



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER LEE

AM2014/285

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/285)**

Social, Community, Home Care and Disability Services Industry Award 2010

Sydney

9.07 AM, FRIDAY, 16 DECEMBER 2016

PN1

THE COMMISSIONER: So in Melbourne I've got Mr Cooney?

PN2

MR J COONEY: Yes, Commissioner.

PN3

THE COMMISSIONER: Yes, coming through loud and clear. And Adelaide Ms Van Gorp, is it? Yes. Can you hear me okay? Can you hear me okay, Ms Van Gorp.

PN4

MS K VAN GORP: I can, yes. Now, I can, yes.

PN5

THE COMMISSIONER: Okay. All right. Everyone has got a mic. You might want to just train those to wherever people are speaking. All right. So we're still working off the summary list that we were working off last time. There's been no new one generated to my knowledge, so we'll keep going with that.

PN6

MS SVENDSEN: The one dated 29 November.

PN7

THE COMMISSIONER: Don't panic. I'll just get myself in order here. Right. So I'm going to propose that we go, not surprisingly, from item 1 all the way through and we did get, when we were together last time, an assessment of matters that it was agreed but I'll also want to just close off on what did that mean, that it was agreed that, I suppose, the draft stays the same or it's agreed that it will be changed in some other manner. So I just want to square all that away.

PN8

So let's start with item 1. Now, my notes, looking at all this again over the last day or so, was there seems to be general support for all definitions to be in the definitions section. Would that be true?

PN9

MS SVENDSEN: Principally I think there are a couple of standout ones that I believe should be with the clauses. So sleepover, the admission for sleepover clauses. I think most of us think we just should be with the sleepover clause and not - well, (a) not repeated; and (b) it would be silly to have it in the definitions clause when it only applies to the sleepover clause and the sleepover clause would be difficult to read without it.

PN10

THE COMMISSIONER: Right. So your position is all the definitions should be in clause 2 except for the sleepover clause.

PN11

MS SVENDSEN: And the definition of coverage which, for the same reason, we think - because you would need to repeat it in coverage and we don't think it needs repetition.

PN12

THE COMMISSIONER: All right. Other views on that?

PN13

MS ZADEL: AFEI would agree. We don't need the duplication. Sleepover is probably more appropriately placed in the sleepover clause.

PN14

THE COMMISSIONER: Yes.

PN15

MS ZADEL: For ease of reading. If we could avoid duplication by even just putting a small reference in the definitions that could potentially assist as well, but rather than repeating the entire definition.

PN16

THE COMMISSIONER: You're with HSU. The sleepover definition should be in the sleepover clause. Okay. Other views?

PN17

MR LIGGINS: We take that same view.

PN18

THE COMMISSIONER: All right. No-one differs from that.

PN19

MS BHATT: We don't differ from that so long as the term remains in the definition clause and there was some reference to the sleepover clause, that is, the definition shouldn't be removed from the definitions clause entirely. The reason for that is the term "sleepover" is used elsewhere in the award apart from clause 14.5, which is the sleepover clause.

PN20

THE COMMISSIONER: Okay. So you might see it in another part of the award and go looking for what does it mean?

PN21

MS BHATT: Exactly.

PN22

THE COMMISSIONER: Well, there's no issue with that is there? That it can be in two places provided it's the same definition? No? Well, then that's what we'll do.

PN23

MS VAN GORP: Commissioner, could I just interrupt?

PN24

THE COMMISSIONER: Yes. Yes.

PN25

MS VAN GORP: It's Ms Van Gorp from South Australia.

PN26

THE COMMISSIONER: Yes.

PN27

MS VAN GORP: Can the microphones perhaps be moved a little closer to the speakers?

PN28

THE COMMISSIONER: Sure.

PN29

MS VAN GORP: Because I couldn't hear - I think it was Ruchi, she was speaking, and I couldn't hear what she was saying at all.

PN30

THE COMMISSIONER: Could you hear what I said at the end?

PN31

MS VAN GORP: Yes, I can hear what you're saying.

PN32

THE COMMISSIONER: Okay.

PN33

MS VAN GORP: But I couldn't hear the parties.

PN34

THE COMMISSIONER: All right. Well, look, sorry about that. But the summary of the position is, tell me if you disagree, is that we're going to have the sleepover definition will be in both the sleepover clause and in clause 2. Do you have any - - -

PN35

MS VAN GORP: No, we won't object to that.

PN36

THE COMMISSIONER: Right. Okay. Very good.

PN37

MS SVENDSEN: And coverage in clause 4.

PN38

THE COMMISSIONER: Well, what's in the exposure draft? What the status of the exposure draft in that now?

PN39

MS SVENDSEN: It's in both.

PN40

THE COMMISSIONER: Two and four.

PN41

MS SVENDSEN: And in actual fact the clauses differ I think.

PN42

THE COMMISSIONER: Yes. At least the social - - -

PN43

MS SVENDSEN: So at least one of them.

PN44

THE COMMISSIONER: You've got one paragraph, the social community sector. It's got one additional paragraph to avoid doubt. Okay. So we've got clause 4, coverage. Right.

PN45

MS SVENDSEN: And that's actually correct. That's got the full definitions of each of those sectors, so family day care scheme, payment for care sector, and social and community services sector.

PN46

THE COMMISSIONER: Yes.

PN47

MS SVENDSEN: And crisis assistance is included, housing sector. Those four are in the coverage clause. They're also in the definitions clause but not fully in the definitions clause, so social and community sector is not the full clause.

PN48

THE COMMISSIONER: I see. Just missing one paragraph.

PN49

MS SVENDSEN: Yes, it is.

PN50

THE COMMISSIONER: Which one? Top of page 6 to avoid doubt.

PN51

MS SVENDSEN: Not a good start to a clause obviously but those - I don't care which way - our position principally was that there was no necessity to repeat it and that we sought that in coverage was better because that's where it's referenced and where it makes the most sense and it's barely two minutes away.

PN52

THE COMMISSIONER: This is a new novel approach.

PN53

MS SVENDSEN: A novel concept of why you do something in an award.

PN54

THE COMMISSIONER: The relevant provision is on the other page so you should be able to find it.

PN55

MS SVENDSEN: That is right.

PN56

THE COMMISSIONER: If only it was so easy. Other views on that, on the coverage clause?

PN57

MS CHAN: If I'm not incorrect I sense from the parties that nobody would maybe be opposed to having a definition in the definitions clause which maybe says something to the effect of, taking maybe crisis assistance as an example, crisis assistance - well, the housing sector has a meaning given by clause 4.2 and then sort of doing that with the rest of the - - -

PN58

MS SVENDSEN: I don't have an objection to it but I think it's completely unnecessary. That's my point. That's my - I think it's unnecessary.

PN59

THE COMMISSIONER: So you were saying you'd take the reference to, for example, the crisis assistance and support definition you'd take out?

PN60

MS SVENDSEN: Of clause 2.

PN61

THE COMMISSIONER: Of Clause 2.

PN62

MS SVENDSEN: And just leave it in clause 4. I would do that.

PN63

THE COMMISSIONER: I'd probably do it the other way around, but I'm not going to die in a ditch over it either way.

PN64

MS SVENDSEN: No. Well, neither would I.

PN65

THE COMMISSIONER: I'd put it in the definitions, carry that missing paragraph to the SACs definition, put them in definitions, and then just run with the names in the coverage clause because they're already used in the definitions and they are used throughout the document.

PN66

MS SVENDSEN: Yes.

PN67

THE COMMISSIONER: So if the primary take is that where it's multiply used we put it in definitions and for the same argument you would see the definitions.

PN68

MS SVENDSEN: I just might explain that possibly my - this is not something that's affecting anyone else at the table, I've been in plain language with pharmacy and that's probably affecting why I've taken that primary view but I actually don't mind. I really don't mind. I think that it doesn't - - -

PN69

THE COMMISSIONER: Why? Because you think that's where pharmacy is going?

PN70

MS SVENDSEN: Pharmacy is putting it in with the coverage because that's where it's relevant and if it's not repeated in the document then the clause is only going in the clause that's relevant so that's just the primary view that the plain language drafter has given us in pharmacy, so I think that's possibly affecting the way I look at it. I think I would have always put it in definitions but for those discussions.

PN71

THE COMMISSIONER: Aren't there multiple references to these different sectors?

PN72

MS SVENDSEN: There are to the sectors though. You're quite right.

PN73

THE COMMISSIONER: Yes.

PN74

MR LIGGINS: I think we could probably pick one because having the award in front of me, Social and Community Services sector is literally applied twice on the same page.

PN75

THE COMMISSIONER: Yes.

PN76

MR LIGGINS: And I think that - - -

PN77

MS SVENDSEN: That makes it only one unit away.

PN78

MR LIGGINS: I know.

PN79

MS SVENDSEN: Sorry.

PN80

MR LIGGINS: But I think that actually is why we've created some confusion because, I think, if you look at the reason for the absence of the second paragraph it is found in the coverage clause but isn't in the definition.

PN81

MS SVENDSEN: Yes.

PN82

MR LIGGINS: That's over the page and I think the person who was preparing the exposure draft copied and pasted without considering the second-half of the paragraph over the page. It seems that we're sort of stuck here with no-one caring enough really to forcibly advocate a point. Maybe because the sectors are being defined, are being used throughout the award, we should just keep them in the definitions clause and remove them from coverage. You know, the words are going to be used there. I don't think it would change the coverage clause in any substantive way. Maybe that's the way forward.

PN83

MR ROBSON: I would agree.

PN84

THE COMMISSIONER: So what was that? Sorry, I never got that.

PN85

MR LIGGINS: All - - -

PN86

MS SVENDSEN: All in the definitions clause, sorry.

PN87

MR LIGGINS: All in the definitions clause. Yes.

PN88

THE COMMISSIONER: You put it all in the definitions clause?

PN89

MS SVENDSEN: Yes.

PN90

MR LIGGINS: Yes.

PN91

MS ZADEL: As it currently is.

PN92

MS SVENDSEN: And the only change therefore is that they come out of the clause 2 and clause 4.

PN93

THE COMMISSIONER: Yes.

PN94

MS SVENDSEN: And the second paragraph that's missing from clause 2 gets re-inserted.

PN95

THE COMMISSIONER: Yes, into the SACs sector.

PN96

MS SVENDSEN: Yes, Commissioner.

PN97

THE COMMISSIONER: All right. Consensus view, which of course we still may not do, depending on what we're doing with other things, but the consensus view is that it's all sector definitions because they're all sectors will come out of 4 and be put in 2. Two?

PN98

MR LIGGINS: Yes.

PN99

THE COMMISSIONER: How are you going there in South Australia? You hearing us okay there?

PN100

MS VAN GORP: Yes. No. Yes, thank you very much, I'm keeping track. Can I just go back to the sleepover one? Sorry to be a pain, so we're putting sleepover in both are we? If we're going to keep sleepover in the sleepover clause could we just not have a reference to it in the definitions clause. Do we have to repeat it? Only because if you've got two things in two different places the threat of it changing one and not the other is increased in the future, so we could we just say "as defined in clause" - - -

PN101

THE COMMISSIONER: Look, I think you'll just have to trust, you know, the Commission holds the pen on those things, so, you know, and we never make any mistakes, so we should be fine. I understand the point but I think it's one of those particular issues, and I know we're going to get the sleepover again later. It's clearly connected with broken shifts, a whole range of things, so I think it probably makes sense to keep it in both. But if that's the only concern that we might miss it in the future, I could guess, I can assure you in all seriousness that we'll do our best not to do that. Can you live with that?

PN102

MS VAN GORP: Thank you.

PN103

THE COMMISSIONER: Thanks.

PN104

MS VAN GORP: Yes, thank you.

PN105

THE COMMISSIONER: So with that we'll move on from item 1 to item 2, definition of sleepover. Now - - -

PN106

MS ZADEL: I think we might just have resolved that one.

PN107

MS SVENDSEN: I think we might just have been talking about that because we talked about definitions and lock, stock and barrel.

PN108

THE COMMISSIONER: Yes. And again just to confirm that the notes I made yesterday were it appears the definitions were the same in clause 2 and 14 and 5(a) and originally it is absolutely identical. Has anyone got a view that it's not?

PN109

MR LIGGINS: Yes, it looks identical.

PN110

MS SVENDSEN: Let's deal with it, if there's any changes in it, let's deal with that.

PN111

THE COMMISSIONER: Yes.

PN112

MS SVENDSEN: Or else we'll be jumping through this document.

PN113

MS CHAN: No, I'm just talking about the definition. As long as we haven't changed it.

PN114

MS SVENDSEN: No.

PN115

THE COMMISSIONER: No, it looks the same. Yes. So we're keeping the definition twice? Yes. That's what you'd agree you'd like to do. All right. So 3, now, my notes are, from the hearing last time that this was agreed.

PN116

MS SVENDSEN: I'll just check that.

PN117

MS ZADEL: I think we'll just double check that.

PN118

THE COMMISSIONER: Yes. By putting that second paragraph into the definitions as well for SACs.

PN119

MS SVENDSEN: Yes.

PN120

THE COMMISSIONER: Yes, okay. Now, given an hourly rate. And we've got - was this kicked off by a view about the - from the AWU, this debate?

PN121

MS ZADEL: I don't know if it was - - -

PN122

MS SVENDSEN: I don't know because it was a view that was held by - - -

PN123

THE COMMISSIONER: All of you.

PN124

MS SVENDSEN: Yes.

PN125

THE COMMISSIONER: Or all of the - - -

PN126

MS SVENDSEN: Unions, and the employers have gone in reply, so I'm not quite sure that they kicked it off but it's certainly principally an agreed position in the sense that we think that minimum hourly rate needs to be defined.

PN127

THE COMMISSIONER: That is that is the agreed position about a minimum hourly rate meaning the minimum hourly rate applicable to the employee's level and pay point. Which is the AWU's - - -

PN128

MS ZADEL: Yes, that's not agreed. I think that's what's not agreed.

PN129

THE COMMISSIONER: So just let me understand the proposition that has come from the AWU. It's what exactly? I mean, minimum hourly rate has typically got its ordinary meaning, meaning I would have thought that the hourly rate that is applicable to you depending on where you've been classified and then if there's some incremental structure where you've moved to, in terms of that incremental point, but the rest of that follows from that. So I'm sort of missing - - -

PN130

MS ZADEL: It is.

PN131

THE COMMISSIONER: I think, to be honest, I'm missing the point as to why it's necessary, the minimum hourly rate.

PN132

MS SVENDSEN: In the current award - - -

PN133

THE COMMISSIONER: Because again - just let me finish.

PN134

MS SVENDSEN: Yes.

PN135

THE COMMISSIONER: You must read all these instruments together. We all understand that. We spend our lives doing it, and you've got the scheme.

PN136

MS VAN GORP: I'm sorry, Commissioner. You've moved away from the microphone. Thank you.

PN137

THE COMMISSIONER: Can you hear me now?

PN138

MS VAN GORP: I can. Thank you.

PN139

THE COMMISSIONER: So you've got a minimum hourly rate that people are entitled to. Well, what is that minimum hourly rate. Well, it's the rate that other parts of the award prescribe applies to them depending on what their classification is and so on. So I am struggling with why it's necessary.

PN140

MS SVENDSEN: It become an issue because the previous award said "their minimum hourly rate" and the exposure draft uses "the minimum hourly rate" throughout it. So the change of the pronoun from "their" to "the" means that the unions believe that the "the minimum rate" might even mean the base rate of pay, that is, the minimum rate of pay in the award, because it's not defined that it means the rate of pay that applies to the individual's classification and years of experience which we've just talked about.

PN141

THE COMMISSIONER: I see.

PN142

MS SVENDSEN: So that's where it principally comes from. The change of language from "their" to "the" and we kind of figured there's two ways of dealing with it; one is to change "the" back to "their" wherever it applies in the award and the other is to have a definition of minimum hourly rate.

PN143

THE COMMISSIONER: Right. A definition creates other issues. What if it was - I understand what you're saying, but going back to where I was it's the relevant hourly rate or the - not really appropriate, that's not right either - the applicable.

PN144

MS SVENDSEN: Yes, it is. Yes, it's the rate of pay applicable to the employee. We all understand that as you go through it, as you go through, it's a very - you know, it's general. It doesn't apply to one spot in the award. We all understand that it means the rate of pay that's applicable to that employee, but that, in our

view, is not what the current draft says because of the change from “their” to “the”.

PN145

THE COMMISSIONER: Can you remember where there’s a reference to that, Leigh, in that exposure draft?

