TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER TRAN

AM2023/21

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

Application by
(AM2023/21)

Melbourne

10.05 AM, TUESDAY, 27 FEBRUARY 2024

Continued from 06/02/2024

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning and welcome. Rather than spending the next 20 minutes going through appearances, we might just deal with appearances in this way. If there are any changes to the appearances since the mention held a few weeks ago, those should be announced; otherwise we will take the appearances as being the same as previously announced. So are there any changes or additions to the appearances?

PN2

MS V WILES: Yes, Deputy President.

PN3

DEPUTY PRESIDENT GOSTENCNIK: Yes, go on.

PN4

MS WILES: I wasn't present at the mentions, but we indicated in email correspondence to chambers that Mr Nicholls and I would be appearing for the CFMEU Manufacturing Division.

PN5

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Any others?

PN6

MS J TINSLEY: Deputy President, it's Ms Tinsley from the Australian Chamber of Commerce and Industry. I'll be appearing today with my colleague, Mr Morrish. I, unfortunately, need to leave at 3.30. I'm hoping I will have the majority of my submissions done by that point, but to the extent there's further matters that need to be dealt with, my colleague will need to deal with those.

PN7

DEPUTY PRESIDENT GOSTENCNIK: Yes. You might just hold that thought when we explain how we are going to proceed this morning, but that's noted. Thank you. Any other changes, special requests, dietary requirements?

PN8

MR J CULLINAN: Cullinan, initial J, for RAFFWU, has joined Kakogiannis, initial L.

PN9

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

PN10

MS A RAFTER: A further appearance for Business New South Wales and ABI, Rafter, initial A.

PN11

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning, Ms Rafter.

PN12

MS M ADLER: Your Honour, it's Ms Adler from the Housing Industry Association.

PN13

DEPUTY PRESIDENT GOSTENCNIK: Yes, hello, Ms Adler. Welcome.

PN14

MR J LILEY: Thank you, your Honour, it's Josh Liley from the CFMEU. I just note that Mr Maxwell is not appearing today.

PN15

DEPUTY PRESIDENT GOSTENCNIK: Yes, thank you. You can put your hand down now.

PN16

MS E SKELDING: Thank you, Skelding, initial E, appearing for the CEPU, Electrical Trades Union.

PN17

DEPUTY PRESIDENT GOSTENCNIK: Yes, thank you. All right. Commissioner Tran is going to lead the session today, so I will hand over to her to explain how it is that we propose to deal with the consultations today.

PN18

COMMISSIONER TRAN: Good morning everyone. Our proposal for how we deal with the consultations for this and the second consultation on 4 March, which will be held in Sydney with access via Teams facilitated, will be regarding questions 6, 7 and 8 in relation to the standard clauses.

PN19

Our proposal is this. There are people in the room present and there are people on Teams who may intend to be present in person in Sydney, so we will proceed with people who are present in the room doing their submissions today, and if there are any additional submissions that would prefer to be made via Teams, that can be made, but those who may be present in Sydney on 4 March may prefer to do their oral submissions when we are physically present.

PN20

Having also reviewed the submissions, our proposal is that the ACTU would go first and then its affiliate unions, and then the employer organisations can go after. Does that proposal suit? Are there suggestions for a different order of events?

PN21

SPEAKER: We are quite content with that course of action, Commissioner, thank you.

PN22

COMMISSIONER TRAN: Yes, Ms Tinsley.

PN23

MS TINSLEY: Thank you, Commissioner. We are fully supportive of that approach. We were just hoping that we could provide our submissions via Teams today, if at all possible. I'm happy to go towards the very end.

PN24

COMMISSIONER TRAN: That should be fine, and we can ask you to speak either towards the beginning of the employer organisations speaking, but you can also converse with your colleagues about that. Mr Cullinan.

PN25

MR CULLINAN: Thank you, Commissioner. We are just enquiring as to when the non-affiliate unions may have an opportunity.

PN26

COMMISSIONER TRAN: Yes, my apologies. I would propose that in terms of the consultation and the submissions that were made, you would speak after the ACTU and its affiliate unions do, if that suits. Alternatively, if you are going to be physically present in Sydney on 4 March, you may prefer to do your oral submissions then.

PN27

MR CULLINAN: Thank you, Commissioner.

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DEPUTY PRESIDENT GOSTENCNIK: All right. If that's all, Mr Clarke.

PN29

MR CLARKE: Thank you, Commissioner and Deputy President. What we have done in our written submission of the 4th, we have responded to the questions that have been put to us and we have come up with some proposals as to how these amended objectives in the Act might be reflected in the modern award terms that the questions direct us to consider.

PN30

In accordance with the statement of 4 October, what we have done is we have identified our position and our reasons for holding it. Our proposals insofar as they relate to standard terms are necessarily put on the basis that there may need to be some award-specific alterations, as is evident in the background paper that there are already deviations from standard terms to suit industry circumstances.

PN31

In crystal ball gazing as to what might happen today, I wasn't expecting that we would be put on the spot to make oral submissions in support of our propositions. That's what we've tried to do in our written material. What we hoped to achieve out of today was to constructively discuss our proposals.

PN32

A constructive discussion, in our mind, could mean a number of different things. It could be one that explores the issues raised by our proposals, noting that most of the proposals have come from this side of the table when I say 'our proposals'.

PN33

DEPUTY PRESIDENT GOSTENCNIK: That's why you get to go first.

PN34

MR CLARKE: Yes, and/or the potential for any alternatives that have some kind of thematic connection to that.

PN35

Alternatively, a constructive discussion is also one that establishes that, you know, no progress from the status quo on these issues is going to be possible until hell freezes over. To our mind, there's no real utility in putting parties to the effort of bringing detailed material forward to support their proposals if you've got a combination of opposition from the other side and yourselves thinking that they are non-starters and are never going to get anywhere. If either of those objections fall away, that's different.

PN36

If there's something specific that you want us to prepare or you want the employers to prepare because you think that's going to be constructive, that's fine, but activity for activity's sake that's just going to lead to the same zero sum gain at the end of the day is probably not the best use of anyone's time, in our submission.

PN37

We don't quarrel with the general point raised in ACCI and Business New South Wales' submissions that the modern awards objective needs to be considered holistically when you are exercising modern award powers, or when we're attempting to satisfy the Commission that it should exercise modern award powers, but, to our mind, that's not what we were asked to do in preparing our responses to the questions that were put in the discussion paper.

PN38

Perhaps that's something that we embark upon in these consultations; perhaps it's a matter for the report; perhaps it's a matter that arises following the publication of the report, either through a Commission-initiated process or an application; perhaps it's something that's ultimately side-stepped through some legislative provision that ultimately says, 'Particular things need to be in modern awards, go ahead and write something.' We just don't know.

PN39

What we do know is that we haven't filed an application to vary a modern award under section 157. As we see it, we are participating in some consultations in aid of the Commission preparing a report about job security and other issues that are highly relevant to ensuring, you know, the workplace relation systems are in tune with the needs of the workforce and the way we organise our society and the way we organise our economy.

PN40

The report is not, as we see it, or as we read the statements that have been issued from the Commission or the comments, indeed, at the first mention before the President, the report is not intended to be determinative, but will rather provide some recommendations or proposals in respect of next steps.

PN41

I hope that provides some explanation as to our general approach or expectation. If any of that sounds outrageous, it would be really good if I knew about that now in terms of the general approach.

PN42

What I could do next is, you know, really up to what people in the room want me to do in terms of clarifying anything that arises out of our submission or addressing some of the points that have been raised in the written material in reply. I just don't want to stand here and talk about things that nobody wants to listen to. I'm in your hands as to what's the most constructive thing for me to do next in terms of addressing replies or dealing with any specific sort of concerns or questions about what we've proposed.

PN43

COMMISSIONER TRAN: In terms of the proposals, Mr Clarke, at least one had some interest from the Ai Group about rearrangement of individual flexibility arrangement clauses, so that's a matter that could be discussed, or could be discussed among yourselves as a future proposal. Our understanding from this consultation, we certainly won't be making decisions to vary any awards, and no proposals have been put up in that context, but the consultation is to inform and ensure that we are considering the amended additional modern award objective.

PN44

MR CLARKE: Yes.

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COMMISSIONER TRAN: And is an opportunity for parties to explore with us and with each other proposals specifically to the standard clauses in these consultations.

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MR CLARKE: Yes.

PN47

COMMISSIONER TRAN: And to explore what may need to be considered in the future to ensure that modern awards continue to meet the modern awards objective. In terms of today and your submission or discussion now, your approach sounds suitable to me. I am interested in hearing further about your specific proposals and the unions' proposals and how the standard award clauses do address or do not address the improving access to secure work objective.

PN48

MR CLARKE: Yes. Sure. Perhaps if I can file the response to the reply into that discussion and do that all now, I will. If I could perhaps just sort of dispose of the issue in relation to question 6, which is: are there examples of the individual flexibility arrangements being - is it misused or abused?

PN49

COMMISSIONER TRAN: Undermining job security.

PN50

MR CLARKE: We say that there are. The only evidence base that we have relied on in our own submission is what's emanated out of the statutory sort of periodic review process from the general managers' reports, you know, the methodology in relation to that, and the people who have been asked to conduct it has jumped around a bit over the years, and we can speculate about that, but, unfortunately, it's not a sort of - not able to compare series to series directly in relation to any of these.

PN51

The difficulty we see with those is that if you accept that the issues that are associated with job security and providing access to secure work are those as were referred to in the Aged Care decision and the Annual Wage Review decision of last year, you are ending up in a situation where a lot of the individual flexibility arrangements are designed around the compensation that one receives for irregularity not being received any more. They are the issues that we are seeing with individual flexibility arrangements.

PN52

There's clearly a different view between us and the employers on how the better off overall test operates in this context. I think, you know, if anybody wanted to get some independent advice about that, Clayton Utz, presumably, who acted for CommSec in the Commonwealth Bank recently in the Federal Court proceeding and advised them to, you know, admit everything, including the serious contraventions, clearly have a view about how the BOOT test operates in relation to individual flexibility arrangements.

