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 2 – Fast Food Industry Award 2020 and General Retail Industry Award 2020

Melbourne

10.00 AM, TUESDAY, 12 MARCH 2024

Continued from 08/03/2024

PN488

JUSTICE HATCHER: Good morning. I'll take the appearances starting with those in person. Ms Burnley, you appear with Mr Main and Mr G van Rensburg for the SDA?

PN489

MS S BURNSLEY: Yes, that's correct, your Honour.

PN490

JUSTICE HATCHER: Mr Cullinan, you appear for Retail and Fast Food Workers' Union Incorporated?

PN491

MR J CULLINAN: Yes, your Honour.

PN492

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

PN493

MS R BHATT: Yes.

PN494

JUSTICE HATCHER: Who's next?

PN495

SPEAKER: (Indistinct).

PN496

JUSTICE HATCHER: Yes, all right. Mr Song, you appear for BI and the NSW Business Council?

PN497

MR V SONG: Yes, your Honour.

PN498

JUSTICE HATCHER: Ms Lyons and Mr Stirling, you appear for Master Grocers Australia?

PN499

MR N STIRLING: Yes, your Honour.

PN500

JUSTICE HATCHER: Who appears for the National Retailers? Okay. And then on line we have Ms Butters for the Australian Hotels Association?

PN501

MS M BUTTERS: Yes, your Honour.

PN502

JUSTICE HATCHER: Mr Morrish for the ACCI?

PN503

MR MORRISH: Yes, your Honour.

PN504

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

PN505

MS J MCKENNARIEY: Yes, your Honour. Ms Windsor and Ms McInnes will be an apologies.

PN506

JUSTICE HATCHER: All right. Just before we start, Ms Butters, can you explain to me what the interest of the Australian Hotels Association is in the Retail Award?

PN507

MS BUTTERS: Yes, your Honour. A number of the AHA's members in NSW and Victoria operate a number of retail bottle shops under the Retail Award.

PN508

JUSTICE HATCHER: All right. Thank you. Well, look, the purpose of today is to discuss the various proposals that have been advanced with respect to the Retail Award and Fast Food Award.

PN509

As I said at the conference last week, this review process is not by itself going to lead to award variations, so parties shouldn't have a concern that they won't get a full opportunity to be heard. If any variations at some stage are proposed by the Commission of its own motion, or by any particular party, obviously parties will at that stage have a full opportunity to be heard.

PN510

What I'm interested in for the purpose of this conference is, firstly, for parties to be able to explain what precisely they're trying to achieve in the various proposals and what they're trying to remedy, and also to identify whether there's any particular proposals which might either be agreed or about which more discussions would be fruitful.

PN511

What I propose to do is to go through the document which summarises the various proposals, which was published on the website. So there's one for the Retail Award and one for the Fast Food Award. So I'll go through them item-by-item. I'll invite the moving party for each proposal to briefly explain what the purpose of each proposal is and what it's trying to remedy, and then I'll invite any short responses to those and we'll explore whether any progress can be made.

PN512

So we'll start off with the Retail Industry document, but as we go through, if parties can just mention, because there's some common proposals, identify which

proposals they advance, which are also advanced for equivalent provisions in the Fast Food Award.

PN513

The initial proposals are those advanced by Master Grocers. The first one is in relation to the table of contents. So, Ms Lyons, what's wrong with the table of contents? Or Mr Stirling?

PN514

MR STIRLING: Thank you, your Honour. Our proposal is that the table of contents, the alphabetised (audio malfunction) that we have received from our members, is that the current structure is difficult to navigate, and it would assist our members if they were able to quickly refer to the alphabetised list so that they would be able to go to the section of those most relevant to your (indistinct).

PN515

JUSTICE HATCHER: Well, this format was extensively workshopped in the Modern Awards Review, and it's broken up by reference to broad topics. I'm struggling to understand how it can be so difficult to find something. Can you give me an example?

PN516

MR STIRLING: I might, just firstly, might call on Ms Lyons to speak.

PN517

JUSTICE HATCHER: Yes.

PN518

MS LYONS: Thank you. Additional payment for annual leave, for example. Higher duties is another example.

PN519

JUSTICE HATCHER: What was the second example?

PN520

MS LYONS: Higher duties.

PN521

JUSTICE HATCHER: But they're not discrete clauses, so they won't be in the index anyway.

PN522

MS LYONS: (Indistinct).

PN523

JUSTICE HATCHER: The annual leave loading is one aspect of the annual leave clause. So it wouldn't appear in the index anyway, except under 'Annual leave.'

PN524

MS LYONS: Our proposal is that you'd have individual sections in that alphabetised index that would direct members.

PN525

JUSTICE HATCHER: So it's not just - - -

PN526

MS LYONS: Other clauses (indistinct).

PN527

JUSTICE HATCHER: - - - alphabetising clauses. It's identifying just topics within clauses. All right. Does anyone want to say anything about this? Ms Burnley?

PN528

MS BURNSLEY: Yes, your Honour. The SDA doesn't have an objection to an inclusion of an alphabeticalised index. If the Commission's able to do it, we understand that it is an additional matter, which would then probably flow across all awards, but we do note that in some of our agreements we do have both the standard table of contents and at the back we also have an alphabeticalised index so that people can use either, whichever they're more comfortable with.

PN529

JUSTICE HATCHER: I could make the observation that that sort of thing is something which employer organisations used to do for their members, but – all right, we'll have a think about that.

PN530

The next one in Master Grocers, you've proposed summary sections that explain key features and consolidate information on specific entitlements. So what's that about?

PN531

MR STIRLING: Thank you, your Honour. This proposal, your Honour, is to provide a quick summary of the sort of key sections of the award. We've used the example of overtime, which will provide essentially in a quick dot point summarised format when overtime would apply. Overtime provisions are found in various sections of the (audio malfunctions) list to consolidate under the relevant heading of the overtime.

PN532

JUSTICE HATCHER: Where are overtime entitlements provided for other than in the overtime clause? Where in the award are overtime entitlements provided for other than in the overtime clause?

PN533

MR STIRLING: There are provisions as I understand it in the recalled section of the award.

PN534

JUSTICE HATCHER: What clause is that?

PN535

MR STIRLING: That's clause 19.11.

PN536

JUSTICE HATCHER: All right. I'm not sure that is necessarily overtime, but anyway. I mean you might consider (indistinct) what such a summary looks like, but the difficulty is you might end up with a summary that's as long as the clause itself.

PN537

So I'm going to invite you, with respect to overtime, to do a draft of what that summary might look like in order perhaps to persuade me and other parties that it's a workable proposition and it doesn't end up with a whole lot of additional text added to the award for no practical purpose.

PN538

The third proposal talks about hyperlinking key terms to their definitions. So does that mean where we have a defined term appearing anywhere in the award there would be a hyperlink and it would refer back to the definitions clause; is that right?

PN539

MS LYONS: Yes. Of particular concern for us is the (audio malfunction) section. So it's not a hyperlinks definition, it doesn't have any capitalisation, and it's referred to four times in the award, twice as shop (audio malfunction) and twice as shop without departments. Our members have found this to be quite confusing, and it's not currently understandable from the classification section that is a defined definition.

PN540

JUSTICE HATCHER: What clauses are they?

PN541

MS LYONS: It's at clause 2, Definitions. So it's the part with the sections, and it's in the classifications, (a) retail employee level 4, retail employee level 6, twice, and then retail employee level 8.

PN542

JUSTICE HATCHER: That the phrase is used?

PN543

MS LYONS: Correct. The phrase is used in two different ways to the schedule.

PN544

JUSTICE HATCHER: That's a slightly different point, isn't it?

PN545

MS LYONS: If 'without departments' was hyperlinked to the original definition in clause 2, then it would be more clear to members what that actually means.

PN546

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

PN547

The next proposal is from Wage Buddy, who are not present, and I think the suggestion is to place all the fine terms, which I think included the classification definitions, in the 'Definitions' clause. Does anyone want to say anything about that? No.

PN548

And there's a general submission about the finding ambiguous terms, but again there's no specific proposal. Unless anyone wants to say anything about that I'll move on.

PN549

Now, the Australian Workforce Compliance Council then in its first proposal says to create a classification table within clause 4 listing industries without references to external schedules. What's that proposal, Ms McKennariey?

PN550

MS McKENNARIEY: The classification table would be designed to enhance the clarity and the ease of reference for stakeholders. It has the potential to reduce the complexity and ambiguity generally in the interpretation.

PN551

So whether it's an improvement or an addition would depend on the specific needs and preferences of other groups as well, so considering the opposition. We think that it actually does clarify the need for the stakeholders, provide easier references and standardisation, and that would support a better understanding of the classifications and its application.

PN552

JUSTICE HATCHER: Sorry, what clause are we talking about?

PN553

MS McKENNARIEY: This is just the coverage, the reference to the schedules and the varied links that can lead to the different interpretations.

PN554

JUSTICE HATCHER: Yes. So how do you want to change the clause?

PN555

MS McKENNARIEY: So creating a classification table, just to make it easier to list the industries without referencing external schedules and jumping to other documents.

PN556

JUSTICE HATCHER: So, for example, in 4.1(b), rather than referring to Schedule A we would there list the classifications, would we?

PN557

MS McKENNARIEY: Yes.

PN558

JUSTICE HATCHER: Including their definitions?

PN559

MS McKENNARIEY: A brief definition.

PN560

JUSTICE HATCHER: Well, I don't know. They only have one definition. It seems to me either you put the definition in or you don't.

PN561

MS McKENNARIEY: That's with the definition to make sure the context is correct.

PN562

JUSTICE HATCHER: So that would mean Schedule A definitions would appear in two places? One's here in 4.1(b), and then again in Schedule A?

PN563

MS McKENNARIEY: I think there could be more of a potential to produce a summary version of it. I think the fear is that the schedule wouldn't be correctly referenced necessarily, or the context of the schedule fully clear without an abridged table.

PN564

JUSTICE HATCHER: And how would you summarise it?

PN565

MS McKENNARIEY: We would have to look at a further proposal. Unfortunately we didn't have a significant amount of time to provide that level of clarity or the solution at this point.

PN566

JUSTICE HATCHER: The difficulty - if you try to summarise these definitions, the difficulty is you won't summarise them correctly and that may lead to non-compliance.

PN567

MS McKENNARIEY: Yes, and that was the reluctance to provide a written solution as part of the submission prematurely without further consultation with the relevant stakeholder groups.

PN568

JUSTICE HATCHER: I'm just wondering whether an easier solution to this might be Master Grocers' proposition that Schedule A could just be put in as a hyperlink.

PN569

MS McKENNARIEY: I think that would also serve as an easier way to navigate the document as well.

PN570

JUSTICE HATCHER: I think at some previous time we did have internal hyperlinks but there was some IT difficulty with the current website, but, look, I'll investigate that.

PN571

The next one is the coverage clause at 4.5. You've got a proposal about the term that's appropriate at clause 4.5?

PN572

MS McKENNARIEY: Yes, just to make the note a bit clearer, as the statement seemed to be a bit confusing around the coverage, so just adding more of a clarification note around who is and isn't covered by the award.

PN573

JUSTICE HATCHER: And what might that say?

PN574

MS McKENNARIEY: If an employer is – so it currently says that an employer is covered by one award.

PN575

JUSTICE HATCHER: More than one award.

PN576

MS McKENNARIEY: Sorry, more than one award. An employee of that employer is covered by the award contained in the classification that's most appropriate to the work performed by the employee in the industry in which they work, and an employee working in general retail who is not covered by this industry award may be covered by an award with occupational coverage.

PN577

JUSTICE HATCHER: Does any other party want to express a view about that? Ms Bhatt?

PN578

MS BHATT: We just identify that obviously this is a provision that deals with potentially overlapping coverage between awards. It's a standard clause that appears in a number of awards, if not most of them. So, you know, careful consideration would need to be given to whether it's to be amended in one award and not others.

PN579

I think the proposition that's being put by this organisation is that guidance should be provided as to how one assesses what is the more appropriate classification definition or structure that applies and given context. But of course that is an assessment that necessarily needs to be made on the basis of the particular facts of a given scenario. It's not clear to us how additional guidance could be given.

PN580

JUSTICE HATCHER: Well, I'd make two observations. One, this formulation I think appears in every single modern award, so it's not just a Retail Award issue, and two, 4.5 is, as it were, the last resort for resolving overlapping coverage.

PN581

I think a better way to approach this might be if parties can identify where overlaps actually exist, then we can simply make determinations as to which award applies in the terms of the awards themselves.

PN582

So I don't know whether this problem's merely theoretical or whether there's been actual problems about particular occupations in retail being covered by more than award. If parties can identify circumstances in which that actually occurs as distinct from a mere hypothetical situation, then we can consider those and simply put in provisions which makes it clear which award is to apply. But, Ms McKennariey, are you aware of any actual overlaps that you've encountered?

PN583

MS McKENNARIEY: Yes. A good example of that would be where you have combination businesses where they may operate retail and fast food within the same premises. So there's examples of split premises, particularly highway roadsides that can be considered as operating under both awards simultaneously.

PN584

JUSTICE HATCHER: Sorry, what's a highway roadside?

PN585

MS McKENNARIEY: So where they have a blend of a fast food provision as well as retail, as well as overlap with fuel services. So your roadside petrol station also provides fast food. So there's staff that will operate within the same store premises. It's often a shared premises, or operated by one franchise.

PN586

JUSTICE HATCHER: Well, there can't be an overlaps, it seems to me, with the fast food by reference to 4.4(d)(i), that is, if you're covered by the Fast Food Award, you're not covered by this award.

PN587

MS McKENNARIEY: The same would apply to the other awards as well. So we've got the employers in the following industry for hospitality. Hospitality and fast food would be primary overlaps, but also with general retail there's an overlap with fuel and potentially other awards.

PN588

JUSTICE HATCHER: All right. We'll have a look at that. I'm sure that these issues have been dealt with. All right, the – - -

PN589

MR CULLINAN: Your Honour - - -

PN590

JUSTICE HATCHER: Yes, Mr Cullinan.

PN591

MR CULLINAN: Just in terms of this issue, we found that the definitions and the classifications refer to a retail establishment, and so generally employers will

default where they operate a retail establishment to all the workers in the retail establishment being covered by the award. So in our experience, there is very little that that overlap – and the circumstance described probably is more the Vehicles Award, which covers console operators and roadhouse attendants.

PN592

JUSTICE HATCHER: Yes. Does anyone else want a say about this? I notice that one would need to also take into account 4.4(e) of the Fast Food Award. All right, we'll come back to that.

PN593

The next one is you, Ms Bhatt. This is about meal and rest breaks.

PN594

MS BHATT: I'm happy to address your Honour on that, but I'm just not sure out of fairness to my colleagues that we might have skipped over a couple of items in the summary.

PN595

JUSTICE HATCHER: Yes, I think we have. Sorry.

PN596

MS BHATT: Items 37 and 38, your Honour.

PN597

JUSTICE HATCHER: Well, while you're on your feet we'll deal with this. This proposal's also raised about the Fast Food Award.

PN598

MS BHATT: Yes.

PN599

JUSTICE HATCHER: Would the consequence of this be that for part-timers it would default to clause 16? No, it's not 16, it's - - -

PN600

MS BHATT: Clause 16.

PN601

JUSTICE HATCHER: Yes, clause 16.

PN602

MS BHATT: In a sense, yes. So the requirement to reach agreement about the timing and duration of meal breaks would be removed, and instead meal breaks will be set in accordance with the various provisions of clause 16, just as they are for full-time and casual employees.

PN603

JUSTICE HATCHER: All right. What's the view about that proposal?

PN604

MR WILDING: Thank you, your Honour. Mr Wilding on behalf of the ARA. Apologies, my colleague was speaking to the Fast Food Award. The ARA supports that proposal, and we've included that at paragraph (l) to our separate application. We don't think that's something that needs to be agreed. It's something that should change over the employment relationship.

PN605

JUSTICE HATCHER: All right. Ms Burnley, Mr Cullinan, is there any difficulty with this proposition, that is, why do part-timers need a specific time to be set for a break in advance as distinct from application of the rules which would otherwise apply to the full-time employees?

PN606

MS BURNSLEY: It is more because of the certainty that is required, especially now that there is a provision for part-timers to add additional hours onto their shifts that they are currently working, by agreement, and it is part of the – when the awards removed some time back the minimum engagement, or weekly engagement that part-timers had with their certain hours. So part of that was to structure a provision that set out some more certainty to part-time work.

PN607

So that is why that provision's in there about their proposed meal breaks - I don't think it covers rest breaks; it's only the meal break, which is the important one - so that part-timers do have certainty as to when their meal break is taken.

PN608

And they do note that at times that is changed by agreement, as it can be, like with the part-timers, and in retail most workers normally do assist their employers when there is a rush on and they can't get off their registers - in the past when we used to have register operators. They do stand there and serve their customers until there is a break in that type of thing. So I think when there is a guarantee as to when their break is taken as a part-timer, they're able to accommodate their other activities that they need to do in their set break.

PN609

I think this was also in some of the common issues last week, your Honour, about the meal breaks and part-timers.

PN610

JUSTICE HATCHER: Yes. Ms Bhatt, how does this work if there's an adjustment to ordinary hours, for example, on a one-off basis?

PN611

MS BHATT: That would necessarily need to be taken into account when one applies clause 16. So, for example, if the working of additional hours results in an employee working a longer period of ordinary hours and they become entitled to additional breaks, under clause 16 those breaks would need to be provided.

PN612

The other thing I'd say in response to what Ms Burnley has put is that this requirement to reach agreement about the meal breaks has been there since the

award was made. So I'm not sure that it's something that has been introduced subsequently in response, or in the context of other changes made to the part-time provisions.

PN613

JUSTICE HATCHER: All right. You rose, Mr Cullinan?

PN614

MR CULLINAN: Thank you, your Honour. Our concern with this is if there's a formal structure around how that will be agreed as distinct from the ordinary roster changes that occur pursuant to clause 16 or the equivalent in the Fast Food Award.

PN615

The Fast Food Award has no rostering arrangements, and we've made some submissions about that. In that arrangement the worker would simply be told when their roster will have their meal breaks, rather than it being a part of the agreed hours in the agreed structure, which for part-time workers in fast food can only be changed with agreement.

PN616

In terms of retail at the moment, those roster structures or those agreed patterns of work at the start of employment, as Ms Burnley has already said, are very clearly documented, and for variation to that there needs to be the consultation of rostering arrangements, which we see as a level of formality, which doesn't occur when employers reissue rosters, as is commonplace in retail under clause 16 or 15. So we're concerned that we would lose those benefits.

PN617

JUSTICE HATCHER: Why is there a different rule for part-timers than for full-timers?

PN618

MR CULLINAN: Well, there's a different rule for part-timers about their hours, and that's laid out in the part-time clause. So the days they work, the number of hours on those days, and that they have documented start and finish times, which can change by consultation.

PN619

So there already are differences, which are there for good reason, and we see that the meal break arrangements that consist within that provide certainty to those workers, which can only be varied through a consultation process and a more formal structure.

PN620

So those workers are more aware and able to engage in that consultation process, as distinct from an employer that just issues rosters which have a few meal break times.

PN621

JUSTICE HATCHER: If on a given day you might have a part-timer working an eight-hour day and a full-timer working an eight-hour day - I don't understand the difference, that is, why wouldn't clause 16 operate fairly for both? That is, it gives them exactly the same entitlement, and it has the same protections as to when - I know AI have got a different proposal about this - but as it stands it's got the same protections as to when the break can be taken. Why wouldn't that be sufficient in either case?

PN622

MR CULLINAN: We see at the moment that the part-timer, through these arrangements, has a more structured approach to their meal breaks, and so to the extent that there would be any unfairness, we would say that that's being perpetrated against the full-timer, and that's because when we look at clause 16, our experience is that employers don't engage in those consultation processes about roster changes when it comes to wanting to change meal breaks.