PN146

MS SVENDSEN: Minimum rates would be one.

PN147

THE COMMISSIONER: Thank you. You’re very good at these things.

PN148

MS SVENDSEN: I actually think I’ve used it as an example when I did it - - -

PN149

MS VAN GORP: 11.2

PN150

MS SVENDSEN: Thank you.

PN151

MR ROBSON: In the exposure?

PN152

MS SVENDSEN: Yes.

PN153

MR ROBSON: That’s not probably the best because it’s says “minimum hourly rate appropriate for the employee’s classification”.

PN154

THE COMMISSIONER: Yes. So that’s correct.

PN155

MS SVENDSEN: Yes, that's correct.

PN156

THE COMMISSIONER: That’s a good one.

PN157

MR ROBSON: Yes.

PN158

MS SVENDSEN: Overtime.

PN159

THE COMMISSIONER: Where’s overtime?

PN160

MS SVENDSEN: I don’t know. I can’t remember.

PN161

THE COMMISSIONER: Okay.

PN162

MS SVENDSEN: I hadn't actually - I hadn't even looked for it, but I just - - -

PN163

THE COMMISSIONER: People are suggesting you've got a photographic memory.

PN164

MS CHAN: Clause 19, page 27. No, it says employee minimum hourly rate in the table. So that's not helpful.

PN165

THE COMMISSIONER: Well, that sort of takes us back to there really.

PN166

MS SVENDSEN: That's the other one. Yes, that's right. So that one is okay.

PN167

MR ROBSON: I think 20.1, Saturday and Sunday work on page 26:

PN168

Employees whose ordinary working hours include work on a Saturday would be paid 150 per cent of the minimum hourly rate.

PN169

But I think, you know, we would understand that the intention is that they are not paid 150 per cent of the minimum hourly rate. They are paid 150 per cent of the minimum hourly rate applicable to the employee.

PN170

THE COMMISSIONER: Yes. No, I see the point. I see the point. Is "applicable" then the best way through just to make that a more consistent use. It's already there. I presume it was already in the earlier version of the award?

PN171

MS SVENDSEN: There's been, I think in the Health Professionals Award, we went with the employees - and in the Nurses' Award we went with the "employee's appropriate classification and pay point" that I remember off the top of my head. Geoff, you might remember better than me. One was one way and one was the other.

PN172

MR LIGGINS: I think - yes. Yes.

PN173

THE COMMISSIONER: Yes.

PN174

MS SVENDSEN: I don't think anybody has come up with a standard version. I think that, in both of those, the decision was not to have a definition but it was to adjust the language in some way throughout the award.

PN175

MR LIGGINS: If "the" became "their" in these examples that would solve it, wouldn't it?

PN176

MS SVENDSEN: It would.

PN177

MR LIGGINS: In those particular penalty rate areas, Saturday and Sunday for instance.

PN178

MS SVENDSEN: Yes.

PN179

MR LIGGINS: Because it's already a reference to employees, so it's there as employees.

PN180

MS ZADEL: Just wouldn't want to be introducing anything too detailed including the classification rate and pay point, I think.

PN181

THE COMMISSIONER: No.

PN182

MS SVENDSEN: I agree with you, Jen. I don't think that's a good idea.

PN183

THE COMMISSIONER: I don't think that's the way to go at all. But really what you're trying to avoid is any sense that any of the relevant provisions like overtime only apply to the minimum - you know, bottom of level 1 basically.

PN184

MS SVENDSEN: Yes.

PN185

THE COMMISSIONER: And you're right, that a literal reading is just that, of what's there at the moment.

PN186

MR LIGGINS: So in 21.3B(1) it actually says "their minimum hourly rate". So it's already used that way in the document. That's the annual leave loading at B, 21.3B(1).

PN187

THE COMMISSIONER: Right.

PN188

MR LIGGINS: And the annual leave loading of 17-and-a-half per cent of “their minimum hourly rate of pay”.

PN189

THE COMMISSIONER: Yes. We can just go back to “their”.

PN190

MR LIGGINS: I think that - - -

PN191

THE COMMISSIONER: Was there any disputes? I’m not imagining this was ever in contest to get it applied here.

PN192

MR ROBSON: No.

PN193

MS SVENDSEN: No, it’s the same.

PN194

MR LIGGINS: No, it was just a change to wording from “their” to “the” in a number of places, but not everywhere.

PN195

THE COMMISSIONER: Yes.

PN196

MS SVENDSEN: We can go through and agree and - - -

PN197

MR LIGGINS: It wouldn’t be hard to do a find and - - -

PN198

MS SVENDSEN: - - -list it at which it applies.

PN199

MR LIGGINS: Yes.

PN200

MS SVENDSEN: And provide that to you; “the” to “their” and see - I mean, just that makes it easier for you to look at and decide whether you agree with this or not. It’s not actually our decision.

PN201

THE COMMISSIONER: No. I appreciate the offer. What I’ll do is get the award mod team to do exactly that.

PN202

MS SVENDSEN: Okay.

PN203

THE COMMISSIONER: And we'll put a proposed solution because often on these things I'll go back to consistency with the other awards and see if there's anything there, because this is a generic issue.

PN204

MR LIGGINS: Yes.

PN205

MS BHATT: Can I just raise one matter?

PN206

THE COMMISSIONER: Sure.

PN207

MS BHATT: I'm hesitating for this reason; there are other exposure drafts where the words - - -

PN208

MS VAN GORP: Could you speak closer to the - thank you - microphone?

PN209

MS BHATT: I'm sorry, I'm not particularly close to any microphone but I hope that's better.

PN210

MS VAN GORP: That's much better. Thank you.

PN211

MS BHATT: AiGroup has raised an issue in some other exposure drafts where the word "their" is used and I think this has arisen because of at least one dispute that we're aware of but I may be mistaken on that. That "their" might be interpreted to mean, "the minimum rate payable to an employee that includes over award components".

PN212

THE COMMISSIONER: Of course.

PN213

MS BHATT: So I'm hesitating about us taking this approach for that reason.

PN214

THE COMMISSIONER: Yes, yes, yes.

PN215

MS BHATT: I was trying to think through whether we might be able to overcome this by - - -

PN216

MS SVENDSEN: In this award if there's an over award payment I'll go to Bali.

PN217

MR LIGGINS: Yes.

PN218

MS SVENDSEN: But you've got a fair point. I understand.

PN219

MS BHATT: That's the concern.

PN220

MS SVENDSEN: Yes.

PN221

MS BHATT: I was trying to think through whether there might be a way of defining a term by reference to the minimum rate payable to an employee for their classification and pay point that is prescribed by the award, but where I'm getting stuck is I don't know enough, but I'm sure my colleagues do, about the interaction between this and equal remuneration order and any other instrument in a way that interacts with this that I just haven't thought through and I don't know how we would overcome that.

PN222

THE COMMISSIONER: Yes, I think that's the problem we've got. So "their", that's right, has the opposite unintended effect of saying the "the" takes you to the bottom of the scale.

PN223

MS BHATT: Yes.

PN224

THE COMMISSIONER: "Their" takes you to the initial over award (indistinct) from the employee's benefit. So I think the answer is "applicable" to the extent that it's finding a way to make it referable to the instrument under consideration. If anyone has any great ideas on this one send them in.

PN225

MS ZADEL: I'm just wondering whether there would need to be any sort of clarification about applicable rates in minimum wages where we start introducing the equal remuneration order because that's really something that's overlaying on top of the minimum hourly rates.

PN226

MS SVENDSEN: But that then becomes their applicable rate, doesn't it?

PN227

MS ZADEL: Yes. Well, all this says is that ERO applies to employees and then there's just minimum rate, so there's no applicable rate in the minimum wages clause. So I don't know if it will introduce any sort of confusion.

PN228

THE COMMISSIONER: Okay. It's not easy.

PN229

MS SVENDSEN: I promise I'm not laughing at you.

PN230

THE COMMISSIONER: The ERO is only applicable to the SACs application and not the others. Yes.

PN231

MS BHATT: I mean I understand the concern that's being raised by the unions. I should say that this term "minimum hourly rate" and - - -

PN232

THE COMMISSIONER: "The minimum hourly rate".

PN233

MS BHATT: The minimum hourly rate.

PN234

THE COMMISSIONER: Yes.

PN235

MS BHATT: Has been implemented fairly consistently across the exposure draft that we've been seeing so far.

PN236

MS SVENDSEN: I know.

PN237

MS BHATT: For our part, for our organisation's part, we certainly understand it to mean "the minimum rate prescribed in the award for the employee's classification" and not the lowest minimum hourly rate. I'm trying to recall whether the Commission's decision of, I think, July last year where it decided the appropriate definition for the term "all-purpose ordinary hourly rate" and how the term "minimum hourly rate" would be used gave any consideration to whether that term should be defined, and whether any comment was made as to what it's intended to mean. I wonder if that decision says something that gives the unions some comfort. And maybe that's something that we can revisit.

PN238

MR ROBSON: I'm not sure our issue is strictly about the interpretation - well, how the Commission would interpret the clause. Like, I don't think you can bring this - any Commissioner would read that to say that the person would be - the penalty rate would be applied to the minimum wage in the award not the employee's appropriate pay rate given their classification level and pay point. I think the issue is sort of right in the clause in a way that means we don't end up in that sort of dispute because I think if you look at, like, say, the literal meaning of the penalty rates clause there are employers out there who, you know, aren't sophisticated industrial practitioners, who will read that in the way that's most favourable to them, even if they don't have a leg to stand on, and I think we'd prefer to write the award in a way that avoids those problems to begin with rather than invites them.

PN239

THE COMMISSIONER: All right.

PN240

MS SVENDSEN: Can I just go back to Ruchi's point in relation to the AiG concern about over award payments. Isn't the award only ever referencing its own rates, not somebody else's. Like I mean, then you might get into an argument on a BOOT about whether or not it's applicable to a - it may well be, it may not be. You're talking about something that's not in the instrument. That's not in - - -

PN241

THE COMMISSIONER: Yes. But let's just all agree. There's no doubt. The fact that there's been a dispute raises ambiguity and that's what we're trying to avoid. So you're right, of course. And that might be - that would be the construction point well, of course it can't possibly include rates of pay that are not in the instrument because it's all grounded in the instrument, but - - -

PN242

MS BHATT: And can I say earlier in this review there was a dispute between AiGroup and some unions that, for instance, where an award expresses a penalty rate as time and-a-half that that is to be applied to over award amounts.

PN243

THE COMMISSIONER: There you go.

PN244

MS BHATT: Which is why I would - - -

PN245

MS SVENDSEN: But they didn't win it.

PN246

MS BHATT: Well, I just - - -

PN247

THE COMMISSIONER: But the point is they wasted a lot of time.

PN248

MS SVENDSEN: Yes, they might have wasted a lot of time. I guess my point about that is that just because somebody raises an argument that's not valid doesn't mean we should - to take Gooley DP's position in one of our cases which is that, you know, we actually can't draft legislation to account for the four per cent of fools.

PN249

THE COMMISSIONER: Well, but we're going to do our best.

PN250

MS SVENDSEN: Okay.

PN251

THE COMMISSIONER: Let's just agree on that.

PN252

MR ROBSON: But I think perhaps we ought to err in a way - look, I think the issue raised by the unions about the use of the words “minimum hourly rate” that actually means an employee can be underpaid and the decision to pay an employee any amount is in the hands of the employer. If anyone wants to raise a dispute to get, you know, penalty rates paid on over award amounts well, that’s going to go nowhere pretty quickly. And no-one is going to have to pay that rate. I think it’s just a less serious problem compared to the potential for underpayment of an employee which they may or may not be able to recover.

PN253

THE COMMISSIONER: All right. We’re ruling off on this one. Other than anyone who hasn’t said anything on this yet, would they like to say something?

PN254

MS VAN GORP: No, I support the - - -

PN255

MR LIGGINS: I don’t think I could add anything that would help.

PN256

THE COMMISSIONER: Yes? Yes, Ms Van Gorp?

PN257

MS VAN GORP: Thank you. I would support the issues that were raised by Ruchi with AiG.

PN258

THE COMMISSIONER: Okay. So the action on this is I’m going to get award mod to look at other awards. Tell me if it’s an issue that’s been raised anywhere else, given they’ve used consistent language. Look at the FB decision from July last year, was it?

PN259

MS ZADEL: Yes, Commissioner.

PN260

THE COMMISSIONER: Yes. And we’ll either come back and say you’re all worried about nothing or we agree that we should do something and - - -

PN261

MR LIGGINS: That’s the other point was whether there’s any interaction with the ERO.

PN262

THE COMMISSIONER: Yes, good point.

PN263

MR LIGGINS: Yes, as well.

PN264

THE COMMISSIONER: Yes, query interaction, yes, with the ERO rates obviously.

PN265

MR LIGGINS: Yes.

PN266

THE COMMISSIONER: Which gives rise to what's - let's just say we were going applicable, so what is applicable rate when you've got this instrument operating with the ERO.

PN267

MR M PEGG: Commissioner, if I may, it's Michael Pegg from Jobs Australia in Melbourne, and firstly I apologise that I was late arriving.

PN268

THE COMMISSIONER: That's all right.

PN269

MR PEGG: I think the issue about the ERO comes up again when we get to the wages clause to make explicit the operation of the ERO. In the award as it currently stands there is a distinction gets made between how the standard rate is calculated as opposed to the rate that applies pretty much all other purposes so the standard rate is calculated in the absence of the ERO, any ERO payment, but for any other practical purposes the applicable rate is the minimum rate contained in, what's now clause 16 plus any ERO payment, so I think it's an issue that does need to be clarified when we get to that clause. I'm just raising it now because it got mentioned and I didn't quite hear all of the discussion.

PN270

THE COMMISSIONER: All right. That's the end of item 4 for now. Item 5.

PN271

MS ZADEL: So AFEI has made, I think, two submissions in relation to how the exposure draft interacts with the equal remuneration order. One is at 5, and there is another one at 51. But at 5 we're really just wanting to retain the definitions of the relevant transitional minimum wage instrument and the award based transitional instrument because they are instruments that are referenced in the equal remuneration order. And it would, for ease of reference, and - - -

PN272

THE COMMISSIONER: You've got to link the two?

PN273

MS ZADEL: Yes.

PN274

THE COMMISSIONER: Yes. Sounds logical. So there's - I've got a note from the hearing that this was agreed. There's no difference to that.

PN275

MS ZADEL: No.

PN276

THE COMMISSIONER: All right. Thank you. So agreed as per AFEI proposal. Item 6. Mr Cooney, I've got a note here that that is agreed.

PN277

MR COONEY: Yes, it is, Commissioner.

PN278

THE COMMISSIONER: There's only reference to the AWU but there's no - AWU agree with you, Mr Cooney. But is any of the employers on board with that? All right. Agreed as per ASU proposal.

PN279

MS SVENDSEN: Yes.

PN280

MR COONEY: Commissioner?

PN281

THE COMMISSIONER: Yes.

PN282

MR COONEY: Just for clarity I'm the one closest to camera in Melbourne.

PN283

THE COMMISSIONER: I know who you are, Mr Cooney.

PN284

MR COONEY: There's a couple of similar looking heads here.

PN285

THE COMMISSIONER: And elsewhere. Relax.

PN286

MS SVENDSEN: Mr Pegg has more hair, Justin.

PN287

MR PEGG: That's the nicest thing anybody has ever said to me in a long time.

PN288

THE COMMISSIONER: I'll just remind you all you're being recorded. Go easy. Item 7.

PN289

MR LIGGINS: I think we've dealt with it, Commissioner.

PN290

THE COMMISSIONER: Okay. Yes.

PN291

MR LIGGINS: I'll scrub it.

PN292

THE COMMISSIONER: That's linked to item 1?

PN293

MR LIGGINS: Yes.

PN294

THE COMMISSIONER: Yes. So put it with under item 1. Item 8 is clause 3.3. So my note is "check this or do HSU and UV agree that it's been determined by the Commission in FWC" - - -

PN295

MS SVENDSEN: We'd like to disagree, but I don't think it would serve us much point.

PN296

THE COMMISSIONER: Because you do agree?

PN297

MS SVENDSEN: No, because we know it's been determined.

PN298

THE COMMISSIONER: So 8 is no longer an issue?

PN299

MS SVENDSEN: It isn't, no.

PN300

THE COMMISSIONER: All right. And so the words, whichever makes them more accessible, have them removed and it will stay that way. Yes?

PN301

MS SVENDSEN: Yes.

