



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL
COMMISSIONER ROE**

AM2014/196 and AM2014/197

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/196 and AM2014/197)
Part-time Employment and Casual Employment**

Sydney

11.04 AM, TUESDAY, 29 NOVEMBER 2016

Continued from 28/11/2016

PN463

VICE PRESIDENT HATCHER: I will first indicate that Bull DP is unavailable to sit with us today but he will, I assure you, read the transcript and participate in our deliberations. Now, I understand the parties want to deal with the passenger vehicle award first?

PN464

MR KING: If your Honours please.

PN465

VICE PRESIDENT HATCHER: Mr King, you appear for the - - -

PN466

MR KING: I appear for the Australian Public Transport Industrial Association.

PN467

VICE PRESIDENT HATCHER: Mr Gibian, you appear for the Transport Workers' Union?

PN468

MR GIBIAN: I do.

PN469

VICE PRESIDENT HATCHER: We'll grant parties to be represented by counsel. So who's going first?

PN470

MR GIBIAN: We're in your Honours hands, both parties have applications. It makes sense, from my part, to deal with the TWU application, initially, since they're both relatively narrow points. The TWU application is one of clarification.

PN471

There are two issues that are addressed by the parties, the first is, as I've said, the clarification proposed by the TWU, in relation to clause 10.5, dealing with minimum engagement of school bus drivers and the second issue being APTIA's application to insert provision allowing for reduction of the minimum payment periods for casual employees, upon agreement, in various circumstances.

PN472

In relation to the TWU's application, can I deal with that initially?

PN473

VICE PRESIDENT HATCHER: Is it actually opposed?

PN474

MR GIBIAN: I think, as we understand the position, there's no dispute by any party as to what the award currently means or should mean. That is, that each time a school bus driver commences work they have a minimum payment period of two hours, be that in the morning and the afternoon of the same day or on different days.

PN475

I think there was some debate as to whether the wording proposed by the TWU was as clear as it might be, or not, but I think that's the extent, as I understand it. There's been disagreement about that matter.

PN476

VICE PRESIDENT HATCHER: So, Mr King, obviously you want the additional provision about a lower minimum, by agreement, but subject to that matter is the Transport Workers' Union proposed variation opposed by your client?

PN477

MR KING: Yes, your Honours, because we think that it leaves unclear the outcome. I'm looking at clause 65D(ii) in the exposure draft, when considering minimum engagements for casual employees the words:

PN478

Where solely engaged for the purpose of transportation of school children to and from school the minimum payment of two hours for each engagement.

PN479

Now, our application is designed to give certainty to the two hour minimum payment required for each engagement by a passenger vehicle driver who drives solely school children to and from school. We note, of course, that 65D(ii) is replicated in 10.5(d) of the current version of the PVT A.

PN480

It's our application that the definition of "an engagement" means a start and that this simple addition should be added to the clause. If what my friend means is that he doesn't oppose that, then we are in furious agreement.

PN481

VICE PRESIDENT HATCHER: You're in agreement as to the substance, the disagreement is about how it should be drafted, that's right, isn't it?

PN482

MR KING: That may well be the case.

PN483

VICE PRESIDENT HATCHER: All right. Well, having clarified that I'll let Mr Gibian make his submission.

PN484

MR KING: Thank you.

PN485

MR GIBIAN: That can abbreviate what I'm going to say, obviously it is our understanding. As to the wording, the union thinks its wording effectively achieves the outcome that everyone desires. I think what's been lost in the position that APTIA raised, in this respect, on a previous occasion is that what is proposed by the TWU is to retain clause 10.5(d), as it presently exists, and that is

as it currently provides that a casual employee is paid a minimum payment of three hours pay for each shift. Then that, in the second sentence:

PN486

A casual employee, engaged for the purpose of the transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement.

PN487

There's nothing there that indicates whether that's a necessity that the two hour payment be made twice on the same day.

PN488

What's proposed to be added is a new subclause 10.5(e), which is a permissive clause. That is, that would provide that a casual employee solely engaged for the purpose of transportation of school children to and from school may, that is, permissively, doesn't have to be, but may be rostered to perform two separate engagements per day. If that occurs there'll be a minimum payment of two hours for each separate engagement.

PN489

Now, that's consistent with the understanding of all the parties as to the effect of the present provisions but since some uncertainty was raised, at least by the Fair Work Ombudsman, as to its operation we've sought to add that clause.

PN490

As we understand it, to the extent that there's said to be any deficiency in the wording proposed by the TWU, that is, firstly, that there's some issue as to whether it would require a driver to be engaged on both the morning and afternoon runs and not permit a person to be engaged only on one of those, that's not what the wording says and it's not what it is intended to mean.

PN491

As I say, (d) makes clear that the minimum payment, per engagement, for a school bus driver solely engaged in school runs is two hours and doesn't require that that be once or twice in the day. The provision proposed to be added is a permissive one, allowing or clarifying that where two engagements are on one day there will be a minimum payment of two hours for each of the engagements.

PN492

The second issue was that one of the witnesses called by APTIA, Mr Doolan, raised an issue as to the existing award, essentially to the effect that he had received advice that in the event that a school bus driver was engaged only in the morning or only in the afternoon there would be a minimum payment of three hours, rather than two hours. The position, in respect of that issue, is that so far as the union is aware no one has ever raised that issue, either in the initial award modernisation or the two-yearly review or in any submission advanced in these proceedings, until Mr Doolan said that in the witness box.

PN493

We cannot see how that is a possible interpretation of clause 10.5(d), as it presently exists, and certainly would not be a possible interpretation of the provision, if it is amended as the union has sought. If Mr Doolan received some advice in that respect it was erroneous advice.

PN494

VICE PRESIDENT HATCHER: Do you know who he received the advice from?

PN495

MR GIBIAN: A Western Australian Association was his evidence. I'm not sure of its precise name, the precise name of the organisation. Those were the only two issues that we understood had been raised, in relation to the clarity of the wording. As I say, we think the wording that's proposed is appropriate.

PN496

VICE PRESIDENT HATCHER: Thank you. Mr King?

PN497

MR KING: Thank you, your Honour. APTIA's concern, your Honours, is with the form of the TWU's proposed amendment, which is similar to that in their application in the two year review, which was properly rejected by Bissett C, you should see paragraph 27 of APTIA's submission of 12 October 2015, because it may be construed as a requirement of minimum of two engagements for such a school bus driver when the evidence shows that in many instances a school driver may only do a morning shift or an afternoon shift but not necessarily both.

PN498

Indeed, as I understand the tenet of my friend's submissions, and he made it clear during the hearing before your Honours, that he freely acknowledged that - sorry, I should withdraw that. Mr Giddens, in his evidence, freely acknowledged that school bus drivers share their shifts and often only work mornings or afternoons.

PN499

If I can ask your Honours to go to PN211, towards the end of his evidence on that page, the second last entry:

PN500

As I've said -

PN501

This is Mr Giddens:

PN502

There's no reason why they can't work two hours in the morning for five days, or two hours in the afternoon, or a combination of either a mix.

PN503

Again, at 525, your Honour the Vice President asked a question, at the bottom, Mr Giddens responded:

PN504

No, except that if a person only does the morning run and the minimum payment is two hours.

PN505

It's therefore our respectful submission that the proposed amendment of APTIA is to simply insert the word "start" alongside of "engagement".

PN506

With respect to this particular provision my friend may have some concern, I don't know what it is, about defining the word "engagement" in the simple way that we have said, and we can accommodate that by simply making it a provision, with respect to that matter.

PN507

However, as your Honours know, APTIA goes further in this case and applies to this Full Bench to vary the existing clause further to allow the parties, that is employers and employees, by agreement, to reduce the minimum engagement to less than two hours for each start in specific circumstances. First, where the employee has secondary employment or the employee is in receipt of other income or benefits, or the employer does not have enough work for a minimum engagement, or the employee cannot complete the full shift.

PN508

The evidence of the TWU clearly identified that the workforce in the industry is an aged one and there are circumstances in which shifts are shared and arrangements are made to accommodate drivers who are looking to work lesser hours.

PN509

For example, Mr Murray, in his statement, exhibit 271 at paragraph 11, stated that he believed the company can already provide flexibility arrangements. In itself an acceptance of the need for that flexibility. Also see PN313 of the transcript of Mr Murray, in cross-examination.

PN510

In the evidence of Mr Edwards, which your Honour's marked as exhibit 272, it was confirmed that newer drivers who limit their hours of work in a week so they don't get their entitlements taken off otherwise, and I refer your Honours to paragraph 356 and 358, PN356 and 358, I won't read them.

PN511

Can I mention, briefly, the evidence of other witness, in particular for APTIA? Mr Doolan raised the issue of a separate morning and afternoon engagement for his casuals. He did indicate to his Honour that he would prefer flexibility if he's only able to pay two hours for a single engagement, see 487.

PN512

On behalf of APTIA Mr Ferris also indicated flexibility would be enhanced by having a casual school bus driver for one hour in the morning and three in the afternoon, to meet a four hour requirement, see 571 to 574. Mr Ferris also gave

evidence of a side agreement, which drivers had requested lesser hours, and that was accommodated, see 585.

PN513

Your Honours, we have made comprehensive submissions, on 12 October 2015, which set out the two-pronged approach of the application. That is to say, defining what is meant by the term "engagement" in clause 6.5(d) and seeking a variation of the provision within the exposure draft to include, by an agreement, that is, by agreement, an opportunity to vary and reduce the minimum hours further.