PN623

They might have a discussion with the employee, but as soon as there's any pushback to that it's simply notified, and so we see that as potentially unfair for the full-timer, but the structure for part-timers as it is, through that agreement when they commence their employment, and through the documented system for variations to that, and that the consultation can be used, provides extra layers of protection.

PN624

Fast food is an entirely different scenario, where those part-timers have structured hours, which can only change by agreement. So for us, that's a different issue.

PN625

JUSTICE HATCHER: All right. Anybody else?

PN626

MS BURNSLEY: Your Honour, I might just add a little bit extra just on the clarity of the part-timers. Because part-timers, unlike full-timers, normally work shorter shifts, so there could be days where they do have a meal break and days where they don't have a meal break, unlike full-timers, who I would think on just about every shift they ever do, they do get a meal break, at least one or two meal breaks during their day, but a part-timer isn't always going to have that provision.

PN627

So having it as built into their roster gives them acknowledgement that on different days they will or won't have the breaks, which also reflects that they may be working at irregular hours for when breaks and meal breaks can be taken. So it is a timing issue, whereas a full-timer who starts at 2 o'clock won't finish till 10 o'clock and would probably have their meal break at 7 o'clock, whereas a part-timer who starts at 2 and finishes - - -

PN628

JUSTICE HATCHER: Am I right in saying that if a part-timer, say, has agreed to work five hours on a given day, there's nothing to agree about because they don't get a meal break?

PN629

MS BURNSLEY: They don't get a meal break; they get a rest break, that's correct.

PN630

JUSTICE HATCHER: So it only arises in the first place if the part-timer's working more than five hours?

PN631

MS BURNSLEY: Yes, your Honour.

PN632

JUSTICE HATCHER: And in that circumstance why wouldn't they just have the same entitlement as a full-timer?

PN633

MS BURNSLEY: It's to give them a more guarantee, because if they're only working a six-hour shift and they're starting at 2, they could be having their meal at 3 o'clock, or they could be having it at 6 o'clock, whereas if they're a full-timer who's working a longer shift, so wouldn't be working a six-hour shift, they'd be working, say, an eight-hour shift, they're going to get two rest breaks plus a meal break, so they're able to coordinate when they can eat or drink better than if they're a part-timer, who could be required to remain at work without a break for four hours after they've had their meal break at 3 o'clock and worked through till 7.

PN634

JUSTICE HATCHER: A full-timer can work a six-hour shift, can't they?

PN635

MS BURNSLEY: Highly unlikely, your Honour, just given the 38-hour week and - - -

PN636

JUSTICE HATCHER: All right. Yes?

PN637

MR STIRLING: Your Honour, Master Grocers supports that (audio malfunction).

PN638

JUSTICE HATCHER: All right. We've got a record of all the parties' positions. You don't need to note it, unless you want to actually add something to the debate. I see.

PN639

SPEAKER: They were just noting.

PN640

JUSTICE HATCHER: Yes, all right. Sorry, I'll just go backwards. So, Australian Workforce Compliance Council, clause 5.11, it's proposed to alter that so that IFAs can be terminated on four weeks' notice. Is that correct, Ms McKennariey?

PN641

MS McKENNARIEY: Yes, that's correct.

PN642

JUSTICE HATCHER: I thought – I'm looking at paragraph (a)(?) - I thought it's the other way around, that if it's a post-2013 agreement it's 13 weeks, that the four weeks only applied to the pre-2013 agreement. So are you actually proposing to reduce time of notice for termination?

PN643

MS McKENNARIEY: No, there is no proposal to reduce the termination notice period. It's more to make it clearer to be able to understand the four-week notice period application and the relevance to that employee. So that was more the point that we were wanting to clarify, was the specifics around the four weeks applying to majority of employees.

PN644

JUSTICE HATCHER: I think that's the point I was trying to make. I think it's the other way around, that the four weeks only applies to pre-4 December 2013 agreements.

PN645

MS McKENNARIEY: Sorry, I'm not sure if others have read it the same way or can perceive it differently, but that was the way we'd interpreted it, was needing to get a bit more consistency with the wording for that particular proposal.

PN646

JUSTICE HATCHER: Does any other party want to say anything about this?

PN647

SPEAKER: We understand it the way your Honour has read it, and we support the change.

PN648

JUSTICE HATCHER: You support a reduction?

PN649

SPEAKER: Yes.

PN650

JUSTICE HATCHER: But that's a substantive variation rather than a - - -

PN651

SPEAKER: Probably. Yes, your Honour.

PN652

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

PN653

MS BHATT: I had understood that the proposal was simply - if your Honour has the clause open?

PN654

JUSTICE HATCHER: Yes.

PN655

MS BHATT: To remove the bracketed words.

PN656

JUSTICE HATCHER: That would make it 13 weeks.

PN657

MS BHATT: That would make it 13 weeks, and I understood that the submission was, and I might have misunderstood, but I thought the submission was that it's potentially unlikely that there are still IFAs in force that commenced operation before 4 December 2013.

PN658

Our submission in response to that, if that is what's being put, is it might be unlikely, but out of an abundance of caution it should be retained, because there might still be such arrangements in place. Anything else is obviously quite a significant substantive change.

PN659

JUSTICE HATCHER: Ms McKennariey, is that understanding of the proposed correct; we'd just remove the words in brackets from 5.11(b)?

PN660

MS McKENNARIEY: Yes, that was what I believe we were looking at.

PN661

JUSTICE HATCHER: So the period would be 13 weeks for all IFAs?

PN662

MS McKENNARIEY: Correct.

PN663

JUSTICE HATCHER: Thank you.

PN664

SPEAKER: Just in relation to that, we don't support that, and we agree with the IAG. We've got members that have old IFAs in place that go before 2013.

PN665

JUSTICE HATCHER: If they've been in place so long I'm sure they won't mind giving 13 weeks' notice, will they?

PN666

SPEAKER: But the entitlement at the moment is four weeks(?). That's the understanding.

PN667

JUSTICE HATCHER: All right. Next one, the AHA. So you want to replace clause 10 with the Hospitality Award provisions?

PN668

MS BUTTERS: Yes, your Honour. Our proposal is to replace clause 10 of the Retail Award with the flexible part-time provisions that are found at clause 10 of the Hospitality and Restaurant Awards. Our members have said that clause 10 of the Retail Award is very inflexible; it's restrictive, and we believe that removing rigidity in favour of the more flexible provisions will make the award easier to use for both employees and the employer.

PN669

We're also mindful of the importance for consistency and perhaps standardisation in those part-time employment provisions. For our members we do operate across all three awards, so Hospitality, Restaurant and Retail Award. This would make their lives a lot easier when it comes to the engagement and ongoing management of part-time employees.

PN670

We also know that this is going to mean increased flexibility for the part-time employees without reducing their entitlements, without diminishing their job security in any way. The same safeguards that currently apply would remain.

PN671

We would also – I think a lot of feedback has been provided by RAFFWU in particular about changing to existing arrangements and whether that would be a reduction. We say there wouldn't need to be a change in existing arrangements; if there is a current part-time employee who wants to work the exact same hours on the exact same day week-to-week, those flexible part-time provisions don't prevent that.

PN672

However, for the employees who do prefer more flexibility in their schedule, particularly ad hoc flexibility to manage caring arrangements or study commitments, we think that this could be helpful for both employees and employers in that situation.

PN673

JUSTICE HATCHER: The provisions in the Hospitality Award and the Restaurant Award were altered in 2018 because nobody was using the provisions. Is anybody using them now?

PN674

MS BUTTERS: Yes, (indistinct), your Honour.

PN675

JUSTICE HATCHER: Are you able to provide evidence of that?

PN676

MS BUTTERS: Yes, absolutely we can. We'll take that on notice.

PN677

JUSTICE HATCHER: Because it seems to me that the Retail Award provisions, to my knowledge, are very extensively used, and the feedback I've received about the Hospitality Award is that hardly anyone is still using them despite the flexibility. So if you want to demonstrate that that position is incorrect, I invite you to provide some evidence about that.

PN678

MS BUTTERS: Thank you, your Honour. Will do.

PN679

JUSTICE HATCHER: That is, where there's data now available as to the extent of part-time employment in the hospitality sector.

PN680

MS BUTTERS: Thank you.

PN681

JUSTICE HATCHER: Does anyone want to say anything about this? Ms Burnley?

PN682

MS BURNSLEY: Not surprisingly, your Honour, we oppose that variation. The Retail Award's part-time provisions have been extensively reviewed over numerous years and it is where it is at the moment, and it was part of the 2020 – I think there was a special case run regarding the part-time provisions in the award, of which most of this was accepted at that time, so we don't think there needs to be a revisitation, especially imposing something from outside the industry into this award.

PN683

JUSTICE HATCHER: What do other employer groups say about this?

PN684

MS BHATT: I think as we've said in our written submissions, we're obviously supportive of measures that would improve flexibility in relation to part-time employment and overtime. We've on various occasions expressed some concerns about the way in which these part-time provisions operate.

PN685

I think further consideration would need to be given to whether the hospitality and restaurants model is necessarily the most appropriate model for the retail sector.

PN686

In particular, one feature of those provisions is that employees must be engaged for a minimum of eight hours per week. I think further consideration would need to (audio malfunction), for example, to whether that is appropriate, but in principle we support the notion that these provisions need to be made more flexible.

PN687

I understand your Honour's point about – I acknowledge that there is obviously a prevalence of part-time employment in the retail sector. What we can't comment on the run is whether that is in circumstances where employers are applying the award, or to a large extent pursuant to enterprise agreements that potentially contain more flexible part-time employment provisions to facilitate that.

PN688

JUSTICE HATCHER: All right. Mr Wilding?

PN689

MR WILDING: Thank you, your Honour. The ARA agrees with the AHA that the provisions are too restricted, and we think that there's merit in exploring options for enhancing flexibility, and that may be through the provisions in the Hospitality Award, but we do think careful consideration would need to be given to how that would interact with the rest of the award, but there's merit in exploring that.

PN690

But if the Commission would prefer to keep the existing structure, then we've made suggested amendments in our separate application at clauses (k) and (l) for those provisions.

PN691

JUSTICE HATCHER: All right. Ms Carroll?

PN692

MS L CARROLL: Thank you, your Honour. I'd echo Ms Bhatt's commentary. We express support for greater flexibility in the part-time arrangements in the Retail Award, and we think greater flexibility in those provisions will facilitate a higher proportion of permanent employment for the retail industry, but whether the Hospitality Award model is the right model or not is something that we should explore, and of course we anticipate (indistinct) later this year.

PN693

JUSTICE HATCHER: All right. Master Grocers – Mr Song, do you want to say anything?

PN694

MR SONG: No, nothing.

PN695

JUSTICE HATCHER: Mr Morrish, do you want to say anything?

PN696

MR MORRISH: Yes, just very briefly, your Honour. We're supportive of greater flexibility and would be supportive of this being explored further as well.

PN697

JUSTICE HATCHER: All right.

PN698

MR CULLINAN: Your Honour, just in terms of this issue, we have objected in our materials, but we do think it comes up in the job security (indistinct), and we think of more relevance is the impact on retailers and how their structures are properly protected in light of the new modern award objective. So we go the opposite way and then some. Thank you.

PN699

JUSTICE HATCHER: All right. So the next one is you, Ms McKennariey, in relation to clauses 10.6 and 10.7.

PN700

MS McKENNARIEY: Correct, your Honour.

PN701

JUSTICE HATCHER: What do you propose to change here?

PN702

MS McKENNARIEY: I believe the summary of the change is wanting to – sorry – the summary of what we're trying to achieve is a better understanding regarding the alteration of work patterns, So just enhancing the clause with a bit of re-wording. So it's more around tweaks as opposed to any material change to ensure better understanding.

PN703

Reading the clause in its current form, it's not clear for an employee with average literacy to understand what they're agreeing to by altering the regular pattern of work and understanding it won't be potentially overtime, but it'll be paid at the ordinary rate. So just wanting to make sure that's particularly clear.

PN704

JUSTICE HATCHER: If you look at your 10.7(b), it says 'must specify in clear print.' Is that some special type of writing or - - -?

PN705

MS McKENNARIEY: Just making sure that it's clear in writing as to what the compromise is and what the payment of rates will result in, or the alteration would result in.

PN706

JUSTICE HATCHER: How does that sort of thing marry up with the notion that you can make these changes by text message?

PN707

MS McKENNARIEY: I think it would still meet the requirements. The only concern would be the operational practicality around the record-keeping given it would be a mobile phone record that's not easily stored. There would have to be disciplines in place for the text message to be stored as a matter of record, particularly if there was any future disputes. That's really the only area of concern with regards to using SMS for that purpose.

PN708

JUSTICE HATCHER: If it was done by text, then under your proposal the text would have to specify the matters you propose in the new 10.7(a)?

PN709

MS McKENNARIEY: Yes, that would have to be made clear that the employee would effectively be paid at ordinary rates. So making that implication clear.

PN710

JUSTICE HATCHER: And then the employee would have to text back that they understand and agree with that solution?

PN711

MS McKENNARIEY: I think yes, a simple yes or affirmative response would satisfy the basic requirements to that reasonably.

PN712

JUSTICE HATCHER: To be frank with you, I'm struggling to understand what problem this is trying to solve.

PN713

MS McKENNARIEY: The core problem I think we're really trying to address is people drawing the line of understanding that the result would be a different rate being paid. So that process of deduction doesn't automatically happen for a lot of people, so making sure it's clearly called out.

PN714

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

PN715

MR WILDING: I think we agree with the view that you've expressed that it's not necessary to this change and it doesn't accord with the practical reality of how this works, how the small retail business owner is meant to incorporate (indistinct) text message, it's difficult to understand. We just don't think (indistinct).

PN716

JUSTICE HATCHER: There's a sufficiently - would it - under the current arrangements would it be sufficiently clear to the employee if they requested to work - to extend their agreed hours to work additional hours so that that's paid at ordinary time, is that sufficiently clear?

PN717

MR WILDING: Well, our position is that (indistinct).

PN718

JUSTICE HATCHER: Right.

PN719

MS McKENNARIEY: The AWCC would argue that the average worker doesn't automatically make that deduction and that it's not clear. A simple basic statement of, 'This will be paid at ordinary rate', would make it sufficiently clear to the employee.

PN720

JUSTICE HATCHER: Ms Burnley?

PN721

MS BURNLEY: Your Honour, I think that is already covered because in the example there of Sonya, she has asked whether she's prepared to work two extra hours at ordinary rates. So I'm assuming that means that the employer will have sent her the text to say that's what they're wanting to do.

PN722

JUSTICE HATCHER: Yes. Well, that's the example. But I think honestly, that doesn't form part of the actual clause.

PN723

MS BURNLEY: The actual clause.

PN724

JUSTICE HATCHER: So that leaving aside the form of words that's proposed, it's a question of whether a request to work, to vary the pattern of hours to work additional hours should make it clear that the additional hours are at ordinary time.

PN725

MS BURNLEY: If agreed then, yes. So it probably should, it might have in the previous version had a better form of words before it was varied again. So if that is to clarify that to make that clear as your Honour has pointed out, that that might not be in the actual text but it's been picked up in the example rather than in the actual (indistinct) clause then that should be something we should consider.

PN726

JUSTICE HATCHER: I mean, the legal position is made clear by 10.8 but it's a question of whether the request would be understood in that way.

PN727

MS BURNLEY: Yes, it would be difficult. Yes, if the intention was to follow the example, that should be reflected in the clause wording so that it's clear as to what the obligation is on the employer to make it clear to the employee what they're agreeing to.

PN728

JUSTICE HATCHER: Does any other party wish to say anything about this (indistinct)?

PN729

MS BHATT: In the absence of any clear indication of evidence that in practice this is resulting in employees not understanding the basis upon which the agreement is being reached then the award shouldn't be varied to add additional prescription as to what the specific agreement should state.

PN730

JUSTICE HATCHER: Well, I mean, if it's in the traditional method whereby you are actually varying the original agreement, that's all fairly clear, but when we're getting down to text messages, an employee might not be able to distinguish a request to alter their ordinary hours, a request just to work additional hours at overtime. Because how would they know the difference between the two types of request?

PN731

MS BHATT: I understand the point that's being made by your Honour. I think if that's a variation that is to be made, some careful consideration would need to be given to precisely what is required to be included in that agreement and how it's to be described.

PN732

MR CULLINAN: Your Honour, I think the critical thing for us is what's the employee is being told as distinct from what the award might say. It's a requirement and then the issue is (indistinct) has raised it, are relevant in that, it's a level of restriction which certainly doesn't exist at the moment, but we would welcome (indistinct).

PN733

JUSTICE HATCHER: Then in relation to 10.9, Ms McKennariey, you propose the substitution of the (indistinct) clause and the hospitality award in respect of the minimum engagement.

PN734

MS McKENNARIEY: Correct, your Honour.

PN735

JUSTICE HATCHER: It seems to me that that does make the position clearer, doesn't it, without affecting a substantive change.

PN736

MS BHATT: If the provision is amended to provide that the obligation can be satisfied either through providing three hours of work, so being engaged or rostered to work three hours, or being paid, then on one view, that does actually change the substance of the provision because it - I mean, it effectively becomes a minimum engagement period or a minimum payment period which is not necessarily a variation that we would oppose.

PN737

JUSTICE HATCHER: Anybody else?

PN738

MR CULLINAN: Your Honour, there's two issues with this for us. The first is that I understand that recall allowance is four hours, but we are concerned by the use of the word, 'Attend' and currently many employees are required to undertake additional work or work which there may be some debate about, whether they're attending a workplace or they're undertaking that work at home.

PN739

So an example would be completing an online module, a training, and so we're concerned that the current clause makes clear that the minimum engagement is three hours and this adds those words (indistinct).

PN740

JUSTICE HATCHER: But it's currently described as the daily engagement, so it's said on each day they're required to undertake work, would that solve the problem?

PN741

MR CULLINAN: If it removes the word, 'Attend', yes.

PN742

JUSTICE HATCHER: Yes. So on each day, they're required to undertake work, does that capture the gist of what you're saying?

PN743

MR CULLINAN: Yes, your Honour.

PN744

JUSTICE HATCHER: Anybody else?

PN745

So the next one is yours, Ms Bhatt. So this is a major change to 10.11.

PN746

MS BHATT: In relation to part-time employment.

PN747

JUSTICE HATCHER: Yes.

PN748

MS BHATT: And again, I think this is a proposition that we've also advanced in respect of the Fast Food Award.

PN749

JUSTICE HATCHER: Yes.

PN750

MS BHATT: The argument being this, as is well-known amongst these parties, I dare say commonly employees require additional hours to be worked. They're in a position to be able to offer those additional hours of work. Whilst the award currently provides a facility for an employer and a part-time employee to agree to vary their hours, to incorporate those additional hours, on each occasion it is necessary to record that agreement in writing and the feedback we've received from employers time and time again, is that in many scenarios, that imposes an unworkable burden.

PN751

JUSTICE HATCHER: Why is it unworkable?

PN752

MS BHATT: Often these scenarios will arise at short notice including during the course of a shift to potentially work an additional few hours, to extend the shift. It might occur at short notice because another employee has indicated that they're unexpectedly not able to attend work and another employee is required - another part-time employee, for example, is offered the opportunity to work those additional hours to replace them instead.

PN753

The notion that we've advanced, which is, you know, commonly referred to is the standing consent model, is that an employer and a part-time employee can agree in writing that that employee may, when offered, agree to work additional hours. Those hours will be treated as ordinary hours, they will be paid as such, but then on each future occasion when those hours are offered and the employee agrees to work them, there is a further necessity to document that agreement in writing.

