



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER TRAN**

AM2023/21

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

**Application by
(AM2023/21)**

Sydney

10.08 AM, MONDAY, 18 MARCH 2024

Continued from 14/03/2024

PN306

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Are there any changes to the appearances since the last occasion that any party wishes to announce?

PN307

MR N NGUYEN: May it please the Commission, Mr Nguyen, initial N. I'm appearing on behalf of the Flight Attendants Association.

PN308

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you, Mr Nguyen.

PN309

MR NGUYEN: With my colleague, Mr Gale, initial M.

PN310

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you. I've got you both.

PN311

MR L ROPER: Your Honour, Louis Roper for Australian Business Industrial and Business New South Wales, with Ms Rafter.

PN312

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you, Mr Roper. I've got you both. Any others? No? All right, thank you. Commissioner?

PN313

COMMISSIONER TRAN: Thank you. Good morning, everyone.

PN314

Ms Sarlos indicated that she would like to go first, this morning. Well, she didn't indicate she wanted to go first, just earlier in the morning. So, we'll start with you, Ms Sarlos, please.

PN315

MS SARLOS: Thank you, Commissioner, for that indulgence. And I note my colleague from the Coal Mining Industry Employer Group was, I think, about to speak. Mr Gunsberg is also on the line.

PN316

So, we have an industry specific issue which, in light of the statement of 9 February, we hadn't prepared submissions in the written round. Given last Wednesday's statement we thought it better to raise it rather than not. And you may dismiss it as irrelevant for the review, and that's fine. Because it is industry specific and not related to one of the most used seven awards but instead, the Black Coal Mining Industry Award.

PN317

It does, however, relate to redundancy which we know is being considered to be in the review. Because of the Coal Award which we submit warrants reconsideration, or may, we should say – we're at the very early stages of

considering what to do in light of the new objective but in light of the new modern award's objective around job security we say clause 34.2(a)(i) of the Black Coal Mining Industry Award may warrant reconsideration.

PN318

That clause – my apologies, I don't have the award for you but it essentially imports the NES exception to redundancy that applies in circumstances where the termination is part of the ordinary and customary turnover of labour. So, the reason we say this is that over the last 25 years since that exception was included in the pre-modern awards the complexion of the industry has changed in a way which we say aligns quite closely with the nature of the building and construction and general onsite award.

PN319

That's with the industry covered by the Building and Construction Award, particularly as it relates to contractors and labour hire. And coupled with the new modern award objective we say that warrants revisiting the appropriateness of the exception in this industry context. Now, as I said, I don't expect that it will become a part of the review or falls within the remit but I did want to raise it in case, Commissioner and Deputy President, you thought otherwise. And my apologies for not raising it earlier. I was trying to justice to the scope of the award and not go beyond remit. Thank you.

PN320

COMMISSIONER TRAN: Thank you for that, Ms Sarlos. Now, was there anyone on Teams who needed to announce an appearance that we missed?

PN321

MR D GUNSBERG: Yes. I'm afraid you were a bit quick for me. David Gunsberg from the Coal Mining Industry Employer Group.

PN322

COMMISSIONER TRAN: Thank you, Mr Gunsberg. We'll turn now to Mr Nguyen, your submissions. Thank you.

PN323

MR NGUYEN: Thank you, Commissioner. I propose to make some introductory remarks about the aims of the FAAA submissions and then I'll address the aspects of the FAAA submissions in response to questions 2 and 3. The FAAA appreciates that the Commission has predominantly been focussed on award system wide issues and clauses as they're reflected in the seven most utilised awards that has allowed industry specific matters to be ventilated in consultation.

PN324

As such I propose to address the major deficiencies in the Cabin Crew Award in order of most deficient, and I don't propose to address all of the proposed variations which are outlined in our written submissions. By deficient, I mean in terms of achieving the modern award's objective of a fair and relevant safety net in terms of conditions along with the NES.

PN325

The FAAA understand the process is not for parties to present complete cases and evidence and the Commission will be deciding what issues it takes forward on its own initiative and what issues it may invite parties to make their own application to vary the award.

PN326

Following on from this what the FAAA aims to do through its submissions is draw attention to the issues which prima face indicate to the Commission that the award is not providing a fair and relevant safety net in terms of conditions or which fails to promote secure work but where more work can be done to promote job security.

PN327

On the scope of what job security and secure work entails the FAAA supports the submissions of the ACTU and opposes the submissions of the Ai Group that seek to narrow the scope. In short the submissions we put today are aimed at supporting the Commission to perform its duty of ensuring the modern awards, along with the NES provide a fair and relevant safety net.

PN328

So, the first issue we highlight is the inadequacy of the minimum rates in the Cabin Crew Award. It goes without saying that there cannot be a promotion of secure work and job security where the base rate of pay in the award is inadequate. And the adequacy if twofold.

PN329

Firstly, the divisor used to arrive at the hourly rate in the award is based on 38 hours ordinary for a fulltime employee, which is not the ordinary hours for fulltime employees in the award. They are provided with maximum ordinary hours of 36 hours. Secondly, the minimum weekly rate appears to be affected by historical assumptions based on gender, and further to this has also not been properly fixed in accordance with the structural efficiency principle.

PN330

The Cabin Crew Award has a significant impact upon the industry rates of pay and FAAA has prepared a bundle of materials which we would like to take the Commission to, if I can hand up some materials. We are forwarding a copy to the awards team, as well. Thanks. If I can then take the Commission to the second page.

PN331

DEPUTY PRESIDENT GOSTENCNIK: Mr Nguyen, do you have this marked with some form of identification?

PN332

MR NGUYEN: Yes. If it pleases the Commission, I'll tender the bundle.

PN333

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. We'll mark the FAAA additional bundle of materials as exhibit FAAA1. Thank you.

EXHIBIT #FAAA1 FAAA ADDITIONAL BUNDLE OF MATERIALS

PN334

MR NGUYEN: May I take the Commission to the second page of the bundle. We have prepared a sample of comparison weekly rates of pay in some major agreements which apply to cabin crew working for Qantas. In the table there, Qantas Domestic Proprietary Limited is a subsidiary of Qantas Airways Limited and supplies labour hire for domestic flying operations to Qantas Airways Limited.

PN335

And we can see there that the weekly base rate of pay is \$49 per week more than the rate in the award, the rate in the award, obviously which we say, is deficient. The second agreement is the Qantas Airways Limited Enterprise agreement which provides for a rate for new entrants up to third year of \$25.32 per week less than what the award provides for.

PN336

Now, we do acknowledge that Qantas Airways Limited has not employed new cabin crew since 2008, so most of the cabin crew under that agreement would be on the classification of ten years and above service. So, whilst this rate of pay exists in the agreement and it's open for Qantas Airways Limited to engage a new cabin crew on that rate which is lower than the award, practically and operationally that's not the case presently because all new hires come through the Qantas Domestic Proprietary Limited subsidiary.

PN337

The third agreement is the Jetstar Group Proprietary Limited Agreement which provides for \$29 per week more. This is also a subsidiary which provides labour hire to Jetstar Airways. And Jetstar Airways also has not engaged new cabin crew directly since around 2008/2009 when the Qantas Group engaged in this industrial strategy of setting up labour hire subsidiaries.

PN338

Lastly, the Maurice Alexander Management Proprietary Limited Enterprise agreement provides for a weekly rate of \$33.48 per week less than the award. And I want to specifically look at why that is the case in that labour hire organisation. So, Maurice Alexander Management, commonly referred to as 'MAM' in the industry, provides labour hire to domestic flying operations to Qantas Airways Limited.

