



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/21

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

**Modern Awards Review 2023–24
(AM2023/21)**

Making awards easier to use stream – Consultation 5 – *Hospitality Industry (General) Award 2020 and Restaurant Industry Award 2020*

Sydney

10.12 AM, TUESDAY, 19 MARCH 2024

Continued from 18/03/2024

PN1

JUSTICE HATCHER: I'll take appearances. In Sydney we have Ms Harrison and Ms van Gent for the United Workers' Union?

PN2

MS L HARRISON: Yes, your Honour. Thank you.

PN3

JUSTICE HATCHER: Mr Song, for Australian Business Industrial and Business New South Wales?

PN4

MR V SONG: Yes, your Honour.

PN5

JUSTICE HATCHER: Mr Tindley, you appear for the Australian Retailers Association?

PN6

MR N TINDLEY: Yes, your Honour.

PN7

JUSTICE HATCHER: Then online we have Ms Thomas, from the Young Workers Centre?

PN8

MS K THOMAS: That's right. Thank you, your Honour.

PN9

JUSTICE HATCHER: Just excuse me a minute while we fix the screen. Do the SDA representatives have their cameras on? Yes. All right, Mr May, you appear for the SDA?

PN10

MR H MAY: That's correct.

PN11

JUSTICE HATCHER: Ms Butters, you appear for the Australian Hospitality Association?

PN12

MS M BUTTERS: Yes, your Honour.

PN13

JUSTICE HATCHER: And, Mr Morrish, you appear for Australian Chamber of Commerce and Industry?

PN14

MR J MORRISH: Yes, your Honour.

PN15

JUSTICE HATCHER: All right. I think most of you have attended these sessions before, so you know the procedures. What I intend to do is to work through the proposals, as set out in the summaries that have been published on the Commission website, and I'll ask each party to briefly outline the purpose and effect of the change made and then ask any other party to comment.

PN16

I think this probably, primarily, involves you, Ms Butters, but obviously there's an overlap in your proposals, between the Hospitality Award and the Restaurant Award so, to avoid doubling up, can you identify, in each case, whether there's an equivalent proposal for the Restaurant Award, so that we can discuss them in one go.

PN17

You'll see, from the summary, that the initial proposals are those from the Australian Workforce Compliance Council. They've corresponded with the Commission to say that they do not intend to participate in the consultation process any further. So with, perhaps, one exception, I will skip past their proposals.

PN18

I note that I'm on the - that they make a proposal, this is on the fourth page of the summary, sorry, the fifth page, about cashing out of annual leave effecting clause 30.10 of the Hospitality Award. That proposal has been reflected in other awards, so unless anybody wants to say anything about it, I'll move on from that.

PN19

Then we have a number of proposals from the Western Australian Chamber of Commerce and Industry. Mr Morrish, are you in a position to say anything about those?

PN20

MR MORRISH: No, your Honour, except for the - potentially, we didn't reference this in our reply submission, but that we'd support their proposed variation to clause 11.2, but that's it.

PN21

JUSTICE HATCHER: All right. Well, I'll just briefly go through these. The first of their proposed variation, the first is something called the pay guide. I don't even understand what that's referring to. Does anyone know what that proposal means? No? All right, well, I'll pass on from that.

PN22

Just excuse me for a minute. Their second proposal talks about re-evaluating the hourly cap for casuals to work additional hours. I read that as meaning that casuals should not be entitled to overtime penalties. Is that the way the proposal was understood by everyone else? Ms Harrison?

PN23

MS HARRISON: Yes, your Honour. We would oppose the proposal that's been put forward. Yes, we read it to - we read it to (indistinct).

PN24

JUSTICE HATCHER: Does anyone want to say anything in support of that proposal? It's a modification, as I understand it, to 11.2 of the Hospitality Award. No? All right.

PN25

Then there's a proposal to put up a specific proposal, in respect of the annualised wage arrangements clause, in 24.2. I know the AHA has made proposals about that, so I think we'll discuss the clause in that context.

PN26

The next one appears to be, although, again, there's no specific proposal to increase the required notice to be given by employees when terminating their employment. Again that seems, thus, to be a substantive change. Does anybody wish to say anything in support of that proposal? No.

PN27

The next one is your first one, Ms Butters, deals with the definition of the appropriate level of training, in clause 2, so do you want to say something about that?

PN28

MS BUTTERS: Yes, thank you, your Honour. This is one of the items that has direct correlation to the Restaurant Award as well.

PN29

JUSTICE HATCHER: Yes.

PN30

MS BUTTERS: Primarily, the AHA thinks there is merit in aligning the classification framework with the Clerks Award, which requires the consideration of the characteristics the employer requires the employee to have and the skills the employer requires the employee to exercise. We say that they're both well within our existing classification structure and won't disturb any trade qualification requirements.

PN31

However, alternatively, if we were to retain the definition of 'appropriate level of training', the main issue the AHA has identified is with the definition at the end of subclause (a), which reads, 'One or more appropriate units of competency forming part of the training package'.

PN32

We say that the completion of one unit, for example a food safety hygiene unit, is not sufficient for classifying an employee appropriately or differentiating what level they should be in and that subclause (a) should require the completion of a training package. So that's the proposal that we put forward, with that draft clause, in our submissions.

PN33

JUSTICE HATCHER: All right, Does the UWU want to say anything about this?

PN34

MS HARRISON: Yes, your Honour. Just in relation to this, we would firstly just say that the proposal actually is a substantial change to the classification structure that's been proposed. In relation to the idea that there be changes in relation to which units of competency, or the like, we would say it should be subject to a separate application, with evidence to be attested and there may well be some merit in that, but I think we do not have an agreed position, at this stage, in relation to what those units of competency might be, or similar.

PN35

In relation to the actual phrasing, 'The appropriate level of training', we say that it isn't - that it's adequate for the purposes of this award review. It's certainly a phrase that is well understood within the hospitality industry and it's been the subject of years worth of case law and similar. So to change it in the format being proposed would, we say, would actually, in effect, actually change - potentially change the classifications of the existing employees, potentially to detrimental effect as well.

PN36

JUSTICE HATCHER: Can I just take you to some of the classification definitions, and I'll just, for example, start with 8.2.1(b), so this is food and beverage attendant grade 2.

PN37

MS HARRISON: Yes, your Honour.

PN38

JUSTICE HATCHER: What does it mean to say that that classification means, 'An employee who has not achieved the appropriate level of training'. Can I say, speaking for myself, I don't understand that context, what that means.

PN39

MS BUTTERS: Your Honour, we think this is part of the confusion that our members experience. I think the introductory level that requires - that considers whether or not someone's got an appropriate level of training is perfectly appropriate. However, when we're already at grade 2 in that stream, and we're talking about not achieved an appropriate level of training, noting that you would have to have a responsible service of alcohol certificate to work in the role, we say that it doesn't reflect how classifications are operating today.

PN40

JUSTICE HATCHER: Ms Harrison?

PN41

MS HARRISON: Your Honour, in relation to your question, the level 1 food and beverage attendant is a very low level entry position. It includes picking up the glasses, the emptying of ashtrays, providing general assistance, not including the service of customers.

PN42

The nature of the appropriate level of training is an on-the-job training, which then enables a food and beverage attendant to supply and dispense - I don't discredit they need a RSA, but assisting in undertaking general waiting duties, so at that point they're moving to customer service.

PN43

So, in relation to the phrasing, it's not about, you know, an AQF framework training qualification, it's just about on-the-job training at that level 1 to level 2.

PN44

JUSTICE HATCHER: But what I don't understand is appropriate level of training for what?

PN45

MS HARRISON: To provide those following duties that are listed.

PN46

JUSTICE HATCHER: So they're doing the duties but they don't have the training to do them?

PN47

MS HARRISON: Level 1, they're not trained to do that.

PN48

JUSTICE HATCHER: No, I'm looking at level 2. So food and beverage attendant grade 2, is at wage level 2 and it starts with words, 'Means employee who has not achieved the appropriate level of training', and, again, it's not a question of merit, I just don't understand what that means.

PN49

MS HARRISON: Your Honour, and, yes, sorry, I do take your Honour's point in relation to what you've just raised. I think that the grade 3, if you then look at that, the differentials there include, 'The mixing of sophisticated drinks, training and supervise the training of food and beverage attendants at a lower grade', so it's those that are not capable of performing - that are not performing those roles of functions.

PN50

As I said, from the outset, we don't disagree that there's potentially scope here for a classification review in the Hospitality Industry (General) Award, but we would say that this stream of award variations, without evidence, is not the appropriate mechanism to change this.

