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

10.10 AM, MONDAY, 28 NOVEMBER 2016

PN1

VICE PRESIDENT HATCHER: Right, before we commence, can I indicate that Deputy President Bull will not be sitting at the Bench today or tomorrow. He is currently on leave, but he will obviously read the transcript and participate in the Full Bench's decision making processes.

PN2

Can I take the appearances please? Ms Doust, you appear for the ASU, the HUS and United Voice.

PN3

MS DOUST: Yes.

PN4

VICE PRESIDENT HATCHER: Mr Scott, you appear for ABI and NSW Business Chamber.

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MR SCOTT: I do, thank you.

PN6

VICE PRESIDENT HATCHER: Mr Pegg, you continue your appearance for Jobs Australia.

PN7

MR PEGG: Yes.

PN8

VICE PRESIDENT HATCHER: In Melbourne, Mr Fleming, you continue your appearance for the ACTU?

PN9

MR FLEMING: Yes, your Honour.

PN10

VICE PRESIDENT HATCHER: Mr McCarthy, you appear for the Australian Nurses and Midwifes Federation?

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MR MCCARTHY: Yes, your Honour.

PN12

VICE PRESIDENT HATCHER: Mr Scott, do you know what happened to the St Ives Group?

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MR SCOTT: I just actually asked Mr Pegg that. I note there's now appearance.

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VICE PRESIDENT HATCHER: Does he know?

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MR PEGG: Not sure.

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MR SCOTT: They did file a submission.

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VICE PRESIDENT HATCHER: Yes, I've seen that.

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MR SCOTT: Now, I'm not sure what exactly it said. Mr Pegg suggested that perhaps they were content to rely on their previous written submissions, but to be blunt, I'm just not sure.

PN19

VICE PRESIDENT HATCHER: All right Mr Scott, since you're the remaining applicant before us, I think you go first.

PN20

MR SCOTT: Thank you, your Honour.

PN21

You will recall that my clients, Australian Business Industrial and the NSW Business Chamber, have made an application to vary clause 10.3(c) of the Social, Community, Home Care and Disability Services Industry Award 2010. Clause 10.3(c) deals with regulating the pattern of hours of work for part time employees.

PN22

My client's application was heard on 14 and 15 July and the Bench heard about one and a half days' worth of evidence. We then filed written submissions on 30 September and do your Honour's have a copy of those written submissions?

PN23

VICE PRESIDENT HATCHER: Yes.

PN24

MR SCOTT: Now, I was going to point out that my client's application was one of two applications from the employer parties, with the other one being the St Ives Group application. Notwithstanding the uncertainty as to the status of the second application, I should note that the St Ives Group's application was more expansive than the Chambers and the ABI's application in that their application sought variations to both the SCHCDS Award and the Aged Care Award.

PN25

Now my client's application is confined to the Social, Community, Home Care and Disability Services Industry Award. The reason I raise that at the outset, is to note that upon reading the union's final written submissions, there seems to be, as is the case in passionate industrial relations debates, a degree of hyperbole in the way in which this case has proceeded.

PN26

As an example, the ACTU in their final written submissions sought to describe the employer parties' claims as radical and variously submitted that the changes sought by employers firstly, removes significant employee protections. Secondly, strike at the bedrock of permanent employment security and then thirdly, represents a progressive destruction of the safety net.

PN27

Now I just pause there. Perhaps erroneously, but I assume that some of that passionate outrage is directed to the St Ives Group because the reason I say that, is that my client's case for change, in my submission, cannot objectively be described in such a way. Rather, the claim that my clients are advancing is, or at least has attempted to be, a reasonable tempered application, striking the balance between the interests of employers and the interests of employees.

PN28

So I just don't think that the degree of hyperbole is helpful. I'm going to attempt to avoid that. I'm going to deal with the application that my clients have filed and explain the problem which the application seeks to address.

PN29

The clause in dispute in these proceedings is clause 10.3(c). What that clause requires is employers and employees to agree on a fixed pattern of working hours. I use the work 'fix' and I perhaps get criticised for that from my friends. It's fixed in the sense that you agree on a fixed pattern of work. To the level of specificity where you agree on the days, the hours and the starting and finishing times. Once you do that, it is fixed.

PN30

But of course, it can be changed. But what it requires is agreement between the parties. Now, the thrust of my case is that section 134 requires the Bench to ensure that the modern awards, together with the NES provide a fair and relevant safety net. Now, it is our case that that requirement, the requirement to fix hours of work and a pattern of work of part time employees, is no longer a relevant obligation. That is the essence of the case.

PN31

VICE PRESIDENT HATCHER: Do I take it that your application proceeds upon the premise that the rostering provision in clause 25.5(d)(i) or (ii) does not apply to part time employment?

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MR SCOTT: Your Honour, was that 25.5(d)?

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VICE PRESIDENT HATCHER: This is of the award, not the exposure draft.

PN34

MR SCOTT: Yes, (d)(i)?

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VICE PRESIDENT HATCHER: (i) and (ii).

PN36

MR SCOTT: Well, I was proceeding on the basis that those provisions apply to part time employees.

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VICE PRESIDENT HATCHER: They do apply?

PN38

MR SCOTT: Yes. I'm looking at that on the run. My claim wasn't to vary the rosters clause. Obviously all of these provisions interact and it is difficult pursuing a variation in isolate, but certainly I was proceeding on the basis that the provisions of 25.5 would apply.

PN39

The requirement at 25.5(d)(i) that seven days' notice will be given on a change in roster, is subject to the consultation requirements and my understanding is there's been a decision that makes that very clear. But the intent of our variation is to provide a regime where hours of work are set pursuant to a roster over the range of an employee's agreed availability and that 25.5(d) applies.

PN40

VICE PRESIDENT HATCHER: But if you can currently change rostered hours on seven days' notice, that is change what I presume means change when the hours are to be worked, what's the problem?

PN41

MR SCOTT: The problem is - no, I appreciate that and I should have picked this up. The problem is this, 25.5(d)(i) needs to be read, not only subject to the consultation requirements, but also subject to clause 10.3(c). So the right to change an employee's roster on seven days' notice, is conditional on 10.3 which requires agreement time.

PN42

My understanding is that these things were raised and tested on appeal when clause 10.3(c) was put in. It might have been the Aged Care Award, but there was a decision which made it clear that the right to vary an employee's roster on seven days' notice, needs to be read subject to those other provisions. One was the consultation obligation; the second was 10.3(c).

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VICE PRESIDENT HATCHER: So, agreement in writing.

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MR SCOTT: That's right. So, if you like, 25.5(d)(i) is not particularly helpful for employers because of the introduction of clause 10.3(c).

PN45

VICE PRESIDENT HATCHER: In relation to your variation, can I just clarify what the scope of it is, that is the scope of the change provision. Are we in fact - we've referred to this as concerning the NDIS, but is it in fact confined to employees working in connection with NDIS?

PN46

MR SCOTT: It is; it's intended to do that. I will accept that there's a clunkiness in the drafting and I was proceeding perhaps on this basis, that my task was first to persuade your Honours that the case for change had been met at which point, the second question is what variation is appropriate to meet the modern award's objectives. We have put one forward, the drafting perhaps is clunky.

PN47

It is intended to cover direct support workers and it's phrased as providing support to people or participants in circumstances where that participant has the ability or discretion to change when the supports are provided to them. It's intended to address the NDIS reforms. It doesn't explicitly say that the provision should operate only in the disability services stream of the award; perhaps it should.

PN48

But yes, Mr Pegg might be able to assist me with his knowledge of the industry, but it is intended to cover those employees who are support workers for NDIS participants.

PN49

VICE PRESIDENT HATCHER: It is intended to apply to anybody who works in residential care?

PN50

MR SCOTT: It became apparent to me at least, that those employees typically - and we heard evidence from Mr Packard and others that there is still variability, but it became apparent that there was less variability in residential support workers' hours of work. I will develop that a little bit. It's intended to cover support workers, providing support to participants under the NDIS. It is primarily targeted at employees who are providing care in lifestyle and leisure programs, non-residential support work as opposed to the residential support work.

PN51

These are some of the issues perhaps with the drafting, that - I'm happy to concede that it requires more careful consideration and analysis, but I suspect the task ahead of me is to advance a case for change and perhaps get over that first hurdle, rather than - I don't want the cart to get ahead of the horse.

PN52

SENIOR DEPUTY PRESIDENT HAMBERGER: But you do need to show how the proposed change would meet the needs. If you've identified a problem, that the change will actually meet the problem.

PN53

MR SCOTT: No, I accept that; I accept that. The first step perhaps is articulating who it is intended to cover and I think I've done that. The drafting might not necessarily perfectly reflect that, but it's intended to cover those people. The reason it's intended to cover those people is because there has been a change in the working patterns or working hours and there's an increased variability in those employees' working hours, which is the problem that we are trying to address.

PN54

VICE PRESIDENT HATCHER: Just one more question about who it's intended to cover, is the change provision intended to apply to persons already engaged as part time employees in the sector as distinct from those who might be engaged in the future?

PN55

MR SCOTT: I was operating on the basis that it would apply prospectively, rather than retrospectively. Now, clause 10.3(c) was inserted effective 1 August 2013 in the two yearly review. 10.3(c) when it was introduced from 1 August 2013 operates prospectively. So what you have is a situation - and because it talks about before commencement of employment you're required to do certain things.

PN56

So it's new employees engaged from 1 August 2013. Employers and employees have to agree on a fixed set of working hours.

PN57

If my case is successful, what you would have, somewhat - it is the way that these things evolve, but you have a situation where employees who are employed before 1 August 2013 were employed on a part time employment contract subject to those terms. Those employed from 1 August 2013 are subject to clause 10.3(c). If this claim was to operate prospectively, you'd have a third category of employees employed on or after X day, whereby 10.3(c) doesn't apply.

PN58

I haven't been as bold to submit that the claim should be retrospective. I haven't necessarily given too much thought to that, but I was certainly operating on the basis that it was prospective.

PN59

VICE PRESIDENT HATCHER: Thank you.

PN60

MR SCOTT: If we deal with the concept level because obviously this Bench is dealing with 122 or a large number of modern awards; it's not confined to the Social Community Home Care Award. Clause 10.3(c) of this award, defines a part time employee as someone who works reasonably predictable hours of work of less than 38.

PN61

My application or my client's application is not intended to alter that position and that is that employees who work less than 38 hours on an ongoing basis, on a permanent basis, are required to work reasonably predictable hours in order to meet that definition. If they don't work reasonably predictable hours, then they don't meet the definition, so they must be something else.

PN62

The ACTU, in its response to the issues paper and their response was filed on 20 June 2016, set out their view of the conceptual differences between casual, part time and full time employees. At paragraphs 1 and 2, they stated that properly

understood, the conceptual difference between casual and part time employees, is that a casual worker is one engaged to carry out work which is unpredictable or ad hoc. Every other form of work is properly regarded as permanent work.

PN63

If we, for the moment accept that proposition, in this particular sector, with people providing support to NDIS participants, their work is not ad hoc; their work is permanent and ongoing and their hours are reasonably predictable. They are, in accordance with the award permanent part time employees.

PN64

Clause 10.3(c) undermines or operates as a practical barrier or an impediment to employing a part time employee on reasonably predictable hours of work. Because what it requires if you fix their hours to the point where you're going to work three days a week, 18 hours a week, six hours on Monday, Wednesday and Friday and you're going to start at 10 and you're going to finish at four. That's what clause 10.3(c) requires.

PN65

Now there's no reasonable predictability about that proposition. There's absolute certainty with that proposition.

PN66

COMMISSIONER ROE: But the provision also allows for changes by agreement.

PN67

MR SCOTT: It does.

PN68

COMMISSIONER ROE: So therefore - and that we've got plenty of evidence that that occurs extremely frequently.

PN69

MR SCOTT: Indeed it is.

PN70

COMMISSIONER ROE: And it's part of your submission that it does. It's clear that reasonable predictable in this case doesn't mean exactly the same, set in concrete for all time and never changed.

PN71

MR SCOTT: That's why we say that 10.3(c) is no longer a relevant part of the safety net. The evidence is that employees regularly - their hours regularly change. They don't have a fixed pattern of hours; they frequently agree to those changes which is what keeps the system working, to be honest, but it remains the case that, if an employee doesn't agree, what does the employer do? They find somebody else to fill the sift.

PN72

COMMISSIONER ROE: They find somebody else to do it, yes exactly.

PN73

MR SCOTT: And they pay the employee who hasn't agreed because they have a contractual right to work those hours. It goes both ways. The evidence is that they frequently agree to request to change their working hours. That is evidence that the work, there's a variability in the hours of work. That is why 10.3(c) is just not a relevant part of the safety net.

PN74

The debate is - - -

PN75

COMMISSIONER ROE: That doesn't make sense to me, that argument.