PN53

The difficulty we see with their operation is that their operation, in fact, is resulting in things that we say are outcomes that are not currently authorised by the statute, and it doesn't matter that those outcomes are outcomes that are the result of not complying, the point is that they are happening, and we would like to see those outcomes not happen, or introduce some nudges in the system to make them less likely to happen, or less likely to end up in situations where employees are no longer receiving the trade-offs that the safety net is deeming appropriate for a loss in regularity of work, or compensation for the loss of regularity in work.

PN54

Our proposal is really based around having some clarity of exactly what it is that someone's being asked to agree to at the front end, with a clear understanding that you can go and ask someone about this and the employer, as relevant to job security, giving some indication as to whether we think the regularity or predictability of your work is going to be enhanced by this, what are the expectations, and then having some checks down the system to verify whether or not it's actually living up to expectations, either in relation to that or in relation to the BOOT.

PN55

Our proposal isn't that that's done in any punitive way; our discussion is that it's done in a way that enables people to say, 'Look, we've got a difference of opinion about that. Can we come in here' or 'on there and get somebody to express a view

about it and then we'll make decisions about how we exercise our rights accordingly?' That's the process that we've put up.

PN56

The principal objection appears, as I say, at least from the Ai Group's point of view, there's a difference of view about how the BOOT test operates. There's no issue really, but sort of, let's say, a sort of less hostile reception around moving the text around and saying, 'Look, you can make a request for a flexible working arrangement instead right up at the front' because, you know, that may well be something that accommodates the employee's needs without having to sacrifice the compensation that they're getting for a lack of predictability and regularity in work.

PN57

The other sort of principal opposition to that is the idea that, you know, it's not the employer's responsibility, or shouldn't be the employer's responsibility, through the IFA to look after the interests of the employee and make sure the work is more regular or predictable. On the one hand, it's sort of said, 'Well, if it did make work regular and more predictable, we might say that and that might be relevant for the BOOT, but, if it doesn't, we don't want to be forced to express a view about whether we think it does or whether it doesn't.'

PN58

Our response to that, I suppose, is that the IFA system, for all the concerns we have about it, that some of that's here and some of that's everywhere, is designed as a system whereby the employee is naively expected to go into it with a capacity to advocate for their own interests for something that is tailored to their own interests, but the obligations on the employer are different. It needs to meet the genuine interests of the employee and the employer, but the employer also actually is the one who has the obligation to make sure the employee is better off overall. So it's not a radical leap to also suggest, well, maybe the employer should also express a view about the impact on regularity and predictability of hours of work and income. That's how I would respond to that proposition.

PN59

In relation to the reporting issue, that's one that we recognise in terms of reporting on the usage and what's happening with individual flexibility arrangements. That's one where we recognise that a legislative approach to that is probably the most sensible one, but that's really something, I suppose, to hold in abeyance to see if they do go ahead with that, as seems to have been suggested by the Senate Inquiry Report, or whether they don't, but merely to state that, 'Look, if you wanted to do something around that, you probably could.'

PN60

If you look back in the COVID situation where we had the case with the ASU on the Clerks Award, there was a situation there where certain of these flexibilities that were introduced in relation to working under COVID were going to be relied upon and, on the employer, there was an obligation to distribute some information and also to notify the Commission that you were actually going to do it. It wasn't impossible; there is a way to do it, but, ideally, we recognise that it would be better if there was some sort of uniform reporting mechanism on the usage of

IFAs which applied equally to enterprise agreements and the modern award system.

PN61

In terms of the consultation clause, we have suggested that a reduction in job security, or a reduction in the regularity of predictability of hours of work, et cetera, be identified as a significant effect as a way of reflecting this element of the modern awards objective in the provision, and to remove the requirement that there needs to be a major change to trigger the obligation to consult.

PN62

We have also included what we are calling - let's call today - the 'contractors clause' more prolifically across the award system. That's a thing out of the Cleaning Services Award and the Security Services Award, again, a nice intersection with the job security issues identified in the authorities. You know, someone is about to lose their job: are there some small steps an employer can take to assist them to get continuity of employment with a new employer? There may well be other industries where you can do that.

PN63

I suppose the most contentious provision in this is providing for the obligation to consult to be activated at a point prior to a definite decision being made. We have used the expression 'seriously considering' and that has, you know, raised a big response. Not wedded to the words 'seriously considering'. You know, we're not coming here with the Times New Roman word processor and throwing it all in; we're trying to get a concept here. The concept we are trying to get at is that you should be consulting before you've signed the contract, the ink is dry, you've signed the cheque and it is completely impossible to make any changes. That's what we're getting at. Now, maybe 'seriously considering' is the wrong word, but it has to be at a point before it is, for all intents and purposes, practically impossible to alter course.

PN64

The expression 'definite decision' seems to be an expression where, in most cases, particularly where there are legal obligations involved in terms of third party providers or property contracts, or so forth, that you're going to be at the point where it's almost impossible to unscramble the egg to any extent - actually that's a terrible phrase - but to make any changes.

PN65

A lot of the complaints that are levelled against us from ACCI and from Business New South Wales like, 'Oh, well, you know, that's not what TCR said; TCR stood the test of time', et cetera, et cetera. No, it's not, it is different, and the modern awards objective is different. This is new; this is a new development, and so we want to seriously consider how it is that you can tweak a provision that, you know, can have its 40th birthday this year to something that reflects the modern safety net requirements.

PN66

I should say, and it's evident from our submission, that the general thinking in the Commission and in the court on what the word 'consult' means has moved on a

little bit around this idea that it involves, you know, a genuine prospect of influencing what the ultimate decision is going to be, and that sits uncomfortably with the idea of this obligation only kicking in once a definite decision has been made, and, you know, the case is really made by some of the materials that are extracted from the principles that were relied on in the TCR case where they explained 'consult' as - was it the Labour Advisory Council principles explained 'consulting' as telling people what's going to happen.

PN67

Now that's not what we understand consultation to be in modern workplace relations in Australia, but that's the view the Commission had of it at that point. You're telling people what's going to happen after you make a decision and then you consult about what you might do at an individual level to, you know, maybe pay people a bit more on their way out the door. I think we can do a bit better in a context where the fairness of the safety net necessarily must involve some consideration of access to secure work.

PN68

COMMISSIONER TRAN: Mr Clarke, what do you say are the indicators of when an employer may be seriously considering changes to when they may be making a definite decision?

PN69

MR CLARKE: I suppose an analogy might help. The discussions that we are seeking to have the affected employees involved in at some level are the discussions that the employers are already having with some of their staff beforehand. Decisions to alter the structure of the business or to outsource a component of work in one of the 12 offices somewhere, there's only sort of three people involved and it might not be a major change in the scope of a big business, but it's going to have a significant effect on a small group of people.

PN70

There's going to be a discussion about that: 'We think it's going to be better for the business to do this.' Someone in that meeting is going to go, 'Oh, no, I get that, it makes sense from the business's point of view, it is more efficient, it is a tough time for us, that can be done in a more efficient way and a quicker way with higher quality if we do it that way, but, jeez, that's going to mean we're going to have to lose some people.'

PN71

There is no one in this room who likes having those discussions. I'm not saying that anyone in this room likes to be in a position of making those sorts of decisions, but those are discussions that are happening at some level in the business already and there's a realisation made that, 'For operational reasons, this is the direction I think we need to go in.' At some point between that point and everything being done to make sure that that happens, in terms of contracts being signed, property being sold, contractors being brought in, you know, capital works to install the new equipment, it's somewhere between those points that there should be a discussion with the employees about, 'Look, this is what we're thinking we're going to do; what have you got to say about it?' To use the words of Logan J, 'This is what we're thinking of doing; what have you got to say about

it?' rather than, 'This is all a done deal, sorry about that; what have you got to say about it?'

PN72

Anyway, we've all been here, and sometimes you can find some technical issue with consultation and you sit in the Commission and you talk about it for, you know, a few days, or whatever, but does it ultimately change the decision? Very rarely. In fact, the standard industrial relations' position is for businesses in this situation to run the train at 110 per cent to make it impossible to back out of it, to make the egg impossible to unravel once you enter that kind of a dispute.

PN73

Does that answer the question?

PN74

COMMISSIONER TRAN: Yes, thank you.

PN75

MR CLARKE: We recognise what Ai Group are saying about, you know, this is different, this would be onerous, and 'seriously considering' might be the wrong expression. It may be it is the wrong expression, but what we would like to test is whether we can have something lesser than a definite committed decision.

PN76

I think that's probably all I can say about that, except insofar as there's some uncertainty expressed about, you know, 'We don't really know what a contracting industry is, you should give us a specific proposal', well, back when they ran the ADJ Contracting case in the Federal Court, they seemed to know what a contracting industry was, but, you know, electrical contracting would be one of them; some of the other sort of maintenance work that's covered by the Metals Award might be some of it.

PN77

You've got a lot of stuff that's currently going on with local government tendering out services that used to be core, you know, waste management, home care. There's a lot of agency/labour work in nursing and aged care as well. They are some examples of where we think that contracting clause from the security services industry - sorry, contract call centre is another one - security services industry and contract cleaning, you know, might be adapted to say, 'Look, we've lost the contract, we're not providing any agency nurses to Ramsay Healthcare any more, that contract's gone to - whatever the one that used to be called 'Privatised District Nursing' now, but if you want a job with them, we'll help you.'

PN78

COMMISSIONER TRAN: Bolton Clarke.

PN79

MR CLARKE: Bolton Clarke. 'We'll give them your resume.' That's an example, if that helps people get their head across what we're asking about.

PN80

In relation to the consultation around regular rosters or ordinary hours of work, what we are suggesting - and this is exactly the type of change that's sort of seized upon by these discussions of what job security is really getting to in those two cases - when you are consulting around a change to regular rosters and ordinary hours of work, we would like the employer to give an indication of whether they expect it to be permanent or temporary. Ai Group has said, 'Well, look, we might not know.' That's fine. Say you don't know, say you don't know, but as long as you give some indication, that's important for people to know.

