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FAIR WORK AUSTRALIA

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 29597-1

VICE PRESIDENT WATSON

AM2010/43 AM2010/130

s.158 - Application to vary or revoke a modern award

Application by Baking Manufacturers Industry Association of Australia (AM2010/43)

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Application by Shop, Distributive and Allied Employees Association (AM2010/130)

General Retail Industry Award 2010

(ODN AM2008/10)
[MA000004 Print PR985114]]

Sydney

10.16AM, MONDAY, 1 NOVEMBER 2010

Reserved for Decision

THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO CONFERENCE AND RECORDED IN SYDNEY

PN1

THE VICE PRESIDENT: Can I have the appearances, please, commencing in Sydney?

PN2

MR A. DUC: If the commission pleases, Duc, initial A. I appear for the Baking Manufacturers Industry Association of Australia.

PN3

THE VICE PRESIDENT: Mr Duc.

PN4

MR A. DOYLE: Your Honour, I appear for the Australian Federation of Employers and Industries. My name is Doyle, initial A.

PN5

THE VICE PRESIDENT: Mr Doyle. And in Melbourne?

PN6

MR M. GALBRAITH: Your Honour, my name is Galbraith, initial M, for the SDA.

PN7

THE VICE PRESIDENT: Mr Galbraith.

PN8

MR N. TINDLEY: May it please the tribunal, my name is Tindley, initial N, for National Retail Association.

PN9

THE VICE PRESIDENT: Mr Tindley.

PN10

MS M. KING: Your Honour, King, initial M, on behalf of Master Grocers Australia.

PN11

THE VICE PRESIDENT: Yes, thank you, Ms King. There are two matters listed today because of some overlap between them, I believe. The application by your organisation, Mr Duc, has been before me before. So perhaps we could start with that one.

PN12

MR DUC: Yes, thank you, your Honour. The issue was concerning how the overtime applied and, whilst recognise that overtime should be paid outside the span of ordinary hours, the award didn't actually say so. So part of the SDA's application deals with that and, secondly, our application would also be dealt with on the basis that the overtime was calculated on a daily basis. So essentially, your Honour, our position is that some of the SDA amendments made in their application satisfy our concerns with the award.

PN13

THE VICE PRESIDENT: So does that mean you support the SDA application in those respects and you don't press variation?

PN14

MR DUC: Your Honour, in relation to our application it's satisfied by their amended attachment A by the addition of the words in 29.2, Overtime, "Overtime is calculated on a daily basis." Secondly, the words in 29.2 at the start of the clause:

PN15

Hours worked in excess of the ordinary number of hours of work outside the span of hours, excluding shift work -

PN16

also satisfies our application.

PN17

THE VICE PRESIDENT: Which was that second part of the SDA application?

PN18

MR DUC: Your Honour, at 29.2, the amended attachment A.

PN19

THE VICE PRESIDENT: Yes. So 29.2 deals with both of the aspects of yours?

PN20

MR DUC: It does but in the ways that I have identified. Firstly, the last paragraph, "Overtime is calculated on a daily basis," and secondly, going back to the top of that clause:

PN21

Hours worked in excess of the ordinary number of hours of work outside the span of hours, excluding shift work –

PN22

also deals with our application.

PN23

THE VICE PRESIDENT: Yes.

PN24

MR DUC: So we support those particular changes.

PN25

THE VICE PRESIDENT: Thank you, Mr Duc. Mr Galbraith.

PN26

MR GALBRAITH: Your Honour, the (indistinct) very long in - I think I picked up most of what Mr Duc said. I heard what he said about the overtime clause. Pending your direction, is there anything further I should add to the - - -

PN27

THE VICE PRESIDENT: Well, I think in essence there's no need to deal with Mr Duc's application further if the changes proposed by your organisation at clause 29.2 are ultimately made. I think that's the essence of what Mr Duc has said. So perhaps we should move to deal with your application. It's probably just as convenient that we hear you in relation to all respects.

PN28

MR GALBRAITH: All right, your Honour. Firstly, I'd like to apologise for the inconvenience the SDA has caused over the last month or so and we appreciate the adjournments due to Ms Burnley's illness. Your Honour, application 130 is an application by the SDA made under section 160 of the Fair Work Act which provides for a modern award to be varied to remove ambiguity or uncertainty. Several ambiguities and uncertainties have come to the notice of various parties and these should be addressed to ensure that the modern award objectives outlined in section 134(1)(b), (e), (f) and (g) are met. Details have been discussed in conference with your Honour mid-year as well as been raised in the hearing of 2010/43 and 44.