PN339

We appreciate that there are measures in the recent closing the loopholes legislation which may be utilised by the FAAA. However, even if the FAAA were to take advantage of these measures around same job, same pay, experienced cabin crew would still have an enterprise agreement of the labour hire host company with the rate of pay which is below what the award provides.

PN340

In summary the table reflects that the award rates will have a significant impact upon the industry, and the fact that most operators in the industry have enterprise agreements is not reflective of the true impact of the award.

PN341

So, I turn now to the issue of the 38 hour divisor. If I can take the Commission to page 4 and 5 of the bundle, we've extracted some clauses from the MAM enterprise agreement there. At clause 44.1 you can see that it indicates that for the base hourly rate a flight attendant shall be paid a minimum hourly rate as set out in clause 45 and in addition, a 25 per cent casual loading will be paid on this rate and/or the entitlement to paid leave.

PN342

If we turn then to clause 45, itself there's a table there which indicates the minimum hourly rate. But if I can take the Commission to clause 45.2 it indicates there that the minimum hourly rate specified in clause 45.1 is the Aircraft Cabin Crew Award 2020 rate as at the date the agreement was put for an employee vote, with the addition of 50 cents per hour. The rate will be adjusted in line with any changes to the Aircraft Cabin Crew Award rate with the retention of the 50 cent differential in respect of any national wage increases which come into effect prior to the nominal expiry date.

PN343

So, looking at that formula the rate of pay for cabin crew under this agreement should always be at least 50 cents more than the award. But when we calculate the weekly rate, if we go back to the table on page 2, we calculate the weekly rate based on what the agreement says is the full-time hours which is 36 hours per week, consistent with the award. We arrive at this weekly figure which is \$33.48 less than the award. And that's because the award hourly rate is based on the 38 hour divisor.

PN344

So, we've got this loophole here where an agreement doesn't specify a weekly rate. It only specifies an hourly rate and is able to produce an outcome for weekly wages which is manifestly inadequate.

PN345

COMMISSIONER TRAN: Where does the MAM agreement indicate its divisor?

PN346

MR NGUYEN: Apologies. We haven't extracted that clause but it's at clause 47.1 of the agreement, which is in the footnote to the table on page 2 of our bundle. So, clause 47.1 indicates that the ordinary hours is a 36 hour week. And we've got also 1,872 hours per year which we divide by 52 to get to the 36 hours per week.

PN347

May I take the Commission now to page 3 of the bundle. We've done a comparison of the hourly rates and awards and other awards where the number of ordinary hours for full-time employees is less than 38. All of those awards which have hours less than 38 divide the weekly rate by the number of ordinary hours to

achieve the hourly rate of pay, except for the Cabin Crew Award and also except for the Marine Towage Award which doesn't have an hourly rate but has a daily rate.

PN348

On this basis alone the Cabin Crew Award along with the NES is not providing the fair and relevant safety net against which enterprise agreements should be compared for the purpose of the better-off-overall test. I will now turn to the second issue which is the weekly rate of pay, itself.

PN349

We appreciate that gender pay equity issues are being dealt with by the annual wage review at the first instance. But we simply note that we suspect one reason for deficiency in the weekly rate of pay in the Cabin Crew Award is due to historical undervaluation and due to assumptions based on gender. Again, there can't be a promotion of job security at the rate of pay and the award does not achieve the modern award's objective.

PN350

In order to demonstrate this we will show that the weekly rate of pay appears not to have been properly fixed to the C10 rate. And we note the aged care wage decision which was published on Friday and earlier stage decisions in this case which refer to the structure efficiency principle as the C10 Metals Framework alignment approach.

PN351

The process of varying awards to establish such alignment to the C10 Metals Framework was known as the minimum rate adjustment process. And that was established in 1989 by the Commission in the national wage case. And in 1998 the award simplification that the Industrial Relations Commission moved to properly fix all award rates to align to the C10. While the C10 Metals Framework alignment approach did not mandate wages for employees with equivalent qualifications to the C10, being paid at the same rate as a C10, in practice that's what occurred.

PN352

We will demonstrate through that practical exercise how the current rate in the Cabin Crew Award is inadequate. However the FAAA notes that it doesn't propose this as an approach the Commission should take in determining what the rates should be. And we refer to the Commission's analysis in the decision handed down on Friday which highlighted the discriminatory basis and bias toward the work that when performed in the Metal Trades Award Work Value Inquiry decision.

PN353

So, we don't propose this as the way to set the rate. It is simply an analysis which demonstrates that the rate is inadequate and doesn't achieve the modern award's objective. So, if I can take the Commission back to the table on page 3, we have included a column there which compares the equivalent Certificate III trade rates. And we can see that some of them have been fixed to the C10 trade rate which is \$995. Coal Export Terminals Award; Electrical Power Industry Award;

and Oil Refining & Manufacturing Award appear to have been fixed to the C10 rate, approximately, 60 cents off for the Electrical Power Industry Award.

PN354

If I can take the Commission to page 12 of the bundle, we've done another comparison of the Certificate III or equivalent trade rate in each of the seven major awards which the Commission is looking at, and all of them except for the Clerks Private Sector Award aligned to the C10 rate. Note that the SCHADS Award has an equal remuneration order which sits on top of that rate.

PN355

So, all of these rates have been fixed in accordance with the structure efficiency principle and aligned with the C10 except for the Clerks and the SCHADS Award. And for completeness we have included at page 9 of our bundle the extract of the C10 classification definition which stipulates that the C10 is the Certificate III or equivalent trade rate.

PN356

We have included at page 13 of the training package for that Certificate III in Engineering & Mechanical Trades – that's from the training.gov.au website – on page 16 we include the Certificate III in Aviation Cabin Crew. We note that there used to be a Certificate II in Aviation Cabin Crew which has been discontinued. That training package no longer exists. The only training package services for cabin crew now is the Certificate III and also the Certificate IV which we have included at page 18 of the bundle. The Certificate IV includes supervision in the training package.

PN357

And again for clarity there, the FAAA does not submit that this C10 alignment process should be applied in order to arrive at the appropriate weekly rate. It is only one aspect of an historical undervaluation of cabin crew work which demonstrates that there is a serious deficiency in the rate in the Cabin Crew Award. I'll now turn to the classification structure in the award which is at paragraph 82 of our written submissions.

PN358

Again, there can't be a promotional job security or access to a choice of secure work if the award classification structure does not provide an accurate reflection of skills required and used in the context of the specific conditions of the workplace. There is only one classification point for cabin crew who are not supervisors or managers under the award.

PN359

And that flat structure for non-managerial cabin crew does not support the increased capability and application of skills that crew demonstrate following subsequent training and years of service. Crew are required to satisfy on an annual basis that they meet the requirements set down in the Civil Aviation Safety Authority's regulations around emergency procedures and those training requirements were attached to our written submissions.

PN360

The one level in the award classification supports enterprise agreements with routinely restricting casual employees to the first level of an enterprise agreement classification structures regardless of their skill level. We note that supervision and management are key factors in determining classification skill levels.

PN361

Currently, non-managerial cabin crew supervise and control sometimes hundreds of passengers on board and this level of passenger supervision and direction and control is not articulated in the awards one level classification structure for non-managerial cabin crew. We note this in our written submissions but it's useful to highlight again because it demonstrates the extent of skill that cabin crew are required to exercise while on board under the chain of command. But we also have a copy of the submission if that would assist the Commission.