PN754

The fact that those hours were worked or are worked, would necessarily be documented, for instance, you know, in the context of payslips and the like so that there would be a record kept of the fact that those hours were worked, but not of the agreement itself.

PN755

JUSTICE HATCHER: But if it's subsequently the subject of dispute, how do we know whether there is agreement or not? These requirements in writing are as much to protect the employer as the employee and that seems to me that in the absence of any record, you'd never know whether the employee agreed or not.

PN756

MS BHATT: And it may be that in many contexts, that record is kept anyway. So it might be a text message exchange, a communication through a mobile phone app that deals with rostering. It might be, you know, a phone call that subsequently gets documented on the roster with a note that the variation was agreed, but there are circumstances arising in practice where that is simply not feasible and the proposition that has been put to us by industry is that this would facilitate two things.

PN757

One is more readily offering part-time employees additional hours of work in circumstances where many employees, indeed, (indistinct) are available to work those additional hours and indeed would encourage part-time employment more generally rather than relying on other forms of employment to, you know, canvas the (indistinct) flexibility that's required from time to time.

PN758

JUSTICE HATCHER: Well, I struggle to understand how it would be harder to send a text message and then go up to somebody, ask them and then get their consent. I mean, why - what is the difference?

PN759

MS BHATT: Well, I dare say that it arises from the particular circumstance of certain workplaces and the circumstances in which it's arising, most commonly during the course of a shift, so an employee's already there, they're already working. Their supervisor or their manager will approach them and say, 'Someone who was going to come in immediately after you has just called in sick. Are you able to cover an extra three hours?' The employee says, 'Yes', and that's the end of it, rather than needing to then document that in writing.

PN760

JUSTICE HATCHER: Anybody want to respond to this?

PN761

MR WILDING: Your Honour, the ARA supports concepts where part-time employees can access additional hours at ordinary rates. We put a proposal in our separate application to clarify the availability standing consent provisions under the award, but we'd also be open to exploring other types of proposals that clarify the availability of that under the award. There are a number of workable examples in Enterprise Agreements. Major employers have said this where this has been utilised and working for them, so we do think it can work.

PN762

JUSTICE HATCHER: Ms Burnley?

PN763

MS BURNLEY: Your Honour, the SDA has concerns with what's being proposed. This has been well-debated in the various applications previously regarding part-time and how additional hours should be worked. We do have concerns that somehow, it's very hard to put something down in writing, especially when you're going face to face with the worker to ask them to extend their shift and they're already - everybody's at the workplace on the floor.

PN764

It's not very hard to find a piece of paper to write something down that they agree that these will be worked and it will be at the ordinary rate, not the overtime rate, otherwise that will lead to disputation in the future about, 'I said that, but it was at overtime rates.' We're never going to be able to prove which way that goes and we'll end up with a big debate happening at the Commission as to who said what and where and how.

PN765

We do note that the ARA has raised that it is in some of the agreements, but, yes, the key word there is that it's by agreements where the union has been involved in most of those negotiations and it's something that has been worked through with the parties given the technology that is employed within those large organisations. So we're not talking about the broad majority of retailers whose seen not to have sophisticated systems to maintain records or keep information in writing. They prefer it all to be oral and so that it's going to apply forthwith.

PN766

JUSTICE HATCHER: Mr Cullinan?

PN767

MR CULLINAN: Your Honour, we see this is as a notorious example of the parent waiting outside to pick up their child from the fast food outlet or the retail outlet. We appreciate the candid approach which is that this is about during shifts, having additional time (indistinct). This isn't the fundamental nature of these changes in the award, which would provide additional work to part-timers beyond other than casual workers.

PN768

This is the extra 20 minutes, half an hour or hour at the end of the shift when the manager realises they need someone to keep washing the dishes or to keep serving customers or whatever else it is. And we say that throughout industrial - well, throughout modern industrial history, that is overtime and that should be classified and characterised as overtime and paid as overtime. So where they're concerned about any structure which is (indistinct).

PN769

JUSTICE HATCHER: Well, even if it's overtime, the employee might have a reasonable basis to refuse to do it anyway.

PN770

MR CULLINAN: Exactly. Exactly, and we think that more information and more support for that will see more of these very young workers be able to stand up and say that so they can get home, get back to study or do whatever else they want to do. So - or get paid the appropriate rate. We think that this is directly undermining that.

PN771

JUSTICE HATCHER: Yes.

PN772

MR MORRISH: Your Honour, we see in the (indistinct) grocery sector this issue quite regularly, particularly in the context of deliveries. There might be a delivery that comes at a time that's not accepted and an agent might need additional (indistinct) to assist him (indistinct) short notice. The feedback that we have received from owners of particularly smaller stores is that it's just too cumbersome to (indistinct) interchange rosters, so they will just unload the deliveries to the sales (indistinct) really use some additional rate.

PN773

JUSTICE HATCHER: But I mean, at the end of the day, you can't make the employees do it anyway, can you?

PN774

MR MORRISH: (Indistinct) sure of course, but we have the same grounding as the rate (indistinct) input (indistinct).

PN775

JUSTICE HATCHER: Anyone - how do you know that?

PN776

MR MORRISH: I beg your pardon?

PN777

JUSTICE HATCHER: How do you know that?

PN778

MR MORRISH: This is something (indistinct).

PN779

MS BHATT: I don't agree with that. it is commonly reported to us that employees are quite willing to work additional hours. They have the availability. They have the willingness. The other thing I'd note is that the provisions in the award that enable a variation to one's agreed hours require that the agreement is made in writing before the variation takes effect, which further complicates these sorts of scenarios in which an agreement is sought to be made sort of at the last minute.

PN780

I think there's some suggestion, not so much that's been made today orally, but in some of the written submissions that were filed in reply, that despite our complaints about the part-time provisions, they are being used extensively in this sector and, you know, of course we're not arguing that these provisions are a dead letter the way they were characterised, I think in previous decisions about the Hospitality and Restaurants Awards, our proposition is that they don't go far enough and these are some of the scenarios in which that issue arises.

PN781

JUSTICE HATCHER: I mean, it seems to me if you adopt that, you may as well abolish the requirement for the agreement in writing anyway because it'll be just, as you say, become a dead letter. Everyone will do this if you put this in and we may as well move entirely to a (indistinct) agreement in writing.

PN782

MS BHATT: Well, I mean we would envisage that there would be scenarios in which, if an employee is unable or unwilling to perform the additional hours of work when they're approached, they would simply say, 'No', and then the question becomes can they be required to perform what is ostensibly overtime or are the additional hours unreasonable and, you know, can they reasonably refuse to perform the additional hours of work and if not, some other solution has to be found. That might be another part-time employee who is willing to work the additional hours and agree to doing so.

PN783

JUSTICE HATCHER: But that doesn't answer my question, that is, if you put this clause in, it seems to me that the requirements for agreement in writing would just become redundant because nobody would do it. That is, I would foresee that any part-timer you get in to sign this agreement on engagement then thereafter you'd seek verbal agreement.

PN784

MS BHATT: There may well be scenarios in which that arrangement simply doesn't suit the employee, for example, because they don't have availability to work outside the agreed hours or they don't wish to. It might, nonetheless be in the case that in the context of that employee at some point, their circumstances change and they change on an ongoing basis. They used to attend university on a Friday, they no longer attend university on a Friday.

PN785

They want an ongoing change made to their arrangement and in that context, a variation is made in writing that they're going to work on Friday moving forward. We see those provisions as playing different roles or applying in different scenarios.

PN786

JUSTICE HATCHER: But even that scenario would be rife for misunderstanding, the employee might - without a record in writing, there might be - there's all sorts of capacities for misunderstandings where the employee thought they were agreeing to one off or the employer thought it was going to be permanent, or vice versa and there's no way to resolve the dispute.

PN787

MS BHATT: That may be, your Honour, and it might be that at least some of these sorts of issues can be addressed through the design of any provision that is developed to introduce this sort of capacity. It's something we would need to give further consideration to and I take all of the comments that your Honour has made on notice.

PN788

JUSTICE HATCHER: And it might be said that if you want the flexibility, employ a casual.

PN789

MS BHATT: And that is indeed what some employers will do.

PN790

JUSTICE HATCHER: Of course. That's what they do all the time because that's the flexibility they want. The question is whether part-time employment was ever meant to contain that degree of flexibility.

PN791

MS BHATT: I understand and I acknowledge the observations that have previously been made by this Commission about the genesis of part-time employment and the role that it has directly played, particularly in proceedings during the four-yearly review that your Honour presided over. I think the proposition we've advanced, and as I said earlier, is we see mechanisms like this as potentially encouraging employment on a part-time basis instead of other forms of engagement like casuals, but I can't take that any further today.

PN792

JUSTICE HATCHER: All right. Thank you. So the next one, I think, is a similar variation to clause 11.2, to follow the Hospitality Award. I think we have

discussed that, so we move on. Ms Bhatt, what do you want to do with the hours of work clause?

PN793

MS BHATT: Our submission makes the observation that there are a myriad of rules that regulate how ordinary hours can be arranged and how they can be rostered. We didn't advance a specific proposal for this reason. We thought that it would be prudent for there to be a discussion potentially facilitated by the Commission between the parties, ideally off the record, to discuss some of the sorts of complexities that seem to arise, particularly from the interaction between a number of these provisions.

PN794

Some of those issues have been highlighted by submissions that have been filed by other parties in these proceedings. They've also been highlighted, in particular, by an application that was subsequently filed by the NRA that I think takes issue with specific parts of the hours of work regime. It might be that that application now becomes a more appropriate avenue to discuss some of the specific issues that arise from that provision unless through this process, the parties have an appetite to sort of explore it further.

PN795

JUSTICE HATCHER: All right. Does anyone have an appetite for (indistinct) the view of clause 15?

PN796

MR WILDING: The ARA will certainly be open to those discussions. We put our separate proposals on the particular clauses, but we're also very willing to discuss the overall structure of that arrangement (indistinct).

PN797

JUSTICE HATCHER: Well, I mean, it does give rise to a procedural issue in that I thought the ARA wanted to give priority to specific proposals to be advanced separately from this process. So is that still the preference?

PN798

MR WILDING: It is our preference, but we also wanted to gauge (indistinct) when , if you'd rather have that discussion in that proceeding, happy to do that.

PN799

JUSTICE HATCHER: Well, it's not a matter of my preference, it's a matter of your preference, so I mean, you've got a right to prosecute your application, have it determined fairly, but yes.

PN800

Ms Bhatt, how do you see this interacting with the ARAs application?

PN801

MS BHATT: The ARAs application has already been listed for conference, I think on 5 April before your Honour. It might be that we see how those discussions evolve. Those discussions will relate to specific proposals that have

been advanced by the ARA which we broadly support. If it remains the case that we have other concerns that are not addressed through those proposals, then we might either make separate application or, you know, seek to have them ventilated but that - it would seem to us that that's the neatest way again - - -

PN802

JUSTICE HATCHER: Well, can I suggest that, Ms Bhatt, for your organisation there, the other organisation wants to advance something a little more specific, perhaps do so in the context of the 5 April conference.

PN803

MS BHATT: Yes.

PN804

JUSTICE HATCHER: And we can have a more general discussion about the issues with the clause at that conference.

PN805

MS BHATT: Thank you, your Honour.

PN806

JUSTICE HATCHER: The next one is Master Grocers. So this is about 15.1. What's the issue here?

PN807

MS LYONS: Thank you, your Honour. It isn't readily apparent when the (indistinct) that ordinary and overtime hours - that overtime is payable outside that span of hours. So our members often report to us that they look at that table and that they don't really understand the difference between that overtime and (indistinct) that's what we are submitting that there be a note there and that just below that table (indistinct) outside the span of ordinary hours, overtime rate is payable or that there (indistinct) overtime clause and (indistinct) pay in relation to those (indistinct). That would be (indistinct) help our members to understand.

PN808

JUSTICE HATCHER: So if you had a note which in some way hyperlinked to clause 21.2(a), would that be sufficient?

PN809

MS LYONS: If we had to (indistinct) the wording of that note.

PN810

JUSTICE HATCHER: Yes. Is that the concept that you've got in mind?

PN811

MS LYONS: It certainly (indistinct).

PN812

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

PN813

Yes, Mr Song?

PN814

MR SONG: Your Honour, we oppose the Master Grocers' variation and we say that the overtime provisions are already provided by clause 21.2 of the award. However, in saying that, we do consider that there may be some area to explore those issues further.

PN815

JUSTICE HATCHER: All right.

PN816

So, Ms McKennariey, yours is the next one.

PN817

MS BHATT: Your Honour, before you move on, can I just identify one small point?

PN818

JUSTICE HATCHER: Yes.

PN819

MS BHATT: It appears that your Honour, pointed to clause 21.2(a) which applies to fulltime employees. There's a separate provision applying to casual employees that also entitles them to overtime for time worked outside the span which is clause 21.2(c)(ii), just very aware that should also be mentioned in that (indistinct).

PN820

JUSTICE HATCHER: Yes. Fine.

PN821

Ms McKennariey, clause 15.2?

PN822

MS McKENNARIEY: Yes, your Honour.

PN823

JUSTICE HATCHER: Is there a problem - so is there some noncompliance problem here, is there?

PN824

MS McKENNARIEY: Yes. The issue driving the change we're proposing is the potential misinterpretation and omission of entitlements around penalty rates for work that's being performed when trading hours have been extended and so examples of this within retail that are fairly prevalent is news agencies, retail stores and cafés that may have adjusted seasonal working hours.

PN825

JUSTICE HATCHER: Adjusted - so what do you mean by 'Adjusted seasonal working hours?'

PN826

MS McKENNARIEY: So, for example, retail stores that extend their trading hours until 11 pm on weekdays without any clarification in the actual clause might add some confusion among employees around whether or not they were still entitled to penalty rates for work performed after 6 pm, if that was the typical operating hours when they commenced employment.

PN827

JUSTICE HATCHER: Would it be sufficient if there were, again, as per the last one, there was a note referring to clause 22.1(b)?

PN828

MS McKENNARIEY: 22.1(b)?

PN829

JUSTICE HATCHER: 22.1 is table 11, I suppose.

PN830

MS McKENNARIEY: Yes. I'll just have a look here. All right. So that's the table of penalty rates, effectively. Yes.

PN831

JUSTICE HATCHER: Well, I think that's where the after 6 pm loadings is contained.

PN832

MS McKENNARIEY: Yes. I think if it's more explicitly called out to reference, that that would potentially address it or calling out as additional points of clarification under 15.2 that in circumstances where those trading hours extend beyond normal operating hours that employees may be required to work as per those extended hours and the needs of the business and therefore the penalty rates apply as per that table.

PN833

JUSTICE HATCHER: Well, I don't know about extended operating hours, whatever, the rate applies after 6 pm, full stop.

PN834

MS McKENNARIEY: Yes. True.

PN835

JUSTICE HATCHER: Does anyone else wish to say anything about this? Ms Carroll?

PN836

MS CARROLL: Your Honour, the NRA would add that we don't support this proposal. We think it's well-accepted in the industry that extended trading hours by reference to the span of hours clause in the award doesn't obviate the need for an employer to pay penalty rates including the evening penalty rate we think across our membership. It's well accepted that that applies and well understood.

PN837

JUSTICE HATCHER: Mr Cullinan?

PN838

MR CULLINAN: Your Honour, as per our submission, we're concerned that there not be less clarity and confusion created about the entitlement to overtime as well. So, yes, the penalty rate has to be paid in certain circumstances, but also, overtime has to be paid in other circumstances. We're just concerned that any of these changes might not make that clear.

PN839

JUSTICE HATCHER: Thank you. All right. The - - -

PN840

MS BURNLEY: Your Honour?

PN841

JUSTICE HATCHER: Yes.

PN842

MS BURNLEY: Just one thing. Just looking at the table because I was trying to get my head around the issue of ordinary hours and overtime, so in 22.1 we do have in the table there - we've got the words, 'Saturday, all ordinary hours', and then on Sunday, 'All ordinary hours and public holidays all ordinary hours.' But the Monday to Friday after 6 pm seems to be missing, 'All ordinary hours', after it, just for clarity because it could mean that we have all ordinary hours after the other three, but not the first lot, which I think should be there.

PN843

JUSTICE HATCHER: It's in the column headings.

PN844

MS BURNLEY: Is it? It just says (indistinct).

PN845

JUSTICE HATCHER: Column 1, 'Time of ordinary hours worked.'

PN846

MS BURNLEY: Monday to Friday.

PN847

JUSTICE HATCHER: Yes.

PN848

MS BURNLEY: All right. It just doesn't printout.

PN849

JUSTICE HATCHER: No, no. It's in the column heading. It says, 'Column 1. Time of ordinary hours worked', can - - -

PN850

MS BURNLEY: Yes, but if you look down the column as you go, your Honour, for Saturday it says, 'All ordinary hours.'

PN851

JUSTICE HATCHER: Yes, because Monday to Friday is not all ordinary hours, it's only those after 6 pm. I mean, I don't know how you read that any differently, with respect, but - - -

PN852

MS BURNLEY: Not all hours on a Saturday are all ordinary hours. Before 7 am it's not ordinary hours on a Saturday, that's overtime.

PN853

JUSTICE HATCHER: Yes. in which case it won't be ordinary hours.

PN854

MS BURNLEY: No, but I'm just saying that for the other three - - -

PN855

JUSTICE HATCHER: If it's not ordinary hours, then the overtime penalty rates will apply.

PN856

MS BURNLEY: (Indistinct), your Honour. I was just thinking for clarity if the concern of the AWCC is that they can't work out what happens after 6 pm Monday to Friday, if it says, 'For ordinary hours after 6 pm', because in some instances, ordinary hours goes to 9 pm for some employees on a Monday to Friday and some will go to 11 pm.

PN857

JUSTICE HATCHER: Yes.

PN858

MS BURNLEY: And so instead of having to refer - well, just to identify that there are two instances that it isn't for all hours after 6 pm. I know that the heading at the top says, 'Ordinary hours worked.'

PN859

JUSTICE HATCHER: 'Ordinary hours after 6 pm.'

PN860

MS BURNLEY: You've got to read the two rows together then, whereas the other ones you don't.

PN861

JUSTICE HATCHER: All right. The next one - this is the AI Group's proposed change to 15.2(c), so Ms Bhatt, we've established a separate process to hear and determine that matter so we don't need to deal with that.

PN862

MS BHATT: Yes, your Honour.

PN863

JUSTICE HATCHER: Then the next one is about remote working, so can you explain that, Ms Bhatt?

PN864

MS BHATT: Yes, your Honour. And I think there was some preliminary discussion of this on the last occasion that we appeared before you last week. The substance of the proposition is this; where an employee is working from home, an employer and an employee should be able to agree, in our submission, that various parts of the award do not apply whilst they're working in those circumstances. Firstly, that there shouldn't be an obligation for the ordinary hours to be worked continuously.

PN865

That is, they should be able to work (indistinct). Secondly, that the minimum engagement and payment periods should not apply and thirdly, that the span of hours not apply and as I mentioned last time although I'm conscious that not all of the parties were present on that occasion, there are scenarios in which, for example, an employee, if they wish to work from home, particularly employees with caring responsibilities, they seek a short break during the course of the day to attend to something else, and then to effectively make up those hours later in the day.

PN866

It might be quite a short period, shorter than the minimum engagement payment periods prescribed by the award and it might be outside the span of hours because that's what best suits their personal circumstances.

PN867

JUSTICE HATCHER: But why does the minimum engagement get affected?

PN868

MS BHATT: In exactly those scenarios. So you might have a situation in which an employee takes two hours off in the afternoon to collect their children from school and attend to something else and then they wish to work two hours - a sort of standalone period of two hours later in the evening. The question then becomes whether the minimum engagement or payment period would apply to that.

PN869

JUSTICE HATCHER: Well, it's a - so 10.9 is a minimum daily engagement. It's not per occasion, is it?