PN76

MR SCOTT: Well, notwithstanding that employees frequently agree, at the request of the employer to change their hours, the concern from employers is that with an increasing degree of variability, requests by the employers need to be made more often to employers to change their hours. Let's accept that 95 per cent of the time the employee will agree. That's great; the system is working; the employer needs to obtain a written agreement from their employee.

PN77

Let's say this happens on a fortnightly basis and you have 65 employees. There's an administrative burden there in recording these changes in writing. You then have the five per cent who don't agree.

PN78

COMMISSIONER ROE: Usually for good reasons, surely.

PN79

MR SCOTT: Absolutely, absolutely. And what we are suggesting in our application, is to set up a more relevant framework where employees' hours can be rostered, taking into account the very good reasons why they can't work at certain times, but not in such a way that you fix a pattern of work which you both know is regularly going to need to be changed.

PN80

And notwithstanding that you both agree to those regular changes, it's this artificial practice of agreeing on a fixed set of hours which you know is going to change fortnightly, and then having to document each fortnight the change. I'm not suggesting that employees shouldn't have certainty in the times in which they should work. Our application makes that clear. We're just seeking to remove this artificial provision which is not relevant to these particular workers and replace it with something that strikes the balance.

PN81

Paragraph 42 of the United Voice, HSU, ASU submissions looked at the purpose of part time work provisions and they cite a case which is Leading Aged Services where the Full Bench said -

PN82

This requirement for reasonable predictability and hours of work stems, we consider, from the originating concept of part time employment as being stable for and attractive to persons who have other significant and reasonably predictable family employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work.

PN83

I accept that. We're not seeking to change that premise. Part time employees do need a reasonable level of certainty over when they work. Does it extend to fixing their hours absolutely to the starting and finishing times? We say not. It's not relevant because that's not what happens in the sector. What we say is that there is a better way, a less administratively burdensome way whereby these hours can be set.

PN84

The variation proposes that on commencement, when the employer and employee agree on the number of hours to be worked, the employee indicates what their availability is and conversely what their unavailability is and the employer then has a degree of flexibility around the rostering of those hours. Those hours are rostered in accordance with the rostering provisions which require 14 days' notice.

PN85

To use an example, a female employee wants 20 hours of work each week and they can do that between Monday and Thursday. They can't do that on Friday because they have a commitment and they can't work the weekends. Now they have certainty that they are working Monday, Tuesday, Wednesday, Thursday. They might not be available on Wednesday afternoon after three. Indeed, they might not be available any afternoon after three, but they have availability for those days between say nine and three.

PN86

I haven't done the maths to work out whether you can roster 20 hours in those four days between nine and three; I think you can. We say, that on our application, the employer and the employee as they do, have a sensible conversation about their availability and they say I can work between nine and three Monday to Thursday. Or I can work Monday and Thursday, I can't work any other days and I can't work on Wednesday after three.

PN87

The employer says that's fine; I can give you 20 hours a week within that window and I'll roster those hours in accordance with the roster on 14 days' notice. That is what we're suggesting. It's not a radical departure from the current position. The employee knows what days they're working; they know how many hours they're working. They have a guarantee of those hours.

PN88

Now there might be a variability of the starting and finishing times, which is necessary because of the nature of the work that they're doing. So instead of 9.30 start on Tuesday, something happens and the person - their doctor's appointment changes or whatever and they need to start at - something happens later in the day

and so the employer says to the employee, look instead of 9.30, you're going to start at 10.30.

PN89

We say that on that scenario, it's a fair and relevant minimum safety net. This idea that you have to fix the hours - the starting and finishing times in particular, and then go this rigmarole of constantly agreeing in writing to change it. It's artificial and it just doesn't reflect the work that's being done by these people.

PN90

COMMISSIONER ROE: Isn't that exactly what a casual employee is? I mean a casual employee will only work the hours where they are available. That's by the very nature of a casual employee, they have the right to determine their availability and of course, in practice that's what would happen, right. The casual employee is only going to work when they are available. So what's the difference.

PN91

MR SCOTT: There's a big difference between casual employment and part time employment. Casual employee has no guarantee of hours. So yes they say this is when I'm available, please roster me. The employer says I'm going to roster someone else and the employee says, I wish I was a part time employee because I would have had some more guarantee as to what hours I got to work each week. That's the difference.

PN92

VICE PRESIDENT HATCHER: This proposal doesn't - would at least allow a situation where there's no meaningful guarantee. That is, there's no minimum weekly hours so that you could guarantee somebody one hour a week and let it be then on the dictate of employers of when the other hours are worked and how many and whatever.

PN93

MR SCOTT: Technically, that's right. That's not intended.

PN94

VICE PRESIDENT HATCHER: Why couldn't employees work that way? It seems an entirely sensible way to use it if they were allowed to.

PN95

MR SCOTT: They could already.

PN96

VICE PRESIDENT HATCHER: They couldn't change it without agreement.

PN97

MR SCOTT: That's right, and that's exactly what happens now. Because they can't change it without agreement, they know that they can give this person 20 hours a week of reasonably predictable hours. There might be some variation to starting and finishing times, but because they have to set the starting and finishing times, they say instead of giving the person 20 hours and a guarantee of 20 hours, I'm only going to give them a guarantee of six.

PN98

That's what happens. That's why these employers in this industry have set up a system whereby they have core hours and non-core hours. Core hours being those hours which we know for certain don't change and therefore we can give them those hours, complying with 10.3(c). There's all these other hours which we know that we've got for them; the work is there, but we can't put that in as part of their guarantee because there's variability about when it changes.

PN99

VICE PRESIDENT HATCHER: Well, that suggests that your proposed clause would be workable if it had added to it some meaningful minimum guarantee of hours.

PN100

MR SCOTT: I can't see why that wouldn't work. In our final written submissions, if I can just find them, there was a suggestion in our final written submissions at paragraph 9.5. I'm looking at this on the run; I'm not sure whether this addresses it exactly, but 9.5(d) of our final written submissions, identifies provisions in enterprise agreements which deal with this issue. 9.5(d) includes a review of part time hours.

PN101

At the request of an employee, the hours worked by the employee will be reviewed annually. Where the employee is regularly working more than their guaranteed minimum number of hours, then such hours shall be adjusted by the employer and recorded in writing.

PN102

Then it has certain carve outs for when there are circumstances where that's not feasible. I don't think an annual review is necessarily the same as a guaranteed minimum.

PN103

VICE PRESIDENT HATCHER: No, they're two different things. That's dealing with hours regularly worked above the guaranteed minimum, allows the minimum to be lifted up to the real number of hours.

PN104

MR SCOTT: But that doesn't address - it does address this concern about zero hours contracts. You put someone on a one hour contract but you regularly roster then 15 hours of work a week, but they've only got the guarantee of one and that's something that we need to avoid. So, on the annual basis you say well look, you're only guaranteed one; you've regularly worked 15. This provision, subject to drafting and looking at it closely will require an employer to bump you up to 15.

PN105

I'm not suggesting that that's necessarily good enough, because you can be on one hour a week for a year before you get the opportunity to be bumped up. But the position remains the same now. You can employee someone for one hour a week. You set that; they work 30 hours a week.

PN106

Your Honours have heard evidence in these proceedings about the perhaps rise of zero hours contracts, particularly in the UK with similar reforms over there. There have been one or two instances in Australia where people have been put on zero hours contracts. None of those employers are members of my clients. I'm not going to stand here and say that that's something that should be allowed to occur.

PN107

Part time employees should be given a number of hours that the employer reasonably thinks that the work is available. The difficulty with the current provision is that it actually hinders it. The employer knows they've got 30 hours but because the starting and finishing times are going to change by half an hour every day, or once a week, the employer will find a way to say well look, I'm only going to hand you 15 hours and we'll call those core hours. They'll be the same because I know that work is stable. The other 15, it's going to change so I'm not going to give you the guarantee of that. Again, that's not something that's necessarily desirable.

PN108

VICE PRESIDENT HATCHER: Mr Scott, you mentioned the UK. In paragraph 2.5 of your submissions, in the last sentence there's a reference to the UK experience and the footnote refers to the number of articles. Were they in the evidence and if not, can you supply them?

PN109

MR SCOTT: My client's filed a tender bundle.

PN110

VICE PRESIDENT HATCHER: So it's in the tender bundle?

PN111

MR SCOTT: I'll check. To the extent that they're not, I can provide those. But I think it was Mr Bowden who gave evidence as well in these proceedings about concerns of zero hours contracts.

PN112

VICE PRESIDENT HATCHER: Thank you.

PN113

MR SCOTT: But you can have them today. There's no increased ability to have zero hours contracts under my client's proposal, that there is already.

PN114

The position put simply is this. The work that this particular class of employees is doing, is variable. It meets the notion of reasonable predictability, but it's not fixed. There's effectively three options that employers can use to deal with that issue. The first one is as the Commissioner suggests and occurs already, you can regularly seek the agreement of employees and the evidence is in these proceedings that employees regularly will be flexible to allow that to occur.

PN115

But notwithstanding that, there will be five per cent of the time where employees don't agree, and that causes the employer real concern. Financially, it's just a problem.

PN116

VICE PRESIDENT HATCHER: How does your clause solve that? I mean if the reason why the five per cent can't do the hours is because they're unavailable in some sense, they have some other genuine commitment, your clause wouldn't save the employer having to pay the employee in that circumstance because it would involve it rostering outside the available hours?

PN117

MR SCOTT: The intent of the provision is that employers cannot roster the employee outside of their available hours. It doesn't say that explicitly, but that's kind of the implied concept there, is that when you agree on the number of hours, you agree on the availability window and then an employer rosters in accordance with the rostering provisions.

PN118

It goes without saying that they roster in that window. If that needs to be made clear, then that can be made clear. So it shouldn't be the case, that provide the employer rosters in that window that the employee is unavailable, but of course, people's availability is not always set in stone and there will be occasions.

PN119

How you deal with that, well I'm not sure. You deal with that the same way that people deal with that today. Someone is unavailable; the inform the employer and the employer makes arrangements.

PN120

VICE PRESIDENT HATCHER: There's two competing concepts here. There's temporary unavailability where you can't do something because of a sick child or some other circumstance. But then there's permanent unavailability; that is you have a second job or a study commitment or a family commitment so that over the medium term you simply can't do it at that time in any week.

PN121

MR SCOTT: That's right; that's exactly right. There's a concept of permanent unavailability and temporary unavailability. What's agreed under my client's proposal is the permanent unavailability. The difference between a casual employee and a part time employee is that the casual employee, when they're temporarily unavailable, they don't have to work. That's the cost benefit of being a casual employee. Part time employees are, in this respect, akin to full time employees which is that they're engaged to work a certain number of hours a week. If I'm not available for a particular day because of carer's responsibilities then there's leave entitlements that can be utilised, as is the case with part time employees.

PN122

The evidence in this sector is that employers are reasonable. It's dominantly a not for profit sector. These conversations, the evidence was, employers and employees have sensible conversations about these things all the time. I'm not sure we can solve all of the world's problems under this application.

PN123

I'm realistic enough to know that we can't, but if an employee - under the current regime if an employee has an agreement that they work fixed hours between 10 and four, Monday, Wednesday, Friday and they're temporarily unavailable during that window, well, I'm not sure how employees deal with that. Presumably they take leave or they request some time off.

PN124

To the extent that your Honour invites me, again thinking on my feet, if there needs to be a provision which deals with temporary unavailability, in addition to permanent unavailability, whereby you establish a permanent window at commencement. Three months down the track something comes up temporarily - because rosters are set 14 days in advance, there could be a provision which says where availability changes on a non-permanent basis, that is for a temporary time, or for a particular issue, provided the employee gives the relevant period of notice, the employer can deal with that. I mean, the reality is they're dealing with these issues already.

PN125

The three options which employers have at the moment is to firstly seek agreement to deal with this variability in the work and the evidence is that employees frequently agree to that; sometimes they don't. Notwithstanding there's an administrative burden in regularly recording these changes in writing.

PN126

The second option, and the evidence of employers was that this was their concern, or at least one of them. I think they were concerned about the administrative burden, but secondly, if part time employment becomes so inflexible that they can't utilise part time employees to perform the work which they need to be performed, they will engage casual employees.

PN127

The third one is that they just won't comply. When this provision was incorporated into the award from 1 August 2013, the decision of Watson VP, there's a paragraph in that decision whereby his Honour says that employers can use standard forms to deal with this issue. It might assist if I can actually find that reference because I'm not sure that your Honours have a copy of that case.

PN128

It's helpfully in the ASU, United Voice, HSU closing submissions at paragraph 36. There's a paragraph extracted there which reads -

PN129

That part of the application seeking a requirement that part time agreements be agreed in writing prior to commencing employment is a common award

provision. It requires employees to be given clear information as to the basis of their employment when they are engaged.

PN130

The case for such a clause is strong especially when there's no award minimum engagement period. In my view, and this is the sentence that I'm talking about -

PN131

In my view the concerns of the employers can be allayed by standard procedures that comply with the clause such as those that have been developed for employers covered by similar provisions in other awards.