PN51

JUSTICE HATCHER: All right. And the other one, the definition says it doesn't apply to casino employees, is that right?

PN52

MS HARRISON: That's correct.

PN53

JUSTICE HATCHER: But I think, if you look in the classification definition, I thought I saw it actually being used there. I'll just give you a second. I see, there's a discrete definition, in clause 8.3.1 for casino employees. Yes, I see.

PN54

Ms Butters, we'll come to it later, but I'm just wondering whether, as Ms Harrison flagged, this issue should be dealt with in the context of a wider review of the classification structure?

PN55

MS BUTTERS: We don't have a problem with that, your Honour.

PN56

JUSTICE HATCHER: I mean, obviously, that's not something that can be dealt with quickly, but there might be some merit in undertaking that review.

PN57

Mr Song, you've got an alternative proposal, can you just explain that?

PN58

MR SONG: Yes, your Honour. We, in principal, oppose the AHA's primary proposal, with respect to the definition, but we would support their alternative proposal, in that it still outlines each of the requirements for what constitutes appropriate training, in that context.

PN59

JUSTICE HATCHER: Well, the existing definition schedule suggest that 'appropriate training' would be constituted by three months doing the work at a particular level, why would that be deleted?

PN60

MR SONG: Your Honour, to that we say employees, as at 30 June 2010, it is more than likely that they've been performing at that particular classification for at least three months for that period of time.

PN61

JUSTICE HATCHER: I see. So this was some sort of grandparenting provision, was it?

PN62

MR SONG: Yes. Yes, your Honour.

PN63

JUSTICE HATCHER: Do other parties agree with that, that that is a grandparenting definition in the definition? Ms Harrison?

PN64

MS HARRISON: Sorry, your Honour, I'm just trying to find it.

PN65

JUSTICE HATCHER: So it's the third limb of paragraph (c) of the definition.

PN66

MS HARRISON: (Indistinct words) grandfathering.

PN67

JUSTICE HATCHER: Do you agree with that, Ms Butters?

PN68

MS BUTTERS: We would use it as if you performed the position for three months, that is, you demonstrating that you have an appropriate level of training to move to the next level. It think that that sentiment, at least, is echoed in the classification definition for the introductory level, which does provide that you may be in the introductory level for up to three months while undertaking appropriate training and being assessed for competency. So we don't take that as a grandfathered provision.

PN69

JUSTICE HATCHER: Well, why are the words, 'As at 30 June 2010' there then?

PN70

MS BUTTERS: Good question.

PN71

JUSTICE HATCHER: I mean that indicates that it was meant to ensure that people would be put into particular classification, base don three months experience?

PN72

MS BUTTERS: Yes. I don't disagree with that at all.

PN73

JUSTICE HATCHER: All right. Again, we'll come to it, in respect of the proposed review of classifications, but I'm just wondering whether, rather than having some generic phrase about appropriate level of training, the classification structure should, in respect - like most classification structures should, in respect of each level, actually set out what is the training required for each level specifically, so parties know exactly what they're talking about. All right, we'll come to that.

PN74

So the next one, Ms Butters, is the definition of liquor service employee. So do you want to talk about that?

PN75

MS BUTTERS: Yes. This is a query we receive form our members multiple times a week. So we think it's pretty clear that the existing definition is not easily understood. We're simply proposing that the Fair Work Ombudsman advice regarding junior liquor servers can be inserted by way of a clarifying note, so just those few dot points, so that we might get some more understanding of when the provision requires juniors to be paid an adult rate. I mean it's really quite important for compliance was well.

PN76

I'm not going to do in our members or anything, but it's not unusual for us to get a query saying, 'I wasn't sure that I had to pay my junior employee an adult rate if they were just ferrying alcohol to and from a bar to a table'. So we think adding this clarifying note will help, for compliance purposes, as well as award usability.

PN77

JUSTICE HATCHER: Well, you've got it as a note, but wouldn't you want it as part of the definition proper?

PN78

MS BUTTERS: Happy with that as well, your Honour.

PN79

JUSTICE HATCHER: Would I take it that, in terms of the five bullet point items you've got, that any one of those would make you a liquor service employee?

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MS BUTTERS: That's correct.

PN81

JUSTICE HATCHER: Does that apply if you do it on any occasion?

PN82

MS BUTTERS: Yes, correct.

PN83

JUSTICE HATCHER: Okay. So the UWU Is happy to discuss that?

PN84

MS HARRISON: Yes, and I don't think we oppose those - - -

PN85

JUSTICE HATCHER: Mr Song, the ABI is opposed to that?

PN86

MR SONG: Yes, your Honour. However we are open to further discussing that proposal. We identify that there is a risk that that list could simply just go on and on. For example, the proposal doesn't identify whether an employee who picks up or collects an empty glass, which had previously contained alcohol, whether, in those circumstances, that particular employee will be classified as a liquor service employee, for the purposes of the Act.

PN87

So we do recognise that there is that degree of risk, however we are, nevertheless, open to discussing that proposal further with the AHA.

PN88

JUSTICE HATCHER: All right. So the next one is a change in the definition of rostered day off. So, Ms Butters, what's the difficulty with this?

PN89

MS BUTTERS: So, again, your Honour, this is a point of confusion for our members. It largely stems from them getting confused with the definition of a rostered day off being as a term used interchangeably with accrued day off, or accrued time in lieu, to a lesser extent.

PN90

We suggested a very minor drafting change, just to clarify that a rostered day off is a non working day and is distinct from the accrued day off or accrued time in lieu. Even if we were to retain the existing definition, if we can add the, 'Distinct from accrued day off or accrued time off in lieu', we think that's just going to make things a lot easier for our members' understanding.

PN91

JUSTICE HATCHER: I mean part of the problem is that what this award calls an accrued day off, in most awards is called a rostered day off.

PN92

MS BUTTERS: Yes.

PN93

JUSTICE HATCHER: So, anyway. I can understand the confusion. If we just – Ms Harrison, if we just added a note to say that an accrued day off is not the same thing as a rostered day off, or vice versa, would there be a difficulty with that?

PN94

MS HARRISON: We wouldn't oppose that, your Honour.

PN95

MS BUTTERS: Thank you.

PN96

JUSTICE HATCHER: Thank you. Does anyone else want to say anything about that?

PN97

MR SONG: No.

PN98

JUSTICE HATCHER: The next one, Ms Butters, seems to me to be a substantive change to the entitlements of part-time employees.

PN99

MS BUTTERS: Your Honour, it's more that we are suggesting there be flexibility to average off the non working days, in accordance with the averaging arrangement that an employee and employer are already able to enter into. So whether that is a matter of having one day off one week, three the next, or however it may work within that 14-day roster cycle, if we have the ability to have an averaging arrangement we simply want more flexibility in how those days could be agreed to be averaged out, rather than having to have the set two days, two days.

PN100

JUSTICE HATCHER: That means a person could be rostered for up to 10 days a fortnight?

PN101

MS BUTTERS: 10 days a fortnight no, because I think you still have to have your two days off a week. Wait, that is 10 days on in a fortnight, I'm doing well this morning. No, I think if they have the ability to agree to that arrangement, we simply want the option for that, not to compel it.

PN102

JUSTICE HATCHER: 10.7 was part of the new part-time clause that was developed by a Full Bench in 2018.

PN103

MS BUTTERS: Yes.

PN104

JUSTICE HATCHER: It might be said that you're upsetting the careful balance that was struck when that clause was made.

PN105

MS BUTTERS: Then we are happy to not pursue this proposal further, your Honour.

PN106

JUSTICE HATCHER: Ms Harrison, or Ms van Gent, do you want to say anything about that?

PN107

MS HARRISON: Your Honour, it's not picked up, sorry, but we did file submissions in relation to this proposal.

PN108

JUSTICE HATCHER: Yes, I noted that. So I'm assuming you oppose it, do you?

PN109

MS HARRISON: Yes, we do, and, yes, we wouldn't - there's nothing that's been said today that would change our position.

PN110

JUSTICE HATCHER: A similar thing might be said about the next one, Ms Butters.

PN111

MS BUTTERS: Yes, your Honour, I'll take your point on that. We believe that it's simply a redraft to aid in the understanding of the combination of clause 10.11 and 10.12. There's no substantive change there as to process or the substance of the provision, it just makes it a little bit easier to read, as a two-stepped process in subsection (a) and subsection (b), rather than having to go 10.11, 10.12. But, again, it's a point we're happy to not push any further if that will be an issue.