PN870

MS BHATT: Yes. I take your Honour's point that that would be (indistinct).

PN871

JUSTICE HATCHER: So you're not suggesting that that would - there would still be a requirement for at least three hours work in the day, but you'd want the capacity to separate it if you both agree.

PN872

MS BHATT: Those are the circumstances in which we have envisaged that arising. That's right. So it might be - I mean, subject to a broader discussion that's been had today about whether that provision should also - or should (indistinct) for a minimum payment, that might need to be revisited, but if that's

not the case then perhaps that provision doesn't pose a problem in this particular context. I should - - -

PN873

JUSTICE HATCHER: And what sort of person might work at home in a retail context?

PN874

MS BHATT: So, your Honour, for example, there are - I mean, the classification structure for this award specifically contemplates clerical work. There's indeed a clerical stream, so many of those employees might work on (indistinct) they're sort of doing what we might describe as back office work. So it's not uncommon just as one might say that it's not uncommon for employees under the Clerks Award.

PN875

There might also be very senior sort of managerial or supervisory roles that are performed either wholly remote from a store or partly at a store, but partly remotely or in an office environment and those employees may seek to work from home from time to time.

PN876

JUSTICE HATCHER: How would this work if it comes to calculating whether overtime is payable on any given date?

PN877

MS BHATT: (Indistinct).

PN878

JUSTICE HATCHER: Well, if you've - so you've done away with the span of hours and you've done away with any requirement for continuous work which effectively leads the employee determining when they're working. So how does the employer or an enforcement authority know when there's an overtime entitlement.

PN879

MS BHATT: So there may be other circumstances in which an overtime entitlement arises. For example, if an employee works - there's an entitlement that arises if they work, for example, beyond the maximum number of hours and if they (indistinct) 38 maximum for three hours, assuming they're a fulltime employee.

PN880

JUSTICE HATCHER: Yes. But use the first example; so if we've done away with the span of hours and we've done away with continuous work and presumably we've done away with the rostered starting time, how do we know whether the employee has exceeded the ordinary number of hours allowed for the day such as to trigger the overtime entitlement?

PN881

MS BHATT: I think what your Honour's question highlights is a need to consider how any such provisions were being tracked with the rostering provisions. That is, would there still be a need for those hours to be identified - the employee's hours of work to be identified on a roster or in some other way which then identifies where an entitlement to overtime might arise in those sorts of circumstances because they've worked more than the daily maximum or the weekly maximum and certainly that's something that we can give some more thought to.

PN882

JUSTICE HATCHER: Well, I think it needs to be dealt with holistically because currently if there's a notional roster of hours then it's pretty easy to tell whether an employee's gone outside the rostered hours and exceeded the daily maximum, but if it's just left on this sort of more general basis, we need to think through, I think how this interacts with overtime provisions and rostering provisions.

PN883

MS BHATT: Yes, your Honour. I should flag that in submissions that we're filing today in the work and care stream, this is a proposition that we propose to advance. It's clearly relevant, but this process, I think, more readily lends itself to dealing with those sorts of award specific issues and so, you know, to the extent that your Honour is open to it and the other parties would seek to give consideration to - further consideration to some of the issues that your Honour's just raised in this process.

PN884

JUSTICE HATCHER: One conceivable recommendation of the purportedly trialled for the issue is that the Commission might initiate a matter of its own motion probably in the Clerks Award for a specific working from home clause which would deal with these sort of matters, but in a holistic way.

PN885

MS BHATT: And I think some unions have indicated or foreshadowed that they too seek to advance proposals dealing with working from home and that might be a vehicle for dealing with any such matters collectively.

PN886

JUSTICE HATCHER: All right. Does any other party wish to say anything about this? Mr Cullinan?

PN887

MR CULLINAN: Thank you, your Honour. I think everything that's just been discussed goes to our submission, which is seeking its working from home proposal. We note that the award provides for work at a retail establishment for levels 1 to 4, but levels 5 to 8 which would capture some of the types of work that my learned friend has described do so - or in connection when retail establishment. So we think that there may be a natural grouping there.

PN888

We did raise, in our submission though, that we have a concern about employers that require employees to do work away from the workplace, particularly online

modules which the FWR has been prosecuting now for near on 15 years and we're regularly pursuing as well. Some employers have taken a more (indistinct) such as Woolworths Group, which is geofencing employees' devices so they can't do them away from work, but we still have very many employers that require work to be done away and we are concerned that this might facilitate that despite the evidence of unions (indistinct).

PN889

JUSTICE HATCHER: Well, that's - I see that as a different issue.

PN890

MR CULLINAN: Yes.

PN891

JUSTICE HATCHER: But do you agree that there is some merit in exploring whether provisions of the award can be altered to allow employees more readily to agree to working from home requests?

PN892

MR CULLINAN: It is a small cohort in retail and probably even smaller in fast food, but as we've said, we're happy to work with the ARG and other parties to try and build that. Yes. Thank you for that.

PN893

JUSTICE HATCHER: All right. So the next one, Ms McKennariey, is about banking of rostered days off. So what is the problem here?

PN894

MS McKENNARIEY: So the clause currently allows for banking of up to five rostered days off per year per the agreement between an employer and employee, but it doesn't actually specify what happens to those unused bank days at the end of the year term or if there are any restrictions on when these days can be taken within the clause. So the consideration is that the clause should be considering the liability for an employer to track and pay out at an accrued rate of pay or overtime.

PN895

We're not seeking to amend entitlements, rather provide the clarity and reduce the ambiguity within awards based on the observations from an operational and an employer technology perspective. So for this reason, rather than forfeit it, we would view that the payout at the relevant accrued rate for an RDO rather than forfeiture may be more appropriate in that sense.

PN896

JUSTICE HATCHER: All right. Is it sufficiently clear at the moment that once they're banked, they just stay banked forever until used? That is, there's no (indistinct) reconciliation requirement, that is, get carried forth.

PN897

MS McKENNARIEY: For an indefinite period, I think the concern is, is that from an employer's perspective over time, the rates of pay may change

substantially or that individual's role or their particular ranking within the organisation may have resulted in a promotion during that time period and if they still have those banked RDOs, the ability to pay that at the relevant rate becomes more difficult to manage after a period of time. So for that reason, there may be accuracies or there may also be loss record-keeping associated with that.

PN898

In the interest of the employees receiving that entitlement and being paid at the correct rate, we think that it would be appropriate to put a boundary on it.

PN899

JUSTICE HATCHER: But would it be easier just to place a maximum on the number of days that can be banked?

PN900

MS McKENNARIEY: I believe the maximum is currently stipulated as five days per year by agreement (indistinct).

PN901

JUSTICE HATCHER: I mean, an overall maximum that is not per year, but an overall, whether it's, say, 10 days. You can't bank more than 10 days and that would (indistinct).

PN902

MS McKENNARIEY: I think that would also address the minimising the liability on the employer, however, it would still potentially span multiple different rates if accrued over multiple years with different salary changes taking effect, or sorry, different pay rates taking effect.

PN903

JUSTICE HATCHER: Well, this is by agreement, that is, if the employer's concerned about it, presumably they wouldn't agree to it.

PN904

MS McKENNARIEY: We said by agreement, that could be deemed to be appropriate.

PN905

JUSTICE HATCHER: Well, that's what it says already. That is, if the employer's concerned that there is an excessive number of days building up then, well, they would presumably simply stop at (indistinct).

PN906

MS McKENNARIEY: I don't know if that's completely clear in the existing wording.

PN907

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

PN908

MS BHATT: We haven't advanced a definitive position in response because I think we'd need to further consult with members as to what their existing practices are. There might be some circumstances in which employers are quite content to continue to bank RDOs and if they're not, as your Honour says, there's no compulsion on them to, the provision operates by agreement. So it might not be necessary to make any variation of this nature.

PN909

JUSTICE HATCHER: So what happens if employees leaves or is terminated with banked RDOs. Do they forfeit them?

PN910

MS BHATT: I don't think that the provision deals with that expressly.

PN911

JUSTICE HATCHER: Ms Burnley?

PN912

MS BURNLEY: Your Honour, we haven't had any concerns over how this worked because normally this has come out of other awards which have a similar provision and it normally does cover closedowns for those work forces, which in retail and fast food, we tend not to have closedowns even though it is provided for in the award.

PN913

JUSTICE HATCHER: Yes, it does.

PN914

MS BURNLEY: So that's where that provision has come from. There has been no concerns about people building up a pool of 20 days or something being a reason people do bank them so that they do get a week of leave at some stage which is more convenient normally for the employer to give them a week of leave rather than bits and pieces through the various days.

PN915

As to the concern that's expressed that people do get promoted and therefore, they're entitled to a higher rate of pay for those days, they could happen at any time in a year, you'd bank one day on Friday and next week you get your promotion so it is already an issue which you could never - I guess, you could in some ways, but it would add a huge complexity to take those days at the rate that you accrued them at. So we don't see that there should be any change to this. We would say that if it's banked, it's recorded and if somebody is terminated, it should be paid out as it is leave entitlement that's been accrued.

PN916

MR CULLINAN: Your Honour, we raised the issue of the unlimited bank, but we also have a difficulty, we're not aware of this being used at all in retail and that could just be on us, but we don't cognitively quite understand how those hours that you are working - because presumably if you're 19 - 19 starts close to 20 because you're banking the RDO, whether the 20th start is at overtime rates or some other structure and how this actually plays out in workplaces.

PN917

So we're not entirely sure that there's a great deal of understanding about how it actually works because there's an agreement that can be reached with an employer to do 20 starts rather than 19. So I just wanted to flag that because we think that if there's going to be changes to it, it might be useful to consult over the rates actually being applied in workplaces now.

PN918

JUSTICE HATCHER: Do any employers want to say anything about this proposal? No.

PN919

MS McKENNARIEY: I'd just like to add, I think, checking on payment on termination, I can't see any references to the payout of RDOs.

PN920

JUSTICE HATCHER: No. All right. So the next two - or the next three proposals of the AHAs in relation to hours of work and rostering. So Ms Butters, do you want to talk about those?

PN921

MS BUTTERS: Your Honour, if it's your Honour's preference that we wait until the 5 April listing of the ARAs application, we're happy to speak to the proposals there if that's more appropriate.

PN922

JUSTICE HATCHER: All right. Would everyone else be happy to do that? All right. Well, I'll leave it to you, Ms Butters, to remember to raise that at the time.

PN923

MS BUTTERS: Thank you.

PN924

JUSTICE HATCHER: Now, Mr Song, the next one is yours.

PN925

MR SONG: Thank you, your Honour. We propose that clauses 15.7 and 15.8 of the award be amended to clarify that these clauses only apply to permanent employees, particularly fulltime employees and we make this proposal based off three reasons. One we firstly recognise that historically, these provisions only apply to fulltime employees and that was apparent from cluse 28 of the 2010 version of the award and we also note that the Commission also noted the ambiguity in that previous Full Bench decision.

PN926

Now, the second reason is that we say that the clause is inconsistent with the nature of casual employment and this is because casual employees often perform substantial work in some periods, whether they be seasonal and we also say that some casuals may only be available to work on Sundays, for instance. But overall, our argument is that the way that the clauses 15.7 and 15.8 are currently drafted, are ambiguous and are operationally inflexible and - - -

PN927

JUSTICE HATCHER: I mean, the difficulty is, Mr Song, I've seen casual engagement contracts in retail which have rostering requirements.

PN928

MR SONG: Yes.

PN929

JUSTICE HATCHER: So you can't say that retailers don't roster casuals because they do. So that means that there's no provisions in the award governing the rostering of casuals.

PN930

MR SONG: Yes. We take your Honour's point on that and we are open to further exploring through discussions with the parties and we - the third point is that our proposal is consistent, we say, would be consistent with the modern awards objective, particularly subsection 134(1)(a), (d), (f). Thank you, your Honour.

PN931

JUSTICE HATCHER: All right. Thank you. (Indistinct) other parties say about this.

PN932

MS BHATT: Your Honour, as I understand it, ABIs submission deals specifically with clauses 15.7 and 15.8 which provide various rules in which ordinary hours can and can't be arranged as opposed to clause 15.9 which deals with the notification of rosters and that potentially goes to the point your Honour has just made and that is that in practice, at least, some retailers do appear to prepare and publish rosters for casual employees. As I understood it, ABIs submission was more confined than that.

PN933

They appear to be taking issue with the fact that the previous two clauses I mentioned on their face now, on one view, apply to all categories of employees and in response we have said that the history that is set out in ABIs submissions makes good the proposition they rely on, which is that historically it didn't apply to casual employees, but also that it didn't apply to part-time employees.

PN934

And I assume, coincidentally, around the same time that ABIs submission was filed, it's separately being raised with us that that issue has been identified in industry as a potential anomaly or concern. It does seem to have flowed from a serious of changes that were made during the (indistinct) language redrafting process.

PN935

And on one view, just as a matter of merit, it would make sense that provisions of this nature are not necessary in the context of part-time employment in circumstances where the setting of their hours is already heavily regulated by other provisions as opposed to fulltime employees whose circumstances were obviously different.

PN936

JUSTICE HATCHER: (Indistinct). Yes, go ahead.

PN937

MR WILDING: (Indistinct) that the ARA agrees that clarity is required as to these submissions (indistinct) our position is that it should be fulltime employees only, consistent with the historical position and we've made that - those proposed determinations in our application.

PN938

MR WILDING: Your Honour, we say those provisions should be extended to part-time employees because part-time - the nature of part-time employees' work, they do work regularly so they don't necessarily have the influx of hours all at once. So again, seasonal work, which would require an exemption from clauses 15.7 and 15.8.

PN939

JUSTICE HATCHER: Does any party contend that these clauses do apply to casual employees or part-time employees currently?

PN940

MS BURNLEY: Yes, your Honour, the SDA does and that has been something that has been debated including during the (indistinct) which the SDA participated fully in every one of those conferences that was held over a lengthy period of time. we do not now, I think, that it's been conceded that they should apply to part-timers, we think that that's where the employer has moved to, I think.

PN941

JUSTICE HATCHER: Well, one employer has (indistinct).

PN942

MS BURNLEY: One employer has moved to that one. And with regard to the issue of Sundays, there's a provision in there that if an employee so wishes to work every Sunday, they can agree to do that. So there is no issue about whether somebody is rostered every four Sundays. If they've agreed to do that, they've agreed to do that and that, I'm still assuming, is in writing somewhere on the employer's file.

PN943

JUSTICE HATCHER: Yes.

PN944

MR CULLINAN: Your Honour, we also say that the clause applies to casual workers. We did, in our submission in reply, highlight the earlier wording which deals with the fulltime issue which we note was some (indistinct) commentary that is being relied on, but we think that the clause that was in the award at the time made clear that part-time employees were covered. But we raised these two concerns about casual employees being excluded from these rights.

PN945

The first is that it could mean that a casual worker never has a day off work and we say that that provides a fundamental safety consideration of what is, very often, a young workforce in early stages of their employment. And secondly, there's a concern that arises about the capacity to confer a casual employee that works every day to other forms of employment. We can see an employer trying to mount the argument that that work cannot be converted to ongoing work because it's not part of the award.

PN946

So we have a couple of concerns, but fundamentally, these are changes which would have a substantial impact on hundreds and thousands of casual employees and we submit that they should not be made.

PN947

JUSTICE HATCHER: Anybody else?

PN948

MS LYONS: Making note of that as well, we have raised this (indistinct) parties' submission because what we've heard from our members is that they're very hesitant to use these clauses if they're casual. We believe that there should be a (indistinct) casual employees because of these words (indistinct) agreement for different arrangements, our members are struggling to understand how they can enter into an agreement particularly something in writing that's recorded in the (indistinct) that actually is to promise a particular set of hours to a casual employee because they're very hesitant to make sure that they're making not making any (indistinct) to casuals.

PN949

JUSTICE HATCHER: Well, if they're hesitant about that, presumably they wouldn't make the agreement in the first place.

PN950

MS LYONS: Exactly. We feel like if the clauses are in the award they should be used, they be able to be used and they should appear (indistinct). And we do believe the rate that (indistinct).

PN951

JUSTICE HATCHER: But wouldn't - I mean, your members would roster casuals, wouldn't they?

PN952

MS LYONS: Yes, they do roster the casuals but without having the consecutive days up and (indistinct) work on Sundays, these employees are willing and able to work but the members are hesitant in using these agreements to change their consecutive days off or have these casual employees regularly working Sundays because they don't know whether or not they can promise these agreement for different arrangements to the casual employees.

PN953

So they may just roster their part-time employees on instead (indistinct) because they know how to change those hours and they know that they can make agreement under these two clauses.

PN954

JUSTICE HATCHER: (Indistinct).

PN955

MS BHATT: I just note the obvious point in response to the submissions made by RAFFWU today that the very nature and premise of casual employment is different and casual employees are at liberty to accept or refuse the work that's offered to them. I think that's a reason, a merit reason why it's not necessary for these sorts of details and complex rules to apply to the way in which their work is arranged and again distinguishes casual employees from, for example, fulltime employees, which is who we say these provisions apply to and only apply to.

PN956

JUSTICE HATCHER: Well, that's just a theoretical position. I don't think, with respect, that corresponds with what retailers actually do which is that casuals get rosters which they're expected to turn up to.

PN957

MS BHATT: But, sir, I say the proposition that rosters may be published, that communicate when a casual employee is being offered work or where they have been offered and accepted work. The proposition that they are then expected to turn up and they don't have the option to refuse that work is not a contention that we would accept.

PN958

JUSTICE HATCHER: The next one, (indistinct) hours and (indistinct), does anyone want to say anything about their proposal such as it is? No. All right.

PN959

The next one is yours, Ms Butters, involving modifying clause 16.

PN960

MS BUTTERS: Thank you, your Honour. The AHA has sought a more standardised clause for meal breaks across the awards. We've used the clause from the miscellaneous award for this example. There is no intention to reduce entitlements, but rather simply to streamline the operation of the clause. We note that there was some additional proposals put forward in submissions in reply, particularly ABIs proposal to retain the existing cluse 16.6 which deals with the breaks between work periods.

PN961

If that needs to be an additional safeguard introduced into clause 16, we think that's a very sound suggestion.

PN962

JUSTICE HATCHER: So your proposal replaces the entirety of clause 16, does it?

PN963

MS BUTTERS: Yes.

PN964

JUSTICE HATCHER: Well, it clearly does reduce entitlements, doesn't it? I mean, for example, it takes away all the protections in clause 16.5.

PN965

MS BUTTERS: I think it streamlines its operation rather than being as rigid. I think the employer's obligation - well, duty of care rather, to ensure the equitable allocation of breaks across a shift would remain regardless of what the award clause would be. So it was just - - -

PN966

JUSTICE HATCHER: Well, what - so what obligation is that?

PN967

MS BUTTERS: The work health and safety obligation to ensure fatigue management.

PN968

JUSTICE HATCHER: I mean, I must say that I - looking at this clause, I think it's drafted in a way which is perfectly clear.

PN969

MS BUTTERS: It's simply our members' feedback that they find it restrictive at times. Well, rather prescriptive with exactly when breaks need to be taken with little flexibility to account for operational requirements and that's the - particularly 16.3, the timing of rest breaks, meal breaks are to be included in the roster and then subject to roster provisions, our members find that where those breaks cannot happen it's leading to some discontent there. So they were hoping to have that flexibility there - well, rather lack of rigidity in that regard.

PN970

JUSTICE HATCHER: So you don't want to roster meal breaks. Is that the point?

PN971

MS BUTTERS: No, we'd rather not have to be tied to a rostered meal break. If that needs to change, obviously subject to a reasonable approach, it's not an arbitrary change, you know, and I certainly don't believe that meal breaks should be taken within the first hour of a shift, but it's simply that if they are rostered and those rostered breaks can't happen, we're getting some discontent around that.