PN514

On this question, your Honours, we do say it's consistent with the Fair Work Act and the objectives in section 134 and particularly the issue of social inclusion, because, as Perry J said recently, in a case in which my friend was on the other side, a dismissal case, *Cole v Kiama Buslines(?)*, that the flexibility in workplace arrangements, particularly In relation to more aged workers, the response was particularly in relation to bus industry workers, was positive.

PN515

So, your Honours, those are our submissions. We note that there are directions that your Honours have made, I think on the 18th, and we, of course, will provide that material in due course.

PN516

VICE PRESIDENT HATCHER: All right, Mr Gibian?

PN517

MR GIBIAN: Yes, thank you, your Honour. Just briefly in relation to the TWU's wording, my learned friend referred to the decision of Bissett C, which didn't embrace wording that had been suggested by the union, in relation to this issue, in the two-yearly review. That's a decision at [2013] FWC 3221.

PN518

Can I just note, at paragraph 18 of that decision sets out the clarification that was then proposed by the TWU, which referred to broken shifts and engagements in the same provision. I think the concern that the - which is quite different that what's now sought and I think the concern that the Commissioner expressed was as to the relationship between the terms "shift" and "engagement". But that's not an issue that arises in the present wording.

PN519

We do think that the wording that has been proposed by the union is better because it squarely addresses the issues that had been raised by the Fair Work Ombudsman, and that is what the minimum payment period is, in the event that a bus driver, as the majority of drivers do, works a period in the morning and a period in the afternoon.

PN520

In relation to the proposal by APTIA to introduce a provision which would permit the reduction in the minimum payment period for casual employees, can I just

note a few things about the effect of the wording that is proposed? Firstly, it appears to apply, generally, to casual employees and not only to persons engaged in school bus work. I'm just looking at the text that appear in paragraph 6 of APTIA's submissions. That is, it appears more generally to casual employees covered by the award and not merely to school bus drivers and would allow a reduction in the minimum payment period, in any circumstance covered by the award, in the absence of the evidence really addressing any situation other than school bus drivers.

PN521

VICE PRESIDENT HATCHER: That's now what the draft determination says, that was filed on 16 July 2015.

PN522

MR GIBIAN: Sorry, your Honour, filed on the?

PN523

VICE PRESIDENT HATCHER: 16 July 2015.

PN524

MR GIBIAN: I'm going off the submissions in October 2015, which - - -

PN525

VICE PRESIDENT HATCHER: That's in paragraph 6?

PN526

MR GIBIAN: Yes.

PN527

VICE PRESIDENT HATCHER: I think it's been changed to reflect the exposure draft, rather the existing award, which may explain the difference.

PN528

MR GIBIAN: Perhaps Mr King could clarify what the wording is that they do - - -

PN529

VICE PRESIDENT HATCHER: Mr King, there's no doubt that the variations only apply to a causal employee solely engaged for the purposes of transportation of school children to and from school?

PN530

MR KING: Yes, and it's reflected in the exposure draft of the proposal. Your Honour's correct.

PN531

MR GIBIAN: Do they not press the wording that's in their subsequent submissions?

PN532

VICE PRESIDENT HATCHER: I think we're more concerned about the merit of the proposal stage, rather than the precise drafting of it.

PN533

MR GIBIAN: Yes, indeed. If that's the intention, it's certainly not how that was drafted.

PN534

The second observation I was going to make is that the proposed provision contains no restriction on the minimum payment that could be agreed, pursuant to the clause. That is, there's no floor, it could be reduced by any amount, subject to the agreement requirement.

PN535

Thirdly, the effect of the provision would be to provide what is essentially an award flexibility provision. That is, allowing the variation of the minimum payment periods applying at least to school bus drivers. In the absence of the protections which are ordinarily attached and, indeed, are required by the Act to be attached to such a provision, and obviously the award already contains, in clause 7, an award flexibility provision. But it appears that what's proposed here, is that there would be the capacity to alter the minimum payment periods, in the absence of requirements for either written agreement or for the employee to be better off overall, or that there be, expressly at least, genuine agreement or for there to be a capacity to terminate that arrangement.

PN536

Fourthly, although it is prefaced by agreement, there would be nothing that would apparently prevent an employer from advertising or offering a job, on the basis that there be agreement to a particular engagement or payment period for a casual employee who takes up that work.

PN537

In short, in light of those matters, the Full Bench would not accept that such a provision is necessary to achieve the modern award objective. Indeed, that if that such a provision were incorporated into the award, it would fail to provide a fair and relevant safety net of conditions for casual employees engaged at least as school bus drivers.

PN538

As I've mentioned, the provision doesn't sit well with section 144 of the Act, which sets out the requirements for a flexibility provision and doesn't reflect those requirements.

PN539

To the extent that any merit cases advanced, in support of the proposed provision, the submissions appear to rely heavily or, perhaps, entirely, upon the proposition that there are certain categories of employee who may wish to work a lesser number of hours. And, with respect, there seems to be little logical connection between that proposition and a proposition that there will be a shorter minimum payment period, or minimum engagement period, for school bus drivers.

PN540

The appropriate flexibility is already available, under the award, by arrangements being put in place for employees to work a lesser number of shifts per week. The

examples that are often mentioned, in the evidence and the submissions, are of employees who are older employees who might, either because they wish to scale back the amount of work they're doing, for obvious reasons, or because of the effect that earnings may have on pension entitlements or other entitlements, wish to work lesser hours. As I say, that is perfectly capable of being accommodated by a person working lesser number of days per week, or a lesser number of shifts or engagements per week, rather than shortening the engagement. How it would assist a semi-retired driver to work one hour or one and a half hours in the morning and one hour or one and a half hours in the afternoon, rather than a two hour period, or receive a two hour payment in the morning, is, with respect, somewhat mysterious.

PN541

The evidence of the TWU witnesses was, in fact, that the vast majority of school bus drivers wish to work the morning and the afternoon shifts and do so with great regularity. Indeed, APTIA's evidence was not any different in that respect. The evidence that was put forward by its witnesses was consistent in agreeing that the overwhelming majority of school bus drivers wanted to work and did work the morning and the afternoon shifts, five days a week.

PN542

To the extent that the witnesses who gave evidence explain any concern they had in relation to the minimum two hour engagement period, ultimately Mr Doolan, who was from an Australian Transit Group, operating in Western Australia and the Northern Territory, clarified in his oral evidence that he was perfectly comfortable with the two hour requirement, that his concern was this three hour issue that if, on his understanding, a driver was engaged only on one of the morning or the afternoon runs, that they would be required to have a three hour minimum engagement and if it was clarified that the minimum engagement was two hours, his evidence was, at PN486 to 488, that he was perfectly comfortable with that, in the context of his business.

PN543

In the case of Mr Ferris, from Buslines Group, his evidence was that he was entirely covered by enterprise agreements and not directly affected by the award, in any event. His evidence, at PN592 to 595 was that the gist of his complaint was that he wanted the award to be changed so that he didn't lose out on workers going to other employers because they wanted longer periods of engagement, not shorter periods of engagement.

PN544

At best there are a couple of isolated examples of employees, I think it was mentioned, a cabinet maker and an auto mechanic who wanted to finish at a particular time. We don't think that kind of evidence would motivate a change of this nature to the award, applying generally across the bus industry. In those circumstances either the employee can accommodate, according to its operational arrangements, the requirements of those small number of individuals, or it cannot. That evidence does not support the making of the alteration to the agreement that is sought.

PN545

Unless you have anything further.

PN546

VICE PRESIDENT HATCHER: Anything in reply, Mr King?

PN547

MR KING: Just briefly, your Honour and simply to respectfully draw attention to three matters. When APTIA wrote to the Human Rights President, on 4 March this year, we attached certain documents referred to in our submissions, in support of our position and I, of course, don't seek to read them but I just draw attention to them. There was an issues paper, Employment Discrimination Against the Older Willing to Work, and there was a national inquiry into employment discrimination against older Australians and disability. That comes back to this issue of flexibility, in the context of section 157 and 156, so which I referred to earlier.

PN548

VICE PRESIDENT HATCHER: How does reduction to something less than two hours assist an older worker remaining in the workforce?

PN549

MR KING: Because there's evidence from a number of persons on this. For example, Mr Murray, who is 55 and your Honour asked him some questions about that, whether he was in receipt of a pension. That's at 286. At 290 he was asked:

PN550

So, for example, there are some older drivers who are in receipt of a pension who wish to put a cap on it---They don't treat it as their pension entitlements. I wouldn't say a cap, I'd say they're very wary of what they do so as they don't affect their pension.

PN551

Then, at - - -

PN552

VICE PRESIDENT HATCHER: There's no evidence that two hours work, if you did it five days a week, would affect your pension entitlement, would it?

PN553

MR KING: Well, at 313 he was asked about paragraph 11 of his statement and he made the observation about negotiating a job sharing arrangement for two permanent drivers who was told by the operational staff that it wasn't possible to be done. After investigating he found it could be done so he went in there and got that arrangement completed. But currently he says:

PN554

I do know of some older drivers now who are looking to cut back and are interested in job sharing arrangements, whether that be casual, permanent or permanent part-time. But I do believe it's got to be accommodated now anyway, in the NES, that's my understanding.

PN555

VICE PRESIDENT HATCHER: What's that got to do with it?

PN556

MR KING: What it has to do with it, your Honour, is that it demonstrates that there are a number of drivers, particularly those in their personal circumstances, whether it's by way of a threat to their pension, so they're working casually part-time, or because of particular family arrangements, wishing to have a lesser involvement but to do particular runs.