PN362

So, while on board under the chain of command of the pilot a cabin crew member can be required to exercise their trained knowledge and expertise to respond to and manage medical emergencies on board including through the use of a defibrillator; control and extinguish any fires on board; restrain and detain disorderly or physically aggressive passengers; protect and defend the cockpit from unauthorised entry; direct and control the efficient and safe evacuation of passengers from the aircraft in an emergency landing, including by assessing the type of emergency landing, whether it's on water or land, the surrounding environment, any hazard such as fire, and deciding which doors are safe to exit from; and defending doors which should not be exited from.

PN363

They also have to be aware and alert to any suspicious activity which may result in incidents on board and/or need to be reported to local law enforcement authorities. As an example, when boarding passengers, while we might only see cabin crew checking our ticket and directing us to our seats, they are also mentally considering the characteristics of particular passengers who might be able to assist in various emergency situations, and also assessing whether there are particular passengers who may need to be disembarked before the plane departs.

PN364

Many of these skills are akin to what the Commission has referred to as the invisible skills in the caring industry which were historically undervalued. And the consideration around these invisible skills occurs in the aged care decision that was published on Friday. A similar approach may be appropriate to the work value for cabin crew.

PN365

For the purposes of these proceedings the FAAA proposes a four-level cabin crew classification structure which recognises the increased capability and application of their skills through the repeated annual training that they are required to do. By way of example, currently a cabin crew earns 94 cents more than a level 1 fast food employee and 51 cents less than a level 2 fast food employee working Monday to Friday.

PN366

Cabin crew regularly work Saturday and Sunday. And on a Saturday fast food employees at the level 1 rate earn \$5.24 more than cabin crew for each hour on a Saturday. Our submission does not dismiss the skill levels of fast food workers. I'm simply demonstrating the absence of a classification structure within the Cabin Crew Award which promotes secure work.

PN367

The importance of skill development through regular and repeated training is crucial in situations where the skill is used irregularly, such as with the emergency procedures. This was demonstrated in 2022 when an Australian Transport Safety Bureau report about a July '21 incident reported about landing gear on a QantasLink aircraft which was not retracted below the maximum altitude, resulting in aircraft vibration.

PN368

After the checklist was done the autopilot was engaged but both pilots noted that the aircraft was noisier than normal with a noticeable vibration that was uniform and distracting. The Australian Transport Safety Review reported that the pilot's only realised the issue when the cabin crew told them that the landing gear was still deployed. And they found in the context that for pilots, skill decay or skill degradation refers to the loss of trained or acquired skills or knowledge following periods of non-use.

PN369

A cabin crew member, after initial cabin crew training is unlikely to have been able to pick up that the pilot had not retracted the landing gear. Similarly, a cabin crew member, even with one year of initial training would be less capable of managing an emergency situation than a crew member who has undergone repeated annual emergency training. Crew report back in the context of rarely having to respond in any emergency situation. Their skills in enacting emergency procedures increases only through the repeated training that it becomes second nature.

PN370

But while emergency procedures are rarely utilised, emergencies do occur. If you look at the recent Japan Airlines Canada incident where 367 passengers were evacuated through emergency exits from a plane that was engulfed in flames it is a recent high profile example of how cabin crew exercising their first responder skills were able to evacuate the entire aircraft with no-one injured.

PN371

There are many other examples which the FAAA can provide to the Commission at the appropriate time which highlight the intrinsic value of the skills and capabilities of cabin crew which they develop through years of training.

PN372

I will turn now to the issue of home reserved. Currently there is no security of hours or pay for a home reserve duty. The award provides for a home reserve duty of up to 12 hours. This duty can be given at roster build or at any time during the roster. The award provides a process and payment for crew when they

are subsequently called in. However there is no explicit provision for compensating crew where they are not called in.

PN373

This creates confusion with employers about what the entitlement should be because there is also a definition where home reserve is a duty under the award and fulfilling that duty has significant impacts on crew who must arrange their affairs on the basis of the fact that they will potentially be called in that day. So, while they're on home duty they'll have to make arrangements for childcare and travel to and from the airport.

PN374

Companies have argued that the minimum four-hour engagement does not apply when a casual employee is rostered on home reserve. The FAAA proposes such that there should be a minimum engagement apply for casual employees including where a rostered duty is cancelled within 24 hours of sign-on and the casual is not reassigned.

PN375

It is relevant to note that cabin crew can only hold one airport aviation security identification card and that can only be with one airline. So, it is not possible for a casual cabin crew member to work as a casual across multiple airlines because of that limitation on the ASIC card. We also propose that the value of home reserve be increased from one hour for every four hours on home reserve, to one hour recognised for every three hours on home reserve.

PN376

Recognising all the hours on home reserve duties for casual employees ensure that they are able to attend and report for duty at that one employer, and also means that they are appropriately compensated for the fact that they are not able to work for other aviation airlines. We also note that employees under the Airline Operations Ground Staff Award are paid under clause 24.4 of that award, their hourly rate for each hour that they are required to be on standby.

PN377

The other thing we note in terms of cabin crew that is unique to the industry is that when crew are required to hold themselves ready on home reserve they are not able to participate in many of the activities that other people on home reserve in other industries might be able to because of the role that they have as safety and first responder professionals.

PN378

They are not able to drink any alcohol and they have to maintain their activities at a level such that they would not be fatigued if they were required to attend to perform duties. And they can be called out as late as two hours before the end of a 12 hour home reserve duty. Improving the minimum engagement and the recognition of hours improves the predictability of hours and earnings which support the modern awards objective factor of job security.

PN379

We also propose in addition to increase the time that crew are required to report from 90 minutes to 120 minutes from the call-out. This is to reflect that more crew are being forced due to housing costs to reside further away from the airport, including outside. Some crew are living outside of the city in which they report for duty. And also taking into account increased parking issues, as well.

PN380

Lastly, on this issue of home reserve the FAAA proposes limiting the length of total duty when crew are called out from home reserve duty to perform another duty. So, as I was indicating before, by way of example if a crew member is on 4am to 4pm home reserve they could be called out at 2pm to operate a 12 hour duty.

PN381

The limits proposed are paid to the daily maximum hours of 18 from the commencement of the home reserve and are crucial not only to promoting secure work but also to ensure a safe workplace for crew and for passengers in the unlikely event of an emergency. It is relevant to also note that the provisions in Schedule B which apply to regional cabin crew exclude duty hours on home reserve in the assessment of ordinary hours.

PN382

On the issue of ordinary hours, if I can turn now to the ordinary hours of duty for regional cabin crew. Regional cabin crew under the award are regulated by schedule B and that schedule currently provides for 90 ordinary hours in a fortnight. We propose that that be aligned with the fulltime number of hours of 36. And it's obvious that the award shouldn't provide for 90 hours of work in a fortnight and it is clear from that, the award is failing to achieve the modern award's objective for regional cabin crew.

PN383

If I can turn now to changes to rosters by airlines. The Cabin Crew Award provides currently that an employer may reassign employees an alternative duty for an operational reason at any time during the roster period. This provision is really the antithesis of stable, secure and predictable hours and income.

PN384

But the FAAA is cognisant of the issues that airlines face and so we do support some ability for employers to access this clause but there should be a protective scope around it and the first way that way propose that should occur is that there should be a definition of what 'operational reasons' are. Presently there is no definition of what operational reason are which allows for a broad scope for employers to adjust hours.

PN385

So, our proposal is to include that definition in clause 2 and we have adopted the definition which currently exists in the Qantas Domestic Enterprise agreement and it's also the definition which existed in the pre-modern Domestic Award. By way of background, and we did describe some of that background in our earlier submissions but I'll just highlight that.

PN386

The pre-domestic(sic) modern award applied to Ansett and Qantas. And at the time of award modernisation, because Ansett no longer existed the Commission characterised that award as an enterprise award and its conditions were not considered in developing the conditions for the Aircraft Cabin Crew Award for the modern award.

