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)

Sydney

10.07 AM, MONDAY, 4 MARCH 2024

Continued from 27/02/2024

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes. Good morning. Are there any changes to the appearances? Mr Maxwell.

PN2

MR S MAXWELL: Yes, Deputy President. I appear today on behalf of the CFMEU, Construction and General Division.

PN3

DEPUTY PRESIDENT GOSTENCNIK: It's good to hear. Welcome. Any others?

PN4

MR P LORIS: Yes, Deputy President. Poy Loris, from the Australian Nursing and Midwifery Federation, standing in for my colleague Kristen Wischer, who is unfortunately unwell today.

PN5

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you for that, and welcome. Any others? No? All right. Commissioner Tran.

PN6

COMMISSIONER TRAN: Thank you, and good morning, everyone. Now, as I recall from last time we got together, I think we were waiting to hear submissions from you, Ms Rafter. Would you like to start?

PN7

MS RAFTER: Thank you, Commissioner, Deputy President. Today I'm just going to address three short point as an opening, reply to one point raised by Mr Clarke on the last occasion, and then very briefly address four matters: the construction, the importance of simplicity and flexibility in the standard clauses, the consultation clause, and dispute resolution. I do not propose to re-canvass our written submissions or otherwise repeat submissions advanced by Ms Barr or Ms Tinsley on the last occasion. Before turning to those specific issues regarding the standard clauses, I wanted to address what seems to be an undertone of a philosophical issue in this review. We tend to the view that job security is fostered by creating a thriving economy, part of which is the efficient deployment of labour. The unions, on the other hand, and perhaps quite understandably, take the view that this is wrong, and that job security is about ever more constraints and rules on the deployment of labour.

PN8

DEPUTY PRESIDENT GOSTENCNIK: I'm not sure that I think that's right. I think they might think that it's not enough.

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MS RAFTER: Thank you, Deputy President. And what we wanted to make clear is that this is very much a philosophical question which we'll necessarily need to grapple with, with the polarising opposites we have in this review.

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DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN11

MS RAFTER: As to secure work, we tend to the view that this is really about predictability, clarity and foreseeability. So when we turn to look at the modern awards, we see a variety of things that currently promote security itself in those awards. Those things are as basic as the classification structure, which delineates precisely between how someone is to be classified and the minimum rate they are to receive. We also have employment categories, hours of work, et cetera. All of the provisions we say cumulatively promote the security of work itself. So we're starting from that position, that awards already do this in many regards.

PN12

We're also very anxious about undue attention being placed on a single limb of the matters in the modern awards objective. Now, if the legislature had introduced an entirely new provision – let's say, section 134A, dealing with secure work – that would be an entirely different conversation. But that's not what the legislature did. All that has occurred is, an additional limb has been added to the things we have to have regard to. It holds no primacy, and it's to be considered with the other limbs, the focus of which is on a fair and relevant minimum safety net for employees and employers. Now, towards the end of Mr Clarke's submission the other day, when he was speaking to the ACTU's proposal for the dispute resolution clause, he suggested that making the clause act beyond the scope of the instrument or the National Employment Standards is still very much within the minimum safety net.

PN13

That approach by Mr Clarke, however, seems to us to require quite a selective reading of section 134, that reveals he's not too concerned with a fair and relevant minimum safety net, especially one for employers. In fact, what he proposes is actually quite a step for modern awards. He wants to create a forum for an employment dispute of any kind. This is something that the Act itself does not contemplate. So rather than a minimum safety net, what he wants created is something at a much higher threshold. In fact, it's in effect removing the word 'minimum', and it's quite telling that in some parts of the ACTU's submissions, that word appears to have disappeared or been omitted.

PN14

But this is because what he's proposing is more akin to a maximum in the context of the dispute procedure. We say, if you allow your mind to go there, to follow that line, you will offend section 138. The legislature, I think we can all agree, has been quite busy the past 18 months. While it has created a role for the Commission in regard to sexual harassment, delegate rights, and other things, it chose not to empower the Commission for any employer matter, which is what the ACTU was asking you to do. But now I'll move on to those four points, starting with construction. We simply cannot start the conversation about whether provisions or proposals offend or are inconsistent with the new text without grappling with the meaning.

PN15

To date, this has not occurred in any real significant way. Many parties, ACTU included, put a lot of weight on the observations of the Full Bench in the aged care work value case. But those observations can only take us so far. In the context of that matter, paragraph AA received very little attention, and as the Full Bench observed themselves, it was a neutral consideration. But more importantly, the surrounding context – access to secure work across the economy – received very little attention. What we don't want to see occur, in this review or otherwise, is a reduction of the new text to two simple bullet point objectives: remote job security and secure work.

PN16

It does result in some interesting and narrow conversations, but the text in the legislation must be considered in context. And so to that end, we say the focus of paragraph AA is upon creating opportunity to access the secure work, more so than the secure nature of the work itself. And critically, improving opportunity across the economy is not a one-sided consideration, and that's what the surrounding context we say section 134(1) makes clear. To my second point, the standard clauses support access to secure work by providing clear and easily understood options, mechanisms to vary arrangements, engage in consultation, resolve disputes, et cetera, all in the context of that minimum safety net, of minimum entitlements.

PN17

It's that predictability and stability that we say provides a framework for working Australians to access secure work. In our written submissions we underscore the relevance of business when considering paragraph AA. The reason is simple: supporting the stability of business at a national level has a beneficial impact on job security. Mechanisms that may further improve access to secure work include increasing the facilitative arrangements and means for mutual agreement, increasing the ability for both employer and employee to agree to arrangements that suit their circumstance. The ACTU have suggested that such arrangements, as we put it, will create a springboard to erode various entitlements, and we say that's just wrong. But again, this likely does hail back those philosophical undertones I mentioned at the outset.

PN18

For our third point, consultation. The consultation clauses, together with redundancy and termination clauses, address two practical realities of business, (1) a dynamic of business is that it is subject to change, and (2) employment can be brought to an end at the initiative of the employer. Those clauses serve an important function. They define regulation that applies to those specific circumstances that can have a detriment to the employee. They establish a minimum entitlement, and that minimum entitlement provides certainty, and a level of predictability in those circumstances of major change. To expand the consultation requirement to all manner of events diminishes the importance of that consultation.

PN19

If every and any event requires consultation, the message of security fades. The difference between a minor change and a major change is eradicated, thus dulling its significance, and just increases the regulatory burden on business. Finally, to

briefly address the definite decision, which attracted a lot of attention in written submissions and on the last occasion. It is an appropriate threshold. By keeping the trigger point objective, this affords further certainty of application for both the employer and the employee. The obligation to consult we say needs to have this clear trigger point. It can't be some vague air. The reason definite decision has stood the test of time is not because simply that's the way it has been for the past several decades or so. It's because it is something in a contested case that can be determined objectively.