PN557

VICE PRESIDENT HATCHER: Mr Murray's evidence about permanent drivers who want to move down to share between the two of them, a permanent role, which presumably means 19 hours a week each, or in that vicinity, but I don't know how you get from 19 hours a week down to less than two hours a start.

PN558

MR KING: Well, at 356 he spoke about that:

PN559

Although I'm not an authority on - - -

PN560

VICE PRESIDENT HATCHER: Sorry, what's that, 356?

PN561

MR KING: 356:

PN562

Although I'm not an authority on pension entitlements I certainly know some drivers do limit the hours they work per week so they don't get entitlements taken off them.

PN563

And he referred, at 358, to Kangaroo Buslines. the number of drivers that negotiated to work less hours simply because of whatever their personal requirements may be, to throw a curveball.

PN564

We have a driver who doesn't work Wednesday afternoon so he can go and play golf.

PN565

I threw a curveball back at him and he seemed to agree with that.

PN566

So it really comes back to the desirability and flexibility subject to, of course, agreement. That's the fundamental protection of all.

PN567

VICE PRESIDENT HATCHER: We're talking about casuals so, effectively, that can simply mean, "If you want a casual shift tomorrow you agree to this", doesn't it?

PN568

MR KING: Yes, but what's being proposed is that that flexibility is reflected in the payment arrangement that's reached as well.

PN569

I did also, in that letter to your Honours, two other papers that are worth referring to, on the issue of flexibility, Moving People Operator Guidelines, Health and Wellbeing Awareness Guide, prepared by BOC and APTIA in March 2015 Finally, Bus and Coach Drivers Health and Wellbeing Survey, of Interact Management, 7 June 2013. Thank you, your Honours.

PN570

VICE PRESIDENT HATCHER: Thank you. We'll reserve our decision in relation to that matter. Mr King, you're now excused and we'll move on to the next matter, relating to the Long Distance Road Transport Award. Mr Gibian, do you continue your appearance for the Transport Workers' Union?

PN571

MR GIBIAN: May it please the Commission.

PN572

VICE PRESIDENT HATCHER: Mr Ferguson, you appear for the Australian Industry Group?

PN573

MR FERGUSON: I do, your Honour. I also appear on behalf of Road Freight New South Wales.

PN574

VICE PRESIDENT HATCHER: What's that?

PN575

MR FERGUSON: It's the peak trucking industry body for New South Wales, not a registered association, and only for the purpose of indicating their support for the application.

PN576

VICE PRESIDENT HATCHER: In Canberra, Ms Ballard, you appear for NatRoad?

PN577

MS BALLARD: Yes, your Honour, I appear for NatRoad.

PN578

VICE PRESIDENT HATCHER: Right, Mr Ferguson?

PN579

MR FERGUSON: Thank you, your Honour. Now, the Full Bench would be aware, the purpose of our application in these proceedings is to facilitate the introduction of part-time employment into the Road Transport Long Distance Operations Award 2010.

PN580

We filed a very detailed set of submissions in these proceedings, dated 26 October 2015, and we also filed an amended draft determination, setting out the specific variations. That was attached to correspondence addressed to your Honour, the Vice President, dated 23 December 2015.

PN581

VICE PRESIDENT HATCHER: I'm not sure we have that.

PN582

MR FERGUSON: It appears on the website and I apologise I've not brought copies. My correspondence indicates there's no substantive difference from the previous determination, although I'll confess, in the year that past, I've forgotten the subtleties for why I filed an amended determination.

PN583

VICE PRESIDENT HATCHER: I certainly have the July 2015 version. What was that date again, Mr Ferguson?

PN584

MR FERGUSON: 23 December 2015.

PN585

VICE PRESIDENT HATCHER: We'll just see if we can find that.

PN586

MR FERGUSON: More recently we filed submissions in reply to the TWU's submissions, they're dated 22 November, obviously with a desire to speed these proceedings up to some degree.

PN587

That material collectively sets out all the merit based arguments that we - - -

PN588

MR GIBIAN: Can I just say something about the further submissions. Obviously they were very late received, I'm somewhat disconcerted about that, but more particularly there's two annexures that are referred to which contain some material, including material on an evidentiary basis, which apparently was derived from the two-yearly review process.

PN589

We do object to that material being received at this point, on two ground. One is that this application has been put forward by AIG, in the absence of any witnesses or any other evidentiary support being put forward to support it, but we now have some material put forward, at the very last minute, that wasn't even prepared for these proceedings but for proceedings a couple of years ago, all, obviously, in the absence of any opportunity to contest it, or the like.

PN590

Secondly, it appears to be annexed because of a misapprehension in relation to the TWU submissions. It's apparently to answer the contention that industrial parties

have not previously put forward part-time provisions in the history of the Long Distance Award and prior equivalent awards. Obviously the TWU submission do not say that that was not done in the two-yearly review, it was obviously done in the two-yearly review and subject to a decision by Harrison SDP and the submissions do not say that that was not done as part of a two-yearly review, and referring detail to the decision of the Senior Deputy President, in relation to the two-yearly review.

PN591

VICE PRESIDENT HATCHER: Mr Ferguson, we can't really receive that as evidence at this late stage.

PN592

MR FERGUSON: I seek to rely on it only as documentary evidence and to rely on it in a manner similar to what my learned friend has put. The TWU put submissions that, in effect, there's consistently been a lack of support within industry or within interested parties for the introduction of part-time employment in this sector. Now, what we've filed is evidence that was uncontested evidence in the two-year review, and the TWU were a party to those proceedings, and we rely on it simply to the extent that it evidences the fact that there was broad-ranging support, in the context of those proceedings.

PN593

The statement itself goes to - - -

PN594

VICE PRESIDENT HATCHER: I'll take it as, perhaps to cut to the chase, that there were some people who supported a variation in the 2012 review.

PN595

MR FERGUSON: Yes.

PN596

VICE PRESIDENT HATCHER: That's as high as we can put it.

PN597

MR FERGUSON: That's right.

PN598

VICE PRESIDENT HATCHER: Is that acceptable, Mr Gibian?

PN599

MR GIBIAN: Yes, your Honour. We didn't say anything to the contrary in our submissions.

PN600

VICE PRESIDENT HATCHER: We'll admit it on that limited basis.

PN601

MR FERGUSON: As I indicated, the material sets out our merit-based arguments. We've been at pains to try and identify all those elements of the modern award objective which we say weigh in favour of granting the claim.

We've also sought to identify those broader objects of the Act, which we say would be consistent with the granting of the claim, and various other merit-based arguments.

PN602

I don't want to take the Full Bench through all that detail, of course, but I just want to make some overarching observations about the merits of our claim, some of the general deficiencies in what's put against us and deal with, briefly if I may, with the small amount of evidence that has been advanced.

PN603

In terms of the merits of the claim, we say that part-time employment is an inherently desirable outcome, in the context of awards. It's long been endorsed by this Commission, and its predecessors, and almost, of course, every single award within the system allows for part-time employment. There are just a very small number that do not. We say the absence of part-time employment in this sector, without any meaningful reason for it, is not only anomalous but it's unfair. Unfair to both employers and to employees.

PN604

We say it shouldn't be contentious for this Commission to accept that there are a range of reasons why employees may want to work part-time. They could include matters such as care and responsibility, family commitments, some kind of illness or injury which prevents full-time work, or situations where an employee wants to reduce their hours as they transition to retirement.

PN605

Now we say, in essence, there's nothing before this Commission to suggest that employees engaged in the long distance transport sector are some special class of employees that don't have those similar desires and reasons for wanting to work part-time.

PN606

VICE PRESIDENT HATCHER: There's some special characteristics in that because it involves long distance driving there's a limit as to how much you can work, for example, part days, as distinct from most other types of work.

PN607

MR FERGUSON: It is.

PN608

VICE PRESIDENT HATCHER: I think it's partly recognised, in the casual provisions, that it suggests that a single full day is basically the minimum that you can work, in a practical sense.

PN609

MR FERGUSON: Let me come to that. There's really two lines of substantive opposition, one is opposition to the structure of part-time employment going into the structure of the award. The second one is limitations flowing from the nature of the work, or the industry, if you will.

PN610

Now, we don't accept that there's any real limitation on the availability of part-time employment or the suitability of part-time employment that flows from the nature of the work. The reality is that practices, such as the implementation of changeover arrangements mean that employees can work, in the sector, now, single days of duties, as such. So an employee employed to work on a long distance operation, which may be from Melbourne to Sydney, and I may be getting the locations wrong, now performs work in a way that that run is effectively split up between two drivers.

PN611

The evidence of the TWU's witnesses, or the one witness that we cross-examined, went to the fact that even at Toll there was implementation of changeover arrangements and that changeover arrangements are implemented quite broadly.

PN612

What that means is the long distance operation, which must be a journey exceeding 500 kilometres, or an interstate journey, a return journey, can be broken up so that two drivers perform it. One can perform half the journey, go to a place such as Tarcutta, and then come back, rather than driving the whole way. That means that they're not required to be away for days on end, in the sense that some long distance drivers may have been, in years gone by, or still are, because they're travelling around Australia to various locations.

PN613

So that means, firstly, that, of course, an employee can perform a single day. The real issue here is, is there capacity to have employees working part-time, in the sense of working less than 38 hours, and the answer must be yes. Yes, there is, because they could work less than 38 hours on those sorts of arrangements.

PN614

Of course, people often think of long distance work as just involving the interstate line haul operations, but there's also a lot of intrastate work that is undertaking. I don't think my learned friends will dispute this. Product needs to travel all through Australia and not every journey needs to take multiple days to undertake. There are some return journeys of in excess of 500 kilometres that can be done in a day.