PN302

THE COMMISSIONER: All right. Nine. My note on that is "sorted?" Is that correct?

PN303

MS SVENDSEN: Yes, renumbering and the ED has been corrected.

PN304

THE COMMISSIONER: So it's, in terms of sorted, it's agreed. And I'll just put this proposition. Tell me if there's any different view. Listen carefully. Clause 5.2 should be renumbered to 7.2. Clause 7.2 is incorrectly numbered as 5.2 and that's it. There's just those two issues. Yes?

PN305

MS VAN GORP: And I have a note on my summary of submissions that - an A-mod note saying that it was a drafting error and the ED has been corrected.

PN306

THE COMMISSIONER: Yes, I've got that. Okay.

PN307

MR LIGGINS: It's actually a fairly common one. There's a number of exposure drafts with that mistake.

PN308

MS SVENDSEN: Yes.

PN309

THE COMMISSIONER: Well, in their defence you should try doing it.

PN310

MS SVENDSEN: No, no, it's all right we're not criticising it.

PN311

MR LIGGINS: No.

PN312

THE COMMISSIONER: Whenever there's a job vacancy put your hand up and see how you go.

PN313

MS SVENDSEN: No, we're having enough trouble with it from our side of it.

PN314

THE COMMISSIONER: Item 10, facilitative provisions. Now, it should be:

PN315

either for an agreement between an individual employee or majority of employees.

PN316

And that's proposed by ASU, so - - -

PN317

MS ZADEL: So this is a concern that AFEI raised because the current and exposure draft clause 13.1B just says by agreement. It doesn't explicitly say by agreement between an individual employee and an employer or group of employees and employer. But now the facilitative provisions clause explicitly says that it's between an individual employee and an employer.

PN318

THE COMMISSIONER: Okay. What was the clause under the current award?

PN319

MS SVENDSEN: The facilitative provision doesn't exist. The other one is rostering clause. So the current award doesn't have the facilitative provisions clause.

PN320

MS BHATT: Clause 25.1B, Commissioner.

PN321

MS SVENDSEN: Thank you.

PN322

THE COMMISSIONER: Okay. So I understand the point. So your point, AFEI, that you said it was by agreement that clearly common place could be agreement by an individual or a number of individuals or a majority of workplace or anything really.

PN323

MS ZADEL: That's right. So it doesn't explicitly say how the agreement would function. It's at this point silent whereas the exposure draft is explicitly saying it's between an individual employee and the employer.

PN324

THE COMMISSIONER: Yes, yes, yes. So ASU, I might be just picking on you, Mr Cooney, because - - -

PN325

MS SVENDSEN: Closer to the camera.

PN326

THE COMMISSIONER: - - -you're closer to the camera, yes. You're noted as specifically opposing this and you say it's a substantial variation, but isn't it the opposite; that to make it now by majority agreement given the existing wording in the award that actually that's the substantial variation?

PN327

MR COONEY: Commissioner, so what we'd be seeking is just clarity around that. So if it's by individual agreement and it's consistent with the current award, we wouldn't oppose that. It's a question really whether is it cast both ways, individual and majority or if it's simply going to be individual agreement, and that's consistent with the current award, we wouldn't oppose it.

PN328

THE COMMISSIONER: Okay. Other union positions?

PN329

MS SVENDSEN: I actually think it's about roster pattern and that it's only by majority agreement because if it's by individual agreement then that applies to a different clause. And part of that is about a history thing because the original hours of work and rostering clauses certainly in health and community services that 10 hour provision by agreement was about putting 10 hour night duty shifts into place, and that's actually an overall roster position in the previous awards. And it was only therefore by majority agreement because it was actually the position that related to a rostering pattern.

PN330

THE COMMISSIONER: In a workplace.

PN331

MS SVENDSEN: So you had eight 10 shifts and it actually went in - forgive me - I was around when it went into the Nurses' Award first and they were the words that were used.

PN332

THE COMMISSIONER: So in other words you're reading of the history of 25.1B is that it could really only pertain to a majority in the workplace because
- - -

PN333

MS SVENDSEN: Yes. Because that's actually about the - - -

PN334

THE COMMISSIONER: - - -you're actually changing the shift roster pattern.

PN335

MS SVENDSEN: It's actually about the global thing not - - -

PN336

THE COMMISSIONER: Yes. And you're not going to change that for an individual.

PN337

MS SVENDSEN: Yes.

PN338

THE COMMISSIONER: I see.

PN339

MS SVENDSEN: There are other provisions in terms of people being able to work up to 10 hours. And I don't think it interferes with that but the history would be that this would be about a roster pattern. And I don't think it says either way in here, but I think that, you know, when I read that - - -

PN340

MR LIGGINS: Leigh, there's a lot more sectors in that now.

PN341

MS SVENDSEN: Pardon?

PN342

MR LIGGINS: There's a lot more sectors in this award now.

PN343

MS SVENDSEN: Yes, I know.

PN344

MR LIGGINS: And it's not that way, there's no history of that in homecare, for example.

PN345

MS SVENDSEN: No, there isn't it. And there wouldn't be but my point is I mean - - -

PN346

MR LIGGINS: And with help related individual - - -

PN347

MS SVENDSEN: - - -in aged care you would know that that's the roster, but this clause comes out of some of - I mean, I'm only talking about the history of the clause. I'm not talking about its applicability here. I'm actually talking about where it comes from. I'm only making a comment in relation to that; that that's where - and this is about - I mean, this clause is about roster patterns. It's not about - - -

PN348

MR LIGGINS: See, in our awards we were - the backdrop of aged care awards in New South Wales, ACT have always been able to work up to 10, so there hasn't been that issue for us. Maybe it was in some of the pre-modern awards but certainly not in New South Wales and not in homecare.

PN349

MS SVENDSEN: It was at one stage because they used to be all 12 hours shifts, but let's not go back too far.

PN350

MR LIGGINS: Yes.

PN351

MS SVENDSEN: No, no, I meant that when this was first proposed, and this is 30 years. I mean, it's not recent stuff. It was about putting in those 10 hour night duty shifts in 24 hour facilities and the concept of homecare for instance wasn't there and, I mean, it's only - I'm only making a - I'm not saying that's what the previous award said, and I'm not saying - or the current award says and I'm not saying that's what it should say. I'm just saying that that's the history of that kind of rostering clause was it's not actually about individuals, it's about roster configuration.

PN352

THE COMMISSIONER: But notwithstanding that, it wasn't about individuals, does it matter that it could be about an individual? If it is about a roster pattern and it's not going to be desirous from an employer's point of view to change it for an individual that there won't be agreement. It's an agreement clause. It's really - it is purely by agreement. If you don't agree it doesn't change. So it doesn't matter. Ms Svendsen?

PN353

MS SVENDSEN: I'm not sure. I mean, the problem that I have with this is I guess it depends on - well, it depends on how it's written. How it's read; how it's implemented in terms of a workplace.

PN354

THE COMMISSIONER: Well, yes, the words will be the extent of the control on that.

PN355

MS SVENDSEN: Right.

PN356

THE COMMISSIONER: You have a think about that. I'll make the observation I'm not sure that it does matter whether it is expressed as - well, I'll put it this way, given where it's come from before, my general view would be this; that to limit it to majority agreement would be a change from what was there before. I understand what you say, that the practical effect of it, to the extent that 25.1B was relating back to what's in (A) which is about shift patterns, then it probably doesn't have much - may not have been actually used on an individual basis but nevertheless maybe it could be in a very small place maybe. I don't know. But I don't think it's going to make a big difference. Yes?

PN357

MR COONEY: Commissioner, I think our experience in the social welfare sector is outside of 24 hour shift operations is that this does operate by an individual agreement to suit individual circumstances so I think it does, in practice with this award, you know, it's a diverse industry and it's relevant both to shift work environments and 9 to 5 environments. So we seek both, the majority and the individual agreement.

PN358

THE COMMISSIONER: So, look, I propose that the next exposure draft will make reference to individual and majority and as per the AFEI proposal. And when we next meet the parties can say whether they've had a chance to think about that and they think it's okay or whether you want to battle on with that one, which you are quite entitled to do on all of these issues of course. Okay?

PN359

MS SVENDSEN: Yes.

PN360

THE COMMISSIONER: Item 11. Now, the bold statement is made by United Voice here, the definition is common to almost all awards; is that right?

PN361

MR LIGGINS: I would hesitate to be so strong - - -

PN362

THE COMMISSIONER: Now that it's plunked right in front of you.

PN363

MR LIGGINS: Like right in front of me, but I don't think we feel very strongly about this. I think we didn't see the need to insert the word "ordinary" but I don't think it necessarily changes anything either way, having it in or out. I think it's a fairly common understanding of what full-time employment would be. Anyway

- - -

PN364

MS SVENDSEN: I don't think it's that bold a statement.

PN365

MR ROBSON: Look, I think you could probably find some awards with a different definition of full-time employment but - - -

PN366

MR LIGGINS: It doesn't mean ordinary hours, does it?

PN367

MS ZADEL: Yes. I - - -

PN368

MR LIGGINS: Well, if it means ordinary hours why not say ordinary hours. I guess that's our only point.

PN369

THE COMMISSIONER: It's consistent with the NES, isn't it? Ordinary hours?

PN370

MR LIGGINS: Yes. I don't think this is a strongly pressed point in any sense.

PN371

THE COMMISSIONER: So you're not pressing it?

PN372

MR LIGGINS: No.

PN373

THE COMMISSIONER: Okay. So it's agreed in respect of clause 9.

PN374

MS ZADEL: Item 12 is very much the same point, I think.

PN375

THE COMMISSIONER: Same issue, yes.

PN376

MR LIGGINS: Yes.

PN377

THE COMMISSIONER: So it's in to item 11 and item 12 which is clause 10. And change clause consistent with AFEI submission. Item 13?

PN378

MR LIGGINS: This regards an AWU submission. I'm not sure we can deal with it without them in the room.

PN379

THE COMMISSIONER: Well, my notes on this were I don't understand the proposal. "Is there a Full Bench looking at" - there is a Full Bench looking at casual employment.

PN380

MS SVENDSEN: Not about that particular issue though.

PN381

THE COMMISSIONER: No, they won't go there.

PN382

MS SVENDSEN: Not having been before that Full Bench.

PN383

THE COMMISSIONER: Before it. Okay. Can I just ask - - -

PN384

MS SVENDSEN: I don't think we can deal with it.

PN385

THE COMMISSIONER: - - -the basic question is that, I know they're not here, but what does everyone understand is put is not so much about the deletion of the word "and" is it or is it?

PN386

MS BHATT: Was it the maximum?

PN387

MS ZADEL: Yes, the maximum of - - -

PN388

MS BHATT: It was the maximum of 38 hours per week and I think that's the - - -

PN389

MS ZADEL: And that doesn't currently exist and a casual employee can work in excess of 38 hours. It's just - - -

PN390

THE COMMISSIONER: Of course they can.

PN391

MS ZADEL: Yes.

PN392

MR LIGGINS: Paid overtime for it.

PN393

MS ZADEL: That's right.

PN394

THE COMMISSIONER: Yes. Look, I think - - -

PN395

MS SVENDSEN: I don't think we'd be supporting our colleagues in putting a maximum on casual employees, Commissioner.

PN396

THE COMMISSIONER: I wouldn't have thought anyone would be wanting to do that. So I think I'll just record the consensus view is AWU position not supported. AWU to advise if they seek to press it. Item 14, clause 11.1.

PN397

MS ZADEL: It's just a submission from AFEI that there's some additional wording that's now existing in the casual employment clause and we don't necessarily - well, we think that it's maybe unnecessary but it's not a huge issue for us.

PN398

MS SVENDSEN: This is actually one that has come up in other awards because it was in other awards, and therefore whether it needed to be included - the current award does say that.

PN399

MS ZADEL: Yes, it looks like the current award has - - -

PN400

MS SVENDSEN: But will not include a part-time or full-time employee.

PN401

MR LIGGINS: Yes, one says "will not include" and one says "is not a" blah, blah, blah, so it was just those three little words. Are they saying the same thing?

PN402

THE COMMISSIONER: They say the same thing.

PN403

MS ZADEL: I don't think we'll be pressing that one.

PN404

THE COMMISSIONER: Item 14, resolves exposure draft to remain as is.

PN405

MS BHATT: Item 15 is one of the matters that I identified at the hearing as being agreed between the parties.

PN406

THE COMMISSIONER: Agreed. I did note "clarify" on that. Is that still the position?

PN407

MS BHATT: As I understand it, yes.

PN408

THE COMMISSIONER: Yes.

PN409

MS BHATT: Put it down that all parties agreed.

PN410

MS SVENDSEN: Yes.

PN411

MS BHATT: That group of employees identified by the Commission in its question in the exposure draft have the benefit of a two hour minimum engagement under clause 11.3(c).

PN412

THE COMMISSIONER: Sorry, can you just give that to me again? So the parties agreed that those parties identified by the Commission?

PN413

MS BHATT: Those employees identified by the Commission.

PN414

THE COMMISSIONER: Sorry, "those employees". Yes.

PN415

MS BHATT: Are entitled to a two hour minimum engagement under clause 11.3(c).

PN416

MS SVENDSEN: I guess the only question that might arise from that, Commissioner, is whether there is any necessity for a re-wording. None of us think there is because we all think it's pretty clear, but it always confuses us when the question is raised by somebody who's drafting something.

PN417

THE COMMISSIONER: So your query is does it give rise to a redrafting of what?

PN418

MS SVENDSEN: The way it's written is, "will be paid the following minimum number of hours at the appropriate rate for each engagement". Well, it doesn't matter which way, the ED does the same. Then it says: (a) Social and Community Services Employees except when undertaking disability services work, homecare employees or all other employees. And the question was does "all other employees" include disability workers or people doing disability work? And the answer from all of us was yes, it does.

PN419

THE COMMISSIONER: Yes.

PN420

MS SVENDSEN: So two hours applies to disability employees. So the question I say is, given that the ED team have asked the question, does it need a redraft to make that clearer? None of us think it does but we read this all the time.

PN421

THE COMMISSIONER: Look, sometimes there can be a little - - -

PN422

MS SVENDSEN: Yes, that's right.

PN423

THE COMMISSIONER: They go for an abundance of caution if what I meant to say and that's appropriate.

PN424

MS SVENDSEN: Yes.

PN425

THE COMMISSIONER: Item 16.

PN426

MR COONEY: Commissioner, the ASU doesn't press that submission.

PN427

THE COMMISSIONER: Okay. Thank you, Mr Cooney. So that is resolved. Item 17.

PN428

MR LIGGINS: We agreed.

PN429

MS BHATT: Item 17, it was indicated that it's a matter that is agreed. Does it assist if I clarify what the agreement is?

PN430

THE COMMISSIONER: That would be good.

PN431

MS BHATT: In clause 12.2 of the exposure draft.

PN432

THE COMMISSIONER: Yes.

PN433

MS BHATT: Clause 12.2 of the exposure draft the word "their" should be inserted between "advise" and "employees".

PN434

THE COMMISSIONER: Yes.

PN435

MS BHATT: Which is the aged care employers' submission.

PN436

THE COMMISSIONER: Okay. Item 18. I've got an "agreed" next to this one as well.

PN437

MS SVENDSEN: Again it was in relation to a question so the only question is
- - -

PN438

THE COMMISSIONER: Yes, I've got the same. Why did you ask that question?

PN439

MS SVENDSEN: Yes, why did you ask that question?

PN440

MS BHATT: Although I think this might fall in a slightly different category because the Commission has actually proposed a change in the question that's been put and I think all parties either agreed or didn't oppose that the change be made.

PN441

THE COMMISSIONER: Yes. Meaning with the words "at each pay point within the level". Sorry, "at each pay point in the level".

PN442

MS SVENDSEN: Within.

PN443

MS BHATT: Within the level.

PN444

MS SVENDSEN: I'd have to look to see whether that's a typo from me or from Kim.

PN445

MR ROBSON: In the exposure draft it says "should clause 12.4(a) refer to each pay point within the level".

PN446

THE COMMISSIONER: "Within the level".

PN447

MR ROBSON: Within the level.

PN448

THE COMMISSIONER: And the answer is yes.

PN449

MS SVENDSEN: Yes.

PN450

THE COMMISSIONER: That's sufficient for me. The answer to the question raised by the Commission is yes. And all agree. Item 19. I've also got "agreed" next to this. "Drafting error insert 'or' after the semicolon". So 13.1A(1) all agreed with the AWU position. We'll take a short break at 10.30 everybody just so we can work around that.