PN112

JUSTICE HATCHER: So would 10.12 - so you've taken out - sorry, just excuse me. You've taken out the provision which says that, 'The request can only be refused on reasonable business grounds'?

PN113

MS BUTTERS: Well, I think that that is captured, 'If the employer cannot reasonably accommodate'.

PN114

JUSTICE HATCHER: Well, if it's not different, why did you change it?

PN115

MS BUTTERS: Simply to read it as a two-stepped process, with the clause as a subsection (a), subsection (b) than rather having to move to the next clause down. I think we're also mindful that 10.12 has an unintended consequence, we think, to potentially jeopardise someone's guaranteed hours, where they have a shift in their availability, which we don't believe would be the intention of that clause, so this remedies that concern.

PN116

JUSTICE HATCHER: So why does it do that?

PN117

MS BUTTERS: So currently, if an employer cannot reasonably accommodate an alteration to the part-time employees availability, their guaranteed hours, that are agreed under 10.4(a) cease to exist and then a new agreement needs to be set, as far as a new set of guaranteed hours, not in the availability. We think that that may have the unintended consequence then of saying, hypothetically, 'If you had 12 guaranteed hours previously now you can't work it with an availability that works for the employer's needs, that we will remove the 12 hours that you had and potentially reduce that down, because your guaranteed hours are no longer set'.

PN118

So we find if there's a change in availability we need to have ongoing conversations about how that works for the employees needs and for business requirements. Jeopardising guaranteed number of hours, though, worries us.

PN119

JUSTICE HATCHER: Well, if my recollection serves me correctly, that provision was asked for by the AHA.

PN120

MS BUTTERS: It could have been.

PN121

JUSTICE HATCHER: Because they had this scenario that if an employee is only available on Saturday and Sunday and, say, their guaranteed hours were 14 hours, so they're a weekend worker, and the employee then says, 'I can't work on Saturdays anymore', then the employer can no longer accommodate the guaranteed 14 hours and there has to be a new agreement. I think that's the reason that's there.

PN122

MS BUTTERS: No problem at all, your Honour. We're happy to leave this point.

PN123

JUSTICE HATCHER: Maybe everyone's happy to take that out, I don't know. Can I ask you a bigger question, Ms Buttes, and you might not know the answer. To what extent are these provisions even being used in the hospitality industry?

PN124

MS BUTTERS: They are being used. They're not being used at the high rate that everyone had intended when the provisions were introduced, but they are being used. I think casual conversion can attest this. The ability to have flexibility, ad hoc flexibility, bearing in mind that many of our employees are university students, people not necessarily using a hospitality job as a career. They're used just so there's employment security but also flexibility in a week. But, yes, certainly not to the high extent as what people would have hoped. Perhaps we can get there with the changes to the definition of casual employment.

PN125

JUSTICE HATCHER: Right. I'm only asking this because I know you want it in the Retail Award that these provisions should go into the Retail Award, which might be something for consideration, but I think the Commission would need to be satisfied that these provisions actually work in the industry in which they operate. So you might want to think about whether there's any data about this that you can provide to the Commission.

PN126

MS BUTTERS: Thank you, your Honour.

PN127

JUSTICE HATCHER: All right. So the next one is the change to the hours of work clause, in clause 15.

PN128

MS BUTTERS: I think we've just skipped our proposal regarding clause 13 and juniors.

PN129

JUSTICE HATCHER: All right. So I think all of these ones we've already discussed have equivalence in the Restaurant Award, don't they?

PN130

MS BUTTERS: Yes, correct. So onto the hours of work provision, we've proposed a - - -

PN131

JUSTICE HATCHER: So we've skipped your proposal, re clause 13.

PN132

MS BUTTERS: Sorry, I've skipped ahead as well.

PN133

JUSTICE HATCHER: Yes.

PN134

MS BUTTERS: That is where we've suggested that the junior provisions of the award be consolidated in favour of the other than office junior employee stream. The reason for this is because, to be honest, our members aren't using the other - are using the other than office junior stream, they're not making a lot of use of the junior office worker stream.

PN135

We're mindful that if we do consolidate these into the one stream it will halve the number of pay rates that are provided for that stream in the award. It will condense the word count, naturally, of that section and it's going to be a lot easier for our members' payroll providers to just have the one set of rules, regarding junior employment.

PN136

We don't believe there will be a reduction in entitlements, necessarily, however we're not opposed to a grandfather arrangement to ensure that no existing employee is disadvantaged at all.

PN137

JUSTICE HATCHER: So that would allow us to remove 18.4(b)?

PN138

MS BUTTERS: Correct.

PN139

JUSTICE HATCHER: Mr Song, the ABI opposes this, why?

PN140

MR SONG: Yes, your Honour. We recognise that this proposal constitutes a significant change and might be more appropriately dealt with under section 158 of the Act, together with the filing of evidence.

PN141

JUSTICE HATCHER: Well, everything will ultimately have to be dealt with by 158. But can you identify any practical reason against the change? I mean it seems to me there's swings and roundabouts if it was entered into. So for an office employee, a junior office employee, if they exist, at 19 it would go from 90 down to 85 but at 18 it would go from 75 down to 70. So, except if you're under 17, most of it would seem to be in the employees favour, if these employees actually exist at all.

PN142

MR SONG: We're happy to take it on notice, your Honour, and perhaps further discuss the proposal with the AHA.

PN143

JUSTICE HATCHER: All right. I think the UWU said it was okay to discuss this, at least.

PN144

MS HARRISON: Your Honour, I think we were okay to discuss it. I think, to the extent that the junior rates go backwards for the administrative stream, I think it would be outside the scope of this proposed stream, in terms of ensuring that no employee goes backwards.

PN145

In saying that, it might, gain, be one of those things that is within that classification structure type review. I understand the rationale behind condensing both of those streams.

PN146

JUSTICE HATCHER: Well, in terms of people going backward, if there's actual real people involved that's one thing, but is there such a thing as a junior office employee, in a hospitality establishment, that you've ever heard of? I suppose there might be.

PN147

MS HARRISON: They wouldn't be our members, generally.

PN148

JUSTICE HATCHER: All right. Well, I'll put that down as something just to (indistinct).

PN149

All right, so ordinary hours of work, Ms Butters?

PN150

MS BUTTERS: Your Honour, the AHA Has put forward a draft clause for consideration, which we believe will streamline the hours of work provisions, without reducing entitlements or foregoing any safeguards. I will say now that there is one safeguard that I had omitted from our draft clause, which was the safeguard that if an employee is rostered to work more than 10 ordinary hours on more than three consecutive days, they're entitled to a break of at least 48 hours. So that definitely would need to be included.

PN151

So, essentially, the clause is just to mirror what is in clause 15.1 of the Restaurant Award and simply streamline the provision. Currently we have an incredibly lengthy clause that we think just doubles up where it doesn't necessarily need to.

PN152

JUSTICE HATCHER: All right. What about the current 15.1(a)?

PN153

MS BUTTERS: Well, we say that the arrangement to work the ordinary hours would be the agreed arrangement and then subsections (a) through (f) are what

would have to be the parameters for it. Does that answer your question, sorry, your Honour?

PN154

JUSTICE HATCHER: Well, it seems to me that it's one thing to say - well, it seems to me the current clause is structured upon a concept whereby there's a number of options by which the 38 hours may be worked and it's up to the employer, at least a full-time employee, which option is chosen. It doesn't seem to me to be that your clause says that.

PN155

MS BUTTERS: Your Honour, I take that point. Potentially an amendment to the first line of our proposed clause would satisfy that concern. So rather than saying, 'An arrangement for working ordinary hours', we could say, 'The employer and employee must agree on the arrangement for working ordinary hours, which satisfies the following'.

PN156

JUSTICE HATCHER: All right. Ms Harrison, is the UW happy to discuss a cleaner redraft of this clause which doesn't actually take away any existing entitlement? Ms van Gent?

PN157

MS VAN GENT: Your Honour, in our written submission I believe we opposed this variation because we saw it as being a reduction in entitlements, for the reasons that you've alluded to. So clause 15, as it currently exists in the award, sets out some, you know, specific kinds of arrangements. We think that they provide important safeguards, in terms of the patterns which people are able to work and we're concerned that the proposed variation would diminish that.

PN158

JUSTICE HATCHER: Yes, but can you answer my question?

PN159

MS VAN GENT: Sorry, your Honour.

PN160

JUSTICE HATCHER: My question was, would the UW be prepared to engage in discussion about a cleaner redraft of clause 15 that doesn't remove any existing entitlements?