PN20

It also ensures that consultation, which, the courts have determined, has to be meaningful, will occur before implementation of any decision. Asking employers to consult at some vague stage, or a moment before a definite decision simply leaves them to pray to possible breach, but perhaps more importantly, exposes them to consult on less than fully considered or thought-out ideas, which could prove unhelpful to the employer, but even more unhelpful to the employees, such that the following comment could become commonplace, 'Sorry to have alarmed you, but we were obliged to inform you we were throwing this around, but it's no longer going anywhere now that we've analysed it thoroughly'. That's not a helpful approach. And to finish on my fourth my point on dispute resolution - - -

PN21

COMMISSIONER TRAN: Before you move on to dispute resolution, Ms Rafter, what do you say meaningful consultation – what's the purpose of it?

PN22

MS RAFTER: Speaking to meaningful consultation, I would like to just echo something Mr Barr said on the last occasion, that it's not about giving the employee an opportunity to necessarily change the decision, to change the outcome. It's about communicating with that employee, having time before implementation of that decision. And that would obviously vary in the different circumstances, what would be necessarily meaningful, subject to the nature of the change. Turning to the dispute resolution procedure. In modern awards, we say it should be limited to the components of the safety net itself in the award and the National Employment Standards, and we say so much flows logically. Anything more is (indistinct) with bargaining.

PN23

The modern awards should not be allowed to create, through a disputes procedure, a power to review all employment issues. As I mentioned before, the Act itself does not do this or contemplate it. This would be entirely improper in creating a safety net for employees and employers. There needs to be a limit as to the scope of what matters are subject of a dispute, so as to ensure the orderly and effective resolution of matters, and avoid impacts on the performance of work, when then in turn impact the productivity of business. The dispute resolution clause does not need to cover all possibilities. The ACTU proposal in this respect is a breathtakingly broad proposition that is entirely inappropriate in the context of a modern award. But if someone wanted to bargain for that, that is of course a matter for them. Unless the Deputy President or Commissioner have any questions, those are the submissions I would like to make on this issue.

PN24

COMMISSIONER TRAN: Thank you, Ms Rafter. Now, at our last consultation, I understood Clubs Australia were present via Teams, and I just want to confirm they're not present today, either in person or via Teams.

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MS LIMBACH: Sorry, was that Clubs Australia?

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COMMISSIONER TRAN: That was.

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MS LIMBACH: Sorry, yes. I'm present today on behalf of Clubs Australia. My name is Claire Limbach, legal counsel, workplace relations.

PN28

COMMISSIONER TRAN: Thank you, Ms Limbach. You do appear on my list. My apologies. Did you wish to make any submissions?

PN29

MS LIMBACH: We would like to rely primarily on our written submissions. How I would like to stress, with regard to question 6, that IFAs, on our view, do not undermine job security. They ensure that by agreement between employees and employers, certain terms of the award arrangements can be varied to allow for the necessary flexibility, whilst ensuring that employees are no worse off. Clubs Australia, as part of compiling our submissions, surveyed our members, and found that the majority of individual flexibility agreements were initiated by employees. Of all IFAs entered into, 44 per cent were agreed due to employees requesting flexibility due to parental responsibility; 26 per cent were flexibility due to study commitments; and a small percentage were requiring flexibility due to sporting commitments. We therefore submit that as employees need to agree, and they need to also be better off, there is no ability to be undermining job security in that regard. Thank you.

PN30

COMMISSIONER TRAN: Thank you, Ms Limbach. Is there anyone else in the room today who wishes to make some submissions in relation to questions 6, 7 and 8? Mr Maxwell.

PN31

MR MAXWELL: Thank you, Commissioner. Commissioner, Deputy President, the CFMEU Construction and General Division made a brief submission in response to the submissions of the employer organisations. In the submission, we stated that we supported the submissions of the ACTU in regard to questions 6, 7 and 8. And the main issue we had a problem with was the IFAs provisions in awards. We don't believe that they improve the job security of employees. In our experience, they're used with some of the most vulnerable people in our industry. We're aware of IFAs being used with apprentices to remove conditions, and we believe that the IFA provision should go, especially noting that now you have the flexible work requirements under the Fair Work Act for people that have family responsibilities. They are the brief submissions I wish to make today.

PN32

COMMISSIONER TRAN: Thank you, Mr Maxwell. Do you say that in terms of IFAs, flexibility can only be available where there are caring and similar responsibilities, as set out in the National Employment Standards?

PN33

MR MAXWELL: Commissioner, the National Employment Standards has the right to request flexible work arrangements. And that covers people with parental responsibilities and people over the age of 55, et cetera. So for a lot of the occasions on which the IFAs are made, where people have parental responsibilities, that's already covered by another provision of the Fair Work Act. And we don't see the need for an IFA clause in the awards, because there's actually no check on whether people are better off overall.

PN34

COMMISSIONER TRAN: Thank you. I understand. Is there anyone present via Teams who wished to make submissions who did not have an opportunity when we were in Melbourne last time? I will take the silence as a no, in which case we will move on to questions – yes, Mr Clarke.

PN35

MR CLARKE: I thought it might be appropriate to respond to some of the things that were said on the last occasion today.

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COMMISSIONER TRAN: You would like an opportunity - - -

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MR CLARKE: If that's all right with - - -

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COMMISSIONER TRAN: Yes. I'm happy to give you an opportunity to respond.

PN39

MR CLARKE: Did you want to do that at the end, or just deal with these questions and then move on?

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COMMISSIONER TRAN: Let's deal with this subject area before we move on.

PN41

MR CLARKE: All right. Sure. Thank you. I'm trying to do with this with screens. I'm trying to move with the times, so, sorry if it's terrible. On the last occasion, we outlined some of the features of the positive proposals we advanced in relation to the standard clauses, and that attracted some sort of specific criticisms that I wanted to respond to. First of all, dealing with the issue of the individual flexibility arrangement standard clause and the submissions of AI Group, it was said that, 'Well, this idea of the Commission having oversight of IFAs, and expressing some view about whether they should be entered into, some gatekeeper role, about entering into these arrangements was dealt with back when

we did the 2012 review, and there's no continuing obligation to make sure that an individual arrangement meets the BOOT'.

