TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/21

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

Modern Awards Review 2023–24
(AM2023/21)

Making awards easier to use stream – Consultation 1 – Common issues

Sydney

10.20 AM, FRIDAY, 8 MARCH 2024

Continued from 04/03/2024

PN1

JUSTICE HATCHER: All right, I will take the appearances, starting for those in person, and I will just go in order of the Bar table. Ms van Gent, you appear for the United Workers' Union?

PN2

MS A VAN GENT: Yes, your Honour.

PN3

JUSTICE HATCHER: Mr Kemppi, you appear for the ACTU?

PN4

MR S KEMPPI: Yes, your Honour.

PN5

JUSTICE HATCHER: Ms Bhatt, you appear with Ms Beasley for the Australian Industry Group?

PN6

MS R BHATT: Yes, your Honour.

PN7

JUSTICE HATCHER: Mr Izzo, you appear with Ms Rafter for Australian Business Industrial?

PN8

MR L IZZO: Yes, your Honour.

PN9

JUSTICE HATCHER: Mr Wilding and Mr Tindley, you appear for the Australian Retailers Association, and Ms Carroll, you appear for the National Retailers Association?

PN10

MS L CARROLL: Yes, thank you, your Honour.

PN11

JUSTICE HATCHER: All right. Online we have Mr Rabaut for the Australian Services Union?

PN12

MR C RABAUT: Yes, your Honour.

PN13

JUSTICE HATCHER: Ms Burnley for the SDA?

PN14

MS S BURNLEY: Yes, your Honour.

PN15

JUSTICE HATCHER: Mr Cullinan for Retail and Fast-Food Workers Union Incorporated?

PN16

MR J CULLINAN: Yes, your Honour.

PN17

JUSTICE HATCHER: Ms Windsor and Ms McKennariey for the Australian Workforce Compliance Council?

PN18

MS J MCKENNARIEY: Yes, your Honour.

PN19

JUSTICE HATCHER: Ms Tinsley and Mr Morrish for the Australian Chamber of Commerce and Industry?

PN20

MS J TINSLEY: Yes, your Honour.

PN21

MR J MORRISH: Yes, your Honour.

PN22

JUSTICE HATCHER: Ms Butters for the Australian Hotels Association?

PN23

MS M BUTTERS: Yes, your Honour.

PN24

JUSTICE HATCHER: Mr Milligan for the Health Services Union?

PN25

MR J MILLIGAN: Yes, your Honour.

PN26

JUSTICE HATCHER: And is it Ms Thomson for Young Workers Centre?

PN27

MS K THOMAS: Thank you, your Honour, it's Ms Thomas.

PN28

JUSTICE HATCHER: Yes, all right. Ms Thomas, you have leave to depart the proceedings when you need to go and come back when you can.

PN29

MS THOMAS: Thank you, your Honour.

PN30

JUSTICE HATCHER: Before we start off today, I just want to emphasise that the purpose of today is not a hearing as such. The process of the review will not, by itself, lead to award variations, so parties should not be concerned that they won't

get another opportunity to be heard if, at some later stage post the review, things move to the award variation stage. If that happens, then obviously all parties will be given a full opportunity to be heard.

PN31

The purpose of today is simply for me to gain a better understanding of the various proposals and responses thereto, to understand the problems that we are trying to solve, and to identify any areas of consensus, whether in relation to a specific proposal or in relation to perhaps a proposal that might be modified in some way.

PN32

The course I propose to take is to go through the document, which was posted on our website, which sets out each issue and a summary of the parties' submissions in reply and their general attitude, so what I will do is I will go through each proposal, I'll ask the moving party to speak briefly about it, and then I will invite anyone to say anything they want to say in response to it, but I might jump ahead in some cases where we've got proposals with common subject matter.

PN33

Mr Izzo, starting with you, the first one in the list is concerning the working of continuous hours in the Clerks Award and the Children's Award, so what do you want to say about that? Mr Izzo, I am going to ask the party speaking to stand so it's easier for those attending remotely to identify who is speaking.

PN34

MR IZZO: Your Honour, I believe just in terms of procedure, my understanding is Ms Tinsley was going to ask, given her location, if she could deal with the ACCI proposals first, if that was convenient to the Commission. I'm not sure if that's still her request, but I thought I might defer to see if that is still the request that they were going to make before I jump in.

PN35

JUSTICE HATCHER: All right. Is that what you want to do, Ms Tinsley?

PN36

MS TINSLEY: Your Honour, I was originally going to propose that, but looking at the order, and only because it's just past midnight where I'm dialling in from, but noting that our proposals come straight after ABI's, while I appreciate Mr Izzo's offer, I was just going to proceed as you suggested, noting that we're second up anyway.

PN37

JUSTICE HATCHER: All right. Thank you. Mr Izzo.

PN38

MR IZZO: Thank you, your Honour. Can I ask your Honour - we obviously have a number of proposals - do you want me to just address the first one first?

PN39

JUSTICE HATCHER: Yes.

PN40

MR IZZO: The first proposal, your Honour, relates to working hours continuously. In a number of awards, there is an obligation to work ordinary hours, I should say, continuously, and in the sample that we are looking at as part of these proceedings, there are two awards of particular interest to ABI, and that is the Clerks Award and the Children's Services Award. Both awards do not permit ordinary hours to be broken up into separate periods in the same day.

PN41

Whilst we understand the rationale for that, which relates to employees not being inconvenienced by having big gaps in their day, since the advent of the pandemic and what has become a much more prevalent arrangement of people seeking flexible work and working from home, we think there are many circumstances where both the employees and employers may wish to break up the day, whether it's to return home for personal or caring responsibilities, and to then return to their normal working hours having had a period off for some time. That is not currently permissible under these two awards in their ordinary hours, and so we are seeking to facilitate that.

PN42

It's where it's basically agreed between the parties. It cannot be done by compulsion by the employer, it is something the employee would seek, and a classic example, for instance take the Clerks Award, is an employee works a 9 to 5 day, but they have to pick up a child after school on a particular occasion, their care might have fallen through, they would like to return home early, collect the child, take an hour or an hour and a-half off to do those things, and then return to work.

PN43

Now there is a correlation here to spread of ordinary hours as well. We haven't sought to expand the spread, although I think there are other claims to do so, but those two concepts feed into each other, and we would only seek to do this by agreement, and it would be primarily to allow more flexible arrangements for when employees wish to work, and so we don't say it reduces entitlements, it's about facilitating flexible work, and that's the essence of the proposal.

PN44

I might just add, in anticipation of a submission against us on the Children's Services Award, for the majority of that award, this type of mechanism might not be that helpful because a lot of the care workers must be at the facility, but there are some classifications, particularly the centre director and some support classifications, where this might still have a utility. We did consult with Australian Childcare Alliance and it's something they are supportive of in relation to that. So it's not irrelevant to that award. Our understanding is it still has some utility in that award as well.

PN45

JUSTICE HATCHER: It seems to me that where it might have serious utility is an area of working from home.

PN46

MR IZZO: Yes, your Honour, in particular.

PN47

JUSTICE HATCHER: That is, somebody - this might be more, say, for the Clerks Award - somebody who wants to work at home presumably does so because it gives them the flexibility to do other things during the day, and employers, absent some sort of provision allowing flexibility, might be concerned that they end up with some sort of liability or contravention if that happens, but, anyway, who wants to respond to that? Ms Bhatt.

PN48

MS BHATT: Your Honour, can I just make some remarks in support of what's been put by Mr Izzo. Picking up on the observations that your Honour has just made in relation to working from home, I thought it appropriate that I identify that in respect of the Clerks Award and the General Retail Award in these proceedings, we have advanced a proposal that is similar to what Mr Izzo has described, but it would apply only where an employee is working from home and where it's agreed between the employer and the employee.

PN49

I don't think those matters are scheduled to be dealt with today, but given that they are of a similar nature, I thought it appropriate that I flag that now.

PN50

JUSTICE HATCHER: Yes, all right.

PN51

MS VAN GENT: Your Honour, with respect to the Children's Services Award, as we indicated in our written submission, we are not supportive of this proposal. We understand the rationale for the proposal was, and it's been confirmed today, that it is to support people who are seeking to work from home. As Mr Izzo has alluded to, that doesn't apply to the majority of people who are working in the early childhood education and care sector. They are required to work in a centre supervising children. They don't have the facility to work from home in the overwhelming majority of cases.

PN52

We would be extremely concerned that if a proposal such as this came into effect, it would effectively open the doorway for split shift arrangements. It would undermine the protection that exists in the award against exactly the issue that's been alluded to, which is the issue of employees being required to travel to and from their workplace for short periods of time at work, and so on that basis, we say it's a reduction in entitlements and therefore not something that we can be supportive of.

PN53

JUSTICE HATCHER: Thank you. Mr Rabaut do you want to say anything about it in respect of the Clerks Award?

PN54

MR RABAUT: Thank you, your Honour. Certainly the ASU also opposes the proposition put forward by the employers on this particular occasion. Our concerns also stem to the occasion that it does also permit split shifts and, for that reason, we also have those concerns.

PN55

JUSTICE HATCHER: How does the ASU see these sort of issues operating for someone working from home?

PN56

MR RABAUT: Our particular concern might be, or in this particular instance it might be, your Honour, that an IFA might be the appropriate mechanism for an employer and an employee to enter into.

PN57

JUSTICE HATCHER: But does the clause in the Clerks Award permit that to occur?

PN58

MR RABAUT: I will just need to double check, your Honour, the particular provision in the Clerks Award, yes.

PN59

JUSTICE HATCHER: I will have a look as well.

PN60

MR KEMPPI: Your Honour, if I can assist on this point - Sunil Kemppi from the ACTU - I note that the clause in the Clerks Award does appear to make provisions - the IFA clause does appear to make provisions for changes to when work is performed, overtime rates, penalty rates, allowances and annual leave loading, and the annual leave loading is not particularly relevant, but I would have thought some sort of - if there were the genuine type of an agreement between an individual that suits the individual's needs, on a very quick view, it would appear that the IFA clause possibly could have some work to do there, whereas this proposal, in addition to catering to the genuine needs of an individual employee, could also have some quite significant ramifications for, at large, how work is performed or how work is structured and organised, and it's that that we're quite guarded against, the sort of possibility Ms van Gent alludes to of wholesale split shifts, et cetera, that don't necessarily support the individual's needs. So we would question what cannot be done in terms of individuals through an IFA.

PN61

JUSTICE HATCHER: All right. I think, in relation to some of the other proposals, there has been some concern expressed as to how that sort of arrangement, perhaps and some other benefit, would satisfy the better off overall requirement for IFAs, that is, if the only thing in the IFA was the employee requests and agrees to work some sort of non-continuous hours, absent anything else, would that satisfy the statutory better off overall test requirement?

PN62

MR KEMPPI: I'd have to give that some further consideration. I wouldn't want to necessarily answer on my feet. It could be that the benefit of being able to work the particular hours could meet that, but I do take your point. I would need to give that some further thought.

PN63

JUSTICE HATCHER: Does the ACTU have a view about - and this might overlap with the work and care aspect of the review - about whether there would be any benefit in having, perhaps, a specific working from home clause in the Clerks Award which would facilitate employees working from home and all the flexibility that involves without exposing employers to some sort of liability for contravention?

PN64

MR KEMPPI: Without wanting to be unhelpful, it is a different colleague of mine that is taking that stream on. I will do my best to seek some instructions to see if I can come back with some sort of answer on that.

PN65

JUSTICE HATCHER: All right. Mr Izzo.

PN66

MR IZZO: Your Honour, thank you. If I could, I think, just make a contribution about some of those questions. I think there is an issue that will repeat itself today in relation to IFAs and that is about the better off overall test. I think there is a very real tension here. Where there is a single variation to the award and, say, the spread of hours is extended, or you introduce a split shift, or whatever it is, often it may be the case that there is an employee preference to do this, but there is a very live question as to whether the fact that the employee prefers it is, in and of itself, enough to satisfy a court that the arrangement is better off overall than what the employee would receive had they been covered by the original award provision.