PN387

We also propose to limit the types of duties that cabin crew can be assigned to. In conjunction with the definition of operational reasons we propose a framework to ensure some level of security and stability around the duties that a cabin crew member can be assigned to for operational reasons.

PN388

And that is a proposal to provide a buffer of two hours around the original rostered hours and that protects the cabin crew members who currently have no award entitlement to resist being reassigned at any time.

PN389

It still retains significant flexibility for the airline to manage their operations. Lastly, our proposal prevents the unilateral reassignment of crew members from a planned one day trip to a reassigned multi-day trip.

PN390

If I can turn now to the overtime provisions, maximum hours in the award have two categories. There are maximum planned duties and there are maximum unplanned duties. Our proposal is to provide for an overtime rate of pay between the maximum planned duties and the maximum unplanned duties. We also propose for a rate for overtime when cabin crew go over the unplanned maximum.

PN391

The current clause enables extending beyond the unplanned limit in a manner that is inconsistent with facilitative provisions which should maintain a safety net floor. And it's another, for example, of how the award is not meeting or achieving the modern award's objective.

PN392

The FAAA proposes that schedule B cabin crew receive an overtime rate when their daily hours exceed 12, up to 13 hours. Overtime rates are ubiquitous across the modern award system, so these inadequacies do very fully indicate that there's some deficiency in the award in relation to overtime.

PN393

If I can turn now to the layover allowance which we propose in our written submission. The award does not provide for meals and incidental allowances for domestic flying crew when overnighing away from home on duty. Both schedules B for regional cabin crew and schedule C which is for international cabin crew provide accommodation and meals for overnighing. It is only the domestic crew which are not provided with this.

PN394

The lack of the secure layover allowance income predominantly affects award remunerated casual labour hire workers that are contracted to Qantas and Jetstar. The FAAA is aware that this issue can affect scheduled flights with crew rostered on multi day trips having to pull out because they cannot afford the duty. And we have had calls from members to the Association about this issue.

PN395

If I can turn now to the protecting of part-time crew from losing entitlements attached to working on a day off, what we propose is that the Commission varies clause 10.2 to specify that the number of rostered days off is calibrated in reverse. The pro rata for the entitlement provides that part-time employees working part-time receive an entitlement currently to four rostered days off calibrated in the 28 day roster period.

PN396

Full-time crew are entitled to eight rostered days off in their 28 day roster period. So, what this means is that the other days for a part-time crew's roster are assigned as duty days or blank days. The variation that we propose ensures that the part-time employees who are drafted to work on a blank day that is a non-duty day but is also not categorised as a rostered day off receives the entitlements they are attached to working on a day off.

PN397

Turning now to the right to return home on duty or a dead head, the ability to go to work and return home as per the rostered hours is a hallmark of job security and roster stability. Cabin crew engaged under schedule B of the award are regularly faced with the choice of flying home on their own time or being left overnight away from home where their hours extend beyond a maximum of 12 hours. There is no provision for overtime or extended hours.

PN398

Buy way of example, a recent call to the FAAA's help desk is illustrative of this issue. A member of FAAA had been delayed for four hours at a Western Australian port and they were consigned to a mining donga while the cause of the delay was attended to. When the flight was able to resume, crewing at the airline advised our member that due to the delay the hours would be exceeded if the cabin crew member operated to home port.

PN399

Crewing advised our member to look at the award and her options to fly home on her own time or stay overnight in a mining donga. This example is not an isolated case. As such we propose a flexible provision which reconciles the range of unscheduled issues impacting on flying schedules with the importance of ensuring that cabin crew have access to stable and secure employment that provides regular and predictable access to conditions.

PN400

I'll turn now to the list meal allowance which we propose and then this rest break penalty. The current clause does not ensure that cabin crew receive a meal break, with their personal wellbeing coming second to the provision of service on board the aircraft. This is not only inconsistent with the fatigue management standards

but also inconsistent with the Commission's modern awards system. The FAAA's proposal acts as an incentive for employers to ensure that cabin crew receive their meal break, or at least the inconvenience and impact are recognised through a modest payment. Pilots and aviation engineers receive cash payments for a missed meal break. These discrepancies between the pilots and aviation conditions add to the gender pay differentials identified in the aviation industry.

PN401

My second-last point that I'll raise with the Commission is on the banking of substituted days and a paid allowance for working on a rostered day off. We propose a flexible approach to the banking of substitute days and an additional payment for domestic and international crew which is consistent with the payment for regional crew when working on a rostered day off.

PN402

The payment for working on a rostered day off is an industry standard within many of the enterprise agreements, all of which provide for a substitute day and an additional payment. The Pilots Award also provides a substitute day off and an additional payment of \$123.44.

PN403

Lastly, on the ABL's proposal of flexible employment we submit that it's not appropriate for cabin crew, particularly where they can only hold one ASIC card for one airline. And we support the ACTU's submissions on that. In concluding, the FAAA respectfully submits that the Commission should on its own initiative commence consideration of these deficiencies in the Cabin Crew Award.

PN404

And practically we consider that the Commission acting on its own initiative is the most efficient way in which it can meet its legislative requirements. The Commission has the resourcing to undertake the historical research and information necessary for the Commission to satisfy itself of the work value considerations, including consideration of the undervaluation of cabin crew work because of assumptions based on gender and including the history of industrial entitlements in the occupation.

PN405

The Association is committed though to fully participating in any process initiated by the Commission and would also consider its capacity to make an application to vary the award where the Commission invites the FAAA to make an application. If the FAAA does make its own application it is likely that the industrial officers will be spending a lot of time in the Commission's own libraries to locate the materials and history relevant to the proceedings.

PN406

The FAAA has proposed many variations which we also proposed in the working care consultations. If the Commission is minded to discharge its duty in relation to the modern award's objective on its own initiative it may be efficient for the proposed variations to be dealt with in the same proceedings.

PN407

If I can take the Commission to page 21 of our bundle, we've compiled all of the proposed variations into one table and this is the most up to date version. Some of our proposed clauses which we've included in the working care stream submissions have been updated to take account of typos or unclear expression. So, if the Commission pleases, this is our final copy of the proposed variations which we propose. That concludes my submissions.

PN408

COMMISSIONER TRAN: Thank you, Mr Nguyen. I don't have any questions. Thank you. I propose now that we move on to any submissions in relation to the draft determination and I will provide the employer organisations with an opportunity to reply to that and to apply to anything that has arisen from this morning's submissions altogether.

PN409

Mr Clarke, did you wish to say anything in addition, having a bit but not a lot more time, to review that draft determination?

PN410

MR CLARKE: Yes, Commissioner. Thank you. I have had a chance to have a closer look at that draft determination but is it a convenient time for me to reply to questions 1 to 3 generally, or - - -

PN411

COMMISSIONER TRAN: Yes.

PN412

MR CLARKE: Yes, okay. Unless there was anyone else who – no? Okay. Thank you. Maybe the best way to start is this. Some things are easier to see if you stand back from them a little bit. When we stand back and have a proper look at the claims that have been advanced by some of the employer associations and in particular, the New South Wales Business Chamber and the Ai Group regarding flexible part-time employment, they look an awful lot like a bit of a bait and switch, in that they are designed to make you think you're getting something, but you're getting something very different.

PN413

A lot of that, in our submission rests with on an effort to recast or reconstruct what the Commission has already said about job security. But as we have set out in our material there is no need or permission or licence to do that. Job security as referenced in the amended provisions is all about promoting regularity and predictability in hours of work and income, and from the employees' perspective, the choice to enjoy those incidents of work.