PN29

There has been some discussion between the SDA, the BMIAA and the NRA over the proposed draft order of 2010/130 as well as admissions by the CCIWA. There is to an extent agreement on many of the matters discussed with some parts still in question and the NRA and BMIAA have had discussions with the SDA on these matters. The SDA has filed a revised attachment A to reflect points raised by the CCIWA and the BMIAA and these revisions include a correction to the numbering of clauses and an issue of ambiguity raised by the CCIWA at paragraph 12 of their submission.

PN30

Your Honour, the first issue raised by the Bakers at their paragraphs 7 to 8 is specification of the rate for Sunday and public holidays in the overtime clause and just to make clear that the appropriate penalty applies. Otherwise it could potentially incorrectly be interpreted that time and a half for the first three hours and double time thereafter be paid if overtime is worked on a Sunday or a public holiday. The industrial norm is obviously that Sunday or public holiday rates apply for hours worked on those days.

PN31

The second issue, your Honour, is overtime for casuals working more than 38 hours. The SDA understands that the BMIAA and NRA have concerns with this. We would say that currently a casual could work hours well in excess of 38 without the payment of overtime. For example, a casual could work five days, 11 hours per day, making a 55-hour week all at ordinary hours. Such a long working week without payment of overtime is inconsistent with the NES – that is, the 38-hour week – and the modern award objective. Casuals need to be paid overtime when they work more than 38 hours in a week to ensure they have a fair and relevant safety net. It's not disputed that full-time and part-time employees are entitled to a weekly maximum. This may be averaged over four weeks for a full-timer.

PN32

So if casuals do not have a weekly maximum, they will be disadvantaged. Equally, a permanent employee may be disadvantaged in the distribution of these overtime hours if no penalty applies to a casual. The previous awards in retail did, in the vast majority, have an upper limit of ordinary hours for casuals. The SDA has compiled an exhibit to demonstrate that the 38-hour weekly maximum is their proposition. If it please the tribunal, your Honour, I believe you have those documents.

PN33

THE VICE PRESIDENT: Is it the table headed Maximum Weekly Ordinary Hours for Casuals?

PN34

MR GALBRAITH: That's right, your Honour.

EXHIBIT #G1 TABLE HEADED MAXIMUM WEEKLY ORDINARY HOURS FOR CASUALS

PN35

MR GALBRAITH: Also, your Honour, we have tendered extracts from the various state awards. The first line of that document is Award Provisions for Casual and Overtime Throughout the States and Territories.

EXHIBIT #G2 AWARD PROVISIONS FOR CASUAL AND OVERTIME THROUGHOUT THE STATES AND TERRITORIES

PN36

MR GALBRAITH: Your Honour, exhibit 1 is essentially a summary of the casual positions on the document marked 2. Would it be helpful for your Honour if I went through on a state-by-state basis the casual provisions?

PN37

THE VICE PRESIDENT: Yes, that would assist me. Thank you, Mr Galbraith.

PN38

MR GALBRAITH: In Western Australia the maximum weekly ordinary hours for a casual are 30. In Queensland also 30, although there is a condition there at the bottom of page where maximum daily hours for casuals in Brisbane (indistinct) eight hours. That's daily hours. So 30 hours per week for casuals. South Australia, maximum weekly hours for casuals, 38. Victoria, there are no maximum weekly hours for casuals. New South Wales, maximum weekly hours for casuals are 38. Tasmania, maximum weekly hours for casuals are 38. ACT, maximum weekly hours for casuals, 38. The Northern Territory, maximum weekly hours for casuals, 38. I think that covers all states, your Honour. So we're trying to paint a picture that the norm around the countryside prior to the General Modern Retail Award was a maximum of 38 hours per week for casuals.

PN39

The third issue, your Honour, is the break to be taken after five hours, a meal break. Both CCIWA and the Bakers have raised this as an issue. The SDA has revised this provision in the latest draft or amended attachment, to read, "No employee can work five hours without a meal break." I think there was some confusion around the absence of the word "meal". So we are talking about meal breaks. This is a longstanding industrial norm. The clarity sought is for meal breaks. To provide an example, your Honour, if an employee works nine hours they may be sent for a 30-minute break after seven and a half hours of work on the current wording. So the draft wording is to ensure that meal breaks are taken appropriately and fairly.