PN161

MS VAN GENT: We would, yes, provided that it didn't diminish any of the existing entitlements under that clause.

PN162

JUSTICE HATCHER: All right. And, Mr Song, does ABI take the same position?

PN163

MR SONG: Yes, your Honour.

PN164

JUSTICE HATCHER: All right. The next one is about clause 16, breaks.

PN165

MS BUTTERS: Your Honour, the AHA is not pursuing this proposal any further. This will also apply for the same proposal that we made, with respect to the Restaurant Award.

PN166

JUSTICE HATCHER: All right. The next one concerns the manager's rate. Just so I understand this, clause 18.2 sets an annual salary which seems to proceed on the assumption that the manager we're talking about is a full-time employee, that is - - -

PN167

MS BUTTERS: That's correct.

PN168

JUSTICE HATCHER: - - - it doesn't contemplate that you could have a casual or a part-time manager. So does the AHA's proposal alter that position?

PN169

MS BUTTERS: No, your Honour, it doesn't. Our proposal is largely simply a drafting change. The weekly and hourly rate are provided in Schedule B, for a managerial employee. We simply want it to be included in clause 18, which provides minimum rates, as it is for every other level, so that an employer or employee, using this award, doesn't have to go through a very lengthy Schedule B to find a minimum rate.

PN170

JUSTICE HATCHER: Well, the hourly rate for these staff, presumably, is for the purpose of calculating overtime, isn't it?

PN171

MS BUTTERS: Yes, correct.

PN172

JUSTICE HATCHER: But the overtime rate, we don't actually set out overtime rates in the body of the award, as a practice. That is, there's no circumstance, is there, where a manager would get paid the ordinary time rate?

PN173

MS BUTTERS: I think there is capacity to do so, particularly in regards to, say, public holidays for example. That's a terrible example because that's (indistinct) as well. Yes. So we're definitely not asking for the overtime dollar amount to be included in clause 18, but I don't think there's any harm in including the base ordinary rate, with the ordinary rates of all other levels.

PN174

JUSTICE HATCHER: All right. Anyway, the UWU agrees with this?

PN175

MS HARRISON: Yes, your Honour.

PN176

JUSTICE HATCHER: Mr Song, ABI opposes it?

PN177

MR SONG: We oppose this proposal, your Honour, because we believe that it will detract from the usability of the award. But it's certainly not something that we look to die in a ditch over.

PN178

JUSTICE HATCHER: Okay. Well, it seems to me that, presumably, managers are paid weekly, or some combination of weekly, fortnightly or whatever, it might be easier at least to have the weekly amount specified.

PN179

MR SONG: Yes, your Honour, we accept that.

PN180

JUSTICE HATCHER: All right. The next one I think is it's agreed that we should take out, is it 19.2?

PN181

MS BUTTERS: 19 point - yes.

PN182

JUSTICE HATCHER: What are waiting apprenticeships?

PN183

MS BUTTERS: There used to be an apprenticeship offered in how to be a waiter.

PN184

JUSTICE HATCHER: Right. So they don't exist anymore?

PN185

MS BUTTERS: Correct.

PN186

JUSTICE HATCHER: All right. Does anybody oppose the removal of clause 19.2? All right. That's not in the Restaurant Award, Ms Butters?

PN187

MS BUTTERS: It is. That was going to be my next point, your Honour.

PN188

JUSTICE HATCHER: Which items is it in, I can't quite see it. Can you see in the - - -

PN189

MS BUTTERS: No, I lie, your Honour. It is not.

PN190

JUSTICE HATCHER: It's not, okay.

PN191

MS BUTTERS: There's a different issue with the apprentice clause for the Restaurant Award.

PN192

JUSTICE HATCHER: All right. So the next one is the higher duties clause.

PN193

MS BUTTERS: The other thing I would add, your Honour, with respect to the apprentice proposals that we've put forward, we note that there's provisions - well, the provisions of the (indistinct) speak to 'Commencement on or after 1 January 2024'. We don't believe that the term, 'on or after 1 January 2014', sorry, is necessary anymore. There's no apprentices.

PN194

JUSTICE HATCHER: So where was that?

PN195

MS BUTTERS: So it's in clause 19.5(a), (b), (c).

PN196

JUSTICE HATCHER: Does anyone oppose that?

PN197

MS HARRISON: No.

PN198

JUSTICE HATCHER: While we're on this clause, Ms Butters, in 19.2(c) there's a reference to - sorry, that would be deleted, okay. So in 19.1(c) there's a reference to 23 January 2020, can we take that out?

PN199

MS BUTTERS: Yes, I would say so.

PN200

JUSTICE HATCHER: Does anyone disagree with that?

PN201

MS BUTTERS: There aren't any separate provisions for before 23 January 2020, so I don't necessarily think it's necessary to say 'after 23 January 2020'.

PN202

JUSTICE HATCHER: All right. I think there is, in the last page of the Restaurants Award there is a reference to a change to the waiting apprenticeship, I think.

PN203

MS BUTTERS: What clause, sorry, your Honour?

PN204

JUSTICE HATCHER: In your - I think it's the classification structure within the summary for the Restaurant Award, at the very last page, it's the AHA proposal to change the classification structure, and the second bullet point refers to waiting apprenticeships.

PN205

MS BUTTERS: Yes. Okay, so that would still be applicable to the Restaurant Award, simply because they still use the word 'tradesperson' for the specialised duties. So, yes, sorry, your Honour, that would be applicable.

PN206

JUSTICE HATCHER: So just going back to this 23 January 2020 date, so 19.1(b) says that 'Except where 19.1(c) applies, and employer must pay', and there's a set of rates there. So are they the before rates, and can we take - - -

PN207

MS BUTTERS: Yes. Your Honour, I think you're actually correct there, my apologies. I believe the competency based progression commenced on or around January 2020, to those are why those provisions would be there. So I think your Honour is right, perhaps we don't touch the January 2020 and we only look to the January 2014 concern.

PN208

JUSTICE HATCHER: Well, I wasn't saying you shouldn't touch it. I mean there must be a point in time where anything before 23 January 2020 is irrelevant, which would mean we can take out paragraph (b). That is, is there likely to be any apprenticeship on foot that predates 23 January 2020?

PN209

MS BUTTERS: No, I don't believe so, your Honour.

PN210

JUSTICE HATCHER: Can anyone else say anything about that?

PN211

MS HARRISON: Your Honour, I think we're flying a little bit in the dark because, in theory, it's should be at least a three-year if not four-year apprenticeship. If someone's doing it part-time then they may have commenced the apprenticeship before 23 January 2020, although there might be very few. I guess what I'm saying is that I don't know that we could be certain of that.

PN212

MS BUTTERS: Your Honour, we're happy to take that on notice and do a bit more investigation into that.

PN213

JUSTICE HATCHER: Yes. Well, if parties could investigate that. I mean the only difference is it translates from a yearly rate to a staged rate, but the percentages are the same.

PN214

MS BUTTERS: Yes.

PN215

JUSTICE HATCHER: Sorry, yes they are the same. All right. Anyway we can discuss that. All right, higher duties?

PN216

MS BUTTERS: So, your Honour, we're proposing that the higher duties clause be streamline and remove the current restriction on food and beverage grade 2 and 3 from higher duties. We make this proposal because we think that it's only fair if higher duties are being performed that they're being paid. This will simplify the rules of our members' payroll systems and to only then look to how long is spent doing higher duties as to whether it's paid as a whole of shift or simply time.

PN217

JUSTICE HATCHER: All right. So Ms Harrison and Ms van Gent, why is that exclusion there? I mean it seems to me that at level - at grade 2 or 3 you can be required to perform higher duties, but you won't be paid the higher rate.

PN218

MS HARRISON: Your Honour, I actually can't recall a period of time where that wasn't in the award. It might just be historical, but I wouldn't want to be quoted in relation to that. But, as we've indicated, we would not support the AHA's amendment.

PN219

JUSTICE HATCHER: All right. Mr Song?

PN220

MR SONG: Thank you, your Honour. Our only concern was the exclusion of the food and beverage attendants grades 2 and 3, but I think my colleague has addressed that issue.

PN221

JUSTICE HATCHER: All right. Next one is clause 23. Is the effect of your change, Ms Butters, that it would allow any pay period to be determined?

PN222

MS BUTTERS: Yes.

PN223

JUSTICE HATCHER: That's a substantive change, isn't it?