PN414

There has been a significant amount of wordplay here to try and convince you that you can somehow satisfy that objective by taking away the very things that it's trying to promote. Our central message here is don't fall for it. Stand back and see it for what it is.

PN415

On the New South Wales Business Chamber's view, in their written material, what they're advancing, starting at page 43, for unspecified awards is the erosion of minimum engagement and the capacity to dictate to part-time employees what their hours of work should be. So that's the erosion of the very choice that the amended provisions are designed to promote and the cherry on top is a request that while you're at it can you get rid of overtime too? Now, that's not something, in our submission, that ought to be entertained in this process at all, including in the very general sense in which it is advanced in our written material.

PN416

The only award that the New South Wales Business Chamber clearly identified that it has in its sights is, well, let's call it the SCHADs Award - I think we all know what we're talking about - and the particular complaint there is that they want to be able to change the hours of work for permanent part-time employees without their agreement - and that's set out in pages 45 and 46 - but what they don't tell you is they already had a go at modifying the rules for part-time work in the casual and part-time case in the 2014 review for that award, and they got some of what they wanted, but not everything in that important July 2017 decision.

PN417

But of course, beyond that there were specific claims made about that award in the review, the 2014 review, including in relation to the hours of work for part-time employees, and those weren't resolved until the determination that was issued in January of 2022 which took effect in July of 2022, and the merits were generally dealt with in the May 2021 decision. Again, the employers got some of what they wanted, but not everything, for reasons including that the bench wasn't satisfied that the flexibility that they were seeking was necessary.

PN418

So against that backdrop, they somehow suggest that today's statutory environment, wherein the Commission is specifically now required to take into account employees' interests to choose to engage in work offering regularity and predictability, as somehow suggested in that environment the Commission ought to be more accommodating of their desires to negate that choice than it was back then, two years ago, and we say that can't possibly be right on any logical reading of it.

PN419

But now we have moved to something altogether, which is this thing. We have a proposal that's basically advanced as a trade-off, if not a threat, in these terms:

PN420

If you do anything to promote job security we want to have a new category of employment that erodes not only what's been gained through this process, but also any notion of regularity and predictability that exists in part-time work.

PN421

Have a look at paragraph (b):

PN422

You will work whenever we tell you to and if you don't you're in breach of the award.

PN423

It does nothing to promote job security. Now, while it was conceded in the last session - you know, with regard to the ordinary hours of work provisions here, paragraph (e) - it was conceded on the last session that deeming the ordinary hours of work was complicated from the leave accrual and acquittal point of view. The response given was the same could be said about the proposals that we're advancing, but with respect, that's just not right at all.

PN424

We advance three proposals concerning casual employment. Only one of them involves paid leave and that's the bereavement leave. It would be an award based entitlement so it doesn't need to be calculated on this (indistinct) affected ordinary hours of work formulation that might arise if you're relying on the NES based leave entitlements, which their proposal is and ours isn't.

PN425

As to the other two proposals, the right for casual workers for a protection against reprisals for absence when they're sick, there's no accrual or acquittal formula there, and a system for workers who are performing regular work to indicate a preference to, for example, work on Thursday afternoons and be told that work is available, no accrual or acquittal involved there either.

PN426

You know, there's also this suggestion, a general suggestion, facilitative provisions are good:

PN427

We like facilitative provisions including majority agreement provisions.

PN428

Well, what exactly are we talking about here, because I can tell you one thing we don't want to talk about. We don't want to talk about facilitative provisions for majority agreement in respect of provisions that have entitlements attached to them in relation to variability - allowances, penalty rates, overtime.

PN429

Majority agreement. What does that mean? All right. Well, if you have everything in the award as a facilitative provision you might as well do an enterprise agreement. The difference is if you do an enterprise agreement it has to be better off overall, and you have now got these new checks and balances in the system that make it pretty clear that it needs to be a genuine agreement and that it can't be based on some sort of skewed, unreliability majority of employees who don't have a stake in what they're actually going to be lumped with, but if you make everything a facilitative provision where is that check on the genuineness of the majority? It's not there. If that's why they like it, we don't want it, but, again, it wasn't examined in any detail to rise above anything other than an assertion that there should be somehow more flexibility and we don't know what it is.

PN430

Moving on to Ai Group. Insofar as they did say something specific, it was that they were unhappy with the level of flexibility in the Retail Award, but that was one of the examples that was given by the New South Wales Business Chamber of one that met its needs.

PN431

The Ai Group have said they have got a fundamental concern about how part-time employment works. Now, certainly the New South Wales Business Chamber don't seem to go that far, and ACCI, on the last occasion, said that full and part-time work - and part-time work - was already consistent with the modern awards objective. Now, we might disagree with that in some respects, and some of our affiliates most certainly do in the way that they have articulated improvements, but there's certainly not a unity ticket on that side of the table in relation to this stuff.

PN432

On the last occasion the Ai Group directed you to the sections of their written material dealing with the more specific claims that they're endeavouring to advance in the ease of use stream of this review, but they have made scant effort here in this stream to sell you on those claims. You know, to tell you, either specifically or in general, how they actually advance the objects of job security. Insofar as that made any general point, fundamentally the approach is:

PN433

Look, just give us free reign to do what we want and we will employ more people and that's job security -

PN434

and to that we say, as we have already said, it isn't. What we have endeavoured to do is provide some modest proposals that do promote regularity and predictability in hours of work and income and an employee's choice to enjoy those incidents of work.

PN435

Our affiliates in respect of particular awards have identified specific things that would promote, you know, these laudable objectives. All we're asking is if you give genuine consideration to a way forward for giving effect to those proposals, and assist us to promote, rather than negate job security as properly understood. I think that was it.

PN436

COMMISSIONER TRAN: Thank you. Thank you, Ms Wells.

PN437

MS WELLS: Thank you, Commissioners. Jeane Wells, National Tertiary Education Union. The NTEU supports the submissions of the ACTU in respect of the employer proposal made late last Wednesday in respect of employer flexibility and part-time work, and we thank the ACTU.

PN438

The AHEIA also made submissions last Thursday and specifically asserted, in their written submissions and in reply, and in Thursday's consultation session, that specifically we, NTEU, have no evidence to support our proposals, and further, any variation, as the AHEIA stated, would require a holistic view of the two higher education awards and extensive evidence to support any changes being made.

PN439

So in brief, we take the opportunity to note, in reply to AHEIA's oral submissions last Thursday, that this Bench has confirmed that the scope of this review is not limited to the seven most commonly used awards and our submissions relate to questions outlined in the discussion paper for this review stream.

PN440

We do not need evidence to prove that the text of sections 333(e) and 333(f) say what they say. The text of those provisions are clear, and again, we rely on our submissions, specifically our submissions of 5 February, our correspondence of 8 February, and our submissions in reply on 21 February. Critically, we do not expect a variation to arise from this process in which the Fair Work Commission has advised parties that out of this consultation a report will be produced.

PN441

What we do wish to ensure, based on our written submissions and participation in this process, is that the report clearly identifies that the clauses we have identified in our written and oral submissions are clauses that are not consistent with the new modern awards objective and minor amendments are required to be made to both higher education awards due to the drafting of section 333(f)(1) to ensure employees covered by those awards are provided with access to more secure work in line with the broader economy, specifically, as section 333(f)(1) states that the restrictions in section 333(e)(1) do not apply to the contract of employment of an employee if a modern award covers that employee and that modern award permits any of the circumstances in section 333(2) to (4) to occur.