PN67

What we are effectively being asked, as employer representatives here, is for the employer to take that risk, so the employer has to take that risk and assume, 'No, I can back this arrangement', and we get requests for advice from employers all the time about this. The employee wants to do this, 'Can we do this?' 'Well, it's very difficult; all we have is their preference, but otherwise a penalty would apply, or otherwise so and so will be the case.' And so the difficulty under the current arrangement is that it is on the employer to take the risk and be subject to possible prosecution and civil penalties.

PN68

So absent some certainty coming from the award provisions themselves, or some court, to give employers the confidence that preference alone is sufficient, then we think something more is needed, and that's why these type of proposals are advanced.

PN69

The reason I raise it up front is it's not just about this proposal, it's going to be a repeating theme, and so that's why I just wanted to address that up front.

PN70

JUSTICE HATCHER: But it seems to me that, at least so far as working from home is concerned, if the deal is the employee has a right to work from home on, say, two or three days a week on the basis of hours of work non-continuously, then I would have thought that would satisfy a better off overall test from the employee point of view because the employee wants to have a right to work from home which they might not otherwise have.

PN71

MR IZZO: It might. We also see this working on an ad hoc basis, that is, an employee situation might arise on a particular day, and so it might not be part of some codified working from home right they have exercised, it could be ad hoc as well, and that's why we seek to have a provision that gives effect to that, whereas you're not going to do an IFA for an ad hoc arrangement that comes up out of the blue. So I think we need to be conscious of that as well, but, yes, if there's a working from home request agreed and, as part of that, there's a split shift, then that could help, but I think it's not the only scenario.

PN72

JUSTICE HATCHER: All right. We will move on to the next one. So that's yours, Mr Izzo, the part-time working hours provisions in the Children's Award, the Clerks Award and the SCHADS Award.

PN73

MR IZZO: In these three awards, your Honour, the awards require, as you would be well aware, part-time employees to have an agreed pattern of work set on the formation of the relationship. That is very common to the award safety net. There is also a mechanism in each of these three awards to vary that agreed pattern of work. What we are proposing, we say, is entirely consistent with what's currently in the awards.

PN74

If I can take you to the Clerks Award, perhaps as an example, clause 10 deals with part-time employees. Clause 10.2 is the clause that sets a requirement for certain things to be agreed at the time of engagement, and then clause 10.3 enables the parties to change the pattern of work or the hours of work that have been agreed by an agreement in writing.

PN75

What we are seeking to do is to work within the bounds of clause 10.3, but make it clear that this can be done on a temporary or ongoing basis. We have retained the requirement for the variation to be in writing, but what we're trying to make it clear is that you might change the pattern of work due to an imminent need that arises in a particular week. As long as the employee agrees, that is permitted by this award. We are just calling it out.

PN76

The reason this has come up is because our experience is that the way these provisions work aren't necessarily well understood, and in our submission, which I won't take you to, we conducted - and we refer to these materials in our submission - we conducted a lot of research in the retail industry, and during the proceedings that were commenced to simplify awards as part of the pandemic response, Ross J found - and we have got the reference to the case in our submissions - that it appeared that employers didn't quite know how they could change the award arrangements. Could they, on a shift, ask someone to vary their shift for the next day, their pattern in advance? The judgment by the Full Bench, headed by Ross J, found that that was available under the part-time provisions of the Retail Award, but it wasn't well understood, and so what the Full Bench did was they introduced a provision very similar to the one we are now seeking to introduce.

PN77

The short summary is that we are not seeking to change the obligations or entitlements, so there is no reduction, we are seeking to better express it. If the unions maintain their view that it's a reduction in entitlements, then what you have is clear evidence of confusion because we're saying the award works one way and the unions are apparently saying it works in another way. That, in and of itself, is very much a problem for that provision complying with section 134.

PN78

JUSTICE HATCHER: That's the issue of whether it can be a variation that's temporary or variable from week to week?

PN79

MR IZZO: It must be the temporary part.

PN80

JUSTICE HATCHER: You've added additional provisions which are taken from the Retail Award, which go a bit beyond that, I think. For example, on one view, things like notifying somebody before the end of their effective shift, that might have worked in the sort of variable environment of retail, but I'm not quite clear how that would work in, say, children's services.

PN81

MR IZZO: Well, both of those examples, children's services and retail, would suffer from similar pressures in that during the course of a particular day, there may be matters that arise that require additional work to be performed, effectively, and the difficulty with part-time employees is they cannot be offered that extra work and asked to perform it without attracting overtime rates, even if they are willing to do it, unless you vary this pattern in writing by agreement, and so the problem we were grappling with in retail, and these provisions - (indistinct) the retail provisions - is that there's extra work to be performed, there's employees who want to perform it, but the award does not allow that to be done at a single time, effectively.

PN82

What we are saying is that is not a sensible application of the minimum safety net, that both parties want this extra work to be performed, it's less than 38 in a week -

we're not talking about hours above 38, we're talking about part-timers that might have a 50 per cent load of a full-timer - and unless we have some mechanism that they can agree to perform the extra hours on a temporary basis, then there's a disincentive to offering that extra work, and that disincentive is overtime penalties.

PN83

So we do think it has work to do, those extra provisions, as well, and there are - in terms of extra provisions, there's also some text about agreement by electronic means and text messages. That's simply trying to modernise the way agreements are reached these days. People, particularly in these environments, retail and children's services, they're not emailing each other, they're on phones, they're on apps. That's how work is being rostered, and in order to ensure awards that are modern and meet the modern awards objective, we need the agreements in writing to match the way people actually engage.

PN84

JUSTICE HATCHER: This might raise a larger problem, which has puzzled me for some time, and that is that all these major awards have different part-time provisions with sort of inexplicable differences from old industrial sediments and no standardisation of the things you're talking about. Is that something we should look at, that is, whether there should be, allowing for some differences between sectors, an attempt to have a standardised part-time employment clause?

PN85

MR IZZO: I think that proposal needs to be treated with caution for this reason, your Honour. As you would be well aware, the differences and variations obviously have historic reasons behind them. As you know, in the award modernisation process, there was a best common denominator, or best kind of common approach applied in each industry, and so the act of disturbing that for the ease of simplicity does create the problem that we would have to go back and uncover why each of these provisions are different.

PN86

So it's something that could be looked at, but we would be reluctant in encouraging the Bench to do that because we'd be concerned about issues from the past or problems from the past have been dealt with and the safety net being undone by a standardised clause. I think that would be our concern to that approach.

PN87

JUSTICE HATCHER: All right. Do you want to say anything about this, Ms Bhatt?

PN88

MS BHATT: No, thank you, your Honour.

PN89

JUSTICE HATCHER: What about the unions? Ms van Gent.

PN90

MS VAN GENT: Not particularly much to say in relation to this, your Honour. As Mr Izzo has alluded to, we think that there's already provision within the Children's Services Award to make short-term variations to part-time work arrangements. We don't see that there's a particular pressing need for a variation.

PN91

If there's a misunderstanding about the way that those provisions apply amongst employers, we would say that that's a matter that requires, you know, greater education and information and it's not a matter that in itself necessitates a change to the actual award.

PN92

JUSTICE HATCHER: But if there's no dispute that you can have temporary variations, or one off variations, and that the writing for the agreement can be electronic, why wouldn't we simply say that, if there's some doubt about that? I mean this is what this aspect of the review is about, that is, making things easier for people.

PN93

MS VAN GENT: Yes.

PN94

JUSTICE HATCHER: I mean it's one thing to say if there's a substantive dispute, but if there's not, I can't see any reason why we couldn't draft the award to make that clear.

PN95

MS VAN GENT: I think there's a couple of separate issues and, apologies, I should have perhaps expressed myself a little bit more clearly. I think certainly with respect to electronic communications, we think that's sort of sensible and reasonable and we agree that that reflects the way that people communicate now, employers and employees, and so that's something that we're very open to discussing.

PN96

Not so much, though, the variations to the part-time arrangements, because, as I sort of indicated, we think that the current award provisions are sufficient and we would be concerned about any proposal that would again open the possibility of somebody being required to work additional hours in circumstances which currently attract overtime and which, pursuant to this kind of variation, wouldn't.

PN97

JUSTICE HATCHER: I'm just trying to understand. So what do you think the variation would allow that's not currently allowed?

PN98

MS VAN GENT: Perhaps I've misunderstood it, but I think the variation, it sounds as though effectively what it would allow would be for there to be, you know, ad hoc variations to working arrangements that would mean that a person could be working additional hours in circumstances that currently would enable them to access overtime and would result in them not having overtime. So they

would be having a short-term variation to their part-time hours, which means that they would be working additional hours over and above their usual arrangement at ordinary time rates rather than having that paid at overtime, as they would currently be entitled to. That's the concern.

PN99

JUSTICE HATCHER: So you say that's not currently allowed?

PN100

MS VAN GENT: That's my understanding, yes.

PN101

JUSTICE HATCHER: All right. I'm just trying to work out - so what's the dividing line? Does the agreement to vary hours have to be permanent ongoing, or can it be for a restricted period? Where do we draw the line there?

PN102

MS VAN GENT: Yes. I think it would need to be more - because what we want to avoid is a situation - exactly the scenario actually that was being described before - where somebody is attending work for a shift, they are requested to work additional hours. Normally they would get overtime for that and, because there's now a short term hours' variation provision in the award, they are effectively required to work additional hours at an ordinary time rate of pay.

PN103

If it was a variation, you know, a short-term variation that allowed a change over a roster cycle or a short-term period, potentially, but, you know, not the kind of ad hoc arrangements that I think are being foreshadowed by this proposed variation.

PN104

JUSTICE HATCHER: All right. Thank you. Ms Tinsley, did you want to say something about this?

PN105

MS TINSLEY: Thanks, your Honour. I just wanted to note our support of both of the proposals that Mr Izzo has put forward, just noting we haven't gone to the specifics in our reply submissions. I just wanted that noted.

PN106

JUSTICE HATCHER: All right.

PN107

MS TINSLEY: Thank you.

PN108

JUSTICE HATCHER: Ms McKennariey, did you want to say something?

PN109

MS MCKENNARIEY: Yes, thank you. Similarly from the AWCC's perspective, whilst we didn't have that noted within our responses specifically, there are similar concerns about the potential for the abuse by employers in relation to the

overtime payments that may be avoided, and also using a 38-hour working week as a benchmark. So just those considerations.

PN110

Around the electronic record-keeping aspects and the practicality from an operational perspective, with respect to using text messages and like electronic means more casually, that may create some compliance and record-keeping challenges for employers and just being specific around the requirements that are applicable for them to maintain compliance in the event that there is some kind of dispute coming off of the back of one of these arrangements.

PN111

JUSTICE HATCHER: All right. Does anyone else want to say anything about this? All right.

PN112

Mr Izzo, the next one is concerning classifying employees. What problem is this trying to solve?

PN113

MR IZZO: The problem, your Honour, is in relation primarily to qualifications held or experience held by employees that is not necessarily required or relevant to the job that they perform. The way that that presents is if an employee has certain expertise and qualification, but it's just simply not necessary for the role, we say the proper task of construing the purpose of the engagement and where they should be classified is that they should be classified by reference to what's required to perform the role, the experience required to perform the role, the skills and the level of independence they have in exercising the work required, as you would be aware, in most classifications.

PN114

The difficulty arises - and we have attached a decision that effectively demonstrates this problem - is that someone is effectively over-qualified for a particularly role, and it may be they automatically jump up even though the employer had no desire to engage someone at a particular higher grade, nor any need.

PN115

The example that we filed is a case called *United Voice v Pet Porpoise Pool*. You don't need to go to the decision now, your Honour, but what effectively happened there is that the Pet Porpoise Pool is covered by the Amusements Events Award. That particular award had a variety of grades for animal attendants. What was required in the role appeared to require a grade 4 or grade 5 classification, but the employee who was engaged had marine biology degree, and automatically the possession of the degree resulted in her claiming a grade 8 classification because of the possession of the degree. She was working with dolphins, so it had some relevance, but it was simply not required in her role.

