employee and they might have a shift at the beginning or the end of the month and therefore we landed on a one-month period of being the most suitable way forward to deal with this.

PN724

We believe this is a reasonable approach and, in fact, actually in alignment with employers, given that you can see, in the statement of Mr Gary Talbot that Taylor Rail, which is a large infrastructure operator, has provided for employees, in an enterprise agreement, we understand that we are talking about awards here, but when the rates of pay are closely connected to the ones in the enterprise agreement, I think it's important to note that an employer was completely fine with allowing someone to do 80 hours of training, which included on site induction, before their classification got reassessed and progressed to a level 2.

PN725

I'd also like to note today that Ai has also not provided any witness statements, or otherwise, to show the effect of the rail employees on any transition period. In particular, there is nothing before the Full Bench in regards to the one-month period. They say that this would cause additional cost, provide for an increase in regulatory and operational burden, impact productivity, along with a raft of other practical consequences which they haven't felt the need to articulate and therefore the RTBU would urge the Full Bench to err on the side of caution in regards to these concerns, with no evidentiary basis.

PN726

The last point I'd like to make today is that the RTBU is of the view that once this standard or structured induction training has been completed that the employees do have the skills and experience required to perform at the upper level, being the level 2.

PN727

While there has been some concern made by my friends, saying that perhaps there potentially could be a situation in which an employee didn't have the skills to undertake level 2, they've picked up one of the duties in regards to level 2 in the rail operations stream, which is supervision of staff. However, both level 2, in both the rail operations and the civil infrastructure stream, both still contain a duty that says that staff will still either be under direct supervision or some supervision. I think it would be difficult to find that an employee couldn't undertake some supervision tasks of others if they were being directly supervised as well.

PN728

They are the comments that I wanted to say, in regards to the reply submissions filed in this matter. But if there's any questions, I'm happy to take them.

PN729

JUSTICE HATCHER: Thank you. Sorry.

PN730

DEPUTY PRESIDENT HAMPTON: So, Ms Davis, is the intention of your redraft that the progress to level 2 occurs either when they've completed their induction training or one month, whichever occurs first?

PN731

MS DAVIS: Yes, that's correct.

PN732

DEPUTY PRESIDENT HAMPTON: Thank you.

PN733

JUSTICE HATCHER: All right, Ms Buchanan?

PN734

MS BUCHANAN: Thank you. We filed submissions and an earlier witness statement. I wish to tender the witness statement of Melissa Cadwell, in these proceedings.

PN735

JUSTICE HATCHER: The witness statement of Melissa Cadwell, dated 3 November 2023, including Annexure A, will be marked APESMA1.

EXHIBIT #APESMA1 WITNESS STATEMENT OF MELISSA CADWELL, DATED 03/11/2023

PN736

MS BUCHANAN: Thank you. It appears we are the only party that's commenting on the classifications with pay rates below C13 in the Architect's Award. Our oral submissions today are really to be no more than to make a minor addition to our earlier submissions and to also clarify our position on the manner in which the Fair Work Commission might determine this particular award.

PN737

The pay rates in question are those that apply to the classification student of architecture 21 years and over. Those pay rates are set out in a table appearing at clause 13.5(b) of the award and the Bench will note that the table establishes pay rates - sorry, establishes those pay rates with a column titled 'Service'. Under that heading appears the words, 'Less than three years experience' and the words, 'Third year of experience', in the second row. That's the classification to which the C14 rate applies, for less than three years experience and the pay rate that's about halfway between C14 and C13 applies for the third year of experience.

PN738

So, further to our earlier written submissions, we submit that the wording of both these rates and terms have been for years of service supports the contention that it is a classification which applies to extended employment and is more than a transitional entry point. That view is supported by the written statement of Melissa Cadwell we filed, which states that those working towards becoming an

architect can, in fact, work in those classifications, on an ongoing basis, throughout their studies and continue to do so during gap years, and also other longer breaks that they might take during the course of their studies. I refer, in particular to paragraphs 7 and 8 of her statement.

PN739

At the time that we initially filed our submissions, it was considered that a broader review of the pay rates might be undertaken, given there are three subcategories of employees who come within the general classification of student of architecture. So apart from this particular classification there's also junior rates, which apply to those under 21 years of age, set out at clause 13.5(a), and another category, set out at clause 13.5(c), who hold their bachelor's degree that provides a pathway to a master's degree in architecture, which is what's required in order to become a registered architect.

