



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT O'NEILL

AM2023/21

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

**Application by
(AM2023/21)**

Melbourne

9.39 AM, TUESDAY, 9 APRIL 2024

Continued from 04/04/24

PN994

DEPUTY PRESIDENT O'NEILL: All right. Good morning everyone and welcome to the new venue.

PN995

So I'll just quickly to through the appearances, so please let me know if I miss anybody. Ms Biddlestone, for the SDAEA. Anna Cloak(?) appearing later, as I understand, it. Mrs Abousleiman and Ms Skelding for the CEPU ETU, Mr Amoresano, for the AMWU. Ms Pugsley for the AHEIA is attending this afternoon. Ms Palmer for the ANMF. Ms Peldova-McClelland who's here for the ACTU. Mr Nguyen, Mr Gale and Ms McCormack for the Flight Attendants' Association of Australia. Ms Wells for the NTEU. Mr Maxwell for the CFMEU. Mr Orr for the UWU. Ms Tinsley and Mr Morrish for the Australian Chamber of Commerce. Ms Delpiano for the Mining and Energy Union. Mr Arndt, with a colleague appearing later, for the Business NSW and ABI. Mr Robson for the ASU. Mr Deguara and Mr Wright for the CPSU NSW branch. Mr Lee, who's attending later this afternoon, for the HSU. And we received advice this morning that there will be no appearance today from the Australian Industry Group, in light of personal illness, at a late stage, with no one else able to attend.

PN996

Did I miss anybody in that roll call? No.

PN997

MR VAN RENSBURG: Deputy President, apologies, Mr van Rensburg of the SDA, in an observational capacity.

PN998

DEPUTY PRESIDENT O'NEILL: All right. Good morning. Now, just before we get under way, I'll just - we discussed this last week, but just to confirm, for anybody who wasn't present, we will formally list the matter for 11 April, to deal with consent matters. The particular agenda will be finalised before the end of tomorrow, but at this stage we've already indicated that issues relating to the higher education sector will be covered and the other potential issues are the annual leave at half pay, but that's on the agenda today, so there may or may not be a need for further discussions in relation to those. And we discussed that, in relation to the Retail Industry Award, the potential matter of consent, in relation to a four-day week can be raised in the separate application by the Australian Retailers Association, to vary that award.

PN999

I did indicate at the end of the second day, if parties had a top three, I am still curious about that, but I might just hold off asking you that until tomorrow, when we've fully canvassed all the issues.

PN1000

Now, the only other thing, in relation to the 11th, to Thursday, if any party proposes that further consultation is required on any of the issues that we've already covered, or will be covering today and tomorrow then, of course, I'm not

precluding any such request. I don't get that sense, but that's obviously open, if parties feel the need for any further consultation in relation to any of those matters.

PN1001

So in terms of proceeding today, we'll adopt the same approach of working through the summary of proposals that has been published. I should just say that the Ai Group has also indicated that because of their unavoidable absence today, they may have, after reviewing the transcript, seek to make some - file some material in response to that and I have no difficulty with that approach.

PN1002

All right. Now, the discussion questions this morning are questions 10, 11 and 12, relating to issues surrounding overtime, time off in lieu, make up time, on call and recall, and travel time. So the first of the proposals, and I appreciate there is some crossover in terms of the matters here with matters that we've already covered, so I am very conscious of that. But the first proposal is at item 1, which is the proposal by the ACTU. Ms Peldova-McClelland, did you want to speak to that?

PN1003

MS PELDOVA-McCLELLAND: I will, briefly, thank you, Deputy President, and good morning. The new venue is lovely.

PN1004

As you've noted, much has already been said about this proposal in last week's consultations, so I just want to simply emphasise today the inherent unfairness in overtime provisions that provide that overtime is only payable when employees work in excess of 38 hours per week. This clearly disadvantages part-time and casual employees. And, as we've submitted, these are more likely to be found in female dominated awards where there are higher rates of part-time work and lower rates of pay, thereby compounding gender based under valuation of work.

PN1005

As we've detailed, at length last week, it's also part of the reason that lower 'I' contracts are so prevalent in those sectors, that can be flexed up and down without penalty.

PN1006

By comparison, male dominated awards, in our submission, are much more likely to contain provisions that overtime is payable to employees, where they're required to work in excess of their ordinary part-time hours. And there are some examples of this contained in the discussion paper that illustrate that pretty clear gendered divide.

PN1007

So we say that dealing with this issue, to ensure that overtime is paid on all additional hours worked, outside of ordinary hours, for all employees is necessary to achieve the Modern Awards objective, especially the considerations at 134(1)(AA), (AB) and (DA). Overtime provisions are designed to compensate employees who perform work outside of their ordinary or rostered hours and this proposal is consistent with that principle.

PN1008

I'd just make one small note, I note there's one employer proposal, from MICA, on overtime, and we say that their proposal, which is that a consistent approach should be taken as to where overtime is triggered, so after 38 hours per week, ignores the existing unfairness with issues we've outlined and their gendered impacts and would make this issue worse and should be rejected. Thank you.

PN1009

DEPUTY PRESIDENT O'NEILL: All right, thank you. Does any other party wish to - Mr Arndt?

PN1010

MR ARNDT: Deputy President, I think our position has been put, either in reply or earlier last week, so we wouldn't say anything further.

PN1011

DEPUTY PRESIDENT O'NEILL: All right. Any other party want to say anything about this proposal?

PN1012

MS PALMER: Deputy President, Palmer, from ANMF. I just really want to take the opportunity to highlight the experience of ANMF members when it comes to accessing overtime and the restrictions around that. Our members are predominantly women on part-time contracts and this is highlighted or evidenced really clearly in the gender pay equity report prepared for the Fair Work Commission. It found that midwifery was the most female dominated occupation but that - so was nursing and other care work, including care work in aged care, and that over half of the registered nurse workforce, being 56.8 per cent, are employed part-time, which is significant.

PN1013

We agree with the literature review that part-time contracts are set artificially low and in conjunction with the provisions currently in the Nurses Award it makes the threshold for accessing overtime incredibly high, so it's used for the employer's financial benefit to be able to flex those hours up and down and not having to pay that penalty. At the moment it's in excess of eight to 10 hours worked per day, which is a long shift and difficulty, you know, can be rostered up to and then they miss out on overtime. It greatly advantages the employers and we think we really need to emphasise that.

PN1014

Finally, I just want to highlight the issue of the low penalty rates for weekend work and the ambiguity around payment of other entitlements. This also fails to meet the modern award objectives of gender pay equity, or gender equality as well and (indistinct) overtime and outcomes and time away from caring responsibilities which female dominated occupations - - -

PN1015

DEPUTY PRESIDENT O'NEILL: What's the ambiguity that you're referring to there, about - - -

PN1016

MS PALMER: Sorry, I've lost my train of thought. So under the current clause 19, point 2 I think, or the payment of penalty rates, there's uncertainty around the payment of superannuation and accrual of other leave entitlements. It's covered in that section.

PN1017

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Palmer. Ms Biddlestone?

PN1018

MS BIDDLESTONE: Thank you, Deputy President. I'll just make a couple of comments, similar to Ms Palmer. In retail part-time employment is the predominant form of employment, so around 65 per cent of workers in retail are employed on a part-time basis. We would argue that that means that the way that part-time employment is constructed is really important, in terms of how those low paid workers get access to stable and secure incomes.

PN1019

I'll just, if I take you to our submission, at paragraph 104, we've included a table in there which sets out the level of full-time employment across retailers. Just to highlight a couple, Aldi employ no full-time workers.

PN1020

DEPUTY PRESIDENT O'NEILL: Yes, I saw that.

PN1021

MS BIDDLESTONE: Coles Group employs 6.5 per cent on a full-time basis. EG Fuels, one per cent are employed on a full-time basis. Myer 9 per cent. Priceline 5 per cent. K-Mart only 2 per cent of their workforce are full-time. And Woolworths Group is only 11 per cent. So what that means is they rely heavily, in terms of their model of employment, on a part-time workforce, where they work a minimal base number of hours and they expect full flex ability to roster them above those hours.