PN615

Now, that all just goes to really establishing that people can work one day a week, perhaps, and part-time in that sense. But I take your Honour's point that much of this will mean that employees aren't necessarily doing particularly short days and we - - -

PN616

SENIOR DEPUTY PRESIDENT HAMBERGER: The problem, perhaps, is more the nature of the way the award works. Rather than the nature of the work, per se, because you can clearly do two days a week, let's say.

PN617

MR FERGUSON: Yes, one day, two days a week.

PN618

SENIOR DEPUTY PRESIDENT HAMBERGER: One day, two days, three days, whatever, so you can do that. But it's the nature of the way the award works, because it's not an hourly rate of pay, in the normal sense, that's probably more tricky.

PN619

MR FERGUSON: I understand that, and I was coming to that issue. The way the award works is atypical, in terms of its remuneration structure. To put it simply, there's a driving rate, which is typically a per kilometre rate, in practice, but it could be a kilometre rate or an hourly rate. That is a loaded up rate. It's not a low rate, by any means, it's includes a notional overtime component, industry component, which means, without taking you through the formula, that it's rated - loaded up by more than 50 per cent on the minimum rates. Now, that's underpinned by a safety net mechanism whereby drivers have to receive a minimum fortnightly pay, passed on the minimum rate, the unloaded rate.

PN620

VICE PRESIDENT HATCHER: The danger is that currently most drivers just do however many kilometres they drive and they get the greater of that or the minimum fortnightly pay. The danger would be, unless there was some appropriate control put in place, that you simply engage people on a part-time basis, you still drive them as many kilometres as you can but the guarantee, effectively, is reduced to a day's pay.

PN621

MR FERGUSON: That's right. In terms of the guarantee what we sought to do, and I understand, I'll deal with that, we sought to make it a simply pro-rataing mechanism, so you pro-rata the minimum fortnightly payment, right?

PN622

The inherent protection is, we say, that there has to be agreement about the number of hours that will be worked. Conceptually I don't see that there's a big difference between part-time employment and full-time employment. In reality, there are many truck drivers that perform a lot of hours, far more than 38, as such, and I don't think my friends will disagree with this submission, but the safety net is rarely applied, in practice, in terms of payments to actual drivers. Most drivers earn far more than that, based on the kilometres they drive.

PN623

Now, we say there's no reason why a driver can't agree to do a particular number of hours, which will be reflective of a single trip that they may regularly do, and that might reflect one day's work and that that be their safety net in case, for some reason, that work is not undertaken, but they wouldn't be required to do any further trips, unless they chose to.

PN624

The NES affords a protection to employees, in terms of reasonable hours of work, and that's structured so that it's broken down by reference to a part-time employees' ordinary hours of work. So if a part-time employee agrees to perform just a limited number of ordinary hours of work, they can't, unreasonably, be

required to work additional hours. So, ultimately, the main safeguard that we say would be applicable is that it's the agreement of the driver to this arrangement that implements it.

PN625

VICE PRESIDENT HATCHER: If there was an overtime award I'd be inclined, speaking for myself, to say that we can do that but it's overtime if you work more than the agreed days. But we don't have an overtime rate, we have a casual rate, perhaps that could be a substitute.

PN626

SENIOR DEPUTY PRESIDENT HAMBERGER: In paragraph 43 of your submissions you suggest that an alternative approach would be to satisfy an agreed number of days. I suppose I wonder, because that does have some traction to me that it's a two day a week engagement, three day a week engagement, you know it's only going to be those days.

PN627

MR FERGUSON: Yes, and I suppose we've advanced this in the face of blanket opposition but we concede that there might be another way of doing it, an extra safeguard, if you will, that could be construed.

PN628

One might be that the driver and the company have to agree on the number of days, or journeys. There might even be some sort of limitation on whether or not extra journeys could be undertaken without some sort of written agreement, or something like that. We wouldn't be opposed to that and a point that we've tried to develop in our submissions is that, of course, the Commission, in the context of this review, isn't bound in terms of the agreement it grants, by the form of the application. If we were to reach a view that the introduction of part-time employment is necessary, in order to meet the awards objective, or even reach that view on a provisional basis, there may be merit in a fuller, further process for identifying precisely how that was introduced.

PN629

SENIOR DEPUTY PRESIDENT HAMBERGER: But if you're on a kilometre rate so what does the part-time agreement actually say? What's the agreement to do so many kilometres in a certain time?

PN630

MR FERGUSON: No, you'd have to agree to work a minimum - a certain number of hours per week. But there's no theoretical distinction between what happens between a part-time employee and a full-time. Full-time the award talks about you being engaged for 38 hours a week, or 38 ordinary hours a week but, in reality, you can work far more without receiving any higher penalty.

PN631

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but these are people who want to get as much income and hours as they can. But if we're dealing with an hypothesis of an employee who wants to work a limited number of hours, or a

limited number of days, I'm just trying to figure out what their part-time employment agreement actually says, in terms of the restrictions upon it.

PN632

MR FERGUSON: We hadn't proposed a restriction but one could be, quite simply, that they can't be required to perform additional journeys. If there was a provision that you said, you'd just agree on the number of journey's you're required to undertake.

PN633

SENIOR DEPUTY PRESIDENT HAMBERGER: Journeys?

PN634

DEPUTY PRESIDENT KOVACIC: How would can you see that, Mr Ferguson, in the sense that depending on the nature of the operator, and you used the example of the changeover between Sydney and Melbourne, but if an operator requires a part-time driver to perhaps do a longer run, which would, on any sort of measure, take them beyond the two days, what's the protection for the driver in those circumstances?

PN635

MR FERGUSON: The National Employment Standards, which protect employees from being required to perform unreasonable additional hours, and that's by reference to their ordinary hours. I do see what you're saying, if they agreed on set ordinary hours and that journey was well in excess of that, that would apply. It's the same situation, but at a different point, that applies in relation to long distance drivers. They may have worked close to 38 hours or 38 hours and be required or directed to perform another run. It's the same protections that apply at that point, it's just for a part-time employee they kick in at an earlier level.

PN636

DEPUTY PRESIDENT KOVACIC: But unlike most workers, drivers can't say, at a certain point, "I'm stopping working", and leave the truck there because they'll be halfway to Whoop-whoop.

PN637

VICE PRESIDENT HATCHER: The problem is, you agree to work two days, the second day you turn up for work and the employee says, "I want you to go to Perth." Then they have to say, "Well, I'm not going at all", and then what happens then?

PN638

MR FERGUSON: Well, they could say, of course, that they're not going at all and refuse that task, but they'd still get the safety net. If they hadn't secured their number of agreed, guaranteed hours, if you will, they'd still get the protection of the safety net, as agreed. So they couldn't be left without whatever they're guaranteed hours were, the same way a full-timer can't be left without the guaranteed 38, if you will, it's just at a different point.

PN639

I take your Honour's point about the overtime distinction as well, but the reality is not all awards in the system require that hours worked outside of the originally agreed hours attract an overtime component.

PN640

Now, I think this sort of issue was ventilated in the context of the review of the Firefighting Industry Award. There was a background undertaken and I don't want to get into that detail, but I think they've identified that about two-thirds of awards operated on that basis, but that the other third didn't. I think we've identified the Wine Industry Award in our submission as one that didn't require the application of penalty rates as soon as you moved beyond the guarantee or the previously agreed part-time hours.

PN641

SENIOR DEPUTY PRESIDENT HAMBERGER: Could you have a clause that just says you reach an agreement on the number of days and you can't work additional hours?

PN642

MR FERGUSON: Or additional days.

PN643

SENIOR DEPUTY PRESIDENT HAMBERGER: Or additional days. You can only work those two days, there's no scope for being required to work, or not being required but even being asked to work extra hours. So it's just a prohibition.

PN644

MR FERGUSON: You could have a complete prohibition on that and that would, of course, overcome some of these concerns.

PN645

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, it's less flexible but it's one way of getting around the problem.

PN646

VICE PRESIDENT HATCHER: That would be read with a capacity of then to, if they wanted to do addition work they'd be engaged as a casual on a separate arrangement and they'd get paid for casual work.

PN647

MR FERGUSON: It could. Or to adopt another common mechanism is could apply only - any other arrangement could be applied only at their election. I don't know if the Full Bench would take as much comfort from that but, of course, some awards have provisions that require the employee to elect or, in effect, to initiate. I understand it has less force, but we would prefer to see some facility for part-time employment, for those that need it. I don't think it can seriously be disputed there would be some employees, or potential employees in the sector, that either need it or want it, especially given the realities of an ageing workforce and we would prefer to see some capacity to enable that to occur. The reality is, some businesses are going to have fixed runs that they do, regularly.

PN648

SENIOR DEPUTY PRESIDENT HAMBERGER: That's right. That's what I'm thinking about, the standard ones they do every week and somebody who wants to work a couple of days a week, he will do those runs on those two days.

PN649

MR FERGUSON: That's right. And any variability in hours then is probably more in the nature of the usual one, in that there might be some variance because of traffic, or whatever, but there's general agreement on what it is and that might provide a sound basis. As I said to you earlier, we hadn't been convinced that all of those additional safeguards were necessary and, in that sense, hadn't called for them, but we would very much prefer to see some facility for part-time employment, even if it's restricted.

PN650

DEPUTY PRESIDENT KOVACIC: Just unpacking that proposition, in terms of an approach which might be premised on a number of days per week and whether it's an absolute cap or whatever, how would that be reflected in practice? I mean arguably driving law limit the number of hours that a driver can legally drive at 12 a day, so does that mean that, arguably, a part-time employee could be working, if they're doing two days a week, 24 hours in those two days? Is days enough?