PN42

Now, we've said in our written material that, certainly with respect to enterprise agreements, there's been a change in policy to allow enterprise agreements to be reassessed, in the event that there's been some change of circumstance. Just park that thought for a moment. But the difference between what's being put now and I think what the employers are reading it as is that our proposal is not just latching onto the idea where an individual flexibility arrangement might not meet the BOOT anymore. Going through the process, it might become obvious that it never met the BOOT to begin with. But the way in which we've gone about identifying it, the proposal that we've put forward allows that to be picked up, but picked up in a non-punitive way.

PN43

So the Commission, exercising its non-determinative functions, is in a position to express this independent view that is effectively treated as some form of advice or guidance about what the next step could be, perhaps brokering some agreement around a unilateral withdrawal or the entering into a new arrangement which is different. So that's not the kind of gatekeeper role that was advanced and discussed in the 2012 review. This is something that is subtly different, and involves the Commission assisting people to come to arrangements that meet their needs in an ongoing way, as well potentially identifying, 'Well, maybe you got that wrong the first time. Let's have another go'. In relation to the - - -

PN44

DEPUTY PRESIDENT GOSTENCNIK: Mr Clarke, why isn't the dispute settlement term in the award sufficient to deal with that gatekeeper role, as you describe it? It's obviously an after-event feature. But if there's some concern about whether a particular arrangement meets or continues to meet the better off overall requirement, then why can't a dispute be brought in relation to that matter here?

PN45

MR CLARKE: The dispute to be brought once the arrangement is – that there's something concrete in the arrangement, so it's been entered into, that's clear. And as to what the Commission might do with that, we've made some separate recommendations about who the dispute resolution procedure might be expressed. But in relation to the individual flexibility arrangement clause, the idea is that it's essentially put up in lights, that that's an option, and furthermore, that the proposal for an IFA becomes something concrete to have a discussion about as well. And so before anybody signs anything, there is a proposal put forward which becomes some concrete thing that one can have a dispute about before it's actually been signed off.

PN46

You'll note that one of our recommendations was that the proposal for an IFA, which is sort of vaguely referenced in the existing clause, is, the proposal becomes a draft IFA, along with some other additions to it.

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DEPUTY PRESIDENT GOSTENCNIK: And you say there can't be a dispute about a proposal, because the employees are free to not accept it.

PN48

MR CLARKE: Well, the employee is free to accept it or not accept it. But it's a little bit easier for a more facilitative role to be played by the Commission if it's clear what the proposal actually is. So the proposal becomes effectively a document setting out what the arrangement is, a draft of the IFA, as well as the existing material around the BOOT, and the expectation around reasonability and predictability. Moving on to dealing with AI Group at the moment, in relation to this issue of the definite decision in the consultation clause. And the expression 'definite decision' was preferred in the TCR cases over a proposal to make major changes.

PN49

We're not here to argue that the TCR decisions were wrong when they were made. Our concern is that we ought to have a little mature reflection about whether consultation only after a definite decision is made is in accordance with our contemporary understanding of what an obligation to consult in general terms actually entails. Can you really have a fair and relevant safety net which, among other things, takes into account the need to improve access to Fair Work, when the parameters of a decision affecting job security are themselves not open for re-consideration, where there is no possibility to influence the decision? How can one adequately protect the interests of employees and the security of their own job when the only options for mitigation of the effects of the change are options which involve treating the parameters of the actual decision as totally immutable? That's the issue that we're inviting some consideration of.

PN50

So just picking up on what was said about that today, we would say that meaningful consultation is not just telling people what's going to happen. It's involving an opportunity an opportunity to influence the outcome. And insofar as the older proposal around consultation, around getting rid of this refer to major change, that's not a floodgates issue, because significant effects, admittedly with our suggested additions around significant effects, would still have some work to do, rather than this two-level test. I think the example that we used last time was around a relatively large business, that, in the context of its operation, we were proposing to make a minor change to its operations, which would nonetheless have a significant effect on a handful of employees. Well, we say the safety net needs to work for everyone. In relation to redundancy and termination - - -

PN51

COMMISSIONER TRAN: If I could just stop you there, Mr Clarke. I know that in submissions, and as you identified last time, you're speaking to an earlier point that a definite decision – do you have some factors, or some ways of ascertaining what is that objective earlier point - - -

PN52

MR CLARKE: We pick up the point that was raised this morning on behalf of ABI, that the objection appears to be that, well, it's not objective enough to say

something other than definite decision, about when a definite decision is made, that that's quite objective and easily identifiable. Well, I would say to that that for those who'd been around the block a few times, there is some – in disputes around consultation, there often is some evidence about, well, when was the decision actually a definite decision, and at what point did you move to start consulting, and wasn't it practicable for you to start to do that beforehand? That's part of your standard case prep, and we all would have heard that numerous times.

PN53

But, yes, it is possible to have a more objective criterion that – I don't know what the words are yet, but it needs to capture the notion of the employer not having committed themselves to following through with implementing the decision. It's really something falling short of, yes, a decision as to what we would like to do; you need to get to that point, but you want to be able to allow the consultation to occur before it's impossible – before the employer has committed itself to implementation, via legal obligations or otherwise. In terms of redundancy, this was something that was raised I think on behalf of ACCI on the last occasion, and also by ABI this morning. Our proposal regarding termination is not that you can't terminate for cause, or that you can't terminate if there's redundancy.

PN54

Our proposal regarding the termination clause provides a precondition for termination, by way of an NES supplementation, that will impinge upon the capacity of the employer to terminate at will before the termination takes effect. So the intent there is to provide an opportunity to avert terminations through the dispute resolution procedure in awards, which we see as wholly consistent with the characterisation of job security given in the cases referred to in our submissions. In relation to dispute resolution and this issue about it being beyond the safety net, if we sort of wind that back – I think it's sort of been presented that there's a merit issue and a permissibility issue around that. And I don't expect to, given what's been said, be able to necessarily convince our opponents in relation to the merits of it, but certainly, these seem to be very fixed views.

PN55

But in relation to the permissibility question, section 139, which deals with the terms that may be included in modern awards, section 139(1)(j), the relevant expression there is procedures for consultation, representation and dispute settlement. You can have a safety net procedure for dispute settlement. The terms of permissibility don't deal with the scope of what it can go to, but that's a legitimate consideration for the Commission, as to how far it goes to. We've said you're likely to get better job security outcomes if you don't artificially constrain it to job security-related matters that arise only out of the NES or the terms of the award; different view on the merits on that. But it's not a question of power, we would say. It's not a question of allowability, to use the old language.