PN1022

We argue that part of what is broken in this is that there is currently not the right disincentive for that model of employment because our members are pretty much, although they can agree to additional hours at ordinary rates of pay, it is the only way they can access additional hours. So that is the model of how they are employed, which means there is no financial disincentive whatsoever for the current construct of part-time employment in the retail and fast food sectors, because of the way additional hours are paid.

PN1023

So we argue that the way that part-time employment is currently constructed in those awards does need to be reviewed and also I concur with the submissions that Ms Peldova-McClelland, that there is absolutely a gendered element to the way that awards are currently constructed and that must form part of this review as well. Thank you.

PN1024

DEPUTY PRESIDENT O'NEILL: So it's not a difficulty with the rates of full-time employment, per se, or part-time employment, it's the particular convergence of the circumstances under the current arrangements, with the low base.

PN1025

MS BIDDLESTONE: Yes, absolutely.

PN1026

DEPUTY PRESIDENT O'NEILL: And no penalty for additional hours.

PN1027

MS BIDDLESTONE: And I think, in terms of the gendered undervaluation of the awards that our members work in, the rate of pay is one thing but what really impacts their ability to earn a decent income and what is being impacted by the gender undervaluation is the actual construction of the award and how it varies starkly from male dominated awards. We just don't accept that that's due to the nature of the industry.

PN1028

DEPUTY PRESIDENT O'NEILL: All right. Thank you, Ms Biddlestone. All right. Well, if there's no further discussion on that proposal, the next proposal is by the AMWU. Mr Amoresano, did you want to speak to this item?

PN1029

MR AMORESANO: Thank you, Commissioner. No, we rely on our written submission. Nothing more, thank you.

PN1030

DEPUTY PRESIDENT O'NEILL: All right. Well, then moving to items 4 and 5, these are proposals by the ANMF. Ms Palmer, did you want to speak to both? Now, I note that two of those proposals are already opposed by the Ai Group. All right.

PN1031

So the next is item 7, which is the proposal by the Flight Attendants Association.

PN1032

MR NGUYEN: Yes, thank you, Deputy President. My colleague, Mr Cope, in the earlier consultations I think outlined the FAAA's approach to these proceedings and we'll be proceeding on that basis, in terms of drawing the Commission's attention to further - the further issues which I'm facing indicate that the awards not providing (indistinct) safety net.

PN1033

In terms of the three issues that you'd identified, we would respectfully request the opportunity to provide those at the end of tomorrow because the top two issues will be presented to the Commission in tomorrow's consultations.

PN1034

Before I turn, sorry, to item 7, if I can also respectfully request permission from the Deputy President to depart from the proceedings between 11.30 and

12.15. My colleague, Mr Gale, will be here if an urgent item comes up during that period.

PN1035

I turn now to item 7. What's unique about cabin crew conditions is that they can work for up to 18 hours on an assigned planned duty and not receive any overtime penalty for that. Now, what the FAAA proposes won't actually change that outcome, in terms of a planned duty, but the standard that we're asking to be brought up to is the expectation that where if you're asked to stay back at work beyond your planned duties, you should expect to receive remuneration for those unpredictable hours. That's the gap between the planned duty and the unplanned duty. So that's really the focus on what we are seeking. That's because unpredictable hours do result in other inconveniences such as disruptions to child care or other caring arrangements, disruptions to meal planning, as well as disruptions to sleep and rest expectations as well.

PN1036

As you'd be aware Deputy President, the Modern Awards objective expressly stipulates the need for additional remuneration for employees who are working unpredictable hours.

PN1037

In the context of working, care is expensive and difficult to arrange any type of care at short notice, so we do ask the Commission to consider that, in terms of this particular issue for the cabin crew onboard. At the moment the current award's overtime provisions are limited to domestic and international flying and they provide unspecified overtime rates when the hours go beyond the monthly or rostered period of annual hours of ordinary hours. But in terms of the daily ordinary hours, there's no overtime in relation to those unpredictable hours.

PN1038

For domestic crew, the planned hours can range from between eight to 14 planned hours. For international crew, the planned duties can range from between 10 to 18 hours. And unplanned hours can increase the duty for domestic crew up to 15 or 16 and for long-haul crew it can increase to up to 20 hours.

PN1039

So what our proposal is, is to ensure that for that gap between the planned duty and the unplanned duty maximums there is a rate of overtime that is payable to the crew for that period. In addition, if they are to go over the unplanned, there should be a rate, a minimum rate, which is negotiated as well.

PN1040

Currently, in the award, the employee - it's up to the employee and employer to agree on what the rate will be. Practically what that means is that the FAAA has a 24-hour helpline for its members and so members will receive advice from the Association about what the standard going rate should be and members will get that advice. But the award itself doesn't provide for a minimum of what can be agreed, in terms of how much employees are remunerated when they work above those unplanned hours.

PN1041

So we do get, in these circumstances of a minimum safety net, there should be an appropriate floor that's set for cabin crew when they're negotiating one-on-one, with or without the union's assistance with the employer.

PN1042

Should I go to item 8, Deputy President?

PN1043

DEPUTY PRESIDENT O'NEILL: Yes, thank you.

PN1044

MR NGUYEN: So that's a relatively simple one, which is that for regional crew there's no overtime payable at all, which is definitely an issue, in terms of the award payment and relevant safety nets, so we just highlight that issue. I don't have anything further to add to that, which is quite self-explanatory.

PN1045

DEPUTY PRESIDENT O'NEILL: All right. Thank you for that, Mr Nguyen. I should also just note that Mr Goldthorpe(?) has joined us, for the Club Managers Association of Australia.

PN1046

The next item, noting the NECA item that Ms Biddlestone has spoken to, is noted by the Australian Chamber, at item 12. Ms Tinsley, did you want to speak to this?

PN1047

MS TINSLEY: Yes, very briefly, Deputy President. Thank you. So this is a proposal that's essentially a - it is certainly one of those proposals that fits better, I think, in the awards implementation stream. We're not changing, in our view, the substance of the TOIL provisions in the awards, what we're doing is simply it's a bit of a, in our view, respectfully, a bit of a mess of a provision. It's quite long. We've got situations where we think that, for our members, has been, in a lot of cases that it is so complex to run through and the wording is a bit clunky that sometimes they feel it's just easier to pay it out, rather than providing the time off. And we thought that, because of that, that's a great disadvantage for those with caring responsibilities, which is why I raise it with you today, Deputy President.

PN1048

So we think or we submit that the - by simplifying the TOIL provisions in a number of these awards, will make them simpler and easier to use, therefore meaning the employee is more likely to enter into these TOIL arrangements and we think that may be a good thing for those with caring responsibilities. Because we know that those with caring responsibilities time off, because time is often more valuable than money, in a lot of cases.

PN1049

So we're not putting a proposal that changes the substance, like I said before, of these awards, we're not suggesting that an employee should, in any way, be able to pressure someone to take time off, instead of receiving the overtime payment,

we just want to make it encouraging to employers, where the employee really does want to enter - wants time off, especially for caring responsibilities, they're not put off - that their employer aren't put off by some clunky scary language in the award. So unless there are questions, I might leave it there. Thanks, Deputy President.

PN1050

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Tinsley. Does anyone else wish to speak to this item?

PN1051

MS PELDOVA-McCLELLAND: Yes. Thank you, Deputy President. We have taken a different view about this proposal, which is that it does change the substance of the entitlement. So if that's incorrect then I'd be keen to hear from ACCI, from Ms Tinsley, about why that is. But from what we can ascertain, from ACCI's proposal, there are a few issues that arise. Firstly, the time, they propose to extend the time that the TOIL can be taken to 12 months. I think the standard term is six months, although it does vary a little bit, as I understand, between awards.

PN1052

Given that the requirement for mutual agreement exists, as to when TOIL can be taken, it's a really common issue that our affiliates report that employees can't actually take TOIL at a time that suits them. An extension to 12 months would just extend the period during which they can't - they don't have the benefit of that entitlement. It gets paid out anyway and they potentially need to wait longer for that to occur and we say this would disadvantage workers in industries where TOIL is really difficult to schedule and to take, such as in many caring sectors.