PN132

I'm not sure what that means. With respect - - -

PN133

COMMISSIONER ROE: It means signing rosters and things of that sort; it seems to be the standard provision. You post a roster and you sign the roster or you have a standard form. It's those sorts of things, isn't it?

PN134

MR SCOTT: So an employer can develop a standard form variation to working hours which requires written agreement. It seems very sensible. It doesn't seem that his Honour is suggesting that you don't need a written agreement, because of course you do. The problem that is sought to be addressed is employers are trying to deal with this in an efficient way and the reality is, they require written agreement.

PN135

When the nature of work is continuing to increase in variability, the frequency with which you need to obtain this written agreement, increases. So what is being proposed is a slightly more flexible way whereby employers can roster part time employees in a manner which fits the work that they do, but at the same time, strikes the balance in terms of taking into account their commitments outside of work and dealing with those in a fair and reasonable way. That is the heart of the application.

PN136

The only other thing that I was going to say was that and I already did mention this, but it is difficult to deal with these issues in isolation. There's an application before this Bench by the ACTU to impose four hour minimum engagements across the board for part time and casual employees. There's an obvious interaction between the two applications and in a way it's difficult to deal with one without know what the situation is with the other.

PN137

The ACTU final written submission that was filed in these proceedings on 18 November has some diagrams which start at paragraph 34. Obviously the purpose of these diagrams is to demonstrate - I'll call it a worst case scenario for employees under the proposed variation. So your Honours will see at paragraph 34, there's a hypothetical employee called Jane.

PN138

In green, Jane's commitments outside of work are recorded on a calendar and unavailable is a creamy colour. So she's unavailable between midnight and 6 am and she's unavailable on Sunday. She then has availability Monday to Friday from about 6 am up until 5 pm. In the first fortnight Jane works nine to three, Monday, Tuesday and Wednesday. Then over the page there's fortnights 14 and 13 which is really designed to show the same number of working hours, but in a disaggregated way across her spread of availability.

PN139

As a worst case scenario, I can't really cavil with that; that's right under the proposed variation. That is right. Minimum engagements may address some of that issue and there's an application before your Honours for fours minimum engagement. There are minimum engagements for casual employees in this award; there's no minimum engagement for part time employees.

PN140

Absent a minimum engagement under my client's application, those hours can be worked in that way. I have to accept that that's a worst case scenario for an employee. Now the reality is, I very much doubt that - what I'll say is this. If the employee is working in this way, there's not a lot of reasonable predictability about those hours. Clause 10.3(a) requires a part time employee by definition, to have reasonably predictable hours of work. That clause has some work to do.

PN141

VICE PRESIDENT HATCHER: What work does it do?

PN142

MR SCOTT: Well, if you don't work reasonably predictable hours of work, you're not a part time employee.

PN143

VICE PRESIDENT HATCHER: That's the general proposition, but as a practical fail safe mechanism, what does it actually do to prevent these scenarios from occurring?

PN144

MR SCOTT: Well, it acts as a prohibition on an employer rostering someone.

PN145

VICE PRESIDENT HATCHER: What precisely does it prohibit? It might prohibit this worst case scenario, but at what point does something slightly less worse than this become reasonably predictable. That's the problem. I mean it's aspirational rather than a precise mechanism.

PN146

MR SCOTT: Yes I accept that. I don't have an answer for your Honour. Like many things in modern awards, there's a level of greyness in it. I don't have a definition for reasonable predictability; what I'm suggesting is that what's demonstrated in fortnights 14 and 13 is not it. Where you draw the line, I don't know. In my client's application in relation to 10.3(c) does not seek to disrupt the

well-established principle that part time employees must have reasonably predictable hours of work.

PN147

Unless your Honours have any questions, they were my closing submissions.

PN148

VICE PRESIDENT HATCHER: Right, thank you. Mr Pegg.

PN149

MR PEGG: I'll be fairly brief, but I'm going to try and really focus in on the problem that we think needs to be solved and the reason that we support the application from ABI and NSW Business Chamber as a potential solution to the problem that we identify.

PN150

I think it's worth noting that clause 10.3(c) of the Social, Community, Home Care and Disability Award is a variation that come into effect from August 2013. The timing is significant because that coincides almost exactly with the introduction of the National Disability Insurance scheme. The operation of clause 10.3(c) took effect at the precise point in time where we'd say the evidence in this case has shown a fundamental change in the nature of the organisation of work in this industry.

PN151

The effect of clause 10.3(c), as Mr Scott has outlined, and I'll try and summarise quickly, is that on engagement of a part time employee, the employer is required to specify precisely the starting and finishing times of work and the hours of work per week which is an expression of words that works fine in a traditional office environment, for example; in a traditional notion of permanent part time employment.

PN152

The problem that employers in this industry are facing since 2013 progressively, as the NDIS rolls out, is that the employer knows that that specificity can't be provided. The employer knows that it's a fundamental aspect of the NDIS that clients have an ability in many cases to seek that the timetabling of support is delivered in a flexible way; that the timetabling varies from time to time. It's a deliberate feature of the NDIS.

PN153

If an employer can't meet that threshold that's been set by 10.3(c) since 2013, then Mr Scott's outlined a couple of options and the most logical option is well, this engagement doesn't meet the definition of part time, it must therefore be casual. The problem with that, is that I think there's furious agreement within this sector that casual employment ought to be for short term ad hoc irregular work, that's not predictable.

PN154

But we have a category of workers, a growing category of workers under NDIS and the evidence is that about 70 per cent of the growth is in one-on-one supports.

A growing category of workers for whom the work is long term, secure, reasonably predictable, there clearly are elements of that work that are predictable in terms of things of personal care in the morning and the evening, but with some variability particularly around lifestyle and social supports and educational supports during the day where the client has an ability to require changes in the timetabling.

PN155

So there's a gap; there's a gap emerging and it's a gap that wasn't a significant issue prior to 2013, but it becomes a big issue as NDIS rolls out. There's a new form of work emerging where the employer knows that we can't, as a contractual matter, guarantee with any kind of certainty, that your hours will always be 9 am to 3 pm, Monday to Wednesday. But we do know that we've got a quantum of hours and we've got some predictability.

PN156

In some ways - not in some ways, quite clearly, the requirements of clause 10.3(c) actually impose more rigidity and less flexibility on the employment arrangement than applies for full time workers. So a full time worker can be engaged as shift worker, that's the deal, that's what the contract says, you're a shift worker and we'll roster you in accordance with the rostering provisions of the award, so you can do, for example, rotating 24/7 shift arrangements.

PN157

A part time employee who's engaged to work four days a week, arguably and I think it is the case, can't be employed on that basis. They have to have their hours specified in the contract of employment and 10.3(c) doesn't allow for an arrangement which simply refers to the rostering arrangement. Mr Scott referred to the decision of the Full Bench in relation to the Aged Care Award and that's the issue there, was the Aged Care Award has an identical clause regulating part time employment and that was the decision that came out in that case and that's referred to in the union's submissions.

PN158

The practical problem that we're trying to solve is, we have a category of work that we say is not short term and ad hoc; that there is some reasonable predictability; there is some ability to engage workers in a sensible way through rostering provisions, but the award doesn't allow for it. Rather than, as the unions are trying to characterise it, rather than this being an attempt to casualise permanent part time work, it's actually an attempt to enable the employment of workers on a permanent basis, with access to paid leave entitlements, with the job security that comes with ongoing employment with both the financial and non-financial benefits of the various incidents that go with permanent employment; where we know that the work is there and it's reasonably predictable.

PN159

Clause 10.3(c) is not the only way of characterising permanent part time employment. Other modern awards have different ways of characterising it. There are enterprise agreements in the sector that operate differently and some of the witness evidence in this case has come from both employers and employees

who were using enterprise agreements that did actually allow for part time employment to operate in accordance with the roster.

PN160

If we're wrong in our submission that the award does not allow permanent part time employees to be engaged by rostering, in other words, they're given a contract of employment that enables their hours to be set by a roster fortnightly in the same way as a full time employee, because it may be that this award can be distinguished from the Aged Care Award in some respects. Then if that's the case, and that would reflect common practice, then the Award needs to be varied to make that clear, because it's certainly not clear at the moment.

PN161

There was a question asked of Mr Scott regarding the scope of the proposed variation and we would certainly agree that the genesis of the proposal comes from the NDIS, that's the immediate problem that's trying to be solved, and primarily it relates to workers who are engaged to provide one-on-one supports for individual clients. The evidence from our witnesses, in particular, from Dr Baker from NDIS who gave an overview of how the system works, but also, if you like, the case studies from the other employer witnesses, is that in that form of work, which is a relatively new and growing form of work under NDIS, the rostering becomes complex compared to traditional residential group home work.

PN162

It's complex because clients can seek changes from time to time. It's also complex because clients don't see their support worker as interchangeable, where they actually have some control over who the worker is. So the employer is constrained in being able to allocate worker A or worker B to individual clients. There are those complications.

PN163

COMMISSIONER ROE: Wasn't it true though, Mr Pegg, that if you looked at the service agreements, that in some cases, the proportion of the time allocated to the client that was for these - taking people to the football or taking them to the dance or in other words, that heart of the money, which was likely to be at unpredictable times or variable times, in some cases that was relatively small. The majority of the money was going for turning up, coming in the morning to assist with getting up and feeding and so on, and in the afternoon, so that that assistance obviously was pretty predictable.

PN164

Now I'm sure there would be some service contracts where the proportion was different and that a large proportion of the contract was of the unpredictable sort. But do we have any real data before us about that? So in other words, if in most cases, most of the service agreement is going to be predictable and there is a relatively small part that is this unpredictable part, well then, why change the provision because you could deal with the unpredictable part using agreement to work additional hours or something of that sort, rather than deregulating the whole sector.

PN165

MR PEGG: There's a spectrum. So absolutely there will be some service plans which are pretty - I'd almost say set in stone, but quite predictable and regular and it might just be related to say personal care duties in the morning. Then at the other end of the spectrum, there are some activities that are totally unpredictable and subject to some degree of them and you'd use casual employees for that.

PN166

But a large part of the growth area is in relation to supports to enable clients to participate more fully in society. We tend, for simplicity in these proceedings we've tended to focus on easy to grasp examples like going to the football which concerns me a little bit. There's a tendency to perhaps trivialise it. It's an important part of - - -

PN167

COMMISSIONER ROE: I wasn't trying to trivialise it.

PN168

MR PEGG: Perhaps not, depends where you sit. But it's an important of what the NDIS is intended to deliver which is to enable disabled people to participate more fully in society, not just in recreational and social activities, but also education and work. So there is a spectrum. One of the - there is some data before the Bench and I think most of the, or a number of the employer witnesses in talking about their services had various bits of data about the variability in rostering, the sorts of level of cancellations.

PN169

For example Dr Baker had some evidence regarding how frequently plans change in just the three years of the operation of NDIS currently with relatively small numbers, but a significant proportion of clients who are on their 15th plan in the space of three years for example. So there is that sort of evidence and I'd reiterate it is a deliberate feature of the scheme that the clients can seek to renegotiate and can change how they arrange their supports to meet their needs as they evolve over time.

PN170

In short it's a spectrum, and we don't say it's all or nothing. That's part of what we're trying to deal with here is that the award essentially forces the employer to set up employment arrangements that fit either in this black square or in this white square, but the reality is something different.

PN171

DEPUTY PRESIDENT KOVACIC: But in the circumstances you've just outlined Mr Pegg, where clients can change their plan, wouldn't the existing award provision, in terms of being able to renegotiate your arrangement with the individual, given the sort of assertion that most employees are accommodating in those circumstances, be the obvious mechanism.

PN172

I accept that cancellations are in a different category, but for those more regular sort of changes, is there any evidence to suggest the existing provisions are not working in that regard?

PN173

MR PEGG: I think the evidence in this proceedings would suggest that for the existing workforce, if you like the pre-NDIS workforce that already have fairly stable hours, that mutually agree to changes on the margins, are relatively unproblematic and it's dealt with on a pragmatic basis. The issue as NDIS expands and there's this growth in the one-on-one support switch, looks like it's new clients coming into the system haven't had supports before and that's why it's different and it's that individualised stuff, it's not collectively organised.

PN174

The issue there is that in order to be able to deliver on what the client is seeking, there needs to be a capacity for the employer to say, well subject to notice as written into the service level agreement, we can accommodate some variations around here. Here are the workers who are assigned to you and here's their availability and we would seek to roster with the fortnightly roster and so forth and that's how we meet your needs, which we know we change from time to time. Whether it's a seasonal change, whether it's a change that's due to changes in study, semester to semester, whatever. That's what different.

PN175

We can predict that there will be more and more of the work will have that element of variability that's manageable and if it's totally random, that's a different thing. But when there's a manageable level of predictability and that's what we're trying to address. Otherwise, as Mr Scott's outlined, you're looking at having to do variations to the contract on what we know will be a very regular and routine basis and that's difficult for an employer to enter into from the outset of the employment of a new employee.