PN740

However, we concede toady that a review of those other rates would involve separate work value considerations and evaluations that exceeds the scope of the current Fair Work Commission review. On that basis we do not wish to press that aspect of our written submissions any further.

PN741

However, we would like to make clear that we submit that the Commission setting on a single C13 rate of pay that applies to the classification of student of architecture 21 years and over would be appropriate, with no transitional C14 rate for any period of time.

PN742

Unless the Commission has any questions or comments, that ends my submissions.

PN743

JUSTICE HATCHER: So the ones that are expressed as a percentage, they're a percentage of the level 1 entry rate, is that right?

PN744

MS BUCHANAN: The level 1 rate, architect rate, correct.

PN745

JUSTICE HATCHER: It has an entry rate then first and second pay points, so it's, presumably, the entry rate, isn't it?

PN746

MS BUCHANAN: Yes. So the entry rate to working as a professional architect.

PN747

JUSTICE HATCHER: And I think you said that requires a master's degree?

PN748

MS BUCHANAN: That's correct.

PN749

JUSTICE HATCHER: Okay. Thank you. Ms Wiles.

PN750

MS WILES: Thank you, your Honour.

PN751

The CFMMEU Manufacturing Division has filed two written submissions in this matter. The first was on 9 November 2023, that's at page 402 of the digital hearing book, and then reply submissions on 5 December 2023, and that's at page 409. We continue to rely on both submissions previously filed and as we outlined in our first submission, we do confirm our support for the provisional view expressed at paragraph 8 of the September '23 statement.

PN752

In terms of our oral submissions today, we want to respond to a number of matters, both general and award specific, raised in the reply submissions filed by the Ai Group and Business NSW.

PN753

I just want to address the Bench briefly on the issue of work value considerations, which has been a bit of a hot topic in these proceedings. Our contentions on the work value issue are set out at paragraphs 10 to 19 of our reply submissions of 5 December 2023 and a response to arguments made by the AIG and Business NSW this morning. We further rely on the oral submissions made earlier today by Mr Maxwell, for the CFMMEU C&G and Mr Giordano, for the AWU.

PN754

There is one further work value contention, made by Mr Scott, for Business NSW this morning. He made that in response to paragraph 19 of our reply submissions. This is an issue or a submission regarding the construction of section 157(2) and section 284(3) and the relationship between them. We think we need to respond to that.

PN755

Mr Scott submitted, in effect, that the Commission should effectively ignore the clear and plain definition of minimum award wages, in section 284(3), which refers to 'Rates of minimum wages' and 'Wage rates'. Instead he urges the Commission to adopt a constructions whereby a variation or variations to a classification, which had the practical effect of increasing wage rates, should be implied into the definition of modern award minimum wages, as it applies to the operation of section 157(2).

PN756

We oppose this submission. There's nothing before the Bench which would lead the Commission to read into section 157 and section 284 that the meaning of the expressions 'modern award minimum wages' and 'the rates of minimum wages in modern awards' meant anything other than the actual rates of pay in awards. It is self-evident that the respective provisions do not include any reference to classifications or classification descriptors or otherwise expand the meaning which would attract work value considerations generally or specifically, as part of these C14 proceedings.

PN757

JUSTICE HATCHER: If we, say, varied a classification to move a job function from one level to a higher level, isn't that just another way of increasing the minimum rate for that level?

PN758

MS WILES: That might be the practical effect, your Honour, which I guess is Mr Scott's argument. But in terms of the plain words of those provisions, we say that they have a meaning and the meaning is set down in the Act. So we say, I guess, as a principle of construction, that work value considerations should not occur in the situation that Mr Scott contends. That's our position.

PN759

JUSTICE HATCHER: Thank you.

PN760

MS WILES: The second issue that we wish to respond to is this sort of general theme about impacts on employer, from any variations. So the cost implications on employers.

PN761

So AiG contend, at paragraph 6 of its reply submissions that the union's proposed variations are significant in nature, including the direct bearing they may have on employment costs. In our submission, these contentions are overstated. Many of the variations proposed by the union parties are modest in nature and do not significantly, or do not reach the bar of significant, in a real to tangible sense.

PN762

We also say that the AiG submissions do not give sufficient acknowledgement to the decision already made by the expert panel in the Annual Wage Review 2023, to uncouple the C14 national minimum wage and the C14 classification rate, which have necessitated the expansion of these proceedings.