PN1053

We also note there was a Full Bench decision, in the Four-yearly Award flexibility matter, in 2015, that wasn't persuaded that TOIL should accrue for 12 months. In their view, at that time, a 12-week period was sufficient, given the employer receives the benefit of the employee's labour at the time when the time is worked. That was later - reconsidered in a later decision, to be a six month period being acceptable.

PN1054

DEPUTY PRESIDENT O'NEILL: Although, of course, everyone is having a go at that kind of proposition that the matter has been already considered in detail and dealt with. The counter proposition is that well, these things need to be viewed afresh, in light of the new objects, et cetera, of the Act.

PN1055

MS PELDOVA-McCLELLAND: Absolutely, Deputy President, I don't disagree with that. But here I don't think there are - I think the considerations go the other way and militate against the extension of the 12-month period but, yes, I agree with that.

PN1056

The second issue of substance we've identified is that the ACCI proposal would change the requirement to pay from the next pay period to 'as soon as practicable'. That would disadvantageous to the employee and might result in delays in payment. I don't think they've identified any reasons to make this change, although I could be mistaken.

PN1057

Our submission is that it should remain the next pay period after the employee requests payment, or the six-month period has expired. This was also commented on in the July 2015 decision, where the Full Bench rejected arguments made by employers that this was too restrictive and that there should be some flexibility about when payment was made. They said, 'In the usual course, overtime payments would be made in the following pay period. We see no reason for a different approach in relation to TOIL'.

PN1058

Again, noted that the employer would have had the benefit of the employee's overtime and will have benefited from the delay between the working of that overtime and the time at which payment is made.

PN1059

The third issue of substance is that, as far as I can see, in ACCI's proposal, there's no obligation to keep a TOIL agreement as an employee record. This would be a significant issue, in our submission. Again, we point to some of what the Full Bench said, in its 2016 decision, which is that because it's a facilitative provision it comes into effect without Commission scrutiny so it's entirely appropriate that agreements to take time off be in writing, be retained as employee records and this ensures that both parties are aware of their rights and obligations and is an important safeguard for employees.

PN1060

Then just the final issue is that it wasn't clear to me, from ACCI's proposal, whether the TOIL would be taken at a time for time rate or a time for value rate and I did wonder if perhaps they could clarify that point. Obviously if it's at a time for time, we oppose that for the reasons we've put forward in our submissions and our proposal.

PN1061

I understand the ASU might wish to - - - -

PN1062

DEPUTY PRESIDENT O'NEILL: All right. Well, there's, in fact, a few hands up. Ms Tinsley, are you able to clarify or respond to any of the matters Ms Peldova-McClelland has raised?

PN1063

MS TINSLEY: Thank you, Deputy President, (indistinct) proposal would be so popular. In terms of the - I might just go in order, so in terms of the question about 12 months, we believe there that there's still a safeguard. There's still - in the proposal there's still the ability for the employee to cancel the agreement at any time. So it's not as though the employee will be stuck for 12 months and not

be able to get payment until a time - not before 12 months elapses. So if the employee provides (indistinct) I actually want some money now and then as soon as practicable, which is a point I'll come back to shortly, as soon as practicable the employer will need to make that payment. So I just wanted to make that clear. What we're thinking now is that realistically it might be a small amount, it might be a few different things.

PN1064

The employee with care and responsibilities might, in some cases, wish to bank that over a period of time, in some form of additional carers leave, say. So I think by opening it up from six months to 12 months, noting that the employee can cancel at any time (indistinct) beneficial for the employee as well.

PN1065

We don't want to be assuming that - I think that the ACTU's submissions seem to be there's an assumption that the employee will always want money, always prefer money and our submission here is that there are a lot of reasons, especially for those with caring responsibilities, having a bank of TOIL that they can call on might actually be quite beneficial for them. So that's a reason for the 12 months.

PN1066

We don't think there'll be any prejudice to an employee because they can cancel the agreement at any time. It just provides them with flexibility. There's no (indistinct) that says, you have to take that within six months. So I just make that point there.

PN1067

In terms of the second one around the next pay period versus as soon as reasonably practicable, I think that goes hand in hand with extending it to 12 months. So let's just say after a TOIL 11 months in there's quite a bit of TOIL ended up there. It might be - as soon as practicable, I think it's well known what we're talking about there. In some cases that may be the next pay period, but there may be circumstances where the employee hasn't given much notice, it might be the morning before the next pay period kicks in, so it's just making sure that there isn't some sort of technical breach there, especially when we're considering that there may be a larger payment that we make because it's extended to 12 months. Noting again, that the employee can cancel the agreement at any time.

PN1068

In terms of the employee record, that's something we'd be open - I do take the point (indistinct) for employee records. I think the main thrust of our concern is how long and complicated these provisions are. So we'd be happy to talk about how we could simplify that. I think it's just more in terms of the different steps. So we'd be happy to maybe discuss about re-including, it being in writing, it being employee record - I think something will need to give as well, as long as we are kind of both walking towards the same outcome of being simpler and therefore easier for employees to use. That's (indistinct) I think, Deputy President.

PN1069

DEPUTY PRESIDENT O'NEILL: There was the final issue, which is the proposal on a time for time or time for value basis?

PN1070

MS TINSLEY: (Indistinct) time for time is my understanding. I'll come back to you if that's incorrect. I'll need to go back to our initial submission.

PN1071

DEPUTY PRESIDENT O'NEILL: All right. Thank you for that.

PN1072

MS TINSLEY: Thank you, Deputy President.

PN1073

DEPUTY PRESIDENT O'NEILL: Mr Robson.

PN1074

MR ROBSON: Thank you, your Honour. My apologies, thank you, Deputy President. I can say from our submission is that ACCI's proposals don't actually simplify the entitlement. I have to say they make them much more complex and some of the issues raised by Ms Peldova-McClelland and ACCI's response actually (indistinct) that quite well.

PN1075

I think the last response that ACCI doesn't know if they're proposal is the time for time or time for value is because it's not written into the clause, which is what the actual clause we have in the award does.

PN1076

So what appears supervision and for simplification is just removing certainty about what the Award and we say that that adds complication.

PN1077

So the benefit of the current clause, and I think Ms Peldova-McClelland has brought to your consideration this clause to the formal review, is that it takes up each of the issues that arise in the context of the TOIL arrangement and provides guidance for it. If that creates a long clause or a complicated clause, then we say it's probably as simple as it could necessarily be. You wouldn't want to strip content in such a clause but if there is a way to simplify some of the language I think it would be in restructuring some of the sentences and perhaps playing with the structure of the terms. So it's very clear the steps that you need to go through logically to comply with it. So if that's the simplification job, that's what needs to be done.

PN1078

ACCI's proposal is actually a substantive attack on the protections in the award from the abuse of TOIL provisions. I think the starting point for this consideration needs to be what Ms Peldova-McClelland noted, which is that a TOIL provision is, on its face, actually fairly disadvantageous to the employee and very advantageous to the employer.

PN1079

Firstly, the employer has the security of the benefit, from the beginning, of the overtime hours have been worked and they've received the benefit of that work. The employee then has to wait for a period of time to enjoy the benefits that flow from the work that they've performed. Now, that's a significant departure from almost any (indistinct) arrangement in the modern award system where employees are paid for the work that they do, in the next payment period, in almost all circumstances.

PN1080

Then we have the additional benefit to the employer of the delay between when the work's performed and when the work is paid. There's obviously the benefit of not having to immediately front up the cash. There's also the benefit to the employer that the value of that work may diminish over time. I think we all agree in the current situation that inflation does diminish the value of the monetary sum, over time, and that's particularly compounded if in that period the annual wage review increases Modern Award minimum rates and the employer receives the benefit of the work, at some later date in the future, when we're already entitled to a higher rate of pay, if they worked, then the value of that money, which would have been greater when they worked it, is diminished because the cost of living has increased.

PN1081

That's the reason why we say it is important that the protections that currently exist can remain in place. It is vitally important that there is a written record of the TOIL arrangement and that it's recorded each and every time that a TOIL arrangement is entered into. This is to make sure that these hours of work don't disappear into the ether, which is very possible if there isn't a positive obligation to keep records.