PN81

'How long am I going to be put in a situation of having to work Friday afternoons because that's the day I normally pick up the kids?', you know, or, 'How long am I going to be without the Wednesday shift?' 'How long can I sustain that on my finances?' That's a fair thing for an employee to ask: 'How long is this going to go for?', and if the employer can't answer it, that's fine. Ideally, you know, you would hope that they could, but, if they can't, that's fine, but say, 'We don't know.' If the response is sometimes, 'We might not be able to tell you whether it's permanent or temporary, or, if it is temporary, how long it's going to go for', that's fine, just tell us, and the employee will make their discussion accordingly about, 'Well, all right, am I going to stick around here or not?'

PN82

The additional proposal we had around providing material in writing, you know, that was something that the Commission thought in 2013 was a bit too onerous. It seems that the modern workplace relies on people sending each other 14,000 emails and Slack messages and SMSs and Teams things, and whatever, that a written communication of that nature might not be too onerous, but, you know, let's have a chat.

PN83

Certainly people are capable of coming up with a fair amount of written material in a short space of time, and also to have consideration of, you know, the English language skills of the workforce that we're working with. If you've got a non-English speaking workforce and next week, you want them to come on a Thursday instead of Wednesday, don't tell them in English, tell them in a language that they can understand. We don't think that that's particularly onerous, but, you know, we're happy to have a discussion about it.

PN84

I think there's some misunderstanding of what we're sort of referring to as this bald time in recommendation 12 around employees who do work irregular, sporadic or unpredictable work. If you want to improve access to secure work, as the decisions say, it's something about having a choice, the capacity to exercise a choice. Now, whether you put it in as consultation around an hours of work clause or not, and we think you could, the general proposition is you've got someone who says, 'Look, I'm casual for the moment, my hours are bouncing around everywhere, but, look, I really would like to get work on Wednesdays, or whenever possible.' Let's just have a framework around them putting their hand up and saying, 'Look, I'd really like to work these hours, if possible, I'm really interested in having more regular hours; can you consider that?' That's all. That's the extent of that.

PN85

DEPUTY PRESIDENT GOSTENCNIK: A hybrid casual conversion clause for workers who work sporadic hours?

PN86

MR CLARKE: It's not necessarily a hybrid casual conversion because it's not suggesting that their entitlements or - - -

PN87

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN88

MR CLARKE: Yes.

PN89

DEPUTY PRESIDENT GOSTENCNIK: That's why I've described it as 'hybrid'. It's a process.

PN90

MR CLARKE: Yes, it's - yes, it's a process, and it's kind of like a jobs board. There might be some people who are happy to work whenever, whatever, you know. It has never been our position - and it has often been attributed to us - but it's never been our position that casual employees are some sort of homogenous group who all want the same thing all the time. We recognise that people have different preferences, but there are some of them who do have some preferences and say, 'Look, I don't do anything on Thursdays, can you please consider me for Thursday work whenever you've got it?' That's all. That's all it is.

PN91

COMMISSIONER TRAN: But how does the consultation about changes to regular hours - how does an improvement to that, or a change to that, affect an individual employee's ability to say to their employer, 'My preference is to work on Thursdays because that's when I've got nothing on'?

PN92

MR CLARKE: Well, it really leverages out of the idea that the consultation around hours of work is expressed and conceived as an obligation in the statute, as interpreted by the Commission, rightly or wrongly - and we raise a question about that - as only applying to people who work regular work, and we're saying, 'Well, if the new obligation is to consider - if there's something new in the modern awards objective that needs you to consider providing access to secure work, maybe you need to do something about people who are working irregular hours but want to have a bit more regularity and want to have a bit more certainty.'

PN93

Maybe there's an opportunity to do that, and a bolt onto this clause, whether or not you're actually consulting about regular hours or rosters or not, but this seems like it could be a logical place to put it because, on the one hand, the clause is saying at the beginning, 'This bit doesn't apply to people who work irregular hours', and you can have another bit that says, 'This bit does, and this bit says, if you're

working irregular hours and you're really interested in working some more predictable shifts, let us know and we'll take it into account, or whatever we land on, if we land on anything.' That's the proposition.

PN94

Again, the black and white of it, the words, the commas, the punctuation, the rest of it, the font, for today's purposes, we don't mind - we're trying to make sure people understand the issues, and if people understand the issues and still say, 'No, that's a dumb idea' and the two of you say that's a dumb idea, well, that's the end of it, but if either of you think it's worth exploring further, then let's do it.

PN95

In relation to dispute resolution, the issues around industrial training leave, we're happy to leave in relation to the process that's coming in relation to the workplace delegates clauses, unless either of you really want to get into that space. We've probably got enough here, so let's just sort of leave that with what we've said about it. We don't resile from the views that we have expressed - we think that's important for the reasons we have expressed - but we recognise there is another opportunity to ventilate that issue.

PN96

In relation to why do we want the dispute resolution clause to indicate what the Commission might do in terms of expressing an opinion, making a recommendation, requiring persons to attend, require production of documents, conducting inquiries, et cetera, there's two parts to that.

PN97

The first part of it is nostalgic, admittedly. I know, as a practitioner, and maybe some of the others in the room - although I must admit they look a lot younger than me - remember a time when you would come to the Commission with a dispute and if they thought you were being stupid, they would tell you and they would say, 'Don't do that, that's silly.'

PN98

DEPUTY PRESIDENT GOSTENCNIK: There are some of us, Mr Clarke, that still do that.

PN99

MR CLARKE: Yes, but I think that that type of interventionist approach, where justified, should be up in lights as plainly something that might result when you come to the Commission with a dispute, with one of the other being told, 'No, no, I'm going to tell you what you should be doing is this instead' or 'You need to go and think about this.' I think in the last sort of decade - showing my age - in the last decade or so, or more, we've sort of drifted into this position where there is this kind of conciliation-type approach where there's no kind of outcome or nudge given in either direction, unless there's some consent that if a recommendation is given, it's going to be followed, and then you might get a recommendation, so the thing's basically settled and the recommendation is just reporting something that the parties got to with some intervention.

PN100

I have a comparison there between unfair dismissal stats and section 739 disputes stats. Some of that, in our view, has got to be related to people thinking, 'There's no point coming to the Commission because they're not going to help, it's not going to go anywhere', and maybe it's because we've all got the wrong view and we tell people the wrong thing when we say, you know, 'You can go there if you want on a dispute, but it's probably not going to help.' The other part of it is - - -

PN101

DEPUTY PRESIDENT GOSTENCNIK: In relation to award disputes.

PN102

MR CLARKE: Yes. We have said what we say about the absence of arbitration in there.

PN103

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN104

MR CLARKE: And, you know, that's not a matter that any of us in this room can fix, or, sorry, address/change, but if both parties to a dispute can see in the dispute resolution clause that, 'Hang on a minute, if I go to the Commission with a dispute, there is somebody who's going to have an objective look at what's going on here and they might tell me, or the other person, that we're doing it wrong, or they might have some advice to provide, or they might find out what's really going on', that might change the level of utilisation of disputes and the way people think about whether or not there's any benefit in bringing it along.

PN105

There are a number of occasions in all of our careers where disputes have come up under the terms of these instruments which are ultimately going to, depending on where they land, impact an employee's decision of whether they are going to stay or whether they are going to go, and it might be in a job, in numerous respects, that gives them an enormous amount of dignity and satisfaction and security. Now, if we can increase the prospect of some positive intervention to keep those relationships intact, to keep that access to secure work going, then I think we should take it.

PN106

That's the motivation for that change and also the motivation for the change we have suggested in relation to the standard termination clause, which is that you supplement the NES, which says you have to give somebody something in writing to give them notice in a case that's not a summary termination, so, why don't you supplement that by telling them what the valid reason is or telling them it's a genuine redundancy, because there you are dealing with a situation where, unless the notice is paid out, the worker is still employed, they haven't been dismissed, the egg - you know, it's not too late. We know what the chances of reinstatement are in unfair dismissal - yes - so let's have an opportunity to get in there and see if we can fix this before it's all too late. Let's see if we can keep people in jobs. That's the motivation.

PN107

Just getting back to the dispute resolution clause, we also made the suggestion that there's no statutory reason for that to be bound up purely in disputes about the terms of the instrument. It could be a dispute about anything really. There are a whole lot of matters that arise under policy and procedure and operational procedures/policies that might impact on job security in some way. You could open that up, and the criticism then is, 'Well, look, there's a history in the award system of keeping safety net stuff to the safety net and not sort of regulating in award clauses what happens outside of the safety net.'

PN108

Well, you know, we recognise that position and understand it. In a way, it's a semantic point and a semantic response to say, 'Well, actually, having a standard way to deal with resolving a dispute, whatever its nature, is, in itself, a safety net about how you resolve disputes.' Even if its reach is beyond the terms of that instrument, or this one, or that one, it doesn't necessarily sort of cross the bridge into saying, you know, penalty rates on a Sunday or 200 - in those days 200 per cent - 200 per cent of whatever you get paid. That's a different thing. It's a safety net in relation to how you deal with disputes.

PN109

To come back to the standard termination clause, we have made a reference to what was in the Black Coal Award there around, if there's a termination that occurs while someone is on personal leave, you need to keep paying them until they have no further leave or until they are fit for duty. Now, a person has no more entitlement to leave if you're paid out. So it's effectively saying, 'Well, you know, we've paid them out.'

PN110

It's put against us that, 'Ah, well, you've already got the general protections to deal with the circumstance of a person who's been terminated because they're on leave.' Different. We're not saying they're being terminated because they're on leave, we're just recognising that they are on leave because they are sick, and so they have a particular vulnerability at that time, they have a vulnerability in their capacity to engage in secure work, and this might alter the calculus a little bit in relation to whether those terminations occur and the position that employees are left in should they occur.