PN442

All higher education employees are covered by these two awards. Most of these employees also have the benefit of enterprise agreements applying to them, however, they remain covered by the awards. There none of the restrictions or benefits of fixed term limitation for these employees will apply to higher education award covered employees until we make this simple change to the award. We seek that the report identifies this and we thank the Commission. Thank you.

PN443

COMMISSIONER TRAN: Thank you, Ms Wells. Anyone else in the room wish to make some submissions in relation to the draft determination?

PN444

MR YIALLOUROS: Thank you, Commissioner and Deputy President. Paul Yiallouros from the ANMF. I do want to address the proposal from Australian Business Industrial concerning flexible ongoing employment, but I would first

like to make a few remarks about the general approach that's been taken in these consultations.

PN445

I mean sort of looking at the task at hand, what we have been presented through the legislature is a situation where the modern awards objectives have been amended in the Fair Work Act which previously contained no requirement for the Commission to consider job security and access to job security as a feature of modern awards.

PN446

We're sort of now, you know, by invitation through the Commission and through its discussion paper, been invited to identify features of modern awards that could be improved to provide that access to job security where job security has previously not been considered.

PN447

Conceptually, the entire task is about providing a benefit to employees through tilting the balance of the way modern awards have been framed to, you know, to provide that access to job security, you know, principally an employee benefit. To a certain extent you could say that it does benefit employers in that it may address issues and concerns around the term of 'labour,' but really the task is about identifying, well, improvements for workers through providing access to job security.

PN448

They are to be the main beneficiaries of these arrangements, and I just think some of the criticisms levelled last week at unions about submissions being raised was somewhat, I think, unwarranted in that, you know, for example - a statement that, you know, that I am sort of generalising here - that where unions have, for example, failed to consider, you know, through our submissions, the impacts on the economy, which is one of the other sort of aspects of the modern awards objectives, that we ought to be sort of considering those other sort of features of the modern awards objectives.

PN449

Really what we were doing is responding to the questions in the discussion paper. We were invited to say, well, you know, if modern awards were to be amended to improve access to job security what would you do? It's not clear to us why we shouldn't have answered the questions as they have been framed. Essentially we were being criticised, I think, for failing to make arguments against our own submissions. I'm not sure why we should have been doing that.

PN450

I mean certainly, and it's right to point out that, you know, that the job security amendment to the modern awards objectives is not to be considered in isolation. We certainly accept that, and perhaps in a contested environment you might sort of engage in an exercise of tempering any proposals to improve access to job security against the other modern awards objections. Certainly, but in terms of responding to those questions, it's really about focusing in on those, on

those features of modern awards which, to a certain extent, do and don't provide access to job security.

PN451

It's been interesting to see, you know, arguments being sort of raised in this environment about, well, you know, I think what was described as a philosophical difference about the approach being taken here, which is, well, if you want to improve access to job security you have to actually reduce the very features of employment that provide for such security so that employers might be encouraged or incentivised to offer those forms of employment to begin with. Our view is that that is a very misguided approach to take. It's sort of a contorted argument of sorts, and we stated that in our submissions in reply at paragraph 12. It's quite contrary to the task at hand.

PN452

Mr Clarke has previously stated, and has sort of again reiterated today that, you know, that there has to be something - and, again, I'm paraphrasing - that there has to be something inherently secure about secure work if you are to provide access to it, otherwise what you are providing is access to a more sort of artificial form of job security, which is that you are being offered something that is called secure employment, but in terms of its very nature, it may not be secure at all if you strip away those benefits that exist. So I think, you know, that sort of view.

PN453

They're sort of my comments about the general approach, I think, that's been taken here. It's that we really ought to be focusing on, well, what are inadequacies of the current settings of modern awards and how do they, in certain instances, fail to provide for job security and, therefore, fail to meet the modern awards objective, which I think does actually lead in to sort of the comments that I wish to make around the proposal that's been provided to us about, you know, inserting a clause into the modern awards that provides for flexible and ongoing employment.

PN454

The ANMF is opposed to this and I think if we sort of look at the way in which our submission, our initial submission has been - our written submission that is - that has been framed, it's premised on, you know, on ever increasing access to secure forms of employment.

PN455

You could sort of look at the way in which employee election to secure employment has been provided through casual conversion provisions in the Fair Work Act. We have proposed including a term in the Nurses Award that would provide for review of part-time hours based on patterns of work that, you know, apply to have your hours reviewed and, therefore, lock in, if an employee desired, a high number of guaranteed minimum hours as a part-time employee. That's, I think, in our submissions at paragraphs 44 to 46.

PN456

They're the kinds of things that would provide for, you know, secure work for employees who currently either are working multiple additional hours which are not being sort of recognised in their work, and I think the ill that has been

identified through these consultations is that employees - particularly, you know, I would say the Nurses Award is a classic example of this - are being engaged on contracts that provide for minimum guaranteed hours with the employer flexing up and down, you know, essentially at their will, with no sort of guarantee that those hours might be locked in at a later stage.

PN457

In the Nurses Award, particularly, there is no overtime that applies to the flexing up and down of hours. You essentially have to accept the hours that you are given, and the minimum hours could be very - well, just that, minimal. We have described it at paragraph 28 in our initial submission as a form of quasi-casual employment.

PN458

The proposal provided here about flexible ongoing employment doesn't really address the issue that needs to be fixed and that, if anything, it entrenches a form of quasi-casual employment. It doesn't do anything to address concerns raised around predictability and dependability of hours, and would see a continued practice of flexi up and down of hours which we say is contrary to the modern awards objective in providing job security when it comes to security of hours.

PN459

Now, I would just sort of like to sort of point out a couple of things that sort of preceded this proposal being put on the table. Employers, in their written submissions, went to lengths to emphasise that casual and part-time employment is a legitimate form of work. I think the suggestion was that, you know, the way in which the discussion paper had been framed - and perhaps in anticipation of some union positions that might be articulated - is that there is a suggestion that those forms of employment are not legitimate. We actually agree they are legitimate forms of employment and that should be noted by the Commission.

PN460

It's also been stated by some employer groups in previous consultations that there is a preference or a desire to maintain a clear distinction between casual and permanent employment, as opposed to - and I quote - sort of muddying the waters by sort of, you know, tinkering with the provisions of modern awards. Now, we also agree with that as, you know, there should be a clear distinction between casual and permanent employment, be it full-time or part-time.

PN461

Now, what unions are seeking to do here is not radically reshape casual employment. As Mr Clarke, again, pointed out earlier, it's that, you know, what we're seeking is bereavement leave which is, you know, which would be an infrequently, we imagine, accessed form of leave entitlement paid, but you know, still infrequently accessed. Sick leave on an unpaid basis, i.e., no sort of costs imposed on employers for doing so, and in the case of the ANMF, we are seeking an increase on the casual loading.

PN462

Now, I mean you could say that the last of those items, the increase of the casual loading, would probably be sort of the most significant for employers to take on if

it were featured in this modern awards review, but I don't think that you could say that any of those entitlements, in and of themselves, or collectively, would muddy the waters. It would still be quite clear who was a part-time and who would be a casual employee.

PN463

Again, we think, you know, maintaining those distinctions is important. This proposal here does the opposite of that. It, in fact, muddies the waters in a very remarkable way, in that it creates, again, this sort of form of quasi-casual employment. I mean it's described as flexible ongoing employment, and we do have reservations around it. You know it would, in terms of the employment, engagement of employees, the decision to employ someone as a flexible ongoing employee and categorise them as such would be designated by the employer and not the employee. It's certainly not about employee choices. They have made it quite clear that that is the way this would work.