PN1082

We also say that there needs to be a clear connection between the time the overtime is worked and the time the employee receives the benefit, that cannot be too long. We say that this issue was considered, in great detail, in the Four-yearly Review, and the Commission's initial view was that the actually needed to be a much stricter requirement, a much stricter time period. So it introduced, in its first proposal, that a four-week period between the employer and the employee to agree a time when the TOIL would be taken and then an upper limit on that period of 12 weeks.

PN1083

Now, that was opposed by employer interests and there was a proposal to extend that period to 12 months, it was considered, but ultimately was rejected and the balance was seen to be a six-month period, noting that (indistinct) preserved the existing TOIL periods, for example the three-month period to take TOIL in the SCHADS Award.

PN1084

It's also particularly important because the longer the employee has to wait the more likely that TOIL is going to be lost, through an administrative error, and the less likely they are to receive the full gain they have received. I think that's just -

that is both a starting point and the finishing point. This is a significant departure from the normal way that work is compensated in the Modern Award system. Without strict guidelines it is more likely to advantage the employer than the employee and there is a risk, I'd say, of ACCI's provision, that there will be pressure put on employees to take TOIL because that would then be suitable for the employer. It's more cost effective for them, it does not require the payment of overtime at that (indistinct), it just requires them to give time off later on. There's absolutely no guarantees that the employee would be able to take TOIL at a time that suits them.

PN1085

That certainly reflects our experience that employees rack up TOIL balances, particularly in the community sector, who, of course, have a preference for TOIL and what we see is that they cannot take TOIL when they need it, because of understaffing and because the time they want to take TOIL are periods when other employees want to use it, say, for example, school holidays, and in the end what we see is the payout of those clauses at some time later. We don't believe that there's any benefit to the employee in a nominal period for TOIL, 12 months is too long. We don't see there's any benefit to the employee in losing the protections that currently apply in the award and we don't think that ACCI's proposal actually simplifies the clause, it just strips out the necessary detail to give employers and employees a certainty about their entitlements under this arrangement.

PN1086

DEPUTY PRESIDENT O'NEILL: All right. Thank you, Mr Robson. Mr Maxwell?

PN1087

MR MAXWELL: Thank you, Deputy President. We would oppose the ACCI proposal. We refer to the Commission to the Full Bench decision in the (indistinct) FWCFB 6847, we start with the (indistinct) TOIL provisions that have been inserted into the Modern Awards (indistinct). In that decision the Full Bench did take into account the (indistinct) work and family responsibilities of employees (indistinct) of that decision when (indistinct) consideration of Modern Awards objective. Literally it says, in regard to (indistinct) group's claim that cause necessary imbalance in (indistinct). The Full Bench said, this consideration is mutual in our assessment of the Ai Group's claim, where a TOIL provision has potential to address the needs of the (indistinct) but the (indistinct) means whereby (indistinct) can balance their work and family with their social responsibilities. There is no evidence (indistinct words). (Indistinct) of living standards and (indistinct) and persuasive. The assesment of (indistinct) to living standards requires a comparison with living standards (indistinct) to undertake such a comparison.

PN1088

The (indistinct) says that the four-yearly review of Modern Awards (indistinct) long and drawn out process. The consideration of the word 'flexibility' during that process is based on the substantial evidence that was provided to the Commission through freedom of information on workers' caring responsibilities and we say it's not appropriate to reopen that issue at this point in time. If the Commission pleases.

PN1089

DEPUTY PRESIDENT O'NEILL: Thank you, Mr Maxwell. Well the next proposal is the ACTU's but it's essentially a time for time - time for value rather than a time for time variation, which we've sort of covered. Is there anything additional you wanted to say, in relation to that item 13?

PN1090

MS PELDOVA-McCLELLAND: Perhaps just briefly, Deputy President, sorry for my indecision.

PN1091

DEPUTY PRESIDENT O'NEILL: No, and while you're on your feet, given that the next one is an Ai Group proposal for standing agreement and for a longer time period, if you've got something to say about those as well it would be a good time.

PN1092

MS PELDOVA-McCLELLAND: Yes, absolutely. Can do, Deputy President.

PN1093

So in relation to our proposal, I won't go over the substance. I might just note a couple of things that were raised in Ai Group's reply submission. So they refer to the family leave test case standard, in the mid 90s, and the decision during the Four-yearly review as a reason why the TOIL provisions are the way they are, time for time basis, rather than time for penalty, noting that time for penalty that already existed in some awards was preserved.

PN1094

We acknowledge those decisions, the thinking of the Commission at the time but, as you may predict, Deputy President, we say the gendered impacts of that decision warrant it's reconsideration, in light of the new considerations in the Modern Awards objective, but also in light of, perhaps, further evidence, or submissions, at least, that have been made by our affiliates today and in their written submissions, of the way which TOIL provisions can disadvantage employees.

PN1095

We say that it is important that there is no incentive for employers to offer TOIL instead of overtime, because they may save costs. Rather, the use of TOIL should be because it genuinely assists workers to balance their work and care responsibilities, which is something the employers have submitted they are interested in.

PN1096

In terms of Ai Group also raise increase to employer costs as a reason to reject the ACTU's proposal. We just note here that if the employee elects payment of overtime, the employer would be paying the full cost in any event. So they are liable for the full cost if the employee makes that decision, at any point in time. So we reject that argument and say, again, instead employers are incentivised to get employees to agree to take TOIL so they can have some savings. That's not consistent with the Modern Awards objective. So I'll leave my comments on that there.

PN1097

Turning to the Ai Group proposal on TOIL, so we put forward, in our written submissions, that we've got concerns with this proposal, both individually and in combination with Ai Group's proposals regarding make up time. We note that existing TOIL provisions are already fraught with difficulty, which we've traversed this morning. They can burden employees to keep track of when they accrue TOIL. There is often errors, which means that time is lost and there is a long gap between the accrual of TOIL and employees actually being able to use it. And, as I've already spoken to, there is the ability of employers to pressure employees to take TOIL rather than overtime, meaning sometimes it's not a genuine choice.

PN1098

So we don't support the changes to the TOIL provisions, as proposed by Ai Group. I'm sure that some of our affiliates can speak further to this. And, as put in our written submissions, we've got significant concerns, in combination with the make up time, because we'd say that that would require employees to have a bank of hours system and, as we've detailed in our submission, our affiliates report that in practice these systems are incredibly difficult to manage. They give rise to multiple issues in their implementation and operation and I think - I won't go into all of those issues put perhaps just to highlight one, which is that often the net result of those systems is that employees take their accrued time off when it suits the business, and the peaks and troughs of work and customer demands and, as Mr Robson referred to earlier, there's no guarantee that this will be at a time when the employee actually needs that time to manage their caring responsibilities and, in fact, is often not, for example, during school holidays, because that's a very busy period for many industries.

PN1099

So, to summarise, the experience of our affiliates is that the systems are largely beneficial for employers and disadvantageous for employees.

PN1100

I'll leave it there, Deputy President, noting that there may be affiliates who wish to say more on this.

PN1101

DEPUTY PRESIDENT O'NEILL: Did anyone else wish to speak to this proposal, or in response to the Ai Group's proposals, at item 14? No. Must have done - - -

PN1102

MS BIDDLESTONE: Just minding my place here. Look, I'm just going to make some brief comments, and that is largely due to the fact that we have addressed the issue around a potential for a bank of hours system to be - may unintentionally be created within awards. The reason we've made submissions is we had experience, in enterprise agreements, of this and the experience has been that it creates a negative impact on workers. They work the additional hours, it gets banked but they're rarely able to take it at time that actually suits them, it's more about supporting the peaks and troughs of the way business might operated. So in terms of work and care, we think that the only way a system, either of TOIL or of

make up pay or bank of course, could possibly work to actually support a worker/carer, is if they could take the time when it actually does suit them so that they can use that time when it's needed, to care for others. So unless the provisions have that protection, and it's not by agreement but genuinely the choice of the employee, we don't think that that system will work to actually support worker/carers.

PN1103

DEPUTY PRESIDENT O'NEILL: I think in your submissions you detailed some instances of where an established bank of hours arrangement has been dismantled, effectively.