PN56

So you wouldn't need, in our submission, to answer the sort of specific objection that was made on the last occasion. You wouldn't need legislative change to include a dispute resolution procedure that permitted disputes beyond the NES and award. And just in terms of, I suppose, the basic sort of – to use the

expression 'a philosophical dispute', we need to focus on the option to secure the opportunity to have secure work, rather than the security of the work. To us, that seems quite an illogical proposition, because if you want to create an opportunity for something, you need to give that something some content. And that's what we're trying to do with the proposals that we've advanced so far. I acknowledge the submissions made this morning from Clubs about surveying their members about what sort of IFAs are entered into, and who's initiating them.

PN57

I just sort of caution that it's not necessarily who's initiating it that gives a clue as to where the outcome has landed, in terms of the issues that we're concerned with in this review. Sure, there may have been employees who had difficulties, who wanted to better accommodate their parental responsibilities, and wanted to better incorporate or deal with their study responsibilities or their sporting commitments. There's no reason to doubt any of that. But the issue is, well, what was the trade-off to allow those commitments to be better accommodated? And if it was, 'Well, you can work your preferred hours, but you're never getting overtime or penalty rates', then we'd see that as an outcome – as not being the type of outcome that – well, let's be nice; let's call them the nave drafters of the IFA provisions, would have supported, in our submission. That was it by way of reply, Commissioner and Deputy President.

PN58

COMMISSIONER TRAN: Thank you, Mr Clarke.

PN59

DEPUTY PRESIDENT GOSTENCNIK: Mr Clarke, sorry, before you sit down, I was just having a look at a full court's decision in *QR v CEPU*, which concerned a consultation provision in a number of enterprise agreements. Those agreements were – the obligation to consult was triggered in circumstances where there had been a proposal for a change. It seems to me to be something different to – I'm thinking about options, something falling short of, 'I've decided to proceed with this change by proposing it for the purpose of consultation, but I haven't yet made a definite decision to proceed with it', which somewhere, it seems to me at least, along the progression of decision making which is beyond, 'I've got an idea that I had this morning about' – so it's something a bit more fleshed out.

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MR CLARKE: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: Is that the kind of - - -

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MR CLARKE: Yes, that's right. And that sort of expression around a change proposal is something that's almost ubiquitous in a lot of kind of public sector type agreements as well, or, those that have moved on, used to be public sector services.

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DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Thank you.

PN64

COMMISSIONER TRAN: Well, in terms of that, Mr Clarke, you may be back on your feet. We'll start to – in relation to your submissions for questions 4 and 5, part-time employees.

PN65

DEPUTY PRESIDENT GOSTENCNIK: A few minutes.

PN66

COMMISSIONER TRAN: Would you like a brief break to gather your thoughts, and we can do that?

PN67

MR CLARKE: No, that's all right. I don't have many thoughts. I mean, this is really – the tenor of our submission in relation to these issues is that award modernisation ran the way that it did, but there's an opportunity to have a closer look at the regulation of casual employment and the trade-offs that are involved in that. And they're necessarily going to be different in different industries. If you're going to have proper accounting of the disadvantages and sequelae, there are sort of secondary and cumulative effects that come with that, based on how long people are casuals, and what the ordinary pattern of hours of work and so forth is. And that's really something to be agitated on a bit-by-bit basis, in terms of how you deal with that.

PN68

DEPUTY PRESIDENT GOSTENCNIK: Sorry. It occurred to me this morning that there may be a step that may need to be taken before consideration is given to any of that. And that is this, that there seems to be – there is a differential description of a casual in an award, or in some awards, compared to what is now the definition of casual employment in the Act. For example, in the Fast Food Industry Award, the modes of employment provisions or types of employment deal with full-time, part-time and casuals.

PN69

And relevantly, the award describes a part-time employee as an employee who works less than 38 hours a week and has reasonably predictable hours of work. And the casual type of employment doesn't carry a definition, but rather describes casual employment by reference to the ordinary hours that they work, which must be no less than 38, and where the employee works in accordance with a roster, no more than 38 average (indistinct) roster cycle, which immediately raises issues about, well, if a person is on a roster and has a roster cycle, it's likely that their hours are reasonably predictable.

PN70

And how does one differentiate between that classification and a part-time employee? And more importantly, how does that description of a casual employee gel with the existing definition, or the current definition of casual employment? And before we come to consider whether there should be alterations to the conditions of casual employees, perhaps there needs to be a review of the way in which awards in various industries describe casual employees, because we're not necessarily talking about the same things.

PN71

MR CLARKE: I accept that that's something that – you don't want to have awards saying, 'Casual employment means this', and an act saying, 'Casual employment means that', and there being a lack of clarity around what a casual employee actually is. Imagine that. But I would say that the legislation that we've now got, or will get, or – I can't remember whether those bits are in effect yet or not, and I think they are.

PN72

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN73

MR CLARKE: Doesn't necessarily provide the sort of hard flicking of a switch, independent of some other process, in terms of characterisation of its own sort of effect of, 'Now you're a casual, because we've changed' – it still requires some steps to be taken for somebody to be shifted from one category to another. And so there would still be a little bit of room within the award system to set some expectations or rules around the engagement of casuals.

PN74

DEPUTY PRESIDENT GOSTENCNIK: Certainly, for example, the Fast Food Award again deals with that issue, on the basis that, at engagement, the person must be told whether they're full-time, part-time, or being engaged on a full-time, part-time or casual basis. But again, that's a reference to being engaged in accordance with the award, presumably in accordance with the award's description of a casual employee, as opposed to what is now the relevant definition of casual employment. And all of those things just seem to me to require some thought, because that might then determine, at least in part, the merits of some of the things that you're proposing. It just seems to me that casual employment, as described in the Act, is a different beast to the casual employment that's described in this award, just as an example.

PN75

MR CLARKE: Yes. All right. So the logical order of things then is to get an understanding, well, what is this casual employment we're talking about, and then deal with the incidents, et cetera, that accompany - - -

PN76

DEPUTY PRESIDENT GOSTENCNIK: Well, that's an approach, yes.

PN77

MR CLARKE: Yes. I accept the logic of stepping it out in that way, but there may still well be issues associated with casual employment that, irrespective of some of those definitional issues, could still potentially can get an ear in in this review. If you look at what the FAAA have said, for example – and I think they sent some correspondence to say that they can only come on the 18th. They've advanced a positive proposal in respect of paid leave for upper respiratory tract infection leave, which is a special category of leave that permanent employees in that award get, but which casuals don't.