PN40

I'm not sure if there isn't some confusion around what we're seeking to achieve here. I'm just going to my copy of the award. I think there are two concepts, your Honour. One is the length of shift where an employee is entitled to a meal break. The second concept is a long shift and how long an employee may work during that shift before they are entitled to a meal break. So we're trying to cover both of those concepts but particularly an employee not working, for example, seven and a half hours without a meal break. We would suggest that our attachment A fixes that problem.

PN41

The last issue is the issue around part-time employees and overtime, your Honour. The SDA proposal is to address occasions where a part-time employee works 38 hours or is rostered for 38 hours rather than less than 38 hours in a week. The employee cannot become a full-time employee. This is a contract change and, without the proposed change, the rostering of a part-time employee would be a breach of the award but difficult and/or costly for an employee to be compensated for that breach. So the award should have a clear remedy for such an occurrence which should be that overtime can be enforced without relying on the courts to interpret the breach of the award. Where are part-timer works hours in excess of their agreed hours, they should be paid at overtime rates. While this is referred to in clause 12.7, to remove any ambiguity and to add clarity there should also be a reference in the overtime clause. If it please the tribunal.

PN42

THE VICE PRESIDENT: Which part of attachment A is directed to that particular matter?

PN43

MR GALBRAITH: That is clause 29.2.

PN44

THE VICE PRESIDENT: The second part of the second paragraph.

PN45

MR GALBRAITH: Yes, that's right.

PN46

THE VICE PRESIDENT: Thank you, Mr Galbraith. Mr Tindley.

PN47

MR TINDLEY: Thank you, your Honour. I think the parties in general are in a difficult position here. At NRA we acknowledge that there are some aspects of the award that are perhaps not what they should be but we're limited by the act in terms of how we can deal with them. With respect to Mr Galbraith's submissions, what we've seen is a combination of the fact under which the application was brought in terms of there being some purported ambiguity or uncertainty but also some of the basic section 157 considerations of whether the modern award's objectives have been met and fair and relevant minimum safety met.

PN48

We certainly would prefer some of these changes in the award. However I think in the absence of complete agreement of all the parties, we have some difficulty in achieving that. If a party in this proceeding is to say, "This matter is not an

ambiguity, this matter is not an uncertainty, this matter is not an error," it is difficult, in my submission, for the tribunal to make a decision to that end. I say that, your Honour, only as a matter of summary of the difficulties that the parties face in having these amendments made. I think the standard position has to be that you have to demonstrate an ambiguity or uncertainty. In a lot of these circumstances the award itself is relatively clear in what it's saying. We would say that it's perhaps incorrectly clear and perhaps not the way that either party would have liked the award to look, but it is of itself clear.

PN49

What I will do, however, is touch on each of the proposed changes of the SDA. I'll just go through the amended attachment A. If we start at 29.2 because that's where the first amendment occurs, the NRA does not object to a more broad application of overtime for full-time employees. It is what employers have been familiar with. It had applied under pre modern awards. We think perhaps there could be some greater clarity around the referencing of the particular provision that the overtime applies to. We accept the SDA has made an attempt to provide some further clarification through amended attachment A but it perhaps would be more helpful to list off each of the provisions that would attract overtime for full-time employees. We're happy to sit down with the SDA and list those off.

PN50

I think that's consistent with what some of the other employer parties are suggesting, that we need to be very clear about what those provisions are. It's perhaps a little too general at the moment. I'd initially intended to question the need for the reference to the rate of overtime on a Sunday, double time on a public holiday, double time and a half but I believe that Mr Galbraith has clarified that, in my mind at least, that it does clear up any potential uncertainty in our members' minds that you could roster someone overtime on a Sunday and pay them time and a half for three hours. So I don't think that there's any objection from our end to that particular provision.

PN51

We certainly have an issue with the definition of overtime for hours in excess of 38 hours for a casual employee. Our submission throughout most of the award modernisation process and variation process has been that this modern retail award is predominantly based on the Victorian Shops Award. The casual provisions of this Modern Retail Award, in particular the casual loading and also the imposition of penalty rates, is beyond what existed in a number of pre modern awards. For that reason there needs to be this swings and roundabouts approach that has been mentioned a lot during the process.