PN1104

MS BIDDLESTONE: It has recently, yes, and with the majority support of our members in dismantling that. Yes.

PN1105

DEPUTY PRESIDENT O'NEILL: All right. There's an HSU proposal which is essentially a time for value variation to the SCHADS Award and the Aged Care and a couple of other awards, but I think we can move past there, noting Ai Group's opposes that.

PN1106

The next is item 18, which is an Ai Group proposal to allow make up time in awards that don't currently provide that. I am a little curious about the position of other parties, in relation to this particular proposal. I understand the submissions that this concerns with a combination of provisions, but I wonder if there's a position, in relation to this is an isolated provision? Ms Peldova-McClelland, did you have anything you wanted to say about that?

PN1107

MS PELDOVA-McCLELLAND: I think in relation to this, it's an isolated proposal. Again, some of the same issues that we've spoken to this morning arise in terms of the employee having the ability to take that time when it genuinely suits them, as opposed to when it suits the business. So I would absolutely concur with and echo the submissions of Ms Biddlestone earlier, in terms of the circumstances in which we say any of these provisions could work to genuinely support employees to manage their work and care responsibilities.

PN1108

So under those circumstances we would be able to consider these kinds of provisions, but that's not the proposal that's been put forward to employee groups, which I believe are all by agreement.

PN1109

DEPUTY PRESIDENT O'NEILL: Yes. Thank you. Did anyone else wish to speak to the make up time proposals? All right. Sorry, Mr Maxwell, I didn't see your hand.

PN1110

MR MAXWELL: Thank you, Deputy President. Just in regards to this group we oppose what's been proposed by the Ai Group. We note that a similar proposal, by the Ai Group, to insert make up time in awards was considered during the Four-yearly review of Modern Awards and in the decision of [2015] FWCFB 4466 the Full Bench rejected the AiG proposal. That's explained in paragraph 2, line 4 of that decision. The view of the Full Bench was that the issues involved in make up time could be dealt with by individuals (indistinct) and that make up time was not necessary to achieve the Modern Awards objective. If the Commission please.

PN1111

DEPUTY PRESIDENT O'NEILL: Thank you. Well, in a slightly different vein, the next item is a proposal by the ANMF to introduce make up time provisions in the Nurses Award. Ms Palmer, did you want to speak to that? I guess this is what's prompted my curiosity about this issue in particular.

PN1112

MS PALMER: Yes, thank you, Deputy President. Just to clarify, rather than make up time becoming something that's banked, like time off in lieu, it would be to be used in the instance that it's occurring, so an adjustment to the (indistinct) end of the shift, rather than be banked.

PN1113

DEPUTY PRESIDENT O'NEILL: That's the same day?

PN1114

MS PALMER: Yes. And we know that - - -

PN1115

DEPUTY PRESIDENT O'NEILL: They'll start half an hour early and finish - knock off half an hour early.

PN1116

MS PALMER: That's right. And we know that that currently happens, so just trying to formalise that arrangement so the worker doesn't end up doing extra time. Thank you.

PN1117

DEPUTY PRESIDENT O'NEILL: Thank you. All right, the next is a proposal by the - Mr Nguyen?

PN1118

MR NGUYEN: Thank you, Deputy President. I just note your request that parties comment on the Ai Group's proposal that no make up time clause inserted in awards that don't have it. The Air Cabin Crew Award doesn't have that provision but we say that, in terms of what we'd be proposing in these proceedings, and this may come off as a bit self-interested, but the FAAA's proposal is that the award should be reviewed by the Commission separately and that proposal should be considered by the Commission in a separate proceedings, specifically for the Air Cabin Crew Award because the occupational conditions are very specific to cabin crew.

PN1119

The example that I raised before, in terms of their hours, ordinary hours being up to 18 hours a day, and we don't propose to change that, because of the unique nature of the industry. It means that these flexibility provisions that are available in certain matters, like the make up time proposal, or even the time off instead of payment provision, which was being discussed earlier in these proceedings, there's no holistic approach to how those particular entitlements are able to be utilised operationally by both the employer and also by cabin crew. So I don't have instructions as to whether to oppose the particular position now, but I can say that it would definitely benefit, in terms of the cabin crew occupation, that this proposal be looked at, specifically, in the context of the Cabin Crew Award itself and the other flexibility provisions that exist within the Cabin Crew Award.

PN1120

DEPUTY PRESIDENT O'NEILL: Mr Nguyen, thank you for that. While you have the floor, this might be a good moment for you to speak, if you wish to, in relation to items 25, 26 and 27, which are FAAA proposals.

PN1121

MR NGUYEN: Yes. Thank you, Deputy President. So item 25 is the missed meal allowance, missed rest break penalty. I'll address the first issue, which is how do meal breaks have anything to do with managing work and care responsibilities. We say that being able to sustain oneself to obtain nutritional calories and to have the energy to work and then go home and also take on care responsibilities, as well as to recharge or recuperate, in the context where you actually have to work potentially up to 18 hours is really critical for employees who have work and care responsibilities.

PN1122

Many awards that we looked at have a requirement that an employer cannot require an employee to work for more than five hours without taking a meal break. I'll give some examples of those that we've looked at, so the General Retail Industry Award, at clause 16.5(c). The Air Pilots Award, at clause 17.1. And also the Fast Food Industry Award, at clause 14.5(c). So those are examples of awards where there is this requirement that an employee cannot be required to work for more than five hours without a meal break.

PN1123

Some awards also have an entitlement to be paid at overtime rates until meals are taken. Three that we looked at include the Hospitality Industry (General) Award, at clause 16.6, which provides an additional 50 per cent of the hourly rate as a penalty on top of their ordinary hourly rate. The Clerks Award, Clerks (Private Sector) Award, at clause 15.4, which provides that employees should be paid 200 per cent of the minimum hourly rate for each hour that they work when the meal break should have commenced, until it actually does commence. The third award is the Restaurant Industry Award 2020, at clause 16.6, which provides for, similar to the hospitality industry award, a payment of an additional 50 per cent of the employee's ordinary rate.

PN1124

Now, those aren't the only awards that have these provisions, but they were just some that we were able to locate to identify to the Commission. What we propose would act as an incentive for employers, to ensure that cabin crew receive the meal break, or at least are compensated for the inconvenience of missing a meal break.

PN1125

Item 26, the banking of substitute days, so this is another example of flexibilities which need to be looked at holistically, in the context of time off instead of payment and any proposal for make up time entitlements. I'll just explain briefly what the substitute day is. So the substitute day off is provided where an assigned or reassigned duty infringes on a rostered day off. Rostered days off for cabin crew are akin to weekends for Monday to Friday day workers. So infringing on a rostered day off is similar to infringing on a Saturday or, if they're roster to work on Saturday, on a Sunday. There's a problem that the Association has encountered where agreement is not able to be reached about when the substitute day is included in the next roster. And also there's an issue when that substitute day off itself is infringed as well, what happens to the entitlement.

PN1126

So what the FAAA proposes is a flexible approach to the banking of substitute days off, which is similar to the approach of the Commission's standard clause for time off, instead of payment for overtime. So although this entitlement is distinct from the overtime entitlement, because it seeks to preserve the actual numbered days off in the roster, it is still critical to have that, in addition to the overtime penalty which we propose, because we want to preserve, particularly in the context of managing work and care, the number of actual days off in the period that an employee has to maintain that proportion between working days and - we say Monday to Friday, versus Saturday and Sunday.

PN1127

Moving to item 37, which is the paid allowance for working on a rostered day off. We don't say anything more about this, except to say that it would assist cabin crew with the cost of having to attend for work, there are costs which cabin crew have when they attend for work, such as travel, meals, laundry, last minute caring arrangements, which they have to pay for. We have had examples of cabin crew indicating to the Association that the cost of attending for work is more than the amount that they're actually paid.

PN1128

Moving to item 38, which is the change in the value - - -

PN1129

DEPUTY PRESIDENT O'NEILL: I might just leave it there, at this stage, Mr Nguyen, because we're then moving to another discussion question.

PN1130

MR NGUYEN: Thank you, Deputy President.