PN763

We say that the stated and, arguably, confined purpose of these proceedings is to ensure that all C14 award classifications become genuinely transitional in nature and, therefore, consistent with the findings and decision of the expert panel in the Annual Wage Review decision 2023.

PN764

That is, to ensure some such consistency, some variations of some form to some awards, as determined by the Commission, will be necessary. Any minimal impact on employment costs invariably flow from the necessity of such variations being made.

PN765

In terms of the CFMMEU Manufacturing Division's proposed variations, we say they are intended to implement, in a modest way, the stated intention of the C14's proceedings. That is, to ensure consistency with the provisional view of the Annual Wage Review decision 2023.

PN766

The cost to employer's argument should be considered in this context, as well as the recognition that the cohort of employees employed at C14 classifications across awards in which we have an interest is a relatively small one. That is, any impact from our proposed variations to a small number of awards on employment costs is likely to be negligible.

PN767

The third issue that we wish to respond to, and it was a small submission made by the AiG, at the end of their reply submission, at paragraphs 265 to 266, where they submit that if the Commission determines to vary any awards in these proceedings, parties should be given a further opportunity to be heard regarding transitional arrangements, including delaying the operative date or implementing grandfathering arrangements.

PN768

We oppose the AiG's submission that any variations to awards in these proceedings should be unduly delayed in their commencement. We note that the expert panel's decision, in this year's Annual Wage Review, was issued on 3 June 2023, over six months ago.

PN769

Employees currently paid at the C14 rate, under various awards, and currently have no apparent capacity to transition to the next level within a confined period of time should not be further prejudiced by any further significant delay in the award terms being varied to make them consistent with the Annual Wage Review 2023 decision and the provisional view.

PN770

We also object strongly to any suggestion that it would be appropriate for grandfathering arrangements to be imposed on certain cohorts of employees as a result of any award variations being made. Such an outcome, if accepted, would, we say, be very unfair to those employees.

PN771

Turning now to specific award matters in which the Manufacturing Division has an interest. Turning first to the Dry Cleaning and Laundry Industry Award 2020. A joint union consent position has been reached, in relation to the proposed variations to the Dry Cleaning Award, with respect to three classifications: dry cleaning employee level 1, in the dry cleaning stream; dry cleaning employee level 2, as a sort of consequential amendment. This consent position was reached in the earlier iteration of these proceedings, between the union and employer parties. The third classification is laundry employee level 1, which is in the laundry stream.

PN772

The consent position is reflected in the joint submission, 3 November 2023, which has been filed jointly, on behalf of the Drycleaning Institute of Australia, the Laundry Association of Australia, the CFMMEU Manufacturing Division, the AWU and the UWU. That's contained at page 441 of the digital court book.

PN773

We contend that the proposed variations to the three classifications in the Dry Cleaning and Laundry Industry Award are consistent with the Full Bench's provisional view, as expressed in the September 2023 statement.

PN774

Business NSW is the only other party which has responded to the joint employer/union position. That's at paragraph 32 of Business NSW reply submission. They do not oppose the proposal and note that it would result in the award being consistent with the provisional view.

PN775

In relation to the Joinery and Building Trades Award, I don't intend to address you on that, only to say that we support the submissions of the CFMMEU Construction and General Division, including the oral submissions made by Mr Stewart this morning in this hearing.

PN776

The third award in which we have an interest is Textile Clothing Footwear and Associated Industries Award 2020. The September 2023 statement identified two classifications in this award which provide a rate of pay at the C14 level and we made submissions with respect to these classifications, at paragraphs 19 to 33 of our 5 November 2023 submission.

PN777

Going to the first classification in this award, at the C14 level, this is general employees trainee. In relation to this classification we propose a modest variation, set out at paragraph 23 of our fist submission, which expressly clarifies, in effect, that the maximum period that an employee can remain on the classification of trainee is three months.

PN778

Although we agree that the trainee classification, as currently formulated, applies to new entrants, specifies a period of up to three months approved training and is intended to be transitional, it, arguably, does not, in its current formulation, precisely define a clear and unambiguous transition to the next classification, which is skill level 1. So for this reason we submit that the variation that we proposed is necessary to remove any ambiguity and we continue to press for its adoption.

PN779

Sorry, I'm just getting some feedback. Did you ask a question, your Honour?

PN780

JUSTICE HATCHER: No, we're good.

PN781

MS WILES: All right.