PN176

Again, it comes back to this irony that we know that there's going to be a growth in work. We know that there's going to be long term secure work available for existing part time employees who want more hours, there'll be more hours but the operation of clause 10.3(c) makes it very difficult for an employer to knowingly enter into a contract that says we can guarantee you these hours when in fact they know they can't. But what they can do is guarantee some parameters and so that's the problem that we're trying to solve.

PN177

That's what the draft variation attempts to do. It attempts to limit its scope to workers who are engaged in work where the client has that degree of control. As Mr Scott says, maybe it could be drafted differently. We've tried I think - we've sought to avoid labelling government funding programs in an award instrument, I suppose is why the wording is the way that it is. We've tried to put in safeguards for employees around what their availability is, which again, on a practical level is what part time employees always do in any event. I'm in the market to work three days a week, that's all I'm interested in, that's what the agreement is.

PN178

We would say that there's some concerns around well what about the zero hours concept? Absolutely not the agenda that we're trying to pursue. It would be counter-productive from the employer point of view. Again, the employer

witnesses were quite clear about that. The prime concern is to not have to casualise work that could otherwise be regular permanent employment. If there needs to be some further drafting work done to provide, as part of the exchange, if you like, some commitments around how you guarantee minimum hours that reflect a reasonably realistic minimum, Mr Scott pointed to the Aged Care Enterprise Agreement formulation. Something along those lines we're certainly open to.

PN179

But the fundamental problem comes back to the growth area under NDIS is a form of work that did not exist to a significant extent prior to 2013, and that's the problem that we're trying to address.

PN180

DEPUTY PRESIDENT KOVACIC: How do you prevent large numbers of as it were broken engagements within a single day being rostered under this system?

PN181

MR PEGG: There's - - -

PN182

DEPUTY PRESIDENT KOVACIC: If it's 9 o'clock you do an hour with one client and then 11 o'clock you do an hour with another client and then 2 o'clock and maybe 4 o'clock, and they just spend the rest of the day driving round between them and having a cup of coffee, and then they get four hours work for a whole day's moving around as it were. How do you prevent something like that happening?

PN183

MR PEGG: Well, that's currently possible anyway under the award. It's partly a consequence - - -

PN184

DEPUTY PRESIDENT KOVACIC: Not without agreement.

PN185

MR PEGG: True, not without agreement.

PN186

DEPUTY PRESIDENT KOVACIC: But here you could unilaterally allocate somebody to work on that basis.

PN187

MR PEGG: Yes. So again, a way forward on that, it's not the draft variation but a way forward on that would be to look at - to the extent that employers are seeking some flexibility, that might be an area that could be looked at in drafting around minimum engagement. Again the Bench has before it applications from the ACTU regarding minimum engagements for part-time employees who currently don't have that in this award.

PN188

DEPUTY PRESIDENT KOVACIC: Well, let's put our cards on the table because this is the final submission.

PN189

MR PEGG: Yes.

PN190

DEPUTY PRESIDENT KOVACIC: So is a minimum engagement the solution to that problem? Leaving aside how long that would be, does it solve or at least ameliorate that problem?

PN191

MR PEGG: There's two aspects. As a matter of logic of course a minimum engagement would put constraints on the employers' ability to do that. As a matter of practicality I think it's important to say that employers already don't have an interest in totally fragmented hours of that nature if it can be avoided, simply because it is impractical as there's too many transition costs in putting workers on for a short period here and a short period here. It's far more efficient for the employer, both in terms of how they organise the work but also in terms of being able to manage long term employees to be able to bundle together tasks to make decent shifts. But we do see evidence of that breaking down in some regional area where there's a, you know, what we call thin markets where there's only a handful of clients dispersed around an area, and those things are difficult to manage.

PN192

Again, it's a spectrum. There comes a point where it makes more sense to use casual employees. But what we do see is a growth in jobs being designed around people doing regular hours say in a residential group home in the morning that are pretty rock solid guaranteed, and then going out subsequent to that as a continuation of their shift to do more of the one on one work out in private homes or out in the community. That's where there's - that's where you get that notion of core hours and some variability around the edges.

PN193

I think I might just conclude by really just once again summarising. The construction of the award as it currently exists sets up a gap between the notion of short-term ad hoc casual work, permanent absolutely set hours for a permanent employee. We've got a rapidly growing category of workers whose work can't be set as predictably as clause 10.3(c) requires, yet who really shouldn't be employed as casual workers potentially for years on end without access to paid leave and without access to the job security and notice of termination that goes with permanent employment and that could be employed that way, would have under older instruments uncontroversially. Can be under some enterprise agreements in this sector uncontroversially. That's what we're trying to address in the draft variation that's been proposed.

PN194

VICE PRESIDENT HATCHER: Thank you. Are you next, Ms Doust?

PN195

MS DOUST: Yes. I expected my submission to go for about 45 minutes if that's relevant to the Bench or information that might be useful. I just wanted to proceed in addition to the final submissions dated 11 November 2016 that have been filed on behalf of the unions, I don't propose to go over them in any length. I presume that the Bench has received a copy of those and has had an opportunity to have a look at them. What I wanted to deal with was just a number of propositions that we say lie in support of the unions' case.

PN196

The matter before the Commission involves a requirement in clause 10.3 of each of the awards for the days and hours of work of a part-time employee to be specified and recorded in writing at the commencement of the employment. The first proposition we want to make about that is this; nothing in the provisions means that part-time employees may only ever work the hours specified at the outset of their employment in that letter of engagement or whatever other form of document it is. That's the language that has been used in relation to the provisions that this means that the hours are fixed, that they're unmoving and that nature.

PN197

We say this, that the provisions that were developed initially in the Aged Care Award and moved into the SCHADS Award were designed to accommodate the offering of additional hours to part-time employees. So that is something that is always available to employers. That was expressly stated in the award modernisation request and referred to in the decision, in respect of the Aged Care Award. That's referred to in the submissions at paragraph 33.

PN198

The relevant aspect of the part-time provisions as they currently exist we say is this; that employees are not compelled to work additional or different hours that is there agreement which is required in order for that to be the case. So departure from the agreed hours is something that will involve discussion between the employer and the employee and is subject to the employee's agreement. A fundamental element of the arrangement, the quid pro quo, if you like is that additional hours to those which are specified in the initial agreement or engagement terms do not attract an overtime penalty where they're up to 38 hours. That is unlike provisions which are commonly found in other awards, whereas a part-timer if you're working additional hours to your part-time hours, those hours will attract overtime penalties. Under these awards those additional hours are worked at single time.

PN199

So the starting proposition that we have in relation to the hours provisions in both awards is that they've been crafted in a considered and deliberate way, and particularly to enable persons with other significant commitments such as family, caring commitments, educational commitments and the like, to have work of a predictable nature where the person can say in relation to those long term long standing commitments, that they can retain work while also attending to those other obligations. The provisions have obviously been crafted having regard to issues such as the need to promote workplace participation, particularly the participation of women and skills retention within these industries. So these are

provisions which we say have been considered having regard to the modern award objective.

PN200

We say what flows from that is this; they should not be interfered with in the absence of first of all, persuasive evidence about the nature of any change - sorry, about the nature of any changing conditions that's said to justify any need to change the provisions, and also a cogent rationale for the particular change that's sought. We say neither of those conditions has been satisfied in the current case, because when one looks at the evidence, that doesn't show clearly and persuasively the nature of the change said to justify the amendment. We also say when one looks at the provisions which are proposed there's not a cogent rationale for them.

PN201

Can I say at the outset in relation to the application of St Ives to amend the Aged Care Award, we say that that application should fail at the first hurdle due to an absence of evidence about the relevant industry. Of course, the Aged Care Award applies under clause 4 of that award to the aged care industry as defined. That is defined in the definitions provision of that award to mean the provision of aged care services in a range of residential settings. It does not have application to the provision of direct support in the home. None of the evidence that was adduced by St Ives was in relation to the provision of aged care in a residential setting. It was all about the provision of care by employees who are covered by the SCHADS Award.

PN202

The references to the evidence of the witnesses, Ms Andretich and Miles is found at paragraph 124 of the unions submissions. Can I just correct one of the references. There's a reference to the evidence of Ms Andretich where I think it's PN5028, which is referred to in support of the proposition that she accepted that she wasn't referring in her evidence to people who are covered by the Aged Care Award but rather to people who are covered by the SCHADS Award. The proper reference for that should be PN5046 to 5051, and I think that's at footnote 131 in that part of the unions' submissions. So we say that the Bench hasn't been given any evidence about the application of the Aged Care Award or employees engaged under that award, upon which it could be satisfied that there was any basis to make any amendment to that award.

PN203

Now the submissions that I wish to make now about the evidential basis for the application are principally directed to the case in respect of the SCHADS Award, and I do so on the basis that I think that it is probably clear that there is no evidence in relation to the Aged Care Award. Can I say though the nature of the observations that I make are equally applicable in relation to the application in respect of the Aged Care Award. So if the Bench was against me on the first proposition about whether or not aged care was still in play, I rely upon the following propositions in relation to that.

PN204

The employers' case in relation to the SCHADS Award is advanced on the basis fundamentally that the introduction of the NDIS creates difficulty for employers because of the choice given to consumers under the funding model. The choice gives them the ability to terminate their arrangement with an existing service provider, so we accept there's been a change from the block funding style to a client or consumer funding style.

PN205

This was characterised by Mr Pegg just moments ago as I think something along the lines of wholesale changes to workplace organisation, or to work organisation. We say that is in fact not the evidence because the evidence so far as it has fallen before the Commission is onerous to funding arrangements and it hasn't gone to the nature of or the quantum of the workloads being carried out by the services that are operating in this area, and I'll go to that in a little bit more detail shortly.

PN206

But it's asserted at paragraph 3.2 of ABI's submissions the clients can choose what services are provided to them, when and where those services are provided and by whom they are provided and we think those submissions need to be read down with a dose of salt. The first proposition I want to make about that evidence and that sort of argument is this; we reject the proposition that the NDIS involves simply a massive pile of downside for employers and nothing else. In fact, what is occurring as a consequence of the NDIS being introduced is an enormous expansion within the disability arm of the social and community sector. Dr Baker in his evidence, and this is at paragraph 14 of exhibit 232, estimated that government expenditure on disability services will double as a proportion of GDP by 2018, and there's no dispute, and this was accepted by Mr Rohr at PN4684 in the transcript, that there will be an increase in demand for services and an increase in funding to the sector.

PN207

In the case of connectability, of which Mr Carey was the CEO, the overall hours of support provided have increased since the introduction of the NDIS by about 20 per cent. The transcript reference for that is PN4895. There is no suggestion at all of any diminution in current funding, any diminution in demand for services or any contraction of the industry. We say that the growth in the sector represents opportunity for employers to increase their revenue and expand their operations. So that's the first proposition. This is not just simply doom and gloom for employers.

PN208

Second, we say the manner in which the services provided will now be variable has been overstated considerably in the way it has been described in the employers' case. In this regard it's instructive to compare the statements prepared and initially served by the employers, with the evidence as it fell out ultimately before the Commission. Some of the aspects of the new funding arrangements which are important to bear in mind are these; first of all clients are funded by the National Disability Insurance Agency in accordance with a plan.

PN209

Clients do not self-assess as to their needs. The plan must be approved by the agency. Clients are not given lump sums of funding to deploy on whatever and with whomever they wish. Funding is linked to the attainment of goals, must be provided by a registered provider. Clients negotiate with organisations for the provisions of services or for the provision of services consistent with their plan. Finally, and importantly we say, organisations have no legislative obligation to take on any particular client, to provide any particular identified service to a client, to provide services at the time of a client's choosing, or to provide a particular worker of the client's choice.

PN210

Not only is there no legislative obligation to do so, we say that aside from assertions which are made in a hypothetical sense as to how these changes in the arrangements will play out in future, there's no evidence to suggest that the operation of the market under the NDIS arrangements, will create some sort of market based compulsion for employers or the organisations who are providing services in this area to bend to those sorts of demands on the part of clients. The assertions that are made that this is what will inevitably unfold are made, we say, on a speculative basis. It's said that this is how things will occur. Clients will be able to simply insist on things and go to another provider and so on, that sort of claim is made. So we say the evidence falls well short of showing that there is any existing, or that there's any legislative compulsion or that there's a market compulsion.

PN211

COMMISSIONER ROE: Well, isn't there to some extent - put it this way. I can understand your submission about the point about the degree of change.

PN212

MS DOUST: Yes.

PN213

COMMISSIONER ROE: But it's part of the whole purpose and architecture isn't it to try and produce more client based demand - - -

PN214

MS DOUST: No question.

PN215

COMMISSIONER ROE: - - - and more flexibility.

PN216

MS DOUST: No question. We don't - - -

PN217

COMMISSIONER ROE: So you're right about the - you're right about the fact that it's a question of degree, it's not going to be, you know, it's a matter of negotiation and if clients want services and they want certain providers, they'll make concessions and I think that's been conceded.