PN464

It, in our view, sort of sits uneasily with the way that the Fair Work Act - now with its sort of casual conversion provisions - it sits uneasy with how that would operate in that you have, you know, in the Act, an ability to go from casual to permanent. There's no sort of envisaging of an intermediate step, and this places an intermediate step.

PN465

It's just not clear, if you are sort of guaranteed minimum hours through this model that's being proposed, how, you know, if you are sort of guaranteed minimum part-time hours, how you would ever sort of escape from that situation and, you know, apply for conversion when you are presumably working some, you know, level of predictable hours and it could, in fact, have the opposite effect of providing secure work, or access to secure work, and that it could entrench employees in this particular employment model and not give them the ability to progress into more secure forms of employment.

PN466

Again, the way our sort of original written submission is sort of envisaged is that you have this ever increasing access to more secure forms of employment, by and large the election of employees, be it, you know, through the casual conversion process, and then as a part-time employee, the ability to have your hours reviewed and, therefore, sort of claw your way up to more sort of, you know, higher and more secure and predictable hours of work. That would be our view of how job security would ideally work.

PN467

You know, the solution provided here is a bit of a Frankenstein's monster of a creature, and that it's sort of got the torso of a part-time employment of, you know, a couple of limbs from casual employment, but it doesn't really sort of fix the problem that we're trying to address.

PN468

I think it should be, you know, as was suggested earlier, I don't think it should be considered by the Commission. I don't think it's helpful, and certainly, you know,

as I said at the start of this, it's really counterintuitive to what we're trying to achieve here which is to, you know, stop and think, well, you know, what does job security look like in a modern award context? How do we increase that and how do we tilt the balance of the way modern awards are framed given that that's now a consideration? That's all from the ANMF.

PN469

COMMISSIONER TRAN: Thank you. Ms Burnley, do you wish to make any submissions?

PN470

MS BURNLEY: (No audible reply.)

PN471

COMMISSIONER TRAN: Thank you. Mr Kakogiannis, do you wish to?

PN472

MR KAKOGIANNIS: (No audible reply.)

PN473

COMMISSIONER TRAN: Thank you. Anyone on Teams wish to make submissions in relation to the draft determination? Yes. Thank you, Ms Wiles.

PN474

MS WILES: Thank you. Thank you, Commissioner and Deputy President. The CFMEU Manufacturing Division supports the oral submissions made by the ACTU this morning and the other union parties in relation to the Business NSW proposal and more generally.

PN475

It will come as no surprise that our union has significant and serious concerns regarding the Business NSW proposal and a draft determination that's been filed. Rather than something that would promote income creation and security of work for employees, which has been contended by Business NSW, the introduction of a new flexible part-time category would undermine important and understanding award safeguards for part-time employees.

PN476

We also say that the Business NSW proposal is inconsistent with the scope and intent of this review, such that any variation proposals should not diminish existing employees' conditions.

PN477

In the president's statement of 15 September 2023, which commenced the process of this review, the president made reference to the letter received from the Minister for Employment and Workplace Relations on 12 September 2023, and at paragraph 4 of the president's statement he says there - and I quote:

PN478

The Minister also notes the government's view that the review should not result in any reduction in entitlements for award covered employees.

PN479

We say, on that basis alone, that the Business NSW proposal should be rejected. It's also difficult to objectively identify how the proposal reflects the new object of the Act and modern awards regarding job security and a need to improve access to secure work across the economy. On the contrary, the proposal would amplify vicarious and income insecurity, the exact opposite of the enabling purpose of the new objective of the new objects. We also say that the proposal would have a disproportionate detriment, in fact, on women's secure employment since significant numbers of women work part-time across multiple sectors and industries.

PN480

More specifically, going to a number of the terms in the Business NSW proposal, it's clear that the proposal for flexible part-time employment category would only be at the initiative of the employer - and that's at proposed clause x.xc - and in our view, this would be intelligible that you need to know about which party this clause is intended to benefit.

PN481

Relevantly, there is nothing in the proposed clause which would prevent a flexible part-time employment arrangement being a condition of employment. We say that the purported safeguard in the proposed clause x.xd, requiring written consent of the employee, would be totally ineffective in preventing exploitation under this category for employment. On the contrary, in many low paid, highly award dependent sectors, the offer of employment under this category would be given on a take it or leave it basis.

PN482

At clause x.xb of the proposal it's apparent that the employer solely determines how many hours a part-time employee would be offered under this category of employment. This is in stark contrast to current part-time provisions in many awards which require agreements, written agreements, between part-time employees and the employer regarding the number of hours et cetera, and the days on which they are worked.

PN483

Clause x.xc of the proposal, on our reading, it's not clear on what basis the flexible ongoing employee would be remunerated for the hours they are given at the discretion of the employer, although we assume that it would be on a basis that all hours worked would be paid at ordinary time, but it's difficult to see how, under this proposal, how a flexible part-time employee would ever be eligible for overtime payments.

PN484

In terms of the proposed clause x.xe, this is the clauses around NES entitlements for an employee would be calculated. We say it's very confusing and unclear how that would occur, and clause x.x - this is the right to request flexible ongoing conversion - well, this clause has, obviously, significant limitations in effectively committing a regular flexible ongoing employee to ever get out of the arrangement. It clearly contains multiple grounds by which an employer could reject a request for conversion from an employee.

PN485

Most notably, the proposal contains no other safeguards for part-time employees which are commonly contained in award part-time provisions with respect to certainty around the number of hours, the days on which hours are worked, starting and finishing times, agreed written part-time agreements and agreed variations to part-time agreements.

PN486

In substance, if this new category of employment is included in one or more awards it would fundamentally shift the existing perimeters around part-time employment to the absolute benefit employers, and submissions have already been made today that it would essentially be a new form of quasi-part-time casual employment, but in another guise.

PN487

As we outlined in our submissions, our original submissions, I mean currently there are insufficient safeguards in a number of awards with respect to part-time employment. The Business NSW proposal, if implemented, would fundamentally undermine what existing protections exist, and we understand, of course, that that is really the intention here; pure and simply.

PN488

We have to acknowledge that part-time provisions in awards are substantive rights. They have been put there for a reason. Despite this, Business NSW would urge the Commission to ignore this and to instead sanction a situation where part-time employees in this category effectively have no security or security of their employment.

PN489

On that basis, we would urge the Commission to strongly reject this proposal for what it is, which is really, ironically, an attempt to create another loophole for employers in which to engage part-time employees, but effectively on a casual basis. If the Commission pleases.

PN490

COMMISSIONER TRAN: Thank you, Ms Wiles. Before I turn to you, Mr Gunsberg, I would just like to confirm that there are no other employee organisations on Teams who wish to make some submissions about the draft determination. Thank you, Mr Maxwell.

PN491

MR MAXWELL: Thank you, Commissioner. Commissioner, my submission is very brief. We understand from the hearing last week that Mr Ward said that this proposal was limited to the services sector. It was in the services sector. So to the extent that they're not seeking such a clause in the Building and Construction Awards, then we don't have a lot to say, however, should they seek to insert such provision in the Building and Construction Awards, we really strongly oppose any such proposal as we see it as a reduction in the existing working conditions under those awards. If the Commission pleases.

PN492

COMMISSIONER TRAN: Thank you, Mr Maxwell. Anyone else before I turn to Mr Gunsberg? Thank you, Mr Gunsberg.

PN493

MR GUNSBURG: Commissioner, I will be very brief as well. I'm simply responding to the submission made by Ms Sarlos for the Mining Employees Union. She was kind enough to let me know she would be speaking today.

PN494

I think all I need to say is that if and when they proceed to make a full submission on the matter, she's mentioned that we would like an opportunity to respond, but I don't think I need to say anything at this stage, except to put my hand up and say that when it happens we would like to speak.