PN52

The Victorian award didn't provide for overtime for casuals over 38 hours. It was quite specific in its terms. It provided that casuals were excluded from overtime provisions and that was at clause 10.4.2(c). It did provide for one circumstance where overtime applied to casuals and that was outside the ordinary times of beginning and ending work for weekly employees. So there was one circumstance only, in my submission, and that was at clause 10.4.2(d)(i). In our submission the Industrial Relations Commission, when it made this award, clearly intended that casuals wouldn't have overtime provisions apply.

PN53

We note that the SDA's application retains the provision at 29.1(a), that an employer may require an employee other than casual employee to work reasonable overtime at overtime rates. In our submission that confirms the position that the Industrial Relations Commission took, that casuals weren't going to be entitled to overtime. It is consistent with the current award provision and it is quite clear that casuals are not entitled to payment for overtime.

PN54

If I could then move to the variation proposed for part-time employees. The difficult that is attached to that is at what point does overtime apply? The clause itself is referring back to 12.1(a) of the award, and 12.1(a) of the award simply says that part-time employees will work less than 38 hours per week. Well, a part-time employee is an employee who works less than 38 hours per week. I think what we lack here is a trigger point, your Honour, for that overtime. If a casual employee works 38 hours in a particular week, when does that overtime start? On the true working of the award a casual could work 37.99 hours and not attract overtime or not be in breach of the award but if they work 38 hours there would be a breach of the award or there would perhaps be overtime triggered.

PN55

In our submission the part-time employee has substantial protection in relation to the regularity, certainty, fixed pattern of work, overtime payment where that fixed pattern of work is altered without their written consent. In our submission we're perhaps not achieving anything through that part-time provision. We certainly support, with the variations made in terms of the circumstances in which overtime applies to full-time employees, that the concept of overtime should be calculated on a daily basis. We think that is consistent with the broad treatment of overtime historically. In our submission it was in all likelihood (indistinct) that that was the case in any event but we think this creates that level of certainty that would assist all parties.

PN56

THE VICE PRESIDENT: Mr Tindley, can I just take you back to the part-time point? Isn't what's sought to be achieved in the second part of the second paragraph of 29.2 of amended attachment A consistent with the effect of clause 12.7?

PN57

MR TINDLEY: Of clause? I beg your pardon, your Honour?

PN58

THE VICE PRESIDENT: Clause 12.7?

PN59

MR TINDLEY: I think that the variation is providing a link to overtime for part-time employees. I think the fundamental issue is that trigger point, your Honour. There are sufficient trigger points in terms of 12.7 for the variations sought to perhaps not have much work to do.

PN60

THE VICE PRESIDENT: Yes, and it's a different trigger point because it's a reference to 12.2 as possibly varied by 12.3 rather than 12.1.

PN61

MR TINDLEY: Yes, your Honour. We do take the SDA's point that there is – certainly from our members' perspective there is a benefit in having clarity around what constitutes a breach of the award and what mechanisms can be utilised to avoid the potential for that sort of breach. It's predominantly for that reason that we have a level of support for the SDA's position in terms of full-time employees and overtime, because there are a number of proscriptions within the award in relation to the way that hours are worked. In the absence of an overtime provision in circumstances where work outside that pattern is unavoidable, we are potentially looking at breach of awards rather than a simple mechanism for preventing that. Certainly an effective modern award should not be one that opens employers up to the potential for significant and ongoing breaches of the award.

PN62

Your Honour, I still struggle to get past this concept of where the trigger point under the SDA's variation would be. I don't know that there's a simple answer to that and I must admit that it's not something that I've given substantial consideration to. Is your Honour happy for me to turn to the other provisions?

PN63

THE VICE PRESIDENT: Yes, please.

PN64

MR TINDLEY: The proposed change to clause 30.1 of the award is certainly a matter that we offer our support in terms of the wording used at 30.1(a). It was identified by NRA and subsequently discussions were had with the SDA that the pre modern award's position was that if you worked more than five hours you were entitled to have a meal break. If you worked five hours, effectively you were finishing work and so that need to have a break wasn't present. As a result of that there are a substantial number of people who worked five-hour shifts in the retail industry. Potentially there has been a substantial change in the way that they should be worked. We believe that the change from "five hours or more" to "more than five hours" in the third point of 30.1(a) – so now it would, under the proposed variation, read "work more than five hours or less than seven hours" – reflects both the pre modern award position and the operations of the retail industry and so, in our submission, would alleviate some uncertainty amongst retailers about how to roster people or how to treat people who are working five hours.