PN116

The magistrate found that it was irrelevant what was required by the employer to perform the role. At paragraph 27, the magistrate said:

PN117

The employer knew that she had a degree of Bachelor of Environmental Science, knew what the award said and decided to employ her, rather than terminating her employment.

PN118

So effectively it's the employer's problem, and the magistrate found that there was a grade 8 classification attaching to her and the underpayment claim succeeded.

PN119

Now we may cavil with the correctness of that decision, but it demonstrates that if this type of issue is not made clear, we have a great level of confusion about how classifications are intended to operate, because we have a magistrate of a Local Court thinking that a mere qualification, with nothing else, can immediately bump you up several rungs in an award classification stream.

PN120

What we are proposing is a provision that already exists in the Clerks Award, and that provision simply makes it clear that in the act of classifying, one is to have regard to the characteristics the employee is required to have, the skills the employee is required to have and to exercise in order to carry out the principal functions of the employment. So it's about what's required in the role, not what might be otherwise desirable or otherwise someone might have, but is not necessary or relevant to that role.

PN121

JUSTICE HATCHER: But isn't that provision more a function of the way in which that classification structure is designed? I mean if you compare it to, say, the Hospitality Award, the Hospitality Award is very specific about who fits in each classification, isn't it?

PN122

MR IZZO: The Hospitality Award and Restaurant Awards - if you just bear with me one moment - are more specific, certainly. They have very specific tasks identified. I'm just seeing if they have any expertise or qualification requirement. They might not.

PN123

JUSTICE HATCHER: At a certain point, they start talking about trade qualifications and the like.

PN124

MR IZZO: The problem that we are trying to resolve is where expertise or qualifications start to form part of a classification exercise. So to the extent that the early grades of Hospitality and Restaurant don't involve considerations about expertise or qualification, the clause we are proposing might not have work to do, but I think it would later on.

PN125

For instance, food and beverage attendant grade 4 talks about completing an apprenticeship in waiting, appropriate trade tests, specialised skills in fine dining

room or restaurant, et cetera. So, as you get more senior, there starts to be more of a flavour of looking at someone's experience or their qualifications, and that's the issue we are trying to grapple with.

PN126

To the extent it's not involved in the more junior classifications, well, I think once we introduce the provision, then it's simple just to apply it to the entire award - that's how it works in the Clerks Award - but we're only pressing it where qualification and expertise is an issue to be considered.

PN127

JUSTICE HATCHER: All right. Does anyone want to say anything about this?

PN128

MS MCKENNARIEY: Yes, your Honour.

PN129

JUSTICE HATCHER: Yes, go ahead.

PN130

MS MCKENNARIEY: From AWCC's perspective, one of the complexities that was raised as a systemic issue across all of the modern awards within the scope of this review was with respect to the classifications framework and the alignment to ANZSCO, for example. So whilst we don't necessarily agree with the specific point of change to particular roles and would oppose potential variations in this context, we believe that there is a need for a broader framework review with respect to review of the classifications and the alignment to the other structures, for example ANZSCO. So we think that implementing that - - -

PN131

JUSTICE HATCHER: Sorry, the classifications were never designed to align with ANZSCO, so what benefit does that achieve?

PN132

MS MCKENNARIEY: From an ANZSCO perspective, the broader alignment that we could potentially see is more of that standardisation of classification systems more widely used across Australia and New Zealand for categorising occupations and consistency really overall. So the other frameworks may potentially lack that same level of standardisation and lead to inconsistencies in classification criteria and terminology between industries.

PN133

The specifics around what ANZSCO offers is a more detailed classification of occupations, and it aligns with international standards as well, so it's a very widely accepted definition with broad coverage and scope. So we thing from an alignment perspective, it does avoid further confusion by the employers with respect to defining and classifying employees within the awards.

PN134

For that reason, we would propose that, potentially outside of this particular scope of review, that a further review of the classification frameworks is conducted.

PN135

JUSTICE HATCHER: Now for the next one, Mr Izzo.

PN136

MR KEMPPI: Your Honour, we will be very short on this one. In our view, it's quite difficult to make a broad submission and look at all of the awards and classification structures even within this cohort. There may well be different policy reasons.

PN137

Notwithstanding the point that in the Hospitality, on my reading, even when you get some of the higher classifications, it does appear to be quite clear, for example, with food and bev grade 4, or even at the sort of higher classifications, that's somebody who has completed an apprenticeship and has specialised skilled duty. So even if you've got a glassy who happens to have done an apprenticeship, they're not at that level. Likewise food and bev supervisor, they need the training, but they also need to actually be supervising other people.

PN138

But the rationale - we'd be a bit more hesitant to unpick the Children's Services Award became of the rationale there. I guess in the dolphin trainer case, the employer was nevertheless getting a benefit from the fact that the person was a marine biologist, and the ultimate beneficiary could well have been the dolphins.

PN139

In Children's Services, the classification structure there does appear to recognise the fact that a person with a higher training qualification will, in fact, be doing the job substantively differently, so there's probably a public policy reason there to perhaps have people with higher classifications, even if they are not working as high in the classification as they might otherwise be.

PN140

JUSTICE HATCHER: All right. Thank you. Next one: excessive annual leave. Why are we going through all this again, Mr Izzo?

PN141

MR IZZO: Your Honour, I acknowledge that there is a level of - - -

PN142

JUSTICE HATCHER: Déjà vu?

PN143

MR IZZO: I was trying to look for the right word, whether it was 'ambition' or a level of 'hesitancy' by some in relation to this matter because we have comprehensively looked at this in 2015, I believe was the year the decision was handed down.

PN144

I think this is a very important issue and I would just like to identify why we think this is worthy of revisitation.

PN145

The easiest way to actually identify it is I actually filed two judgments with your chambers - I'm not sure if you have access to them.

PN146

JUSTICE HATCHER: Yes, I do.

PN147

MR IZZO: If I could take you to the first one, which is [2015] FWCFB 3406.

PN148

JUSTICE HATCHER: Yes.

PN149

MR IZZO: For everyone's benefit, and I take it your Honour is obviously acutely aware, there was a comprehensive consideration of annual leave clauses in awards as part of the 2014 review.

PN150

At paragraph 151, if I could take you to that paragraph, there's a summary of the provisions in awards. To just take things back a step, your Honour, the provision we are seeking to introduce was one that was effectively already in 52 awards pre 2014, so at paragraph 151, there's a summary of the awards and the Full Bench says:

PN151

52 awards provide the employer a right to direct an employee to take leave after eight weeks. A further 17 allow it after six weeks.

PN152

So in total, there were 69 modern awards that had clauses that were very, very similar to what we are proposing. Almost identical. They were all about a paragraph, and what occurred was the employers were trying to apply those award provisions in 79 awards to the other 30 or 40 that didn't have them.

PN153

What happened as part of those proceedings is that the Commission ultimately revised all modern award provisions, and we went from a directing excessive leave clause that was literally one paragraph to one which spans over two and a-half pages now.

PN154

We say obviously there were important concerns that motivated the change in approach, but it has become very lengthy and very complex to issue what was, up to that point, a relatively simple and straightforward process of excessive annual leave directions, and what I would like to engage with is the reason why we ended up here with the clauses we have, and that's really derived from the second judgment.

PN155

The second judgment is FWCFB [2015] 2406, and if I could take you to paragraph - sorry, 3406, at 177, so it's the same judgment. Apologies.

PN156

JUSTICE HATCHER: The same judgment?

PN157

MR IZZO: Yes, the same judgment. The first issue in the same judgment was that the proposal we had, which aligned with 79 awards, did not require an employer to enter into any dialogue with the employee before requiring them to take the annual leave. That seems to be a reasonable concern. That's actually not - that issue is not addressed in our proposal, but it is in ACCI's, so we will be more than comfortable having a simple requirement that there is an obligation to genuinely try and reach agreement before the direction is issued, and that is incorporated in the ACCI proposal currently, in any event, so that concern is addressed if we slightly modify what ABI and BNSW have proposed.

PN158

But the real issue that caused the clause to go from one paragraph to two and a-half pages is identified in the other judgment, and that's [2015] FWCFB 5771, and if I could ask you to go to paragraph 95 - sorry, a bit earlier - paragraph 92. Paragraph 92 of that judgment identifies that section 93(3) of the Act gave the Commission power to include a provision in a modern award to enable an employer to direct the taking of annual leave subject to the direction being reasonable.

PN159

That 'reasonable' concern troubled the Bench because, as we go forward to paragraph 95, the Bench was conscious that there might be certain individual circumstances that need to be taken into account which couldn't be satisfied by some generic direction to take leave, and so the Bench said the better approach, in their view, was to establish a process whereby you try to reach agreement, the employer then gives the direction, and then we have this rather complex arrangement whereby, after a direction has been issued, there is then this right of the employee, that they actually don't even have under the Act ordinarily, to direct the taking of leave at a time of their choosing, notwithstanding that that the employee has accrued an excessive amount of annual leave, so they haven't been taking it, and, in any event, they will always retain a balance of six weeks at the very least.

PN160

We think what has happened, out of a very rational and reasonable concern to ensure that the requirements of section 93(3) were met, we've ended up in a world where what had hitherto been a very simple process for excessive leave directions has become extraordinarily complicated, and what we think is that there must be a better way to deal with this. There must be a better way to deal with the concern around section 93(3) of the Act, because the way the judgment reads is that the Commission wanted the parties to try and reach genuine agreement - the Commission inserted that, there was an additional threshold for shift workers to acknowledge that they had slightly higher accruals - but what really prejudiced the ultimate clause was the desire to comply with 93(3).

PN161

We think, given the Act expressly contemplates annual leave directions being reasonable - there's a note in the Act to that effect - the Act says at 93 that a direction can be issued to take leave in circumstances where it's reasonable, and the Act has a note that says, for example, 'directing to take excessive leave' - given that, given the effort to reach genuine agreement can be codified, and given the residual balance an employee can have, that there are already sufficient safeguards for a much simpler mechanism. We don't think this employee right to direct the taking of leave, which they wouldn't ordinarily have, is one which is consistent with section 134, and it effectively goes too far to address the concern the Commission had by 93(3). That's the bit we want looked at and revisited.

PN162

JUSTICE HATCHER: All right. Thank you. Ms Tinsley, is it convenient for you to talk about ACCI's proposal in this space at the same time?

PN163

MS TINSLEY: Yes, your Honour, I was just about to propose that myself, so thank you.

PN164

As Mr Izzo has suggested as well, I think our proposals are essentially the same, so, without putting words in Mr Izzo' mouth, I think he has just stated that he is comfortable with our proposal to include that requirement that the employer has genuinely tried to reach an agreement with the employee, which we think is a key difference, as Mr Izzo has already said, between the proposal that employer groups are putting forward in 2015.

PN165

I know, reading union reply submissions, there was concern that we are, as you have said, already revisiting something that has already been dealt with. In terms of the proposal that ACCI put forward in 2015, I think it's worth noting here that we were only proposing at the time - well before my time - that the accrual would have been for six weeks of annual leave, the employer gives the employee four weeks' notice, and the employee would retain four weeks.

PN166

What we are proposing to do here is address some of the concerns that the Bench raised in that decision, including by retaining the genuine agreement requirement, increasing the accrual to eight weeks, giving eight weeks' notice, and allowing the employee to retain six weeks of accrued annual leave, and making that differentiation with shift workers, which puts us consistent as well with some of the other additional comments that (Indistinct) put forward in their proposals.

PN167

So I think the employer groups, separate to Ai Group, and Ms Bhatt might make a submission on this herself, but the other employer groups that have put forward submissions on this point seem to be aligned, but I might just leave it there and just repeat the points that Mr Izzo has raised.

PN168

JUSTICE HATCHER: All right. Do you want to say anything, Ms Bhatt?

PN169

MS BHATT: I can't take it further than what we have already put in writing.

PN170

JUSTICE HATCHER: All right. Mr Kemppi.

PN171

MR KEMPPI: No, I think Mr Rabaut would like to go first on ASU.