PN495

COMMISSIONER TRAN: Yes. Of course. Thank you, Mr Gunsberg. I will turn now to you, Ms Bhatt.

PN496

MS BHATT: Yes. Thank you, Commissioner and Deputy President. In respect of the submissions that have been made today about the Black Coal Mining Industry Award, I just highlight that we, too, have a significant interest in that award and our position is the same as has just been articulated by Mr Gunsberg.

PN497

Similarly, in relation to the submissions that have been advanced by the FAAA regarding the Cabin Services Award, obviously the proposals that have been advanced in their written material and today orally are significant in nature. I think the union has either invited the Commission to deal with those matters of its own motion or foreshadowed that it will file an application. Either way, we might seek to be heard further in relation to those matters too.

PN498

Turning very briefly to the submissions that have been made by Mr Clarke on behalf of the ACTU today. One of the criticisms that's been made of the approach adopted by Ai Group in this process is that there has been a lack of detailed proposals that have been advanced which the unions might otherwise have been able to respond to or take aim at.

PN499

I think, as we sought to explain in our written submissions, we elected to identify, conceptually, the ways in which we think awards can be varied to improve access to job security and we had foreshadowed an intention to advance specific proposals if the unions indicated a genuine willingness to engage in some discussion through this process about proposals that might be agreed, or you know, about which there might be some appetite to endeavour to reach a consensus, but speaking for ourselves, I don't think that that has been at all apparent in the material that's been filed in response.

PN500

If that's not the case, then we are, of course, prepared to do whatever work is required, either through this process or a subsequent process, and of course, we have sought to highlight the more specific proposals that have been advanced through the making awards easier to use stream, which is focused more clearly on specific awards.

PN501

I think one of the challenges that we have faced through this process is, as we understand it, it does relate to the award system at large, and for an organisation that has an interest in as many awards as we do, there are simply some practical challenges associated with putting up proposals that would necessarily suit the circumstances of all awards.

PN502

You know, I think to some extent - and I don't mean this as a criticism whatsoever, it just highlights the practical challenges from our perspective - this has been highlighted through the proposal that's been advanced by ABI. I mean if one accepts the description of the part-time employment provisions that's been put to us today by the ANMF in the Nurses Award, one might reasonably argue that a proposal like the one that's been advanced by ABI is not necessary in that context because some of the very concerns that we have been ventilating about part-time employment provisions don't arise in that award.

PN503

I think the unions have made similar submissions about the part-time employment provisions found in some other awards in these proceedings, such as the (indistinct) Ground Staff Award in some of the written material that's been put on by the ASU, but as I say, to the extent that there is any willingness to engage in any of these issues specifically, of course, we would be happy to put on specific proposals and we have done in other parts of the review.

PN504

To the extent that the ACTU and its affiliates take issue with the very nature of the concepts that we have advanced, I think that simply continues to highlight that, to some extent, we are diametrically opposed with what we say is intended by the amended awards objective and how that can best be achieved, and I don't think I can take that any further. I think we have dealt with that on multiple occasions now.

PN505

The last thing I would say is just in response to a submission that has been made by Ms Wiles this morning from the CFMEU. She made reference to a statement issued by the president of the Commission when this review commenced in which his Honour, Hatcher J, made reference to correspondence from the minister and in that correspondence the minister indicated that it was the government's view that this review should not result in a reduction in employee entitlements.

PN506

Just to be clear, as we understand it, that is not a barrier or a parameter that has been applied to this stream of the review. It really goes no further than the government's policy position that was articulated in a piece of correspondence,

and that's in contrast to the approach that's been adopted by the Commission in other parts of the review. Unless there are any question, I wouldn't seek to put anything further at this stage.

PN507

COMMISSIONER TRAN: I have none, Ms Bhatt. Mr Roper.

PN508

MR ROPER: Thank you, Deputy President and Commissioner. I don't seek to say much further than what my colleague, Mr Ward, said last Thursday. I do want to highlight a couple of points though. To the extent that we're talking about job security being a new thing for the Commission to address, I think that that's a bit of a misnomer. I mean we have had to consider job security now for a number of decades in determining conditions in awards, with things like minimum engagements and changing roster provisions, so there is some history to that and I think it's a bit silly to consider this review now as a bit of a novel, you know, incident in time. Turning to our - - -

PN509

DEPUTY PRESIDENT GOSTENCNIK: I'm not sure anybody is suggesting that.

PN510

MR ROPER: I beg your pardon? I'm sorry?

PN511

DEPUTY PRESIDENT GOSTENCNIK: I'm not sure anybody is suggesting that.

PN512

MR ROPER: I will take that on notice. In terms of talking about our proposal, I want to say a few things. One, we advanced a conservative position in relation to this. We have said previously that many awards have got architecture in them that address job security provisions. The idea behind this proposal was in response to the union proposals around removing casual employment as a category of employment or diluting further or restricting the manner in which part-time employment could be performed.

PN513

Now our proposal, it's not seeking to water down or dilute further part-time employment. I mean it's in response to the concern that if you remove casual employment, an employment type that does have a level of flexibility that employees in service sectors, in particular, the seven awards subject to this part of the review are, that if you remove that, well, there needs to be something else that is there to enable employers to be able to have some level of flexibility in addressing, you know, instances and matters that arise in businesses where you have got fluctuating demands.

PN514

Now, to the point of our proposal, I mean we're not seeking to broadly introduce this across all industries. Certainly I mean there may not be, you know, need in manufacturing or, you know, for example, the quarry industry where you have got, you know, reasonably sort of stable, you know, future production plans

coming in. I mean this proposal really is, effectively, limited to service based sectors where there is a need to be able to have some level of flexibility for employers.

PN515

In terms of the last comment I want to make, just in terms of the comments around facilitative provisions, in terms of those provisions I think the concept of facilitating provisions goes to the core of what we're trying to achieve here with job security in that you have the ability for two parties to discuss and come to a mutuality of agreement on provisions that suit their individual needs.

PN516

Now, we would say that this promotes, in our view, job security and enables people to be able to come to an agreement that meets their individual needs and that that, in itself, will help promote job security because parties can come to an arrangement to say, 'Okay. We have got something that suits us.' That, in itself, helps people to have jobs and also relates also to businesses to be able to keep jobs, so I think that the concept of facilitative provisions are extremely important to this.

PN517

I think, finally, to say this, that, as I said, we don't seek to introduce this as a means to water down any existing provisions. It's essentially going to be a separate type of employment, but it would be, as I said, in response to removing the concept of casual employment from the employment regime itself. I don't have anything further to say unless anyone else has any questions.

PN518

COMMISSIONER TRAN: Not from me. Thank you, Mr Roper. Is there anyone on Teams that I may have missed who wishes to make any submissions today? I will take no one turning their cameras on as a no. That concludes our consultation, so I thank everyone very much for your attendance and participation in this consultation and we're now adjourned.

PN519

Yes, Mr Miller and Ms Pugsley - we're not adjourned.

PN520

MR MILLER: No. Just thanking the Commission.

PN521

DEPUTY PRESIDENT GOSTENCNIK: You just wanted to make sure we saw you were still here.

PN522

MR MILLER: That's right. Just acknowledging the Commission.

PN523

COMMISSIONER TRAN: All right. Thank you.

PN524

MS PUGSLEY Yes. We're in Melbourne, yes.

PN525

COMMISSIONER TRAN: Thank you. All right. We're now adjourned.

ADJOURNED INDEFINITELY

[11.46 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #FAAA1 FAAA ADDITIONAL BUNDLE OF MATERIALS..... PN333