PN65

The proposed insertion of 30.1(d), the provision that says, "No employee can work five hours without a meal break," as a starting point I think that probably should say, "No employee can work more than five hours." You may not see, your Honour, but I am getting a nod from the SDA on that one. So I'll let Mr Galbraith respond perhaps but in my mind that would alleviate the concern we have with that particular provision. I think that (4)(g) perhaps deals with that. There should be circumstances where that can be subject to variation. There will always be circumstances where there needs to be changes, operational requirements, et cetera, but we think (g) is sufficient to deal with that.

PN66

I think the last variation – and I don't know that the SDA touched on it – was the additional sentence in the payment of wages clause, clause 23. That is the provision that the payment will be made within three days of the end of each pay period. Your Honour, I think there's potentially a practical difficulty with that. My submission would be that, generally, the retail working pay period finishes on a Sunday and employees will generally be paid, I think, on a Thursday which would perhaps fall outside that proscription. That's an initial concern that I have. The other concern is that in those very rare circumstances where a public holiday falls within that period – I'm talking predominantly about large employers who have substantial payroll systems – that public holiday can cause difficulties to the processing of pays if that sort of time frame is imposed.

PN67

Certainly it's not a provision that was included in the award initially. There were provisions of that nature in pre modern awards but, if we go back to the initial issue, the award doesn't say that there is any limitation on when payment has to be made. It simply says an employee must be paid weekly or fortnightly or the additional provision in terms of monthly pay for certain classifications. We don't think that there's ambiguity or uncertainty about that. The award is quite clear. We see some benefit in – are you getting feedback there, your Honour?

PN68

THE VICE PRESIDENT: Yes, but I am following you, Mr Tindley.

PN69

MR TINDLEY: I'm hearing myself twice and I don't know if I sound quite as good the second time, your Honour.

PN70

THE VICE PRESIDENT: I'm taking into account the combined effect.

PN71

MR TINDLEY: Perhaps the first part of the payment of wages provision which says that pay weekly or fortnightly is sufficient to ensure the employees are being paid in sufficient time but we do see that, in very limited circumstances, that could create difficulty for employees. I wouldn't expect that employers generally are withholding pays for beyond a week period. It's not my experience with employers but we do see that the three days may be too tight and may create problems with current payroll systems which would mean a substantial change for employers with substantial costs potentially. Those are the submissions of the NRA, your Honour, unless you have anything further for us.

PN72

THE VICE PRESIDENT: Thank you, Mr Tindley. Ms King.

PN73

MS KING: Thank you, your Honour. MGA contends that the application made by the SDA to change the Retail Award based on the need to clarify ambiguity is without merit. The MGA is of the view that unless an ambiguity has been made out by the SDA, they cannot succeed in their application. Very briefly, a test for ambiguity was identified by Grey J in the 1986 Federal Court of Australia case, PKIU v Davies Bros Ltd. In that case Grey J cited two cases in which the test or definition for ambiguity were explored. Ultimately Grey J, at paragraph 9 of that

1986 Federal Court case, accepted the test laid out by Isaacs ACJ in the 1924 High Court Case, Pickard, and the John Hine case. In other words a difference of opinion can be an indicator of ambiguity. Indeed, this particular view was further endorsed in a 1995 AIRC decision of the Victorian Public Transport Corporation v Australian Tram and Bus Industry Union case.

PN74

However, their Honours in that 1995 AIRC decision – Vice-President Ross, Senior Deputy President Palates and Commissioner Grimshaw – at page 3 did warn that in finding an ambiguity an arguable case can be made out for more than one contention. MGA contends that in these instances the SDA has not necessarily made out a case for more than one contention on these issues of overtime, meal breaks and pay provisions.

PN75

On the matter of overtime, your Honour, the award is quite clear as to when overtime is paid. Clause 29.2 identifies that full-time employees become entitled to overtime in the event that they work more than a 38-hour week or the various permutations that a 38-hour week might take. Part-time employees under clause 12.7 of the award identifies that the part-timers become entitled to overtime in the event that the number of hours worked exceeds the number of hours agreed to when the contract of employment was entered into or that the hours exceed the number of hours as agreed to by mutual agreement. We also note that in relation to casuals under clause 29.1(a) of the award that casuals are not part of the eligible group of employees who can be asked to work overtime.