PN651

MR FERGUSON: I think, firstly, there's some complexities around what the driving legislation requires and perhaps allows for longer than 12 a day.

PN652

VICE PRESIDENT HATCHER: Were they going beyond 14 at one stage?

PN653

MR FERGUSON: I think, depending on the level of accreditation and so forth that the driver has or the operator has.

PN654

COMMISSIONER ROE: Hopefully a safe system.

PN655

MR FERGUSON: There's a whole science to it that I won't profess to understand.

PN656

DEPUTY PRESIDENT KOVACIC: Presumably the same rules would apply to a part-time driver as would - - -

PN657

MR FERGUSON: The same rules apply. The reason we haven't - - -

PN658

DEPUTY PRESIDENT KOVACIC: They might be slightly safer because at least they only work a couple of days a week instead of seven days a week. I hope not seven, they can't do seven.

PN659

MR FERGUSON: That's right. We hadn't thought to limit the number of hours, below 38, that a part-time employee could work. We also hadn't proposed a minimum engagement, in the nature of what's contained in the casual employees' provisions because the reality, and we had, at one stage of these proceedings thought to delete that, but thought maybe for another time. It's hard to see a justification for a minimum engagement provision when these people are performing work on long distance operations. It's met with complete opposition when we've proposed to delete it, but it's there and we don't know what possible purpose it serves but that's why we hadn't put it in. We're not opposed to a minimum engagement if it gave someone comfort, potentially, but we just can't see that it's necessary in the modern awards objective.

PN660

But to come back to your question, I hadn't proposed that there be any restriction below 38. It may be that someone is still keen to work quite a few hours in the day, but just not as many.

PN661

Part of the rationale for inserting the "ordinary hours" definition in is the Act dictates it, of course, section 147 says it's required and in context of the two-year review we ran an application to have that deficiency in the award addressed and rectified, and it was. But that doesn't preclude there being some additional limitation on the number of days or journeys that they'd be required to undertake.

PN662

I think that circumvents much of what I was going to put, other than to briefly address the evidence that's been advanced. There are two employee witnesses that the TWU rely on. I make the observation they both work for the Toll Group, both in one of Toll's division, the line haul division. They've both worked there for extensive periods, I think one for 25 years, one for 23 years.

PN663

The point I make, firstly, is that to an extent they can only assist the Bench in terms of identifying the nature of work that employees of Toll undertake. So while they talk about their hours and all the activities they undertake that is, of course, as an employee of Toll.

PN664

I make the other obvious observation that Toll, based on their statements, has an agreement that applies to these drivers, so they're not actually subject to the Long Distance Award itself, in any event and we can't assume that all the additional work that these people perform is necessarily reflective of the industry.

PN665

But, again, as I've observed, we did cross-examine - - -

PN666

VICE PRESIDENT HATCHER: What are the names of the two witnesses?

PN667

MR FERGUSON: Mr Hosking and Mr Osland. We did undertake a brief cross-examination of Mr Hosking, on 15 August, that was at PN64 to PN107. To an extent, what that went to establishing is the prevalence of these changeover arrangements within the sector. There was also some acknowledgment of the fact that there other employees that perform that interstate work that I talked about.

PN668

VICE PRESIDENT HATCHER: What about where there's an overnight stay in Melbourne? There's consent where you could have a part-time driver who goes out to do a leg, has an overnight stay and then comes back the next day?

PN669

MR FERGUSON: Yes.

PN670

VICE PRESIDENT HATCHER: So what do they get paid for the overnight stay?

PN671

MR FERGUSON: There's nothing in the award that you get paid for overnight stays.

PN672

VICE PRESIDENT HATCHER: I know, but there's a meal allowance or something?

PN673

MR FERGUSON: There's a living away from home allowance and there is certain disabilities compensated for in the industry allowance. There's a very high industry allowance. I can't remember precisely what all of those factors go to, but there's no separate amount that is payable when you stay away overnight. It's part and parcel of being a long distance driver.

PN674

Similarly, a casual employee, in that predicament, wouldn't get extra money. Again, I observe, these are very high rates that these people are paying, they're loaded up by more than 50 per cent on the minimum award rates. I don't mean that - - -

PN675

VICE PRESIDENT HATCHER: It is 50. It's 30 per cent plus 20 per cent.

PN676

MR FERGUSON: That's right.

PN677

VICE PRESIDENT HATCHER: That incorporates every overtime penalty, shift loading, weekend work.

PN678

MR FERGUSON: And the necessity to eat fast food and working irregular hours. There's a list identified in the award. I've got the award if you'd like me to go to it, but no one is challenging the fundamentals of the remuneration structure,

in the context of this review. I mean it may be that both sides have concerns about it. Certainly there'd be views from our side that there are certain developments which may justify the rate reducing and I'm sure my friends will have other observations about it. The point is, and when I say that I mean developments such as the truck's power. I mean trucks travel faster, and so forth. That's a fight for another day.

PN679

The point I'm saying here is that part-time employees won't be in a discernibly different position to casuals or anyone else, in the sense that that may occur, but they'd still be remunerated as follows. They'd, of course, get the overtime component in their rate, for every hour that they work, even though they may never work the assumed hours beyond 38 hours per week. So it's not like they'd be receiving no compensation for the possibility that they're doing overtime. They'd, in fact, be receiving some even though they wouldn't be working a particularly large number of hours.

PN680

In terms of the evidence, the only observation I'd make then is that the witnesses express some sort of opinions or concerns that this might be abused by other operators in the industry. Based on the length of service, and I think there was a concession from Mr Hosking, that he had never applied for another job during his period of employment with Toll. There's really little capacity for them to make meaningful - or there's no basis for them to provide an opinion as to what other employers in the industry might do. That material should be given little to no weight.

PN681

COMMISSIONER ROE: Wouldn't it be reasonable for us to note that it's a very competitive industry and there's plenty of commentary about that, more generally. So it's a very competitive industry, we're trying to - they're very cost conscious, the operators in the industry and given that, if there's a possibility to exploit a new provision in the award to reduce costs, at the expense of the employee, some operators would do that.

PN682

MR FERGUSON: I think the danger in making that assumption is that it potentially overlooks the realities of the labour market, there are driver shortages. It's not necessarily going to be that easy to attract these long distance drivers and I can't point to the same sort of evidence that I've answered in the last review. I think if you're going to make that assumption it would be difficult to place much weight on it without a full picture of the labour market. But in saying that and, again, it's not a provision that we think is necessary, we've even said that one safeguard that could be included is for the part-time to be available as a form of conversion from another form of employment, under the award.

PN683

The evidence said that they have concern that some operators may offer new employment on a take it or leave it basis.

PN684

SENIOR DEPUTY PRESIDENT HAMBERGER: That's not necessarily - if you think part-time employment is something that should be plannable, it may well be that the people who maybe worked in the not long distance sector, experienced drivers who would like part-time work because they're coming near retirement or because they've got family or other responsibilities, but could work for a couple of days or would like to work a couple of days a week, have - I don't actually see that that's - it's the sort of safeguard that I think wouldn't be particularly helpful.

PN685

MR FERGUSON: I think that's excessive. But part of the rationale for this was the ageing workforce and the reality is that you have an ageing workforce, coupled with a growing problem with driver shortages and the reality, which I don't think is controversial, that there'll be older drivers working full-time and what to cut their hours. At the moment the only option available is to convert them to casual employment. That's all that's available, or to terminate them and they have to go and work elsewhere.

PN686

Of course, in saying that, we didn't think that that was the sort of protection that was necessary but if you've got an existing employee, afforded all the protection of the workplace relation system, in terms of unfair dismissals and so forth, and general protection privileges, it's very hard to see how they could be unfairly coerced into it.

PN687

SENIOR DEPUTY PRESIDENT HAMBERGER: I think the worry seems to be, unless I've misunderstood what the TWU is saying and what these witnesses appear to be saying, is that people would be taken on, notionally on a part-time basis, so they'd have an agreement to say they're going to work one day a week and that would then be the minimum - that would be the safety net, but they'd actually work five days a week, or whatever. That seems to be a concern, so that's the concern that needs to be addressed, I think.

PN688

MR FERGUSON: I suppose a more meaningful protection would be the imposition of some sort of limitation on the award, in terms of some sort of extra robust protections around that happening, even if it was a complete prohibition beyond the number of days.

PN689

SENIOR DEPUTY PRESIDENT HAMBERGER: What do you think of that idea of saying you have a prohibition on the number of days, any additional - you can work, as a casual, additional hours, as a separate engagement?

PN690

MR FERGUSON: We would see merit in that, as it's put now, without thinking through it and we can't see any particular difficulties flowing from it, to be honest. It might be a sensible way forward. Then, of course, there is - it may be that none of these concerns actually ever crystallise and there are further reviews that are currently scheduled in the not too distant future.

PN691

SENIOR DEPUTY PRESIDENT HAMBERGER: Don't say that.

PN692

MR FERGUSON: No one wants to say that less than I do.

PN693

DEPUTY PRESIDENT KOVACIC: Let's get through this one first, Mr Ferguson.

PN694

SENIOR DEPUTY PRESIDENT HAMBERGER: Permanent review, permanent evolution.

PN695

MR FERGUSON: That's right. I'm terrified of the prospect. That was all I was really going to put about the mechanics and so forth. We do identify, in our submissions, a concern that as the current award stands and the current requirement that an employee is engaged either as a casual or full-timer, there is a potential exclusion of section 65 of the NES, which is the provision that entitles people to request flexible working arrangements in some circumstances. The obvious ones of relevance potentially being caring for children, or older employees.