PN224

MS BUTTERS: Well, I think it allows for what's already permissible, under the award. I think that this then would also become a matter of agreement between the majority of employees. But, yes, I think that any method, whether it's the weekly, fortnightly or monthly, is permissible. It would cut down on the word count and we would keep 23.6 on, regarding the payment on termination of employment and the clarifying notes that are already in existence there.

PN225

JUSTICE HATCHER: All right. So currently you can only pay monthly for managers or annualised salaried persons, is that right?

PN226

MS BUTTERS: That is what 23.1 says, yes.

PN227

JUSTICE HATCHER: All right. Ms Harrison and Ms van Gent, in relation to 23.2 and 23.3, is there any reason to retain those provisions?

PN228

MS HARRISON: Your Honour, are we able to come back to you, in relation to that question? The only thing, I think, in principle I think we would like to go away and just have a look at it. I just want to make sure that there's no unforeseen consequences, in terms of the way in which the monthly annualised salary provision is paid, compared to if it was to be paid weekly or fortnightly, and it wouldn't leave employees in a position when it interacts with the hours of work. But other than that, we would - - -

PN229

JUSTICE HATCHER: That's 23.1 though, isn't it?

PN230

MS HARRISON: Yes.

PN231

JUSTICE HATCHER: So I'm not asking you about that. It appears to me that that involves a substantive change.

PN232

MS HARRISON: Yes.

PN233

JUSTICE HATCHER: But in relation to 23.2, 3 and I'd add 4 and 5, that those provisions just seem to me to be anachronistic. Does anyone get paid cash anymore?

PN234

MS HARRISON: I had a case that a member did.

PN235

JUSTICE HATCHER: If they are being paid cash there's probably something dodgy about it.

PN236

MS HARRISON: The employer did go under, but they were given cash payments, where they didn't get give receipts. Yes, look, we wouldn't - we would agree, in relation to that, your Honour. Sorry, my apologies.

PN237

JUSTICE HATCHER: And Mr Song?

PN238

MR SONG: We are aligned with your Honour's view, in relation to clause 23.2 and onwards, your Honour. With respect to clause 23.1 we say that that clause acts as a facilitative provision. It's not a carbon copy of section 332 of the Act. But leaving that clause aside, we would agree with your Honour's comments.

PN239

JUSTICE HATCHER: All right. So with annualised wage arrangements, so, first of all, Ms Butters, there's a proposal to apply this clause to part-time employees. Why should that happen?

PN240

MS BUTTERS: Well, your Honour, I think that we will take the feedback that United Workers' Union have provided in their submissions in response, and we agree that that is outside the scope of this review. So I think it's probably appropriate that we leave that to a separate application. So regarding our proposal for the annualised wage arrangements, the proposals that we're willing to pursue that this time will be just the drafting amendments, where there've been inaccurate references to the wrong clauses, basically. So the rest of that, your Honour, we'll put aside for now, but the drafting clauses, so that would be paragraph 3 and paragraph 7 of our proposal, they refer to clause 24.2(a)(vi) in the award. That just needs to be changed to clause 24.2(b), so just a drafting change.

PN241

JUSTICE HATCHER: All right. In relation to the eighth item, it occurs to me that that might be a drafting improvement.

PN242

MS BUTTERS: Yes. I would agree, your Honour.

PN243

JUSTICE HATCHER: Does anyone want to say anything about that? I suppose, if you put that in then there's a requirement to - I mean you can't take two years to do the reconciliation, I assume, Ms Butters?

PN244

MS BUTTERS: No. I think that subsection (b) requirements to do the reconciliation each 12 months and then to correct the shortfall within 14 days is clear, but I think it could be improved by saying, 'of the reconciliation'.

PN245

JUSTICE HATCHER: Yes.

PN246

MS HARRISON: Your Honour, we would actually oppose that, in that context. We've had a number of employers, when they do the reconciliation it takes a significant amount of time and there's questions about - I mean I think it would add to the ambiguity about when the shortfall needs to actually be corrected. I appreciate that they might be in contravention of the bit above it but then it becomes a question about, well, if they haven't made payment and they're at day 20 after the 12 months is concluded, but they haven't finished the

reconciliation, are they actually in breach of that clause or not. I think it actually adds to the difficulty of enforcement.

PN247

JUSTICE HATCHER: Well, that may be a separate issue. The last sentence would be - assumes you've done the reconciliation, because it says, 'Once you've calculated there's a shortfall you have to pay them within 14 days'. Yes, I take your point. All right. Do you agree about the drafting errors identified in items 3 and 7?

PN248

MS HARRISON: Yes, your Honour.

PN249

JUSTICE HATCHER: In relation to the one numbered 4 in the summary, Ms Butters, I didn't quite understand that because I think it already says 35.2(a), unless I've misread something.

PN250

MS BUTTERS: It does, now, which I've just checked, that's why I didn't read it out. So, thank you, your Honour.

PN251

JUSTICE HATCHER: All right. You don't pursue the others?

PN252

MS BUTTERS: No, not at this time, your Honour.

PN253

JUSTICE HATCHER: All right. Next one is clause - sorry, does the same apply to the Restaurant Award proposals?

PN254

MS BUTTERS: It doesn't have the same level of drafting issue, but essentially, yes, your Honour. We're not pursuing the substantive amendments that we proposed, with respect to extending it to part-time employees.

PN255

JUSTICE HATCHER: All right. Forklift allowance?

PN256

MS BUTTERS: So, your Honour, we're proposing to consolidate the forklift allowance in favour of the all purpose allowance, provided in subsection (a). We acknowledge that currently there is the ability for part-time and casual employees who were engaged prior to 23 January 2020 to be paid the allowance of \$2.99 a day, up to a maximum of \$98 per week, or they can elect to receive the all purpose allowance. We're proposing to streamline, go with the all purpose allowance, which we don't believe will be any loss of entitlement for workers.

PN257

JUSTICE HATCHER: So the \$2.99 appears to be \$0.39 an hour, times 7.6. Is there any reason why we can't do this, seeing it's going to be simplified? Mr Song?

PN258

MR SONG: Your Honour, we're not necessarily opposed to the AHA's proposal. All we say, in relation to this proposal, is that it should be the weekly maximum amount. I think subsection (b) provides the weekly cap, otherwise there is a risk that the allowance will keep accruing.

PN259

JUSTICE HATCHER: But the employee can elect to receive the one in (a), can't they? That is, if they're doing a lot of hours they can just avoid the cap by saying, 'I want (a)', in which case what's the purpose of it all? Do you agree with that, Ms Harrison?

PN260

MS HARRISON: Your Honour, I actually think it works the other way as well. If you had a casual employee who's only doing two hours, then they - and they were employed immediately prior to 23 January, they'd be entitled to the allowance of \$2.99 per day, regardless of how many hours - that they only worked two hours, which would be 80 cents, under the all purpose. Similarly, if you've got a casual employee who was engaged after 23 January, and they worked a 10 hour shift, which is possible under this award, they'd be entitled to more than the \$2.99 per day. But you're right, in terms of the hourly rate, that would be fine.

PN261

JUSTICE HATCHER: Sorry, what was that last bit?

PN262

MS HARRISON: In terms of the hourly rate then that would be fine. If they worked over - so it's only really when you've got someone working less than 7.6 hours that they might actually see a fall, if they were engaged immediately prior to 23 January 2020.

PN263

JUSTICE HATCHER: Well such persons may exist but is it likely this will affect anybody?

PN264

MS HARRISON: Your Honour, I can't say, without consulting members.

PN265

JUSTICE HATCHER: All right. So meal allowance?

PN266

MS BUTTERS: Your Honour, we've suggested a redraft of the meal allowance clause, to simplify the application of the allowance, whilst also ensuring that the employee will receive a meal, or the allowance of \$15.30, if they're required to work overtime without the requisite notification. We say subclause (c) should be removed, as the employee has received a meal, so they don't need to be also paid

an allowance for the overtime they're no longer working. This is also applicable for the Restaurant Award.

PN267

JUSTICE HATCHER: Yes. So, Ms Harrison, what does (c) do? It seems to me if you're not advised of the overtime and you have to work more than two hours you get a meal allowance or a meal. But if you are advised, and you don't have to work the overtime and you get a meal, you also get a meal allowance. What's the logic of that?