PN111

Small business redundancy, you know, the history of that is recounted in the background paper. We didn't have small business redundancy, and then we did, and then some did, and then no one did, and then some did. It's not as neat as, you know, here's the principle that came down from the mountain that says, 'There shall be no small business redundancies.' Actually, you know, there's a principle that came down from the mountain that said, 'Well, you can have it, but it might be a little bit different.' That's okay. Maybe it does need to be a little bit different - let's have a discussion about it - but small business redundancy provisions, I think, are important.

PN112

If the response that's put up to is is, well, it's going to stop people from employing people in secure work, what really determines whether or not you engage people

in secure work is, you know, what's happening in the demand side of the economy and also what's happening in the labour market more generally.

PN113

If you look at the post-lockdown bounce, for example, and then you had the labour supply shortage that followed from the post-lockdown bounce, you had a lot of businesses putting people on permanently so they could keep them, and they've been there, you know, now for just over two years now, and so businesses are probably going to think twice about putting them off about a week if it's going to cost them six weeks' pay to put them off. They might be more inclined to see if they can ride it out to wait and see or to negotiate a move maybe to part time, or something, from full time. It's about trying to keep people in secure jobs.

PN114

I think that kind of covers it. You can come back to me later, but that will do for now.

PN115

COMMISSIONER TRAN: Thank you, Mr Clarke. Did anyone from the unions wish to speak to their submissions this morning? Ms Wiles?

PN116

MS WILES: Thank you, Commissioner and Deputy President. We didn't make any specific submissions about the standard clauses in our initial submission, but I did just want to add just a number of short points today in relation to our experience, or our union's experience, of how the model clauses operate in practice in the sectors in which we represent members.

PN117

On the issue of IFAs, our experience is that, obviously, when they were first introduced into the Fair Work Act in 2009, there was a lot of heat about them. Certainly they were used quite a lot in some sectors, but, over time, what we have observed is that they are used less and less in a formal sense, so we do find, however, that what would be considered to be an IFA, in effect, entered into in particular sectors - the laundry sector for one - but they are often not recorded formally as an IFA, so we often have this situation where there's some sort of agreement that's called, you know, a flexibility agreement, but it doesn't conform with the requirements.

PN118

That's just an observation that we just wanted to share with you.

PN119

The model term 'consultation of major change' and the submissions made by Mr Clarke this morning, we think are very pertinent. Again our experience is that 'consultation around major change', often the decision is made and the so-called consultation is very shallow, to say the least, and that it's not genuine, in effect, and that the decision really has been made and, effectively, the sort of surface consultation process, if there is one, is then embarked on by an employer.

PN120

We would also make the point, and Mr Clarke made this issue point as well, that the TCR provision is over 40 years of age - old.

PN121

DEPUTY PRESIDENT GOSTENCNIK: (Indistinct.)

PN122

MS WILES: What was that, sorry?

PN123

DEPUTY PRESIDENT GOSTENCNIK: It being over 40 years of age; I accept that.

PN124

MS WILES: Well, as we all know, workplaces have changed beyond recognition in 40 years, including the level of union density in many workplaces. We now have many workplaces with no union members, or very low union density, and so the substantive right of consultation needs to be considered as to, one, do the employees know that they have got a substantive right and, if they do, how do they implement that substantive right, particularly in workplaces where there's no union delegate or no union density?

PN125

The other thing we would say, and again this issue is raised in relation to the second consultation obligation around translation of information to employees for whom English is not a first language, we say that's an important point in showing that any obligation process is genuine and is understood by the employees who are going to be significantly affected.

PN126

On the issue on the standard clause of the consultation in relation to regular roster and ordinary hours of work, it's worth noting that the Textile, Clothing and Footwear Award does have a specific term, which was introduced during the 2014 award review of that award, which does expressly obligate the employer to provide the information in a form that is accessible to employees, and reading out the actual formulation - it's clause 39.5 of the TCF Award - it says:

PN127

Information must be provided to affected employees and their representatives, if any, in accordance with clause 39.3(a), in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills. This may include the translation of the information into an appropriate language.

PN128

That term has now been in the Textile, Clothing and Footwear Award for 10 years. It is used, and, when it hasn't been complied with, we do seek to enforce that clause and make sure that employees for whom English is not their first language do receive that information.

PN129

Having said that, I mean the sky really has not fallen in by having this term in this award, and, in our submission, we would say this should be just a standard term in every consultation clause in every award because, if it's needed, it should be utilised, in a greater or lesser extent, depending on the demographics of a particular workplace.

PN130

The other observation that we would make is that, you know, in practice, roster changes are made very commonly, often without any consultation whatsoever, particularly in certain sectors. Often the extent of the notice or notification of consultation is really simply putting up a new roster arrangement with, you know, 24 or 48 hours' notice, and by the time the union hears about it, the new roster has already begun.

PN131

On the model term of dispute resolution, I think many unions would say that our experience of award dispute resolution procedures is really just systemic frustration really.

PN132

Mr Clarke, again, made very good points about the role of the Commission, and we can't emphasise enough the importance of this Commission in dealing, on a day-to-day practical level, in assisting workers and their employers to resolve what often are quite minor disputes, and so we would support anything which would enhance the dispute resolution procedures in awards and, through that, enhancing the role of the Commission in resolving disputes, which, at the end of the day, is one of its key functions in ensuring that employees and employers have their disputes resolved in a timely and accessible way.

PN133

We would also support anything which extends the current scope of the SPs in terms of the category of the disputes that they can assist to resolve.

PN134

That's our submissions - and obviously to support the written submissions, the primary and reply submissions of the ACTU, and Mr Clarke's oral submissions this morning.

PN135

COMMISSIONER TRAN: Thank you. Ms Wiles, can I just take you back to individual flexibility arrangements. There was one submission that made mention of the different individual flexibility arrangement clause in the Textile, Clothing and Footwear Award relating to notifying a person's representative if an IFA was proposed. Can you speak to how that has been operating?

PN136

MS WILES: Again, I mean, as time's gone on, we've sort of had less and less - from my experience, there's less and less formal arrangements, but, where there are, certainly it's something that organisers and officials can use in their discussions with employers once they're aware that an IFA has been presented to an employee about a particular change to the award, so we say that that's an

important obligation and also an important safeguard for employees, so that they are able to get advice from the union in a timely way.

PN137

COMMISSIONER TRAN: Thank you.

PN138

DEPUTY PRESIDENT GOSTENCNIK: Ms Wiles - perhaps I should have asked this of Mr Clarke while you were on your feet. The proposition that the award and dispute settlement terms contain a statement about the various hours that a member of the Commission might exercise in dealing with a dispute by conciliation, for my part, I think it's something worthwhile considering, but its impact will be, presumably, to encourage more parties to come to the Commission with disputes knowing that there are these powers.

PN139

You're not asking for the award to create particular powers, but merely to state those powers which already exist, but it seems to me that your real concern is the fact of members exercising those powers as opposed to having statements in awards which set out what the powers are, and I'm just wondering whether you have given - I know it's a little bit off track - but if you have given any thought to how members of the Commission might be encouraged, or more disposed, to, in fact, utilising the full extent of conciliation powers in a given circumstance.

PN140

It must be accepted that, in a lot of cases, it won't be appropriate to do so, so I'm just wondering whether we should spend time on the proposal, or whether, separately, the real issue is about having members more engaged in the conciliation, which is, I think, the substance of your complaint, Mr Clarke and Ms Wiles, and whether that's something that should be undertaken separately, because one won't work without the other, because we can put all the words into the relevant awards that you like, but, ultimately, it's about having a desire/will of members to give their hands to it, in effect, to try and really resolve the dispute through all the available means.

PN141

I'm not fussed if you two want to swap and Mr Clarke answers the question.

PN142

MS WILES: I'll just say a small thing. I've been appearing in this Commission since 1995 and, to be frank, it's like light and day as to the approach that the Commission, or some Commission members, have to try and assist the parties. Like it's that basic. We have had examples where the Commission member has essentially said, 'Yes, you're all here, I've read the application, you're both represented by the union or an employer organisation, I'll just leave you to it and I'll come back in half an hour.'

PN143

From our perspective, it's just not very helpful because, I mean, often we're bringing a member who feels quite passionately about the issue and, for them, it's the only real opportunity where they are going to have an independent third party

listen to them and also, hopefully, give some view about whether their position has merit or not, so from a union's perspective, it's not always the case that we think our members have the best case - they often don't - but, for them, they have a grievance or an issue that they wish to have resolved, and so - I said I'm being pretty frank - but it is about, I think, the Commission having more - some Commission members having more rigour and intentionality in their role.

PN144

DEPUTY PRESIDENT GOSTENCNIK: Well, let me be frank. That's a two-way street. It seems to me, if that happens in a given case and you feel strongly about it, you ought to say something, so, 'Well, that's not how we want to proceed; this is what we want, this is how we want you to conduct the conciliation. We want to have an opportunity to outline our case and we want to persuade you that you make a recommendation.'

PN145

MS WILES: Look, I accept that, yes, but I might hand the baton to Mr Clarke because he's chomping at the bit here, I can see.

PN146

DEPUTY PRESIDENT GOSTENCNIK: The reason I am raising it, Mr Clarke was this, that, you're right, a significant proportion of the Commission's work still remains dispute resolution. Primarily it's been focused in the area of agreements, because usually those disputes are constructional disputes and, in an arbitration capacity, that's quicker than (audio malfunction), but there are lots of disputes that come before the Commission, either brought by the unions or by the Fair Work Ombudsman, referring employees on wages issues through this process, and I accept that it's not good enough for us to simply be rolling our eyes over and churning through them, it's about trying to apply the various dispute resolution mechanisms that are available to us.

PN147

MR CLARKE: Perhaps I can respond in a few ways. Firstly, thanks for engaging with that, because I was a little bit timid about how we did put it up there, but thank you. There are two different sort of sides to it, though, in our view.

PN148

Yes, there is that issue around how the Commission might approach it independently of whatever is written in ink, and you've got an Act that (audio malfunction). Practice notes, bench books, those sorts of things that explain how a process might operate and what the outcomes might be and how they go, you know, might be helpful in that regard, but the other side of it, as Ms Wiles said, the landscape, in terms of the level of representation, both of employees and of employers, you know - I don't think you will mind me saying this - has shifted a bit in the last couple of decades.