PN451

Now, my notes on item 20 is that, is it a substantive change. It seems logical to me.

PN452

MS ZADEL: So where AFEI submissions have come from is because previously the sleepover 24 hour excursions clauses existed in, I guess, an umbrella title of ordinary hours and rostering.

PN453

THE COMMISSIONER: Yes.

PN454

MS ZADEL: And presently that's been moved into the rostering provisions as separate from the ordinary hours provisions, so it's a change from the current award. AFEI is of the view that the sleepover excursions and 24 hour provisions are not rostering provisions but are rather ways to organise ordinary hours. So we'd probably be willing to withdraw that any clarification needs to be made if those provisions were moved back or were moved into the ordinary hours clause or otherwise that the ordinary hours clause and the rostering clause were made into one clause again.

PN455

THE COMMISSIONER: Okay. So the fact that they came out of there gave you the concern?

PN456

MS ZADEL: That's right.

PN457

THE COMMISSIONER: Yes.

PN458

MS SVENDSEN: I don't agree. But I don't understand why you think that's a problem because it's been moved around. So let me say I don't agree on that explanation.

PN459

MS ZADEL: So for an example in the excursions clause I understand that there are provisions about the number of ordinary hours that you could work in a particular day. And that somewhat differs to the ordinary hours as it's generally set out at the start of what was previously the ordinary hours and rostering clause which is per shift, so we think that the definitions are different and so the sleepovers excursions and 24 hour care, we're of the view that those ordinary hours clauses and not rostering clauses. It's not about setting up the roster.

PN460

MS SVENDSEN: So are Saturday and Sunday rates about ordinary hours. I mean, and that clearly is, you know, sits in a kind of penalty rates group of things, but it's still about ordinary hours of work, which is, I guess, why I'm saying I

don't understand the concern that you're raising. I would say that I don't really think it's a major issue either.

PN461

MS ZADEL: We'd be comfortable if either it was moved into the ordinary hours clause, because I don't think it's appropriately placed in the rostering clause. The rostering clause should be about setting up the roster, setting up the hours for the week.

PN462

MS SVENDSEN: But that's what 24 hour shifts are and sleepover shifts are too. Like, I can see the argument both ways, I guess I'm saying, Jen.

PN463

MS ZADEL: Would there be any appetite to again collapse them as they had previously been in the current award?

PN464

MS SVENDSEN: I would actually suggest that given there's been a decision of the Commission in relation to the plain language format that it's more likely to be separated more than it currently is. I don't think - I can't remember now because I haven't looked at it. I don't think the draft ED is in the format of the new plain language set out, so I think it's going to be separated further by that rather than going back in the collapse, and I would suggest that you'd have to have a really strong argument to go against that decision or that current position. I hear what you're saying but I don't think it matters which place it's in and I don't think it could be reversed. That's just my belief about what would be responded to unless it was a really strong argument.

PN465

THE COMMISSIONER: Are there any other views on this matter? Item 20. Perhaps if I reframe what you're putting; it's that the sleepover clause 24 hour care and excursions are sort of exclusive; they're specific provisions that don't get caught by this span. And I take it that that's always been understood as to how it operates, and you just don't want to create - you've got a concern it will create some confusion that there's somehow a span of hours over ways - - -

PN466

MS ZADEL: That's right. That you would have to read them next to each other and that could potentially lead to some situations that are somewhat unworkable and we've had questions like that brought to us from our members.

PN467

THE COMMISSIONER: From your members, yes. Saying, "This person is doing a sleepover, how do I deal with the fact that they're outside the span?". Yes.

PN468

MS SVENDSEN: See, the - - -

PN469

THE COMMISSIONER: Because you don't have any disagreement about how they operate in reality?

PN470

MS SVENDSEN: No.

PN471

THE COMMISSIONER: No.

PN472

MS SVENDSEN: No absolute rubbish. I think that, I mean, you also - a broken shift is, you know, in rostering not in ordinary hours. I think it is anyway. I think there's so many of those that I'm not sure that it makes a difference whether they're in span in ordinary hours, or span of hours. I think the span of hours stuff, which I'm not necessarily saying should exist, it's a new concept in modern awards. I think that that is a standalone. It doesn't determine what people get paid. It just determines what the industry sees as the norm in terms of rostering practices or whatever.

PN473

THE COMMISSIONER: Yes.

PN474

MS SVENDSEN: However you want to call it. Whereas all of the other rostering - I mean, if you actually move sleepover and excursions out of rostering, then you go to the rostering clauses, how do you roster a sleepover? So I think the argument works both ways is what I'm saying. So I'm not actually sure that it actually, you know, fixes anything.

PN475

MS ZADEL: And this is why we've made the submission to have a clarification around those provisions.

PN476

THE COMMISSIONER: In 13.2? All right. So there's no difference between the parties as to how these provisions apply. The concern is moving location; that it could create confusion or create ambiguity for any re-span of hours versus sleepover et cetera. Assuming not possible to reverse where the position is. The award mod team to consider words to clarify, what I'll call the, discrete operation of sleepover, 24 hour care. It's just those three things; yes? Is the concern.

PN477

MS SVENDSEN: I'm not sure that it is but, look, we would see that as a substantive change.

PN478

THE COMMISSIONER: You do?

PN479

MS SVENDSEN: Yes. At least in the sense that we would need to look at it and we'd need submissions about it because I'm not sure that I can see a way that that isn't a substantive change.

PN480

THE COMMISSIONER: Well, it depends on what it is that we come up with.

PN481

MS SVENDSEN: Yes.

PN482

THE COMMISSIONER: You're not opposed to having somebody put out a draft and you can sort of say, well, that looks okay or that needs to be changed.

PN483

MS SVENDSEN: No, I'm never opposed to more work.

PN484

THE COMMISSIONER: Do you support or agree that the span doesn't apply to those three provisions?

PN485

MS SVENDSEN: I don't think the - I mean, that's confusing the span about how you roster or the payment as the same thing, and they aren't the same thing. So that's my concern about it. All right. So I don't think - I mean, it's saying that the span somehow dictates how you roster or what you pay, and, in fact, it doesn't. Like, that's the problem with the concept of a span of hours because my understanding is that - I come from Victoria. We didn't have the concept of a span of hours in our awards. My understanding principally is span of hours - - -

PN486

THE COMMISSIONER: Yes, you did.

PN487

MS SVENDSEN: Sorry?

PN488

THE COMMISSIONER: Yes, you did.

PN489

MS SVENDSEN: Not in the old awards we didn't. My understanding about the dictate of span of hours was that outside that a day worker got overtime. And that is not applicable in most - well, certainly in most of the health awards. So the span of hours in most of our health and community service awards has no - it actually has no impact. So if you actually took it out of the award it wouldn't change what people were paid, when they were paid, when, you know, shift allowances kicked in, when weekend rates of pays kicked in. How they were rostered; how they weren't rostered. So that's what I think applies in this case, that the span of hours has no real work to do and therefore the consequences on any of those clauses are not relevant. Does - - -

PN490

THE COMMISSIONER: They're actually saying the same thing.

PN491

MS SVENDSEN: Well, yes, but - - -

PN492

THE COMMISSIONER: You've got a complete overlap of interest there. It's
- - -

PN493

MS SVENDSEN: I'd just remove the thing quite frankly.

PN494

MR LIGGINS: I'd support that.

PN495

THE COMMISSIONER: Remove what thing though?

PN496

MS SVENDSEN: The span of hours clause.

PN497

THE COMMISSIONER: You don't want a span of hours?

PN498

MR LIGGINS: No, never did.

PN499

MS SVENDSEN: No, I think they're a waste of space in terms of our awards.
They mightn't be in other awards but in terms of our health and community
services sector awards they don't make sense and they - - -

PN500

THE COMMISSIONER: But usually - - -

PN501

MS SVENDSEN: - - -lead to arguments for no reason.

PN502

THE COMMISSIONER: - - -it's to provide for the operation of when does
overtime and so on kick in and isn't that relevant here?

PN503

MS SVENDSEN: I know, but it doesn't in this case.

PN504

MR LIGGINS: It's not been the case in the awards that we've typically dealt
with. Overtime is just if you work more than 10 or more than 76 or more than
you're rostered.

PN505

MS SVENDSEN: Or more than you're rostered shift.

PN506

MR LIGGINS: If you work more than 10 days - - -

PN507

THE COMMISSIONER: Okay. And if you're working sort of late night hours then you're on a shift penalty.

PN508

MR LIGGINS: Yes.

PN509

MS SVENDSEN: Yes. That's right.

PN510

MR LIGGINS: It depends where you work as to what shift penalty or what weekend penalty you get.

PN511

MS SVENDSEN: Yes.

PN512

MR LIGGINS: And there's no distinction.

PN513

MS SVENDSEN: So the span has absolutely no work to do.

PN514

THE COMMISSIONER: Yes. Does anyone - I mean, you know - - -

PN515

MS SVENDSEN: That's a radical change.

PN516

THE COMMISSIONER: That is a substantial change but it might be one - that might be the way you want to deal with it. You might want to have that to go to a
- - -

PN517

MS SVENDSEN: I've sort of suggested in Health Professionals.

PN518

MR LIGGINS: You already know one. Yes.

PN519

MS SVENDSEN: Sorry, we're having a huge argument about this in Health Professionals because we had five spans of hours and another five applications for various additions to that span of hours clause and it has no work to do.

PN520

MR ROBSON: And I'm not necessarily sure what the impact of span of hours clause has in either sleepovers or excursions.

PN521

MS SVENDSEN: No.

PN522

MR ROBSON: Any work performed during a sleepover is performed at overtime rates. You know, excursions it's got a very specific entitlement.

PN523

MR LIGGINS: Specific entitlement.

PN524

MR ROBSON: That clearly derogates from any span of hours even if it was in the same clause.

PN525

MR LIGGINS: Yes.

PN526

MR ROBSON: It seems fairly equivalent.

PN527

MR LIGGINS: And same with the 24 hour shift.

PN528

MS SVENDSEN: Yes. Yes.

PN529

THE COMMISSIONER: So you're all in agreement. AFEI are just saying I want to square that away just so you don't want to argue the point. Don't want a call from my members giving me grief about what - - -

PN530

MR LIGGINS: What does it mean and how does it fit with that, yes.

PN531

THE COMMISSIONER: You'd be saying it's the bleeding obvious.

PN532

MS SVENDSEN: I mean, if we actually wanted to remove the confusion we'd remove the span of hours. That's the radical position because that doesn't apply in most modern awards.

PN533

MR LIGGINS: That's the logical position.

PN534

MS SVENDSEN: But it's the logical position. Thank you, Geoff.

PN535

MR LIGGINS: We've agreed on something, Leigh.

PN536

MS SVENDSEN: We've agreed on this for a while actually.

PN537

MR LIGGINS: And that's not on transcript.

PN538

MS SVENDSEN: No.

PN539

THE COMMISSIONER: You are on transcript.

PN540

MR ROBSON: I would need to look into the issue of the removal of the span of hours. But if that's something that the A-mod team comes up with, you know, we'll make submissions on it.

PN541

THE COMMISSIONER: Well, look, I'll put into the mix and we'll see what we come back with. And you wouldn't be opposed to that as resolving your - you look confused?

PN542

MS ZADEL: No, we won't be opposing that.

PN543

THE COMMISSIONER: No. Okay. Well, we're charging through. It's the hour-and-a-half. Let's have a little break and come back at - is 10 minutes enough for everyone just to - - -

PN544

MS SVENDSEN: Yes. It's not enough time to get a coffee if you want to go down and do that.

PN545

THE COMMISSIONER: Yes, we'll make it 15. Come back at quarter to. See you all then.

PN546

MS SVENDSEN: Thank you.

PN547

MR LIGGINS: Thank you.

PN548

MS ZADEL: Thank you.

PN549

THE COMMISSIONER: Back at quarter to, Melbourne and Adelaide. Whatever time it is there.

PN550

MS VAN GORP: In fifteen minutes. Yes.

PN551

MS SVENDSEN: In 15 minutes.

PN552

THE COMMISSIONER: Yes, 15 minutes. That's all you need to know.

SHORT ADJOURNMENT

[10.29 AM]

RESUMED

[10.48 AM]

PN553

THE COMMISSIONER: Item 21.

PN554

MS ZADEL: 20 and 21 were very much the same issue, I think.

PN555

THE COMMISSIONER: So we'll deal with the first part of item 20. Item 22.

PN556

MS VAN GORP: So my notes on this were it should be easily resolved. The word "rostered" has been inserted and actually claims that's reduced the entitlement. AiG doesn't oppose deletion of "rostered" sought by ASU. Business SA disagrees with the ASU.

PN557

MS VAN GORP: Business SA won't press the opposition. We will withdraw our opposition.

PN558

THE COMMISSIONER: Okay. So the consensus view is that the word "rostered" should be deleted from 14.1(b).

PN559

MS VAN GORP: Yes.

PN560

THE COMMISSIONER: Item 23. I've got "agreed" next to that. "Contiguous with" has been changed to - - -

PN561

MS SVENDSEN: Silly word, "contiguous with", isn't it? In terms of current wording, but I don't think the exact words about how we would resolve this is agreed, but everybody agrees that it's not incorporating.

PN562

THE COMMISSIONER: What does the word "contiguous" actually mean?

PN563

MS SVENDSEN: I actually haven't looked it up, but I assumed "continuous with" or "attached to" or - - -

PN564

THE COMMISSIONER: I've always thought of the "attached to" sort of notion.

PN565

MS SVENDSEN: Yes.

PN566

MS VAN GORP: Alongside.

PN567

THE COMMISSIONER: Alongside.

PN568

MS SVENDSEN: But I - because that's what - that's actually the operation of it and the - in the way we have all talked about the intention of it initially, and when there was - we had at 2012 - no, we actually had another variation to it before 2012, didn't we? Or was it only in 2012? I'm trying to remember, because it initially had been drafted in the 2010 proceedings to only have a shift attached to the sleepover one side or the other. And it's an "and/or" provision. So we actually had had those discussions. So you know - - -

PN569

THE COMMISSIONER: But in summary, the view is the current award wording should be retained?

PN570

MS SVENDSEN: Yes.

PN571

MS CHAN: Until the (indistinct) drafters get to it.

PN572

MS SVENDSEN: Don't even threaten that, Margaret.

PN573

THE COMMISSIONER: Agreed that current award wording to remain. Item 24. I think everyone is on the same page, bar the AWU was my summary here. Is that right?

PN574

MS SVENDSEN: The AWU is sort of on the same page it's just proposed an amendment to the wording which is not really substantial.

PN575

MS ZADEL: The AWU's wording does introduce a new obligation by including the wording "when necessary".

PN576

MR ROBINSON: I'm not sure what "necessary" means.

PN577

MS SVENDSEN: Yes, but look, nobody is opposed to retaining the - we all think it should be retained and the easy thing is to retain it in the current wording.

PN578

THE COMMISSIONER: All agreed to retain current wording except AWU at this stage, because they're not here. AWU to advise if still press for alteration.

PN579

Item 25, relieving staff.

PN580

MS SVENDSEN: It's currently in the award. The question was - - -

PN581

THE COMMISSIONER: Where in the current award? When we say "the award", always say - can everybody please say "exposure draft" or "current award".

PN582

MS SVENDSEN: In the current award.

PN583

THE COMMISSIONER: Yes.

PN584

MS SVENDSEN: The question as raised in the exposure draft about whether it should be retained or explained. We just thought it should be deleted, because there's no other provision for it, but that's not agreed. Other people think that deleting it is the wrong thing to do, but it doesn't need an explanation.

PN585

THE COMMISSIONER: Before I hear from anyone else, can I just have a look at then where it is in the current award? Where is it?

PN586

MR PEGG: 25.5(c).

PN587

MS SVENDSEN: 25.5(c). It's not obligatory for the union. Yes.

PN588

THE COMMISSIONER: Is that the only place it exists in the current award? "Of casual or relieving staff." Okay. And so where is it now in the exposure draft?

PN589

MS SVENDSEN: At 14.3(e). It's only been changed from "it's not obligatory" to "you are not required to display any roster" and the meaning is exactly the same. It's just the question is asked about the term relieving staff.

PN590

THE COMMISSIONER: All right. So you say just get rid of the word, so it's only, "you wouldn't have to display any roster of the ordinary hours of work of casual staff", would be your proposal?