PN696

That provision of the Act, and I won't take the Full Bench to all of it, obviously expressly contemplates the ability to request part-time employment. Now, we say that the essential benefit that flows from that provision of the NES is a right to request such flexible arrangements and to only have it refused on reasonable business grounds, as defined.

PN697

Now, we say that the operation of the award effectively excludes that benefit, or negates that provision, because the award would prohibit, regardless of the business grounds if you will, any arrangement whereby part-time employment is ever implemented. We say that the Act, when it refers to part-time employment, is referring to a type of employment, given the Act has obviously been implemented against the backdrop of the existence of a modern award, or the amendment to the Act, facilitating that provision, has been implemented against the backdrop of the operation of the award system and that long-standing notion of part-time employment as having special meaning within that system.

PN698

So we say we rely on the authorities of *Re Canavan Pty Ltd* and also the Full Bench decision in this review, associated with NES inconsistencies, to make good the proposition that the complete prohibition of an arrangement that is contemplated by the NES must go to negating that element of the NES's operation or removing the benefit of the NES to the employee. On that basis we say that, strictly speaking, clause 10, which deals with types of employment in the award, actually excludes the NES in the sense that it contravenes section 55(1) of the Act.

PN699

They're my submissions, unless there was anything else the Bench wanted to raise?

PN700

VICE PRESIDENT HATCHER: No, thank you. Ms Ballard, do you want to go next? Ms Ballard, it might be easier if you just stay seated so you can stay in camera shot.

PN701

MS BALLARD: So I don't lose my head completely. I provided submissions this morning. A lot of those submissions drew on the 2012 review, and evidence that was raised - - -

PN702

VICE PRESIDENT HATCHER: Ms Ballard, there were directions about the filing of submissions, which basically went back many months. Although we've been generous in granting extensions to deadlines, as Billy Hughes once said, "You've got to draw the line somewhere." Now you've filed submissions half an hour before the hearing and I don't think - has the Transport Workers' Union got a copy of that?

PN703

MR GIBIAN: No.

PN704

VICE PRESIDENT HATCHER: So I'm not sure that you've really given anybody a fair opportunity to deal with it. Do you want to address that at the outset?

PN705

MS BALLARD: Yes, your Honour. I was just going to say, given what Mr Gibian has said about that evidence, I wasn't going to press that today.

PN706

VICE PRESIDENT HATCHER: Well, Mr Gibian doesn't even have the submission I don't think.

PN707

MS BALLARD: I know, your Honour. I could read through the submission, I provided it just for the Commission's convenience, but I won't go through that now, given what Mr Gibian has said, in relation to the 2012 review.

PN708

All we wanted to say was that we support the AIG's claim and also the draft determination that they provided on 23 December 2015. In our view, that it would be timely, fair and equitable, particularly in light of the Full Bench's recent decision in the Firefighting Award, to ensure that part-time employment is also available to employees who are working within the road transport industry, under the Long Distance Award.

PN709

In our view, allowing part-time employment, under the Long Distance Award, would have a number of benefits, including reducing confusion and inconsistency, particularly for employers and employees, where they might be employed under the Road Transport and Distribution Award, as a part-time employee, but sometimes they undertake long distance work, under the Long Distance Award, but there's no provision under that award. So we think that it would help alleviate some of the confusion and apparent inconsistency, in relation to that.

PN710

We also feel that it would create meaningful part-time employment opportunities for those people who don't necessarily want to work full-time. As Mr Ferguson has said, providing other benefits by way of attracting and retaining staff, particularly older staff who might want to remain working but not work longer hours.

PN711

Clearly, retaining and attracting staff in the road transport industry is an issue. Providing part-time employment opportunities would also increase the opportunities for workers to return home from work each night and also provide opportunities to increase employee work health and safety, particularly for those employees who are nearing the end of their careers and/or perhaps have medical conditions. It's a constant concern for a number of our members that they, particularly for people who have medical conditions or they're recovering from an injury, that they have no facility to provide suitable return to work opportunities for them because, under the award, there's only the opportunity for full-time employment, 38 hours per week.

PN712

In an industry in which fatigue is a significant thing and a consequent rate of high injuries and high mortality, perhaps arising from high rates of fatigue, providing for increased flexibility and working hours, which might be achieved by facilitating part-time employment, under both the Road Transport Awards, may help contribute to a reduction in the road toll, as well as soaring workers' compensation premiums.

PN713

While we recognise that part-time employment does happen in the long distance operations, and they can be facilitated through individual flexibility agreements and enterprise agreements, there is evidence to say that a lot of employers, particularly, are not aware of those provisions particularly and while individual flexibility agreements are reasonably easy to negotiate, as far as enterprise agreements are concerned, for a lot of small to medium sized businesses, the cost of doing so is often prohibitive. So why should we have a situation where those sorts of arrangements for part-time work can be negotiated through individual flexibility agreements, or enterprise agreements, yet the award doesn't provide that opportunity to allow employees and employers to avail themselves of part-time work in the event that that's something that they want.

PN714

That's all I wanted to say, thank you.

PN715

VICE PRESIDENT HATCHER: Thank you. Mr Gibian?

PN716

MR GIBIAN: Thank you, your Honour. The TWU filed two sets of submissions in these proceedings, sorry, one set of submissions, which we rely upon. In short, the TWU has submitted, firstly, that no case has been advanced, supported by any evidence at all, that would justify any conclusion that the award does not, at present, meet the modern award objective of that a substantial change, by way of the introduction of part-time employment, is warranted, in the context of the Long Distance Operations Award.

PN717

Secondly, that the consequences of the introduction of the provisions sought by AIG, in the particular context of Long Distance Operations Award, would have undesirable consequences which would fail to meet or ensure that there's a fair minimum safety net conditions.

PN718

SENIOR DEPUTY PRESIDENT HAMBERGER: Does the TWU have an actual in principal objection to part-time employment or is it just that it's worried that a part-time employment provision could be abused?

PN719

MR GIBIAN: The difficulty is the present structure of the award. If it was changed to a wages and overtime award, then the part-time employment, albeit that it's probably only going to be a very narrow window that it would be capable of application, having regard to the nature of long distance operations. It could be done and, look, it exists under the Road Transport and Distribution Award, obviously, where people are paid for actual time that they work, for all the actual time that they work and entitled to overtime payments in the event that they work greater than the - - -

PN720

SENIOR DEPUTY PRESIDENT HAMBERGER: Why couldn't you have an arrangement under this award that somebody works, say, two days or three days, especially if they did a regular run. But instead of doing it five, six days a week they did it a couple of days a week. There would be runs that would be a suitable length that you could do probably twice a week.

PN721

MR GIBIAN: Firstly, that's not a proposition that's ever been put forward, but there's a number of difficulties with it. One is that the foundational objective of part-time employment is to accommodate those employees who are in a position where, for a range of reasons, they are unable to work on a full-time basis. Customarily, those are because the employee has carers responsibilities, family responsibilities, they're undertaking some form of educational opportunity or matter of that nature. That is, the predictability and certainty of the times and hours of work is a critical feature recognised in many modern awards of part-time employment. Even if there was a limitation to particular days, these awards, the introduction of part-time provisions would not promote that certainty because the

precise hours of work, the hours of work on a particular day are inherently uncertain.

PN722

SENIOR DEPUTY PRESIDENT HAMBERGER: But you could imagine if you were studying, and that's an example, that you had lectures or something on certain days of the week, you can work the other days, I don't see that that's the problem. I think the issue that's been raised, in a practical sense, in this industry is that you've got an ageing workforce, you may well have quite a lot of employees who still want to work but want to phase down the hours they work. So may want to work two or three days a week, still earn some money, but not necessarily work the sort of crazy hours they used to work.

PN723

MR GIBIAN: The first proposition I was wishing to make, in relation to the option that's been presented, is that there would still be a lack of predictability of hours of work on the days that the person does work, which are going to be incompatible with many of the circumstances which are relied upon as justifying and requiring introduction of part-time employment. That may extend to long distance operations, for some unexpected reason, going over days and extending beyond one day, and what would happen in that circumstance if there was some award prohibition upon the person performing the work on the next day if the for whatever logistical or practical reason the operation extends in a manner that wasn't expected.

PN724

The second proposition is that the award already contains a reasonable amount of flexibility in terms of the way in which people are operated. At its core, the award provides for the minimum fortnightly payment and then payment arrangements either on the cents per kilometre or hourly basis, on driving time, not connected to actual hours of work. As we've pointed out in our written submissions, in fact drivers would likely earn the minimum fortnightly payment if they worked on two days a week, performing long distance operations. So the concept of there has to be some alteration to account for that, for that limitation.

PN725

VICE PRESIDENT HATCHER: Just on that point, if you're driving a standard semitrailer, how many kilometres do you have to drive to earn what is currently the weekly wage?

PN726

MR GIBIAN: I'm not sure I know the answer to that specific question. I just did a couple of calculations that if you go up to Brisbane, from Sydney to Brisbane and back, that is, two trips on two days, you'll earn more than the minimum fortnightly payment or weekly payment, if you do it twice. If you do it once a week, then you'll earn more than the minimum fortnightly payment.

PN727

It's obviously not directed at the precise number of hours of work that that entails, that is, it may involve more or less a number of hours of work, depending upon how long it in fact takes to do the trip and whether there's waiting time at each end

and the like. It may be that there's loading time paid on top of that as well, depending on what the driver in fact does.