PN76

In terms of paying employees rates for public holidays and Sundays in instances where, for example, overtime overlaps with a Sunday or a public holiday, we acknowledge that this has not been specifically referenced in the award. However clauses 29.4(c) and 29.4(d) already set out the entitlements for employees who work the public holidays and the Sundays and those particular entitlements, those penalty rates, outstrip the overtime rates.

PN77

Apart from the clarity in the award on that issue of overtime, the SDA's submissions and suggestions do tend to raise various problematical issues, your Honour. First of all, there seems to be some ambiguity introduced by the SDA's submissions. A classic example of that is their suggestion about part-time employees. The suggested amendment seems to indicate that overtime will become an entitlement for a part-time employee simply by being a part-time employee because clause 12.1(a) becomes not only the trigger but the very definition of a part-time employee, ie someone who works less than 38 hours per week. Furthermore, the specification that the rate of overtime on a Sunday be paid at double time and public holiday at double time and a half is somewhat redundant, given that these are already the penalty rates prescribed in the clauses 29.4(c) and (d) for working on those particular days.

PN78

We also note that the submission by the Baking Manufacturers Industry Association at paragraph 8 of their submission is of a similar view to the MGA that the Sunday and public holiday rates are already clearly set out and that the

proposed variation is not required. The SDA's proposed daily calculation of overtime requires more detail from the SDA to explain firstly what is the current ambiguity and how such a process of calculation interacts with the already current convention. My understanding is that the current convention is generally that overtime is already calculated on a daily basis.

PN79

Your Honour, MGA has also formed the view that the SDA application is motivated more by an objective to expand employee entitlements rather than a legitimate requirement for clarity. If we go through some of the consequences of the suggested amendments we soon see this becoming apparent. Currently, as I said before, full-time employees become entitled to overtime in the event that they work over the 38-hour week. The SDA's suggestion would mean not only do they become entitled to overtime for working beyond the 38-hour week but also for working beyond the span of hours. For the part-time employees, as I've already mentioned, it's very difficult to ascertain (a) as to what the current ambiguity is but also what actually the SDA is suggesting is the trigger point for part-time employees to become entitled to overtime if it's the very definition of a part-time employee.

PN80

The SDA also wishes to provide for an entitlement to overtime to casual employees despite the award clearly prescribing in clause 29.1(a) that an employer cannot request a casual employee to work overtime. We also are of the view, your Honour, that this wish to expand employees' entitlement can be seen quite clearly from the SDA's submission dated October 2008 in response to the draft exposure of the award, and that award matter was AM2008/10. At paragraphs 161 to 164 of that reply submission the SDA suggests that there is a drafting issue in the 2008 exposure draft because the overtime provisions which set out for full-time employees on the same terms as the current award sets out overtime entitlements, that that drafting is a very limited application, eg casuals do not get overtime.

PN81

Further, at paragraph 164 of the SDA's reply submission to that 2008 exposure draft the SDA asserted the following:

PN82

> *To be applied appropriately overtime needs to apply to all employees to any hours worked outside the span of hours and to any hours worked outside the various roster conditions. Example, maximum daily shift, maximum days per week.*

PN83

Effectively, the current SDA application to vary the award achieves these substantive amendments which the SDA argued for back in October 2008 but did not succeed in securing. We note that the full bench of the Australian Industrial Relations Commission in its decision of 26 June 2010 outlined in paragraph 3 that the commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances. We do of course urge his Honour to take this perspective into consideration when deciding the current application.

PN84

Just briefly, your Honour, on the other couple of issues that the SDA would like to secure change on, on the matter of unpaid meal breaks, to reiterate our previous submission, MGA is very unclear as to what the current ambiguity in the award is. Once again the SDA has not established the case for ambiguity on the wording of the award. On the matter of pay, to reiterate our position yet again, we're unclear as to what the current ambiguity supposedly is.

PN85

Clause 23 of the award which deals with the payment of wages specifies that wages must be paid either weekly or fortnightly. The SDA in their clause would like that payment would be made within three days of the end of each pay period. In terms of the practical consequences of that amendment we would have thought that the specification in the award that wages be paid either weekly or fortnightly is sufficient to secure employees entitlements in a timely manner. There's one possibility that the SDA's suggestion might actually allow employers to extend the time within which payment of wages is to be made because it may actually contradict the current clauses as they stand that payment be made either weekly or fortnightly.