PN149

So there's still value, in our view - they might not look at the Act but they are going to look at the award because somebody's telling them, 'I think the award means we should be doing this and I've got a dispute about it', but it's informative to have in the clause, rather than something, 'Refer the dispute to the Commission

and deal with the dispute' - what does that mean - that it actually gives some context of, 'Oh, well, that's actually what's possible' is also going to help from the parties' side.

PN150

So you might have, you know, the practice notes and the bench books, and so forth, on the members' side, but to have that informative educational piece through the content of the award is also valuable, in our submission.

PN151

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN152

COMMISSIONER TRAN: Thank you. Ms Wischer.

PN153

MS WISCHER: Thank you, Deputy President, Commissioner, thank you for this opportunity. The ANMF did not make direct submissions about the standard clauses in its primary submissions, so I won't take very much time at all.

PN154

I did want to support particularly the ACTU's submission, both the written and the oral submissions this morning, but, if I could just make the observation, particularly with respect to the consultation clause as a standard clause, that much of what Mr Clarke talked about this morning I would see as underpinning other parts of the award, from our perspective, the Nurses Award in particular, but we also have an interest in the Aged Care Award.

PN155

That is extremely important to our members, particularly because of the nature of the work that they do in health settings and aged care settings. The vast amount of that work is done on a 24/7 basis, it's therefore shift work, so consultation, particularly around rosters, is extremely important, and when we look, in our submission, at some shortcomings in the provisions directly connected to rosters, to see those two clauses working together would be something that would be extremely valuable to improving job security and predictability.

PN156

We would certainly support the submission that recognition of, as Mr Clarke was touching on, people being able to say, 'Well, look, this is what are my caring responsibilities, this is what my week looks like, can that be taken into account?' Now, in a 24-hour, seven-day a week service, there are going to be some constraints around that because somebody has to do the night shift and the weekend, and so on, but consideration of that, we would see as very valuable, particularly to our membership, that is extremely predominantly female, largely part time, and also highly represented with caring responsibilities.

PN157

That would be one other point that I would make, that we approach this job security as highly connected to gender equality and the work in care stream, that

anything that assists in secure employment and predictability will dovetail to those other objectives.

PN158

The other point I would perhaps want to make is about the issue of contractors. Labour hire/agency work is, I think, in part, due to issues of workforce shortage and is becoming increasingly used in the care sector, and so I think we would certainly support anything that makes that consultation around when there are changes, as to how that is going to operate, would also be beneficial, and we recognise that that is something that is going to become more prevalent, whether we wish that to be so or not.

PN159

I think the other points made about the regular roster and ordinary hours of work where the changes are permanent, again we would see that as dovetailing and underpinning the submissions that we would intend to make when we come to the more particular award clauses, as we will discuss under questions 2 and 3. Thank you, Commissioner and Deputy President.

PN160

COMMISSIONER TRAN: Thank you, Ms Wischer.

PN161

MS BURNLEY: Deputy President and Commissioner, I will just make a few comments. The SDA did provide a written submission, so we rely upon that, and we also rely upon what the ACTU has put in their submissions. We also support what Mr Clarke has put today on behalf of the SDA in regard to answering some of the questions posed in the discussion paper.

PN162

We are going to only address two matters, which is - the main one was going to be about the IFAs, which we have put a sample into it - but I will address the first question that your Honour did pose about the issue of disputes and the powers in dispute for members.

PN163

I jotted down that there's provisions, such as making bench books, and also whether there's an issue about what guidance can be given to employees or employers when they come and what are the powers that can or cannot be used and how you can raise issues with the Commission member, but there is - in the end, there are three parties in a dispute, which is the two who are at the dispute and also the Commission member.

PN164

The SDA's position has always been that there should have always been a maintained arbitration in the award system for the purpose that then meant parties did have to do the other steps before they got to arbitration, so it encouraged people to come and discuss and even to have a member of the Commission be engaged, or otherwise it would have to have been dealt with by arbitration. So it used to be the lesser of two evils, I guess. In a way, it's to try and resolve the dispute without going to arbitration. The SDA still maintains that was a correct

and proper process. Unfortunately, it's beyond this review as to implementing that back into the award system.

PN165

On the issue of individual flexibility arrangements, we support the proposition that the ACTU had that there should be a legislative change to curtail and prevent IFAs in the system. We do see that they do undermine job security and are at odds with that principle now in the Act.

PN166

What we do see is that the current system lacks safeguards and checks, which is what Mr Clarke outlined in his submission this morning. There is a range of lack of checks down the system for the IFAs, and having a positive statement from the employer that an employee can check, discuss, seek assistance about entering an IFA would be one step to try and resolve that problem.

PN167

As per the example that the SDA provided, there was an indication in it that they shouldn't discuss the IFAs with anybody else at their workplace or the wage rates which were contained in it, which we think is a disincentive for people to be able to go and seek advice and to discuss it with their fellow workmates at the site. So it is an issue of control that the employer has. They know what everybody's IFA is and, yes, there are disincentives and directions (audio malfunction) actually spelt out that they should not discuss these with any other worker.

PN168

One general observation is that, of course, the award system is a set of conditions that is set by very experienced people and parties in the Commission in setting what is an appropriate safety net. However, the IFA, in the end, is set by an individual worker with their employer, and the individual is probably most inexperienced in his workplace and is just offered this, and there is no knowing what their rights are, or how it all works, and the lack of power that they do have against their employer to actually argue it.

PN169

We note that there is no check for compliance in IFAs, so the employee can sign it. There is the award system, if they come and raise it with somebody, but there is nowhere that the IFA is filed, checked, counted, or what have you, and the survey which is done to check IFAs, it is whether the employer actually admits that they've got one or whether they have signed up to it, and, in some of these instances where the SDA comes across the IFAs, they are in very tiny workplaces of maybe five or six employees, so they are unlikely to be picked up in the surveys that are done.

PN170

COMMISSIONER TRAN: Ms Burnley, do you propose any process for checking IFAs?

PN171

MS BURNLEY: We haven't at this stage, but it would be something that we would be - well, in the context that if we can't get rid of them, then having some

sort of checking process and filing of them would be useful, so that they could be monitored in some way. We haven't developed a theory as to how that could or couldn't work, but we are happy to enter into discussions with the parties about how such a system could work because it is one of the concerns the SDA has, is that we encounter these out in the workplaces and we either react to them, we support the worker, we try and get them changed, we try and get them withdrawn - all sorts of things which happen - and get them fixed in some way, so therefore, in the end, sometimes the IFA isn't continued with, or it's changed dramatically to what it was to start with.

PN172

COMMISSIONER TRAN: Yes.

PN173

MS BURNLEY: But it's only by chance, in a lot of circumstances, that we come across these, or the member raises them with us, or a non-member actually raises them.

PN174

COMMISSIONER TRAN: Have you, in any of your bargaining, in the opportunity to do something different or better than the safety net, implemented any processes?

PN175

MS BURNLEY: Sorry, Commissioner?

PN176

COMMISSIONER TRAN: In terms of any bargaining in any enterprise agreements that you may be a party to, have you implemented any processes that allow for a check of an IFA that allows for something better than what the safety net provides?

PN177

MS BURNLEY: Generally, no, we haven't, Commissioner, but what we do find is that, when we do enter into bargaining with an employer, then the IFAs are either not going to be used - they are in there because they have to be as part of the agreement process, so it's put in there - and that there is very few instances somebody actually enters into an IFA with that employer.

PN178

There would be, in some of the larger ones, which is to do with particular flexibility that the employee wants, and then, when the union is involved, it is for a genuine and proper purpose. So we don't have issues where we do have agreements, because then we also have an arbitration clause as well in the agreement, so if there is an issue with any IFAs, we could come to the Commission and have it arbitrated anyway as a dispute under the agreement, so we get our arbitration in one way or another.

PN179

What we say is that there should be a better way to address this, and this would add to the job security principle which is now enforced.

PN180

The SDA also would not agree, as proposed by some of the employer organisation subs, that the regulatory system, in implementing IFAs, needs to be eased. We think the contrary applies. The SDA's real experience is that employees are disadvantaged currently and that there is no need to further add to this misery.

PN181

If it pleases the Commission.

PN182

COMMISSIONER TRAN: Thank you. Is there anyone in the room from the union - so Ms Sarlos or Mr Rabaut may wish to speak to their - - -

PN183

SPEAKER: (Indistinct.)

PN184

COMMISSIONER TRAN: Thank you. Mr Cullinan, you indicated that you may wish to speak to your submissions today. This may now be your opportunity.

PN185

MR CULLINAN: Thank you, Commissioner. If it pleases the Commission, we just have a few short points to make as introduction. We did not make a submission in the first round, but we made a submission in response. That submission in response is largely directed in the job security stream at the ABI's submission, which seemed to deal with more detail than some of the other employers.

PN186

In terms of some of the submissions today, we agree with Mr Clarke from the ACTU that we didn't see this process in this consultation process as needing to justify the basis for change, and we understood that this would be, hopefully, a participatory discussion to guide and assist the Commission in its deliberations and considerations of what to do following the discussion paper and the initial request from the minister.

PN187

We do disagree with the ACTU about the question on definite decision, and I will come to that in a moment, in consultation provisions.

PN188

In terms of the submissions of the SDA, we agree that IFAs are limited in their use where there are enterprise agreements. Unfortunately, they are used in other circumstances with maximum effect, and we have examples of employers who have used IFAs to abolish penalty rates and other conditions. When those workers were assisted to terminate those IFAs as casual workers, they felt the full repercussions of taking that course of action and lost their work. So we are very interested in systems that would either limit the use of IFAs, but certainly monitor their use.

PN189

We agree with the SDA that dispute arbitration is a foundational core to many of the entitlements and rights of workers being able to be cheaply and easily enforced through the Fair Work Commission. We don't agree that dispute arbitration is not in the scope of this consideration.

PN190

I had the fortune of working in a period when we used to have section 99 disputes under the previous legislation, and that certainly provided an avenue for workers and their unions to bring issues to the Commission for resolution, which we have not had now under successive legislation for 20 years.