PN218

MS DOUST: I think the way I prefaced all of those observations, Commissioner, was that the employers' case had been considerably overstated.

PN219

COMMISSIONER ROE: Yes.

PN220

MS DOUST: We say first of all that it doesn't get to the high water mark that one finds in some of the submissions that have been filed along the way. Some of the claims that are made, some of the assertions that have been made by the clients. It needs to be taken with a dose of salt, and I'll get to precisely what the evidence showed in a moment. When one talks about the quantification of the extent of the change. So those are the fundamental propositions in terms of the architecture of the system.

PN221

What's been put is - I think the word that's used in some of the submissions is that clients can simply terminate as if the decision to change any sort of provider was something that would happen with the click of the finger, and what we say is that that is an assertion also that the Commission would take with a dose of salt. First of all, there's no evidence of that having happened thus far, so there's no evidence of clients on a whim terminating their arrangements with providers.

PN222

The second thing is this; as a matter of pure common sense, the Commission would think that in terms of any client of a disability service, determining the services that are going to be engaged to meet their needs, that any decision to change their service provider is likely to be informed by a number of considerations, and I want to suggest a couple, not by any means exhaustive. First of all you would think the history and relationship with the organisation would come into play. Second of all the range of services being provided by the organisation. Third, the availability of those services or a preferred range of services from alternative organisation. Fourth, the location of other services. Fifth, the client's particular disability and needs. So all of those factors would come into play. We don't think that there is any evidence before the Commission by which it would think that a change in service provider is something which would be undertaken lightly by a client.

PN223

The third proposition we want to put is this; to the extent there has been or will be a growth in the market for the provision of one on one supports to clients, which are in the category that are more likely to be volatile or changeable, we say that the extent of that growth is something that has not been properly addressed in the employer's evidence. To the extent that the evidence sought to quantify the extent of the increase in that cohort of work or client, we say it fell well short of what might persuade the Commission to dispense with an existing considered provision in awards.

PN224

So for example, just going to the evidence. In relation to connectability which I think was Mr Carey, yes. Mr Carey gave evidence about that. The transition to

the NDIS he said involved a 10 per cent increase in the number of clients seeking individual supports. This was an increase to 80 per cent from a pre-NDIS figure of 70 per cent. Of course it's always difficult with percentages to get any sense of how that might operate on a practical basis on the ground. We're not given any information as to the number of employees who are required to deal with that cohort of client, whether the clients who are seeking individual supports are also clients in relation to whom supports that are of a much more predictable nature are already being provided.

PN225

It's simply a number to show that there is an increase and we don't cavil with that proposition that there will be an increasing amount of funding for the provision of those individual supports under the NDIS. But if one's going to make an amendment to the award that has application across all of the employees covered by the award, theoretically and I'll come to the question of the scope of the amendment shortly. In my submission some sort of real detailed examination of the impact of those changes should be made.

PN226

The second example to go to is the evidence of Dr Baker whose statement was filed by Jobs Australia. He's the chief executive of Disability Services Australia. In his statement, which is exhibit 232 at paragraph 26, he referred to:

PN227

Increases in short duration service requests, requests for support from clients located distant from other clients and less predictability.

PN228

Again, none of that was given any real substantial quantification by Dr Baker, so that the Commission could understand what's the extent of the workforce, in relation to whom these observations have any application.

PN229

Mr Packard, the CEO of Valmar also characterised the trend in broad-brush terms. This is at exhibit 254 at paragraph 44, his words were:

PN230

The quantum of support hours has been increasing and the predictability around many of the support shifts has steadily been reducing.

PN231

Can I pause for a moment and just emphasise that use of the word "shifts" there. Unfortunately, in a deal of the employer evidence and submissions there's a confusion between an employee's shift and the engagement to provide the support for the client. The shift is of course how the employer determines to engage the employee or what is agreed at the outset, depending upon the - depending upon the employee. It doesn't follow that because there is a client who wants support for a period of one hour, that that is the factor that defines the length of the shift.

PN232

Mr Rohr, who gave evidence from Made Well, addressed the issue of the change to the nature of the organisation's work at paragraph 41 of his statement. That's exhibit 228. He identified these trends; increased requirement for services outside core hours, shorter shift length, again confusing in my submission a shift, an employee's shift, with what's being sought by clients. Really what he's talking about there is shorter attendance length. Increased one on one work, increased community or home based services and an increase in cancellations. None of the trends was quantified in relation to Made Well's overall service (indistinct).

PN233

He then referred to four case studies at paragraph 46 and following of his statement. The issues said to be illustrated by the case studies were these; a need for services on weekends or evenings, requirement for higher intensity staffing, the need for services outside of core hours and the need for flexibility because of cancellations. Of course as to the first three issues, that is; provision of services on weekends or evenings, higher intensity staffing, provision of services outside of core hours, there is nothing in the existing part-time provisions that prevents that sort of service from being delivered, if one was to assume that the award must facilitate that being delivered by part-timers.

PN234

That work of course can be delivered by part-timers. It can of course be delivered by any other category of employees. Clearly, the existing part-time provisions present no impediment to dealing with those demands in services. It's really only the fourth category, the need for flexibility because of cancellations which might cause some sort of difficulty if a part-time is engaged to perform that work, or part-timer is asked to perform that work in the course of working their agreed hours during the course of the week. I'll come back to that issue shortly.

PN235

Finally, just to round out the summary of the evidence, Dr Fitzgerald from Scope gave some evidence, and she quantified some of the increases within her service, and this is at paragraph 42 and following of her witness statement. She referred there to a 400 per cent increase in home support shifts and - or the increase in individual support shifts on the weekends from 3 per cent to 8 per cent. Again, those sorts of percentages, if they're not coupled with a detailed analysis of the underlying proportions of work being performed in that area, are of very little assistance to the Commission in understanding really what is the nature and dimension of the change. How is it impacting the organisation? One needs to know the baseline to understand how that 400 per cent might be played out.

PN236

If there was one shift currently being performed of that nature and it has now going to four, that wouldn't be something that would persuade the Commission that there was a need across the board to carry out changes to the award. So far as there was evidence about increases in the distribution of individual shifts over the course of a week, again the fact that support is sought on a weekend is not, we say, something that is impeded by the operation of the current part-time provisions. There is no impediment to engaging a part-time worker on the basis that they perform work on a weekend.

PN237

We say that when one looks at that evidence, it falls well short of the sort of persuasive evidentiary case that would be required to justify change. Something more in the way of data would be required, but also an analysis to demonstrate how this impacts on the ground. Something more than simply assertions about there is an increasing demand for one on one shifts, there is an increasing demand for the change of services and the like. We say it would be premature of the Commission, at the very least, to effect a major diminution of conditions of a large proportion of the workforce in the industry based on changes which haven't yet been bedded down.

PN238

Of course the evidence is that the NDIS is not yet fully implemented. One would expect in any process of major funding change such as this, for the parties to be on an implementation learning curve. Only once those changes are bedded down will it be possible to get a real sense of the dimension of the change to the entire work task of the organisations, if you like, and what changes, if any, are going to be appropriate to deal with the new arrangements. Also, in that context, what corresponding allowances should be made for employees to compensate for any additional flexibilities that are given to the employer.

PN239

Of course in the modern awards objective, changes in predictability of work are said to warrant additional compensation. If there is to be some wholescale shifting of the ground in relation to part-time work, we say that should be considered in the context of what are the appropriate supports or quid quo pro being put in place?

PN240

VICE PRESIDENT HATCHER: What would they be?

PN241

MS DOUST: It might be that there is additional loadings. I'm not here today advocating that these changes should be allowed subject to some other accommodation. We oppose the application and we say one reason why the bench would dismiss the application is that, apart from the absence of evidence, there has been no attempt to grapple with the value, if you like, of the increased unpredictability of work.

PN242

VICE PRESIDENT HATCHER: We are obviously entitled to take that approach, but if you don't put an alternative submission, then we don't know what - if we were minded to grant the application to some extent or to some degree, in part or in whole, we don't have any systems as to what countervailing measures might need to be put in place.

PN243

MS DOUST: Yes. Well, we don't do that now and it may well be that is something that needs to be dealt with down the track; but that is the position as it currently stands in opposition to the application.

PN244

VICE PRESIDENT HATCHER: You characterise the application as involving a diminution of part-time conditions.

PN245

MS DOUST: Yes.

PN246

VICE PRESIDENT HATCHER: But one of the difficulties I have with this is that essentially under the current clause you can engage someone on a part-time basis on something that's very close to a zero hours contract. That is, you can engage them on one hour a week.

PN247

MS DOUST: Yes.

PN248

VICE PRESIDENT HATCHER: You can then allocate additional hours which, by some notional agreement, the employee performs.

PN249

MS DOUST: Yes.

PN250

VICE PRESIDENT HATCHER: As I read the award, the additional hours don't even require agreement in writing. That is, the agreement in writing only seems to apply to changes to the guaranteed hours, not any additional hours, but if you can point to something about that to the contrary, please do so. There is no minimum weekly guarantee. There is no daily guarantee.

PN251

MS DOUST: Yes.

PN252

VICE PRESIDENT HATCHER: I'm not sure that this current clause is anything to write home about, to start with. That is, I don't think the clause protects against the sort of disadvantages which the unions are actually concerned about.

PN253

MS DOUST: I don't say that they are the gold standard in drafting, but we oppose the changes that are sought. That may well be an argument for another day, as to how the existing arrangements might be improved. We do say that additional hours need to be agreed in writing and that flows from clause 10.3.

PN254

VICE PRESIDENT HATCHER: Why?

PN255

MS DOUST: 10.3(c). We say the final sentence, "Any agreed variation to the regular pattern of work will be recorded in writing - - -"

PN256

VICE PRESIDENT HATCHER: That is the regular pattern agreed at the outset. That is he fixed hours.

PN257

MS DOUST: We would say that a variation to the agreed pattern would be adding additional hours; so if one is to take on an additional shift or some additional hours at the end of a shift. So far as the argument was made about the administrative burden of registering such agreement in writing, we say that an email isn't an unduly onerous administrative burden.

PN258

VICE PRESIDENT HATCHER: Or a text message.

PN259

MS DOUST: Equally. Yes, I accept that. Either of those is forms of recording an agreement in writing. The final point to be made in terms of the evidence is this: the NDIS is not something which is industrywide. It obviously only applies to disability funding. In particular, it does not apply in the area of home care, so the provision of aged care in the home.

PN260

These are provisions which on their face would appear - and I'll come to the provisions themselves because we say they're not entirely clear. We say on the face of them they appear to be directed to pick up people providing home care, as that phrase is understood to mean aged care in the home, and the evidence isn't that the NDIS applies to the provision of that sort of care.

PN261

COMMISSIONER ROE: Mr Scott, I think in his submission, conceded that we could - - -

PN262

MS DOUST: Carve out some - - -

PN263

COMMISSIONER ROE: - - - amend the wording or the wording could be amended to reflect the intention. I think Mr Scott has made it clear that the intention isn't to include that area.

PN264

MS DOUST: Yes. Well, as it's currently drafted, we say it doesn't meet that stated purpose and should not be adopted in its current form for that reason. If there is to be a different proposal, we say that's something that should perhaps be dealt with by way of a conference between the - just one moment. As I understand it, in fact there might be some of the home care workers who are covered by disability funding, but it's not the entire cohort. I think if this is directed to the difficulties generated by the NDIS, there needs to be some limitation in the way in which the amendment is drafted.

PN265

Can I move on now from the evidence to the rationale that has been advanced for this change. We say to the extent it is asserted that there is a tendency for volatility at short notice because of a tendency for clients to cancel or terminate their arrangements on short notice, this amendment would not deal with that issue, because if one was to fall back on the rostering provisions and they had application to the cohort of workers, one gets to the point where rosters need to be set with 14 days' notice and there is a provision for change by the giving of seven days' notice.

PN266

We say even if those provisions were to apply and you had an employee who was a part-time worker who was rostered within a window of availability that changes on short notice - and by short notice, I think we're talking a day or two or perhaps even less - they would still require employers to negotiate with the employee about rescheduling, changing their hours or finding other work for employees to do. The amendment that is proposed would not assist the employer to deal with that very short term volatility or potential for volatility in this cohort of work.

PN267

COMMISSIONER ROE: Wasn't the evidence that under the NDIS arrangements if it's a short-term cancellation - I think I remember somewhere 48 hours.

PN268

MS DOUST: Yes.

PN269

COMMISSIONER ROE: So less than 48 hours - well, the service still gets the funding for a certain number of cancellations where it is less than 48 hours.

PN270

MS DOUST: Yes.

PN271

COMMISSIONER ROE: So is the issue the period between 48 hours and seven days? Is that the issue?

PN272

MS DOUST: I think so far as cancellation is concerned, the finding that we would say the Commission would make is simply this: cancellation of a service by a client does not, ipso facto, result in the employer not receiving funding in respect of that attendance. So, it does not necessarily follow from the fact that a client has cancelled, that there won't be funds received in the organisation which could be applied to the payment of the employee who is engaged for those hours. That's the first proposition. Evidentially, we don't think it follows that cancellation means either no money or no work to do for the employee.