PN782

So the second classification, under the TCF Award, is the wool and basil employee, general hand. In our submissions of 5 November 2023, at paragraphs 25 to 33, we make submissions regarding our proposal for a variation to this classification. This is located at clause B.4 of the TCF Award.

PN783

We acknowledge that clause B.4 of the TCF Award is relatively unusual amongst modern awards, in that it contains a general description of wool and basil employees, but contains no detailed classification descriptors, as such. There are, however, six classification levels and associated wage rates contained at clause 19.2 of the TCF Award.

PN784

JUSTICE HATCHER: Ms Wiles, what is 'basil', I assume that that's not referring to the herb?

PN785

MS WILES: Your Honour, I really can't enlighten you. I think it's something to do with wool scouring, but I have to profess my ignorance on that question.

PN786

JUSTICE HATCHER: Okay. Thank you.

PN787

MS WILES: I can say that in my entire time working for the union I think I've come across one wool basil employee, so that kind of tells you how little, at least at this level, these classifications are used.

PN788

JUSTICE HATCHER: All right, thank you.

PN789

MS WILES: In any event, we submit that the classification, wool and basil employee general hand, is not consistent with the Full Bench's provisional view and any of its elements such that it is not limited to new entrants, or not expressly limited to new entrants. It expressly does not operate for a limited period of time and there's no clear expressed transition to the next level of classification.

PN790

At paragraph 32 of our 5 November 2023 submission, we have proposed a variation to clause B.4, specifically to clause B.4.1, which would ensure that the classification is consistent with the provisional view of the Full Bench. The key elements of the proposed variation would expressly provide that the general hand classification applies to, firstly, new entrants into the wool and basil industry. Secondly, that such employees would undertake up to 38 hours induction training and on completion of the induction training the employee will, at a minimum, transition to the next classification, which is operator grade 3. And, consistent with the Annual Wage Review 2023 decision, it would ensure that the lowest rate applicable in any modern award to ongoing employment is at least the C13 rate, or equivalent.

PN791

In its reply submission, at paragraphs 215 to 219, the AiG opposed the variation sought by the CFMMEU Manufacturing Division. The AiG appeared to accept that the classification is not transitional, but it provided no alternative variation proposal to that contended by the union.

PN792

In addition, AiG submit that if the union's proposed variation was adopted the award would no longer expressly contemplate the performance of work by a general hand and that such employees would not be covered by the TCF Award, arguably, and this would be anomalous.

PN793

In response, we say that this argument ignores the terms of the classification rates at clause 19.2 itself, which expressly states that it is a classification rate only for a general hand. A proposed variation to clause B.4, by the addition of a new subclause B.4.1 is titled general hand.

PN794

Business NSW, in their reply submission, at paragraph 69 to 72, appears to also agree that the classification is not transitional and does not confirm to the provisional view. While not supporting the union's variation, Business NSW do not provide any alternative formulation.

PN795

On that basis, we say that it is open for the Commission to make the variation in the form sought of the CFMMEU Manufacturing Division.

PN796

Moving now to the last award in which we have an interest, which is Timber Industry Award 2023. The September statement identified two classifications in the Timber Award which provide a minimum C14 rate. This is the general timber stream level 1 and the wooden timber furniture stream level 1. We made submissions with respect to these classifications, at paragraphs 34 and 53 of our 5 November 2023 submission.

PN797

Turning first, to the first classification, the general timber stream level 1. In our submissions regarding this classification, we propose a variation to achieve two things. Firstly, to clarify, up front, that the classification applies only to new entrants in the general timber industry and, secondly, to remove the capacity for an extension by agreement of the maximum three-month operational period of the classification.

PN798

JUSTICE HATCHER: Why is that submission inconsistent with the provisional view, as it's still subject to an overall cap of three months plus three months.

PN799

MS WILES: We say there's two elements to this. One is obviously to clarify that it's only applicable to new entrants, for this stream. But, secondly, given the

nature of the work, we don't think it's appropriate, really, for there to be a longer period than three months, even by agreement.

PN800

JUSTICE HATCHER: But do you say it's inconsistent with the provisional view or not?

PN801

MS WILES: The element probably isn't inconsistent, we say the first element is, the new entrant element, and requires clarification.

PN802

JUSTICE HATCHER: I mean it's pretty clear, isn't it, that you can't employ anybody in level 1 for more than six months?

PN803

MS WILES: Under this classification?

PN804

JUSTICE HATCHER: Yes.