PN172

JUSTICE HATCHER: Yes, all right. Go ahead Mr Rabaut.

PN173

MR RABAUT: We say on this particular matter, it actually diminishes an employee's entitlement on four particular points. It removes the employee's right to give notice in taking the excess leave; it removes the protection from the employee not to be directed to take the leave which is of less than one week; it also removes an employee protection against an employer from directing leave which is inconsistent with other planned leave and, finally, it also removes an employee protection from the employer directing leave that's in more than 12 months' time.

PN174

In this particular instance, your Honour, we actually say it goes far beyond the ease of use, but rather diminishes employees' entitlements.

PN175

MR IZZO: Your Honour, could I just respond to that? Thank you, Mr Rabaut.

PN176

I think there's certain elements of those concerns that could be dealt with from an ABI and BNSW perspective. As I said earlier, our real concern is this direction is issued after excessive leave has been accrued and then there's a right to respond with an employee's own direction that the leave will be taken at a particular time. That's the mechanism we're trying to remove.

PN177

Concerns about whether it needs to be in a block of one week and concerns about whether a direction could be more than 12 months out, I think they could easily be addressed in a conference in process. I don't see them as the problems that we are trying to deal with. The problem we are trying to deal with is the very long, with respect, quite complicated process of a direction issued and then there's a right of reply with one's own directions.

PN178

I just wanted to make that clear from the outset. We might not be as far apart as it might seem.

PN179

JUSTICE HATCHER: All right. Does anyone else want to say anything? No? All right. Ms Tinsley.

PN180

MS TINSLEY: Just to echo what Mr Izzo has just said.

PN181

JUSTICE HATCHER: Sorry, echoing what? That you can have a discussion?

PN182

MS TINSLEY: In terms of I think there's further discussion that could be had.

PN183

JUSTICE HATCHER: Ms Burnley, did you want to say something?

PN184

MS BURNLEY: Yes, your Honour. So the SDA does oppose the change which was noted for the ACCI. I know that we don't have any of our - we're not recorded anywhere in most of these things, just because of the structure of our submission in response, because we did identify the provisions that we could have some useful discussions on. We would support what the ASU has said today.

PN185

We do think that there is removal of rights of the employees regarding the right to request in regards to the GRIA and the FFIA, and the issue of whether these clauses are long and superfluous as such, we do say that this does give guidance to the employees and the employers as to how to approach these issues, so it shouldn't just be dismissed that they are long and fruitless. There is a reasoning for putting in some descriptions as to what the steps should or shouldn't be taken, so that people can have their issues addressed fairly and appropriately, and the reason for that guidance is given because we do hear the complaints that these awards are complex and people can't understand them, whereas these clauses do step out what should or shouldn't take place when looking at annual leave accruals.

PN186

JUSTICE HATCHER: All right. Mr Izzo and Ms Tinsley, is it the employers' experience that employees are exercising their rights under this clause, that is, is this just a theoretical complexity or are employees actually - I'm just looking at 32(a), for instance, in the Clerks Award. Are they exercising that right?

PN187

MR IZZO: I would need to take that on notice, your Honour. I can't say that I've had specific discussions with members about that query.

PN188

JUSTICE HATCHER: But that's the problem, that's what you've identified as the problem.

PN189

MR IZZO: Yes.

PN190

JUSTICE HATCHER: I'm just trying to work out whether it's just theoretical or whether there's something substantially going on which employers don't want to happen any more.

PN191

MR IZZO: We think it certainly has the propensity to present as a problem. The extent to which it is a problem, I would need to take on notice.

PN192

JUSTICE HATCHER: All right. Next one is yours, Ms Tinsley, and this goes to time off in lieu of overtime clauses.

PN193

MS TINSLEY: Yes, thank you, your Honour. I will be brief. In terms of our proposals for TOIL, we say our proposal reduces the prescriptive nature of the current clause, and in particular removes the mandatory form of the agreement that currently appears in most awards. It also allows an agreement to be reached - sorry, it removes the requirement for a separate agreement to be made each time overtime is worked and TOIL is wished to be taken as an alternative form of the entitlement.

PN194

Importantly, we say that the proposal we are putting forward retains some of the important protections. Critically, we have kept the protection here and, in fact, as Ai Group has noted in their reply submission, actually expanded the protection here as a form of what we see potentially as a compromise, which is this protection against undue influence and pressure. I note that the Full Bench has previously said that the preference there is that there is a (indistinct), a separate agreement that's entered into each time because of the heightened risk of the undue influence or pressure.

PN195

While we don't necessarily agree that employers engage in that sort of behaviour in any sort of widespread manner, the proposal we put forward as part of this review would actually expand it such that it's not simply unlawful and a contravention of the modern award or the agreement that covers a longer period of time to not be entered into because of undue influence or pressure would actually invalidate the agreement as well, so I think that's actually an expansion of employee protection and a form of compromise that deals with some of the issues that the Full Bench has mentioned previously.

PN196

JUSTICE HATCHER: Sorry, Ms Tinsley, can you explain to me what problem we are trying to solve here? The form of agreement is not compulsory. The form of agreement which appears in the schedules is just an example, it's not required, so what are we - - -

PN197

MS TINSLEY: I - sorry, your Honour, I didn't mean to talk over the top of you.

PN198

JUSTICE HATCHER: No, that's all right. I'm just trying to get a better understanding of what we're trying to fix here.

PN199

MS TINSLEY: Essentially two factors. It's in terms of the prescriptive nature of what needs to be included in these agreements, so nothing that, yes, the schedules there, they're not mandatory, but there's a lot of procedural requirements that we say that are unnecessary to describe in the detail of the agreement. Secondly - - -

PN200

JUSTICE HATCHER: So what are they?

PN201

MS TINSLEY: I will just take you to our - - -

PN202

JUSTICE HATCHER: I mean I'm just looking at the clause. It says the agreement must state the number of overtime hours to which it applies and when they were worked. Well, that's just a given as to what you're talking about.

PN203

MS TINSLEY: Mm.

PN204

JUSTICE HATCHER: And you agree that you take time off in lieu, and that if the leave can't be taken, they can get paid later.

PN205

MS TINSLEY: But in terms that there's some prescription in there in terms of requirements, so it currently requires the agreement just state all of the following. There's the number of overtime hours - and remembering the second part of our complaint - well, our issue here is the fact that these agreements need to and this detail needs to be provided each and every time, as opposed to having one simple agreement that the employee can terminate at any time that will cover arrangements that will happen in practice moving forward, so, in reality, if the employee has a preference for TOIL as opposed to getting paid for overtime, they are likely to continue to do that into the future, again noting the protection that they can terminate that.

PN206

In terms of the over-prescription that we point to, I note that the agreement that must be entered into each and every time requires the number of overtime hours to which it applies and when those hours were worked - which again I think that's standard and any sort of existing employee records would include that in any case - that the employer and employee agree that the employee may take time off - which is fine and would be included - that any payment mentioned must be made in the next pay period following the request. There's also some requirements in there that - the fact that it's the next pay would need to be expanded such that to fit the fact that the agreement will be moving forward as opposed to each and every occasion.

PN207

I think the point I'm trying to make here, your Honour, is that the main problem for employers is the requirement to enter into this agreement and provide this detail each and every time, so the thrust of our argument here is that the big benefit for employers would be - and for employees as well - that one simple agreement could be entered into moving forward, which again could be terminated by the employee at any time, and retain - - -

PN208

JUSTICE HATCHER: Ms Tinsley, where's the requirement that it needs to be at every instance? Where do we get that from?

PN209

MS TINSLEY: If you go to page 53 of our submission, it includes a table which has the existing clause and our proposed clause.

PN210

JUSTICE HATCHER: So what's in the existing clause that requires that?

PN211

MR IZZO: Your Honour, if I could assist?

PN212

JUSTICE HATCHER: Yes.

PN213

MR IZZO: I think 23.1 would give us some concern because you may agree in writing to take a particular amount of overtime - - -

PN214

JUSTICE HATCHER: Yes, but that's - - -

PN215

MR IZZO: There's a level of specificity there that might prove a problem for a standing agreement.

PN216

JUSTICE HATCHER: Well, you need to identify what overtime is being replaced by leave so that you don't end up with a claim of a contravention, don't you?

PN217

MR IZZO: I think the difficulty is - - -

PN218

JUSTICE HATCHER: Because you need to specify what you've actually agreed to. For example, it seems to me that if someone had a permanent roster where they've had two hours a week permanent overtime in the roster, I can't see why you couldn't reach an agreement to say that, for that roster, two hours every week, that would be taken as leave.

PN219

MR IZZO: I think the provision would allow that. So you could agree on a standing basis to do two hours' overtime and have that as time off in lieu every week. I think 23.1 would accommodate that. I think what it would not - - -

PN220

JUSTICE HATCHER: Yes, but surely you can't have some in future agreement which says, 'Any time I work overtime, I'm going to take leave' because there's no specificity of what we're talking about.

PN221

MR IZZO: Well, I think what's being sought is an overarching umbrella arrangement that the employee agrees, the employer agree, they've agreed to how it's all going to be done, but then, each week, the amount that they agreed to do in a particular week effectively is agreed between the parties under the umbrella arrangement. I think that would not succeed under 23.1 because 23.1 requires the agreement to deal with a particular amount of overtime. I think that's where there's a level agreement that would be needed each time.

PN222

JUSTICE HATCHER: Is that your point, Ms Tinsley?

PN223

MS TINSLEY: Your Honour, yes, that is my point, your Honour, and I note as well that a similar point was raised by the AHA, the WA Chamber of Commerce as well, so it's clearly at least the interpretation that employers have grown to expect, and that is having a practical impact on them in the way they are entering into these arrangements.

PN224

JUSTICE HATCHER: It seems to me that, as long as you can specify the overtime hours that are being replaced by leave, it can be ongoing. It's just a case of whether you can specify the number of overtime hours to which the agreement applies. It seems to me you can say, for example, the first two hours of overtime in every week will be taken as leave.

PN225

MS TINSLEY: I think this is certainly a point of - if that is your reading of the provision as well, I think we may be talking about a clarification variation in that case because it is certainly feedback from my members that that is not - the employers are not using those in that way; they see them as overly prescriptive. So perhaps what we're talking about is a clarification variation.

PN226

JUSTICE HATCHER: I mean even if it's one off, the note makes it clear that you can just do it by way of an email. Anyway, do any of the unions want to talk about this?

PN227

MS VAN GENT: No, your Honour, I think I'd just be restating what you have already noted about the importance of ensuring that overtime hours to be taken as leave need to be recorded.

PN228

JUSTICE HATCHER: All right. Ms Tinsley or Mr Izzo, if you want to think about how you might clarify that particular issue, whilst still requiring the number of overtime hours to which it applies to be specified, then I will invite you to do so. All right.

PN229

MS TINSLEY: Thank you, your Honour.

PN230

JUSTICE HATCHER: All right. So Ms Tinsley, annualised wages.

PN231

MS TINSLEY: Yes, thank you, your Honour. And again I will be brief. The Full Bench have recognised the importance of annualised wage arrangements. The feedback we consistently get from our members, though, is that they're not used, the overly descriptive nature of these provisions in awards has led businesses to still entering annualised wage arrangements but to do that under the common law which we know is filled with risk, particularly for the small businesses.

PN232

So our proposal here is to make them easier to use and, essentially, in a nutshell - - -

PN233

JUSTICE HATCHER: Well, it just restores these clauses to the way they were before they reviewed them.

PN234

MS TINSLEY: Yes. Yes, your Honour. Which is referred by – in essence, yes.

PN235

JUSTICE HATCHER: And the problem with those is that they were leading to rampant wage theft because there was no reconciliation of the annualised salary with hours actually worked.

PN236

MS TINSLEY: Well, I think in terms of – the proposal we've put forward does differ to proposals put forward previously. We recognise that we have worked in new requirement for a review which employers should be doing and increasingly doing as well. I think that the difference between when these decisions was handed down, and more recently even in the last 12 months or so is around the increasing understanding of the importance of the wage reviews – the wage underpayments and the risks associated with it.