PN86

In conclusion, your Honour, we view the suggested changes by the SDA as concerning for a number of reasons. Such variations are counter to the intention of the AIRC, that such significant changes be made so early in the modern award's process. Furthermore, we are very much of the view that the suggested changes represent a wish list, if you like, of SDA objectives as revealed in their response to the 2008 exposure draft rather than genuine lack of clarity in the award. We would respectfully request that if indeed there is found to be an ambiguity in the award that your Honour is of course mindful that it is not necessarily a requirement to adopt an all or nothing approach to the SDA's application and that the various matters that they've raised can be dealt with discretely. Thank you, your Honour.

PN87

THE VICE PRESIDENT: Thank you, Ms King. Mr Doyle.

PN88

MR DOYLE: Thank you, your Honour. AFEI has a written submission in relation to this matter. It's a brief submission but we would agree with the earlier submissions that the application appears to be based on a combination of variations proposed to remove ambiguity, uncertainty or error but also applications which really relate to wider matters and, probably more appropriately, section 157 matters and not section 160. Specifically, we do not oppose those aspects of the changes which are more squarely, in our view, related to the section 160 matters, and those are changes relating to the overtime provisions but in particular in relation to the references to the span of hours and maximum daily hours.

PN89

Your Honour, we also do not oppose the changes in relation to meal breaks and in particular in the amended attachment A, clause 30.1(a) and under the heading Hours Worked, the second point where it refers to "work four hours or more but no more than five hours". In our view that corrects an error and we do not oppose

that change but we note that the proposed 30.1(d) in the amended attachment appears to be at odds with that provision and we do not support 30.1(d). Also, we do not oppose the changes in relation to payment of wages but we note the submissions of other parties today for flagging that there are potentially more significant problems perhaps for other employer parties other than ourselves.

PN90

Your Honour, in relation to the other matters we do not support the changes. The changes relating to casuals and part-time – well, the changes relating to casuals in particular we see are not a matter of section 160. The application seeks to do something wider than that and we do not support that. The changes in relation to overtime and part-time employees we think are unnecessary and, in fact, the reference to 12.1(a) we think is inaccurate. As you've pointed out this morning, your Honour, the trigger for payment for overtime for part-timers is not actually in 12.1(a); it's more correctly in 12.7, I think. We do not support the changes in the new 29.2, the reference to the rate for overtime on Sunday and public holidays. We think that is unnecessary. Provisions concerning those matters are found elsewhere in the award. Your Honour, unless there's any questions, those are the submissions of AFEI.

PN91

THE VICE PRESIDENT: Thank you, Mr Doyle. Mr Duc.

PN92

MR DUC: Thank you, your Honour. Likewise the BMIAA has filed submissions in this regard and we rely on those submissions. Firstly, your Honour, in regard to casuals and overtime there is no ambiguity or uncertainty. The clause is very, very clear that an employer may require an employee other than a casual to work reasonable overtime. So there is no ambiguity or uncertainty that has been correctly raised by the union. We rely on our submissions in that regard to say that if Fair Work Australia is mindful to make that change then there should be further submissions allowed on that point because it is a very, very large cost impact that retailers would face all across the country. It's a very substantive change that both the NRA and the MGA have highlighted.

PN93

THE VICE PRESIDENT: Isn't this your opportunity to put what you wish to put?

PN94

MR DUC: Your Honour, we've just had this morning handed to us a whole range of clauses that have been provided to us with the union not addressing in any detail at all how they seek to rely on these to make the argument that casuals are to be paid overtime. They have not taken us to any clauses at all to indicate that casuals do get overtime. So we would require further time to have a look at this and come back to Fair Work Australia on that particular point.

PN95

THE VICE PRESIDENT: How much time would you want to put anything further you wish to put? The way you put it previously, Mr Duc, is that if Fair Work Australia believes that some change should be made there should be further opportunity to address all of the changes, which means that the case is broken up

into a number of parts. It has a further life after a decision is made. It's not really practical to proceed in such a manner.

PN96

MR DUC: Your Honour, having casuals to be paid overtime is a very, very big matter for employer across Australia. That is our submission, that it can be discretely dealt with in the manner, say, that a three-hour minimum has been dealt with. It is a very, very big matter.

PN97

THE VICE PRESIDENT: Well, if you require some further time to respond to the written material that has been put, can you submit that in writing within a week?

PN98

MR DUC: Certainly, your Honour.

PN99

THE VICE PRESIDENT: Yes, okay.