PN591

MS SVENDSEN: Well, casual employees. That's probably the standard wording in most. I think it just says "casual employees" in most - it doesn't matter, though. That's - yes. That would be - we would say - but I - we don't really, if people are really opposed to removing it, we are not - - -

PN592

THE COMMISSIONER: You don't care.

PN593

MS SVENDSEN: I am not going to do or die on that. I just think it's unnecessary, because it's not used anywhere else.

PN594

MR LIGGINS: We thought it should stay. That there is no misunderstanding this. Just to replace one employee for a period. Yes. I doesn't require any defining. It's understood. I don't know that there has been a dispute about it. So we would just want to leave the clause or leave the word and it's not necessary to define.

PN595

MS CHAN: It's the ordinary meaning. What (indistinct) because a relieving staff member is not necessarily going to be a casual, but - - -

PN596

MR COONEY: Yes. We would also support retaining it. I think this concerns where relieving staff aren't necessarily casuals and this is just a practical sort of thing that makes it clear about what can be done around rostering relieving staff.

PN597

THE COMMISSIONER: Yes. It could be a full-time staff member who has been called back or something like that. Or a part-time who is doing extra hours.

PN598

MR LIGGINS: Filling in for someone else who is not there.

PN599

THE COMMISSIONER: Yes.

PN600

MS SVENDSEN: Whose shift would be displayed on a roster anyway, so - - -

PN601

MR LIGGINS: Well, those might be. That's right.

PN602

MS SVENDSEN: Yes. That's all right.

PN603

MR LIGGINS: But leading staff members, you know, wouldn't necessarily.

PN604

THE COMMISSIONER: You don't want to press it, Ms Svendsen?

PN605

MS SVENDSEN: I'm not going to press it. No.

PN606

THE COMMISSIONER: All right. So "relieving staff" will stay in clause 14.3(e).

PN607

Item 26.

PN608

MR LIGGINS: We withdraw our opposition.

PN609

THE COMMISSIONER: Well, my note on this is, "Need to better understand this." So I don't know what you are talking about.

PN610

MS SVENDSEN: Okay. I will tell you. The consultation clause in relation to roster changes at clause 28 refers to consultation around changing roster practices per se and not about me and you having a discussion about your roster or my roster yes. And therefore is a meaningless reference in this clause. I just - it has no work to do and it might confuse people.

PN611

THE COMMISSIONER: Yes.

PN612

MS SVENDSEN: Because to refer to the concepts of that kind of roster change consultation process in a normal change of roster process is - makes it ambiguous.

PN613

THE COMMISSIONER: Yes. So delete the words "and 28" in (f)(i). Is that right? Is that the only place that there's an issue?

PN614

MS SVENDSEN: Yes.

PN615

THE COMMISSIONER: That's where it is? It's not in (ii) or (iii)?

PN616

MS SVENDSEN: Yes.

PN617

THE COMMISSIONER: And there's no opposition to that, so agreed to delete. (Indistinct) (f) Roman number (i). Item 27, broken shifts. So you will have to explain this one to me, given the conversation we had earlier had about sleepovers sort of being a standalone arrangement.

PN618

MS SVENDSEN: The question raised by the Commission was does a sleepover meet the definition of "shift" for the purposes of payment of broken shift allowance. The answer by everybody, I think, generally is no, because a sleepover is a specific type of shift. It's not a broken shift and a broken shift is a completely different arrangement.

PN619

Broken shift in no way provides for a person to remain on premises or available to do any work whereas that's what a sleepover does. You are available to assist clients, residents in an emergency situation and you are there to actually - you are actually paid to be on premises. It's not that you're shift is broken by - the question arises because you might have a shift before the sleepover and after the sleepover. That's a stand-up shift, or we colloquially call the stand-up shift, active shift. The question is does that constitute break and it doesn't because it's continuous with a sleepover and a sleepover is a shift you are paid to be present for, albeit not to stand up and work for.

PN620

THE COMMISSIONER: So in the notes in the table, we've got a sleepover under HSU, a sleepover does meet the definition of a shift.

PN621

MS SVENDSEN: That's incorrect. It should be "does not".

PN622

THE COMMISSIONER: That's incorrect? That's my source of confusion then.

PN623

MS SVENDSEN: Okay. Which is also why everybody says it and then says they agree with me when it - - -

PN624

THE COMMISSIONER: Yes, that's what threw me. That's why I didn't understand what was going on. Okay. So this is an agreed position, is it, in terms of the answer and there's no amendment required to the exposure draft. It's really just a matter of what's the - the answer to the question is except further the word "not" has dropped out of the summary and it should say "A sleepover does not meet the definition of a shift for the purpose of payment for a broken shift when work is formed contiguously with the beginning and end of a sleepover period." Everyone agrees with that proposition?

PN625

MS SVENDSEN: That's right.

PN626

THE COMMISSIONER: All right. Item 28. AiG, do you want to lead off with this one?

PN627

MS BHATT: (Indistinct) clause 25.14.

PN628

THE COMMISSIONER: A 24-hour care shift.

PN629

MS BHATT: Yes. The clause commences by telling us what a 24-hour care shift is. It says:

PN630

During this period the employee is required to provide the client with the services specified in the care plan. The employee is to provide a total of no more than eight hours of care during this period.

PN631

The way we read that provision, those eight hours of care or the maximum eight hours of care is not confined to services specified in the care plan. It's any form of care provided to the client. That provision has been redrafted in the exposure draft at clause 14.16.

PN632

THE COMMISSIONER: Yes.

PN633

MS BHATT: And it now appears to say that - in (indistinct) report it does say:

PN634

The employee is required to provide the client with the services specified in the care plan for a total of no more than eight hours.

PN635

THE COMMISSIONER: Where are we?

PN636

MS BHATT: Clause 14.6, subclause (c).

PN637

THE COMMISSIONER: Subclause (c). All right.

PN638

MS BHATT: It says:

PN639

The employee is required to provide the client with the services specified in the care plan for a total of no more than eight hours.

PN640

THE COMMISSIONER: Right.

PN641

MS BHATT: And we say that's a substantive change. I think there might be some disagreement.

PN642

MS SVENDSEN: There is significant disagreement. I think it's the same thing. I absolutely do not figure out how AiG can read the current clause which says they're not required to provide - sorry, that they are required to provide services in the care plan and that they're required to provide no more than eight hours' care, how that eight hours' care couldn't be about the specified care plan, but about something invented.

PN643

MR LIGGINS: I think it's - and let me say ACE have changed our position on this and we support AiG now, because we have had more discussion about it and better understanding about it. Sometimes the care plans can be very specific in terms of the technical or the clinical support that a person is being provided.

PN644

THE COMMISSIONER: Yes.

PN645

MR LIGGINS: And just quite general about anything else. For instance, if you help the person get a glass of water or something, it wouldn't necessarily be written into the care plan, but it would be care that you are providing to support and assist the client in their home, if that's the circumstance.

PN646

So we totally agree that any work that they do, whether it's in the care plan or not that's for the care of the person the eight hours covers, but that the specific detail of the technical or clinical care issues that are written in the care plan may not cover all of the types of care that the person would be expected to provide in a normal period of working with that person.

PN647

So we do think it's changed, because now it seems to suggest that unless it's specifically dealt with in the care plan that you couldn't do it. That it wouldn't form part of eight hours.

PN648

Now, that can be overcome by writing the care plans very differently, but that would be an unfortunate and very difficult job for many organisations out there, and I don't believe that's the intention.

PN649

MS SVENDSEN: There are two things, I suppose, arising out of that and one is that care plans must have changed a lot in the last six months since I last saw one, but they don't have a general all-specific clause included, but leaving that aside, not having the services tied to the care plan, presumably could mean that I could then ask somebody to go up and get up on the roof and clean the guttering out, because that's something that I need done, and that clearly is not the intention.

PN650

So there is something between the two. I hear what you are saying about the specificity of care plans, if that's the case, but there must be something between the two, because it's not open to interpretation that it's outside at least the context of the care plan conceptually, as opposed - you know, like, it's not about anything at all. It's not providing care or support in just any way shape or form. It's actually providing the care that is envisaged would be required by that person.

PN651

MS PATTON: Would the current wording in the award which refers to being no more than eight hours of care during this period - wouldn't - that seems to suggest that there's meant to be a relationship between the work being performed being relevant to caring work or work of a caring nature?

PN652

So I mean, your example of someone doing something outside that would seem to not be fitting into the care during this period.

PN653

MS SVENDSEN: I'd agree with that, Emma. I am not - yes, it's about no confining it to - I mean, I don't see that the interpretation that Ms Bhatt has suggested is actually there, that it's anything, because I don't think it is anything. So I didn't see anything wrong with the specificity of the care plan, but I also conceptually understand what Geoff said in relation to a care plan that detailed only specific issues when it was - - -

PN654

MR LIGGINS: But there's a whole - and that's my concern. There's a large degree of variation in terms of the sophistication that some organisations provide in the care plan and what other organisations - - -

PN655

THE COMMISSIONER: Some of the basic (indistinct) and only deal with the particular needs of the client.

PN656

MR LIGGINS: Yes.

PN657

THE COMMISSIONER: And what you're raising, Ms Svendsen, is - I'm only just grabbing an example - - -

PN658

MS SVENDSEN: Well, you haven't just invented anything- - -

PN659

THE COMMISSIONER: (Indistinct) that is house maintenance stuff, not - - -

PN660

MS SVENDSEN: Yes, I know.

PN661

THE COMMISSIONER: It goes back - I think that's a relevant point. It's not care.

PN662

MS SVENDSEN: It isn't, but I mean, what I understood from Rushi's(?) explanation was a much broader concept. I don't have a problem if it's narrowed to the concept of the care and what it might encompass - what that care might encompass. I've written care plans. You can't write care plans in a way that - in a detailed -which is why I say I've never seen a care plan without an all-encompassing - almost like "and any other duties" that's in PDs, because of those issues. But that doesn't mean that others don't. But, you know, it is still about that - it's about that body of work that relates specifically to that concept of the care plan, even if it's not detailed in it.

PN663

MR LIGGINS Have you got an issue with the current clause as it is?

PN664

MS SVENDSEN: No.

PN665

MR LIGGINS: Can we just - - -

PN666

MS SVENDSEN: But I don't - I don't actually understand the - as I said, I don't understand the explanation that Rushi gave, but yes.

PN667

MR LIGGINS: Well, I don't think there's been - well, you tell me, because I am unaware of a dispute that we've had about the interpretation of the current - - -

PN668

THE COMMISSIONER: (Indistinct.)

PN669

MR LIGGINS: Yes. So is there any reason why we shouldn't just maintain that?

PN670

MS SVENDSEN: No, I don't have a problem with maintaining those words.

PN671

THE COMMISSIONER: That's a beautiful thing.

PN672

MS SVENDSEN: See, everybody says I'm just, you know - - -

PN673

THE COMMISSIONER: Everybody says you are what?

PN674

MS SVENDSEN: Nothing.

PN675

THE COMMISSIONER: Remember, the tape is running.

PN676

MS SVENDSEN: Yes, that's right.

PN677

THE COMMISSIONER: It's agreed that to resolve existing award clause 25.8(c) to - not (a)- - -

PN678

MS BHATT: Commissioner, sorry, it will be the second and third sentence of 25.8(a).

PN679

THE COMMISSIONER: Good point. Yes, ie second and third sentence thereof. Just while I think of it, what I am going to do, particularly as I'm going on leave for three weeks as of tonight, I am going to - I will be in the office next week anyway to do something else, but I will have all these typed up and get a - well, what I will do is get them typed up and get them circulated and ask you to respond by 9 January or something, which will - you will all love that. We can talk about a date you can respond by that we all agree that that's what we agreed and then if I've got any errors in the notes, you can point them out. Okay?

PN680

MS SVENDSEN: Yes.

PN681

MR ROBSON: Item 29 is not pressed but United Voice.

PN682

THE COMMISSIONER: Not pressed by United Voice. "Do they press it" is my notes, and the answer is no. (Indistinct) on request, so ED to remain unchanged. Item 30. Well, I've got the classic Commissioner note there, "Need to look at more closely." Must have been falling asleep at that stage. Anyone want to tell me about this?

PN683

MS ZADEL: I think it's whether someone on an excursion would be entitled to only the sleepover allowance or also where they are performing sleepover as part of the excursion, the other provisions of the sleepover clause. It's AFEI's view that they would only be entitled to the sleepover allowance.

PN684

THE COMMISSIONER: Same with, I think, most of the employers. You are either doing one thing or the other.

PN685

MR LIGGINS: When you are on an excursion, it's not necessarily locked into the shifts beforehand and the shifts after. When you're on an excursion, you're sometimes on a cruise ship or a resort or somewhere. So it's not that locked in

scenario and you have to have an attached shift before sleep. You might stay up late with the person.

PN686

THE COMMISSIONER: You are talking up the excursions, I've got to say.

PN687

MS SVENDSEN: Yes. They're not usually like that.

PN688

MR LIGGINS: The ones that our members have gone on have been like that. They've gone to a resort.

PN689

THE COMMISSIONER: I'm thinking of home-stay farms and things like that.

PN690

MR LIGGINS: So we believe the allowance is payable, but not the other provisions of the sleepover clause in that circumstance.

PN691

MR PEGG: Commissioner, Jobs Australia here. We'd say the same thing. The current provision talks about payment of an allowance and that's all it talks about. It doesn't talk about the other half a dozen provisions that go with sleepover in the current 25.7.

PN692

THE COMMISSIONER: Yes.

PN693

MR COONEY: Commissioner, it would be hard to envisage that when you're on an excursion you're not entitled to a bed - well, to separate sleeping facilities and the other provisions of the clause. What we would say is that to now rule those provisions out on the basis of a question posed by the Award modernisation team would be to remove those entitlements from employees that otherwise might apply.

PN694

MS ZADEL: That's not what the current award says however. It just refers to the sleepover allowance. It doesn't refer to the remainder of the sleepover - - -

PN695

MS SVENDSEN: It doesn't rule out the risk though.

PN696

MR LIGGINS: Plus this is not a directed activity. It's by agreement with the employee and they know what they're doing and where they're going.

PN697

THE COMMISSIONER: They know what they're in for. That's the argument, is it?

PN698

MR LIGGINS: So I think that's got some weight here.

PN699

MS SVENDSEN: Emotional blackmail.

PN700

MR LIGGINS: I don't think so.

PN701

THE COMMISSIONER: Can you just take me to the current provision? 25.9, is it?

PN702

MS SVENDSEN: Yes. It would be. Yes. It is 25.9. It's actually a very poorly-worded clause overall, but that's a different question.

PN703

MR LIGGINS: I don't think clause 3(c) is poorly worded.

PN704

MS SVENDSEN: Clause (b), did you say?

PN705

MR LIGGINS: No, 3(c). Not really. Payment of a sleepover allowance. It would have said payment of - well, you know, payment of the allowance in compliance with the provisions or something.

PN706

MS SVENDSEN: Yes, but the fact that it talks about payment of a sleepover allowance in accordance with the provisions of clause 25.7 does not exclude the rest of the clause. It just says payment of a sleepover allowance.

PN707

MR LIGGINS: Yes. That's all that saying it applies.

PN708

MS SVENDSEN: But it doesn't exclude the rest of it.

PN709

MR LIGGINS: I know we've got a different view of it. That's our view.

PN710

THE COMMISSIONER: Yes. Anyone - - -

PN711

MS SVENDSEN: It's clear what the allowance is that's paid. I will agree on that.

PN712

THE COMMISSIONER: Yes.

PN713

MR PEGG: In the current clause, and it's reproduced in the exposure draft in sleepover - in the exposure draft it is clause 14.5(a) and in the current award it's clause 25.7(a). In defining a sleepover it excludes excursions. So the sleepover provision as it currently stands excludes the situation of an excursion, and so we would say therefore the reference to payment of a sleepover allowances means only payment of a sleepover allowance. Not the rest of the sleepover clause.

PN714

THE COMMISSIONER: That's compelling. What was your issue, Mr Cooney? That there would - you wouldn't get a separate bed - - -

PN715

MR COONEY: There is that, but ultimately it is whether this is the form to determine that. I mean, this is a question we'd imagine put forward by the Award Modernisation team.

PN716

THE COMMISSIONER: Yes.

PN717

MR COONEY: And we would say that if it is to be settled, it should be settled, you know, basically through enforcement proceedings, if that becomes an issue.

PN718

THE COMMISSIONER: Well, that's true of a lot of things, but - can someone just remind me of what the question was that was raised in the first place?