PN237

I would say that the complexity of the award system on this issue is leading to greater compliance risk under the common law that a lot of – it's actually the common law offsets that are leading. But if we provide a clearer mechanism

under the award that that would actually help improve compliance rates. And would, as I said, particularly assist small businesses.

PN238

JUSTICE HATCHER: I mean the - - -

PN239

MS TINSLEY: Or enable.

PN240

JUSTICE HATCHER: This clause goes back to a difficulty. So, one, an obligation review is basically meaningless because it doesn't say what you actually have to do. There are no records kept by which you can conduct the review and there's no obligation to make up the difference.

PN241

MS TINSLEY: Your Honour, I take those points. As you say, look this is – and I understand this is dealt with recently. But this is – I have included this – we included this proposal but this is an issue that members consistently come to us on. It's one of I'd say sort of the top five Award issues.

PN242

JUSTICE HATCHER: All right. Do any other employers want to say anything about this?

PN243

MR IZZO: Your Honour, I might just put a stake in the ground on this issue in this way. We obviously appreciate this has been looked at and we appreciate all of the issues you have raised in terms of safeguards. Where BNSW and ABI has landed is that it may be - well be very difficult for us to have a very large contest with everyone around the right safeguards and how we deal with your concerns, how we deal with the concerns of our members. It's a very difficult exercise that we all went through, as part of the original proceedings that I am sure your Honour recalls.

PN244

We have identified a separate solution because we agree this is a problem. We think employers are absolutely struggling to pay annualised salaries and record keeping penalties have just been multiplied 10-fold to the point that one record keeping breach is now $450,000.00 for an employer. Now, that's the maximum penalty and $4.5 million for serious contravention.

PN245

We need to grapple with this problem and we say the solution is an appropriately positioned exemption rate and we will be seeking that later in clerks but more broadly, because we think that is the solution that everyone needs to seriously contend with because this problem will not go away. So that's our submission and that's our solution.

PN246

JUSTICE HATCHER: All right. Ms Bhatt? Do you want to say something?

PN247

MS BHATT: We've similarly advanced exemption rate propositions which I understand will be dealt with later, and they too are directed towards the same problem that's been discussed by the other employer representatives.

PN248

JUSTICE HATCHER: All right. Do any other unions want to make any point that goes beyond the observations I've already made or - - -

PN249

MR KEMPPI: I will just make the short point but I wouldn't go too far beyond your own observations. I won't say anything about exemptions or rates until we've seen the proposal on that of course. But if we were to seriously list the sorts of safeguards we would want to see we would probably taking hospitality as an example end up with something like the current hospitality clause for the reasons we have already outlined. But we look forward to seeing the exemption rate proposal.

PN250

JUSTICE HATCHER: All right. So unions have since agreed. So, Ms Tinsley? Consultation clauses.

PN251

MS TINSLEY: Yes, your Honour. So what we're essentially trying to do here is we note that there are two separate consultation requirements for changes around rostering, and then changes around the thought of workplace changes. What we're proposing to do here is we note they're both very long. They're similar in some ways, but different in others that other employer often – that they will, in fact, treat them as the same which leads to compliance issues. Whereas – and often we note as well in EAs that employers will combine those two factors.

PN252

What we're proposing to do here is amalgamate the two in some ways that I have referred here from about paragraph 6.8 of our initial submission where we listed the differences between the existing clauses. In some cases, it may be that we have sort of lifted up the requirements from the employer, from an employer perspective. But we're trying to do that in a way to seek some sort of compromise.

PN253

So it's not just a matter of fact that we're always trying to reduce that procedure requirement from the employer. What we're essentially trying to do is have one simple clause that that can treat both of those.

PN254

JUSTICE HATCHER: All right. I mean apart from simply reducing the amount of text in the Award, is this trying to address any actual factual problem?

PN255

MS TINSLEY: So one of the key points – one of the issues as well here is our proposal would mean that employers are only required to invite prospective

employees to a discussion about the change. We say this is a practical change in so far as it is difficult for an employer to discuss something if that invitation has been rejected.

PN256

Additionally, our new wording would provide employers some degree of certainty around what information must be provided. Noting the current requirements provide all relevant information to track from useability. And here as well I think. Yes, so I think in terms that they're probably the two major changes I wish to raise at this point.

PN257

JUSTICE HATCHER: All right. So, Ms Bhatt, you say this impact answer to employer requirements do you?

PN258

MS BHATT: It would, which I think has been acknowledged by Ms Tinsley today. Whilst we understand and acknowledge the intent that underpins the proposal that's been advanced, we do say that it would increase the regulatory burden that flows from obligations concerning regular rosters and ordinary hours of work in particular in various ways. And to that extent we oppose the proposal that has been advanced.

PN259

I would also just raise that to some extent it would introduce requirements that are actively being sought by some unions in other parts of this award review, such as the job security statement – the review – and we propose them in that context too. For example, an obligation to provide certain types of information in writing.

PN260

JUSTICE HATCHER: Right. Mr Kemppi?

PN261

MS TINSLEY: Your Honour, could I just - - -

PN262

JUSTICE HATCHER: Yes. Yes, go ahead.

PN263

MS TINSLEY: Sorry, could I just engage very, very briefly with a point that Ms Bhatt just mentioned? I think – and this is a point that I raised in the job security stream. I think the consultation provisions are a good example of where further discussions could be had on reaching a compromise. I think that the problem we have is that for certain proposals – there's certainly proposals in the union that the union has progressed in streams, such as job security, which we reject in all cases. However, there is some minor point which I think Ms Bhatt has also mentioned in terms of which we have included in here that the unions progress in the job security that we have opposed in the context of that, but the reason why we have opposed in the context of the job security stream that they're mentioned at here is the potential compromise is that there's a concern that if we were to see no improvements on this for this, for example, this particular consultation

requirement in the useability streams, but then accepted them in the job security stream, we'd find ourselves in a situation where employers were backwards.

PN264

So I think this is a good example of where if we were to combine consideration raised by the union stream – sorry, the job security stream that the unions have progressed, that if we were also removing other sorts of requirements and making it easier for employers within this stream, that we might be open to considering. But I think that's probably just a broader observation of the way the streams are operating. So that's just is in context of why we've progressed the proposal on this stream the way we have.

PN265

JUSTICE HATCHER: Right. Thank you. Mr Kemppi, do you want to say anything?

PN266

MR KEMPPI: Yes. On the changes themselves, we're naturally predictably quite wary of taking away any entitlements or procedural steps. And there is a distinction, of course, between inviting a discussion and ensuring that a discussion does, in fact, take place. And that's, in our submission, within the powers of the employer to make sure it happens.

PN267

The other thing that we would point out is that the Commission is soon to embark on quite a detailed consideration of Modern terms including a consultation term. So we would, again, say that perhaps consideration of this is best put after that more broad process has taken place.

PN268

JUSTICE HATCHER: Right. Thank you. Anybody else? No? All right. Individual flexibility arrangements, Ms Tinsley?

PN269

MS TINSLEY: Yes, thank you, your Honour. So, essentially, what we're trying to do in this proposal is to clarify what was meant by a better off overall as is required by section 144(4)(c), in the context of an individual flexibility arrangement.

PN270

Now, I note that both the union representatives and the Ai Group have concerns our proposal does not satisfy this requirement. So we've gone into great detail from about paragraph 7.11 of our initial submission regarding why we believe it does comply. So, in short, we say that it will comply – will potentially will comply with the statutory requirement, in that in the first instance the employee can't be disadvantaged by the arrangement overall.

PN271

And, secondly, and this is the key part that makes it better off overall in the context of this provision is that the arrangement must be beneficial overall, taking

into account the employee's view of whether the arrangement better meets their needs.

PN272

So, here the overall better off assessment is bolstered by the individual's own preference which we say is a purpose behind the individual flexibility arrangement provisions in the first place.

PN273

So, of course, this thinking departs from the way the test is applied for when we're dealing with, say, collective agreements. But this is proper, in so far as that the difference here is that the collective nature of an enterprise agreement is that they're – that no finding can ever really be made about or revive an agreement which satisfies the preferences of all employees. Where the preference of the employee in the individual flexibility arrangement can be easily ascertained and should be taken into consideration. So, again, the first part ensures that the employee doesn't go backwards at all under the agreement, but then – and it's difficult for me to use an example here, because it really does come down to the individual and what their preferences are. Noting that the individual's preference will be clearly identifiable because it will be what they say it will be.

PN274

JUSTICE HATCHER: The difficulty I see with this, Ms Tinsley, is that the test is a statutory test. And better off overall of the Fair Work Act, in section 144(4)(c) means what it means and I'm not sure that the Commission has got the power to define it or to change its meaning, or to alter the obligation which is upon the employer, by putting something in an award. That's not commenting upon the merits of what you've said. It's just this seems to me a jurisdictional problem. Because at the end of the day we could put that in the award but that doesn't change the meaning of the Act and it might lure an employer to enter into nisi which is contrary to the Act.

PN275

MS TINSLEY: So, I would – and I take your point there – and I know this is a difficult one. I still propose that within light of the nature of this review which we understand has been quite broad and putting forward these proposals that you may recommend – whether you may wish to recommend in your report at the end of the day – that we think there is merit in this proposal. But, additionally, I think there could be an interpretation of the statutory provision that could lead to this particular interpretation.

PN276

MR IZZO: Your Honour, if I could address that comment? I think the position, or our position certainly, and I think of many employers, is that it should be axiomatic. That if the employee does not go backwards, they're not disadvantaged and they prefer this arrangement it automatically leads to the consequence of to have better off overall. And, in that regard, there isn't a variation to the statutory test. It's saying the obvious, in our view.

PN277

Now, if that doesn't carry the day and there are people who have expressed concerns about it, and you've expressed your own hesitation, that's the position, that's why we support what's being put by ACCI. I just note that if we're not successful on that, because you don't accept it's axiomatic, I think that just reinforces some of the submissions I made earlier that this is an ongoing tension for employers. And so we need the awards to be more facilitative in terms of arrangement.

PN278

JUSTICE HATCHER: But I think – I'm not saying whether it's right or wrong.

PN279

MR IZZO: Yes.

PN280

JUSTICE HATCHER: I'm saying it's not for the Fair Work Commission to determine. That is, the section 1 before directs an employer obligation to ensure that the employee is better off overall, and if there's ever a dispute about that that will be for a court to determine. It won't be for the Fair Work Commission.

PN281

MR IZZO: We would accept that.

PN282

JUSTICE HATCHER: So I mean we might – I mean, for argument sake, the Commission might accept that you're right but so what?

PN283

MR IZZO: Yes, I think from our perspective if something is, as I have said, axiomatically follows it's not necessarily interpreting. It's providing guidance. And, on that basis we wouldn't say you'd be exercising the function you're saying you would be but that will be as far as we put it.

PN284

JUSTICE HATCHER: All right. Anybody else want to say anything about this? Mr Kemppi?

PN285

MR KEMPPI: Yes. I might this as a convenient moment to play with the order a little bit and come back to the issue that was raised as a part of the number one point. I am instructed that we do propose to tackle working from home arrangements in the context of individual flexibility and the worker and care stream. So we will be advancing something there. And I think that that will probably be the better stream in our submissions but at least from our positions where we will grapple with the notion of whether immaterial things, like preference can ever factor into the material things that are better off directed at.

PN286

But at any rate I understand we will advance a proposal but we'll probably deal with this amendment, as well as the broader care issue.

PN287

JUSTICE HATCHER: Right. Anybody else? No? All right. Ms Tinsley, arrangement schedules?

PN288

MS TINSLEY: Yes, your Honour. Thank you. In the interests of time I don't propose to put forward anything better than what we have in our submission. Again, noting, we haven't put forward a specific proposal with drafting for what the schedules could look like. It was simply an issue that had been raised by a number of our members but in the time of day with all – we note that these would have to be a little bit different for each award. So we just note here that we floated, as it is an issue, that members to come to us about. But I might leave it there, your Honour.