PN100

MR DUC: Thank you, your Honour. Moving on to clause 29.2, the last paragraph discusses that the rate for overtime on a Sunday is double time and on a public holiday double time and a half. Now, certainly in our view there is no ambiguity or uncertainty there and we would go further to say that it is actually inconsistent with the provisions for Sunday and public holiday that are detailed at 29.4(c) and (d). So we think that that line should be struck out. There is no ambiguity or uncertainty. It's only two paragraphs further down to have a look at what the rates are for Sunday and public holidays.

PN101

Your Honour, in relation to the meal issue we support what Mr Doyle has put this morning but largely that issue was agreed to change the wording that is in the table format, but we do not support 30.1(d) being included because it is inconsistent. Lastly, in relation to payment within three days we support the other employer parties and what they have said. We don't necessarily oppose that but obviously there are some practical issues that are involved. If your Honour pleases.

PN102

THE VICE PRESIDENT: Thank you, Mr Duc. Mr Galbraith.

PN103

MR GALBRAITH: Thank you, your Honour. Your Honour, if I could go to one of the simple problems first. May I start with meal breaks?

PN104

THE VICE PRESIDENT: Yes.

PN105

MR GALBRAITH: Mr Tindley has highlighted a problem at 30.1(d) that I picked up in the draft when I was going through this a couple of days ago. We would be prepared to change (d) to, "No employee can work more than five hours without a meal break," in which case that would be consistent with perhaps the second line in the table at 30.1(a). Again, that is just to protect people who are

working a long shift such that they don't have to work seven and a half or eight hours without some kind of meal break.

PN106

Your Honour, going back to overtime, I've heard the various submissions from the various parties. One of the submissions went very much to removing ambiguity but we would also seek to remove uncertainty. We believe that the draft clause that we've come up with, albeit it with some amendments perhaps in discussions with the parties, makes it clearer as to how the overtime clause will work, particularly when it combines with hours beyond and work on Sundays, work on holidays. We don't see inconsistency. We seek clarity for people who are not industrial experts picking up the award and trying to work out how the overtime provision actually applies.

PN107

Your Honour, there's also the matter of casuals being paid overtime beyond 38 hours. I took you through the first exhibit earlier this morning. Mr Tindley has referred to the Victorian Shops Award whereby overtime is not paid beyond 38 hours but I think it's important to remember that overtime in the Victorian Shops Award outside the span of hours is paid at double time for all those hours. There is no first three hours at time and a half. So that's one of the clear differences between the Victorian Shops Award and the modern award.

PN108

It was also raised by Ms King that, "Overtime is calculated on a daily basis," reflects an existing convention. We just argue that that adds to the clarity around the overtime clause so that there can be no dispute that overtime is calculated on a daily basis and not perhaps over a weekly basis, which in some circumstances can occur in some awards but is unusual. That again goes to the issue of clarity. I didn't in my submission earlier this morning refer to payment of wages which I should have done. The suggested amendment we have made is to clause 23, Payment of Wages, that payment will be made within three days of the end of each pay period.

PN109

It has been raised with us the situation around public holidays and potential delay in payment. In such circumstances we would be happy to redraft this, such that where there is a public holiday you may be paid within four days. I think with modern payroll it's a fair request that our members can expect to be paid within three days from the end of their pay period. A lot of our members will have direct debits from bank accounts relating to mortgages or various loans they have. So they need some sort of consistency around when they will be paid. Your Honour, I think that covers most of the points.

PN110

I'd also like to say that with respect to the Master Grocers submission, we've only received it this morning and it goes to some fairly technical points. So I'm not in a position to address those technical points this morning. There's also a submission by the AFEI which I haven't seen. So again (indistinct)

PN111

THE VICE PRESIDENT: Yes, thank you for those submissions. I note the Baking Manufacturers require some extra time to deal with some of the matters

and I will permit the filing of any further written submissions by the Baking Manufacturers Industry Association within seven days. I'll also permit the SDA to file a written submission in reply to material filed subsequently by the Baking Manufacturers Industry Association and the written submissions that had not been able to be addressed today because of their late filing. There's no criticism in that because I don't think there were any directions to file submissions but to provide the SDA with that opportunity that they seek. I'll otherwise reserve my decision in this matter and adjourn the proceedings.

<ADJOURNED INDEFINITELY [11.20AM]

LIST OF WITNESSES, EXHIBITS AND MFIs