PN1131

DEPUTY PRESIDENT O'NEILL: Thank you for that. Now, we skipped over item 22, which is an ACCI proposal. Now, Ms Tinsley, if there's anything you wanted to speak to about that, feel free. It does seem to cover a lot of the ground that we dealt with, in relation to working from home and span of hours and minimum engagement, but is there anything additional you wish to say?

PN1132

MS TINSLEY: I think we've canvassed both, and 23 as well, the points around the iPhones, so I (indistinct), Deputy President.

PN1133

DEPUTY PRESIDENT O'NEILL: Thank you.

PN1134

MR ARNDT: Deputy President, I think ABI and BNSW probably should have got a guernsey at that point in the summary was well. I think our proposals, which are identical to ACCI's proposals, but I have the same view as Ms Tinsley, it's already been covered in our comments last week.

PN1135

DEPUTY PRESIDENT O'NEILL: Thank you. In the same way that you've all had to work incredibly hard to prepare for this process and make your submissions, Commission staff also worked incredibly hard to prepare the summaries and the discussion paper and they've done a pretty remarkable job I think, I have to say. But there has been the odd thing missed.

PN1136

All right, well that takes us to the end of discussion of question 10. So moving to question 11. The first proposal is item 30, the ACTU's proposal in relation to the differences in payment between on call and recall work.

PN1137

MS PELDOVA McCLELLAND: Thank you, Deputy President. We, again, highlight the findings of the Senate Work and Care Report, that the expectation to remain on call and available for extended periods of time, including on sleep over shifts, have a profound impact, obviously, on the ability to manage work and care effectively. We observe, in our submission, that awards covering male dominated industries often or are more likely to require ordinary rates payable for employees required to stand by for duty, whilst in awards covering female dominated industries often see only a daily or a weekly allowance for being on call. Sleep over work is also very poorly valued. Some awards provide for a mixed payment type of a monetary allowance and any work performed in excess to one to two hours being paid at overtime.

PN1138

Some awards pay a higher sleep over allowance for weekend work. I think it's worth noting that SCHDS Award, the Aged Care Award, Schools (General Staff) Award and Higher Education (General Staff) Award have a lower sleep over allowances and they are obviously all covering female dominated industries.

PN1139

So this is why we have recommended that this issue be looked at carefully and considered and that the Commission consider varying awards to rectify these differences in payment for on call and recall to work provisions.

PN1140

Obviously, we say, it is our principal position that ordinary rates should apply for employees required to standby for duty. At the very least the Commission should consider the significant increase of the allowances that currently apply in any female dominated industries as well as how to properly value sleep over work.

PN1141

Just turning very briefly to the Ai Group reply submission. They say a couple of things but the one I want to call out is they say that it can't be assumed that the disutility associated with being on call or recalled to work in all sectors is the same. In response, I just say it's hard to imagine a bigger disutility than sleep over work, which requires the employee to spend the night at the work site, away from their family, and often with a shift either side of that sleep over shift, which has them being away, thinking of the submission of the CPSU-SPSF last week, for at least a day, if not longer, and missing all of the activities that are happening during that time.

PN1142

So it's unclear to us why the disutility of being on call in the care economy, for example, or in female dominated industries, would be any less than in male dominated industries. If anything, on call work is likely to pose a bigger disutility for a female dominated workforce, who carry a disproportionate burden of caring responsibilities and for whom that sort of work would significantly disrupt their ability to manage work and care.

PN1143

DEPUTY PRESIDENT O'NEILL: Thank you. Does anyone else wish to speak to this proposal? All right. The next is item 32, a proposal by the AMWU. Mr Amoresano, did you wish to add anything to your written submissions?

PN1144

MR AMORESANO: Thank you, Commissioner. No, we rely on our written submissions, thank you.

PN1145

DEPUTY PRESIDENT O'NEILL: All right. Item 34 is a proposal in relation to standover and sleep over, same issues. Mr Robson, did you want to speak to this proposal?

PN1146

MR ROBSON: No, your Honour, we'll rely on our submissions.

PN1147

DEPUTY PRESIDENT O'NEILL: All right. Next is in relation to broken shifts, under the SCHADS award, the CPSU PSF's proposal.

PN1148

MR WRIGHT: Thank you, Deputy President, we'll rely on the submissions.

PN1149

DEPUTY PRESIDENT O'NEILL: Thank you for that. Well then I think we're back to you, Mr Nguyen, at item 38.

PN1150

MR NGUYEN: Thank you, Deputy President. We can rely on our written submissions in relation to item 38. I just note that the award provides for home (indistinct) duty for up to 12 hours. Just in terms of context, for our next item as well, the - what we propose is to increase the value of the home reserve from one hour for every four hours to one hour for every three hours. There was an additional proposal which we had put in our submissions which is not listed, which should slide in approximately at this point, between 38 and 39, which is the proposal for the full credit for casual employees who are assigned a duty to be on at home reserve and are not called in. So they're assigned a home reserve duty and then are there, on standby, fit for duty for the full 12 hours and they're not called in for a duty at all. Our proposal is that for those casual employees they should get the full value of that unreserve.

PN1151

There has been some confusion - - -

PN1152

DEPUTY PRESIDENT O'NEILL: Could you just give me a reference to the paragraph numbers in your submissions, in relation to that proposal, so that I don't lose it?

PN1153

MR NGUYEN: Yes, Deputy President, let me just grab that for you. So it's paragraph 145 to paragraph 149 of our submission, which is on page 35 to page 36.

PN1154

DEPUTY PRESIDENT O'NEILL: I see that. Thank you. Thank you.

PN1155

MR NGUYEN: So there has been some confusion with some of the employees about what the entitlement should be because presently home reserve is defined as a duty, in the definition in the award, and fulfilling that duty, obviously, has a significant impact on crew who have to manage their affairs on the basis that they have to be fit and ready to be called in and, presently, they have to be at the airport to sign in, within 90 minutes of being called.

PN1156

So in order for - thinking about this and just managing your work and care responsibilities, an employee has to make sure that for that full 12-hour period they have caring arrangements appropriately arranged, as well as meal planning arrangements and then also in terms of potentially having to arrange sort-term

caring arrangements for the end of their duty as well, because they might get called out during that 12-hour period which will extend beyond 12 hours.

PN1157

Companies have also been arguing that the minimum for a four hour engagement does not apply when a casual employee is rostered on a home reserve, so that's another issue that we think needs to be clarified, which will be clarified through our proposal.

PN1158

The other thing that the Commission should also note is that for cabin crew, you can only have one airport security identification card, and that's assigned to a particular airline. So it's not the case that a casual cabin crew member can work for multiple airlines at a time and be casual and called in by whichever airline, because they're only allowed to have one ASI card.

PN1159

They can, of course, have an employer outside of the industry, so that leads me to the other point which is, if you're going to deprive someone of having the opportunity to work for another employer, even outside their industry, they should be properly compensated for that. And the standard which applies in other awards should be the standard that applies in this award.

PN1160

So, for example, the Airlines Operation Ground Staff Award could - the employees in that award are paid hour for hour that they're required to be on standby. I guess, it goes without saying, that improving those minimum engagement provisions and improving the predictability of the hours of cabin crew contributes to a better ability for them to manage their work and care responsibilities, taking into account that the standard of cabin crew is still going to be a much more unpredictable circumstance than most other industries.

PN1161

So what we're proposing doesn't really take away from that, in a significant way, because they'll still have to make arrangements for the fact that they're going to be called out, potentially, at six or eight hours into the home reserve and then have to work for another potentially 10 or 12 hours following that.

PN1162

Should I move on to items 39 and 40 as well, Deputy President?

PN1163

DEPUTY PRESIDENT O'NEILL: Yes, please.

PN1164

MR NGUYEN: So item 39 is about clarifying the definition of duty. So this, again, goes to that earlier issue that I was referring to, where there's a definition of home reserve in the definitions in the award. We want to make sure that that is absolutely clear. In order to do that we propose that variation.