PN289

JUSTICE HATCHER: Right. Thank you. So now we go to Ai Group, minimum engagement and payment periods.

PN290

MS BHATT: Yes, your Honour. Thank you. As is set out in some detail in our written submission, this proposal is to introduce a facilitative provision. It would operate only with an employee's agreement to reduce the minimum engagement or payment period. It wouldn't apply unilaterally and so to that extent would not resolve or could not resolve in a unilateral reduction in employee entitlements.

PN291

In addition to the obvious operational circumstances in which a need might arise for a minimum engagement or payment period to be refused it is a flexibility that is not uncommonly also sought by employees or one that would benefit them.

PN292

For example, children who wished to engage in a short period of work after they finish school or those who are engaged in other study commitments, such as at university, as well as those who have other personal commitments, such as caring responsibilities.

PN293

One of the observations that we have made in our written submissions is that the IFA provision in this context is not in play. In other proceedings previously the Commission has made the observation that an IFA cannot have the effect of hearing an award term that provides for a minimum engagement period, and it would seem that that logic therefore obviously applies to minimum payment periods.

PN294

And so for that reason we've proposed that it be dealt with directly by way of a facilitative provision. I think one of the arguments we have put in the alternate is that if that were not accepted or palatable, then perhaps specific provision could be made for it through the IFA. But there's been some discussion today already about various limitations associated with the Modern clause and they're concerns that we share.

PN295

JUSTICE HATCHER: This clause would allow an employer to offer a job on the basis of the reduced minimum period or minimum payment period and then the employee, by accepting the job would be seen to be agreeing to it. That would just vitiate the whole notion of minimum engagement and payment.

PN296

MS BHATT: Well, if those are the sorts of concerns that arise from our proposal, then it might be that certain safeguards can be considered. So, for example, it might be that this is not a proposition that can be put as a condition of employment. There might be other safeguards that can be developed. I mean to date there hasn't been serious engagement with the proposal that we have advanced by the unions. But if those sorts of concerns arise either from the Bench or from the unions we're very happy to consider them further and, perhaps propose an alternate that seeks to address at least some of those.

PN297

JUSTICE HATCHER: All right. Anybody else? Mr Kemppi?

PN298

MR KEMPPI: If no one else will say anything. Predictably, we strongly oppose this. I could but perhaps won't list all of the reasons but it is seriously undermining a quite serious entitlement that has been turned into awards forum recently. We oppose and I think we record that.

PN299

JUSTICE HATCHER: Right.

PN300

MR TINDLEY: Sorry, your Honour?

PN301

JUSTICE HATCHER: Yes.

PN302

MR TINDLEY: I appear on behalf of the Australian Retailers Association.

PN303

JUSTICE HATCHER: Mr Tindley.

PN304

MR TINDLEY: We'd simply say there's perhaps a merit in discussions about these types of provisions. And particularly as Ms Bhatt referenced – the safeguards around them – we understand the concern about conditions – being made a condition of employment or an offer of employment. But I think there are circumstances in having been involved in the reduction in the Retail Award for secondary school students. I think there are some of those circumstances might be relevant. Thank you.

PN305

JUSTICE HATCHER: Ms Burnley?

PN306

MS BURNLEY: Yes, thank you, your Honour. So as Mr Tindley just alluded to this was an issue that was heavily debated and argued in the Retail Award. I don't know whether you call it recent history but it was examined quite extensively, including two Full Benches and the conclusion of that argument about reducing the casual shift and the part-time shifts resulted in the student shift provision being put into the Award. So we seek there be no reason to examine again the Retail and the Fast Food Awards on this issue because the minimums have been established.

PN307

JUSTICE HATCHER: All right. Thank you.

PN308

MR IZZO: Your Honour, I apologise. I should have engaged earlier but I accept the concerns in relation to safeguards. We have expressed our support. It's primarily around this issue. It again comes back to working from home. It again comes back to people working at times their choosing. We think there is significant merit in engaging with minimum engagement periods when it comes to working from home. And a part-time casual case that I believe your Honour presided over, if I am correct. The Award review case, the Full Bench mandated minimum engagement periods across a number of awards. The reasoning in that decision which I don't have to hand talks heavily about the inconvenience associated with coming to work and travelling home. The costs. The entire purpose from that decision appears to be associated with getting to and from work, and all of that dissipates in terms of working from home.

PN309

And I will just give one simple example. We have a member that employs a very high casualised workforce and they require that workforce to complete training packages from time to time and inductions. And as all of this has become remote so this is a hospitality business that actually do their work in the business. But they like to send out the training in bite-size modules.

PN310

So rather than saying to an employee, you've got to get across two and a half hours worth of content at once, where they know for anyone who's had to do compulsory training and inductions – I'm sure we all have – your eyes glaze over after two hours. They send it out in 15-minute or 30-minute bite sized pieces that they employ, logs on on their app or on their phone and completes.

PN311

Under the hospitality award that's two hours' payment every single time. The employees at a place of their choosing, they're at home or at a park or wherever, and a minimum engagement should just not apply to that type of activity. They are choosing when they do it. The employer is not mandating when it's done. And none - - -

PN312

JUSTICE HATCHER: But that's requiring employees to work at 15-minute bursts at the employee's discretion.

PN313

MR IZZO: So, for instance, in the training example. They've got two or three weeks a month in order to complete the training. They can do it at their discretion at any time of their choosing. If they do it that way which is beneficial to the actual learning being completed, it's much more beneficial the business believes to do it in bite-sized pieces, rather than in one chunk, that can't be done. And the employee will be entitled to be paid two hours each time. That's just one example.

PN314

But the moment we're talking about remote work and people at home, these are the types of issues that just don't align well to a minimum engagement clause. So we are supportive in relation to working from home only really. That's our focus - - -

PN315

JUSTICE HATCHER: Well, I'm not sure what you're describing is really working from home is it? It's just - - -

PN316

MR IZZO: Well, working remotely. Not at a workplace that is the employer's premises but for those that have the opportunity to do work away, which can include in the example I gave, even the hospitality retail workers on occasion, in a training context.

PN317

JUSTICE HATCHER: All right. Thank you. Mr Cullinan, did you want to say something?

PN318

MR CULLINAN: I just think for us that raises a whole new set of concerns that we come across now on a daily basis about the obligations being imposed on workers who use their own devices in workplace areas, that might be the local park or the home and have no health and safety assessments, using their own internet, often referring to piece rates. So that explosion of all of the issues that we've already described in our submission creates even more concerns for us. We think it's really important that as Ms Burnley said these things have already been tested in GRIA and FFIA limits have been put in place. And all the issues that have just been described by Mr Izzo raised further concerns.

PN319

JUSTICE HATCHER: All right. Ms Bhatt?

PN320

MS BHATT: I think as Mr Izzo's submission highlights this issue does arise in both of the scenarios that he has described. And it's for that very reason that in the proposals that we have advanced in the context of particular awards and that's why I have not sought to address them today. The proposals we have advanced in relation to working from home deal with this issue again and propose specifically that where an employee is working from home, the minimum engagement or payment period should not apply.

PN321

I mean there will be circumstances in which employees, for instance, wish to work non-continuous hours and a segment of their working day is only two hours, for example, but the Award prescribes a minimum engagement or from a period of three or four hours.

PN322

The issue in relation to training that's undertaken remotely applies also in some circumstances to attendance at, for example, team meetings. And there are operational reasons why, in some contexts, those meetings simply cannot be scheduled when everyone is physically present at work. The store needs to continue to operate. The fast food outlet needs to continue to operate. So they are scheduled at a time when some employees are otherwise not physically present. And, indeed, employers take steps to enable employees to be able to attend remotely, so that they are not required to return to the workplace for that purpose.

PN323

And yet there are minimum engagement and payment periods of two, three, four hours that might apply to a meeting that requires only one hour of the employee's attendance. And that, too, is a specific proposal that we have advanced in the context of some awards where we have received member feedback on that issue.

PN324

JUSTICE HATCHER: I mean it seems to me that if you want to go down that path you'd need some sensible limitations. For example, there'd need to be some limit on the frequency in which you could do that.

PN325

MS BHATT: Given that these issues are, I think, we'll list it for further discussion next week.

PN326

JUSTICE HATCHER: Yes.

PN327

MS BHATT: I'll take that on notice and give that some further thought prior to that occasion.

PN328

JUSTICE HATCHER: All right. Pay averaging.

PN329

MS BHATT: Yes, your Honour. We say that this is a simple sensible change that would make very clear in awards that pay averaging is permitted. I think the way we've characterised existing payment of wages provisions, in our submissions, is that in some cases it's not clear whether it is permitted and in others there is a reasonably good argument that it's not permitted because the payment of wages provisions appear to require that wages accrued over a particular period might be paid by the given pay day.

PN330

JUSTICE HATCHER: Is there some existing clause in the award whether it's one of the seven or not it doesn't matter that, in my view, might service an appropriate model for this?

PN331

MS BHATT: I think we have sought to model the proposal that we have advanced, by reference to the Clerks Award. I'm just looking to turn to now. I think it's clause 17.4 of the Clerks Award.

PN332

JUSTICE HATCHER: Yes.

PN333

MS BHATT: It provides a potential model for pay averaging. There's a similar provision that's extracted in our submission that's found in the Manufacturing Award. And that's clause 27.1(a)(ii) and it's at paragraph 45 of our submission of the 22 December. It essentially says that wages made with - - -

PN334

JUSTICE HATCHER: So what's the clause number again?

PN335

MS BHATT: I'm sorry. 27.1(a)(ii).

PN336

JUSTICE HATCHER: Right. Well, that's more limited obviously. Yes.

PN337

MS BHATT: Yes. It is.

PN338

JUSTICE HATCHER: But presumably we're talking about over the length of a roster period. Is that what we're talking about?

PN339

MS BHATT: I think our proposal makes reference to the pay period. So you would be paid according to the average number of hours that are attributable to that pay period, which commonly for full-time employees will be 38 hours under most awards.

PN340

The particular difficulty that arises is that there is a disconnect in many awards between, on the one hand, an ability to average ordinary hours, so far as the arrangement of hours is concerned, but then there isn't an ability to average one's pay. I think as we have identified in our written submissions, particularly, in the context of the introduction of the recent wage theft penalties this gives rise to quite a serious concern. I mean late payment is identified as a matter that attracts some of the most serious penalties.

PN341

There are a number of submissions that have been put against us in reply by the various unions. I think RAFFWU has argued that employers might be more likely to make errors in the processing of payment of wages if averaging is allowed and that it would make it more difficult for employees to verify whether they have been paid correctly.

PN342

We'd disagree with both of those propositions. In fact, this would simplify the process and give employees obvious certainty and far greater predictability as to how much they are owed in a given pay period. I think if the ASU makes an observation that it would impact an employee's ability to predict their earnings we say that's true. But, it would improve their ability to predict what they are owed.

PN343

There's a point that's been raised by the UWU that our proposal doesn't contain a mechanism for ensuring that other amounts are payable, such as allowances or overtime. I just wanted to make clear that the proposal that we have advanced is not supposed to or intended to disturb any existing arrangements or provisions that apply to the payment of other amounts.

PN344

It's just about where ordinary hours are averaged. Any amounts owing in relation to overtime or any other amounts would be payable, as required, by the existing provisions. That's all I wish to say about that matter.

PN345

JUSTICE HATCHER: Right. But just so I'm clear again. But if you're in a roster cycle - - -

PN346

MS BHATT: Yes.

PN347

JUSTICE HATCHER: - - -and the hours are averaged over the roster cycle you work out what the average is - - -

PN348

MS BHATT: Yes.

PN349

JUSTICE HATCHER: And then in each pay period you'd pay that average.

PN350

MS BHATT: That's right.

PN351

JUSTICE HATCHER: Yes. All right. So what's the objection about that?

PN352

MR IZZO: There might not be one, your Honour.

PN353

JUSTICE HATCHER: Speak up. Mr Cullinan?