PN78

The last few years have taught us about the environments in which those infections are transmitted, and I think the historical industrial sort of justification around it was around injury to people's ears. But that might be an example of something – we might not have the niceties around how the rostering or the rest of it works. And I haven't spoken to them about this. They may well say, 'Well, that's all well and good, and we're happy to do that, but we still want this'. So it's just as an example. There may still be some things that we can - - -

PN79

DEPUTY PRESIDENT GOSTENCNIK: I'm not suggesting you don't float your ideas. It's just that they need to be assessed in a broader context.

PN80

MR CLARKE: Yes. I understand. In terms of the proposals that we've advanced as ones that we think bear some consideration beyond the specifics of how casual employment works, or is now required to work in particular awards. There's two. The first is really dealing with this sort of bizarre situation where, at a statutory level, you have casual workers. You have entitlement to be absent when they need to care for somebody in their immediate family or household. And that carries with it, by virtue of the general protections provisions, a protection against a prejudicial alteration in their employment, or an injury in their employment, in the form of different preferences around allocation of shifts and so forth.

PN81

That's all right if you're caring for someone else, but what if you're sick yourself? That's where the gap is. So irrespective of where you might get to in particular awards, in terms of their paid entitlements, at a general level we would say it would make a lot of sense to have some recognition in the safety net of a casual employee's right to absent themselves when they are sick, without those types of consequences. Now, the reasoning behind putting it in the awards is, well, it's not in the Act, so it should go somewhere. And this is an award review; why don't we put it here? And also, oddly enough, we do have a problem with the because test in the general protections. We acknowledge that there's the unlawful termination right and the section 352 right around dismissal for temporary illness or injury.

PN82

But that's dismissal. We're not talking about dismissal here. We're talking – which is often difficult to put your finger on, unless the boss says, 'All right, well, if you can't come tomorrow, don't come at all', for a casual. But it's around this, 'What if I don't get the same hours anymore? What if I get less hours, because I'm seen as less reliable'? And the because test in general protections isn't available, because there is no workplace right. But we would say that even if it is, it's insufficient, so we should take steps in this award review to enshrine a right of casual employees to be absent when they're unwell, without those types of consequences that they fear, which were discussed in the casual and part-time case in the 2014 review. And the other one was just around bereavement leave.

PN83

These bereavements of people in your family and people in your household can often come on pretty unexpectedly, and often associated with needing to incur an

expense. And I'm suggesting that perhaps we move to a point where that might be able to be accommodated, notwithstanding that the employee is a casual employee. In terms of how you sort of structure an entitlement around that, it's always kind of said that it's hard. But we managed to figure out how to have a paid right of absence for casuals in the award system, for the paid pandemic leave in the aged care industry. We figured out how to do it in the award system for paid domestic violence leave, for the brief period that it was in the award system, and we can do it again here. But I think that what we've said really speaks for itself on those issues.

PN84

COMMISSIONER TRAN: Thank you, Mr Clarke. I don't have any questions. Thank you. Ms Burnley, is there anything you wish to say to supplement your submissions in relation to questions 4 and 5?

PN85

MS BURNLEY: No, Commissioner, there isn't. Thank you.

PN86

COMMISSIONER TRAN: Thank you. Mr Maxwell?

PN87

MR MAXWELL: No, Commissioner.

PN88

COMMISSIONER TRAN: Thank you. Anyone else in the room? Thank you. Is there anyone on Teams who wished to make submissions in relation to questions 4 and 5, concerning casual employees and part-time employment? Yes. I will turn to Ms Bhatt shortly. Thank you.

PN89

MS WILES: Sorry, Commissioner.

PN90

COMMISSIONER TRAN: Yes, Ms Wiles.

PN91

MS WILES: The CFMEU Manufacturing Division, in our written submissions, we did suggest a number of proposals to three awards around casual employment and part-time employment. I think those proposals are pretty clear on the face of the written submissions. So unless there are any questions about those, we're happy to rely on our submissions. And today, we support the oral submissions made by Mr Clarke on behalf of the ACTU. And in particular, we support the proposal in relation to casual employees being entitled to some form of paid bereavement leave. We think, in 2023, the fact that a casual employee would not be entitled to take paid leave to attend a funeral of a family member is an anomaly, and really needs serious consideration, in terms of a change to the award system. That's all we wish to say at this point.

PN92

COMMISSIONER TRAN: Yes. Thank you, Ms Wiles. Mr Morrish, I did note that you put your hand up, and it's gone back down again. Mr Yiallouros. But Mr Morrish, I might see if we can finish with union and employee organisation submissions. We'll then turn to employer organisations, and I will ensure that I ask you to speak at that point in time. Mr Yiallouros.

PN93

MR YIALLOUROS: Thank you, Commissioner. I'll just keep it very brief, and it'll sort of foreshadow everything by saying that I'm having quite a few technological issues. So if my computer unexpectedly crashes midway through submissions, I do apologise to everyone. Like I said, I will keep it brief, because our position is not too dissimilar from that of the ACTU and other affiliates, in that we don't seek to disturb the provisions for casual employees too much in this regard, beyond sort of extending a positive right for employees to be absent when they are unwell, albeit with unpaid entitlements, and also that access to bereavement leave should be extended to casual employees, given what the existing community expectations and standards would suggest.

PN94

Separately from that, this also sort of dovetails into our written submissions in response to question 1 to 3, about sort of award-specific entitlements. And I note that this was viewed as being rather controversial among employer groups who provided submissions in reply, is around the setting of the casual loading. And I suppose two questions that arise from that, which is whether or not the casual loading, as it's currently set, has been adequately made, taking into consideration the way in which the loading accounts for entitlements that are otherwise not received by casual employees.

PN95

And then, separately to that, a consideration of whether or not, with the job security element of the modern award objective being inserted into the Fair Work Act, whether or not that now requires a reconsideration as to whether or not the balance between the casual loading and the entitlements forfeited is adequately set, when you consider that they are currently designed to be sort of on an even kilter, whether or not the Commission should be minded to consider to increase the casual loading, so as to, I suppose, incentivise more secure forms of work, and thereby disincentivise casual employment, which is comparatively less secure.

PN96

Now, we haven't sort of come to these consultations with a set view as to what the exact figure should be, in terms of that percentage amount. But we certainly think it is worthy of some discussion around, well, what should casual employment look like if the casual loading were adjusted across the board, to account for, I suppose, the insecurity that comes with not knowing your sort of regular pattern hours, the fact that you don't have the same predictability around your employment. That would be our submission about casual employment in response to questions 4 and 5.

PN97

COMMISSIONER TRAN: Yes. Thank you, Mr Yiallouros.