PN1165

Item 40 is limiting the total time between reserve sign on and allocated duty sign off. So that issue that I was referring to before about the cabin crew can still be called out at a later time. So, for example, if a cabin crew member is on home reserve from 4 am to 4 pm they could be called out at 2 pm for a 12-hour duty and that would mean that they would have been fit for duty, or supposed to be fit for duty for 22 hours in total. Obviously the research around that indicates that at 18 hours you're already equivalent to 0.05 blood alcohol concentration. So the extent to which that's actually possible is refuted by the science around that. So our proposal is about capping the assigned duty so that the total duties is capped at the 18 hours.

PN1166

That's not just for the cabin crew member's safety and also for their ability to plan around what the maximum that they're caring arrangements need to be arranged for, but also for the safety of passengers as well, because as regard and noted in our submission, because of the first responder duties and responsibilities of cabin crew, they need to be alert and responsive in the unlikely event of an emergency.

PN1167

The next item is 47, which is - - -

PN1168

DEPUTY PRESIDENT O'NEILL: I might just - we'll pause there because we've come to the end of the discussion question. But can I just ask you, Mr Nguyen, I'm just curious, there's obviously a really significant number of issues that the Association has raised, in relation to the awards of the sector. It's also a sector where there's a significant presence of enterprise agreements. It doesn't change anything, in relation to the substance of the issues that you've raised but, just as a matter of curiosity, are any, many, none of the issues that you experience or have raised in relation to the awards, been successfully address in enterprise bargaining, from the Association's perspective?

PN1169

MR NGUYEN: Yes, Deputy President, in some enterprise agreements there will be very specific operational rules, which are more than (indistinct) that that is the case, however, from our analysis, what we - and I was going to address more of this tomorrow, but I'll address it now, which is the award has a significant influence on the enterprise agreements that apply to the smaller airlines, as well as to the labour hire companies, including subsidiaries of major airlines. So they do - it does have a significant impact, even though some of those enterprise agreements you might think would have highly beneficial conditions because they might have a major airline's name in them, they're applying to a subsidiary of the major airline, which has been specifically established for the purpose of aligning the terms and conditions with the award for those new employees. So because of the legacy arrangements and the industrial strategy that's been pursued by the airlines in the industry, they are legacy agreements which only apply to employees who were employed prior to, for example, 2008, don't have application to new employees. Hence the enterprise agreements that apply to the new employees, which are much closer, in terms of their alignment, to the terms and conditions and also the pay rates of the award.

PN1170

DEPUTY PRESIDENT O'NEILL: Thank you, Mr Nguyen.

PN1171

MR NGUYEN: So shall we continue or wait till - - -

PN1172

DEPUTY PRESIDENT O'NEILL: No, I'll come back to you about item 47 I think it is.

PN1173

MR NGUYEN: Thank you, Deputy President.

PN1174

DEPUTY PRESIDENT O'NEILL: So moving to question 12, the first proposal is the ACTU at item 41.

PN1175

MS PELDOVA-McCLELLAND: Thank you, Deputy President. So we've observed, in our submissions, that payment for travel time while at work varies across awards and not all awards provide for travel times to different locations or work sites. Seven of the 25 awards examined in the discussion paper don't contain these kinds of provisions and most of these cover female dominated industries. We say this is compounding low remuneration in the care economy as well as unpaid time spent for being on call, completing administrative work and undertaking training. We've detailed some of that in our submissions.

PN1176

I'll just note that the Senate for Future Work and the Workplace Family Policy round table, I think I've gotten that right, I've just kind of guessed that, have similar proposals. I turn to Ai Group's comments in their, I think, initial submissions and in their replies, which are similar. So they put forward that the calculation of travel time is inherently complex. There's lots of difficulties with developing a method of calculating the distance travelled. Numerous factors that can impact this, such as the route taken and traffic. They also submit that in relation to the SCHADS Award, that it was dealt with in the Four-yearly Review, and that a number of union claims were dismissed, by the Commission, in relation to travel time.

PN1177

So in response to those two points, I guess, in relation to the complexity of travel time, just because this might raise some complex issues, in terms of how things should be calculated, does not mean and shouldn't stand in the way of rectifying what we say is a gendered issue and the current reality that many workers aren't being paid for work related travel time. Of course these issues can be looked at in more detail, in any forum that the Commission would deem appropriate and we could say can surely be worked through.

PN1178

Ai Group do give some examples in their submission, and our affiliates can also give examples of some of the common ways in which travel time is

calculated. Our affiliates report that Google Maps is the most common that tells you the estimated travel time and that accounts for traffic and any sort of interruptions on the roads.

PN1179

We note that UWU's proposal, which is included in the summary, is that work related travel should be paid, based on the actual time taken and we concur with that.

PN1180

In relation to the SCHADS Award, yes, the issue was looked at in the Four-yearly Review. The Full Bench, whilst it declined to include provision for paid travel time, it obviously made changes in relation to minimum engagement and broken shift provisions. And it also said that it would allow a period of time, after the changes, in which to see whether these issues persisted. It stated that, 'Further consideration of travel time claims would be deferred', until the variations they have made had been in operation for 12 months.

PN1181

It's clear to unions that the issues they were concerned about and raised in that proceeding have persisted. And given that almost two years have passed since those variations were made to the SCHADS Award, also having regard to the Senate Select Committee Report and the new considerations in the Modern Awards objective, we'd say this issue of unpaid travel time absolutely warrants reconsideration at this point in time.

PN1182

Finally, I think Ai Group say that it's unclear to them how the aspect of our proposal relating to payment for training, being on call and completing admin responsibilities relates to the scope of question 12. In response to that, we would say a few things. One, it became apparent, when consulting our affiliates, that unpaid work time is a broader issue that just travel time and includes all of the aforementioned issues. Also we would note that compensation for training was also raised in the discussion paper and the Senate Inquiry also identified unpaid work for travel, on call, administrative tasks and training. So these are issues that have been recognised in other forums and that our affiliates report are really significant issues in some industries.

PN1183

Finally, Ai Group say that, in relation to training and administrative work, this is work performed at the direction of the employer and in the course of the employee's duties and so they don't see any reason why that work wouldn't warrant payment and that there are obviously avenues available to recoup underpayments.

PN1184

In response to that, and I need to defer to the detail to the relevant affiliates, many of whom have proposals in this category. But it's clear to us these issues are widespread in some female dominated industries, including homecare, disability, residential aged care and children services, but as well as in other industries, such as hospitality and fitness. That indicates to us there are systemic problems that are

failing to be addressed and are not going to be addressed simply by trying to bring underpayment cases and therefore do require award variations. Again, I would note that specific affiliates can speak to those issues and why they do arise on a systemic basis in their industries.

PN1185

DEPUTY PRESIDENT O'NEILL: Does anyone wish to speak to the ACTU's proposal?

PN1186

MR ORR: Deputy President, if it pleases, our proposal, at point 50 relates to this. I can make some brief comments.

PN1187

DEPUTY PRESIDENT O'NEILL: Yes.

PN1188

MR ORR: So thanks. So, yes, we largely rely on our written submissions but I'll make some brief comments that are specific to our members in the SCHADS Award. So members we represent under that award are home care workers for aged and disability. The nature of the work means that they are required to visit people in their homes, using their own vehicles and travel from one client's home to the next.

PN1189

There is a vehicle allowance in the SCHADS Award, which means you get X amount of cents per kilometre travelled, but we say that that's not sufficient to capture the work that home care workers do. Quite plainly the SCHADS Award doesn't sufficiently remunerate people for the time taken to travel, which should be considered work. So this results in unpaid work and, of course, unpaid work encroaches on time that could be dedicated to care and responsibility of other.

PN1190

In the same vein, across the different sectors that we represent, including ECEC, there is travel time but also unpaid administrative work that's done. So we say that the award should address this. Thank you, Deputy President.

PN1191

DEPUTY PRESIDENT O'NEILL: Thank you, Mr Orr. All right. Item 44 is an ANMF proposal, in relation to travel time. Did you wish to - all right. And similar, at item 46, in relation to the SCHADS Award, in particular, raised by the CPSU SPSF.