PN273

The second point we make is that even if that were so, bringing an employee under these roster provisions, under 25.5 where you have to set rosters 14 days and can effect a change in rosters on seven days - even then that wouldn't assist in an employer redeploying an employee in circumstances of the, say, 48-hour

cancellation, because they still wouldn't enable an employer to effect a change of hours for the employee on that sort of short notice.

PN274

Now, all of that really is a discussion that is had in the highly theoretical, because none of the evidence demonstrated that employees were taking an unreasonable approach to requests about changing their times. In fact the evidence was quite contrary and I think Mr Scott sought to make a virtue out of the fact that this is occurring frequently; that employees were, on the whole, accommodating when clients change their times for the provision of services. So, there is no evidential basis to think that any real difficulty is caused by that circumstance.

PN275

VICE PRESIDENT HATCHER: That cancellation clause, 25.5(f), deals with rostered home care services.

PN276

MS DOUST: Yes.

PN277

VICE PRESIDENT HATCHER: So obviously, referring to the earlier discussion, that would primarily be aged care and not disability, although it might in some cases be disability. Is that what - - -

PN278

MS DOUST: Yes. I think a portion of those workers would be disability.

PN279

VICE PRESIDENT HATCHER: Would there be a basis to extend that provision to apply to NDIS one-on-one care services?

PN280

MS DOUST: The same cancellation clause apply to any worker providing NDIS one-on-one services?

PN281

VICE PRESIDENT HATCHER: Yes.

PN282

MS DOUST: We would resist that. I would be reluctant to depart from our principal position, which is opposing the application. If you're asking would I make that submission in the alternative if the bench was inclined to accept the application and grant it - - -

PN283

VICE PRESIDENT HATCHER: If you get a choice between Mr Scott's application and that - - -

PN284

MS DOUST: Yes.

PN285

VICE PRESIDENT HATCHER: - - - which would you resist the least strongly?

PN286

MS DOUST: I really think that's a matter I would prefer to take some instructions about rather than to extemporise, as much as I can extemporise, you know, at length; but perhaps I can come back to that right at the end. Can I say just on that question about client volatility and so on, there have been a couple of threads to this argument that have been put by the employer and I think there is a logical inconsistency revealed in it.

PN287

On the one hand, we're told about the clients who cancel their supports on a whim, terminate their contract on a whim, that sort of thing. On the other hand, we're told about clients who are so unwilling to have their supports provided by anyone other than their nominated worker that they won't continue dealing with you unless they can get that worker. It seems to me if clients really do have a strong attachment to a particular worker and a strong desire to maintain that relationship, that is something that logically would sound in the client and the worker being willing to display a greater degree of flexibility in the way that they approach the question of hours in order to ensure the continuation of that relationship.

PN288

I think it might have been Dr Baker who gave the example about the care worker taking the client out to something on a Saturday night. Somehow things went wrong and the event continued on for longer than the worker was slated to work. Of course there was no surprise that the worker hung around until the end of the engagement and that was, I think, accommodated later on in the week. There is, I think, a logical inconsistency and it highlights, in my submission, the way in which this case has been advanced by ABI, I think on a somewhat overstated basis on what the real position is.

PN289

I must say at one stage it was contended that there might be something like 5 per cent of cases where employees didn't agree to what the employer sought to obtain. Now, that was not, in my submission, supported by any evidence as to the scale of that problem; but if that were the case, if there were 5 per cent of cases where employees were unwilling to bend, the Commission wouldn't think that that was something so monstrous that it would have to intervene to attend to it.

PN290

VICE PRESIDENT HATCHER: Mr Scott has made it clear the application is not intended to affect existing part-time employees.

PN291

MS DOUST: Yes.

PN292

VICE PRESIDENT HATCHER: So in one sense what has happened in the past is not entirely relevant. The real issue is whether the current clause is of a nature that it will lead to employees in the future accommodating what everyone agrees will be an expanded demand for work by way of casual employment.

PN293

MS DOUST: Yes.

PN294

VICE PRESIDENT HATCHER: Which I think everyone thinks is not desirable.

PN295

MS DOUST: Yes.

PN296

VICE PRESIDENT HATCHER: It's not so much a matter of whether we think it's reasonable or not. It's whether the clause as it stands would encourage employers to engage casuals rather than part-timers.

PN297

MS DOUST: Yes.

PN298

VICE PRESIDENT HATCHER: There seems to be some evidence, at least, that that is what some employers are doing.

PN299

MS DOUST: We don't say that that is entirely the question. We don't say that the question in this matter comes down solely to are employers going to meet this by increasing their casual workforce? We accept that that is one consideration that is relevant to the bench's task in this matter, but only one. One has to look at the other considerations, including all those considerations embedded in the clause as currently drafted.

PN300

Of course when one thinks about casual workers, one can see that the ACTU has proposed a scheme whereby employees who may be engaged as casual can, upon demonstrating that there is a regular pattern of work, that there is consistent work, transition if you like to a more permanent arrangement. That may well be the more appropriate way to deal with a problem of this nature.

PN301

If one is to talking about work which is such that it can be changed at 24 hours', 48 hours' notice, that sort of thing, and it's not expected that the bulk of the time there will be sufficient work both from that client and other clients to keep a part-time employee engaged at that set time, if in truth it is work of that nature, then perhaps it is better characterised as casual work or flexible work; but, in my submission, what is absent from the employer evidence and the employer submissions is any sense of reality about the way in which the work and the workforce might be managed to meet demands from a number of individual clients.

PN302

Once the funding arrangements settled down and are bedded down over time, one would expect to see that there are ongoing patterns of work such that there is the capacity to predict the patterns of work that are able to be performed by part-time

employees. We think, on the evidence to hand, the response sought by the employers is premature. Where client plans change and there is in fact two weeks' notice of that change - so the sort of change that could be accommodated by a change to a roster under clause 25.5 - the question that arises is whether that is a circumstance sufficient to warrant the change of that existing part-time guarantee.

PN303

If what we're talking about is changes where there is two weeks between the employer knowing about them and them playing out in practice in terms of the provision of services, then that is a circumstance where the employer has a great deal of lead time in order to negotiate with an employee affected about change of hours or to otherwise rearrange the shifts.

PN304

VICE PRESIDENT HATCHER: Where does the two weeks you're referring to come from?

PN305

MS DOUST: It comes from the rostering provisions. There are two ways in which we put the argument. The first is if the changes that the employer complains about which are occurring as a consequence of the NDIS are changes which are happening on a very short-term basis, then how we answer that is we say the changes you're seeking to the award don't meet those sorts of changes.

PN306

VICE PRESIDENT HATCHER: That is the cancellation scenario.

PN307

MS DOUST: That is your short-term cancellation. If what we're talking about is longer term changes, so changes that they can see happening over a period of two weeks or so - - -

PN308

VICE PRESIDENT HATCHER: A change to a plan.

PN309

MS DOUST: Yes - then what we say is the employer then has a very substantial time and no substantial capacity to deploy other measures to deal with that change in demand, so in that 14 days - - -

PN310

VICE PRESIDENT HATCHER: Did the evidence demonstrate under the NDIS the time frame or the notice period to a change a plan that the employer in practical circumstances would have?

PN311

MS DOUST: I can't say that it demonstrated that as any consistent proposition across the board, but I'm just contrasting the two different sorts of changes. If in fact the changes that the employer will experience are changes that play out over a longer lead time, and one would expect things like termination would, then that time - rather than the employee, if you like, bearing the risk of those changes,

perhaps it's not unreasonable in those circumstances to expect the employer to think about things like, "Well, maybe we drop off casuals that we were expected to use over that period. In the 14 days that we've got leading up to this time, maybe we speak to clients about whether or not they're willing to accommodate a change in their shifts."

PN312

There are a number of variables that the employer is able to seek to juggle in that sort of time and they have a capacity to do so.

PN313

DEPUTY PRESIDENT KOVACIC: Isn't that view based on a premise that an employee's availability under either of the options that are contemplated in the employer's proposed clause are different and that the availability is broader than what might be ultimately agreed with an employer? It might be that the two are the same.

PN314

MS DOUST: There might well be a difference, because one could imagine a situation where, for example, you agreed to permanent part-time hours on three days of the week because you had a set arrangement to undertake study, but you're on a semester break or for some reason something was rescheduled that week, or you didn't have to look after your aged parents during that week because they were in hospital. What we say is the merit of the existing provisions is that they leave that capacity to say nay or yea in the hands of the employee when the additional - - -

PN315

DEPUTY PRESIDENT KOVACIC: How does that change in the circumstances you just mentioned where an employee on semester break or whatever would invariably say to their employer, "For the next couple of weeks, I can work an extra few hours?"

PN316

MS DOUST: Yes.

PN317

DEPUTY PRESIDENT KOVACIC: I mean, under 3(d) - the proposed 3(d) - - -

PN318

MS DOUST: Yes.

PN319

DEPUTY PRESIDENT KOVACIC: - - - the period within which an employee can be asked to work is something identified subject to the employee's availability; so if it's Monday, Wednesday, Friday, 9.00 until 3.00, that doesn't change.

PN320

MS DOUST: Yes, that's right. It doesn't change. They can of course always work additional hours by agreement, so that's something that can happen under the existing provisions.

PN321

DEPUTY PRESIDENT KOVACIC: What I'm trying to get a sense of, it's not entirely clear to me beyond the example of perhaps being asked to work a range of broken hours across the 9.00 to 3.00 on Monday to Wednesday which might be - you know, the guarantees perhaps aren't officially low - what is necessarily the mischief that might be there in circumstances where the employee's availability are specified by the employee.

PN322

MS DOUST: Well, it's simply that currently one has the certainty of the definite hours which are set out in the contract. When one can be allocated within a range, one can be moved around within the range - - -

PN323

DEPUTY PRESIDENT KOVACIC: Let me put a slight variation. An employee is willing to work 9.00 until 5.00, Monday to Friday, but the employer can only offer, sort of, you know, the 9.00 to 3.00-type hours.

PN324

MS DOUST: Yes.

PN325

DEPUTY PRESIDENT KOVACIC: But in terms of a 10(3)(d) it might be something that is advantageous to the employee.

PN326

MS DOUST: Which would be advantageous?

PN327

DEPUTY PRESIDENT KOVACIC: In the sense that they say 9.00 to 5.00 - - -

PN328

MS DOUST: Yes.

PN329

DEPUTY PRESIDENT KOVACIC: - - - and perhaps the agreement is, within that, for the minimum of 25 hours or whatever it might be within that period. I'm just trying to get a sense of the actual mischief that is necessarily there.

PN330

MS DOUST: Well, what I would say there is that if an employee has definite hours 9.00 to 3.00 on the Monday to Friday, that they're desirous of additional hours, there is nothing currently to stop that in the award. We say there is no need to introduce an availability arrangement in order to facilitate the employee from working the additional hours.

PN331

What happens is if that gets changed to an availability arrangement, then subject of course to the hours that are identified, the employer can say, "Oh, well, no, actually what I'll work you is 11.00 until 5.00 during those days in this roster cycle and then I'll change you back to 9.00 to 3.00s, and then I'll do you 9.00 until 5.00s the following week."

PN332

VICE PRESIDENT HATCHER: But you can do that type of change with a full-time employee.

PN333

MS DOUST: Yes, that's correct, subject to complying in relation to shift arrangements and so on.

PN334

VICE PRESIDENT HATCHER: If you can do that for a full-time employee - that is, for example, move their whole bunch of hours forward or back an hour or an hour or two - --

PN335

MS DOUST: Yes.

PN336

VICE PRESIDENT HATCHER: - - - what is the detriment of doing that for a part-time employee within the part-time employee's specified availability?

PN337

MS DOUST: I think fundamentally what we say to that proposition if you're going to compare the position of full-timers and part-timers and say that, you know, part-timers really should just be a scaled down version of full-timers, then one necessarily has to look at the overtime loading. If the quid pro quo in respect of having definite hours set out in writing was that you could work additional hours at single time, that's really at the nub of how these provisions were created and that's really the quid pro quo.

PN338

What that might have a tendency to encourage in some cases is an identification of the set hours in a contract as minimum hours and what the award provision facilitates is that capacity to work additional hours at the single time. That was made clear in the award modernisation request so that there wasn't any disincentive to offering those additional hours to part-timers; but we say that that's fundamental to the way in which the part-time model was developed in this award.

PN339

Now, if one is going to depart from that in the way in which hours are fixed and set, then it seems to me the whole arrangements should be considered.

PN340

VICE PRESIDENT HATCHER: Alternatively, you could do the quid pro quo by way of changes to guaranteed weekly and daily hours.

PN341

MS DOUST: Yes, it could be. One way might be to compensate for those changes with minimum engagement times, minimum weekly hours, minimum daily hours, that sort of thing. I'm told that it's much harder to change around the number of hours a full-time employee must work because of the requirement that they have two days per week off, so that's something that impacts on the ability to move full-timers around; so there is not precise comparability in those two categories.