PN98

MR YIALLOUROS: And my computer did not crash.

PN99

COMMISSIONER TRAN: Very good.

PN100

DEPUTY PRESIDENT GOSTENCNIK: Well, if it does in the future, Mr Yiallouros, we'll just record you as having agreed with the AI Group.

PN101

COMMISSIONER TRAN: On which note, if there's no one else via Teams, I will turn to Ms Bhatt. Thank you, Ms Bhatt.

PN102

MS BHATT: Thank you, Commissioner and Deputy President. In response to questions 4 and 5 in the discussion paper, the unions have advanced for broad contentions, as we've heard from Mr Clarke this morning as well. And they relate broadly to the casual loading, the right of casual employees, or a proposed right for casual employees to be absent from work due to illness or injury, bereavement leave. And there's a proposition that's been advanced by the RAFFWU in particular about the Commission being able to deal with certain types of disputes concerning casual employees. We've dealt with all of those in quite some detail in our submissions in reply, so I don't propose to deal with any of that in any kind of detail today, unless the Commission has any questions for me.

PN103

For the purposes of today, I really just propose to deal with one principal proposition that arises from the recent passage of the Closing Loopholes No. 2 Act, which received Royal Assent last week, and of course will result in a material change to the way in which casual employment is defined in the legislation. If I can try and pick up first on the point that the Deputy President raised with Mr Clarke. It may be the case that if one has regard to the existing definition, prior to any amendments being made, that there are certain inconsistencies or difficulties that arise between the operation of that definition and the way in which certain award terms apply.

PN104

My recollection is that when the existing section 15A of the Act and the casual conversion scheme were introduced in the NES, the Commission conducted major proceedings, in which it took into account at the very least those two provisions in awards, so casual conversion provisions and casual definitions. And there was a considerable amount of work that was done in assessing whether they work in parallel or not, and some consideration was also given to other parts of awards. It may be that there are some residual issues. But in the context of these proceedings, we will take that one step forward and say that, indeed, now, any consideration given in relation to casual employment in these proceedings should be done bearing in mind the significant change that will shortly be made to the definition of casual employment in the Act.

PN105

Those changes are due to commence operation from 26 August 2024. It's clear from the explanatory material that was published with the bill that was Parliament's intent that that new definition would serve to improve job security. At this early stage, it is difficult to assess what the precise effect of those changes will be in a practical sense. To some extent, they're like to be complex, and it's difficult to – we've started consulting with members about what they foresee will likely be the potential ramifications, but I think businesses are at an early stage of assessing how they are likely to respond to those changes.

PN106

And in that context, we say – and we've set this out in our written submissions too – that it would be inappropriate for the Commission to make, in these proceedings, any changes, or indeed any recommendations to the safety net in respect of casual employment, including any of those that have been advanced by the unions. In particular, we say that the extent and nature of any purported problem that is identified by the unions in respect of casual employment will likely change once that new definition is in place, given that it appears intended to constrain access to and the availability of casual employment. And so it would be premature to make any fundamental variations to awards in that respect at this stage.

PN107

Indeed, we say that what may fall from the narrowing of this definition is that, firstly, as I foreshadowed, it might remove, entirely or in part, the purported need or support for the variations that have been proposed by the unions in this proceeding. And indeed, it might necessitate a need for a reconsideration of the regulation of part-time employment in awards. And the reason we say that is this, the existing part-time employment framework that is found in modern awards was developed at a time when the definition of casual employment, in the award system at the very least, was very different. It applied plainly on the designation of an employer. So if an employer engaged and paid as a casual employee, generally, under most awards, that employee was a casual employee. Casual employment was therefore far more readily available than it will be once the new definition commences operation.

PN108

And so in light of that significant change in the regulatory environment, in which the same part-time provisions are continuing to operate, it might in fact be necessary to consider whether it is appropriate that they continue to apply in the same way. We haven't at this stage proffered a specific solution to what that might look like, and that is again for the reasons I've said earlier. That, too, is difficult to do at this stage, in circumstances where industry is still assessing how it might respond to the changed casual employment definition. And it's also of course conceivable that the need for any such reconsideration might be greater in certain industries or sectors, or in respect of certain occupations, or, at the very least, might be more pressing in some more than others. And that's an assessment that is yet to be made.

PN109

I think the other point we would make in respect of part-time employment is that it would appear that the new casual employment definition will potentially create

a gap, that is, that there will be at least some employees who are presently able to be employed as casual employees, who won't meet the new definition of casual employment, and likely would not meet the definition of part-time employment in a number of awards either, because generally, those award provisions contemplate that part-time employees have regular, fixed, agreed patterns of work. And so to the extent that, in practice, that also transpires, and it becomes clear that that is the case, that might, too, give rise to a need to reassess the part-time employment definitions in certain awards.

PN110

COMMISSIONER TRAN: Ms Bhatt, can you provide me with an example of this?

PN111

MS BHATT: I can try to. I've got to endeavour to keep this straight in my head. So under the existing definition of casual employment, as it applies under section 15A in the Act, if an offer is made to an employee on the basis that the employer has not made a firm advance commitment – so there's three elements to this, as we all know – a firm advance commitment to continuing and indefinite work according to an agreed pattern of work, then the employee can be employed as a casual. Under the new definition, the last element that I just mentioned does not appear. So irrespective of whether or not there is an agreed pattern of work, if an employer has not made a firm advance commitment to continuing and indefinite work, then the employee can be employed as a casual.

PN112

So if you might say to an employee, 'I'm offering you employment on a continuing and indefinite basis for 20 hours a week', but there's no agreed pattern that's in place, that's where, whilst, under one definition, you could be employed as a casual, under the other you couldn't. And part-time employment provisions in awards generally – this is not always the case, because some awards contemplate greater flexibility. But typically, the part-time employment model does not permit an employee to be engaged on that basis either. Now, if one follows this through, and I think Mr Clarke touched on this point, under the new legislative provisions, my understanding is that if an employee is engaged as a casual employee under the current definition, they will be deemed effectively to remain a casual employee under the new definition.

PN113

But where the rubber might hit the road is where an employee exercises their choice, under the new sort of conversion scheme, and notifies their employer that they have a view that they don't meet the new casual employment definition – and I think that there's a period of time that has to pass before they become eligible to exercise that choice – there are limited grounds upon which an employer would be able to refuse to convert the employee's employment to full-time or part-time. And I think one of the bases upon which an employer can do so is if it would be necessary to make substantial changes to the employee's terms and conditions, in order to ensure that an employer does not contravene a term of a Fair Work instrument, for example, the manner in which an employer is permitted to engage part-time employees.