PN728

A further difficulty, and this perhaps goes to the difficulty that we've identified, is that the minimum fortnightly payment, or the minimum weekly payment that's currently in clause 13.1 of the award, is then, as one would expect, utilised for a whole range of purposes under the award. That is, it's utilised as the payment that's made - basically it's the minimum payment, obviously enough, but also the payment that's made for delays, for rostered days off, for annual leave, for public holidays and the like, that then flows through the award.

PN729

How that would then operate if one wasn't working on hours, one wasn't working on hours but on days, it couldn't be the case that if someone had agreed to work two days a week that they get two-fifths of the minimum payment when they go on holidays because in fact their work on those two days may earn them, ordinarily, in excess of the minimum fortnightly payment for a full-time employee. So how one will then flow that through the other entitlements in the award is - - -

PN730

VICE PRESIDENT HATCHER: So what do they get now?

PN731

MR GIBIAN: What they get now when they go on holidays is the minimum fortnightly payment. What the AIG proposes is - - -

PN732

VICE PRESIDENT HATCHER: But presumably they're earning a lot more than that?

PN733

MR GIBIAN: Yes, they would - - -

PN734

VICE PRESIDENT HATCHER: So what's the difference?

PN735

MR GIBIAN: I'm sorry?

PN736

VICE PRESIDENT HATCHER: Why wouldn't they be able to just get the 40 per cent, if they work two days a week, get 40 per cent? It's a lot less than they would normally be earning, I appreciate that, but isn't that just the same for anyone?

PN737

MR GIBIAN: It may be the same for some full-time employees and I think it's accepted that many work in excess of 38 hours when they go on holidays, but it is the level that has been considered appropriate for a full-time employee. A full-time employee may, under this award, as I say, work on two days a week and earn more than the minimum fortnightly payment. If that's the case, why does the part-

time employee, who works on two days a week, then get two-fifths of the amount of the minimum fortnightly payment when they go on holidays or there's a public holiday? It's really inherent in the structure of the award that it's very difficult to see how it can operate fairly.

PN738

Obviously the concern that we've raised is that employees that operate as will, in a competitive industry, as it's been pointed out, engage people on the lowest number of hours that they can possibly obtain employees. Then if they regularly work more than that, as many employees - and I think whilst it's been said that some employees want to work lesser hours, and that's conceivably possible, there's (a) no evidence to support it, but all the evidence is that most drivers want to work more and more hours in order to earn income. One can easily foresee the circumstance of drivers being engaged on a lesser number of hours and then commonly working well in excess of that. And that having the particularly undesirable consequence of the employer both being able to, if they don't have work for them one week, pay them a far inferior amount, and also that their entitlements on leave, in case of delays and RDOs and the like, would be much reduced.

PN739

SENIOR DEPUTY PRESIDENT HAMBERGER: But I can't see why you couldn't put protections in to prevent that. I understand that's your - - -

PN740

MR GIBIAN: I'm not sure what the protections would be that would achieve it, other than having within it the incentive that an employer would have of an hours and overtime payment. That's the difficulty.

PN741

VICE PRESIDENT HATCHER: Looking at section 16, if their piece workers, then we can specify the base rate of pay for the purpose of NES.

PN742

MR GIBIAN: Sorry, section?

PN743

VICE PRESIDENT HATCHER: I'm looking at section 16(1) and (2), that is, if they're piece workers, which I assume that is what someone on a kilometre rate is, Mr Ferguson disagrees.

PN744

MR GIBIAN: I think there's been some debate about that in other cases, your Honour, I'm not sure I'm necessarily on top of it, but I think it has certainly been contended they are not piece rate workers, perhaps contrary to what would be an ordinary understanding of the provisions, at least if they were on cents per kilometres, but I am aware that that's an argument that's been had in other cases. It wasn't in the case that I'm thinking of, so I can't precisely say how it turned out.

PN745

As I say, the difficulties just exponentially increase the more you think about it. What we've got weighed against that is an absence of any evidentiary case that it is necessary or desired, by workers or any substantial number of workers.

PN746

Could I just say something while it occurs to me, and that's there seems to be the view that if an older employee is wanting to reduce the hours of work and that can't be accommodated within the long distance operations of an employer that they're then cut out of the transport industry. Most of the employers will operate local work and long distance work. To the extent that some don't, and perhaps some don't, there's other employment available doing local work and that's a more obviously - where, obviously, part-time employment is available and employees are employed on a wages and overtime basis. So it's not as if they're excluded from the industry entirely.

PN747

VICE PRESIDENT HATCHER: If you're in a regional and rural location it's much more likely that any available road transport work will be long distance?

PN748

MR GIBIAN: That's more likely. As I say, there's an absence of evidence in that respect as well. In terms of the merits evidentiary case, aside from what the Full Bench has generally said about the need to establish an evidentiary foundation for any substantial change to the modern awards, that was an issue which was specifically raised on the two-yearly review, that an evidentiary case was advanced at that point by AIG, which was found to be insufficient to justify that change and we come back with an absence of any evidentiary case at all. The submissions rely, really, entirely upon the proposition that in other context there is some desirability of having part-time employment and therefore because it allows particularly women and other employees who have other demands to enter the workforce in the absence of any evidence connecting that to long distance operations.

PN749

Can I just note, with respect to the reference to the Full Bench decision concerning the Firefighting Industry Award, that's relied upon really by way of analogy to say that the Full Bench accepted the desirability of part-time employment for firefighters that it should come to the same conclusion. Can I just note, at paragraph 63 and 64 of that decision, which is [2016] FWCFB 8025, there's a reference to the fact that there are six modern awards that do not provide for part-time employment, including the Long Distance Operations Award, and that the Full Bench noted that in relation to four of those, including the Long Distance Operations Award, it is likely that the nature of the work means that employees are away from home for long periods of time and creating a practical impediment to part-time employment.

PN750

Could I also just note, and I don't need to go to it, but the Commission did, in that case, have regard to general studies, and the like, in relation to changes in the propensity of part-time employment but it didn't just reason from that to its application in the context of firefighting operations, there was, at least it appears

to be recorded in the decision, 12 witnesses called by employers to demonstrate the applicability of part-time employment, in the context of the operations of the employers and employees engaged in that industry and of the desire of employees to engage in part-time employment, in the context of that industry. We have none of that here.

PN751

There are, as we've said in the written submissions, reasons to think that part-time employment is likely to have a relatively little role in long distance operations, having regard, as I've said, to the types of drivers that commonly cause persons to engage in part-time employment and the importance of certainty and predictability of hours of work for people in those situations with family, study or caring responsibilities.

PN752

Obviously enough, the mere fact of the award applying to long distance operations is such as to limit the applicability of this type, or the practical application of this type of work to many people who fall in the category of employees who seek part-time work. That's both because it involves at least a 500 kilometre return journey and the difficulty of that.

PN753

Mr Ferguson referred to the changeover scenario and the evidence in that respect, and drivers driving from Melbourne to Tarcutta or somewhere halfway between Sydney and Melbourne and then getting out of the truck and driving a different truck back to Melbourne. Mr Hosking's evidence, in that respect, was that that was at least a 12 or 12 and a half hour operation, which is going to present difficulties for many people in the position of employees seeking part-time work.

PN754

The second proposition that I don't think came up in the discussion with Mr Ferguson was that the operations necessarily have an uncertainty in the amount of time which is going to be taken undertaking the work. They involve the transport of goods or other materials from one location to another. There is inherent uncertainty in the time that's going to be taken to undertake that task, whether because of traffic conditions or uncertainties in loading and unloading and waiting time, in a manner which deprives the nature of the work of the predictability and certainty that is critical to part-time employment.

PN755

That's a matter which is really acknowledged by the award itself, which does, in clause 20, indicate that the ordinary hours of work, or 20.1, of the ordinary hours of work of a full-time employee are 38.

PN756

VICE PRESIDENT HATCHER: Which clause?

PN757

MR GIBIAN: Clause 20.1. But immediately notes, in 20.1(b), that:

PN758

Scheduling starting times are at the discretion of the employer and that a roster must set up and display in such a manner that an employee, so far as is practicable, will know the hours of duties the employee is required to perform.

PN759

That is, it's not a circumstance in which there is some kind of certainty that can be attached to it. As has been observed, the driver, if they're still on the road, can't just stop work at the time that their children are required to be picked up or carer's responsibility kick in and the like.

PN760

All of those considerations present reasons as to why the submissions, based upon the generalised or the desirability of part-time employment in other contexts have limited or be given limited weight, in the context of the operations that are covered by this award.

PN761

COMMISSIONER ROE: Mr Gibian, what do you say about the section 65 argument? Were you going to come to that? If you were I'm happy to wait until you get to it.

PN762

MR GIBIAN: Yes, I'll come to that. I think the members of the Bench have apprehended what we say, in relation to the potential abuses of part-time employment that arise if the AIG proposal were to go forward and the difficulty of marrying part-time employment with an award which doesn't provide for any time-based payment related to all hours of work. There is either a cents per kilometre or an hourly rate, but the hourly rate itself only attaches to driving time and not to all working time and, in any event, can operate on the basis of assumed driving time rather than actual driving time, for various routes and in the absence of any addition payment to accrue for additional time worked.

PN763

It is said, in AIG's most recent submissions, that a part-time employee would get some additional pay if they worked additional time, albeit not on any loaded rate. Even that is not necessarily true, in that, as I've just said, the amount of pay that is derived by an employee from a particular journey depends on the distance travelled or the amount of driving time, but not upon the total time worked. If the additional time is some waiting time or some such other delay then there'll be no additional payment, as a result of the employee working 25 instead of 20 hours in a particular week.