PN972

So it's more to streamline its operation and agreeing to a little bit more flexibility when operational requirements prohibit a very strict operation of what a roster says.

PN973

JUSTICE HATCHER: All right. So the real issue appears to be clause 16.3. So does any party want to say something about that?

PN974

MS BURNLEY: Your Honour, this breaks clause did arise out of some of the SDA early agreements we had, which is why it's differently set out to most of the breaks clauses in awards. It does specify quite clearly which shift length you are and where you fall with regards to how many breaks you get and how long they should be, whether it's a meal break or a rest break. So it's quite clearly set out between the columns there. So we don't think it adds a complexity, it actually simplifies the provision.

PN975

You don't have to interpret a set of words; you just look for the shift length and go to the corresponding row that applies to that. As to the other provisions that the AHA is now seeking to delete, we would oppose that of course, because it is a reduction in the benefits and protections that employees have and they are running it from their Restaurant and Hospitality Award, which is different to the retail industry.

PN976

JUSTICE HATCHER: Yes. All right. Anybody else?

PN977

MR WILDING: Your Honour, whilst the ARA is open to some streamlining of this clause, we do think it's important that the entitlements remain determined by references to the times worked as they currently are, rather than the shift work.

PN978

JUSTICE HATCHER: All right. Related to this proposal by the Workforce Compliance Council to remove clause 16.4, I must say, I'm not sure myself what 16.4 actually means or what effect it has apart from the other provisions of the award. Ms Burnley, what does clause 16.4 do and what does it even mean?

PN979

MS BURNLEY: What it was meant to do was to make sure that the rest breaks were appropriate for this length of the shift that you were doing and taken at a time that was appropriate.

PN980

JUSTICE HATCHER: Well, clause 16.2 deals with the length of the breaks.

PN981

MS BURNLEY: Yes.

PN982

JUSTICE HATCHER: Clause 16.5 deals with when the breaks can be rostered. I'm just trying to work out what does clause 16.4 do in addition to that?

PN983

MS BURNLEY: In addition to it, it would mean that - what it was trying to encapsulate was in some of the awards where they have the provisions that you've got to - there's other provisions - I'm trying to think now of what the other provisions are in some of the other awards. It was trying to encapsulate that into

one. So it was just to emphasise that the break was to be meaningful for the employees so that they were properly rested and that they can - - -

PN984

JUSTICE HATCHER: But the time of the break is specified in 16.2, so what does 16.4 add to 16.2 to say that it must be meaningful? I mean, if it's a 30-minute break, it's a 30-minute break.

PN985

MS BURNLEY: It's to whether that's a meaningful break. So it's to make sure that the breaks aren't too close together if you're working a 10-hour shift, but they would be spread out over that 10 hours so that it would be meaningful breaks during the day, not all just clumped into the middle or towards the end of the shift because if you were working a 10-hour day, there's nothing in there to stop you having your first rest break at four and a half hours and then your meal break would be then an hour later and then your second rest break could be an hour after that.

PN986

So therefore you're not breaking up the day appropriately for that person. You're not having meaningful breaks during their work. They're working - they could be working an awful lot of hours during their first four or four and a half hours before they get any breaks. So what it is meant to do is to try and provide it that it's meaningful for various reasons such as safety and for rest and recuperation so that people are getting a break from their work throughout their shift.

PN987

JUSTICE HATCHER: All right. Anybody else?

PN988

MS BUTTERS: Your Honour, to that point, we wonder if clause 16.3 of the Hospitality Award which states:

PN989

When the employer rosters an employee's breaks, they must make all reasonable efforts to ensure that breaks are evenly spread across the employee's shift.

PN990

We wonder if that might be a more appropriate inclusion in lieu of the current clause, subsection (3) and (4) of the Retail Award.

PN991

JUSTICE HATCHER: All right. That's noted. It's very gratifying, Ms Butters, that you regard the Hospitality Award as so appropriate.

PN992

MS BUTTERS: It's my bread and butter, your Honour.

PN993

JUSTICE HATCHER: Well, we won't get many proposals about that, no doubt. All right. I'll move onto the - - -

PN994

MR CULLINAN: Your Honour?

PN995

JUSTICE HATCHER: Yes.

PN996

MR CULLINAN: One small element that we did in reply, we raised the issue of the word, 'Or' in the (indistinct) of the table and we've had some feedback that two employers have tried to interpret that as an entitlement to a rest break or rest breaks as specified 'Or meal breaks', rather than 'And meal breaks.' So we just wanted to flag that. It's in our reply submission as well.

PN997

JUSTICE HATCHER: Yes, Ms McKennariey, you have your hand up.

PN998

MS McKENNARIEY: Sorry. I had my hand raised. Just with respect to 16.4 and the meaningful breaks, I think the concern is more that that term particularly introduces subjective interpretation opportunity based on the lack of defence counsel and potentially could introduce opportunities for rest breaks and (indistinct) to be not managed appropriately and compromise the provisions in 16.1 and 16.2.

PN999

JUSTICE HATCHER: All right. Look, I know we've got some distance to go, so what I might do is we'll take a short adjournment and resume at 12.15.

SHORT ADJOURNMENT **[11.57 AM]**

RESUMED **[12.18 PM]**

PN1000

MR CULLINAN: Your Honour, before you move on from 16.4, we were just going to raise one issue that might be relevant and that is the equivalent clause in the Fast Food Award and that is 14.4 in the Fast Food Award.

PN1001

JUSTICE HATCHER: Just give me a second, I'll just get that. Yes. Is that the same wording?

PN1002

MR CULLINAN: It's not the same wording. It doesn't provide the obligation on the employer to, when considering or when rostering to ensure. That clause at 14.4 is of great interest to RAFFWU and, no doubt, the SDA, in terms of some of the litigation that's underway in Federal Court by the couple of major fast food companies and class actions, but it might be alternative form of words which is more amenable.

PN1003

JUSTICE HATCHER: So is - the class actions you're talking about, is this clause one of the clauses that's relied upon?

PN1004

MR CULLINAN: We expect - it's still, unfortunately at an early stage (indistinct) but we expect those words will be relevant to the determination by the court in relation to any award breaches of how that was complied with and also the other part to that clause is just the notes underneath the table. They might be of assistance. They're not, for some reason, in the Retail Award, but we heard a reference made to shift lengths and hours worked.

PN1005

But those notes indicate that a rest break is counted as time worked, which might be of assistance so that an employer knows when other breaks, meal breaks and second rest breaks actually accrue, unless there was some concern that the 15 minutes didn't count for five hours or something like that. So there's two notes underneath that table which might be of assistance. Thank you, your Honour.

PN1006

JUSTICE HATCHER: All right. Ms Bhatt, you're the next one.

PN1007

MS BHATT: Yes, your Honour. and this proposition is really directed at clause 16.5 of the Retail Award and we've made a similar submission in respect of a provision of Fast Food Awards that is in the same terms. The issue that has been raised with us is this. There are, in the contexts of the Retail Award, retail establishments in which a specified number of employees are rostered to work at a given time.

PN1008

In order to ensure that employees can be given their break, an employee can be afforded their break and there are a sufficient number of other employees that are still working to continue the operations of the employer, there is a greater need to effectively stagger those employees' meal breaks to allow the meal breaks over a greater span of hours or spread of hours.

PN1009

One way of doing that, we suggest, is to introduce a facilitative provision of the nature that we've described in our submissions which would effectively allow an employer and employee to take - for the employee to take the meal break within the first hour or the last hour, to work up to six hours without a meal break at all or to take the meal break and the rest break together, combined. That last proposition, I should say, we've been told that employees are requesting that arrangement specifically.

PN1010

They wish to be able to take a longer break or you might have an employee, for example, who is working in a shopping centre and they'd like to take a longer break because it gives them time to leave the premises to consume a meal and attend to something else, you know, pick up groceries, go to the post office,

whatever the case might be and a longer break would allow them to do that. It's a facilitative provision. It would only operate by individual agreement.

PN1011

JUSTICE HATCHER: Why would an employee agree to take their break in the first hour?

PN1012

MS BHATT: It might be that it's less likely that that situation arises as compared to an employee, for example, agreeing to take their break in the last hour, but as I said, I mean, one of the objectives that this is directed towards is increasing the period of time over which breaks can be taken to address that concern that employees have raised with us.

PN1013

JUSTICE HATCHER: All right. Does anybody want to comment upon 16.5(e)? That is, I'm not going to worry about (a) and (c) for the time being, but the notion that an employee might agree to have their rest break combined with a meal break.

PN1014

MS McKENNARIEY: Yes, your Honour. Where the combined time for rest break and a meal break, I think, would be something that would be of benefit to a lot of employees and potentially employers. So for that reason, we wouldn't have any objection to that flexibility.

PN1015

JUSTICE HATCHER: All right. Ms Burnley?

PN1016

MS BURNLEY: Your Honour, the SDA would object to combining the breaks together. It isn't something that our members have been demanding in any great volume, if at all, during any of the enterprise bargaining that we've been doing with companies. It is (indistinct) - - -

PN1017

JUSTICE HATCHER: Might that be a concern more than it might suit an employee by agreement to have a long break because they'd need to, I don't know, go to the shops during the lunch break or do something?

PN1018

MS BURNLEY: There is provision that the lunch break can be up to an hour already if the employer so rosters it that way. So we haven't had this issue, but there is a problem with people taking their breaks at this time. What we have noticed in the industry is that there is a lot more shorter shifts so that there is somebody rostered for a morning shift and somebody rostered for an afternoon shift and there is no meal break taken by those employees, they just get a - they are already provided with a rest break.

PN1019

So we haven't had this put to us in any form of negotiations, et cetera. We also have concerns that it could also affect the WHS standards of those employees if they suddenly are working a very long shift and combine everything together and still only get an hour off their feet because they're getting a 30-minute meal break and two 15-minute or two 10-minute rest pauses, so they get less than an hour away from their work station.

PN1020

JUSTICE HATCHER: All right. (Indistinct) for the next one, so Ms McKennariey, this deals with 16.6(b). What's the difficulty here?

PN1021

MS McKENNARIEY: Without the explicit clarification, it's unclear whether the payment represents a penalty or overtime rate for the hours that have been worked without the mandated 12-hour break between shifts.

PN1022

JUSTICE HATCHER: Well, that would depend, wouldn't it? I mean, obviously if they've already passed (indistinct) hours, it would be overtime but if they haven't, it would.

PN1023

MS McKENNARIEY: Correct, but if we don't make that statement clear, there's the potential for the misunderstanding and dispute between employees and employers. So it's more around the clarification of the - or is making that clear around the penalty or overtime applicable.

PN1024

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

PN1025

MS BHATT: There's nothing in the provision that characterises the nature of the payment, it just requires the payment. So we'd agree with, I think what your Honour inferred, which is that it will depend on the application of other provisions as to whether they constitute ordinary hours or overtime.

PN1026

JUSTICE HATCHER: I mean maybe this is the point I assume, that if it is overtime it would have to be clear that the 200 per cent is in substitution of and not additional to overtime.

PN1027

MS BHATT: That's certainly how we would read those provisions. The more specific provision would apply instead of the overtime provisions.

PN1028

JUSTICE HATCHER: And ditto any other penalty rate that might apply on a weekend. It's ordinary time on a weekend.

PN1029

MS BHATT: Yes. Again I have to look at the specific scenario, but on its face the more specific provision would apply; in which case it would be this, the 200 per cent penalty.

PN1030

JUSTICE HATCHER: Ms McKennariey, if rendered a note that said that payment is in substitution of any other penalty payment that might be applicable would that solve the problem?

PN1031

MS McKENNARIEY: I believe that without seeing it on paper it's a little bit challenging, but, yes, I believe it would.

PN1032

JUSTICE HATCHER: You might want to think about that. The next one is - - -

PN1033

MS BURNLEY: Your Honour - - -

PN1034

JUSTICE HATCHER: Yes.

PN1035

MS BURNLEY: This provision is slightly different to every other provision in this award. It does come out of some of the other retail previous awards, and it is to be 200 per cent of the appropriate penalty that should be applied. So if you were working on a Sunday and you got called back in it's 200 per cent of now the 150 per cent. So it's not - there might be some debate about all of this, but that is how the SDA has always interpreted this clause. We are looking for some history to it. Otherwise it would mean that you could come in and work on a public holiday and only be afforded 200 per cent rather than 225 per cent.

PN1036

MR WILDING: That's not just penalty rates, it's the rate that would be entitled. So overtime at time and a half would become 300 per cent, double time would become 400.

PN1037

JUSTICE HATCHER: Yes. On reflection that's what it seems to say, doesn't it?

PN1038

MR WILDING: Your Honour, that's a contested position by ARA and certainly in a number of retailers and we're seeking at (c) of our application for a provision to be amended so there's clarity (indistinct) 200 per cent of the base rate.

PN1039

JUSTICE HATCHER: All right. So the next one is clause 17.3. Is there any need to retain provisions for pre January 2014 apprenticeships? No? All right.

PN1040

MS McKENNARIEY: On the basis that the apprenticeships typically wrap up within four years. Depending on the (indistinct) or qualification the majority

would have expired by 2020 at the outside, so I believe that would be justification to remove.

PN1041

JUSTICE HATCHER: All right, thank you. So clause 17.5, Master Grocers suggest that there should be cross reference in schedule A to the higher duties clause.

PN1042

MS LYONS: If your Honour pleases. Our members find this clause very, very useful, particularly our members operating very small stores (audio malfunction). Whether there's a manager or 2-I-C absent (indistinct) employees they're not sure whether or not they can give them (indistinct) higher duties, what perhaps the rate of pay is. They find this clause very useful, but that is when they can find it.

PN1043

We often have to tell them that it does exist, and (indistinct) if a reference to clause 17.5 (audio malfunction) with a classification definition it would be a lot more visible to our members when they're performing (indistinct) classifications knowing that they can classify that employee as particular classification level, but (audio malfunction) 2-I-C or manager is away they can then temporarily promote that employee to a higher classification level and pay them the sufficient rate of pay.

PN1044

JUSTICE HATCHER: Why would you be looking at schedule A for that?

PN1045

MS LYONS: That's (indistinct) by their employees initially. They're not really aware that 17.5 exists. They do look at the classification schedule quite frequently, but they don't even know that (audio malfunction). Just (indistinct) to that clause would be a big help.

PN1046

JUSTICE HATCHER: All right. Does any other party want to say anything about this?

PN1047

MR CULLINAN: We have put into our reply submission that a similar (indistinct) clause, 17.5.2 clause 14 a bit of assistance. The higher duties isn't the panacea for all circumstances. There will be times when a worker should just be classified higher and (indistinct) note making that point at 17.5 was - - -

PN1048

JUSTICE HATCHER: All right. The NRA is the next one, clause 18.2, Ms Carrol. This came up last week in a different context, but - - -

PN1049

MS CARROL: That's correct, that was ventilated in the common issues consultation session on Friday, and it's a proposal in support fundamentally of Ai Group's proposal at page 18 of their submission.

PN1050

JUSTICE HATCHER: All right. I don't think we need to discuss that. I think I heard the parties about that last week. The next one is you, Ms McKennariey. So payment on termination. This is not a simplification, this is the substantive change, isn't it?

PN1051

MS McKENNARIEY: I don't believe it would be considered the substantive change, rather providing clarity on the boundaries related to the termination dates where agreed to be more than seven days by the employer and the employee. So it provides a boundary that still cannot be more than 14 days, but it also avoids necessitating out of cycle pay runs for employers potentially.

PN1052

JUSTICE HATCHER: Again it's a change; that is there's no lack of clarity in the current provision, is there?

PN1053

MS McKENNARIEY: The wording particularly could be perceived as a bit complex or ambiguous, particularly regarding the timing of the payment upon termination. So the proposed wording aimed to clarify that it should be made within a specific timeframe after the termination date and provide that clear guidance.

PN1054

JUSTICE HATCHER: It says, 'Must pay an employee no later than seven days after termination.' What's unclear about that?

PN1055

MS McKENNARIEY: The potential payment within 14 calendar days of termination just allows for that flexibility in certain situations such as administrative or logistical issues that may effect the immediate processing of payments. So it's something that's just been observed from an operational perspective across varying parties.

PN1056

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

PN1057

MS McKENNARIEY: I'm sorry, I should probably just add that the intent is to accommodate varying circumstances while still ensuring timely payment. That's really what the intent of this change is.

PN1058

MS BURNLEY: Your Honour, I think you have alluded to the fact that that would be a substantial change and this is one of the clauses which would end up with huge debates and has been hugely debated, so the SDA would oppose any

change just to conform with that pay run situation. The employer to a certain degree could control when they terminate the employee to match their pay run if they preferred.

PN1059

JUSTICE HATCHER: All right. The next one is clause 19.3. So this is Master Grocers. What's the difficulty here?

PN1060

MR STIRLING: The difficulty, your Honour, is in the interpretation, particularly what constitutes a uniform in the context of special clothing. Our members frequently provide us with feedback that they find this clause confusing and would benefit from further examples which could perhaps stand on this definition, particularly around uniforms, and it is our proposal that (indistinct) the distinction has been that branded uniform as opposed to (indistinct) dress would be beneficial.

PN1061

JUSTICE HATCHER: What's the lack of clarity, because it says it covers any clothing that an employer requires an employee to wear?

PN1062

MR STIRLING: It's the word 'special clothing' here which (indistinct) for our members in trying to understand in what circumstances can (indistinct) uniform considered special clothing, as opposed to the (indistinct) style of the dress that (audio malfunction).

PN1063

JUSTICE HATCHER: If the employer requires the employee to wear a certain item of clothing it's special clothing, isn't it?

PN1064

MR STIRLING: It's our view that there is a bit of nuance to the interpretation here. It may be the case that (indistinct) clothing, which is the preferred style of the dress which is not mandated by an employer could potentially be caught up in (indistinct) clarification.

PN1065

JUSTICE HATCHER: And what's an example of that?

PN1066

MR STIRLING: A plain black shirt and black pants for example, but no association is going (indistinct) at all.

PN1067

JUSTICE HATCHER: But if the employer requires the employee to wear that then it's special clothing, isn't it?

PN1068

MR STIRLING: We're referring to a specific instance where it's expressed as an optional (indistinct).

PN1069

JUSTICE HATCHER: If it's not required or necessary it's not special clothing.

PN1070

MR STIRLING: That is what - - -

PN1071

JUSTICE HATCHER: I am just challenging you whether you're actually clarifying something or just trying to change it.

PN1072

MR STIRLING: It's not our intention to change (audio malfunction) clarify what constitutes a uniform (audio malfunction) special.

PN1073

JUSTICE HATCHER: All right. Anybody else?

PN1074

SPEAKER: We are in align with your Honour's view and make the observation that the definition of special clothing is already provided for in clause 19.3(a) of the award.

PN1075

JUSTICE HATCHER: All right.

PN1076

MR CULLINAN: Just to clarify, your Honour, we don't think that that definition is in any way exhaustive, but many employers do choose to make preferred dress optional, and that means that it's optional, and we otherwise align with your comments.

PN1077

JUSTICE HATCHER: The next one again, Master Grocers, is the cold work allowance. What's the problem here?

PN1078

MS LYONS: What the words 'principally employed' means, and it is set out in our submission here whether that's, for example, the main duties of the employee; the employee is asked to perform those duties specifically; whether the employer has planned for the employee to perform those duties or whether they're just ad hoc; if the employee spends more than 50 per cent of their shift undertaking this work, or in any case where the employer directs the employee to perform this cold work.

PN1079

A lot of our members for example operate very small bottle shops, and when I have these conversations with members I will say, well are they principally (audio malfunction), and then the answer is they do everything. And I say when do they do it and they say whenever it needs to be done. So here we haven't really got a definition in the award in supporting these types of employers to tell them exactly

when an employee is entitled to (audio malfunction), and that's what we would ask (indistinct).