PN191

Then, turning to the actual proposals from RAFFWU, we made proposals around consultation and dispute clauses, and IFAs as well, but I think that that's been adequately dealt with.

PN192

In relation to the consultation provisions, we have referred to Mt Arthur Coal, which gives fantastic guidance to what employers should be doing when it comes to consultation over major changes and consultation over roster changes. We think that there could be great assistance to employers to make absolutely clear that a definite decision is not an irrevocable decision, and that a definite decision still needs to be the subject of consultation with a view to potential change, and there needs to be genuine and thorough consultation.

PN193

We propose that that should, in terms of roster disputes, be a necessary precondition to any change to the roster, and that there should be minimum periods for any consultation over major change or rosters of at least six weeks to drive the mind of the employer to engage in that process in a fulsome and wholesome way prior to then implementing any changes, to make sure that the very best decision is made both for the business, but also taking into account the needs of the worker.

PN194

In terms of the dispute arbitration, which we see as a necessary component of that, to ensure that it's done properly and that workers have a system to deal with issues that arise through that, we note that, even though there may be perceived limits on the capacity for the Commission to insert arbitration into awards, either that can be drawn to the attention of the minister and parliament, or, in the very least, we note that what consultation is about is about changes, and in circumstances where the Commission isn't able to institute arbitration provisions, we submit that it would be appropriate to consider structures which guarantee rosters for part-time work, just as they do in Fast Food, but to extend that into General Retail and for full-time workers across both awards, so that when an employer wants to make a change to any roster, it either be by agreement or it be following consultation with an express consent arbitration from the employer in seeking those changes.

PN195

So we think that there are ways home - in circumstances where the Commission feels, or believes, that it is unable to insert compulsory arbitration, there are still ways home that will honour the new objective of job security in awards.

PN196

Those were the major proposals that we were making in response around consultation over major change and rosters and on disputes. We are happy to answer any questions, and we are delighted to be part of the process.

PN197

COMMISSIONER TRAN: Thank you, Mr Cullinan. I don't have any questions. Deputy President?

PN198

DEPUTY PRESIDENT GOSTENCNIK: No.

PN199

COMMISSIONER TRAN: I think that brings us to the end, unless there is anyone else on Teams who wishes to now say anything. I might propose a short 10-minute break and we will come back to then move on to the next part of submissions. Thanks all.

SHORT ADJOURNMENT **[11.33 AM]**

RESUMED **[11.50 AM]**

PN200

COMMISSIONER TRAN: Thank you. Shall we start with you, Ms Bhatt?

PN201

MS BHATT: Yes, thank you, Commissioner. I have engaged briefly with some of my colleagues who are also appearing for employer representatives and my understanding is that there's some broad consensus, at least amongst some of us, that I will make submissions first on behalf of the employers, followed by Ms Tinsley, so that she has an opportunity to do so before she needs to depart today, and then we will move on from there.

PN202

COMMISSIONER TRAN: All right. Thank you.

PN203

MS BHATT: As the Commission is, of course, aware Ai Group has filed two fairly detailed written submissions in this matter. We continue to rely on those and, subject to any questions that the Commission might have arising from those written submissions, I don't otherwise today propose to reiterate or to cover the same ground; rather, I propose to make some overarching and general observations that might be made about what's been said by the unions, both in their written submissions and orally today.

PN204

The first observation we would make is that many of the changes that have been proposed by the unions are significant in their nature and would, in our

submission, have potentially serious or, indeed, even profound implications for employers and for industry. This is particularly so in the context of the standard clauses that are being considered in today's proceedings, given that they apply across the economy and in a broad range of circumstances, that is, they are contained in all of the modern awards, or virtually all of the modern awards that are in operation.

PN205

As some of the other employer parties have already observed in their written material, the standard clauses generally reflect test case standards, and it's true to say that when they were developed, many of the issues that are being ventilated by the unions in these proceedings were expressly considered, or, indeed, have been expressly considered since. I propose to just provide some examples of that for the purposes of supplementing the material that we have filed in reply.

PN206

There is a proposition, for instance, that has been advanced by the ACTU in particular that the Commission should be given oversight and an ability to express an opinion or a recommendation about whether an IFA that is already in operation is continuing during its life to pass the better off overall test. In a decision that was issued during the context of the Modern Awards Review 2012, or the two-year review, the Commission made some observations about the proper interpretation of the BOOT test and how it was intended to operate. I must apologise, I don't have copies of these decisions for the Commission. I wasn't intending to take the Commission to these matters necessarily, but given the opportunity, I propose to do so very briefly, if I may.

PN207

I will read the citation for the record. It's [2013] FWCFB 2170. The Commission there said:

PN208

The second observation...

PN209

that the Bench was making there:

PN210

...is that the employee must be better off overall at the time the IFA is made. In other words, the requirement to meet the BOOT is not a continuing obligation over the life of the IFA.

PN211

In a decision of 2008, the AIRC Full Bench - which I think is a reference to a decision that was made during the part 10A award modernisation process - the Full Bench dealt with this issue at paragraph 180. It referred to the 'no-disadvantage test' at the time in the context of the statutory scheme that was in operation then, and the Bench said:

PN212

PN213

The no-disadvantage test should be applied as at the time the agreement commences to operate. We are not satisfied that the test should be continuously applied over the life of the agreement. This would add an extra process requirement to agreement-making and introduce an element of ongoing uncertainty. It is relevant to point out that the provision for termination on notice, which we deal with later, provides some additional protection against disadvantage arising during the life of the agreement.

PN214

I will leave that there - the rest of the paragraph is not relevant - but that's an example of a circumstance in which some of these issues have been given relevantly recent consideration.

PN215

One of the other key issues to arise from the unions' submissions in writing, and in particular today during the course of oral submission, relates to the consultation provision that concerns major change and, in particular, whether, if I can call it, the definite decision threshold is an appropriate one, or whether the obligation to consult should arise at an earlier stage, and I think today Mr Clarke, for example, used the phrase 'seriously considering'. I note, of course, that he indicated that that might not be the most appropriate phrase, but, conceptually, it was the sort of situation in which the obligation to consult might arise.

PN216

I would start by making the obvious point, and we have made this to some extent in our written submissions in reply 2, that businesses will seriously consider many changes very often. It would be incredibly onerous and, in our submissions, entirely inappropriate to require employers to undertake a process of consultation with employees and their representatives in each of those circumstances and, in fact, may be detrimental, and we have set out the reasons for that in our written submissions, which I don't need to cover again today.

PN217

The other thing I would say in response to Mr Clarke's submissions today, though, is that, in our submission, the provision concerning major change is not directed or designed at giving employees or their representatives an opportunity to seek to change the decision itself.

PN218

The purpose of the consultation clause is to ensure that there is an opportunity and a focus on what the significant effects or the implications of that change might be. Now, of course, the existing consultation clause requires employers to provide information in writing to employees and their representatives about the nature of the change itself, as well as what the implications will be, and indeed to turn their minds to, and provide information about, how those adverse effects might be alleviated.

PN219

In the course of the discussions that follow, as part of the consultation process, there will very often be a discussion about the decision itself and whether there is

some scope to adopt what might be a different approach, but we would say that that is not what that provision is designed to do.

PN220

If we can turn our minds back to the TCR case, which, of course, is the genesis of the existing term, and it reflects that test case standard. The citation for that is (1984) 8 IR 34, and I am reading from page 51. The provision was introduced as a product of an ACTU claim and the decision says:

PN221

The ACTU made it clear that the purpose of the consultations was not to tell an employer what he must or must not decide with respect to the introduction of change. The main object of the clause is to ensure that notification and consultation procedures are followed by employers in respect of major changes.

PN222

The ACTU claimed that the opportunity to discuss matters such as job requirements, training, job security, working hours, monitoring the change and so on, would minimise the potential for conflict which exists when changes are introduced with significant benefits for industrial relations.

PN223

In a subsequent decision that was issued shortly after, which I won't take you to specifically, but I will just read the citation - (1984) 9 IR 115 - and in particular, on page 126, it was observed that the most appropriate threshold was that the consultation obligations apply only after a definite decision to make major changes has been made and, indeed, it was ruled that such a provision is more appropriate than the expression that had been used in a draft order previously published, which referred to circumstances where an employer 'proposes' to make major changes. If I can turn then to - - -

PN224

COMMISSIONER TRAN: Before you do, Ms Bhatt - - -

PN225

MS BHATT: Yes, Commissioner.

PN226

COMMISSIONER TRAN: - - - do you have anything to say about how workplaces may have changed and how the consultation term may be interpreted differently in the modern workplace?

PN227

MS BHATT: Well, I think there are two points in that regard that have been put today by the unions. One is, as the Commissioner says, that perhaps the nature of workplaces have changed in a way that warrants a reconsideration of this provision. Our response to that would be, well, there would need to be a detailed consideration of that. If that's the assertion, then there would need to be various propositions that would need to be made out through evidence that establish that

the existing model term is no longer appropriate, that it's not doing its job. On its face, that's not a contention that we would accept.

PN228

The second thing that the unions have said is that the statutory context has changed, that the legislative framework has changed, indeed, it has changed since the 1980s when the TCR decisions were handed down and, indeed, has changed more recently through the introduction of various new elements to the modern awards objective. Of course that's true, of course the legislative framework has changed, but, again, if, on that basis, it is argued that the standard clauses should be amended, then that, too, particularly given its significance, or the significance of the potential consequences that would flow, is a matter that needs to be considered in far more detail than what is feasible through this process.

PN229

We say that for a few reasons. It is partly because the very nature of this process, the time frames within which it is being conducted, the, to some extent, limited submissions that have been advanced, and of course the absence of any opportunity for any party to bring evidence in these proceedings, means that it would, in our view, be inappropriate for the Commission to certainly adopt any changes.