PN764

So it's not even simply the absence of overtime on some loaded rate, the employee may work in addition to the work sought to be the agreed maximum ordinary hours and receive no additional payment at all. Then there's no incentive upon the employer to minimise that or avoid that possibility.

PN765

Can I just make a couple of matters, in relation to the variation that's proposed, and that is what is sought in a proposed 10.3 will be is that there be an agreement,

at the time of engagement, of the maximum number of ordinary hours of work, either in a particular week or averaged over a period of 21 days. There's not any attempt to agree what the actual work hours will be, or any requirement to agree what the actual work hours will be, necessarily because of the uncertainties to what those hours might be, for the reasons that I explained. That may have no relationship to the actual hours that are subsequently worked by the employee.

PN766

The number of maximum hours is then, as the Full Bench would have seen, carried through the minimum payments in clause 13.1, if the proposal goes forward and that the principal effect of that variation would be to reduce the minimum weekly payment, reduce the rate payable for RDOs, annual leave, sick leave and public holidays and provide no additional remuneration if, in fact, the employee works in addition to those agreed ordinary hours.

PN767

I wasn't going to add anything to the written submissions, in relation to the other considerations arising in section 134 of the Act. In relation to the section 65 point, it's not really clear, with respect, how it's put by AIG. They raise a concern about it and it's not clear whether an express submission is made that there is some inconsistency. If such a submission is made then the TWU's submission, as is set out in writing, is that no such inconsistency is revealed and the provisions of the award do not exclude that aspect of the National Employment Standards.

PN768

What section 65 does is to permit a person, in particular circumstances, to make a request to change working hours. As was observed in the written submissions and by Harrison SDP, when this issue was raised on the two-yearly review, nothing in the award excludes the right of an employee to make a request to change working arrangements and nothing in the note, under subsection (1) of section 65, which indicates an example of changes of working arrangements include changes to hours of work or patterns of work, or in subsection (1)(B) which, for the avoidance of doubt, indicates an employee's appearance or returning to work after taking leave, in relation to a birth or adoption of a child, may request to work part-time to assist the employee to care for the child changes the essential nature of the right which is conferred and that is a right to make a request.

PN769

Nothing in section 65 that any particular request will be acceded to and nothing in section 65 guarantees that any change conceivable in the working arrangements or working hours of an employee in such a situation must be acceded to. Even if an award or an enterprise agreement were to have some affect upon the likelihood of a request being acceded to, there is no exclusion of the right in section 65.

PN770

If AIG's submissions were correct, then awards would contain no restrictions upon the hours of work, essentially. That is, an employee may request to work a one hour shift, for one of the reasons identified, if that's what's convenient to them, in light of availability of respite care for someone they're providing care to, or the like.

PN771

The fact that an employee can make such a request does not mean that an award that provides for minimum engagement periods or minimum payment periods is excluding the right of that person to make the request. Whether the employer is able to comply with that request or accede to that request is a matter that depends upon the operations of that employer and the right is not excluded, even if the chances of the employee's for a one hour shift is effected by the minimum payment provisions of an award or a minimum engagement period of the award or enterprise agreement concerned.

PN772

Here, a person might request to work two days a week. That may be accommodated, as I've said, under the Long Distance Award, in a manner which is entirely consistent with the minimum fortnightly payments that are provided for in the award, if the employer is able to structure their operations in that way. If the employer is unable to structure their operations in that way then they may have a reasonable business reason for refusing that request and it's not correct to say that the award, as is said in the AIG submissions, that the award prohibits an employer from accepting a particular working arrangement or hours arrangement in any particular case.

PN773

Those are, essentially, the reasons that we advance on the section 65 point. They are consistent with what's in Harrison SDP said when this issue was raised on the two-yearly review and her Honour was, with respect, correct in the decision that she reached.

PN774

VICE PRESIDENT HATCHER: Thank you. Anything in reply, Mr Ferguson?

PN775

MR FERGUSON: A small number of matters. Firstly, in reply to a submission that was put by NatRoad, it's only one point, they identify the availability of the use of the award flexibility provision to implement part-time employment. Now, we don't accept that that is a provision that enables an employer to implement a type of employment that is not permitted, under the award. That doesn't appear to be one of the identified types of matters.

PN776

Moving on, more squarely, to the TWU, there is some protest about the absence of evidence that we've advanced. Obviously we've advanced our case by reference, largely, to merit-based arguments that flow from the framework of the Act itself and previous relevant authorities. To the extent that we've relied on factual assertions, they are, largely, in the nature of reliance on matters that are uncontested, we would have thought, in terms of the motivations for some employees, to work part-time employment.

PN777

I don't know how assisted the Full Bench would have been by a raft of employees who say that they might want to work less than 38 hours a week. I don't think anyone would seriously contest that no such employees would exist in this sector

and there's no evidence from the union to say that employees in this sector are completely different to everyone else in industry.

PN778

In any event, we, of course, have included some statistical information about the workforce and so forth, that's all derived from publicly available documentation and we say that establishes the factual context which we rely upon. We also do rely on the evidence that was advanced by the TWU and flowed from cross-examination of their witnesses, about the prevalence of changeover arrangements and so forth, and I don't think that there'd be any serious contest that something of that nature does arise. That's the heart of what we're relying on here, that part-time is possible in this sector. There's a factual assertion from the TWU that it is not. It is incumbent upon them to bring evidence to make good their submission.

PN779

Now, we appreciate the firefighting industry speculated the likely reason why there is not part-time employment in this industry, but it did no more than that. There wasn't anything before it that they would have been able to reach that conclusion and we don't accept it.

PN780

We have addressed, in our submissions, the fact that there may some 16-odd years of agreement between some parties that this industry may not be suited to part-time employment. That agreement has evaporated and, as we've said in our submissions in the context of the two-year review, there was wide support for this. We've addressed why we say, given the framework of the Act, the changed nature of the award system, reliance of the views of some parties to what were respondent awards, must be afforded far less weight in the context of this review.

PN781

Now, in terms of my friend's submissions about the unsuitability of part-time employment we say this. Firstly, we acknowledge that there's probably an inappropriateness in trying to require a specificity around the precise hours of work for a part-time employee that may be adopted in other awards because of the very nature of the work. Now, there is rostering arrangements that require the provision of rosters and so forth, but there are certain realities about the nature of this work that means that there can't be precision in the nature of the precise hours.

PN782

VICE PRESIDENT HATCHER: That's goes back to the question I asked earlier, that is, what does a part-time employment agreement in this industry, what would it look like? Obviously if you've got a collision with scheduling it's at the discretion of the employer then you can't specify precise hours of work?

PN783

MR FERGUSON: No, but you'd have to reach agreement on there being less ordinary hours of work. So you'd have to be committing to less guaranteed hours, as such. Because at the moment the award provides for a guarantee that a full-time employee must be afforded 38 hours of work and characterises them as ordinary hours of work. That then does perform a function, for the purpose of

calculating various entitlements and so forth. All that you would require, in essence, or the essence of what you would require is an agreement on a reduced number of hours. They may be reflective of work performed on one single standard run, for example.

PN784

VICE PRESIDENT HATCHER: That means the person could be required to perform work on any day, how's that part-time work?

PN785

MR FERGUSON: It does, as they can now.

PN786

VICE PRESIDENT HATCHER: No, but for a part-time employee, that is, somebody who allegedly wants to confine the scope of their work could be required to work on any day of the week.

PN787

MR FERGUSON: Look, I can see we haven't thought about that. We had sought, in adopting our approach, to do as little violence as we can to the remuneration structure and the general structure of the award as possible, because we didn't want to create any unnecessary disincentive to an employer agreeing to engage a part-time employee.

PN788

Now, the reality is, and I'll come back to your Honour's point, that the remuneration structure, as it stands, is of critical importance to this industry, for a raft of reasons, and we didn't want to create an entirely different structure for part-time employees. But I take your point, the utility of part-time employment, where there's not even certainty around days, is somewhat reduced for those persons that may be using it to balance their carer's responsibilities or responsibilities to children and so forth.

PN789

If the Full Bench was of the view that a requirement there be some certainty about the days, number of days and the day on which that work is performed, we would still accept that that's an improvement on having no availability for part-time employment. You can see that the agreement could provide for, say, one day a week, and even specify what day that is, and that would still be a beneficial outcome. So we don't see any reason why that's not possible to be achieved through a part-time employment provision.

PN790

We understand that there is some principles in relation to what part-time employment might generally look like but that needs to be amended to reflect the nature of the particular industry. This isn't a typical industry but it isn't one that necessitates working 38 hours a week, or otherwise you have to be engaged on a casual basis with all of the characteristics that apply to casual employment, in terms of both - in terms from the employer's perspective the employee - not being even certain that the employee will work. So we say there is some benefit to both

parties of having a more flexible form of permanent employment available under this award.

PN791

VICE PRESIDENT HATCHER: Realistically, would any part-time employee be performing work that doesn't require them to return to their home on the same day?

PN792

MR FERGUSON: It could - well, it could occur that an performs a long distance journey that might not even be one of those journeys identified in the schedule of journeys in the award, between two locations somewhere in Australia, that enables them going somewhere one day, staying overnight and then coming back the next day and the total number of hours being performed being less than 38. That could arise, conceivably, but I'll confess, I haven't thought through that in detail, in terms of the number of hours and so forth. But I can't see why that couldn't arise.

PN793

VICE PRESIDENT HATCHER: All right.

PN794

MR FERGUSON: There are no further submissions, unless there's anything else.

PN795

VICE PRESIDENT HATCHER: All right. I thank the parties for their submissions. We will reserve our decision on the matter and we'll now adjourn.

ADJOURNED INDEFINITELY

[12.53 PM]