PN268

MS HARRISON: Your Honour, I'll have to go back through and we would also like to put some thought into this. I think, historically, it's to do with that situation of the person staying - advised of a requirement to work overtime. They've then not been required to work that two hours of overtime and, essentially, this \$15.30, despite the correlation of it being the same as the meal allowance elsewhere, is almost a penalty type amount that's paid to an employee because they're not actually provided with that full overtime component that they were - that's why it operates differently than (b) above, where it talks about the employer actually provides the meal as well. But, as I said, I'm pretty sure that this is - you'll see the number of print variations, I think this has got a very long history to it, which we'd be happy just to traverse and find - - -

PN269

JUSTICE HATCHER: They're just some variations of the amount, I would assume.

PN270

MS HARRISON: They probably are.

PN271

JUSTICE HATCHER: All right. We might discuss that. It just looks a bit weird to me. Clause 26.5, the tool and equipment allowance?

PN272

MS BUTTERS: Your Honour, we're seeking for the allowance provided in subsection (a) to be amended to apply to employees who are required to provide and use their own tools. Currently it's applicable only to cooks and apprentices. We get the two main questions from our members, regarding this, the first is, 'Does this include chefs?', because they're different to cooks. But the second is, 'Does it apply to the handy people that are employed and who do bring their own tools to work?'. So we're simply seeking to change that wording in subsection (a) so that an allowance is payable to all employees.

PN273

JUSTICE HATCHER: Well, the result may be that people who currently fall under (b) and get full reimbursement are then - would then get a lesser amount? I mean you could do it the other way around, that is, everyone just gets reimbursed for the cost.

PN274

MS BUTTERS: Yes, I take your point on that, your Honour. I think there's an issue for our members in having two separate allowances for tools and equipment, so if we can streamline it to make that easier to use, then, yes, I agree that subsection (b) would no longer have any relevancy.

PN275

JUSTICE HATCHER: Obviously. But you could delete (a) and just leave (b).

PN276

MS BUTTERS: I'm not adverse to that either.

PN277

JUSTICE HATCHER: All right. What do you think about that, Ms Harrison?

PN278

MS HARRISON: Your Honour, can we also come back to you in relation to that. I just say that because I think the cook and the apprentice cook, to which that monetary allowance is for the trades qualified and often when the apprentices are going through their trades courses they've got to buy particular tools, knives, et cetera, which they then use in their work and it's not necessarily always directly combined with their - they obviously do placement or they'll do their placements, they might do their placements as public or training providers as well. So I think we would like to go away and have a look at that.

PN279

In relation to the reimbursement of the purchasing costs, and it being broadened out to include that category of cook, I just want to have a look at that one element of it.

PN280

JUSTICE HATCHER: Mr Song?

PN281

MR SONG: Your Honour, we would oppose this proposal, based on the fact that the allowance will be extended to apply to all employees. Without having the benefit of doing the full research, doing the full investigation behind why cooks are entitled to this particular allowance, we do consider that there may be some degree or level of training that they would need to complete, in order to be entitled to that allowance. So in that context, we would say that the entitlement to that allowance would vary between different employee cohorts. So on that basis we oppose that proposal but we would like to go back and look at the history behind that.

PN282

JUSTICE HATCHER: All right. So the next one is about the special clothing allowance?

PN283

MS BUTTERS: Yes, your Honour. So we propose that clause 26.6(e) be removed. It currently applies to motel employees. Motel employees are not defined in the award. This is the only time they're used in an excusatory

manner. So we say it's not longer relevant, it should be removed and then the existing allowance should be payable to employees, including motel employees.

PN284

JUSTICE HATCHER: In the same vein, why would we retain (d)?

PN285

MS BUTTERS: I was about to add the same thing, your Honour, so thank you. Agreed on that point. I think that both 'catering' and 'motel' can be removed from this allowance.

PN286

JUSTICE HATCHER: I mean part of the problem is that (c) becomes the default provision for laundering and it's not really useful, or practicable, from my perspective, to say that employee has to show evidence of the cost of laundering a uniform. I mean that's just impractical, isn't it?

PN287

MS BUTTERS: Yes, I think that it definitely would raise a barrier there. I think that that largely does come down, though, to the employment relationship. The employer can pay the allowance without that evidence. So perhaps more guidance as to what would be sufficient evidence, we're certainly not opposed to that.

PN288

JUSTICE HATCHER: Well, maybe another approach - I mean obviously these provisions were the result of putting different pre-modern awards into one single award, hence pulling together old provisions. But it seems to me a more modern approach would be to simply scrap all that and come up with a standard laundry allowance for everyone under the whole award, which is what most awards do. Would the parties be prepared to discuss that?

PN289

MS BUTTERS: Yes, your Honour.

PN290

MS HARRISON: Yes, your Honour.

PN291

MR SONG: Sure.

PN292

JUSTICE HATCHER: Is there a laundry allowance in the Restaurant Award?

PN293

MS BUTTERS: Yes, there is, clause 21.5. I don't necessarily think that that clause resolves your Honour's concern about the subsection (c).

PN294

JUSTICE HATCHER: That's the same reimbursement concept.

PN295

MS BUTTERS: It is, correct. Yes.

PN296

JUSTICE HATCHER: Just one moment. All right, overnight stay allowance, 26.15.

PN297

MS BUTTERS: Your Honour, this is a very minor amendment, but it is something that confuses our members. Just bearing in mind that a lot of their businesses do operate a 24/7 roster, so there are people who work overnight. We have members who query with us if that allowance is applicable for employees that work overnight, who aren't necessarily required to do an out of the norm sleepover and aid in any customer requirements. So we are suggesting that we remove the wording in the SCHADS Award and change the word 'stay' to 'sleep'. It's a very minor amendment but we do think it's going to aid some of our understanding in how this allowance is applied to business.

PN298

JUSTICE HATCHER: How are you sleeping if you have to provide prompt assistance to guests?

PN299

MS HARRISON: Yes.

PN300

MS BUTTERS: Well, you may be awoken.

PN301

JUSTICE HATCHER: Sorry?

PN302

MS BUTTERS: You may be awoken.

PN303

JUSTICE HATCHER: Well, that's not - who's going to wake you up?

PN304

MS BUTTERS: A phone call, a knock on the door. Probably those two. It's not something we're tied to, your Honour, we're happy to move it forward.

PN305

JUSTICE HATCHER: Look, I can understand there being confusion about what this clause is meant to apply to, but it doesn't seem to me, on its face, that it was meant to do what you're suggesting. What do you say, Ms Harrison?

PN306

MS HARRISON: Your Honour, we haven't had - we've had a handful of members that would be covered by this, where they often, particularly in country hotels, where they might actually live on the - they might be staying on the premises as well and they've got an overnight guest so they might get woken up in the middle of the night because something's gone pear-shaped, or someone has lost their key to their room. But I have to say, we haven't experienced the same level of - well, we haven't had any issues, in relation to the payment and the

overnight stay has very different connotations, in the context of the Hospitality Award than it does in the Social Community Home Care Award. So, in that respect, we probably wouldn't support a change in the wording at this stage, without evidence that it actually has caused problems.

PN307

JUSTICE HATCHER: Ms Butters, your main concern is to make it clear that this isn't applying to some sort of night shift?

PN308

MS BUTTERS: Correct.

PN309

JUSTICE HATCHER: All right.

PN310

MS HARRISON: Your Honour, just in that, I just note the note that I think was put in afterwards, from recollection. I can't remember when, it must have been pre 2015, where it says, 'The allowance specified is intended to compensate for the overnight stay for work undertaken of up to one hours' duration'.

PN311

JUSTICE HATCHER: Well, can we just add another note saying, 'This clause does not apply to a person performing a night shift', does that answer the - - -

PN312

MS BUTTERS: That would assist, your Honour.

PN313

JUSTICE HATCHER: Is there a night shift, or a shift work provision, Ms Butters?

PN314

MS BUTTERS: There is, your Honour. So there's an allowance for late night and early morning, depending. So between 7 pm and midnight and then midnight and the morning, Monday to Friday. So there is an additional payment that compensates for that.

PN315

JUSTICE HATCHER: Okay.

PN316

MS HARRISON: Your Honour, just in relation to that, your Honour will note that 26.15(b), subsection (2), requires that when a person is required to work more than one hour they get paid the 150 per cent.

PN317

JUSTICE HATCHER: Yes, but that's only if they're interrupted to provide assistance to guests.

PN318

MS HARRISON: Yes, that's right.

PN319

JUSTICE HATCHER: That is, it's not - this is not intended if someone's going to be working during the whole period.

PN320

MS HARRISON: No, that's correct, your Honour.

PN321

JUSTICE HATCHER: All right, the overtime clause?