PN230

I take your point, Commissioner. Earlier today, I think you indicated to the parties that, you know, we shouldn't proceed on the basis that there are changes that will necessarily be made by the Commission as a product of this process. But we would go further: we would say that in relation to the sorts of changes that I have just referred to, the sorts of variations that I have just referred to that the union seeks through this process, that not only should the Commission not make them through this process, it should not recommend them or endorse them. It would be inappropriate for the Commission to do so on the basis of the material that it has before it. Before the Commission forms any such view, it would be necessary for there to be a further detailed ventilation of the relevant issues and an opportunity for parties to bring evidence. That is, in our view, critical to a proper consideration of issues of this nature, particularly in the absence of any consensus between the various industrial parties that are appearing before you.

PN231

The last point I was going to make in relation to these decisions relates to the consultation clause concerning regular rosters and ordinary hours of work. I think there are various contentions that have been advanced by the unions that, in the context of that provision, information should be provided in writing and there should be an obligation to translate such information into an appropriate language.

PN232

This, too, was specifically considered in 2013 when that provision was formulated. I will just give the Bench the reference. It's [2013] FWCFB 10165 from paragraph 75 through to paragraph 83, and the Commission expressly declined to adopt those variations - I withdraw that - to adopt those proposals, and we would say that the relevant circumstances have not changed to such a degree

that it would warrant a reconsideration of the conclusions that were made by the Commission in that matter.

PN233

I think the only other thing I need to deal with today is the proposals that have been advanced by RAFFWU, which I won't do in detail, but I just wanted to note that because those proposals were put in their reply submissions, we have not responded to them in writing. To varying degrees, the concepts that underpin those proposals, or the arguments that underpin those proposals, overlap, to at least some extent, with proposals that have been advanced by some of the ACTU's affiliates or the ACTU itself, and so, you know, to that extent, we would simply rely on what we have already put in writing about those issues.

PN234

Unless the Bench has any questions for me, that was all I proposed to say today.

PN235

DEPUTY PRESIDENT GOSTENCNIK: Ms Bhatt, can I ask you this: what good is a right to receive some information in writing to an employee who can't read it?

PN236

MS BHATT: Is the Deputy President, if I might respectfully ask, raising that question with me in the context of the consultation provisions?

PN237

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN238

MS BHATT: The first observation I would make about that is that the consultation provision concerning hours of work and rosters currently does not contain any requirement to provide information in writing, and we would say that that, of itself, if that was to be required, would be a very significant step. I think that the Commission, in its decision when that provision was formulated, made the observation that the effect of consultation provisions, or their purpose, is very different to a provision like the model flexibility term, in which there is a specific requirement, I think, to provide information in a different language where the employer assesses that that's appropriate. That's my recollection of it.

PN239

If I take the Commission to that passage of the decision, the Commission observed that the context of the various provisions is very different. An individual flexibility arrangement varies the effect of a relevant modern award term, whereas, in the context of consultation, employers are generally exercising existing rights that they have to implement certain changes, and that context needs to be borne in mind when the Commission decides on the level of prescription that is stipulated in the context of those model clauses. So that's the first point I would make.

PN240

The second point I would make is that, I think in many cases, employers are very much alive to circumstances in which it may be necessary to communicate information in a particular way to ensure that it is accessible to its workforce, and it is, of course, a consultation process, often it involves representatives, but often we would say that these are matters that are appropriately being dealt with at the enterprise level.

PN241

If that's not the case, if it's the unions' assertion that that's not the case, then again, you know, we would need to see some evidence of that, but we don't have a view that there is a widespread or any kind of systemic issue arising from the absence of any requirement stipulated in the award to do so.

PN242

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Thank you.

PN243

MS BHATT: Thank you.

PN244

COMMISSIONER TRAN: Thank you. Ms Tinsley.

PN245

MS TINSLEY: Thank you, Commissioner, Deputy President. Just a point of clarification before I begin. I missed that mention in terms of her speaking on behalf of employers. That was just a reference in terms of the order for today as opposed to Ms Bhatt's suggestion that she was speaking on behalf of ACCI's point as well. I also note that we've got a number of other employer representatives here today and we should be heard.

PN246

DEPUTY PRESIDENT GOSTENCNIK: Resolving demarcation disputes between employers is beyond our remit today.

PN247

MS TINSLEY: We have also got some very valued - some affiliates online as well, and I know that they will wish to be heard on their own account as well. So just a point of clarification. Thank you so much.

PN248

Before I delve into the substance - then I might go through the order of my oral submissions in the same order as Mr Clarke outlined his - is a threshold question, of which we elaborated on in our reply submission, and this really being a threshold question.

PN249

Now, I did raise my hand earlier just to see if it was more timely to mention it before and catch Mr Clarke before he went further, but it's been difficult, at least from my perspective, to engage in this process without fully understanding what the union representatives and particularly the ACTU's position is regarding the proper construction of the updated modern awards objective.

PN250

Referencing Mr Clarke early in his submission, when talking about the individual flexibility arrangements, he mentioned something about issues raised in the Aged Care decision and the Expert Panel Board there, the most recent Annual Wage Review decision. Other than that, there has been no further - and this is reflective as well in terms of the ACTU's written submissions - I don't think this has been adequate enough for us to really get an understanding of what the ACTU and, more broadly, the union movement's understanding of what is meant, what is - how should the Commission be interpreting the updated awards objective, and that's in contrast to the numerous employer organisations, and I think we are broadly aligned in terms of what we see that is. There might be some slight differences, but we're broadly aligned and, in each case, we have really dedicated pages upon pages in terms of the proper construction.

PN251

Now I take Mr Clarke's point about this being - the purpose of this stream being to consider a particular updated award objective relating to secure work, as opposed to consideration of the other modern award objectives and, that said, the Fair Work - the job security as well in terms of the objectives for the Act more broadly, but I think in terms of - respectfully, I don't think enough work has been done specifically to do with the updated modern award objective in question here, being related to secure work and how that justifies some of the proposals then made.

PN252

I just wanted to raise that at the outset, and I will come back to this when I touch on each of the standard provisions.

PN253

In terms of the individual flexibility arrangements, putting to one side the threshold issue around how the updated award objective may justify a change here, it seems to me, through Mr Clarke's submissions and also those submissions, those oral submissions, put forward by his affiliates and, indeed the RAFFWU briefly as well, that the issue seems to be one of non-compliance. This is clearly no grounds for removing the provision or even justifying a change essentially amending the provisions here.

PN254

So while we don't agree that these provisions, and haven't seen evidence that these are widely abused - of course, like with every other part of the Act or the award, there's going to be employers that aren't complying with the law - so we're not saying that there is no compliance issues, but we don't see that they have been widely abused, which has been the evidence put forward by our union friends.

PN255

I think, assuming that there, perhaps, is a compliance issue of some sort of a minor nature, this proposition actually supports - the proposition put forward by all, by my reading of the submissions, all the employer groups represented here today, that the rigid nature of the IFA regime means they are not widely used.

PN256

What I mean by this is, of course, if a system is not widely accessed or used by employers, and especially if the reason for the lack of take-up with those provisions is because they are so complex and they are so rigid, then of course it follows that that may be actually the explanation for any compliance issues. So if the employers are regularly using, or more regularly using, a particular regime, or are more comfortable with provisions, then of course those - in most cases, a lot of those compliance issues will fall away.

PN257

What I mean here is, to the extent that if there are any compliance issues, they are more likely to be as a result of - they're unintentional, they are not deliberate, it's not deliberate trying to get around them. It could just be - I think our union friends and employer organisations here are probably the same, (indistinct), the provisions are confusing, and that may ultimately be leading to compliance issues.

PN258

In respect of the award simplification stream, we have put forward some proposals to make them less rigid, to simplify and, hopefully, that would (indistinct) in terms of use of these employment provisions, and I also note that a number of other organisations, employer organisations, have also put forward submissions. I don't intend to delve into those here.

PN259

So, again, in terms of - so, otherwise, issues of compliance, you know, a better remedy by, you know, by making by additional resources, so, on the one hand, we would say that if there is a compliance issue, it's better remedied by actually making changes that will increase their usage to get employers more comfortable using them. Then issues around non-compliance are, of course, better remedied by additional educative resources the Commission might provide, which, of course, we would be supportive of.

PN260

Putting this issue of compliance to one side, again it's not really clear to me what the ACTU's position is regarding the proper construction of the modern award objective and how this may support a variation to the IFA regime. That said, it's not really clear to me how the IFA regime could possibly impact an employee's choice to enter into work which promotes regularity or predictability, so here the key word being 'choice'.

PN261

I repeat our submissions at paragraph 13 of our initial submission, where the Expert Panel has emphasised the term 'choice', choice of employees. So, significantly under the IFA regime, both parties must genuinely agree to an IFA. There's also protection worked in under the Fair Work Act which would stop an employer forcing an employee to sign an IFA, which is relevant in terms of supporting whether an employee has actually chosen to enter into one of these agreements. Our submission is these are all relevant considerations which support the fact that those who work under an IFA are choosing to do so.

PN262

In addition - I am referring here to page 25 of our initial submission when we conducted a survey of a proportion of our membership - I think the statistics here point to two things. First of all, it rebuts this concept from the unions that, in all cases, or most cases, it's the employers that are pressuring employees to enter into IFAs - again here being the choice. So what we found is 59.62 per cent of the respondents which have an IFA in place with the employee, they have said that it was actually the employee who initiated - who wanted one of these flexibility arrangements in place. Only 5.77 per cent of the respondent businesses who had an individual flexibility arrangement in place had initiated the arrangement, and then 34.62 said, in response to this survey, that it was initiated by both the employee and the business.

PN263

Now these stats might not necessarily add up, but what we would say here is, when responding to the survey, the businesses were here contemplating where they might have more than one IFA in place with employees, so it might be, on one occasion, they have initiated, in other cases, the employee has initiated.

PN264

So I think the key statistic here, though, is 59.62 per cent of respondents said that it was actually the employee who initiated one of these arrangements, and I think that is really critical, and pushing back on the proposition, respectfully, from the ACTU and others, that employees are entering into these arrangements and doing so without any real choice.