PN719

MS SVENDSEN: The question was did the rest of the sleepover clause apply and our - or is it only the sleepover allowance. I mean, the problem with the question is it makes you look at stuff, and the problem in relation to - and you know, it goes back to what I said before, does that then raise the issue about whether you have to define it. The problem with that is that while there are provisions in this clause about, you know, having a - having for instance the active shift before and/or after, there is also provisions around how long the sleepover shift goes for and what you are paying for. There is also provisions around whether you are paying overtime applicable because, you know, you are actually doing - have to get up and do some active work. There are provisions around provision of facilities and some of those things clearly would be considered and probably apply in relation to excursions, but I mean - - -

PN720

MR LIGGINS: That would have to be a - - -

PN721

MS SVENDSEN: It's just - it's just - - -

PN722

MR LIGGINS: Because it's (indistinct) completely excluded from excursions at the moment.

PN723

THE COMMISSIONER: Yes. I tend to think that's - - -

PN724

MS SVENDSEN: I understand that. I'm not saying - - -

PN725

THE COMMISSIONER: So just - let's just - for example, we're not on a cruise. We are doing a camping sort of trip. Well, then you are not going to have a separate room with a bed and appropriate facilities, because it's an excursion. That's the - I mean, I think that's the - that's probably where I am sort of - you know, a very preliminary view, but that's probably where - - -

PN726

MS SVENDSEN: But there's the also issue about payment for four hours work and there's - I mean, there's - there's all sorts of stuff that fit within this clause that are notionally excluded and not dealt with in excursions at all, and it just become quite problematic.

PN727

THE COMMISSIONER: Yes, but has anyone actually pressed for - in terms of answering the question, part of the answer is, well, has anyone actually thought that these provisions in the sleepover clause do apply to excursions?

PN728

MS SVENDSEN: Not all of them, no. I think some of them, yes. But it's - but the point is that - I mean, the point I am making is in fact that the excursion clause is completely deficit, because it actually doesn't provide for - - -

PN729

THE COMMISSIONER: That's another argument.

PN730

MS SVENDSEN: Yes, which is a separate - no, I'm just saying that. And if you exclude sleepover entirely, except for the payment of the allowance, then you make it more deficit - more deficient, I should say.

PN731

THE COMMISSIONER: Yes. I will just make the observation I think I will probably tender the view that that is what the current position is in terms of the existing award, that it's - you've got - it's more likely that the operation of the provision is that you've got an excursion provision which makes clear that you've got a series of three things and read those as conjunctive, so all of those things you get and advise from that, but that's all you get. And you might be inclined to the view that that's skinny, in terms of what you get, but that's probably where it's at.

PN732

So can we just - but that might be - this might be one that you have to have a bit more of a think about.

PN733

MS SVENDSEN: There are some applications around this matter. I mean, on one reading of this clause, you don't get paid if you do a weekend excursion at all.

PN734

THE COMMISSIONER: Looking at the exposure draft?

PN735

MS SVENDSEN: No, no. Looking at the clause itself. It's got nothing to do with the redrafting effect. I don't think it changes particularly the - in fact, I'm not sure that it does, but on one version, you get paid the ordinary rate for Monday to Friday and where you are involved in an overnight excursion that includes Saturday or Sunday, the days worked in the two-week cycle, including that weekend will not exceed 10 days. There's no payment for weekend work on one view of reading this clause.

PN736

MS BHATT: But that doesn't arise from the redrafting of the - - -

PN737

MS SVENDSEN: No. No, I'm not saying it does. I'm saying the clause is deficient. So there are - and we just - the reference - the problem for us is that exclusion of other things makes it more deficient. We don't - we do recognise that the current clause is just significantly deficient. And that's not a redrafting issue. In fact, I don't think there are changes really. Except the minimum hourly rate one.

PN738

THE COMMISSIONER: So in a way, we go back to where Mr Cooney was, which is the position probably is that you don't - none of you - well, you've got different views to the answer to the question, but in terms of the exposure draft you will live with what's in the exposure draft and should there ever be a desire to fight that out, well, you can fight it out, but it's not something that you can sort out through a technical drafting process.

PN739

MS SVENDSEN: That's right.

PN740

THE COMMISSIONER: Is that a fair summary? All right. Agree to keep the wording the ED. Parties disagree on the answer to the Commission question, but nevertheless agree to keep the wording in the ED. Item 31.

PN741

MS SVENDSEN: HSU just thinks it reads easier if the dollar signs and percentages are in there, particularly when there are percentages and dollar amounts in the same table, which there often are. I think his - we were before his Honour in relation to supported employment services yesterday. I think there's going to be a decision made per se on the basis that it will either be standard or it won't be.

PN742

THE COMMISSIONER: Right. So you think that will get resolved?

PN743

MS SVENDSEN: Outside this award. We had the same position - we've got the same position in relation to the supported employment services tables and Ross J suggested that this was a matter that applied to all of the awards and that they'd made - that he'd make a decision generally. The Commission would make a decision generally. It's only proactive yesterday's - - -

PN744

THE COMMISSIONER: You won't deal with that. Anyone else there for - no.

PN745

MS SVENDSEN: It's on transcript.

PN746

THE COMMISSIONER: I'm not disbelieving you.

PN747

MS SVENDSEN: I know you are not. I'm just - his actual answer is on transcript.

PN748

THE COMMISSIONER: Expectation that this matter will be clarified in other Full Bench proceedings. Other than this one.

PN749

MS SVENDSEN: I think just generally probably. That was that - I think that's what he was suggesting to us.

PN750

THE COMMISSIONER: I will see if I can find out what he actually means. All right. Item 32. AiG. To be paid weekly and hourly rates prescribed to all employees including payment (indistinct). So it's the notes, is it? Is that the problem?

PN751

MS BHATT: It's below the notes, Commissioner. So above (indistinct).

PN752

THE COMMISSIONER: Yes.

PN753

MS BHATT: In clause 16.1, 2 and 3, there is now (indistinct) that creates an express obligation to pay the (indistinct) debt out. The preamble was not contained in the current minimum wages clause. There are two issues that arise from this. One is an issue that we've been raising across the board and that is this preamble appears to create an obligation to pay the minimum weekly rate for all employees including part-time and casual employee. We doubt that that's what is intended.

PN754

And it creates a tension with provisions we find earlier in the award, which will say that a casual employee is to be paid a minimum hourly rate for the hours that they actually work, and I assume that there's provision somewhere in the part-time employment clauses that says that part-time employees are entitled to pro rata entitlements under the award. So that's one issue and in many cases that has simply been resolved by inserting the words "full-time employee" under "minimum weekly rate". That's the solution that's been adopted in many other awards.

PN755

The other issue we - - -

PN756

THE COMMISSIONER: Including it in the table?

PN757

MS BHATT: Yes.

PN758

THE COMMISSIONER: Okay.

PN759

MS BHATT: The other issue we raised, I think, in our submission is again how all of this fits with the equal remuneration.

PN760

THE COMMISSIONER: Again, I'll stop you there. So the notes that the AMOD prepared said your position was the preamble should be removed. That's not right. What you think the resolution is is the preamble can stay, but that you resolve the problem by simply putting "weekly" in the middle and - so it's "weekly rate" and then "(for full-time employees)" in brackets.

PN761

MS BHATT: That would resolve the problem I've just identified. But in this award, there might be a second problem arising again from the existence of this equal remuneration order. It would appear to me that there are some circumstances in which the obligation on an employer is not in fact to pay this minimum rate, but is to pay some other rate by virtue of an order of this Commission. So that's why in our submissions we propose that in this instance it would seem more appropriate to simply remove the preamble.

PN762

MS SVENDSEN: I think that creates other problems. That's part of the problem, I guess. If you remove the transitional pay equity order provisions under the notes in this provision, then the - - -

PN763

THE COMMISSIONER: You're not wanting to do that, are you?

PN764

MS BHATT: No.

PN765

THE COMMISSIONER: It's just the last sentence.

PN766

MS SVENDSEN: Sorry. I actually understood that you were suggesting remove the whole preamble.

PN767

MS BHATT: No. It's just the sentence that sits directly above the table. "An employer must pay employees." That sentence.

PN768

MS SVENDSEN: That's part of where we've had confusion.

PN769

THE COMMISSIONER: So having heard the explanations why it's a problem and the key problem is that in fact the obligation - it's misleading in a way. Well, it's technically not misleading, because you have to pay the minimum wages for ordinary hours in order to comply with this award of course. We are dealing with the fact that, of course, over there there is this other instrument that says you've got to pay that. That's the issue, yes.

PN770

MS BHATT: Yes. You can't have a combination of under minimum weekly rate make the reference to full-time employees as you (indistinct) opposed and then have - so remembering that the ERO is only for a particular stream. You could put a note that - you could put a - yes, you could put a note referring to the ERO obligation in respect of the relevant stream.

PN771

MR PEGG: Commissioner, if I could sort of add to that, we - I think the insertion of that preamble does create a confusion and it's - the ERO is already a source of confusion within the sector. The current award simply has the note there which at least draws attention that there is another instrument that might set the pay rates. That preamble, I think, does have the unintended consequence of directing a reader just straight to those pay rates in the table.

PN772

THE COMMISSIONER: Yes.

PN773

So we'd support removing that, because I think it introduces a confusion, but further to that - we haven't made a submission about this, but just wondering whether - excuse me, wondering whether it might be helpful to have some kind of additional emphasis in relation to the notes referring to equal remuneration order or the transitional pay equity order to make it clearer that the pay rates that apply are set together with any accrual remuneration payment that applies.

PN774

THE COMMISSIONER: Yes.

PN775

MS SVENDSEN: There is also a - you know, there - because of each of these is set out under slightly different clause, so for instance, clause 16.3 for home care employees has the note concerning the pay equity order. 16.3 for family day care employees doesn't. It doesn't actually apply to either and it seems to me that - - -

PN776

THE COMMISSIONER: The note shouldn't be there in clause 16.3.

PN777

MS SVENDSEN: Well, it's - there's nothing wrong with it in one sense, except that it would suggest that it might be applicable for home care employees, and it's not.

PN778

THE COMMISSIONER: Yes. Well, that's what I mean. It shouldn't be there if it's not.

PN779

MS SVENDSEN: Yes. And so in that sense it shouldn't be there, because it's applicable to SACS workers.

PN780

MR PEGG: I think - I haven't double-checked it, but it's only referring to the Queensland TPEO which applied to the - - -

PN781

MS SVENDSEN: Did that apply to home care employees?

PN782

MR PEGG: There's a TPEO that applied to disability support workers. It's a Disability Support Workers Award in Queensland that may - I'm not sure, but may have applied to home care workers.

PN783

THE COMMISSIONER: It is expressed in a very specific way.

PN784

MS SVENDSEN: You are quite right. It is the TPE in Queensland. I don't know that it does still apply to home care workers, but that's really a good point, Michael.

PN785

MR PEGG: I just need to check that, but I'm just surmising that might be why that's there.

PN786

THE COMMISSIONER: All right. Well I will just put a query, "Is note required under 16.3."

PN787

MS SVENDSEN: Although it is exactly the same note as under SACS, which is what I'd been looking at. It doesn't just refer to the Queensland provisions and certainly the federal decision is not applicable to home care employees.

PN788

MS CHAN: (Indistinct) is that 16.4 doesn't replicate 16.3 from what I can see.

PN789

MS SVENDSEN: Yes, is it. Sorry, the second one, point 2, isn't - yes.

PN790

MS CHAN: Yes.

PN791

MR PEGG: That first note does only refer to Queensland.

PN792

THE COMMISSIONER: So it's probably on point. Not relevant. All right. I understand the conundrum. I'm just wondering though whether removing - simply removing the preamble kind of helps. Remembering that, as we are all in the business of trying to help people out there understand what it is they're supposed to do. I'm just sort of standing back and looking at this and thinking, well, if those words aren't there, I've still got to table the rates of pay. I have to understand what the notes are, but I'm still operating and organisation obligated by this award. I'm just going to pay those rates of pay, if I don't know what the ERO is and what my obligations are under that, whether you've got that note there or not.

PN793

MR PEGG: Commissioner, perhaps if the - that preamble was to stay then we would suggest simply adding some words to the end of it, so it would read, "The employer must pay the employee the following minimum wages for ordinary hours together with any equal remuneration order payment that applies," or words to that effect.

PN794

THE COMMISSIONER: You'd keep the words "worked by the employee"?

PN795

MR PEGG: Yes.

PN796

THE COMMISSIONER: You'd just drop those out and so you would add - your proposal is you would add the words "together with"?

PN797

MR PEGG: With any - I'm just trying to think it through, but "together with any equal remuneration payment that applies", or any payment that applies under a transitional pay equity order or an equal remuneration order.

PN798

THE COMMISSIONER: Yes. Well, something like that. Yes. No, that sounds sensible. Is there any comments on that proposal?

PN799

MS SVENDSEN: Does that still mean the full-time issue that AiG - - -

PN800

THE COMMISSIONER: You would still want the full-time part? Yes?

PN801

MS BHATT: Just a couple of matters. I don't know if the wording of this is a factor, but there is going to be a classification under the award that doesn't receive an equal remuneration payment, which would be the level 1. And that's why I just wanted to note that the equal remuneration order refers to applicable minimum wages in the award. So whether that wording (indistinct).

PN802

THE COMMISSIONER: Ms Svendsen, you're making murmuring noises. Do you want to say - - -

PN803

MS SVENDSEN: No. I was just thinking that we keep intersecting with the similar matters about applicable and minimum wages. I'm just wondering whether they're - the answer to that minimum weekly wage claim issue might not be a definition after all.

PN804

THE COMMISSIONER: Just to come back to Jobs Australia, can you just give me again the "together with any equal remuneration payment that applies". What was the next bit?

PN805

MR PEGG: I think I changed it slightly. "Together with any payment that applies under an equal remuneration order or a transitional pay equity order.

PN806

THE COMMISSIONER: Yes. It's sufficient at this stage, and then in combination also add the words (indistinct) to minimum weekly rate", like we'd put in brackets, "full-time employee", to the minimum weekly rate heading. I'll just put a note at this stage, "Not agreed fully, but parties will consider this in further ED draft."

PN807

MS CHAN: I just wonder if the wording might be able to say, "the following minimum wages or where applicable the following minimum wages together with any payment that applies under the RLTPAO", which would address your issue about there being classification levels of the - - -

PN808

THE COMMISSIONER: I think it's kind of the same thing. Can we just leave it? We will have a play with those words. I mean that's - what we've got (indistinct) is that applies- is it applicable. Yes. Well, leave that to us. We will

have a look at what sort of fits best. But yes, it's the same - you're on the same tram. All right. Are we happy to move on from there on that basis?

PN809

Okay. We're up to item 33.

PN810

MS BHATT: Which is a matter that was previously identified as being agreed.

PN811

THE COMMISSIONER: Agreed. No change to that? The wording of clause is changed between the current award and the ED. The ED change is unnecessary. The wording of current award or clause should be retained.

PN812

MS BHATT: So as I understand it, the agreement is to replace clause 17.2(b) in the exposure draft with the current clause 20.4 (b).

PN813

THE COMMISSIONER: It's agreed to replace clause 17.2(b) of the ED with - - -

PN814

MS BHATT: Clause 20.4(b).

PN815

THE COMMISSIONER: the current award clause 20.4(b).

PN816

MS SVENDSEN: It's the same.

PN817

MR ROBSON: I think this one is a - - -

PN818

MS SVENDSEN: It's already the same, except for the clause reference.

PN819

MR ROBSON: Pro rata is in a different - there's a different wording - - -

PN820

MS SVENDSEN: On a pro rata - thank you. Pro rata on the basis - on a pro rata basis. Yes, but "on a pro rata basis on the basis that," it's very clumsy wording.

PN821

MR ROBSON: Actually, that's worse. I think United Voice changes its position. We want the exposure draft wording. I don't think it changes anything.

PN822

THE COMMISSIONER: You might make your minds.

PN823

MS SVENDSEN: Does it work - does it - should there be a comma after "employees"? The exposure draft. "(indistinct) allowance in 17.2(a) will apply to eligible part-time and casual employees, pro rata on the basis of the ordinary weekly hours." No, that doesn't work. No, "will apply pro rata". It's actually the way it - I don't understand how this could change the entitlement. I think it is very clumsy wording that's attempted to be changed, but I don't think there is any difference in the entitlement.

PN824

THE COMMISSIONER: It's the Commission's fault, is it

PN825

MS SVENDSEN: No.