PN1080

JUSTICE HATCHER: What do you say about bottle shops?

PN1081

MR WILDING: We say there's a broader issue. This issue comes up regularly with those working in fridges, or associated with fridges, and we say that there's an opportunity to have a conversation about what principally employed means, because our view of precedent gives no guidance on how that should be applied in these circumstances.

PN1082

Some employers do a 50 per cent of time test. If you spend more than 50 per cent of your time working in a fridge or at a fridge then you are eligible. Others argue it has to be the major duty that you're employed to do. Others have different approaches. This comes up fairly regularly (indistinct) of consideration and discussion.

PN1083

JUSTICE HATCHER: All right. Ms Burnley?

PN1084

MS BURNLEY: Your Honour, we would agree that this is a clause that does depend on the employment and the employer what the structure of the workplace is. We would be prepared that it should be something that should be - have a discussion as to whether we can refine it to make it a bit more applicable to the modern working practices of companies these days.

PN1085

JUSTICE HATCHER: Can I invite the parties to exchange and file proposals as to what they think it should say. That would give (indistinct) clarity. First aid allowance. Ms Bhatt?

PN1086

MS BHATT: Yes, your Honour. The concern that's been raised with us is that there are situations in which employees have a current first aid qualification and they're appointed to perform first aid duty, to do so from time to time, not all of the time. It's not clear that the clause contemplates those sorts of arrangements; that is it makes clear that the allowance is not payable if at a given time you're not appointed to perform those duties.

PN1087

I think a secondary issue that flows is that the allowance is expressed as a weekly amount. There's no clear mechanism to pro rata it if you're only engaged to perform these duties for certain shifts. There is some overlap I think between this submission and matters raised in the ARA's application, in which it has also squarely advanced that there should be a pro rata mechanism that's introduced, not just for these scenarios, but also in respect of part-time and casual employees, which is, you know, a further issue that seems to arise.

PN1088

MR WILDING: Thank you, your Honour. That's right, Ms Bhatt summarised the ARA's position on this. We do see that it should be applied on a pro rata basis and that should be done on an hourly basis rather than a daily basis being advanced I think in the next proposal.

PN1089

JUSTICE HATCHER: And what's that, 30 cents an hour? Who is going to do this for 30 cents an hour, seriously?

PN1090

MR WILDING: Our position would be, your Honour, that that will add up over the week depending on the number of hours that they'd worked, and it's appropriate that part-time employees receive this on a pro rata basis reflective of the hours that they're appointed to perform those duties.

PN1091

JUSTICE HATCHER: All right.

PN1092

MS BURNLEY: Your Honour - - -

PN1093

JUSTICE HATCHER: Ms Burnley.

PN1094

MS BURNLEY: I should say that we would object to that proposal of course. This matter was dealt with in the 2012 interim review as such, and it was argued then about whether it should be pro rata or not, and so it was decided by the Commission to maintain it as a weekly amount.

PN1095

JUSTICE HATCHER: All right. The next one is yours, Ms McKennariey, 19.11. So what's this about?

PN1096

MS McKENNARIEY: The particular naming convention such as call back or call in that are used interchangeably with respect to allowances - - -

PN1097

JUSTICE HATCHER: Where is that?

PN1098

MS McKENNARIEY: Apologies, I can't seem to find the reference, so maybe to just disregard that one at this point.

PN1099

JUSTICE HATCHER: Okay. And then in relation to the same clause Master Grocers has a proposal?

PN1100

MS LYONS: (Audio malfunction) where it's not payable (indistinct) for our members. Particularly if I can draw your Honour's attention to the interaction between this clause and clause 10.6, changes to regular (audio malfunction). (Indistinct) if the employer (indistinct) agree that there is a change in hours a part-time employee (indistinct) does the recall allowance (indistinct). We feel like that's something that should be addressed.

PN1101

JUSTICE HATCHER: This is where you've left work and come back. It's not about additional hours.

PN1102

MS LYONS: (Audio malfunction) is that either you have finished your shift or on a day that you have not worked, but that could be a part-time employee for example that works Monday to Wednesday, and then the employer asks them to come in on a Friday because they need them to fill in. They undertake a change to regular pattern by agreement under 10.6. Is the employee being called in when the roster has been changed, or is it only at the request of the employer when the employee is recalled to work?

PN1103

JUSTICE HATCHER: So you say they might have completed their normal roster on a day before the day they're called in?

PN1104

MS LYONS: (Audio malfunction) this might constitute a change to their roster which means they're not being called into work for example. So we feel like that is (audio malfunction) the recall (indistinct).

PN1105

JUSTICE HATCHER: So on the example you've given 10.6 only allows changes to the number of hours on a particular day. So you would say a change would be from zero to four say on a given day?

PN1106

MS LYONS: The day that they would not normally work, which is their roster has now changed, but does that mean that they have been recalled to work? Perhaps not, because their actual roster has been changed by agreement. So the allowance (audio malfunction). We would ask for clarity of that.

PN1107

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

PN1108

MS CARROL: The SDA and RAFFWU might have a view on how this allowance is used, but our understanding is that it's commonly the case that the recall allowance is applied when mostly managers need to return to the premises or the retail establishment after an incident of a break in or theft and that type of incident in the middle of the night or early hours of the morning. It may be the case that given the point that the MGA raises that 19.11(a)(ii) doesn't have any

utility in the context of this clause, but Mr Cullinan and Ms Burnley might have something to say about that.

PN1109

JUSTICE HATCHER: But you might be rostered Monday to Friday and you're recalled to work on a weekend because somebody is away or something.

PN1110

MS CARROL: And we would say that that maybe a situation where that's most commonly dealt with by the employer through a roster variation rather than considered a recall.

PN1111

JUSTICE HATCHER: Why shouldn't the three hours apply in any event? What's the minimum daily roster for a part-time employee?

PN1112

MS CARROL: There's no doubt that that would still apply if the employee is working on a day that they would not normally work. Obviously they would still be needed to be engaged for that minimum three hours, but the recall allowance - for example we're looking at the employee's travel time as well. So say they take an hour to go to work on a train and then take an hour to come out that cuts off those extra two hours, that recall.

PN1113

JUSTICE HATCHER: Okay. Ms Burnley?

PN1114

MS BURNLEY: Your Honour, we don't see that there's an issue if there's a part-time alteration to the hours of work provisions. They're all agreed, that is that if they're agreed during their shift to work an extra two hours that's not a recall because they haven't left the workplace, which is what this is meant to cover, is that they've gone home or halfway home and something happens. It's normally an alarm going off at the end of the shift, is the most common use for this, so that's what this covers for. If somebody didn't work, such as a part-time, and getting their roster changed under 10.6, then that's a roster change that has been agreed to vary their regular pattern of work, it's not a recall to work. So this is a very separate provision which we think - - -

PN1115

JUSTICE HATCHER: It may be the use of the word 'normal roster' in one might be part of it.

PN1116

MS BURNLEY: It could be, maybe it is just completed their roster, but is it then their roster is read under 10.6 or 10.5 - - -

PN1117

JUSTICE HATCHER: Anyway, the parties agree that the clause isn't intended to apply to a circumstance where a party works because of a roster change. Is that agreed?

PN1118

MS BURNLEY: Yes, your Honour. Yes, if it's a roster change that's been agreed to as a part-timer then that's not covered by the recall allowance.

PN1119

JUSTICE HATCHER: Mr Cullinan, do you agree with that?

PN1120

MR CULLINAN: We do, and I think that if that's clarified as the concern then that can be addressed, but we do want to raise that we do not in any way see 19.11(a) as limited to return to the workplace. It is return to work, recalled to work, and therefore this provision applies where an employer requires someone to be recalled to work, which can be at home or can be at another location. They might log in to deal with the alarms issue, but we also might have an employer that directs a worker that they are on that date to complete an online module, and we say, well that's recalled to work.

PN1121

JUSTICE HATCHER: As it currently stands the three hour minimum engagement would apply anyway, in which case this clause has no work to do because you're not travelling anywhere.

PN1122

MR CULLINAN: Well, the clause at 19.11(b)(ii) has the application because you're being recalled to work after you've finished your other shift or you have no hours on that day.

PN1123

JUSTICE HATCHER: Yes.

PN1124

MR CULLINAN: So the three hour minimum applies because that does not ordinarily apply to overtime.

PN1125

JUSTICE HATCHER: All right. So the next one, Ms Bhatt, is your proposal for exemption rates, and I note the AHA has a proposal that's somewhat analogous.

PN1126

MS BHATT: I think so. Before I come to that, your Honour, can I just point out that we have also advanced a proposal in respect of annualised wages, which is missing from the summary of submissions. Just for the record it's at paragraph 370 of our 22 December submission, and it's a proposal that we have also advanced in respect of the Fast Food Award. When it's convenient, I'm not sure if that's now or later, I might just make some brief comments about that.

PN1127

JUSTICE HATCHER: Didn't we discuss this last week?

PN1128

MS BHATT: Not the annualised wages proposition, your Honour, no.

PN1129

JUSTICE HATCHER: Yes, all right, go on.

PN1130

MS BHATT: So in respect of annualised wages the proposal that we've put up is based on one of the model clauses that was determined by a Full Bench of the Commission during the four yearly review of modern awards. It was referred to as model clause 1. However, there are some modifications that we have proposed. One of them being for example that the provision would apply to part-time employees, and the other is to provide for some streamlining, if you will, of the reconciliation process.

PN1131

One of the issues that's been put to us by members is that there is some efficiency in being able to undertake that reconciliation process that is required annually simultaneously for all employees that are on this arrangement, rather than having to do it for each one at precisely their 12 month anniversary date. So we have made some proposals that would make those sorts of modifications. Otherwise it's reflective of one of those model clauses.

PN1132

It would apply in the Retail Award to employees that are classified at Levels 4 to 8, and those classification levels have been selected deliberately. It's from classification Level 4 onwards that employees have some, or may have some supervisory or managerial responsibilities. Those employees that in practice may be and are being in fact paid by way of a salary, but of course employers rely on common law arrangements, and in decisions that were issued during the four yearly review there was some commentary about the various difficulties that flow from that.

PN1133

The unions in opposition in this review have said that the proposal would result in employees being paid less than what they would otherwise be paid. That's obviously not the intention. All of the safeguards that were decided by a Full Bench in the four yearly review have been adopted in our proposal. Indeed we would say that there are many benefits that might accrue to employees from having annualised wages regulated through awards, rather than reliance being solely placed on common law arrangements.

PN1134

In relation to exemption rates, I mean again this is an issue that has been raised with us time and time again. It's something we advance in the context of the Retail Award, not the Fast Food Award. It's at least in part borne out of various concerns that flow from some of the provisions that have been the subject of discussion today, such as the hours of work provision and the rostering provisions, that are simply not fit for purpose in the context of senior, often managerial or supervisory employees, who are as a matter of fact being paid salaries that well exceed the base salaries prescribed or the base rates prescribed by the award. So we have sought to proffer a solution to that.

PN1135

Your Honour mentioned the AHA's proposal. I think that there is a somewhat similar proposal that's been advanced by the ARA in the context of this application. We hope to be able to engage in some dialogue with all of the parties about this at some stage. Again perhaps the 5 April conference is an appropriate time for that.

PN1136

JUSTICE HATCHER: I mean if you say that there's people already paid well above the base rate they will be the biggest losers, won't they, because currently they get a higher base rate, but they're also entitled to the benefit of all these provisions.

PN1137

MS BHATT: Well, perhaps I have misspoken. They're paid a salary that well exceeds what they would be entitled to under the award. So I wasn't suggesting, and I have misspoken, I wasn't suggesting that they're paid a much higher base rate and the various penalties and overtime rates that accrue under the award. They're paid a salary.

PN1138

JUSTICE HATCHER: But isn't it notorious that there's been underpayment scandals about these sort of people? I mean seriously. You say they're being paid above what they're entitled under the award, but in fact they weren't, and that was the issue, wasn't it? It seems to me that on one view this is just legitimising that.

PN1139

MS BHATT: I say two things about that. The first is that part of the reason why we have advanced a more modest annualised wages proposition is because it does contain various safeguards that would guard against any of those sorts of situations arising again, including quite prescriptive record keeping requirements.

PN1140

The exemption rate proposition is in large part a solution that's been advanced in response to concerns about various other terms of the award. Now, it might be - it seems inevitable to us the concern that your Honour has just raised will be raised by the unions. I think to some degree it already has been in writing, and we're prepared to do the work it takes to try to work through those.

PN1141

If the answer to that is that there are some additional safeguards that need to be built into an exemption rate provision then that's something that we're very open to considering. But obviously from my perspective the consideration that needs to be given to that is what flows from that and whether employers would still get the benefit, the additional flexibility that is supposed to flow from exemption rate proposals.

PN1142

JUSTICE HATCHER: I mean obviously part of it is the percentage. On my rough maths I have done if you did work Saturday and Sunday and did three hours overtime you're already above 25 per cent, which isn't that much for retail I would have thought.

PN1143

MS BHATT: Well, I think one of the issues that would need to be taken into account, your Honour, is obviously whether that's an appropriate threshold, but also the extent to which those sorts of hours, so performance of work on weekends, is occurring regularly or not regularly. I mean one of the things that's often raised with us in this sector is that there are some seasonal fluctuations, at least in some parts of the sector, as to when hours are worked that attract overtime or penalty rates. I am by no means suggesting that this is a simple proposition. All of those issues would need to be worked through, including potentially better consideration to the threshold.

PN1144

JUSTICE HATCHER: With all those caveats are any parties interested in discussing this proposition, and it might be that the percentage is higher or it might be that there's some limitation on hours worked that would make the numbers more attractive.

PN1145

MS BURNLEY: Your Honour, the SDA is not particularly interested in going down this discussion point. We do note you were correct, your Honour, that this was a common issue that was raised last week at page 8 by ACCI as annualised wage - - -

PN1146

JUSTICE HATCHER: I was more talking about the exemption rate annualised.

PN1147

MS BURNLEY: Yes. Previously the SDA has experienced exemption rates as they did lead to people missing out on entitlements and receiving less than what they would if they had been on the proper award conditions. We do not think that they're fit for purpose that has been proposed. There was opportunities during 2020 I think it was when the part-time clause got varied. Either the restaurant or the Hospitality Award got an annualised wage provision placed into it with various limited exemptions as to what was or wasn't included. At that time the retailers decided not to pursue that because they were after a lower model to put into the Retail Award.

PN1148

So we think that having a discussion about this type of thing unless there is a greater increase than what they're providing or proposing is not worth the time and the effort, and we note that it's probably going to come up on the ARA application as well. I think they've got various concerns regarding what should or shouldn't be exempted for higher rate employees.

PN1149

JUSTICE HATCHER: The practical position may be that you engage with the concept, or that we just arbitrated in the context of the ARA's application perhaps.

PN1150

MS BURNLEY: It could be, your Honour. We do note that it was in part of the 2014 review annualised wages and it wasn't pursued in the Retail Award. The

AiG decided not to pursue the Retail Award. There was an opportunity for them and for the employers to nominate other awards, which they didn't. We do note - - -

PN1151

JUSTICE HATCHER: This is annualised salaries?

PN1152

MS BURNLEY: Annualised salaries.

PN1153

JUSTICE HATCHER: I am talking about the exemption - - -

PN1154

MS BURNLEY: The exemption rate. With regard to the (indistinct) which they're cutting it in at tradespeople at Level 4, so they're not managers in any way, shape or form, and we do note the comment that you did make regarding the underpayments which have occurred, which have been prosecuted in various courts and proceedings, and some are still ongoing. So we do not think that we would be entertaining anything that now - would identify the wage theft would be something that will be entertained in an award.

PN1155

JUSTICE HATCHER: Well, it depends what sort of protections you have.

PN1156

MS BURNLEY: Precisely, your Honour, but - - -

PN1157

JUSTICE HATCHER: It could be some annualised limit on hours. It could be a higher percentage or a combination of both. It's just really whether you're prepared to talk about it at all.

PN1158

MS BURNLEY: Yes. Thank you, your Honour. I'm not sure whether - we've had these discussions before. We did go down the path of them in 2020. It depends how serious they are. The proposal which has been - - -

PN1159

JUSTICE HATCHER: What happened in 2020 in respect of the exemption rates? I'm not recalling - - -

PN1160

MS BURNLEY: It might have been an annualised rates - - -

PN1161

JUSTICE HATCHER: I'm certainly (indistinct).

PN1162

MS BURNLEY: - - - an exemption.

PN1163

JUSTICE HATCHER: Has there been any discussion about an exemption rate for this award for certainly some classifications?

PN1164

MS BURNLEY: We don't see that there's much difference between an exemption rate and an annualised salary rate, your Honour, when it comes down to the fine details of what's included or excluded.

PN1165

MR WILDING: Our recollection was that there was an initial inquiry made as to using exemption rates that wasn't pursued in 2020. Unless they're going to happen we're not interested in any discussion about this (indistinct).

PN1166

JUSTICE HATCHER: So just remind me what's your proposal?

PN1167

MR WILDING: The ARA's proposal is for an absorption and exemption rate and model that on the clause in the Hospitality Award with some additional safeguards. So we acknowledge there needs to be those safeguards. There's safeguards around the maximum number of days worked in each roster cycle, maximum number of hours that would be covered averaged over the cycle of the six month period, and that's hours per week, and there's additional payments that would flow. If those were exceeded those hours would be recorded. We think that's an appropriate basis in which to proceed and to deal with arrangements which are in place for managers in the sector, many of whom can set their own hours of work.

PN1168

JUSTICE HATCHER: Ms Butters, do you want to add to this in light of your proposal?

PN1169

MS BUTTERS: Yes, your Honour. I'm probably jumping forward a bit, but the AHA has proposed, and I am going to refer to the Hospitality Award again, but a clause 25 salary absorption for managerial employees, so employees between Level 6 and 8, and then separate to that an annualised wage clause for other employees, which would be modelled on the clause 24 of the HIGA, which is what the ARA has just referred to as far as setting out a limit requiring the annual reconciliation and the obligation for the employer to address any shortfall at least once annually. We think that's a sensible approach to include. It ensures employees get their entitlements, it ensures they have got certainty in the pay that they receive every week, but it means they're also never disadvantaged.

PN1170

JUSTICE HATCHER: All right. Anyway, we're going to discuss this on 5 April, and otherwise there's going to be at least one application that's going to be arbitrated, so I would simply invite the parties to think about what sort of protections or enhancements they need for a proposal of this nature. In relation to superannuation fund I think it's agreed that that's been overtaken by the superannuation review. Next, Ms Butters, is your proposal with respect to clause

21, which I must say prima facie has a lot of merit. Does any party want to say anything about clause 21?

PN1171

MS BUTTERS: Well, just reiterate what we put in submissions. There's no need to revisit.

PN1172

JUSTICE HATCHER: That is the AHA proposal seems to be consistent with what appears in most awards as to the working of overtime.

PN1173

MR CULLINAN: Your Honour, we took this opportunity to raise a further concern about clause 21 in our submissions at 11 page in reply, and that was that the structure of the clause was changed during the plain language drafting process, which we think was inconsistent with what was being sought there and it's created some difficulties for employers or employees. We have laid out the timeline of that at 11 page of our submission, but at its core we see that the ability to roster or to require a part-time employee to work overtime is substantially restricted as compared to the previous award, and we propose at 11 page (viii) that some consideration be given to finding a solution to that. I think it was an error, a process. So we tried to outline all of that in some detail. We note that there's a reference to it in the submissions in reply on the summary.

PN1174

JUSTICE HATCHER: Anybody else?