PN805

MS WILES: I think that's correct, but I mean the other part of this classification is that there is, obviously, a reference to the achievement of certain company requirements at level 2. We say that given that it would be helpful if the capacity to extend was deleted.

PN806

JUSTICE HATCHER: All right, thank you.

PN807

MS WILES: So just moving to the second classification; this is the timber furniture production employee level 1. This is in the wood and timber furniture stream of the award, at clause B.1.

PN808

In our submissions regarding this classification, which is at paragraphs 45 to 53 of our 5 November 2023 submission, we propose a variation to this classification to achieve three things. To clarify that an employee on this classification will remain at level 1 for a maximum of three months only. Secondly, to remove clauses B.1.5 and B.1.7, which appear, on their face, to make transition to the next level conditional, based on competency requirements. And, thirdly, to ensure consistency within the terms of clause B.1 itself and to ensure consistency with the provisional view.

PN809

The AiG, in it's reply submission, appeared to agree that such progression to the next level is conditional. However, AiG is silent as to whether this classification is consistent with the provisional view and otherwise oppose the union's proposed variation, but did not provide any alternative variation for consideration.

PN810

Business NSW, in their reply submission, at paragraph 73, make no specific submission in relation to the Timber Award, with respect to either classification. They, instead, refer to their submissions relating to another award, the Electrical, Electronic and Communications Contracting Award, at paragraphs 33 to 35 of their submission, where they raise the issue of industry allowances applying for all purposes and appear to argue the same issue applies to the Timber Award.

PN811

We reject this argument in principle and specifically for the Timber Award, for the reasons that we have outlined at paragraphs 20 to 24 of our reply submission, in relation to industry allowances. If the Commission pleases.

PN812

JUSTICE HATCHER: All right, thank you. So apparently basil is a tanned sheepskin, I'm advised.

PN813

MS WILES: Thank you, your Honour.

PN814

JUSTICE HATCHER: Ms Abousleiman?

PN815

MS ABOUSLEIMAN: Thank you, your Honour.

PN816

The CEPU relies on its submissions of 3 November whereby we support the Commission's provisional views. We also support and adopt the written and oral submissions of the AWU, the CFMMEU Manufacturing Division and the CFMMEU Construction and General Division, insofar as their submissions touch on the work value contentions and the industry allowance issues.

PN817

In addition to this, I just wish to make two very, very brief submissions, in response to Ai Group and ABI's reply submissions, with respect to the Electrical Contracting Award.

PN818

So the first issue which has been ventilated quite a lot today, in respect to the additional allowances, whether they be all purpose allowances or, in the case of the Electrical Contracting Award, the industry allowance and whether that should be taken into consideration in lifting the rates up for below C13 but are above C14.

PN819

The CEPU continues to press it's submission that this consideration shouldn't be taken into account and we say this on the basis that the industry allowance is an allowance paid to all employees under the award. It's an allowance traditionally and it is paid, as described by the award, for disabilities. It's not some sort of allowance that's paid, or it's not a special allowance paid only to the low paid

employees and therefore it shouldn't be treated as a buffer to lift the rates of the low paid when it's not treated in that way for any other employees under the award. So we continue to press our primary position that it shouldn't be taken or it's not a relevant consideration to be taken when considering the electrical grade worker 1 rates to the C13 rate.

PN820

The second point I wish to touch on, which is really more of a clarification point, is Ai Group, in paragraphs 82 and 83 of Ai Group's reply submissions, so that's at page 150 of the digital court book, they say that they don't understand paragraph 8 of the CEPU submission, that appears at paragraph 384 of the court book, with respect to adult apprentices, and they contend that adult apprentices minimum wages are calculated by reference to the minimum hourly rates of a grade 5 electrical worker. Yes, that's in part true, but I can understand the confusion with respect to our submission at paragraph 8, is because this submission is in relation to clause 16.4(b) of the Electrical Contracting Award (v), which isn't referenced in our submissions, so apologies for that. But, basically, clause 16.4(b)(v) says that:

PN821

An adult apprentice commencing their apprenticeship on or after 1 January 2014, in the second year to fourth year, are paid the rate of an electrical grade worker 1.

PN822

So for the purpose of the CEPU's submission, basically what we're stating here is that we're in support of the provisional view because adult apprentices who have commenced their apprenticeship after January 2014, in classifications of the year 2 through year 4, are receiving below the minimum wage and, for that reason, we support the provision view to lift the C13 rate for the electrical grade worker 1 rate to the C13 rate.