PN342

Can I say this: in considering any diminution of employee conditions - and we say this is a diminution. Moving from a certainty position to a position with less certainty is a diminution - we say the Commission would find that that would inevitably have the capacity to be adverse for employees' health and welfare. The uncontradicted evidence of Dr Muurlink showed the connection established in the literature between diminution of the control the employee has over their working hours and adverse health and welfare outcomes.

PN343

That happens for a number of reasons, including shutting off various windows, access to services, capacity to engage in self-care activities, participating in family life and the like. The capacity to establish routine is obviously central to every form of self-care practice. We say in terms of employees, the Commission would regard the amendment as a step backwards for them. It is a lessening of control and it is not something that the Commission would think in the circumstances was warranted, where the changes which have led to differences in the - or the changes which are called in aid by the employer, being the NDIS funding, are changes which have, we say, a whole lot of upside for the employer, as well.

PN344

The question is whether or not in employers accessing that upside, should they have to bear in that process some of the risk of having to manage their workforce and the like or should employees inoculate them against any downside in that process by giving them back greater flexibility over their working hours? In my submission, on the evidence there is nothing to warrant employees being the party that pay that price or make that sacrifice, if you like.

PN345

Finally, considering the proposed amendment, we say there are real difficulties with the terms in which it defines the group caught by it. That is described as employees who are engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided. We say that formulation is problematic for a number of reasons. First, it's directed to the point of engagement of an employee. It's not directed to whether the employee is actually allocated to perform work of the particular nature in any given week or in any given roster cycle. It puts in the employer's hands the capacity to self-define the group of employees caught by what we say is the less attractive hours arrangement.

PN346

Next, it uses the notion of discretion as its touchstone. We say the use of that concept is problematic in circumstances where clients' rights will be set out in service agreements, where employees have no right to access those agreements to determine the extent of the clients' discretion and where employers appear to have been unwilling to insist on the rights to notice and the like that are contained in the agreements.

PN347

We ask rhetorically why that concept of discretion is not applicable to workers in community legal centres, where clients can decide if they would like to approach the centre to seek to obtain services and might have a choice of a number of different appointment times.

PN348

VICE PRESIDENT HATCHER: Ms Doust, once the NDIS is fully rolled out - - -

PN349

MS DOUST: Yes.

PN350

VICE PRESIDENT HATCHER: - - - will there be any disability services conducted under this award which would not be services under the NDIS?

PN351

MS DOUST: I don't think that is a question that can be answered at this stage, because I think the evidence shows that there is too much flux at this stage. There is discussion about new organisations who are registering for the NDIS. It remains to be seen, I think, whether or not there are any disability services who perhaps remain entirely outside the model and to operate wholly perhaps through charitable funding on a block basis. I don't think the evidence really - yes, there are too many questions still unresolved.

PN352

VICE PRESIDENT HATCHER: Right.

PN353

MS DOUST: Nonetheless, we say the description "discretion" is one that is apt to apply to other services provided under the SCHADS Award. Legal centres, counsellors, homeless services, refugee support services, advocacy groups and so on could well fall within the scope of this amendment and should not be affected by it, and could not be, we say, on the force of the evidence currently before the Commission.

PN354

Further, the amendment which is proposed appears to have application to a worker who performs any amount of work where the client has discretion, even if the bulk of the work they perform is not of that nature. You might recall Mr Pegg's submission towards the end where he spoke about workers who have predictable set hours providing residential care in the morning, but then later on during the course of the day go on to provide those one-on-one supports which would appear

to fall within the scope of the sort of work that's sought to be caught by the amendment.

PN355

Of course if what occurs is that there is a new formulation that doesn't catch all the part-time workers or it doesn't catch all the part-time workers in a service, it creates a situation where there are two strings of workers; different arrangements in place. One can hardly see how that would assist the employer to deal with the administrative burden.

PN356

Finally, can I say in response to the ABI's submissions where there was reference to enterprise agreement provisions towards the end of the submissions - I think at paragraph 9.5 - where there is a part-time provision from agreements in the aged care industry, we say this: first of all, it's inappropriate to advance a case along these lines after the evidence has been closed.

PN357

One of the things that the unions might have wished to do, if that was the case they were to meet, would be to adduce evidence in relation to that issue and in particular as to any concessions that were obtained in bargaining in connection with the negotiation of those clauses. It may well be the case that these clauses have been negotiated, but that pay premiums have been negotiated as a consequence of these sorts of clauses.

PN358

VICE PRESIDENT HATCHER: But taking that at its highest, it means that in some cases employees are prepared to trade away some of the security attached to their hours of employment in return for a monetary benefit.

PN359

MS DOUST: Yes.

PN360

VICE PRESIDENT HATCHER: It's not an absolute value. It's a value which - it's something that has a price.

PN361

MS DOUST: Well, I think a recent presidential candidate said something about everything has its price. One of the modern award objectives is to encourage bargaining and that can always happen. We say one doesn't go and cherry pick from the enterprise agreement provisions that one likes and try and get them inserted into awards, because one has to see these provisions as the product of negotiation and the product of bargaining. To understand their value in any particular case, one would need to see what was traded off; what was the quid pro quo.

PN362

Now, there is no impediment here to bargaining, although that is asserted, "Oh, we can't possibly bargain." We say the employers sell themselves short by making that claim and that one matter in particular that will assist them to bargain

is the fact that they'll be dealing with greater sources of funding, and the capacity or the potential in those circumstances to work with greater economies of scale. If they have a greater flow of work, that assists both in the management task in terms of allocating it to employees and being able to allocate particular predictable hours, but also in terms of the funding resource that they have to apply.

PN363

In short answer to the question, yes, that is a provision that might be negotiated away in particular circumstances. But, if it's going to be diminished, we say it should be by way of bargaining and with all the protections that apply in that process where the Commission determines whether on the whole there is no disadvantage, and employees have an opportunity to be represented in that negotiation process and to apply obviously all the strategies that are available to parties in that bargaining process. We say to eliminate that provision now in the award would actually eliminate an important incentive for employees to engage in enterprise bargaining.

PN364

Unless there is anything further, those are the submissions. I know there was a question about 25(5)(f) and I wonder whether it's convenient perhaps to come back to that in a couple of minutes.

PN365

VICE PRESIDENT HATCHER: Sure.

PN366

MS DOUST: Depending on the Commission's convenience, we could perhaps do it briefly in writing.

PN367

VICE PRESIDENT HATCHER: All right. We'll see how we go. I think we'll finish before lunch, so if you can't respond by then, you might send us a note about it. Mr Fleming?

PN368

MR FLEMING: Your Honour, I will be about 20 or 30 minutes. I understand my friend will only be a couple of minutes.

PN369

VICE PRESIDENT HATCHER: All right. We'll keep on going.

PN370

MR FLEMING: Keep going?

PN371

VICE PRESIDENT HATCHER: Let's keep going, Mr Fleming.

PN372

MR FLEMING: Could I request a quick convenience break, your Honour?

PN373

VICE PRESIDENT HATCHER: All right, yes. We will adjourn for five minutes.

SHORT ADJOURNMENT [12.33 PM]

RESUMED [12.41 PM]

PN374

VICE PRESIDENT HATCHER: Mr Fleming?

PN375

MR FLEMING: Thank you, your Honour. Like Ms Doust, I don't intend to traverse our final written submissions in full here, just highlight some key points to be available for the Bench for discussion.

PN376

As we foreshadowed in our earlier submissions, and as was agreed between the parties in the aide memoire that was forwarded to Ross P, I believe on 22 December last year, the ACTU intends to rely on its evidence in the common claim in answering the employer's claims here. And as my friend, Mr Scott has said, to some extent that's inevitable because they're directly at odds with each other. There's some overlap.

PN377

So that evidence that the ACTU's put on shows the impact of insecurity, variability, short shifts on casual employees and short shifts in terms of part-time employees and on women. That evidence shows that some 40 per cent of employees are now in insecure work, who don't have the benefit of permanent employment. And so, from our point of view, it seems counterproductive to then be looking at making permanent employment less secure.

PN378

From our point of view, we should be strengthening the protections of the employees in that 40 per cent category, not diminishing the protections of those in the permanent category.

PN379

We say ABI's claim is radical and it strikes at the heart of permanent employment. Unless there be any doubt, Jane's example, which has been discussed already, illustrates this clearly.

PN380

VICE PRESIDENT HATCHER: Just dealing with that example.

PN381

MR FLEMING: Yes.

PN382

VICE PRESIDENT HATCHER: Why would the model lead to her being rostered to perform hours where she's unavailable because it clashes with her private commitments. That is, under the regime it's proposed why couldn't she at least nominate - I was trying to find it - the hours which are in green is hours which

she's not available for work and thus avoid any of those clashes which you've marked out in red?

PN383

MR FLEMING: Thank you for the question. Firstly, she has to nominate her availability during recruitment. So, there's likely to be pressure there to overstate her hours, especially to a service provider that's impacted by the NDS. And we've heard about the number of providers, you know, giving 24 hour care.

PN384

Secondly, the whole point of this proposal seems to be to expand the employee's span of hours. So, by definition, in those kind of rostering practices, she's going to have to give a broader span of hours per day than she's likely to receive on any one shift.

PN385

VICE PRESIDENT HATCHER: Yes.

PN386

MR FLEMING: And that's what this example is meant to illustrate, that if we look at the standard aggregated, undisaggregated work roster in fortnight one, her span of hours is 9 am till 3. She works 9 am until 3. So if she's employed under this new regime, the whole intent is, it should give her greater span of hours. So we- - -

PN387

VICE PRESIDENT HATCHER: She could nominate, for example, 9 am to, I think it's 5 pm, Monday to Friday?

PN388

MR FLEMING: Well, the consequence is that she may not then be able to be given the hours that she's seeking. So say for example, if she was to just nominate - or if she was to nominate the standard hours, standard daily hours from 6 till 8 pm, that wouldn't do much, you can see in this example, to minimise the clash with her social commitment.

PN389

If she was to nominate fewer hours, the consequence could be that she's not able to be given enough hours, the hours that she needs, because she's expected to work only a proportion of that span and her hours are expected to move around.

PN390

VICE PRESIDENT HATCHER: I mean, under the current clause, I mean you talk about what employees face when they're at the point of recruitment, but under the current clause, she could be engaged under the patterns on fortnight 13 and 14. That is, as long as she agreed to it.

PN391

MR FLEMING: As long as she agreed to it. That's right.

PN392

VICE PRESIDENT HATCHER: But as you say, there may be pressures about what she does or doesn't agree to. But at the end of the day, the clause doesn't prevent anything. It currently doesn't prevent any of this, does it?

PN393

MR FLEMING: It doesn't prevent it, but it gives it a capacity to reject it, which in this example, she doesn't have after recruitment. So here you've got someone who would never agree, for example, to do a shift less than five hours long and then is suddenly given one hour and a half hour shifts, and she cannot resist that.

PN394

So yes, the employee, the award has no minimum hours protections at the moment, but the right to set start and finishing times provides some practical protection to that.

PN395

VICE PRESIDENT HATCHER: Let's say, for example that we accept your argument that at the point of engagement, there may be pressure on an employee to be flexible about their availability in order to get the job. So, why wouldn't that equally apply to the sort of fragmented - accepting the sort of fragmented pattern that you see on page 12 of your submission?

PN396

MR FLEMING: Well, there's two issues there. There's the length of shifts and also the days of work. So, it would provide some protection, because the parties have to decide on the days of work, it would provide some protection in minimising the span of hours there. And I take your point, your Honour, that if she agreed to it, she could be rostered - an employee could be rostered for disaggregated hours at the point of engagement. But they at least know what they're getting and have to agree to it.

PN397

So if I may continue, just while we're talking about examples, I think the question came up about well can't full-time employees be rostered on some varying hours, and Ms Doust addressed the point that there's some countervailing protection that doesn't apply to part-timers in that full-times have to be given two days off work a week. And also, they have greater overtime entitlements, compared to a part-time employee, because a part-time employee can be offered additional hours up to 13 hours a week without overtime.

PN398

The other aspect is, I suppose, to point to the evidence before the Commission about why part-time employment is sought and particularly in those industries. So we're talking about highly feminised industries. We know that unfortunately today, two-thirds of women still bear family and child rearing responsibilities and that part-time employment and growth of part-time employment has been sought, in order to accommodate that and to accommodate the employee security, employee oriented flexibility that women, in particular, need.

PN399

So, that employee oriented flexibility is grounded in a fixed pattern of work. So hence, the benefit of part-time employment to those who are seeking it, if we start to remove that protection, it's undermining one of the core benefits that part-time arrangements have for those workers.

PN400

So we can see also in this example, the capacity for disaggregation, the capacity for greatly expanded span of hours. So here we've got a span of hours that has expanded beyond what a full-time employee would be expected to work. We've also got the capacity for great variation between rosters and we've heard evidence about the impact of that on workers of Scott Quinn, for example, talking about the number of hours he had to leave available in order to just get a full day's work a day.