PN826

MR ROBSON: No.

PN827

THE COMMISSIONER: Where is the existing clause?

PN828

MS SVENDSEN: Clause 20.4(b).

PN829

MR ROBSON: That's page 23 of the comparison document.

PN830

THE COMMISSIONER: Thanks.

PN831

MR ROBSON: Every word after "pro rata" in the exposure draft that's - - -

PN832

MS SVENDSEN: The words "on a" have been removed between "casual employees" and "pro rata".

PN833

MR ROBSON: And then the word "basis".

PN834

MS SVENDSEN: Yes, sorry. I've had this problem every time I've looked at this particular - - -

PN835

THE COMMISSIONER: How could you not understand it? Well, wouldn't it just say the first - - -

PN836

MR ROBSON: I think every - in the exposure draft, every word after "pro rata" seems to be redundant. I would assume that you'd divide it by 38 to get the appropriate hourly rate.

PN837

MS SVENDSEN: Probably. You could probably put a full stop after "pro rata".

PN838

MR ROBSON: Yes. And let's not also start giving people 35-hour weeks.

PN839

MS BHATT: "First aid allowance in clause 17.2(a) will apply to eligible part-time and casual employee on a pro rata basis", full stop.

PN840

MS SVENDSEN: Yes.

PN841

MR ROBSON: Yes.

PN842

MS SVENDSEN: I would be happy with that.

PN843

THE COMMISSIONER: So as per the exposure draft, a full stop after the word "basis".

PN844

MS SVENDSEN: No.

PN845

MS BHATT: No.

PN846

MS SVENDSEN: Actually, no. In fact, if you go back to 20.4(b) and put a full stop after the first "basis", that's it. So "The first aid allowance in now 7.2(a) will apply to eligible part-time and casual employees on a pro rata basis." Full stop.

PN847

THE COMMISSIONER: First aid allowance in clause 17.2(a), is the new clause -
--

PN848

MS SVENDSEN: Clause 17.2(b) is the bit we are referring to though.

PN849

THE COMMISSIONER: Yes, but - - -

PN850

MS SVENDSEN: Yes. Sorry, the allowance. Yes. Sorry.

PN851

THE COMMISSIONER: We can't go straight out of the - - -

PN852

MS SVENDSEN: Yes. No. No, you're quite right.

PN853

THE COMMISSIONER: - - - old award. First aid allowance in clause 17.2(a) will apply to eligible part-time and casual employees on a pro rata basis." Full stop. All right. Are we all good with that?

PN854

MS SVENDSEN: We are.

PN855

THE COMMISSIONER: Nothing further on that. We move to item 34.

PN856

MS SVENDSEN: The question raised by the Commission was is the heat allowance still relevant and, yes, it's still payable to a very limited number of people and decreasing rapidly.

PN857

THE COMMISSIONER: So that's - I've got "agreed". There's no - from your - no. "Agreement to HSU answer."

PN858

MS SVENDSEN: Yes. About two minutes after I retire, it will be non-existent in (indistinct) about the same age.

PN859

THE COMMISSIONER: Item 35.

PN860

MS ZADEL: This is the AFEI submission, so we are looking at the current clause 20.2.

PN861

THE COMMISSIONER: I'll just grab the marker.

PN862

MS ZADEL: So the current clause 20.2 and exposure draft clause 17.3, the exposure draft drafting has had the effect of separating the clauses under a number of subheading. So it's about the provision of clothing and equipment and, where that's not provided, the provision of an allowance. And we were just submitting, just for the purposes of clarity to be clear that the first part of the clause (a)(i) and (ii) would be subject to the allowance clauses, so that it's clear that you wouldn't have to really comply with both. You either provide the uniform and equipment or you provide the uniform allowance and laundry allowance.

PN863

MS SVENDSEN: Except that you have to provide a laundry allowance if you don't launder and maintain the uniform that you've provided. But I'm not sure, I think we - I think from the union's point of view we agree the intent. I don't think we agree the solution works.

PN864

MR ROBSON: Yes. Well, like, we just don't see the need for it. I think if you read the clause as a whole it's either - you know, the first part is subject to the second part and it's pretty clear it's (indistinct) it's providing uniforms to employees under clause 17.3(a)(i), "the employer and employee may agree" - like, I think you've got the default position at 17.3(a)(i) and (a)(ii), and then you have the uniform allowance which is set out as an alternative position that may be agreed with an employee.

PN865

MS ZADEL: I think the concern is that perhaps someone may not read the entire clause now that it is separated into a number of subclauses. I don't think the exposure draft has changed the meaning of the current award.

PN866

MR ROBSON: No.

PN867

MS ZADEL: It was just for ease of reference really, to provide a clarification at the start of the clause.

PN868

THE COMMISSIONER: Well, for mine, I'd be on the HSU's side of the camp on this one. I just think it's sort of - you do have - reading them through, there's a logical structure to it. I don't know if adding additional words in is necessary. It seemed clear enough to me. Do you want to have a think about it?

PN869

MS ZADEL: Yes. We will have a think about it. I doubt it would be something we would be pressing.

PN870

MS SVENDSEN: I would just say that it's also - if you - I've had this happen a couple of times. If you actually read it in the comparison document, it seems to be more disjointed. Whereas if you actually read it in the ED draft, it just flows through the heading, laundry allowance is, you know, a subheading. Whereas in this it seems to be a new heading like clothing and allowance heading. So when I went to the source document, it just seemed to flow straight through.

PN871

THE COMMISSIONER: In the new draft, the ED.

PN872

MS SVENDSEN: Yes. That's happened a couple of times. I've picked up mistakes and been about to write them up and then discovered that the ED itself didn't have that same mistake in it. It was just the comparison document.

PN873

THE COMMISSIONER: The comparison document. Okay. All right. Well, summing this up, I will say I did have in my notes before we got in here, "Not a big issue." So I will put the - the general view is that the ED draft should remain as is and AFEI to advise if they wish to press their position. Okay. Item 36.

PN874

MS SVENDSEN: I don't think it's a big issue, I will say, but I've got to say that the concept of at least one hour to more than one hour, ie 60 minutes to 61 minutes is pretty ridiculous that it changes the meaning.

PN875

MR LIGGINS: But that's what it is. Currently you might do one hour or two. Not one hour and one minute to get it.

PN876

MS SVENDSEN: Yes. If that happens, I will go barley.

PN877

MR LIGGINS: I've got to say, that does happen. They seem to not employ people to do one hour and three minutes. It's on the hour or the half hour. So it does have that effect.

PN878

MS SVENDSEN: Except that they won't have done just one hour.

PN879

MR LIGGINS: I'm not going to get them to do 59 minutes, Lee. That's a change. It's unnecessary, but it would be the way it was.

PN880

THE COMMISSIONER: Where is the existing award provision?

PN881

MR LIGGINS: 20.3(a)(i), where required to work more than one hour after the usual finish time. Now it's at least one hour. So in the ED you'd get it in an hour. Previously you would have to work more than an hour.

PN882

MS: It's a substantive change. It has the effect of (indistinct) entitlement earlier.

PN883

MS SVENDSEN: Yes. Rubbish, but never mind, I'm not opposed to changing it if it doesn't make any difference.

PN884

THE COMMISSIONER: Right. Okay. So the proposal from ACE was to delete those words from the clause. So how should the clause read now in the exposure draft.

PN885

MS SVENDSEN: More than one hour.

PN886

MR LIGGINS: Yes. "More than one hour."

PN887

THE COMMISSIONER: Delete the words "at least one hour" and insert "more than one hour." That is agreed to delete the words "at least one hour" and insert "more than one hour" - acquiesced. Clause 17,3(b)(i).

PN888

MS ZADEL: Item 37 and 38 are submissions from AFEI. It's very much in the same vein as our submissions earlier to the clothing and equipment allowances, just providing for the clarification about what the allowances are subject to. Again, we don't think the exposure draft is changing how the allowances apply. So I propose just to deal with it similarly as the clothing and equipment, and AFEI to go away and advise whether we are pressing it or not.

PN889

THE COMMISSIONER: So in respect of items 37 and 38, I can record similarly to item 35, the general view is ED draft to remain unchanged and AFEI to advise if still want to press for change. Okay. Item 39.

PN890

MS SVENDSEN: I had concerns that it reversed - the meaning reversed the reimbursement requirement so that they are not entitled to reimbursement if the expenses exceeded the mode of transport agreement, whereas I think the entitlement is they are not entitled to reimbursement for the amount that exceeds the mode. Does that make sense?

PN891

So you are entitled to reimbursement up to that. It doesn't say it quite this way, but you are entitled to that reimbursement, and not this. And this is the bit you are not entitled to and now the wording is you are not entitled to it if it exceeds, which would imply that you've got no entitlement to any of it.

PN892

THE COMMISSIONER: You end up with no entitlement to anything. Yes.

PN893

MS SVENDSEN: That's our concern. That's what we - - -

PN894

THE COMMISSIONER: That's the literal reading.

PN895

MS SVENDSEN: Yes. That's the literal reading.

PN896

MS BHATT: So I think - I just - I think it's agreed that that concern can be resolved if we replace that provision, which is 17.3(c)(iii) of the exposure draft with the current clause 20 5(c).

PN897

THE COMMISSIONER: Yes.

PN898

MS SVENDSEN: Yes. If they don't like the word "provided" at the beginning, we are not going to be - you know, die in a ditch about keeping that, but yes.

PN899

THE COMMISSIONER: So it's replace 17.3(c)(iii) from the ED entirely with clause -which one?

PN900

MS BHATT: Clause 20.5(c).

PN901

THE COMMISSIONER: Clause 20.5(c) from existing award. And that is agreed. Item 40.

PN902

MS VAN GORP: Business SA have picked this up, because it's something that we thought needed a definition.

PN903

THE COMMISSIONER: Yes.

PN904

MS VAN GORP: However, AiG have said that - well, I interpret this as meaning that they're got - that there is general understanding in the industry of what this means. Is that correct?

PN905

MS BHATT: No. I don't think submissions put it that high. I think we are just saying that we are not aware of any disputation. On that basis, we say it's not necessary that - to (indistinct) As far as I know, no specific definition has been advanced by any interested party.

PN906

THE COMMISSIONER: Is this one of these things that's a bit "olde world" - - -

PN907

MS BHATT: Yes.

PN908

THE COMMISSIONER: And everyone in the cafeteria in (indistinct).

PN909

MS SVENDSEN: And I suspect that it's not disputed because it's principally - - -

PN910

THE COMMISSIONER: Gone.

PN911

MS SVENDSEN: Yes. Principally not used. I would be surprised if it has been used anywhere, but I don't know the answer to it.

PN912

MR ROBSON: When we discussed this with our branch industrial officers, you know, there was an idea that a definition might be good, but it would really only be used to clarify that it's not really used.

PN913

MS SVENDSEN: So as a consequence of that, I would kind of leave it as it is. Then we don't have any arguments about it and we won't argue about what a rule - what a definition might look like.

PN914

THE COMMISSIONER: Are you okay with that being - - -

PN915

MS VAN GORP: Absolutely. Yes.

PN916

THE COMMISSIONER: So it's agreed to leave - - -

PN917

MS VAN GORP: Would it be tidier if we just withdrew that?

PN918

THE COMMISSIONER: Well, yes. You're withdrawing it today.

PN919

MS VAN GORP: We will withdraw that.

PN920

THE COMMISSIONER: Yes. We're agreed to leave the ED draft in its current form. Item 41.

PN921

MS SVENDSEN: The reference to disability - the question was raised by the Commission. We don't believe the reference to disability services should be removed, because they actually have a different overtime - the overtime kicks in at two hours for those engaged in disability services. To remove it would change their entitlements.

PN922

THE COMMISSIONER: Mr Cooney. As I read this summary, you've got the opposite view. Is that right?

PN923

MR COONEY: Commissioner, we don't press that. We just make no submission on that.

PN924

THE COMMISSIONER: So that would be no. Employers? Who want to go first? Don't all leap forward at once.

PN925

SPEAKER: We've said there's no basis for deleting the disability services reference.

PN926

MS VAN GORP: And we have also said that.

PN927

THE COMMISSIONER: You're all in furious agreement. Has it been removed in the ED?

PN928

MS SVENDSEN: No. It was just a question asked whether it should be.

PN929

THE COMMISSIONER: All right.

PN930

MS SVENDSEN: So the answer to the Commission's question is no, it should not be deleted.

PN931

THE COMMISSIONER: All right. Agreed. Item 42.

PN932

MS SVENDSEN: It's an AWU claim, and I don't think anybody really understands what they are getting out, to be honest

PN933

THE COMMISSIONER: It's possible I'm in that same cart, because I've written nothing for this. Just let me read the clause and do it justice. They are saying in Roman numeral (i) there it should say 38 ordinary hours.

PN934

MR ROBSON: I think - and I'm guess here - is that what they are - this is more in the realm of a substantive claim and I don't understand what the casual employees matter is, but part-time employees, 10.3 provides for the agreed regular pattern of work.

PN935

THE COMMISSIONER: Yes.

PN936

MR ROBSON: Except, unlike many other awards, in this ward, a part-time employee doesn't earn overtime immediately after they work outside their - - -

PN937

THE COMMISSIONER: Outside their regular hours.

PN938

MR ROBSON: Yes. So they are only paid overtime once they've worked 10 hours in a day or 38 hours in week.

PN939

THE COMMISSIONER: I see.

PN940

MS SVENDSEN: Yes. That was the only position we could put on it, but as it wasn't listed as one, it became - like it wasn't actually recorded as a claim. It was just about it being inconsistent and I don't think there's anything in the ED that differs from the current award.

PN941

THE COMMISSIONER: No.

PN942

MS SVENDSEN: There's no - so in terms of this being technical and drafting matters, I don't think they've got a claim to make that it differs.

PN943

THE COMMISSIONER: Yes. So I will put it that the general view is that the current ED draft should remain unchanged. AWU to advise if pressed, if they want to press their claim.

PN944

MS SVENDSEN: As a claim.

PN945

THE COMMISSIONER: As a claim, yes. Is that what you said?

PN946

MS SVENDSEN: Yes.

PN947

THE COMMISSIONER: Yes. Item 43.

PN948

MS SVENDSEN: I think item 43, 44 and 45 are all linked.

PN949

MS BHATT: I understand that there's agreement that clause 19.3 be replaced with the current clause 28.3 and that would resolve items 43, 44 and 45.

PN950

THE COMMISSIONER: Did everyone hear that?

PN951

MS SVENDSEN: Yes.

PN952

THE COMMISSIONER: (Indistinct.)

PN953

MS SVENDSEN: Yes. Good point.

PN954

THE COMMISSIONER: Okay. It's agreed that (indistinct). It's agreed that the wording (indistinct) existing award clause - - -

PN955

MS BHATT: 28.3.

PN956

THE COMMISSIONER: 28.3.

PN957

MS SVENDSEN: I would say that we don't have an objection to it being separated out, but the wording is just - it doesn't work. The wording that the ED team have put together.

PN958

THE COMMISSIONER: It doesn't work?

PN959

MS SVENDSEN: No. I mean, I don't mind it being separated out into subclauses, but the wording that they have used does not - is not accurate and it doesn't work.

PN960

THE COMMISSIONER: In what way?

PN961

MS SVENDSEN: Because they have used things like "at the end of work on one day or shift" and "the start of work on the next or shift." They have not used "off duty period", they've got "a break of". They've got - you know, instead of "termination of their ordinary work", I mean, it could be "finish of their ordinary work" or - but, you know, it's not - that's not the same thing and they've - and the meaning of the clause has actually changed by the way it's been written.

PN962

THE COMMISSIONER: General agreement on that? Do you want to go back to the future? Yes? No? Thinking? Agreed?

PN963

MS SVENDSEN: Yes.

PN964

THE COMMISSIONER: Well - and that is in respect then of what exactly? It's all of 19.3. We were just dealing with 19 - - -

PN965

MS SVENDSEN: It has actually resolved 43, 44 and 45. They are - yes - by replacing it entirely.

PN966

THE COMMISSIONER: You're must making the point it doesn't change what needs to be done?

PN967

MS SVENDSEN: No. I'm just saying that they might go, "Yes, but that's clause is so long," and, like, it is. It's not a very - it's not - it's a very - it doesn't meet the principles that have been used in EDs - in the ED in the sense that it actually puts things into subclauses.

PN968

THE COMMISSIONER: Yes.

PN969

MS SVENDSEN: I am just saying that I don't oppose it being redrafted in subclauses, but they can't change the words the way - they can't use the wording changes they've used, because that's actually changed the meaning of the clause in various different ways. Yes.