PN322

MS BUTTERS: Your Honour, this is mostly, I will be frank with you, to lessen the word count of this provision. So we are proposing that clause 28.1 of the HIGA be replaced entirely with a note. The same note appears in the Restaurant Award and states that, 'Under the NES, see section 62, an employee may refuse to work additional hours'. Section 62 sets out the factors to be taken into account when determining whether additional hours are reasonable or unreasonable. So we're proposing that that note go in, in place of clause 28.1 and then commence this clause with clause 28.2 and the payment of overtime.

PN323

JUSTICE HATCHER: Does anybody oppose that? The next one, I think we discussed that last week, in a different context, Ms Butters.

PN324

MS BUTTERS: That's correct, your Honour.

PN325

JUSTICE HATCHER: Is there anything to add about that?

PN326

MS BUTTERS: No, thank you.

PN327

JUSTICE HATCHER: Does anyone wish to add anything to this one? I think it's sufficient to note that the TOIL clause is a standard clause that was developed by a Full Bench so I think if anyone wants to reconsider that, that would need to be an across the board application to be further considered by a Full Bench.

PN328

All right, 29.2?

PN329

MS BUTTERS: Your Honour, the wording of this clause, specifically the per hour or part of an hour causes our members quite some confusion when determining whether that penalty is paid on a pro-rata basis for a part hour. We've suggested that the language be consistent with clause 24.4 of the Clubs Award, to separate out the language and say that the allowance is payable for an hour, for such time worked, and then the amount will on a pro-rata basis for a part hour thereafter. The same value is provided in both awards, so it's just simply a drafting change for useability and understanding.

PN330

JUSTICE HATCHER: Well, I mean I must say I read it as saying it's not pro-rata. That is, if you work two and a half hours you get three times 262, is that - that's what it currently says, isn't it? Is that what you think it means?

PN331

MS HARRISON: Your Honour, that's what we understand that clause to mean.

PN332

MS BUTTERS: In that case, your Honour, if it's appropriate to include a further note to clarify that, I think that would be very helpful, for compliance purposes.

PN333

JUSTICE HATCHER: What would that note say?

PN334

MS BUTTERS: Well, it could say, as your Honour just suggested, that, say, the 2.62 per hour, or part of an hour, is paid in full, regardless of the portion of the hour worked. Something to that effect. I think that will assist in usability.

PN335

JUSTICE HATCHER: All right. Would you agree with that, Ms Harrison?

PN336

MS HARRISON: Yes, your Honour.

PN337

JUSTICE HATCHER: With the next one, Ms Butters, the practice is that in all our awards is that we put penalty rates for holidays in the penalty rates clause. What's the difficulty with that? The public holiday clause sets out when the public holidays occur and then the penalty rates clause set out when penalty rates occur.

PN338

MS BUTTERS: Your Honour, we'll take that point. We're happy to not push that proposal any further.

PN339

JUSTICE HATCHER: So these last two are also in the Restaurant Award?

PN340

MS BUTTERS: That's correct.

PN341

JUSTICE HATCHER: The next one is a definition of a shift worker.

PN342

MS BUTTERS: Of a shift worker. Your Honour, we're not pressing this proposal any further either.

PN343

JUSTICE HATCHER: Thank you.

PN344

MS BUTTERS: Apologies. The same will go for the next clause, regarding excessive annual leave accruals. I think that's been well canvassed anyway and also in the common issues section. So we're happy to not push that proposal either.

PN345

JUSTICE HATCHER: All right. So the next one is 35.3.

PN346

MS BUTTERS: Yes. So, your Honour, this is mostly regarding subsection (a), which is pay the employee an extra days pay. We continue to get questions every public holiday about how that is paid. So whether it's paid at the employee's ordinary hourly rate, how many hours, those sort of questions. So we proposed some wording for that clause, just to clarify that it would be paid at the usual rate of pay for the equivalent ordinary working hours, and that those equivalent hours aren't going to be counted, for the purposes of overtime, et cetera.

PN347

JUSTICE HATCHER: All right. Well, presumably an extra days pay is the ordinary hours the person would have been rostered, if it had not been a public holiday, which might be five, six, seven, whatever. That is, I'm not sure that usually 7.6 hours is very useful to say, particularly in the hospitality context.

PN348

MS BUTTERS: Your Honour, if we were to change that to say 'the hours they would have worked, if not for a public holiday'.

PN349

JUSTICE HATCHER: The ordinary hours?

PN350

MS BUTTERS: Yes.

PN351

JUSTICE HATCHER: Does that work? Now, as to the second sentence in your note, I don't understand why a payment would ever - - -

PN352

MS BUTTERS: No, that's correct, your Honour, but it's the question we get quite a lot.

PN353

JUSTICE HATCHER: That is, a payment would count as hours worked?

PN354

MS BUTTERS: Yes. No, we certainly agree with that and I think - I'm sure that all parties would agree with that, but it's something that confuses our members. So that's really the only reason why we're seeking that clarification.

PN355

JUSTICE HATCHER: All right. So do you agree with that, Ms Harrison and Ms van Gent? That it's a payment, it's not - it doesn't constitute any hours worked.

PN356

MS HARRISON: Your Honour, I don't disagree with that part of it. The actual interaction that I'm just sort of querying is actually with workers compensation payments and whether that sentence is actually necessary or actually might cause interaction problems that don't exist, if it's not included. Particularly where it talks about leave accruals and the like, because the different state workers compensation legislation interacts differently, depending on how - whether or not payments are counted as leave or not leave, particularly when they're doing their accruals. So that's - and I won't know that unless we go through it while we are checking it. Whereas, the absence of that sentence would not cause the same difficulty.

PN357

JUSTICE HATCHER: Anyway, if you want to consider that, that might be useful. So the next one is clause 37.

PN358

MS BUTTERS: Your Honour, we proposed a consolidation of clauses 37.4 and clause - to clause 37.8. It's simply to streamline the provision. We had also noted, well suggested an amendment to clause 37 to allow for recurring employee authorised deductions, however, on further review of the clause we don't think that will be prevented anyway, so we don't - we're not pursuing that part of our proposal any further. It's just the consolidated between subsections (4) and (8).

PN359

JUSTICE HATCHER: Well, would that take in 37.7 as well? That is, are you consolidating 37.7 as well?

PN360

MS BUTTERS: Yes, correct.

PN361

JUSTICE HATCHER: All right. So this appears to be agreed, is that right?

PN362

MR SONG: Yes, your Honour.

PN363

JUSTICE HATCHER: All right. Next one is replacing the term 'roster cycle' with 'averaging arrangements'.

PN364

MS BUTTERS: So, your Honour, this is another thing that our members routinely ask us about. It's the difference between an averaging arrangement and a roster cycle, neither of which are defined in the award, or awards, this one's also applicable for the Restaurant Award, but they are used interchangeably. For example, clause 15.1(b) of the HIGA details the eight different options for an

averaging arrangement available for full-time employees. So just one example is the 152 hours over each four week period with eight days off. There's a similar provision in clause 15.1 of the Restaurant Award. When we proceed to clause 24.1(b) of the HIGA, regard must be had to a roster cycle, for the purposes of determining outer limits and not to the averaging arrangement that had been agreed on to say how the ordinary hours would be worked.

PN365

We understand these are largely interchangeable terms, however, it's something that our members get confused about. So we would suggest, I suppose, two prongs of our proposal is to define either term in the definitions. Make it clear that averaging arrangement and roster cycle can be used interchangeably and then reflect that in a language change throughout. So if that is for averaging arrangement, then we would suggest changes to references to roster cycle in clause 24, in particular. If we were to define roster cycle and use that as the preferred term, we would suggest making clear that the averaging arrangements detailed in clause 15, for example, are intended to reflect the employer's roster cycle.

PN366

JUSTICE HATCHER: Where's it used in 24?

PN367

MS BUTTERS: 'The roster cycle'? 24.1(b). 24.2, sorry.

PN368

JUSTICE HATCHER: 24.2(b)?

PN369

MS BUTTERS: Yes. Thank you.

PN370

JUSTICE HATCHER: So that uses the phrase 'roster cycle'?

PN371

MS BUTTERS: Correct.

PN372

JUSTICE HATCHER: I mean it seems to me they're two different things. Roster cycle is simply a period longer than a pay period, or a week, over which hours are rostered. An averaging arrangement usually refers to a means by which, for the purposes of calculation of pay, or calculation of overtime, the hours may be averaged over the roster cycle. I don't think they mean the same thing.

PN373

MS BUTTERS: I take your Honour's point on that. I suppose the confusion for our members remains, however, the difference between the two and how they can interact with things like clause 24 and the calculation of hour limits. But perhaps that might be more an option for us to work through and educate our members more. So we'll take your Honour's point on that.