PN114

Where does all of this leave us? It might be that in those circumstances, an employer can lawfully, properly say that that employee's employment cannot be converted to part-time employment. But surely, that's an outcome that's not consistent with improving access to secure work. To some extent, these arguments presently are being made in the abstract, as I say, because the definition hasn't commenced operation. And it remains to be seen what the practical operation of all of this is, particularly in certain sectors. I'm not sure if I've done a very good job of explaining what we see as being the potential gap, but conceivably, we think that's how it might arise.

PN115

DEPUTY PRESIDENT GOSTENCNIK: But in substance, you suggest that any consideration effectively of these matters the subject of the two questions will be delayed until commencement of the new definition, because that will inform, amongst other things, how awards might need to be varied, just to deal with the categories of employment, much less anything else, and then the rest follows from that.

PN116

MS BHATT: Yes, Deputy President. If we take the ACTU's submission about increasing the casual loading, just by way of example – I'm paraphrasing, but in effect what the ACTU appears to say is that the Commission should not adopt a standardised approach to reviewing and potentially increasing the casual loading in awards. It should instead take into account the specific experience of being engaged as a casual employee in a particular sector. But of course, that might change once the definition of casual employment changes, and that's precisely why we say at this stage nothing should be done.

PN117

DEPUTY PRESIDENT GOSTENCNIK: Yes. I understand. Thank you.

PN118

MS BHATT: Thank you. Unless there are any questions, those were the only submissions I intended to make today.

PN119

COMMISSIONER TRAN: Thank you, Ms Bhatt. I don't have any further questions.

PN120

MS BHATT: Thank you.

PN121

COMMISSIONER TRAN: Ms Rafter.

PN122

MS RAFTER: Once again, we continue to rely on our written submissions, and just by way of supplementation, wanted to speak to three points; for casual employment, just briefly speak to its legitimacy as a type of employment, and it's a distinct form of employment, and then part-time, very brief. So we say casual

employment is a legitimate recognised category of employment that has benefit for both employees and employers. A feature of casual employment is of course the absence of a firm advance commitment to continuing and indefinite work, such that an employee has no obligation to keep accepting shifts, and equally, and employer has no obligation to keep offering shifts.

PN123

However, to ensure that employees' choice remains informed, we note there are protections in the National Employment Standards and the Act to protect against inappropriate use by employers – by way of example, the Act operates with unfair dismissal protections for a class of casuals, and the GP protections, which were referred to before. Awards also provide various securities concerning work. The first is the minimum engagements. Others include hours spans, overtime, which provides certainties for casual employees. And Deputy President, before, when you were speaking to rostering arrangements under the Fast Food Award, that could also be viewed as another form of security.

PN124

Further, the Act, as Ms Bhatt spoke to, has only just been amended in a very material with respect to casuals. Parliament has established the new definition for 'casual', together with deeming provisions for the pre-existing casuals and a new casual process that is now within the hands of the casual, supported by a cost-effective and efficient way to resolve any conversion disputes. Now, we say the distinction between casual and permanent employment must be retained. The casual loading does play an important part in maintaining this difference. If the question of paid leave and other entitlements were to be considered, it follows that the calculation of casual loading may need to be revisited.

PN125

But what we would like to say in supplementation is, this must necessarily bring about some caution, as many casuals make the conscious choice to forego paid entitlements to access the immediacy of that casual loading. It is for this reason that some casual employees don't readily convert when the offer is made. But if promoting job security and improving access to secure work is the aim, then a better proposition is to revisit the flexibility of part-time employment. And broadly, we say this can occur in one of two ways. In our submissions we refer to the creation of a flexible part-time employment category. Such an arrangement could include an additional margin or loading to compensate for increased flexibility, to roster workers according to operational requirements.

PN126

But what this would do is avoid creating uncertainty and muddying the waters between casual employment and part-time employment. Additionally, turning to the second possible way, is, to the extent possible, revisit the flexibility of the existing part-time provisions. However, as set out in our submissions, the Commission has already given detailed consideration to the current format of the part-time provisions, including requirements such as written agreements, specifying the number of hours to be worked, and also the need for the work to be characterised by reasonable predictable hours. But just to end, as to the varying proposals made by the ACTU, as consideration is given, it is just imperative that an appropriate balance is ultimately struck to provide a fair and relevant minimum

safety net for both employees and employers. And those were the submissions we wanted to advance on those points.

PN127

COMMISSIONER TRAN: Yes. Thank you, Ms Rafter. Before you sit down, what are the flexibilities that you're considering for part-time employment that are the alterations that you're saying is necessary to be retained, so you've got this distinction between casual employment and part-time employment?

PN128

MS RAFTER: I will confess, we haven't put on a proposal or developed one in this respect, but I could furnish a note after these proceedings to identify some points. But we haven't developed a proposal. We're just more or less flagging that these are the things we'd need to revisit if we were going to play with the hours, for example. We have to just be careful that we don't fall foul of current provisions, but it's something that is not developed yet. We more just flag it as an idea that we would need to further consider.

PN129

COMMISSIONER TRAN: All right.

PN130

DEPUTY PRESIDENT GOSTENCNIK: I'm just wondering whether any of that might be necessary. For example, if what you have in mind in relation to part-time employees is sometimes replicated in some enterprise agreements that provide for a certain category of part-time employees to receive additional loading – for example, of about 10 per cent, usually – which then allows them to have more flexible hours of work, as opposed to those that are agreed to, and changes to those hours can more rapidly occur. I'm just wondering why those sorts of arrangements wouldn't be possible under the individual flexibility arrangements which currently exist in an award, as an employer and a part-time employee could agree that the employer pay an extra 10 per cent, and the strictures attached to their predictable hours and so forth could be removed.

PN131

MS RAFTER: I would say it does seem to appear that that could also be approached via the IFAs in the awards. But mainly, our primary point in this is we don't think we should be muddying the waters, to use that awful phrase, regarding casual employment. We don't want to ruin the distinction between casual and part-time. But using the mechanism in the award via the IFAs is another way of potentially getting to that new category, we say, without creating the new category.

PN132

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN133

MR KAKOGIANNIS: I'm speaking for the Retail and Fast Food Workers Union. I think I should have jumped up earlier to speak, but I'm a little bit unfamiliar with the processes. We just wanted to put that we want to speak to our

submissions on questions 4 and 5, but Mr Cullinan will do that at the meeting next week in Melbourne.

PN134

COMMISSIONER TRAN: All right. Thank you. I'll make a note of that. Mr Morrish.