PN970

THE COMMISSIONER: But to sum up, in terms of items 43, 44 and 45, we are replacing ED 19.3 clause with 28.3.

PN971

MS SVENDSEN: Yes.

PN972

THE COMMISSIONER: But you are just anticipating there might be a bit of, I guess, well - - -

PN973

MS SVENDSEN: Push back, because it's a long sentence with no breaks.

PN974

THE COMMISSIONER: Because we are trying to get rid of that - - -

PN975

MS SVENDSEN: Yes. Yes.

PN976

THE COMMISSIONER: All right. Well, we will wait and see what the view is and we will deal with that. Okay. Item 46.

PN977

MS BHATT: If I can try to short cut this a little. I think there was an issue raised. The HSU proposed a form or words. Business SA proposed a slightly different form of words. They both had the same effect.

PN978

MS SVENDSEN: Yes.

PN979

MS BHATT: I think it might be a matter of just picking one of the two.

PN980

MS SVENDSEN: Yes. I agree with that. I think it's agreed on the intent and not on the solution. That's what I wrote.

PN981

THE COMMISSIONER: Well, my note was everyone agrees with Business SA. I might not be right about that. "Not opposed to Business SA. Agreed with Business SA."

PN982

MS PATTON: We - sorry, Business SA - I think when Aged Care employers had to get on this the other day with the new inclusion for those hours worked, we thought it doesn't need to be clear about those hours worked on that day or on what day. Because if we had a shift - the current clause talks about midnight to midnight. This one says where hours are worked on a Saturday, and the shift could start the day prior.

PN983

THE COMMISSIONER: Yes.

PN984

MS PATTON: So it could start at 10 pm Friday and go through into Saturday.

PN985

SPEAKER: In which case, is the HSU's wording preferable?

PN986

MS PATTON: The current award language seems to be clear in that you're talking about a loading between midnight Friday and midnight Saturday, to midnight Saturday and midnight Sunday, whereas now it says "the hours worked on the day", which could mean that if you are doing a shift that runs across those two days - - -

PN987

THE COMMISSIONER: What day?

PN988

MS PATTON: Are we talking about just whether it picks up the midnight or are we talking about now the (indistinct) shift?

PN989

MR ROBSON: I think that's covered by the HSU's wording. I mean, it doesn't say when a shift starts or ends on a Saturday. It says - - -

PN990

MS SVENDSEN: The hours worked on a Saturday. "Ordinary hours worked on a Saturday." Well, Saturday doesn't start until midnight.

PN991

MR ROBSON: Yes.

PN992

MS SVENDSEN: But I don't - I agree with you that the - I agree that the intent changed.

PN993

THE COMMISSIONER: All right. Well, we're looking for consensus. Are we coming around to the HSU's draft?

PN994

MS PATTON: We will follow your lead, Lee.

PN995

MS SVENDSEN: Beautiful.

PN996

THE COMMISSIONER: Any divergence from that path? So item 46, agreed that HSU proposal be adopted. Is there an end? We're getting to the end. Right. Item 47. No opposition to the ASU's proposal. From the AWU there was, but no-one else said anything. What's the view on item 47?

PN997

MS BHATT: As I understand it, the ASU submission isn't seeking any change to the exposure draft. The Commission has inserted the (indistinct) and the ASU has made an observation that they don't have any difficulty with it and it appears no-one else does either.

PN998

THE COMMISSIONER: All right. So I will just -the note is "Exposure draft to remain as is."

PN999

MS SVENDSEN: Yes.

PN1000

THE COMMISSIONER: So issue resolved. Item 48. My notes are here. So everyone seems to be agreed it's over 12 months, but is there a pro rate issue?

PN1001

MR LIGGINS: Well, we propose that it should be year of service, because otherwise if someone starts halfway through the year or a quarter of the way through the year, it's the (indistinct) for that person which is their year of service and each subsequent year of service. It's not the calendar 12 months. So to be clear - - -

PN1002

THE COMMISSIONER: Is that what the issue is?

PN1003

MS SVENDSEN: The question by the Commission was does it need to be clarified in terms of that the additional week's leave. This is actually a question that's raised or been raised - it isn't actually raised by every AMOD drafting team, I might add, but it has been raised in other awards, and it's also been raised in whether or not the additional week's leave for a shift worker accrues progressively

for the purposes of the NES as annual leave does. And I think it relates - and it relates to that particular question.

PN1004

THE COMMISSIONER: Well, that's what I thought.

PN1005

MS SVENDSEN: And from our point of view, we've said that it accrues progressively in exactly the same way as annual leave does. But I'm - - -

PN1006

THE COMMISSIONER: Yes, but how - - -

PN1007

MS SVENDSEN: I don't know whether it's been - - -

PN1008

THE COMMISSIONER: That's an interesting point.

PN1009

MS SVENDSEN: It is. But I don't know if it's been resolved.

PN1010

MR LIGGINS: Page 28, just below 21.2. Sorry - - -

PN1011

MS SVENDSEN: No. I mean, I don't know if it's been resolved at a - because the question actually applies for more than - for the whole - even for the NES.

PN1012

THE COMMISSIONER: Yes.

PN1013

MS CHAN: So even (indistinct) whether you would have worked 10 or more weekends.

PN1014

THE COMMISSIONER: This is the point.

PN1015

MS SVENDSEN: But it's true, but the pro rata'ing of annual leave does the same. I mean, it =- the NES actually changed the way annual leave was defined to progressively accruing from - at the end of a service year and that's quite clearly something that occurred to everybody and everything.

PN1016

The issue is resolved in some awards, because they actually have effectively a progressive accrual by a tabling of - so there's, you know, if you've worked seven weekends, you get a day or it depends on what the rationale is, but in this case it would be you'd get a day or whatever it is. So it's kind of pro rata'd in the award or the agreement anyway.

PN1017

But I think it's - I think we've said no to clarification primarily because I don't think the issue has been determined as far as the NES is concerned. So we are taking a "don't try and define it" approach.

PN1018

MS BHATT: Can I just say the (indistinct) Manufacturing Award comes to mind first and there used to be that provision in the Manufacturing Award that said that if a worker is a shift worker for a month, I think you got an additional half day of annual leave or you worked for half a month, your accrual progressed by a specific amount. A provision like that was found in many other awards and at the start of this review a five-member Full Bench that dealt with a number of alleged inconsistencies with the NES decided that all such clauses would be deleted, and they have now been deleted.

PN1019

It was on the basis that that's inconsistent with what the NES says, and that is progressive accrual. I, of course, understand the issue where (indistinct) admitted that is practically how does that work - - -

PN1020

THE COMMISSIONER: Yes.

PN1021

MS BHATT: But many of those award clauses have now been found to be inconsistent with the NES.

PN1022

THE COMMISSIONER: Ones which have a - like a - - -

PN1023

MS BHATT: Yes.

PN1024

MS SVENDSEN: A specific trip.

PN1025

THE COMMISSIONER: Yes, 10 days or - - -

PN1026

MS SVENDSEN: That seems logically inconsistent, because it actually provides for progressive accrual.

PN1027

MS BHATT: But at a rate - - -

PN1028

MS SVENDSEN: That wasn't consistent. Okay.

PN1029

MS BHATT: That defers to (indistinct).

PN1030

MS SVENDSEN: Okay. All right. So that's - so the principle - - -

PN1031

THE COMMISSIONER: Because you can't reconcile the trip wire of (indistinct) with the progressive accrual.

PN1032

MS BHATT: I think that was the logic. Yes.

PN1033

THE COMMISSIONER: So your provision is still in (indistinct).

PN1034

MS BHATT: I'm sorry?

PN1035

THE COMMISSIONER: So this provision is still - - -

PN1036

MR LIGGINS: Because this doesn't deal with accrual. This just deals with whether you get it or not and over what period you have to have worked those 10 days. So the issue is do we not change it - do we make it over 12 months or do we make it a year of service as we suggest?

PN1037

MS SVENDSEN: You see, I think on the same terms - our position is that on the same terms and conditions it means that the accrual is included in that and it's progressive accrual. I think that adding anything about - annual leave is about - in its entirety is about the annual - the 12-month period, but there's no clarification that that's - - -

PN1038

THE COMMISSIONER: Yes, and that's what the - well - - -

PN1039

MS SVENDSEN: You see, the thing is that this - all it does is say annual leave is provided for in the NES, which talks about four weeks over 12 months and then the NES says there is an additional week's leave for shift workers and all 21.2 does is define how you get a shift worker's additional week of leave.

PN1040

The 12 months comes out of the NES provision for annual leave over a 12-month period regardless. I'm just - - -

PN1041

THE COMMISSIONER: So your position is you don't need to do anything to 21.2 in the exposure draft.

PN1042

MS SVENDSEN: Yes.

PN1043

THE COMMISSIONER: But it doesn't say anything about it in here at all.

PN1044

MS SVENDSEN: I know. Neither does the annual leave clause itself. So the whole clause doesn't. It just refers to the NES.

PN1045

MS BHATT: But is it your view that that reference to 10 or more weekends is to be read as 10 or more such weekends over a year of service?

PN1046

MS SVENDSEN: It's the same as annual leave. Yes. It's a 12-month - - -

PN1047

THE COMMISSIONER: Yes. You don't disagree.

PN1048

MS SVENDSEN: No. I just don't agree that we need to change anything. And I'm cautious about changing it because of the implications in relation to the progressive accrual.

PN1049

MR ROBSON: I certainly think this issue requires perhaps a little bit more thought than we are able to put into it now.

PN1050

THE COMMISSIONER: Can I get this far with you all that there is no (indistinct) entirely driven by concern about what impact any change to the existing exposure draft clause would have on the requirement to accrue progressively under the NES?

PN1051

MS SVENDSEN: Yes.

PN1052

THE COMMISSIONER: Right. But you don't disagree any of you, that it's not about the calendar year. It's not something that goes from 1 January (indistinct) it's a year of service.

PN1053

MS SVENDSEN: Yes.

PN1054

THE COMMISSIONER: That 10 or more weekends relates to. Yes?

PN1055

MS BHATT: Yes.

PN1056

MS SVENDSEN: You see there's no change to the wording at all.

PN1057

THE COMMISSIONER: Relates to - yes, a year of service, but as is usual I (indistinct) reference to a year of service as may impact on right to progressive accrual. Is that a fair summary of what - - -

PN1058

MS SVENDSEN: Yes. That's a summary of - - -

PN1059

THE COMMISSIONER: Of the situation. Item 49. I've got agreement on - agreed for item 50. (Indistinct) That's the ASU proposal. Everyone agrees with the ASU's proposal. Yes?

PN1060

MR ROBSON: Yes.

PN1061

THE COMMISSIONER: Item 50. Everyone agrees with the HSU proposal.

PN1062

MR ROBSON: We support the use of "all groups". I think the issue of weight average I just point out the - where is it? So the difference is that it's changed in deductions for board and lodging to "all groups." The - I suppose what it's done there is actually specified the group that it's referring to. The weighted average eight capital city CPI is just a bit over - a type of calculating CPI. Within that category there are other groups that are referred to and that's - we would say it's referring to all the items in that basket, those eight capital cities weighted average, rather than just a specific subsection, like the clothing and footwear group, the takeaway or fast food subgroup or the private motoring subgroup.

PN1063

THE COMMISSIONER: Yes.

PN1064

MR ROBSON: Yes. Yes. I think that actually - that more accurately describes what's been referred to, but I am not sure it makes a significant difference. I've double-checked that with my research officers who - - -

PN1065

THE COMMISSIONER: Who do the calculations on those things.

PN1066

MR ROBSON: Yes.

PN1067

THE COMMISSIONER: And they say it will make not a lick of difference.

PN1068

MR ROBSON: No.

PN1069

THE COMMISSIONER: Basically.

PN1070

MR ROBSON: Yes. Except - - -

PN1071

THE COMMISSIONER: Maybe to the second percentage point.

PN1072

MR ROBSON: No.

PN1073

THE COMMISSIONER: Not even that.

PN1074

MR ROBSON: All groups would be the thing you're actually referring to.

PN1075

THE COMMISSIONER: Yes.

PN1076

MR ROBSON: As opposed to the eight capitals consumer price index.

PN1077

THE COMMISSIONER: Okay.

PN1078

MR ROBSON: Because the broader - the biggest category.

PN1079

THE COMMISSIONER: So can I just round that out to you are still on board with what I just said, that we all agree with the HSU proposal?

PN1080

MR ROBSON: The HSU - - -

PN1081

THE COMMISSIONER: Which is the applicable CPI figure for the board and lodging allowance has been changed from - well - - -

PN1082

MS SVENDSEN: Yes. I made the point that it had been changed.

PN1083

MR ROBSON: It has been changed. We support -we support the change.

PN1084

THE COMMISSIONER: The change should be reversed is the Business SA position. Agreed with HSU's submissions. UV supports the use of "all groups".

PN1085

MR ROBSON: It's a very fine technical distinction that actually doesn't change the substance of the entitlement. What that referred to in the current award is actually the old groups of the eight capitals consumer price index.

PN1086

THE COMMISSIONER: Yes.

PN1087

MR ROBSON: And if you look at the other ones, it refers to specific categories within the eight capitals consumer price index. So that would be the CPI for Clothing and Footwear.

PN1088

THE COMMISSIONER: Yes.

PN1089

MR ROBSON: The CPI for - well, this is just CPI.

PN1090

THE COMMISSIONER: Which, by definition, is all groups.

PN1091

MR ROBSON: Yes.

PN1092

MS VAN GORP: Business SA is happy to not - to withdraw that. We won't - - -

PN1093

MS SVENDSEN: So is the HSU. Just leave it as "all groups".

PN1094

THE COMMISSIONER: Leave the ED as it is.

PN1095

MS SVENDSEN: Yes.

PN1096

THE COMMISSIONER: Item 51. AFEI.

PN1097

MS ZADEL: So this is AFEI opposing the removal of schedule A of the current award. The reason being is the equal remuneration order currently makes reference to schedule A. Within schedule A it references 8.3.9 which requires you to compare modern award rate with the relevant rate under the transitional instrument.

PN1098

THE COMMISSIONER: Yes.

PN1099

MS ZADEL: And paid by whichever is highest.

PN1100

THE COMMISSIONER: Yes.

PN1101

MS ZADEL: And so the equal remuneration order required us to look at that and then adds the equal remuneration payment as per the order on top of that rate. So we think that removing that - - -

PN1102

THE COMMISSIONER: It's the mechanism by which you know what you are actually supposed to pay.

PN1103

MS ZADEL: Yes. So it would make it very difficult to pay in accordance with the order if the schedule were removed.

PN1104

THE COMMISSIONER: That sounds reasonable. Does any disagree with that proposition?

PN1105

MS SVENDSEN: No.

PN1106

THE COMMISSIONER: No. All agreed with AFEI proposal. Are there any other matters in respect of this award? No? Beautifully done. Thank you all for playing. Thank you for your contributions. As I said earlier - it was early in the day and not everyone may have been here, but my notes will be drafted up and perhaps finessed somewhat and circulated to the parties to comment on whether or not there is any different view about that is the agreed course, and then I think we will do that as a first step and then subsequent to that, have the Award Mod team put out another exposure draft tracking the changes that we have made consistent with the discussion that we've had today.

PN1107

Of course there may be areas where arising from discussions within the Commission that despite the furious agreement of the parties, we might not agree with you and we will obviously let you know about that. That's all for today on this particular award and I look forward to seeing a number of you - - -

PN1108

MS SVENDSEN: All of us.

PN1109

THE COMMISSIONER: Every single one of you - - -

PN1110

MR COONEY: Not the ASU.

PN1111

THE COMMISSIONER: Not the ASU - - -

PN1112

MS SVENDSEN: Not the ASU. Sorry. I forgot about you.

PN1113

THE COMMISSIONER: All right. Thanks, Mr Cooney. Is there anyone else - it's always a worry. There is no-one else that would come to the 2 o'clock, other than those that are here?

PN1114

MR ROBSON: There could be the nurses - - -

PN1115

MS SVENDSEN: No, they've sent a letter saying they can't come.

PN1116

MR ROBSON: Commissioner, I have to apologise if you're - I've scheduled an appointment in the break. I won't be able to be back before 2 pm.

PN1117

THE COMMISSIONER: That's okay. We will leave it at 2.00. All right. See you all then.

ADJOURNED TO A DATE TO BE FIXED

[12.38 PM]