PN1175

MS BURNLEY: Your Honour, the SDA's preference is to maintain the clauses as they are regarding reasonable overtime setting out the various factors. We do note they are in the NES, but we do think that employees need to have reasonable access to what they're rights and entitlements are. We do note that the Ai Group also want to put back in that there is a right for employers to require employees to work reasonable overtime, which would then be a departure from what's in other awards. So it should be either what's in other awards if that is where we're going to, or otherwise maintain what we've got, which both of these awards went through the plain language exposure draft proceedings.

PN1176

JUSTICE HATCHER: Anybody else? No. All right. The next one is payment of overtime. This is you, Ms McKennariey. I thought that EPA Capital decision made the position fairly clear, but what else do we need to do?

PN1177

MS McKENNARIEY: We were just seeking to get clarity regarding whether leave and absences on public holidays should be included when determining if a full-time employee was entitled to overtime working more than 38 hours per week. So just reducing the potential for ambiguity in that wording.

PN1178

JUSTICE HATCHER: Why does it belong in clause 15.6?

PN1179

MS McKENNARIEY: Let me just double check the reference there.

PN1180

JUSTICE HATCHER: 15.6(a) in particular.

PN1181

MS McKENNARIEY: Yes.

PN1182

JUSTICE HATCHER: It seems to me if it would go anywhere it would go in 21.2.

PN1183

MS McKENNARIEY: Correct. It was just the reference to full-time employees that's within 15.6, just for cross referencing purposes and context, but the change itself relates to 21.2.

PN1184

JUSTICE HATCHER: All right. So does anybody want to discuss this?

PN1185

MR WILDING: Your Honour, the ARA is opposed to the inclusion.

PN1186

JUSTICE HATCHER: On what basis?

PN1187

MR WILDING: Well, the basis you've identified about where it is, and we say the position under the award is clear.

PN1188

JUSTICE HATCHER: What about the proposed note at 21.2(e)? Sorry, that's a different issue. All right, well we will consider that. And what's your issue, Mr Cullinan, is that the same issue?

PN1189

MR CULLINAN: So we raise an issue - in terms of 22.2(a) - I'm just bringing it up - we are just concerned that the table has the rate of pay for when you're taking an alternative day off, that it says at 22.2(a) 'The employee is paid at the minimum hourly rate', that the employee under table 4, which is the minimum rates table, but it should also include any penalty rate that would be paid for having worked at that time. It's not the public holiday penalty rate.

PN1190

JUSTICE HATCHER: No, you get the ordinary time rate and you take equivalent time off. That's the purpose of the provision, isn't it? If you work on a public holiday you can get the penalty rate, but alternatively it can be that you will get the ordinary time rate and you will get an equivalent amount of time off. That's the point of the provision, isn't it?

PN1191

MR CULLINAN: Yes, your Honour.

PN1192

JUSTICE HATCHER: All right, the next one is yours, Ms McKennariey, so this is clause 22.2(b). It seems to me the clause is perfectly clear, but what's wrong with it?

PN1193

MS McKENNARIEY: We wanted to address the ambiguity independently of any of the issues with other subsections of that clause, just clarifying that this aspect ensures consistency and adherence to the legal requirements regarding public holiday work entitlements, so to better explain the clause for understanding and general interpretation around the public holiday and penalty rates applicable.

PN1194

JUSTICE HATCHER: Yes, but what's unclear about it? This is 22.2(b) you've raised.

PN1195

MS McKENNARIEY: So 22.2(b), the specifics was really around even though some may understand what's written in the clause based on legal acumen, that there's still ambiguity that leads to interpretation among employers and employees, and without clear guidance on whether or not time for a public holiday work should be added to an annual leave or time off in lieu. That confusion can cause disputes. So we felt that clarifying that aspect alone would help ensure more consistent application and understanding.

PN1196

JUSTICE HATCHER: It says you can take it by agreement. You can add it to annual leave, or you can take it as time off within 28 days.

PN1197

MS McKENNARIEY: So it was really just wanting to specify whether or not it was added to a particular balance, whether it's added to annual leave or TOIL and clarifying the time limits.

PN1198

JUSTICE HATCHER: How would it read then?

PN1199

MS McKENNARIEY: The employee should receive compensation time off equivalent to the hours worked on the public holiday either as annual leave or TOIL as agreed between employer and employee.

PN1200

JUSTICE HATCHER: Okay. Does any other party consider there's any difficulty with this clause? All right. So your next one, Ms McKennariey, is about the annual leave loading. What's the problem here?

PN1201

MS McKENNARIEY: So the clarity around the naming, or renaming the clause to leave loading would simplify payment options and enhance some clarity for both parties and reduce the likelihood of misinterpretation. So the alignment with industry standard terms like 'leave loading' instead of 'annual leave loading' would potentially make it less confusing to parties as to what they're looking at from a terminology perspective. It also has the potential to reduce some of the risks that have been identified within payroll processing and the administration with having the terminology 'annual leave loading' versus 'leave loading'.

PN1202

JUSTICE HATCHER: Why? What's the difference?

PN1203

MS McKENNARIEY: Occasionally it's with tagging of data and the codes that are applied and how those are described, if there are multiple different terms being used where it's 'leave loading' versus 'annual leave loading'. That may create some confusion with what is actually being paid out.

PN1204

JUSTICE HATCHER: I haven't checked that, but is it described as annual leave loading in other major awards?

PN1205

MS McKENNARIEY: I am not aware of the reference within other major awards, but that would be something to check for consistency.

PN1206

JUSTICE HATCHER: I might be wrong, but I thought this expression was - I see it's annual leave loading in the Fast Food Award. All right. What do other parties think?

PN1207

MS BHATT: I think to some extent this overlaps with the discussion we had on Friday of last week about some annual leave proposals that Ai Group has advanced. I think your Honour put to the parties during those proceedings that if aspects of the Retail Award were to replicate the Fast Food Award - - -

PN1208

JUSTICE HATCHER: Yes.

PN1209

MS BHATT: - - - would that address our concerns.

PN1210

JUSTICE HATCHER: All right. Ms Carrol, the next one, again we discussed the options for that last week.

PN1211

MS CARROL: That's correct, your Honour.

PN1212

JUSTICE HATCHER: Ms Butters, you're the next one.

PN1213

MS BUTTERS: So we've proposed that 29.1 is retained, which simply refers to the NES for entitlements to personal leave and compassionate leave. We say the rest of 29 isn't necessary to include because it only duplicates the NES, and to be honest it's probably not accurate anyway. It limits facilitation of an absence of 48 hours for casual employees.

PN1214

JUSTICE HATCHER: Is 29.4 in the NES, Ms Butters?

PN1215

MS BUTTERS: Well, no, it's not. I don't believe the NES restricts an absence for casuals to 48 hours.

PN1216

JUSTICE HATCHER: Yes.

PN1217

MS BUTTERS: I would probably argue it's an arbitrary limit. Given the fact that casuals can elect or reject work to suit their schedules if they're unavailable for work they're unavailable for work. I don't necessarily believe the rest of clause 29 is operational.

PN1218

JUSTICE HATCHER: What do other parties say; that is why do we need in a lot of the NES as it now stands, why do we need 29.2 to 29.5, and are they even accurate?

PN1219

MR CULLINAN: Our view was that we didn't oppose change.

PN1220

MS BURNLEY: Your Honour, we do have concerns because there's a similar provision in the Fast Food Industry Award. I'm not sure whether the AHA has strayed into that also, which does cover off on similar provisions. What we do want, because you've identified, is 29.4 in there, that by agreement a casual can have additional hours, can take additional leave as unpaid leave if they are sick. We do have situations where casuals are threatened, that if they do not turn up for work they will not be re-engaged, so they're told they're not allowed or not entitled to have personal leave.

PN1221

So we think that this provision does clarify what casuals may or may not be able to do regarding personal leave, and given that there is a large proportion of young casuals in the general retail industry, which is different to the hospitality industry where most of their casuals tend to be over the age of 18 just due to licencing and liquoring responsibilities that they have, we do think that this is something that needs to be maintained.

PN1222

SPEAKER: Your Honour, we say that the clause is inaccurate, that the rights for absence for temporary illness under the Act and under the regulations provide for a casual employee that provides medical evidence to have a much longer period away and to have all the protections that they're afforded because of that, and we have never heard of an employer relying on this provision in the award, but we're concerned that it's an inaccurate provision.

PN1223

JUSTICE HATCHER: All right. The next one; so Master Grocers you want written templates for other types of facilitative provisions?

PN1224

MR STIRLING: That's (audio malfunction) templates which our members refer to (audio malfunction, and in paragraph 48 of our submission (indistinct) some additional templates which (indistinct) would be of assistance to (indistinct).

PN1225

JUSTICE HATCHER: So again these would be facilitative and not compulsory, but - - -

PN1226

MR STIRLING: It's rather similar to what - the note that is in 28.8(b). There is a note to make that point clear that these are (indistinct), the example templates that we built, but if they're in the award (audio malfunction).

PN1227

JUSTICE HATCHER: Is there any disagreement with this?

PN1228

MR CULLINAN: We have put in submissions, your Honour. There's several issues that this raises. The first is that a number of these are matters which an employee requests, and so a template from an employer seems to raise questions about whether the employee is requesting it.

PN1229

In terms of the templates, the third template is about the 10 hour break (indistinct), and we think it's important that if there is going to be a template it needs to accurately identify the health and safety risks for a worker, particularly young workers, in agreeing to a 10 hour break between shifts.

PN1230

We are concerned that the fourth template when it talks in relation to recall allowances that that identify and explain the higher wages that might be entitled and there are other structures. And then we say we don't oppose the fifth template, which is time off instead of overtime.

PN1231

MS BURNLEY: Your Honour, just with regard to any of the templates if there are any to propose they would have to be carefully examined to make sure that they do comply with everything and that they don't change the emphasis that it is

whether it's the employee who is requesting it or the employer who is making the suggestion to the employee. So all of those provisions would need to be - - -

PN1232

JUSTICE HATCHER: Why would that make a difference about a particular term of it? I mean for example if you look at schedule G, which is cashing out of annual leave, it's not dependent upon whose idea it was, although presumably the employee would request it, but why does that affect the drafting of it?

PN1233

MS BURNLEY: Because that's a mutual agreement that has to be reached, whereas with these, of giving up your rights say to work, to have a fourth Sunday off each month, that has to come from the employee only to the employer. Whereas the employer might say, 'I prefer everyone to be available every four Sundays. So here's all the templates everybody needs to fill out.' It's a subtle change as to what the emphasis is, but that needs to be maintained that it is the employee's right to enforce their entitlement.

PN1234

JUSTICE HATCHER: All right. So we have dealt with the AHA's salary absorption proposal.

PN1235

MS LYONS: I disagree that coming from the award that means that the proposal from the employee is coming from the employer. I think if we look at the templates that are already in the award, like the agreement to take annual leave in advance, that is something that is (indistinct), something that (indistinct), yet it is a template that can be used by both parties in the award to facilitate that. We believe that these templates would also go to (indistinct). We don't think they would be geared towards the employer.

PN1236

JUSTICE HATCHER: (Indistinct) they could just (indistinct) the employer; the employee requests and the employer agrees to X.

PN1237

MS LYONS: Yes.

PN1238

JUSTICE HATCHER: All right. So, Ms Butters, the classification definitions and the role of clerical employees.

PN1239

MS BUTTERS: Yes. Your Honour, this is simply a drafting proposal more than anything to aid in the readability of that classification structure. Currently the description for retail employees Level 4 and clerical employees Level 2, just as an example, are under the same sub-heading. We're simply proposing that the retail level be detailed, and then the clerical level be detailed immediately thereafter. It doesn't create a new stream or new rates of pay or anything like that. It's just easier to find where you would fall amongst that classification system. So it's just a drafting change that we would suggest.

PN1240

JUSTICE HATCHER: Well, one difficulty may be that as I read the current structure where there's clerical functions at a classification, an employee can be required to perform the clerical functions as a mix of other duties. That is by separating them out you may be restricting what looks to me like a long established relationship for multi skilling and tasks.

PN1241

MS BUTTERS: Yes, your Honour, we will actually take that feedback. I think that's a very good point. We won't progress that point any further.

PN1242

JUSTICE HATCHER: Thank you. I don't know what the next proposal means, so I will skip that. The second last one is the same proposal, and I don't know what the last one means. So I will just skip those.

PN1243

In relation to the Fast Food Award, Ms McKennariey, there's 10 concepts you've identified that aren't boiled down to specific proposals. Can I invite you to actually provide the terms of the draft variations that you would seek in respect of those matters.

PN1244

MS McKENNARIEY: Yes, your Honour. With respect to clause 1 for title and commencement we saw that there was a lack of reference to the major variations. So we believed including a brief summary reference to the major variations for context, pointing people and the average layman reader to the context information that they may need to be aware of for correct payments, so making sure that - - -

PN1245

JUSTICE HATCHER: Can I stop you there. The online versions of the award does have a separate history of variation which any party can look at. But you want to put this in the text of the award, do you?

PN1246

MS McKENNARIEY: A linkage to, to make it easier to cross navigate would potentially suffice in the absence of being able to provide an abridged summary.

PN1247

JUSTICE HATCHER: Each clause does contain - the online version does contain the variations with hyperlinks. For example if you go to clause 15 it actually sets out an online version of the variations with the hyperlinks.

PN1248

MS McKENNARIEY: Yes. I think what we're proposing is that in addition to just the hyperlink and the numbered reference that there's a brief context of the type of variation, potentially whether it's major. In the current form it doesn't quite engage a reader to understand that they do need to reference that context, or whether it applies to them.

PN1249

JUSTICE HATCHER: So how would this work?

PN1250

MS McKENNARIEY: So if we take say the minimum rates varied by those two existing determinations, something as simple as summarising what the core topics, i.e. wage review, whether it's a rates review focus, just at a very high level, so very simplistic top level wording to indicate what type of change occurred. The fear is that the absence of that is resulting in a lot of employers bypassing that thinking that, or making an incorrect assumption that the relevant references we need to be aware of have been included.

PN1251

JUSTICE HATCHER: I don't understand that. What's the risk involved?

PN1252

MS McKENNARIEY: Joining the dots effectively between the information and understanding from the average reader's perspective what is my need to understand the determination that applies, and has made a subsequent variation to this award.

PN1253

JUSTICE HATCHER: But all the variations are incorporated on the online version. So you've got a version which incorporates everything that's occurred. So just again remind me what's the risk?

PN1254

MS McKENNARIEY: I think point in time application where there's also date ranges that are applicable and the type of variation that it was. So it's really just that context for people to refer to and understand what was changing when.

PN1255

JUSTICE HATCHER: I mean if you look at clause 15.1, adult rates, it's got the variation, it's got the operative date. I would assume that anyone would read that as saying that's when these rates were varied, and just click on the hyperlink to find out what the variation was.

PN1256

MS McKENNARIEY: The number of variations that occur within the award may be seen as somewhat problematic to include under the category 1, 'Title and commencement.' So that's appreciated, but the statement of where these points apply as a summary view and when changes have taken effect and what the context of that change is in summary is a little bit hard to piece together for the average worker and the average employer. So just understanding point in time interpretation of whether or not they have been compliant with an award is also an aspect of this looking back retrospectively.

PN1257

JUSTICE HATCHER: So does any other party identify a difficulty about this?

PN1258

MR CULLINAN: Just in relation to the last point of point in time there may be a benefit to having accessibility to awards at certain dates more easily that will be found by an employer, but - - -

PN1259

JUSTICE HATCHER: It's all there. I am not an IT expert, I don't know how to make any simpler than it is. But if you look at the history of variations it just sets out every chronological variation and it has the hyperlink.

PN1260

MR CULLINAN: It takes a little time to find a version of the award at a date, but it can - - -

PN1261

JUSTICE HATCHER: I know it does, but I can't imagine any simple way of doing it.

PN1262

MR CULLINAN: We in our submission can't think of a way that would make it simpler. In fact it's just going to make it more difficult if you have a summary of a variation in the actual award. It's not going to be understandable.

PN1263

JUSTICE HATCHER: All right. With the rest of these proposals, Ms McKennariey, I am not going to ask you to do it on the run, but can you file a document which actually sets out what these changes would look like, because it's very hard to, I think, discuss them in the abstract.

PN1264

MS McKENNARIEY: I appreciate that. We just simply haven't had the time - - -

PN1265

JUSTICE HATCHER: How long might you need to do that?

PN1266

MS McKENNARIEY: Given resourcing constraints probably within a six week period.

PN1267

JUSTICE HATCHER: Okay. If you can do that within six weeks that would be great.

PN1268

MR CULLINAN: It's in our submissions. Can we just ask that it be track changes, rather than us having to try and piece together the changes that are made, if that's okay.

PN1269

JUSTICE HATCHER: If that's easier, but I don't frankly see track changes as being useful, but I will let Ms McKennariey work out how she's going to do that. The next one is your one, Ms Bhatt. I think we have discussed this, haven't we?

PN1270

MS BHATT: We discussed it on the last occasion (indistinct).

PN1271

JUSTICE HATCHER: And then there's the same proposal about meal breaks.

PN1272

MS BHATT: Yes, it's the same as the Retail Award. The same can be said of the additional hours proposition for part-time employees.

PN1273

JUSTICE HATCHER: All right. The next one is yours, Ms McKennariey. Again can I invite you to - this is about clause 12.4 classifications - can I again invite you to set out in writing within the same time period what exactly the changes that you envisage.

PN1274

MS McKENNARIEY: Yes, your Honour. Thank you.

PN1275

JUSTICE HATCHER: The next one you've raised is about competence. What's the issue here, and you might want to incorporate it in your proposal for the classifications, but I'm not quite sure what the issue you're raising with this one is.

PN1276

MS McKENNARIEY: The issue with using the word 'competence' without further definition is the interpretation by employers differently as to what constitutes competency, and it can be largely discretionary for employers to determine. It can be subject to very variable interpretation across a skills-based interpretation, adaptability and versatility versus qualification. It is a very interpretable term from a competency basis without definition in its current form. So what we would propose is further guidance on what the definition of competency is meant to infer.

PN1277

JUSTICE HATCHER: What would that contain? I mean fast food employee Level 1 is not a classification which requires any qualifications, and it seems to me that the clause contemplates that the employer will need to make a judgment about what employees can or can't do. I'm not sure how you can as a practical matter specify precisely what it is that may constitute the limits of somebody's competence at that sort of level, without going into an extreme level of description.

PN1278

MS McKENNARIEY: Yes. Whether or not the intent is to have a skills-based interpretation and an alignment to interpret core competency solely based on the employee's technical skills and ability to perform tasks efficiently in this context, of an entry level fast food worker for example, that could be considered a competency definition in itself as opposed to a broader interpretation around are they adaptable and potentially able to meet the ask of the task. So determines level of competency based on assessment.

PN1279

JUSTICE HATCHER: Like formal assessment based on - - -

PN1280

MS McKENNARIEY: Well, assessment of skills on the job based on performance, or prior performance rather.

PN1281

JUSTICE HATCHER: Again can I ask you to specify in your document what you actually want to say in this respect.

PN1282

MS McKENNARIEY: Absolutely.

PN1283

JUSTICE HATCHER: The next one is your proposal, Ms Bhatt. Have we dealt with that before?

PN1284

MS BHATT: We haven't, your Honour.

PN1285

JUSTICE HATCHER: All right.

PN1286

MS BHATT: The issue specifically that has been raised with us is this; there are many fast food outlets that operate 24 hours a day seven days a week, and employees are and can be under the award roster to work ordinary hours throughout the course of that 24 hour period. In some cases that results in an employee working a period that straddles two calendar days. They start one night, finish the next morning.

PN1287

The award provides that one cannot work more than one period of ordinary hours on a given calendar day. So that means that on either of those two days the employee cannot be required to work a separate period of hours, even where they wish to, (indistinct) to and are available to do, have to be treated as overtime.