PN401

We've heard about workers sitting in their car waiting out interim period. We've heard about, not just from Dr Muurlink, but other expert evidence about the impact of intrusion of work and span of hours on one's social life, the psychological effect of that, and the undermining of an employee's ability to achieve work/life balance.

PN402

So, in some ways, the employer's proposals for this new form of part-time employment provide lower conditions of work than casual employment, just in that there's no loading given for this loss of hours security and pattern of work security. And the employee can't resist the unilateral changes to their roster in that in practice, a casual employee can, given that they can in principle, accept or reject any shift.

PN403

So we'd say what's being asked, what's being sought is a radical change, but for this radical change we have indeed very weak and self-defeating evidence. We've got no expert evidence - none. We've got no survey of employers. We've only got a handful of employers, one of whom during the proceedings itself, conceded that they'd gotten the collective agreement with the flexible arrangements that they were seeking - the ABI's made submissions about that as well - and so they've achieved the flexibility that they said they needed to alter the award in order to do. And we've heard conflicting evidence about, on the one hand, for example, the security of part-time employment is useful for all parties involved, but then the employers are seeking to undermine some of the core features of that permanent employment, and therefore its benefits.

PN404

I won't traverse much more of what's in our written submissions, which we rely on. I needn't address the Modern Award objectives criteria in detail, just to say that we see, having one, employees employed under one award have lower conditions of employment for part-time employment than exist under other awards would be unfair.

PN405

And the Commission's right to be concerned about casualisation generally and - but the way to the bulwark against that casualisation in this industry is the proposed conversion clause sought by ACTU. Thank you, Commission, those are my submissions.

PN406

VICE PRESIDENT HATCHER: Thank you, Mr Fleming. Mr McCarthy?

PN407

MR MCCARTHY: Yes, your Honour. Just very briefly. We rely on our previous written submissions and we support the submissions of the other unions and of the ACTU. That's all we wanted to add. Thank you.

PN408

VICE PRESIDENT HATCHER: Right. So Ms Doust, do you want to make any comment about that additional issue now, or put something in writing?

PN409

MS DOUST: Yes. I think it's best that I put something in writing because, on the instructions that I've been able to obtain in the time available, it appears there's actually an application on foot in respect of the provision that you pointed me to, Vice President, 25.5(f).

PN410

I think currently the position that, at least two of the unions here are taking, is that it doesn't comply with the Modern Award's objective. So- - -

PN411

VICE PRESIDENT HATCHER: So this application - what application is there?

PN412

MS DOUST: I'm sorry, I think there's an application in respect of that particular provision.

PN413

VICE PRESIDENT HATCHER: By who?

PN414

MS DOUST: By two of the unions. I think HSU and United Voice.

PN415

VICE PRESIDENT HATCHER: What, to remove it?

PN416

MS DOUST: I'm not sure. I haven't seen the application yet. I don't know the details. I just know that it's the subject of an application at the moment, making that contention.

PN417

VICE PRESIDENT HATCHER: Ms Svendsen?

PN418

MS SVENDSEN: Excuse me, your Honour, there's also an application, I think, by Jobs Australia, but it's certainly an employer application in relation to this clause. So there's actually several applications.

PN419

VICE PRESIDENT HATCHER: What do the unions applications seek?

PN420

MS SVENDSEN: I'll probably have to go back and look for it. It actually strengthens the provisions and requires longer notice and does some work around, if I remember correctly, work around how an alternative shift is provided and the time around that.

PN421

And I think - the reason I think that it's Job's Australia's application - Mr Pegg's here, she can probably answer that question - around this particular clause is because it seeks to cover disability workers.

PN422

VICE PRESIDENT HATCHER: Right, then where is that application? Are they just in the stage- - -

PN423

MS SVENDSEN: They're in the general Four Yearly Review process.

PN424

VICE PRESIDENT HATCHER: Yes, is that stage Group 4, is it?

PN425

MS SVENDSEN: Four - Group 4 and currently subject to conferencing.

PN426

VICE PRESIDENT HATCHER: Right. Okay. Is that right, Mr Pegg, you've made an application about that?

PN427

MR PEGG: There are a number of applications flying around in respect to this award. We have an application in regard to the cancelation clause which, I think Ms Svendsen was referring to about extending that to disability services. And in relation to the rostering clause, there are applications, but I'm embarrassed to say, I can't remember if it's ours or one of the other employer bodies. But there is another employer application around, opening up the ability to mutually agree to change rostering provisions.

PN428

VICE PRESIDENT HATCHER: Well, parties might want to consider whether those applications, to the extent they affect the NDIS or disability sector, should be determined simultaneously by us. It seems to us they may raise a lot of the same issues and the same evidence.

PN429

MR SCOTT: If I could, your Honour, there was a discussion to that effect. There was indeed, an application by my clients to have this particular application taken away from your Honours and this Full Bench, and dealt with in the individual award stage, so that it could be dealt with, with all of those other applications, given that there is some interaction between them.

PN430

The unions opposed that. We're now before you. My clients also do have an application in relation to the client cancellation provision, which is designed to extend that to the disability services stream.

PN431

VICE PRESIDENT HATCHER: Okay. Well, the parties might want to - we might give some renewed consideration to that procedural course, but the other way round, of course. Any submissions you want to make in reply, Mr Scott?

PN432

MR SCOTT: Just very briefly, your Honour. Just four points, your Honour. There was a submission by Ms Doust that the service agreements don't contain any obligation on a service provider to provide services at all. Any particular types of service, when those services must be required to be provided and who provides them. That is, of course, the case.

PN433

The point that I think is important to note is that the organisations predominantly in this industry are not for profit organisation. They're mission driven. Their purpose is to provide services and supports to those people with disabilities. So, notwithstanding that there's no obligation on them to provide those services, they will endeavour, to the extent that they can, and they'll go out of their way to attempt to provide the services. And that's particularly the case in rural and remote areas.

PN434

So it's not simply, you know, the application can't be viewed in the typical employer corporate landscape. There's other less corporate interests at play in this particular field.

PN435

The second issue I just would like to touch on is in relation to the Paddick statement, which was a statement filed by the ASSU, which attached a plan. And your Honours might recall, it was a hypothetical plan of Bob, who was a participant under the NDIS and he had a particular interest in attending football games and wanted to go and see the Geelong Cats.

PN436

Now, the plan set out a particular goal or goals for the participants. One of those goals was for him to regularly attend football matches. His plan contained flexible supports of three hours on a weekend, a number of times a year, so that he could endeavour to go and watch the football. The organisation, obviously because it's mission driven, wants to, to the extent that they can, provide that service so that the participant can achieve his goal. And the employee no doubt,

also has an interest in ensuring that the participant is able to obtain and achieve their goals.

PN437

I think it's a useful example because obviously, and I think I touched on this and I went and had a look at the Geelong Cat's roster. The games are not on at the same time each Saturday. There is fluctuations in the time at which these games are played. So if we assume that Bob's - that the support worker who provides these supports to Bob is a part-time employee who is available to provide work on a Saturday, it follows that because of the game and the times at which these games are on, that from time-to-time, the Saturday shift is not going to be fixed.

PN438

So that is, if the game starts at 2.30, the shift will probably start at say 1.30, 2 o'clock, to allow them to get to the game. If the match starts at 4.30, the shift is going to change. That's a really useful example of the type of work that's being provided by these particular employees who are predominantly part-time employees. And that is what the application is designed to address and provide a regime whereby there can be some fluctuation in the starting and finishing times so that written agreement does not need to be obtained every fortnight.

PN439

VICE PRESIDENT HATCHER: But you could agree to that for the whole year in advance, couldn't you? You don't have to do it for every game. If you have the schedule - - -

PN440

MR SCOTT: Yes, you could. You could.

PN441

VICE PRESIDENT HATCHER: - - - the part-time employee just has one agreement to do it on these days, doing it the whole year.

PN442

MR SCOTT: That's right. An alternate formulation of that is that Bob's carer, call him Steve, says "Well look, I'm available to work on Saturdays. I like the football. I'm happy to take Bob to the football. Look, I can do Saturday afternoons between 12 and 6". That seems like a sensible way of dealing with it. They agree up front that that's the window of availability and then you don't need this agreement, in either a rolled in agreement for a year in advance, or every fortnight, reaching a new agreement.

PN443

VICE PRESIDENT HATCHER: That's, in effect, what you've just described it as, isn't it? An agreement to do it at a certain time every week?

PN444

MR SCOTT: No, that's right. But what you have is, you have - that's just one scenario that if you role that out across 60, 70, 80 employees, the flexible supports - I've picked that because it's a football game where you can check the times 12 months in advance.

PN445

Bob also likes to go to the moves. Now, presumably you can't look at a movie cinema schedule 12 months in advance for him to be able to select what moves he'd like to go to. That's something that you can't do. But if you have the certainty that the carer is available between 12 and 5, now you might not roster him between 12 and 5, you might roster him between 12 and 3 or whatever the case is, that's what the application is intended to do. And by doing that, you don't need a situation where you need to obtain written agreement.

PN446

VICE PRESIDENT HATCHER: Is that realistic, what people are going to do? They're going to allow people just to select a movie at random at any time of the year? I mean, I understand you might say, "I'll go to the moves on a Friday night at 7 o'clock once a month", and then you've got your pick of movies of what's on when you go there. But are people realistically going to allow clients to say, "I want to pick my movie and my day and my location and my time and I'll tell you when and you'll provide a person and it will be the same person"?

PN447

MR SCOTT: Well, the organisation will endeavour to do that.

PN448

VICE PRESIDENT HATCHER: I mean, you tie yourself up in knots if you ran a business that way.

PN449

MR SCOTT: The difficulty is that being tied up in knots, with the frequency with which they need to reach agreement on variations and record those in writing to ensure that there's no breach of the provision. And what the application seeks to do is, have a streamlined arrangement whereby a particular worker is available between 12 and 5, or on a Friday night you know that they're available between 4 and 10. And then you roster them for whatever service the participants want.

PN450

There were some submissions in relation to the model of part-time employment being developed or constructed to allow workers to manage their family commitments and, in my earlier submissions, I indicated that that's an important part of part-time employment as a category of employment. Ms Doust also talks about the importance of employees having a routine. Now, the availability window or the unavailability window, which forms part, and one of the core parts of the application before this Commission, I say deals with the importance of a routine adequately.

PN451

The fourth and final matter that I just wanted to address was the submissions in relation to the need to encourage collective bargaining. Now, it goes without saying that the need to encourage collective bargaining is a factor - one of the factors that is required to be considered under section 134. But the overriding requirement is to ensure that the Modern Award terms are fair and relevant. And we say that the current provision clause 10.3(c) is not relevant to the nature of the work being performed.

PN452

There was evidence before the Commission in relation to Valmar and its experience with enterprise bargaining and Mr Paddick gave evidence that he was, his organisation was able to negotiate a collective agreement or an enterprise agreement. Sorry, Mr Packard, not Mr Paddick, the CEO of Valmar.

PN453

The example there, and his evidence was, and it's been further ventilated in submissions was that Mr Packard and Valmar was able to engage in collective bargaining because their geographical location, their very thin overheads, and his evidence was that they were one of the few who, because of the way their organisation was structured with a very lean back office, they were able to offer 3 per cent over award.

PN454

In return for that, they were able to then bargain for greater flexibilities around part-time employment. The file before the Commission will show that that was not an easy process for Valmar to navigate through, but nonetheless, they were able to do so with some undertakings.

PN455

But it should be relatively uncontroversial that enterprise bargaining is an exception, rather than the rule, in this particular sector, due to the fact that it's Government funded. Dr Baker gave evidence about the funding and the fact that NDS had done the maths and considered that the funding did not cover the disability services operator's costs.

PN456

So, just to finish. Ms Doust talked about the certainty of definite hours that the current provision gives. Our application, to be very blunt, seeks to water down the certainty of definite hours. It seeks to water that down to a guaranteed number of hours within a definite span. That is at the crux of what my client's application is. We say that is - it will ensure that the safety net is fair and relevant. There are the appropriate safeguards there with respect to employees and their out of employment commitments or family commitments.

PN457

We say that that is a fair and relevant minimum safety net and the Commission should grant the variation. If the Commission pleases.

PN458

VICE PRESIDENT HATCHER: All right. Well, what I think we'll do is, allow parties who want to put anything in writing in relation to various propositions that were raised during the course of argument and about which they need instructions, within seven days. Is that sufficient, Ms Doust?

PN459

MS DOUST: Yes. In relation to that choice between - - -

PN460

VICE PRESIDENT HATCHER: Well, in relation to any proposition that arose in argument about various alternatives.

PN461

MS DOUST: Yes, thank you.

PN462

VICE PRESIDENT HATCHER: And that invitation is open to any party. Subject to that, we'll reserve our decision to now adjourn.

ADJOURNED INDEFINITELY [1.08 PM]