PN135

MR MORRISH: Thank you, Commissioner. I'm sorry about raising my hand earlier. I think that might have been an accident. I'll be attending the consultation next week in person, and was hoping to speak to questions 4 and 5 then if that was possible.

PN136

COMMISSIONER TRAN: Yes. That will be possible.

PN137

MR MORRISH: Thank you.

PN138

COMMISSIONER TRAN: Ms Pugsley, did you wish to speak to your submissions today? Mr Miller.

PN139

MR MILLER: Thank you, Commissioner. I need to advise the Commission that Australian Higher Education Industrial Association seeks to rely on the submissions that we've made to date, and has nothing further at this time.

PN140

COMMISSIONER TRAN: Yes. Thank you, Mr Miller.

PN141

MR MILLER: Thank you very much.

PN142

COMMISSIONER TRAN: Mrs Wolens, would you like to speak to your submissions?

PN143

MS WOLENS: Yes. Good morning. The AMIC is relying on its written submissions, but certainly this morning I do tend to agree that we do need to be careful with where we are travelling, from the perspective of muddying the waters, as the expression that's been used, in creating that difference between and casual and part-time employment. A lot of the complexities that we're seeing is because we are trying to increase, and almost merge the two together. And that is why I feel it's difficult to get that definition correct. We've had definitions for years and years, and now, by some of the changes and the things we're asking, we're tending to draw the two together more closely, and it is becoming harder to differentiate between the two. So we rely on our submissions that we've already put in place, but basically saying that we just need to be mindful where we are going. We've got changes coming in August. It may be a little bit remiss to go

too early with changes, but we should keep and practise – the whole purpose of having the differentiation is that there is an ability to differentiate between the different types of employment that we can securely engage under each provision that is available.

PN144

COMMISSIONER TRAN: Yes. Thank you, Mrs Wolens. Have I missed anyone on Teams who wishes to speak to their submissions? I will take that as a no. Have I missed anyone in the room? Thank you. Ms Butters, from the Australian Hotels Association, had indicated she wished to attend, but will be late today. So we will take an early lunch break. We'll reconvene at 1 o'clock. Thank you.

LUNCHEON ADJOURNMENT **[11.28 AM]**

RESUMED **[1.00 PM]**

PN145

COMMISSIONER TRAN: Thank you. Yes, Ms Rafter.

PN146

MS RAFTER: Commissioner Tran, having had some further time over the luncheon break to consider your questions, I was hoping to briefly return to them and give a more direct answer, if I may. So in the context of part-time provisions that currently operate, we'd say they're quite rigid. Now, under the new flexibility category that we were speaking to, we envision the following would occur: (1) there would be an option for flex-up hours and flex-down hours, (2) this arrangement may still be subject to some constraints, such as notice periods or an envelope, which operates in some awards now. And allowing for this flexibility, we say some modest allowance may be considered, which would take the form of the loading.

PN147

And the end result would be, you would have fixed-time, par-time arrangement, and then what we'd call this flexible part-time arrangement. And then, having set out that proposal, having further considered the comments made by the Deputy President in relation to the IFAs, whilst we accept that an IFA is a route that could be taken, upon further consideration we say it would not achieve the necessary flexibility that could be achieved via a separate category. By that we mean there'd be some immediate practical problems.

PN148

For example, a new agreement may need to be entered in each time an adjustment is sought, and that could be weekly. Also, the requirement under the IFA would need to be put in writing, and so that's quite some onerous – not the flexibility we're seeking there. And a simpler alternative, we say, would be that flexible part-time category. And if it would be of assistance to the Commission, we could file this proposal before the next consultation session.

PN149

COMMISSIONER TRAN: Yes. Thank you. That would be of assistance. We will continue at the next consultation on this subject area. So do file that proposal, and we'll see if you may wish to speak to it again, or we may have questions on it. But thank you for that.

PN150

MS RAFTER: Thank you, Commissioner.

PN151

COMMISSIONER TRAN: Ms Butters.

PN152

MS BUTTERS: Thank you, Commissioner. Sorry, one second. I hope you can hear me all right.

PN153

COMMISSIONER TRAN: Yes, we can.

PN154

MS BUTTERS: So the crux of the AHA's submission with regards to casual employment and part-time employment is also to reiterate the importance of those flexible part-time employment provisions. We note the object of improving access to secure work can assist with many of our casual workers who have previously avoided casual conversion, for the reason where they feel that they are restricted then to move to a part-time arrangement that requires them to have the exact same set hours and set days per week, where a level of flexibility that has been afforded by those flexible part-time provisions have balanced both the employer's needs and the needs of the casual worker.

PN155

We say those should be continued across awards. We don't think there is any prejudice in doing so if there is a part-time employee who does wish to restrict their hours to the same days and same hours per week. Setting their agreed availability in such a manner to allow that to happen would not be prevented, whereas the flip arrangement of the permanent part-time employee, who requires those flexibilities, having those flexible part-time provisions allows them to do so. It also allows them to accept offers of further work within their availability, which increases their earning capacity on the weeks when they're available. So that would be the crux of our suggestion with respect to the flexible part-time – thank you.

PN156

COMMISSIONER TRAN: Thank you. Is that all you wish to say in speaking to your submissions, Ms Butters?

PN157

MS BUTTERS: I suppose the only other thing – sorry, Commissioner – I should add is that the AHA doesn't see the need to increase casual loading or to provide casual employees with access to NES entitlements that's not already compensated by that 25 per cent casual loading. Thank you.

PN158

COMMISSIONER TRAN: Yes. Thank you. Mr Clarke, would you like to reply in relation to questions 4 and 5? I do note we will be moving on to it and allowing ACCI the opportunity to make their submissions in person when we reconvene in Melbourne, but you're welcome and invited to do a reply now, in terms of what you've heard today.

PN159

MR CLARKE: It's probably more helpful if I wait until we've heard everything that the employers have got to say, and deal with it all at one time.

PN160

COMMISSIONER TRAN: All right. Thank you.

PN161

MR CLARKE: Thanks.

PN162

COMMISSIONER TRAN: Is there anyone else in the room who wishes to speak further to their submissions? Anyone on Teams who may have been missed who wishes to speak further to their submissions? Well, once again, we've been very efficient, in terms of hearing everyone's oral submissions in relation to this. We will continue on 14 March in Melbourne, with access via Teams facilitated, to continue with questions 4 and 5. And we'll move on to questions 1, 2 and 3, and then we'll discuss the arrangements following that. Thank you all.

ADJOURNED UNTIL THURSDAY, 14 MARCH 2024 [1.11 PM]