PN1288

There are also some other scenarios in which this might arise, for example an employee who's happy to work a period of work in the morning, attend to university, and then return in the evening. So the proposition is a facilitative provision that would allow those sorts of arrangements by individual agreement.

PN1289

JUSTICE HATCHER: I mean that's really just an open ended split shift clause, isn't it?

PN1290

MS BHATT: We haven't characterised it as split shift, in part because we were concerned about how for example that proposition might interact with minimum engagement payment provisions. In this award the part-time minimum

engagement provisions (indistinct) differently to the Retail Award. It's not expressed as applying per day, it applies per shift. So the intention here for example would be that it continues to apply to both proportions of work, as opposed to some idea that it can be split because the shift is split.

PN1291

JUSTICE HATCHER: And it seems to me if the problem is just shifts which overlap from one day to the next that's just a way of defining that so the shift is determined to be on the day where the majority of work is performed, or something like that. That doesn't require something like this, does it?

PN1292

MS BHATT: It might be that that can resolve the issue. I mean this is not just about the rate that's payable, it's about being able to roster an employee for a separate shift. We're happy to give some further thought to whether there's another way of coming at the problem. To us this seems the most obvious and it seemed to address many of the concerns that have been raised with us.

PN1293

JUSTICE HATCHER: All right.

PN1294

MS BURNLEY: Your Honour, just on that we do oppose broken shifts. We do concede there might be some wording issue regarding a shift that starts on one day and finishes on the next day, which probably is a consequence of the span of hours being removed out of the Fast Food Award in 2010 or 2011. So we would be prepared that that should be worked through to make sure that that is counted as one continuous shift, not as two shifts that are separated.

PN1295

JUSTICE HATCHER: Yes. All right, Ms McKennariey, the next one is your one. The next one is yours, Ms McKennariey. So this is clause 14.1. What's the problem here?

PN1296

MS McKENNARIEY: So there's an assumption that rosters are clearly documented and retained as an auditable record potentially by some parties. The tracking of breaks through rosters alone may not provide sufficient proof of compliance with the break requirements. So while they may outline scheduled break times they're not an actual accurate reflection of actual break times taken by the employees. So whether or not the existing clauses around breaks and the guidance to ensure compliance with tracking of paid breaks being taken the absence of that is open interpretation which would lead parties to interpret this is rosters being sufficient, when in fact the time and attendance records or break times would be potentially required.

PN1297

JUSTICE HATCHER: Is there a statutory requirement to record meal break times?

PN1298

MS McKENNARIEY: I don't believe that there is a statutory requirement specifically outlining the documentation of break times. It's whether or not there's a record of a negotiation to standard break times anticipated being required. But as to whether or not the documentation around break times at that level of detail is required I am not clear.

PN1299

JUSTICE HATCHER: So what you're seeking is a requirement to record when the break is actually taken?

PN1300

MS McKENNARIEY: There's just an absence of guidance on what the acceptable proof would be, given a requirement for evidence if it was disputed.

PN1301

JUSTICE HATCHER: Does anyone want to say anything about this? Mr Cullinan, is there any statutory requirement to record break times?

PN1302

MR CULLINAN: Not off the top of my head. I can't recall what the employee records obligations are for this issue. We can certainly look into it. I am just trying to piece together our response to this concern, and clause 14.2 around breaks does specifically relate to part-time employees must be included in the roster. So there may be some benefit for broader consideration of how break times are being recorded by employers. But like I mentioned earlier these issues are of concern to very substantial legal teams at the moment, for the SDA and RAFFWU - well, not RAFFWU, but for class action applicants through Shine. I'm reticent to say much more, but we can certainly look into what the statutory obligations are.

PN1303

JUSTICE HATCHER: Ms Bhatt, (indistinct) on this?

PN1304

MS BHATT: I don't think there is a statutory obligation, and so to that extent obviously the introduction of any award derived obligation to record break times would be a very significant departure from the existing safety net, and one that we would oppose.

PN1305

MS McKENNARIEY: Just quickly checking from a Fair Work Act perspective there doesn't appear to be any specific mandate around the recording of break times, but they do require employers to keep an accurate and detailed record of employee hours worked, including start and finish times, for each work period as well as unpaid meal breaks taken. I think that's where the challenge is around the lack of guidance within the actual award compared to that overarching request.

PN1306

JUSTICE HATCHER: I presume that unless you want to be slugged for half an hour's pay you would be recording - in your recorded working hours you'd record the break. That is if it's an unpaid break the onus would be on the employer in

recording working hours to record that there's been a break. Otherwise on the face of it there would be another half hour's pay. Is that correct?

PN1307

MS McKENNARIEY: Correct, if it was a block taken, a block of hours recorded.

PN1308

JUSTICE HATCHER: And if it's a paid break there's no reason to record it because it's paid anyway.

PN1309

MR CULLINAN: Yes. A number of fast food employers now have systems that may be out of concern or compulsion for paid rest breaks. We do have employers that require employees to log off and log on for their unpaid meal breaks. We have others that simply deduct the half hour of wages, assuming it's been done. So there's a range of practices at the moment that we're aware of.

PN1310

JUSTICE HATCHER: All right. The next one is your meal break proposal again, Ms Bhatt; is that right?

PN1311

MS BHATT: The retail (indistinct).

PN1312

JUSTICE HATCHER: Then, Mr Cullinan, you want guarantee of safe breaks. What's that about?

PN1313

MR CULLINAN: I think a number of the things we have just been talking about are encaptured. Raise the issue that this is an unusual award in that it adds no hours of work arrangements. It has no subsequent strong rostering provisions and it has no 12 hour gap between shifts rights, and we say all of those things should be an active consideration for the Commission. We understand that there's substantive changes, but we think that considering the workforce here is manifestly young and very early in their employment experience that those types of arrangements - we're also dealing with employers now where I think that there's a general view that there's about 250,000 fast food workers in Australia.

PN1314

In the past very few of them were award reliant, and now all McDonald's, all Domino's workers are award reliant, so the vast majority of workers in fast food are now award reliant. We submit that the Commission - there should be a discussion by all parties about putting in place a structure which is hours of work, rostering, and breaks between shifts type, which would deal with some of the issues we've been talking about.

PN1315

JUSTICE HATCHER: You want to reintroduce span of hours?

PN1316

MR CULLINAN: We believe it's appropriate, yes, your Honour.

PN1317

JUSTICE HATCHER: Given what we're discussing is making awards easier to use is that - I mean parties can make applications about that if they want to, but is that really within the scope of what we're trying to do here? I know I've kept a fairly loose leash about this, but this is just - - -

PN1318

MR CULLINAN: Of course RAFFWU can't make such an application, because - - -

PN1319

JUSTICE HATCHER: Any employee can make an application.

PN1320

MR CULLINAN: That's right, your Honour. We think there's a range of issues with this award such as its classification structure and some of these other issues, and it seems like because of the way that these issues were being raised and trying to find solutions to them it seems that the obvious solution was a solution of many other awards. We hear you, your Honour, there's a lot on (indistinct).

PN1321

JUSTICE HATCHER: All right. The next one is yours, Ms Bhatt.

PN1322

MS BHATT: Yes, your Honour, and the proposal is this; the Fast Food Award doesn't make provision for circumstances in which an employer might need to require an employee to work through an otherwise scheduled meal break and then take their break at a later time, unlike many other awards. There are an obvious array of circumstances in which that might arise. So the proposition is to facilitate that to require that payment be made during the break that was supposed to have been taken, and an obligation to ensure that an employee is able to take a break as soon as practicable.

PN1323

I think in our submissions we have provided a number of examples of other award provisions that make a similar provision across the awards.

PN1324

JUSTICE HATCHER: Such as?

PN1325

MS BHATT: It commonly arises in the manufacturing type awards, so Manufacturing Award, Food Manufacturing Award. I think those provisions make specific reference to a need to for example attend to breakdown in machinery, the (indistinct) time it takes expected repair work.

PN1326

JUSTICE HATCHER: That's really a crisis situation.

PN1327

MS BHATT: It might be described as such, and in this context you might have a situation which for example there's an unexpected increase in customer demand or you don't have all the staff present that you expected you would have that day because of some unexpected absences, and therefore you require an employee to work for a bit longer before they take their break to ensure that the operations can continue.

PN1328

Just looking at pages 110 to 111 of our submissions where we've footnoted a number of examples. Some seem to relate to specific circumstances; as I said the need to undertake maintenance work, operational or emergency reasons. So they're sort of limited to particular circumstances. But my understanding is that there are other provisions that are much broader than that. They're not confined to a given reason why the employee is required to work.

PN1329

JUSTICE HATCHER: No doubt Ms Butters might point you to clause 16.6 of the Hospitality Award and put that sort of provision in.

PN1330

MS BHATT: I have to take that on notice. The Hospitality Award is not one that we have specifically looked at, but it may be appropriate.

PN1331

JUSTICE HATCHER: It says this:

PN1332

If an employee is not allowed to take an unpaid meal break in accordance with clause 16.2 for any shift more than six hours, the employer must pay the employee 50 per cent of the employee's ordinary hourly rate extra from the end of six hours after starting work until either the employee is allowed to take the break or the shift ends.

PN1333

MS BHATT: So it appears that I'm unfortunately having some difficulty opening the Hospitality Award, so I thank your Honour for that. That provision requires the payment of a penalty until the break is taken, which is different to the proposal that we have advanced. We've advanced a proposal to say that you're paid whatever rate you would be paid for that work, which is again consistent with provisions that are found in other awards, but happy to consider that further.

PN1334

JUSTICE HATCHER: All right.

PN1335

MR CULLINAN: Can we just say something for this one, your Honour. Again the requirement to work through paid rest breaks is the subject of two of the largest class actions in employment history at the moment, and we think that this Fast Food Award should not be changed to basically manifest that practice or codify that practice. But also we go further as well in that these arrangements are just simply not crises. The idea that a fast food employer has to keep its outlet

open because someone needs to take a 15 minute break or a 30 minute break and therefore they lose that entitlement is just - we in some ways need to stop that.

PN1336

JUSTICE HATCHER: It's not a question of losing entitlements, it's a question of having some flexibility to move the break from the precise times rostered to (indistinct) urgent circumstances. I mean I would be absolutely confident that happens every day in Australia, and I think maybe part of the (indistinct) of making awards easier to use might be to have some sensible accommodation of that within reasonable boundaries rather than pretending it's not occurring.

PN1337

MR CULLINAN: But that happens every day through discussions, agreement.

PN1338

JUSTICE HATCHER: Yes, and that might be the case, but as the award currently stands it doesn't provide for that, and it may be a sensible case that parties by agreement can move their rostered break, for example 30 minutes in either direction.

PN1339

MR CULLINAN: We don't understand how it isn't currently provided for in the award.

PN1340

JUSTICE HATCHER: Okay. So if I'm wrong where is it currently provided for?

PN1341

MR CULLINAN: We understand this is an application to direct a worker, which is as distinct from agreeing. And so we understand that at 14.2 the timing and duration of rest and meal breaks for part-time employees must be included in the roster and are subject to any agreement. So a worker can agree.

PN1342

JUSTICE HATCHER: No, that's the part-time agreement which requires the meal break time to be set.

PN1343

MR CULLINAN: Yes.

PN1344

JUSTICE HATCHER: That's an entirely different thing. I'm talking about a situation where you have a rostered meal time, but the employee and the employer by agreement put on the day agree to move that half an hour forward or back.

PN1345

MR CULLINAN: Yes.

PN1346

JUSTICE HATCHER: Just as an example. That is the award doesn't allow for that, but I'm sure that that's what people do in realities.

PN1347

MR CULLINAN: Sorry, your Honour, we don't understand that that's prohibited by the award. There's no term that regulates that there can't be agreement when it will be worked.

PN1348

JUSTICE HATCHER: Maybe that's what we should say. I mean if that's what you say the award means, well then maybe we should make it clear.

PN1349

MR CULLINAN: We do think that that's what the award means, and we understand what's being requested here is an ability to direct an employee to work during their break, and then give them some time later, which is an entirely different thing we say. But our understanding is that right now, yes, those agreements come into play very regularly.

PN1350

JUSTICE HATCHER: Do you agree with that, Ms Bhatt and Ms Burnley?

PN1351

MS BURNLEY: Your Honour, as we said in the similar provision in retail was that there are agreements which are made on a day if there needs to be a change for some reason. Normally in retail it's because there's a queue of customers and they can't get off the register for 10 minutes, so they take their break 10 minutes later.

PN1352

JUSTICE HATCHER: Yes. Does the award permit that to occur?

PN1353

MS BURNLEY: It doesn't not permit it to occur, so long as you're still complying with the provisions that it has to be not within the first hour or the last hour, all those other safety nets which are in there, but if it is delaying it and your lunch break was supposed to happen at 12 o'clock and you go at quarter past 12 because somebody was late coming in to start the shift, then that is allowed under the award. You could do it part-timers very specifically, but if you're a full-timer or a casual it's normally just negotiated, someone comes along and says 'Can you.'

PN1354

That would be the same that would apply in fast food also, that those arrangements would be made ad hoc. However, this here is a provision that would enable direction to be made that would circumvent all the protections which are there in the Fast Food Award, and as has been said there are few protections in here, but that would mean that somebody could work eight hours because the employer could say, 'We're just busy for the rest of the day. There isn't sufficient staff on, so therefore you can't take your break.'

PN1355

We do note that in some of the awards there are provisions that if you don't get your meal break you get a higher penalty until you're (indistinct) for that, which is a protection which is in there, which does acknowledge that in some

circumstances there may be occasions where an employer can't provide the meal break at that particular time and it's (indistinct) whether it's a critical breakdown of mechanisms and what have you.

PN1356

But as quoted in the Hospitality Award that's there so that if there is some reason you don't get your meal break you do get some compensation for not being able to take what is a standard of having a meal break, not working more than five hours, whereas the proposal which has been put up here doesn't have any of those protections in it.

PN1357

JUSTICE HATCHER: Ms Bhatt, could we make progress by adding a provision that within some reasonable boundaries an employer and employee can agree to move the break from a (indistinct) of time?

PN1358

MS BHATT: Well, as I think this discussion has highlighted there doesn't appear to be anything in the award that prevents those arrangements from - - -

PN1359

JUSTICE HATCHER: I would have thought the implication is that if you have to have a rostered time for a break that's when it needs to be taken.

PN1360

MS BHATT: The award doesn't regulate how and when rosters can be changed, and so to that extent it would appear that these sort of arrangements that have been described by the union would be implemented; that is that there's a discussion, it's agreed and the change is made. I think where the rubber hits the road is where that agreement can't be reached. So I am just not sure whether what your Honour has proposed necessarily solves the problem that's been put to us. I can take instructions on that.

PN1361

JUSTICE HATCHER: I would invite you to, because for example it seems to me that in most practical circumstances that if an employer says to the employee, 'Look, can you just take your meal break 20 minutes later because we're busy at the moment or something needs to be done', the employee would agree to that. But there might be circumstances where, I don't know, the employee has to go to the pharmacy to get a vaccination at lunchtime and they will say 'No', and in that circumstance why would the employer have the right to direct that?

PN1362

MS BHATT: I understand that point, that's been made, and I suppose what we would say about that is that that right does exist in some other contexts. The answer might be that there need to be other parameters put around that right. Your Honour and others have raised the proposition that some awards provide a penalty that's payable in those sorts of circumstances, but perhaps what I can most usefully do is take some instructions on the proposition your Honour has put to me to see if that advances the matter, or indeed resolves it from our perspective.

PN1363

JUSTICE HATCHER: All right. The next one is yours, Ms McKennariey. Why do you say the reference is unnecessary? This is clause 15.4. You might not appreciate the context of this, but all the modern awards were varied so that the various lengthy traineeship provisions were put into a single award with a cross reference, and that was done to reduce the amount of text in every award, which was done by widespread consensus. So you want to go back to the old method, do you?

PN1364

MS McKENNARIEY: (Indistinct) understanding that context. We believe that the content that was in there was actually a duplication of information that was already covered, but from a coverage perspective if that's the intent of that Miscellaneous Award as a whole then believe that would be redundant.

PN1365

JUSTICE HATCHER: All right, thank you. The next one is the Broken Hill allowance.

PN1366

MS BHATT: That's our proposal.

PN1367

JUSTICE HATCHER: Yes. So you want it as per the Retail Award?

PN1368

MS BHATT: Yes.

PN1369

JUSTICE HATCHER: Why is there still a Broken Hill allowance anyway? I thought we got rid of district allowances.

PN1370

MS BHATT: We got rid of other district allowances, and the Broken Hill allowance remains, a small (audio malfunction).

PN1371

JUSTICE HATCHER: All right. Is there any reason why the Fast Food Award should be different from the Retail Award in this respect?

PN1372

MR CULLINAN: Your Honour, we say this is a substantive change, that right now there are young casual workers and part-time workers who are entitled to the full rate, and making any change to it will substantively impact on their entitlements. That's all of the workers at Domino's, McDonald's and Broken Hill, and a number of the other fast food outlets. So we see it as a substantive change and it shouldn't be - - -

PN1373

JUSTICE HATCHER: As some parties might recall on a recent appeal we had to request a very lengthy undertaking to accommodate the BOOT as it applied to this

allowance for part-time and casual employees when an employee attempted to incorporate it into the hourly rate.

PN1374

MR CULLINAN: Yes. We weren't involved, but we read it.

PN1375

JUSTICE HATCHER: All right. Ms Burnley, what do you say about this; why is the Fast Food Award different to the Retail Award?

PN1376

MS BURNLEY: Well, we noted here - I'm not too sure as to the history as to why that variation occurred in the GRIA or - - -

PN1377

JUSTICE HATCHER: Are you saying (indistinct) is appropriate?

PN1378

MS BURNLEY: Yes, we did say it was appropriate, that it should apply. Whether there needs to be some consideration as to a phase in all when it is implemented or transitioned to it. That would be a further consideration.

PN1379

JUSTICE HATCHER: So, Ms McKennariey, for the next four proposals can we add that to your homework list in the next six weeks?

PN1380

MS McKENNARIEY: Yes, your Honour.

PN1381

JUSTICE HATCHER: In relation to 20.7 you're talking about the note after paragraph (h), are you?

PN1382

MS McKENNARIEY: Yes, that's the one.

PN1383

JUSTICE HATCHER: The Commission not that long ago established a standard time off in lieu clause for all awards of which this is part. Is there any compelling reason why we would change this?

PN1384

MS McKENNARIEY: Not without further consideration and consultation, your Honour.

PN1385

JUSTICE HATCHER: Thank you. And finally consultation, again this is a standard clause. What do you want to do here?

PN1386

MS McKENNARIEY: Just with respect to major workplace changes, addressing the lack of clarity around notice periods for major workplace changes within

clause 28. Specifying a timeframe for notice would provide some clarity and ensure that the employers have sufficient time to prepare for proposed changes.

PN1387

JUSTICE HATCHER: All right. I think this would be a major issue because this clause has a very long history. What do other parties think about this?

PN1388

MS BHATT: It would be a very major issue and a significant change. To some extent these sorts of issues are also being ventilated in the job security stream of this review, and those are the very arguments that were put against proposals.

PN1389

MR CULLINAN: We agree with the idea, but we also accept that it's a substantive change and it should be dealt with in job security.

PN1390

JUSTICE HATCHER: Okay. I think we have gone through everything. As I said at the last conference what I propose to do once all the consultation sessions have occurred is to consider what's been put and then make an assessment as to whether it would be fruitful to have a further conference about some of the matters that we have discussed today. Obviously that will be aided, Ms McKennariey, when you file your document in six weeks time, and of course where some of the matters will again be discussed on 5 April. But again to the extent that parties have indicated some willingness to discuss matters I would invite parties to engage with each other and see if some progress can be made. Beyond that path thank you for your participation today and I will now adjourn.

ADJOURNED INDEFINITELY **[2.04 PM]**