PN374

JUSTICE HATCHER: Well, I'm just thinking out aloud. So do you want a definition of 'roster cycle', do you?

PN375

MS BUTTERS: Yes, I think that would be helpful your Honour.

PN376

JUSTICE HATCHER: Is there a rostering clause?

PN377

MS BUTTERS: There is a rostering clause. It applies only to full-time and part-time employees, which I think is probably a separate issue but it's also somewhat problematic in that the hours of work for a casual employee can also be averaged over a roster cycle, even though the rostering provisions don't apply. But I think that might be a separate issue entirely.

PN378

JUSTICE HATCHER: Okay. Look, this can be discussed, but I think there's a level of complexity here. So if you want to come up with a definition, you're welcome to have a go, but it seems to me it's slightly different nuances in different clauses.

PN379

MS BUTTERS: Yes, your Honour.

PN380

JUSTICE HATCHER: With the classification structure, so I think there's some willingness of parties to discuss this. Perhaps, as a starting point, can I ask you, Ms Butters, to file a document setting out a consolidation of the specific changes that you seek in your proposal but also dealing with the appropriate training issue. That is, perhaps it can be done, rather than using that generic phrase, just specifying what you say should be the training requirements at each level?

PN381

MS BUTTERS: Yes. Thank you, your Honour.

PN382

JUSTICE HATCHER: Then we can use that as a starting point for the discussion. How long might you need to do that?

PN383

MS BUTTERS: By the end of the week, your Honour, if that works.

PN384

JUSTICE HATCHER: Well, I wasn't going to suggest that quickly, but if you could do it in two weeks, that would be fantastic.

PN385

MS BUTTERS: Perfect.

PN386

JUSTICE HATCHER: All right, so that's everything for the Hospitality Award. I'll just try and locate the Restaurant Award proposals we haven't discussed yet.

PN387

MS BUTTERS: Your Honour, I believe the only outstanding discussion that we haven't had, that is not applicable to the Restaurant Award, would be on classifications. So can I suggest that we do the same for that?

PN388

JUSTICE HATCHER: All right. Can you just hold on a second?

PN389

MS BUTTERS: Of course.

PN390

JUSTICE HATCHER: With the AWCC proposals, they suggest, I'm only just going to raise a couple of them, but they suggest that, for the purpose of clause 3.3, I'm pretty sure this would be a standard clause, but there should be a definition of 'accessible electronic means'. Does any party think there's any doubt about what that means? No? All right.

PN391

MS HARRISON: Your Honour, I don't think there is any doubt and I also think there's actually benefit in not defining them, particularly as technology changes. I think we would have ended up in all sorts of problems if we'd defined it when the awards came in.

PN392

JUSTICE HATCHER: All right. That sounds fair to me.

PN393

In relation to, and again, this may be something that would effect awards generally. In relation to clause 7.2, the AWCC proposes that the table be expanded to include a summary of what the provision is about. Is there any interest in doing that, or does that simply add a slab more of text to the award?

PN394

MS HARRISON: I think, from our perspective, it also adds, to the extent that things are over summarised, it adds another layer of confusion in interpretation and ambiguity as well.

PN395

JUSTICE HATCHER: All right, no takers for that.

PN396

All right. Another AWCC one. If you go to 18.3, 18.3, this is table 5 in 18.3, It's suggested, I think, that in column 4 we should add the words, in brackets, 'Part-time employee' having regard to what's immediately above the table. That seems right to me, doesn't it?

PN397

MS BUTTERS: Yes, your Honour.

PN398

JUSTICE HATCHER: The next one I've got is yours Ms Butters, in relation to clause 18.2.

PN399

MS BUTTERS: Yes, your Honour. That would be in regards to removing 'cooking trade'. We acknowledge that, yes, that would be the majority of apprenticeships that are offered under this award, however, it's not exclusive. There are, for example, front of house.

PN400

JUSTICE HATCHER: Sorry, I think we've jumped ahead. The first one is about 18.2(b) and (c), that is these rounding provisions.

PN401

MS BUTTERS: The rounding, yes.

PN402

JUSTICE HATCHER: Ms Harrison?

PN403

MS BUTTERS: We would say it's not necessary anymore, we've got electronic payroll systems that don't require rounding.

PN404

JUSTICE HATCHER: I'll have to check whether this is any other awards, but is there any reason to include that?

PN405

MR SONG: Not from our perspective, your Honour.

PN406

MS HARRISON: Not from our perspective either.

PN407

JUSTICE HATCHER: All right. So the next one is apprenticeships. This is 18.3 to 18.5. So currently these provisions are confined to the cooking trade. What other apprenticeships might there be in restaurants, if we don't have waiting apprenticeships?

PN408

MS BUTTERS: There is the hospitality specialist front of house apprenticeship, that is currently available. That's specifically is relevant to restaurants. I couldn't tell you how often it's done, but it is available.

PN409

JUSTICE HATCHER: All right. And are you able to say whether these provisions are appropriate for that type of apprenticeship?

PN410

MS BUTTERS: We believe they would be. It's simply relevant to the payments. So, yes, we would believe that they would be applicable to all apprenticeships.

PN411

JUSTICE HATCHER: I mean this appears to contemplate - provision to contemplate a four-year full-time apprenticeship, is that the same?

PN412

MS BUTTERS: It is, your Honour.

PN413

JUSTICE HATCHER: All right. Ms Harrison?

PN414

MS HARRISON: I think, in principle, we wouldn't oppose it, on the basis that I can't see the difficulty in expanding this out, based on apprenticeships, although your Honour, I might come back to you on those, if that's okay.

PN415

JUSTICE HATCHER: All right. Next one is a specific change to the annualised arrangements in clause 20.1, as to the matters, 20.1(a), as to the matters which might be incorporated in an annualised wage. I simply note, although this is not meant to shut down discussion, that this specific topic was the subject of a Full Bench discussion, in [2022] FWCFB, I can't read what I've written there, but anyway, it's at paragraph 47. Yes, [2022] FWCFB 31 at paragraph 47. That is, the differences between this clause and the Hospitality clause were on the basis that they preserved the existing capacity to incorporate provision in annualised salaries. Having said that, Ms Harrison, is there a reason why it might not be changed?

PN416

MS HARRISON: Your Honour, we think the proposed changes, particularly in relation to the Restaurant Industry Award would actually - would actually negatively impact upon employees. The actual provision itself, the general one that's in the Hospitality Industry (General) Award allows for the inclusion of all allowances, whereas the Restaurant Industry Award is very specific, in relation to it only being a split shift allowance. We note that it was the subject of considerable evidence, in relation to the operation of restaurants, particularly, and there being some nuanced differences between the Hospitality and the Restaurant Industry Award. On that basis, we would say that we would oppose the variation that's been put forward.

PN417

JUSTICE HATCHER: All right. The summary did say you were open to discuss this.

PN418

MS HARRISON: Sorry, your Honour, we've gone through it in more and more detail since then.

PN419

JUSTICE HATCHER: All right. Did you want to say anything in response to that, Ms Butters?

PN420

MS BUTTERS: No, thank you. We agree.

PN421

JUSTICE HATCHER: All right. So the next one is the tool and equipment allowance, in 21.4.

PN422

MS BUTTERS: So this is the same issue that we've discussed in relation to the HIGA.

PN423

JUSTICE HATCHER: It's the same one. Yes, we've done that.

PN424

MS BUTTERS: Yes.

PN425

JUSTICE HATCHER: 21.3, the split shift allowance.

PN426

MS BUTTERS: Your Honour, we're not pursuing this proposal any further.

PN427

JUSTICE HATCHER: Okay. So jumping ahead, you're likewise able to provide just a starting point proposal for amending classification structure, in two weeks, Ms Butters?

PN428

MS BUTTERS: Yes. Thank you, your Honour.

PN429

JUSTICE HATCHER: The last one was (indistinct) HR Consulting, which suggests that there's some disparity between 24.4(d) and 30.3. It appears to me that those clauses do two different things, but does any party have anything to say about that? No? All right.

PN430

All right, well, that's all the proposals. As I've said in other matters, once all the consultations are completed and once we've received various further documents from parties I'll then consider whether there's any purpose for a further consultation. Having regard to what's been said today there may well be such a purpose for this matter. But I'll advise the parties about that, in due course. Is there anything else the parties wish to add? No? All right, thanks for your attendance, we'll now adjourn.

ADJOURNED INDEFINITELY

[12.00 PM]