PN354

MR CULLINAN: Well, there's concerns in relation to the specific industries of GRIA and FFIA, and we've already heard a range of reasons why various flexibilities need to be included, because of the way hours change in any given period. Workers subject to the Retail Award need to be able to understand the wage that they're receiving and where that's based from, including the hours they've worked in that particular period, what times of the day they have worked, what other overtime might have applied, what changes in that part-time arrangement for that week, or that day may have occurred. All of that goes into the factoring of how a worker determines what wage they have received. As soon as it's being averaged out over a longer period of time, it makes that process more difficult.

PN355

So that's why we have raised some of the concerns we have. We understand that there's a natural inclination to say, 'Well pay averaging seems like an ordinary sensible idea where someone may be used full time – 38 hours a week. Well, maybe even if they were part-time and they were working during the day on week days, there was no change in their hourly rate and one week they worked 16 hours, the next week they worked 20, if each week they're paid 18. But as soon as there's any further complexity to it it is difficult for a worker to assess pay slips, to understand the wages they're being paid as against the various time they've worked, and all the other elements.

PN356

And that's why having simply the wage that you earned for your week as a simple assessment that they can work with and that they can check is important to them.

PN357

JUSTICE HATCHER: But wouldn't there be employees who would prefer stability of income for the purpose of a whole range of things, for example, meeting financial obligations, dealing with getting loans from banks and those sort of things. That is to be able to say I'm going to get the same – I have got this roster which gives – has different hours and different weeks but I am going to get the same ordinary income every week guaranteed.

PN358

MR CULLINAN: We accept, your Honour, that there are employees that prefer to have the pay average and we find that they are much more often workers who might have a six/four shift in one week or in the next week, or workers that are full time that might have an arrangement where 36 and then 40 and so that they're able to better assess it. We accept that. The difficulty that we have is is that as an obligation or as a right for an employer to implement these kinds of structures, we're concerned that that will make it more difficult for workers who do rely on being able to check.

PN359

And very often, unfortunately, finding errors in their pay slips, errors that they need to then raise and get resolved. This will make it more difficult for them to stay on top of that.

PN360

JUSTICE HATCHER: Right. So, Ms Bhatt, this would need to be an employee under a fixed roster? I mean once we get started – we've been talking about part-timers changing their hours and all those sort of things. Once we start getting into that sort of field it becomes very difficult to work out averaging, doesn't it?

PN361

MS BHATT: To some extent, yes. And it might be that if in those circumstances the provision has limited utility it wouldn't be relied upon by an employer in any event. I think – you know – its utility is really found in circumstances where you have full-time employees, in particular, who work regular rosters or a pattern of hours that, at the very least, doesn't change often.

PN362

I neglected to raise one point earlier which I had noted. And that is to just identify that the SDA in the context of the job security stream of the review has also proposed pay averaging in the fast food and retail award. And, you know, just for reference their submission is dated 5 February – paragraphs 41 to 43. That matter has not yet been the subject of consultation before the Commission. It's due to be conducted on Thursday of next week.

PN363

JUSTICE HATCHER: Right. Mr Rabaut? Do you want to say anything?

PN364

MR RABAUT: Thank you, your Honour. For the purposes of the SCHADS award it's a highly feminised part-time workforce which the rostering arrangements are also subject to certain sector differences, such as client cancellations and we can require workers to make up that – those hours. And so for the purpose of a pay averaging our view would be it would be far too complicated for this particular set of workers covered by the SCHADS award.

PN365

JUSTICE HATCHER: Okay. So there's no current pay averaging provision in that award? Is that right?

PN366

MR RABAUT: I don't believe there is, your Honour. I'm just doing a quick check as we speak.

PN367

MS BHATT: Just referring to our written submissions in response to your Honour's question which observes that the SCHADS award does contemplate the averaging of ordinary hours of up to four weeks. But it doesn't allow pay averaging.

PN368

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

PN369

MS BURNLEY: Yes, your Honour. As Ms Bhatt has alluded to, the SDA did make a brief comment in the job security stream at paragraphs 41 to 43. However, we did restrict that proposal to being to full-timers only and that it was averaged hours worked over up to a fortnight in each week or each fortnight. So it wasn't any further than going to part-timers or casuals.

PN370

JUSTICE HATCHER: Yes. All right. Thank you. All right. Well, the next one - - -

PN371

MR WILDING: Sorry, your Honour.

PN372

JUSTICE HATCHER: Yes?

PN373

MR WILDING: Could I just note on behalf of the ARA THAT broadly support the Ai Group's proposals and we've included a specific variation to the Retail Award at paragraph (d) of our separate application which reflects the terms of the Ai Group's proposal.

PN374

JUSTICE HATCHER: Right. Thank you. All right, Ms Bhatt, payment of wages?

PN375

MS BHATT: Your Honour, it might be convenient if I deal with items 13 and 14 in the summary together, because they both relate, in effect, to the same issue and that is to permit the payment of wages four weekly or monthly. The first proposition which is identified at item 13, is that we seek the introduction of facilitative provisions that would operate by majority agreement or by individual agreement that permit these arrangements. But, in the alternate we have proposed that the IFA model clause be amended to permit those sorts of arrangements from being introduced.

PN376

Now, again, I repeat the comments that have been made earlier about various limitations around the IFA clause and in this case it would seem that if an arrangement was put in place that permitted, for example, monthly pay but nothing else there would be a real question about whether the employee was better off overall. It would need to be in the context of an IFA that presumably deals with various other matters.

PN377

We say that this is a change that has obvious benefit. More generally, in terms of the facilitative provision as well it would address the significant regulatory burden that flows from facilitating weekly and fortnightly pay periods, that that benefit is

best realised through uniform pay periods and that's part of the reason why we have proposed a facilitative provision that would operate by a majority agreement, not just by individual agreement.

PN378

JUSTICE HATCHER: So now why is fortnightly pay and regulars to be burdened?

PN379

MS BHATT: Well, if one has the ability to pay monthly or four-weekly, then it naturally reduces the frequency with which pay needs to be processed and that of itself results in a necessary reduction in a regulatory burden. And in the various costs that flow from needing to process an employee needs pay regularly. It is a proposal that we have advanced that would operate, as I say, only by agreement. So it's not one that would be imposing laterally by an employer.

PN380

But it would have various obvious benefits from an employer's perspective. It would also, to some extent, address some of the pay averaging concerns that we've raised. If, for example, you have an ability to average ordinary hours over a period of four weeks and if you can then pay four-weekly or monthly.

PN381

JUSTICE HATCHER: But I don't understand how – is the regulatory burden if you've got it – some people you work for is monthly and some people are fortnightly. What does that solve?

PN382

MS BHATT: Well, to the extent that different cohorts of employees have different pay periods that apply to them, it doesn't solve the entire problem, but it would nonetheless go in some way if, for example, there was a cohort of employees that can be paid monthly instead of weekly or fortnightly, and by extension that results in their pay periods being aligned with, for instance, a cohort of award-free employees who are also being paid monthly.

PN383

MR IZZO: Your Honour, if I might address the regulatory burden point? And it's not something that employers have traditionally been very good at explaining but it's becoming more and more obvious to us. There is considerable strain in payroll departments, generally, at the moment. And I will explain why.

PN384

Payroll have a variety of tasks to perform. One of them – one of the most important is processing pay. But there's other things they deal with. They deal with all sorts of finance – you know, novated leases, things like that, they deal with termination payments. There's a lot of things they do that's outside the payment period. But one of their biggest tasks is processing the pay. They're also involved in pay rules, putting things into the systems like KRONOS and human force kind of payroll processing systems.

PN385

What we're seeing is more and more, and it may be that evidence at some point might be required for this. More and more they are struggling with the workload and one of the things that increases that workload is the frequency with which they need to process payments. And if they have an opportunity to process it less frequently it reduces the strain considerably.

PN386

And what we have seen with our membership is a lot more bullying claims coming out of payroll departments, associated with workloads, performance management – just strain – generally.

PN387

I'm not saying that with bullying often is a euphemism for or is a symptom of a department under stress. And we are seeing increasing stress that involves conflict, that then involves different types of behaviour arising. So what we need to try to explain is that the regulatory with which these payments are processed does actually increase substantially their workload and then gives rise to all sorts of other friction. There's actually a matter the union should be concerned about themselves, and I believe the ASU would be the relevant union.

PN388

So maybe it's something you need more evidence on but it's something we think is becoming more and more of an issue.

PN389

JUSTICE HATCHER: But presumably there is more work involved in calculating a monthly pay than a fortnightly pay?

PN390

MR IZZO: There might be. But the fact that it's done once and not twice, it just reduces the streamlining and efficiency in the way it's done.

PN391

JUSTICE HATCHER: All right. All right, Ms Bhatt, annual leave loading.

PN392

MS BHATT: Your Honour, there are effectively three elements to this part of our submission.

PN393

JUSTICE HATCHER: All right. Just hold on a sec.

PN394

MS BHATT: Yes, your Honour.

PN395

JUSTICE HATCHER: Sorry, Mr Rabaut, did you want to say something about pay periods?

PN396

MR RABAUT: Thank you, your Honour. I was – I just wanted to particularly mention in relation to the SCHADS sector as well. These particular workers tend

to be award reliant. So the frequency of pay is pretty important for these workers, in terms of meeting their day to day costs. But also there's an additional consideration that I think is pretty – or that we think is pretty important, being a lot of the workers are quite cultural and linguistically diverse, and so there's a question of whether employees may generally understand what the impact might be in entering an arrangement where they're paid on a monthly basis or four-weekly basis, instead of either weekly or fortnightly. So on that basis we oppose that proposal.

PN397

JUSTICE HATCHER: Yes. All right. Thank you. Yes, annual leave loading?

PN398

MS BHATT: Yes, your Honour. Thank you. There are three elements to the submissions we have advanced in relation to this issue. The first is an issue that we have identified as arising from the Retail Award, the SCHADS Award, the Fast Food Award and the Clerks Award, and it relates to the comparative exercise that is required to be undertaken by annual leave loading provisions when determining the amount of the loading that is payable to an employee for the period of leave. That is, whether the default annual leave loading of 17 and a half per cent is payable or whether it is some other amount, that takes into account shift penalties and/or weekend penalties that would have been paid to the employee had they worked.

PN399

The practical issue that's been raised with us by members is that in some circumstances the pattern of hours that the employee would have worked during that period is simply not known. It can't be identified.

PN400

So, for example, you might have a situation which an employee has rosters that are highly variable. The pattern of work changes commonly. And the employee applies to take annual leave – some eight weeks in advance – well, before any rosters are prepared. It is simply not practicable to make a real or sensible assessment of what they would have earned by way of various penalty rates during that period of leave.

PN401

Because it requires you to know more than just the hours – the number of hours they would have worked. Also the pattern of hours. It's really just a fiction. So the proposition we have advanced is that if there are circumstances in which the employees' hours are not known or identifiable then the 17 and a half per cent loading is payable. But where the hours are known or they can be identified or discerned then the existing provisions would continue to apply.

PN402

I think there is a very real practical difficulty with understanding how these provisions work in the context of employees where you genuinely just don't know what the hours would have been.

PN403

JUSTICE HATCHER: Right. Anybody else? Mr Cullinan?

PN404

MR CULLINAN: In terms of that, I mean our submission stands on some of the things we think it would be worth discussing. But in terms of that specific issue under the Fast Food Award and the General Retail Award those patterns – those hours of work are nine. Obviously they might change in a years' time, by the time you get there, but other than for the part-time workers. But they are known. So this maybe objectively explain is this a BOOT issue or some other thing for retail and fast food because we don't quite understand for full-timers and part-timers how that could not be known.

PN405

MS BHATT: It's not a BOOT issue. It's an issue that's arising from the application of the award and its feedback that we have received from members in a number of industries, including the fast food and retail industries. We would contest the proposition that in those sectors the hours of work of employees will be known. I acknowledge that in the context of part-time employees the issue arises to a far lesser extent that it would in relation to full-time employees and where there is likely to be greater variability of their hours.

PN406

Part-time employees' hours are generally fixed and can be varied only by agreement with the employee. So the issue might be more acute in relation to full-time employees. But, certainly, we understand it is arising in those sectors.