PN823

So that's all I have, if it pleases the Commission.

PN824

JUSTICE HATCHER: Presumably this clause could be updated to remove the pre 2014 provisions, it must be.

PN825

MS ABOUSLEIMAN: Yes, I think that will be 16.4(a) is where the confusion arose from.

PN826

JUSTICE HATCHER: Yes. All right, thank you.

PN827

MS ABOUSLEIMAN: Thank you.

PN828

JUSTICE HATCHER: Ms Bhatt?

PN829

MS BHATT: Just some very short points in reply. Your Honour asked Mr Hodges, in relation to the Vehicle Award, as to whether, firstly, an employee can be engaged indefinitely at level 1 and, secondly, whether the award requires that an employee must undertake structured training in order to transition to level 2.

PN830

We've dealt with this in our written submissions, but just to highlight that, quite specifically, the classification description for a level 1 indicates that an employee at that level may be undertaking structured training so as to enable the employee to progress to a higher level. So it's quite clear, in our submission, that it's not required, but an employee may be undertaking such training.

PN831

In relation to the Rail Award, the union has today said that there's no evidence from Ai Group about the classification - the relevant classification levels being applied indefinitely. I think it invited the Commission to infer that that's because employers don't, in fact, apply the award in that way. I just wanted to indicate that our position, in respect of that award, has been developed in consultation with the relevant members and their understanding of how the award operates.

PN832

Those are the only submissions, thank you.

PN833

JUSTICE HATCHER: All right. If there's nothing further we'll now adjourn and resume at 10 am tomorrow to deal with the Meat Industry Award.

ADJOURNED UNTIL TUESDAY, 19 DECEMBER 2023 [4.00 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #AW1 WITNESS STATEMENT OF SHANE ROULSTONE DATED 03/11/2023 ..... PN301

EXHIBIT #AW2 WITNESS STATEMENT OF ANTHONY BEVEN DATED 2/11/2023 ..... PN302

EXHIBIT #AW3 WITNESS STATEMENT OF STEVEN CARTER DATED 2/11/2023 ..... PN303

EXHIBIT #AW4 WITNESS STATEMENT OF DANNY MUNDEY DATED 2/11/2023 ..... PN304

EXHIBIT #AW5 WITNESS STATEMENT OF TRAVIS PHILLIPS DATED 2/11/2023 ..... PN305

EXHIBIT #AW6 FURTHER WITNESS STATEMENT OF SHANE ROULSTONE DATED 29/11/2023 ..... PN306

EXHIBIT #AFPA1 WITNESS STATEMENT OF CARL JOHN PHILLIPS DATED 10/11/2023 ..... PN407

EXHIBIT #AFPA2 WITNESS STATEMENT OF CARL JOHN PHILLIPS DATED 1 DECEMBER 2023 ..... PN408

EXHIBIT #NFF1 WITNESS STATEMENT OF ANDREE ROWNTREE DATED 5/12/2023 ..... PN464

EXHIBIT #NFF2 WITNESS STATEMENT OF BENJAMIN GRUBB DATED 30/11/2023 ..... PN465

EXHIBIT #NFF3 WITNESS STATEMENT OF BRETT GUTHREY DATED 1/12/2023 ..... PN466

EXHIBIT #NFF4 WITNESS STATEMENT OF KATE MUNRO DATED 1/12/2023 ..... PN467

EXHIBIT #NFF5 WITNESS STATEMENT OF MATTHEW KLEYN DATED 1/12/2023 ..... PN468

EXHIBIT #NFF6 WITNESS STATEMENT OF NARELLE BURKE DATED 30/11/2023 ..... PN469

EXHIBIT #NFF7 WITNESS STATEMENT OF RACHAEL FINCH DATED 1/12/2023 ..... PN470

EXHIBIT #NFF8 WITNESS STATEMENT OF RENATA CUMMING FILED 5/12/2023 ..... PN471

EXHIBIT #NFF9 WITNESS STATEMENT OF STEPHEN TULLY DATED 1/12/2023 ..... PN472

EXHIBIT #CFMMEU/MUA1 WITNESS STATEMENT OF WARREN SMITH DATED 26/10/2023 ..... PN645

EXHIBIT #RTBU1 WITNESS STATEMENT OF GARY TALBOT, DATED 03/11/2023 ..... PN714

EXHIBIT #APESMA1 WITNESS STATEMENT OF MELISSA CADWELL, DATED 03/11/2023 ..... PN735