PN265

I know that the ACTU has put forward some specific proposals, but it doesn't sound to me that they are genuinely asking, or seriously asking, for IFAs to be consummately abolished, and note that they have got some quite minor changes in mind. I must say, looking at this list, and I will quickly run through them, but where we're talking about relocating subclauses, where we're talking about clarifying what the law already says, I think I would say to the ACTU that we are quite appreciative of the nature, you know, in terms of that they are quite moderate and minor changes and, in that, do appreciate the way in which they are approaching this process in this regard.

PN266

The one thing I will say is that we are concerned about supporting some of these proposals, even those minor ones that may seem really sensible, in terms of their ability to add to the already complex nature of these provisions. So within the award simplification stream, we are putting forward proposals that would sort of take some of these unnecessary requirements out, so you can see where I'd be loath to sit here and say that we actually support including some more provisions in, because we believe that, without taking anything out, these will just add to the complexity and further reduce the uptake.

PN267

That said, I think that some of these proposals, if read together and a discussion was had where we were both on the same page about simplifying them, where we can, but also having a discussion about how we could potentially provide more

clarity for employees about their existing rights, that may be something we would be open to.

PN268

So I think with the two different streams, it's a little bit difficult to do that in that forum because, again, you don't want to say, from an ACCI perspective, that we would support these if there was nothing being removed at the same time, so I'm not sure what the solution here is. Maybe, with that, it might be worth having a separate couple of hours sitting down to see if we could agree to a new provision by consent. I'm not sure - there might be something in that - but, again, really loath to just accept and say that these are fine, despite their minor nature, just because of the doubling up and, you know, the constant build up there of complexity.

PN269

The one point that I will make is that we would have concerns about the requirement for the Commission to review the IFAs or express an opinion about whether they meet the BOOT. I think that that would be a step too far, even if we were removing complexity in other areas, but I think some of the other ones, there may be some sort of agreement that we could reach. I might be being a little bit optimistic there.

PN270

I might just leave the IFAs to one side now and quickly move on to the last few provisions.

PN271

In terms of consultation about major change, I certainly share the concerns already raised by Ms Bhatt. Clearly, this clause already exists in promoting access to secure work, so that's the very nature of it. You are meant to be - here the provision is providing an employee the opportunity to be consulted on major changes. However, that needs to be balanced with the ability for the employer not to be bogged down with unnecessary - I guess, rotate to a certain extent. So that's why the provisions are clearly addressed to major workplace changes.

PN272

In this modern day workplace - Deputy President, you asked previously how a workplace has changed. I think that the fundamental way workplaces have changed is that they have become more complex. Employers are making more and more decisions on more and more different issues every single day, so if we were to - so more so today than 40 years ago, if we were to require an employer to consult on, sort of, lesser decisions, I guess what we would find is we'll be tipping the scale too far against the employer, who will be tied down and justifying his consulting on a whole range of different decisions that may not even have a potential impact on the employees. So that would be my response there.

PN273

In terms of the TCR decision, Mr Clarke has correctly identified that a new modern award objective may justify variation. However, I do still - we respectfully submit here that there is a step missing. So while it may be the case that an updated award objective could, of course, see a variation, I don't believe,

with respect, that Mr Clarke has successfully, or at all, stepped through what is the proper construction of the updated awards objective and how that could justify variation of this particular provision.

PN274

Moving on then to consultation about changes to rosters or hours of work, again it's difficult to engage with this without fully understanding the unions' position in terms of the proper construction, so our view is very much consistent with other employer groups here today that this is a standard provision that really gets the balance right between allowing businesses to run their business while ensuring employees have a real impact/input into decisions that could materially affect them.

PN275

Moving here to redundancy and notice of termination, we will deal with these together very briefly. On a broad reading of the modern award objective, these provisions could go to the heart of whether an employee has access to ongoing regular or predictable work.

PN276

They clearly go to circumstances where an employee might not have any work at all. However, it clearly would be a really absurd outcome if the Commission was to construe the updated awards objective to suggest that - you know, of course, employers need to be able to dismiss employees where they're not performing, or where work is no longer available, so these provisions, in our view, are better considered as part of a more fulsome range of protections for employees, which are each connected to a statutory entitlement or consistent with the NES. This is in terms of things like unfair dismissal laws in general and the general protections regime, so it's not really clear how any changes in this area could be justified by the updated modern award objective.

PN277

Finally, and again very briefly, in terms of dispute resolution, it is again unclear how the changes to the standard provision could be justified by the updated modern award objective. It's unclear how the statutory basis of giving the Fair Work Commission the power to hear disputes - sorry, here I'm talking about one of the ACTU's proposals, which I won't deal with in detail, but it's unclear how the statutory basis to giving the Fair Work Commission power to hear disputes regarding other matters other than the award or the NES is - whether you would be able to actually even recommend something like that. It would clearly require legislative change, so I don't propose to delve into that in detail.

PN278

If it pleases the Commission, I will pause there.

PN279

COMMISSIONER TRAN: Thank you. Ms Tinsley, what do you say to - as I understood it, and Mr Clarke is here and he can correct me - the ACTU is relying on recent decisions of this Commission's Full Bench and Expert Panels about what job security and secure work might mean in the updated objectives, both on

the (audio malfunction) and modern award objective. So, in terms of that, that construction is reasonably clear. As you were saying, that is less clear - - -

PN280

MS TINSLEY: Commissioner, I would say that our construction put forward in our submissions, particularly - well, we summarised how we see the Expert Panel could be summarised at page 8 of our initial submission - so here, at paragraph 13, subparagraph (3), the fact that the Expert Panel suggests that the need to improve access to secure work is more tightly focused on the capacity of employees to enter into work - in terms of the choice - so we would say that - and, from the choice, and without delving too far into what we would say from an ACCI perspective the proper construction is, we would say there's a choice.

PN281

What hinges - a key consideration that hinges on this choice is the effect of general economic circumstances, because if there is no job, there is no work which is focused on regularity or predictability, then it's negating the choice of employees, so we would say that the proposition that we are putting forward in our submissions also repeats what the Expert Panel in the Annual Wage Review decision contemplates, and, clearly, the ACTU would disagree with that.

PN282

They have done so in their rely submissions, but, apart from this referencing - and I'm not alone in terms of I know that submissions put forward by other employer organisations have also used decisions, such as the Aged Care decision and the Expert Panel in the Minimum Wage Review decision as a basis for their construction - so clearly there's a difference in the construction, and we are both saying that it's based off these previous decisions, but, clearly, someone has to be wrong, I guess, and I don't think we've had sufficient discussion about that.

PN283

COMMISSIONER TRAN: Thank you. Thank you, Ms Tinsley. That was all you wished to - that's the end of your submissions today?

PN284

MS TINSLEY: Yes, thank you, Commissioner.

PN285

COMMISSIONER TRAN: Thank you. Mr Miller looks like he wishes to jump off. Thank you, Mr Miller.

PN286

MR MILLER: We note that in the Commission's 9 February statement, noting that the parties may raise issues to specific matters in their submissions, but also that (audio malfunction), but, further, (audio malfunction) seeks to rely on what we have - thank you very much - (indistinct) seeks to rely on what we have said in respect of industry-specific matters and proposals by the NTU.

PN287

Particularly, we submit that any review of some fixed term provisions incorporated into our Higher Education modern awards would necessitate an

holistic review of all industry-specific provisions, and with the opportunity to bring and test evidence before the Commission.

PN288

Thank you very much, Commissioner.

PN289

COMMISSIONER TRAN: Thank you, Mr Miller.

PN290

We are doing very well in terms of time, so are there any parties on Teams who wish to speak now to their submissions? I have on Teams Ms Rafter of ABI. Would you like to speak to your submissions now?

PN291

MS RAFTER: Commissioner, we are happy to take the opportunity to give submissions in person on the next occasion, if that pleases the Commission.

PN292

COMMISSIONER TRAN: Thank you. Ms Shaw, from Clubs New South Wales?

PN293

MS SHAW: Thank you, Commissioner. We would be happy to give really brief submissions in person at the next date, thank you.

PN294

COMMISSIONER TRAN: Thank you. That may cover, from my list, the employer organisations. I will turn to any of the union organisations who might be on Teams.

PN295

MS ADLER: Sorry, Commissioner - - -

PN296

COMMISSIONER TRAN: Yes?

PN297

MS ADLER: Ms Adler from the Housing Industry Association.

PN298

COMMISSIONER TRAN: I'm sorry, I missed that, Ms Adler, yes.

PN299

MS ADLER: From the Housing Industry Association. Just if I can make two very brief comments.

PN300

The first is just to, on the record, support the submissions of ACCI, both the written submissions and the oral submissions made this morning.

PN301

The other observation we would make is that the CFMEU, Construction and General Division, did make a reply submission dated 21 February and, in response to that, I just wanted to comment on the proposals in respect to individual flexibility arrangements.

PN302

We outlined our position in respect of those clauses in our submission dated 5 February and, further to those written submissions, just to highlight that we are supportive of the current provision as it is in the award. We see that it operates in the way it's expected to and, for the residential building industry, provides an option for individual arrangements that they otherwise, should the clause not be there, be able to access. That was the only comment that I wished to make.

PN303

COMMISSIONER TRAN: Yes, thank you, Ms Adler. Are there any other parties on Teams who wish to make submissions this morning? I will take the silence as 'No'.

PN304

So in terms of where we go from here, the next consultation day is on Monday 4 March in Sydney, with facilitation of access via Teams, and should we be as efficient as we have been today, which is great, instead of containing the consultation to the subject area that was previously indicated, so the questions relating to standard clauses, we will move on to the next questions in the next area, so that was questions 4 and 5, relating to casual and part-time employees, when we are at the consultation on Monday 4 March, and that may allow for some further submissions, or additional discussion, relating to industry-specific matters, if the parties wish to raise them, as they relate to the subject areas.

PN305

Unless any party has anything additional to say this morning, we will adjourn today's consultation. Thank you. I see no desire to say anything additional at this point? Thank you. We will adjourn.

ADJOURNED UNTIL MONDAY, 04 MARCH 2024 [12.35 PM]