PN407

JUSTICE HATCHER: Why couldn't you use the roster period immediately before they go on leave?

PN408

MS BHATT: So that might be one way in which your Honour undertakes the calculation. But the existing provisions require you to determine what they would have worked and that's the thing that we have sought to respond to. The solution to that might look like – you know – an examination of what their roster has been over a proceeding roster cycle or multiple roster cycles. As it stands it's not clear that that would satisfy the current obligations.

PN409

JUSTICE HATCHER: All right. Anybody else want to say anything about this?

PN410

MR IZZO: We support the concern, your Honour.

PN411

JUSTICE HATCHER: All right.

PN412

MR WILDING: Sorry, your Honour, the ARA also supports that concern and that's put an equivalent clause in the separate application.

PN413

JUSTICE HATCHER: All right. What do you call the – well, two and three, do they overlap with the issue that was addressed in the Fast Food Award?

PN414

MS BHATT: Yes. Squarely.

PN415

JUSTICE HATCHER: So if the drafting of the Fast Food Award was applied to the other awards would that solve the problem?

PN416

MS BHATT: Yes, it would and I think that's exactly what - - -

PN417

JUSTICE HATCHER: I can't quite remember. But I remember we spent some time sorting that out.

PN418

MS BHATT: We did, your Honour. And, in our submissions, we've sought to set out the relevant parts of the decisions that I think your Honour issued in relation to the Fast Food Award and we have sought to respectfully adopt that very drafting in the solutions we have caught up. It seems from the reply submissions that have been advanced that there isn't any violent opposition to those propositions. They really are just intended to clarify the operation of those clauses.

PN419

JUSTICE HATCHER: All right. Well, does any party oppose the notion that the annual leave loading clauses should be drafted to be consistent with the drafting of the Fast Food Award?

PN420

MR IZZO: No. No opposition.

PN421

JUSTICE HATCHER: And you speak on behalf of everyone Mr Izzo?

PN422

MR IZZO: No. Obviously – I'm happy to.

PN423

JUSTICE HATCHER: All right. That's good. One thing. Yes, the next one, Ms Bhatt, calculation of minimum hourly and weekly rates.

PN424

MS BHATT: Yes, your Honour. I will endeavour to explain what the problem is.

PN425

JUSTICE HATCHER: Well, I think I understand it. Maybe we should just change our rounding rules so that we don't round to 10 cents any more. Would that solve it?

PN426

MS BHATT: It might. I wasn't sure what the processing is for adopting that course. I mean my understanding is that the rounding rules have been set by reference to the process that is followed following the annual wage review and a way in which Award rates are effectively updated to reflect the outcome of those proceedings.

PN427

But, yes, I think that if the rounding rules were applied differently and in a way that didn't result in a rounding of – to the nearest 10 cents – it would probably address the issue. What I would say though is that some thought would need to be given to how the retrospective issue is dealt with. That is the way in which the awards have expressed the relevant rates since – essentially since the hourly rates were introduced in these awards, up until any such variation was made.

PN428

JUSTICE HATCHER: So I am looking at, for example, at 15.1 of the Fast Food Award.

PN429

MS BHATT: Yes.

PN430

JUSTICE HATCHER: So even though the minimum rates have a weekly rate for full-time employees and an hourly rate, the words above it say that an adult employee must be paid the minimum hourly rate.

PN431

MS BHATT: And - - -

PN432

JUSTICE HATCHER: So that's probably a place where there needs to be some modification.

PN433

MS BHATT: Yes. And, again - - -

PN434

JUSTICE HATCHER: So it could say that the weekly rate in the case of a full-time employee of the hourly rate in respect of other employees or something like that.

PN435

MS BHATT: Yes. And, again, prospectively – certainly – that would potentially resolve the issue. I dare say that that wording is quite common to a number of awards that these – I think we have identified perhaps one award which is the Clerks Award which specifically stipulates that a full time – in the minimum wages provision stipulates that the weekly wage is payable to full-time employees and part-time and casual employees are to be paid the hourly rate.

PN436

Based on the analysis we've done for the purposes of these proceedings we've not identified any other such award.

PN437

JUSTICE HATCHER: All right. Would any party oppose such a modification? No? All right.

PN438

MR CULLINAN: Your Honour?

PN439

JUSTICE HATCHER: Yes.

PN440

MR CULLINAN: We just raise that there is a connected issue of the way penalty rates and overtime rates are calculated to full-time employees. So there just have to be considerations about how that gets built into the structure of what a full-timer would be paid in that circumstance.

PN441

JUSTICE HATCHER: Well, usually, they operate by reference to the hourly rate.

PN442

MR CULLINAN: Yes.

PN443

JUSTICE HATCHER: But in the standard terms where the minimum rates are set out that's referrable to ordinary hours and then other clauses build on those to give you the overtime rates but - - -

PN444

MR CULLINAN: Yes, your Honour.

PN445

JUSTICE HATCHER: Yes. I understand. All right. Electronic communications. So does this arise outside of part-time employment? Where might this arise?

PN446

MS BHATT: It appears to arise in the context of various different types of provisions. So, for example, in relation to the publication and communication of rosters and changes to rosters. There are other provisions, I think, relating to – for example – some of them are model terms. Consultation. The model term concerning IFA. There are some annual leave provisions that require agreement to be made in writing, for example, the cashing out of annual leave, taking annual leave in advance.

PN447

So there are, I think, some provisions that apply across the board or that appear in all awards, in which these obligations to undertake certain things in writing arise. And then there are other award specific instances in which we've identified certain provisions that contain such requirements.

PN448

I think there's a second category that we've identified in which a document is required to be signed by the employer and employee. Some award provisions make clear that that too can be done electronically, whilst others don't. I think the rationale for the proposed changes is clear from our written submissions.

PN449

JUSTICE HATCHER: Right. Does anyone say against the change of that nature?

PN450

MR KEMPPI: The only concern we have with or rather the main concern that we have – how widely it should apply – we accept that there are some things that – excuse me – we accept there are some things that should be dealt with by electronic means. Perhaps we would throw some caution on that being applied in all industries. There might be some industries where it's not as appropriate to go by electronic means. And there might be some issues. For example, variation of part time hours or hour variations, generally, where we might exercise some caution.

PN451

JUSTICE HATCHER: Some caution in what respect?

PN452

MR KEMPPI: Of applying a blanket rule that everything can be done electronically as opposed to in writing and a record kept and so on. That said, we would say, where things are electronic there should obviously be a corollary, recording keeping requirement and so on. But other than that we would defer to our affiliates in terms of what they would be prepared to discuss and accept in each award.

PN453

JUSTICE HATCHER: Ms Burnley?

PN454

MS BURNLEY: Yes, thank you, your Honour. We do have – we're open to the issue of talking about this but we would have concerns about the keeping of these records and maintaining these records. We have had instances with Snapchat issues for roster changes. And then there is also the problems that have arisen in the past that the systems that are being used aren't maintained into the future so the software development no longer supports it. So, therefore, records seem to get lost.

PN455

So there are some issues, plus we wouldn't want to extend it to absolutely every provision of written – where it says 'written' or 'signing' as there are some, I guess, degrees as to what you're committing yourself to that needs to be carefully and fully explained and provided. Such as, maybe the termination provisions and going through that redundancy provisions, reducing that down to some text messages is probably not as appropriate as say doing a roster change for a part-timer.

PN456

JUSTICE HATCHER: Right. And electronic signature?

PN457

MS BURNLEY: It would be one we'd be open to look at but it would, again, depend on which level of documentation you're putting an electronic signature to and what ability the employee does have to use electronic signatures on their devices or computers, et cetera.

PN458

JUSTICE HATCHER: Right. So can for part-time employment can you already do it electronically, can't you?

PN459

MS BURNLEY: Under the GRIA you can, your Honour.

PN460

JUSTICE HATCHER: Yes. Email, text messages or other electronic means.

PN461

MS BURNLEY: Yes.

PN462

JUSTICE HATCHER: It seems to me it's a matter for the employee to work out how to record – I mean they've got to keep the record but that's their obligation that – it seems to me that if it's an electronic communication which can't be kept as a record then it can't be used. Would that be right - - -

PN463

MS BURNLEY: No.

PN464

JUSTICE HATCHER: - - -Ms Bhatt?

PN465

MS BHATT: No. I think so, your Honour.

PN466

JUSTICE HATCHER: Mr Rabaut?

PN467

MR RABAUT: No similarly to – yes – we're open to have this conversation around the particular proposal. Our concerns are quite similar to – sorry, apologies – as far as it relates to other mechanisms such as Snapchat or WhatsApp that might be disappearing. Our members have raised those concerns as well. But broadly speaking happy to discuss so we don't have any large opposition to it.

PN468

JUSTICE HATCHER: So we could attach a condition that the mode of electronic communication has to be one which can be kept as a record by the employer.

PN469

MR RABAUT: No. It would be fine.

PN470

JUSTICE HATCHER: Yes. Mr Cullinan?

PN471

MR CULLINAN: The same too, your Honour. I think there was a bit of an error in numbering in our submission in reply. Our concern with this is that it's a record – whatever it is – is accessible to the employee. And so often at the major retailers there might be a screen they have to tick a box to accept and to agree.

PN472

We're just concerned that whatever the record is that it's actually able to be accessed by an employee when they have desired.

PN473

JUSTICE HATCHER: Yes. All right.

PN474

MR CULLINAN: Thank you.

PN475

MR IZZO: Your Honour, may I make a contribution just on a matter you raised? And it may be that I am jumping the shadow that doesn't exist but just when you made the comment about electronic signature, as Mr Cullinan has just identified in his summary, more and more of what's been happening is that employees are being asked to check a box in and out. So there's not necessarily a signature. It's actually just ticking a box or indicating their consent. And that then goes off.

PN476

Now, obviously, it needs to be recorded but we would caution against any electronic signature reference because more and more they're simply checking, that they've got a log-on. They check 'yes' and then it gets sent off and a record is kept. So that' the kind of mode of communication we're trying to document.

PN477

JUSTICE HATCHER: I thought Ms Bhatt was simply saying that where the award requires a signature it could be an electronic signature. Is that what we're talking about?

PN478

MS BHATT: So we're talking about situations in which an award requires an employee to confirm – often by way of a signature - - -

PN479

JUSTICE HATCHER: Yes.

PN480

MS BHATT: - - -a certain record for example. We have borrowed words that I think appear in the annualised wage arrangement provisions that fell from the four-year review proceedings, in which the Commission said that that could be

confirmed using electronic means, which would deal with the kind of circumstances that Mr Izzo is describing.

PN481

JUSTICE HATCHER: I mean it seems to me prima facie there would be standard just to – it would be appropriate to standardise these rather than trying to work out some ad hoc arrangement for every single award.

PN482

MS BHATT: Certainly that's our view. I mean we have gone to some extents to identify, in our submission, all of the instances in which these provisions appear. But we see no reason why a different approach should be taken either between those provisions, or between awards.

PN483

There's some issue that's been raised today about part-time employees, for example, or changes that are made to one's hours of work, potentially under existing rostering arrangements.

PN484

I mean those are the very sorts of circumstances in which employers and employees commonly now engage electronically. It might be by email. It might be by text message. It might be through a mobile phone app, and I'm not referring to Snapchat there, but a payroll system that is accessed through one's mobile device. It is entirely appropriate we'd say that those sorts of arrangements are very clearly permitted by the award.

PN485

JUSTICE HATCHER: All right. Thank you. Is that all we need to deal with today? All right. Well, look all I want to say at this stage is that to the extent that the parties have indicated that there might be room for further discussions about particular proposals, I would invite them in the first instance to engage with each other.

PN486

What I intend to do is to complete all the consultation sessions and then in light of that I will consider whether further consultations about specific proposals would be productive or not. But, as I said, I won't reach that conclusion until I finish the whole process.

PN487

All right. Well, I thank you for your attendance today and your participation. If there's nothing further we will adjourn.

ADJOURNED INDEFINITELY **[12.32 PM]**