PN1192

MR WRIGHT: Thank you, Deputy President. Mainly we rely on our written submissions but it is our experience that broken shifts are a problem for carer's responsibilities. I mean you have got to hang around for a period of time in between the two shifts. If you work in a regional area, the distances concerned can be considerable, so you have costs associated with excess fuel. We think broken shifts should be limited and if the Commission does not agree, we propose that a minimum start of four hours be applied.

PN1193

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN1194

MR WRIGHT: Thank you, Deputy President.

PN1195

DEPUTY PRESIDENT O'NEILL: Just carrying on with that theme, item 49 is the SDA proposal for travel time. Did you want to add to that, Ms Wilson?

PN1196

MS WILSON: No, thank you, Deputy President.

PN1197

DEPUTY PRESIDENT O'NEILL: All right. Then, Mr Nguyen, that takes us to item 47.

PN1198

MR NGUYEN: Yes, thank you, Deputy President. Just a really quick one, which is just to say that the additional time, aside from assisting with the distance that crew are having to move further and further away from airports, is also to ensure that they have that additional time to make sure that they can make those caring arrangements that might need to occur for the time that they won't be home, which they won't know until they're assigned the duty, because the duty would then indicate to them how long they'll be away from home. Thank you, Deputy President.

PN1199

DEPUTY PRESIDENT O'NEILL: All right. Thank you. There's the HSU proposal, which, again, relates to the issues in the SCHADS Award in particular, and in their absence I think we can move on.

PN1200

All right. Well, we are picking up pace as we work through the program. So we're ready to move to the afternoon session. I don't anticipate any difficulties. The two parties that I'm aware are not going to be attending until this afternoon, the first is the AHEIA, with Ms Pugsley, but in all of the matters last week we've identified that we're going to have some time on the 11th to deal with those issues, so I think we can progress. The other is the HSU, but their matters are covered by the morning and afternoon so unless anyone has a different view, I'm inclined to just keep going and move on to discussion question 13.

PN1201

All right. It's a bit hard if anyone opposes and they're not here, but if they do say anything then we'll deal with that - - -

PN1202

MR NGUYEN: Deputy President, my only request is to (indistinct) a submission on item 69 and then if we may be excused from the proceedings?

PN1203

DEPUTY PRESIDENT O'NEILL: Yes, Mr Nguyen.

PN1204

MR NGUYEN: Thank you, Deputy President. So presently cabin crew, in terms of context and background, cabin crew are compensated for being available to the assigned work through public holidays, through the two weeks of additional annual leave. However, they're not compensated for consistently working on Sundays. Recent decisions of the Commission have outlined that the threshold is the working of 32 Sundays in the previous 12-month period, in order to be entitled to an additional week of annual leave. So FAAA's proposal is simply to align with the recent decisions around the shift worker definition. Thank you, Deputy President.

PN1205

If it please the Commission, Deputy President, see you tomorrow.

PN1206

DEPUTY PRESIDENT O'NEILL: Indeed.

PN1207

MR NGUYEN: Thank you.

PN1208

DEPUTY PRESIDENT O'NEILL: So the first set of issues relates to the question of annual leave at half pay and this seems to be one of the - well, probably the only area where there may well be some consensus. I note, Mr Arndt, that the ABI has open to that proposal, as I understand the position. The CFMMEU, as I understand it, somewhat agrees, but there's obvious questions about the details, if nothing else. Well, perhaps I'll open it up and the proposal has been put forward by the ACTU so perhaps, if you wanted to speak to that, Ms Peldova-McClelland, and then if any party has any difficulty or issues that they want to raise, in relation to that proposal, confirm their consent or otherwise, or likely consent or otherwise. Related to that is whether - so if there is a broad consensus around this proposal, then it may well be something that the Full Bench would note in the final report, the outcome of this review, and, in light of the indications of consent, initiate proceedings on its own motion to vary awards in this respect. So that's what I would probably anticipate would be the case, so it is important to get an indication of consent or otherwise, or concerns in relation to the proposal put. So starting with you, Ms Peldova-McClelland.

PN1209

MS PELDOVA-McCLELLAND: Thank you, Deputy President. Just to clarify, this might seem like a small point. Now, in our initial written submission obviously we have a number of proposals regarding annual leave and one component of that was that the Commission should consider variations responding to specific affiliate submissions regarding this, the flexibility of how annual leave is taken. We've obviously taken the opportunity, in our reply submission, to respond to the Ai Group's proposal on taking annual leave at half pay and noting, of course, that many of the other employee groups are open to this.

PN1210

So what we've said, in our reply, is that certain safeguards would need to be in place but the proposal, on its face, has merit and could be of benefit to employees, but those safeguards need to be in place to ensure that such a provision isn't used to the disadvantage of employees and note that there may be affiliates, obviously, who wish to speak to this in more detail and that some of our affiliates helped to put together the wording of the proposed clause that we've provided to the Commission.

PN1211

So some of those safeguards are that any arrangement is initiated by the employee and granted only at their request. So it wouldn't be able to be by an employer directive. That it not be unreasonably refused by the employer, that the employer keep appropriate records of the arrangement, that there be prorating of annual leave loading to cover the period of proportionate leave and that payment for the period should be the relevant proportion of what the employee would be paid, had the arrangement not applied.

PN1212

In the proposed clause we put forward, those safeguards are reflected and then we've also included some consequential variations that may need to be made. So the limits on the proportionate leave that is available. I'm not sure what the views of different parties are here. For example, is it limited to twice the leave on half pay, or is there an ability to do other things three times the leave at one-third, et cetera, et cetera. Consequential variations to accrued leave and to superannuation contributions during the period.

PN1213

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Who'd like to go next? Mr Maxwell, you've got your hand up.

PN1214

MR MAXWELL: Thank you, Deputy President. Sorry to be the (indistinct words) from the consensus. It's the position of the CFMEU Construction Division that (indistinct) annual leave aren't being inserted in construction works. In our submission we did make the comment that some of the concerns raised by the employers were mysterious, given that there was a clause inserted into the schedule during the COVID-19 pandemic, that we did then clarify that any reinsertion of the clause should be by (indistinct). It turns out that during the consideration - - -

PN1215

DEPUTY PRESIDENT O'NEILL: Sorry, what was that last point that you just made, that any variation should be made based on merit?

PN1216

MR MAXWELL: Based on the consideration that the factors relevant to the insertion of the clause.

PN1217

DEPUTY PRESIDENT O'NEILL: Do you mean consistent with the Modern Awards objective?

PN1218

MR MAXWELL: The Modern Awards objective, yes.

PN1219

DEPUTY PRESIDENT O'NEILL: Well, of course. I mean any variation, any Bench would need to be satisfied that any variation is consistent with the Modern Awards objective.

PN1220

MR MAXWELL: Deputy President, I just wish to refer to a decision of Hatcher VP, in 2020, FWC 6636, which dealt with - which was dealing with applications to extend the operation of Schedule X, during the COVID-19 pandemic. The proposal had applications made by the unions to extend their unpaid pandemic leave provisions of Schedule X but the unions did not seek to extend operation of the (indistinct) half pay. Although the ACCI and, I believe, the (indistinct) did seek the continuation of annual leave half pay, the Vice President declined to do so and noting that the unions, in respect of these awards, have chosen not to seek the extension of the annual leave provisions in the case that there's no consensus that a continuation is necessary to meet the Modern Awards objective (indistinct) paragraph 1 of that decision. I am instructed that our position was that we (indistinct) the inclusion of annual leave part payment construction awards.

PN1221

DEPUTY PRESIDENT O'NEILL: So, as I understand your position, is there any insight you can give me as to the basis of the opposition to such a change?

PN1222

MR MAXWELL: The main concern is the extent to which (indistinct) introduced by employers. As you'll be aware from recent (indistinct) and articles, the (indistinct) insolvency of companies in the construction industry is (indistinct) and the concern that the attempts by employers to (indistinct) workers to agree to extend the time period for payment of any leave that they're entitled to, which when insolvency occurs means that those workers will (indistinct words). (Indistinct)nature of the work in the industry, together with the construction (indistinct words).

PN1223

DEPUTY PRESIDENT O'NEILL: That's helpful. Thank you, Mr Maxwell. Okay, who is it, Mr Deguara? No?

PN1224

MR WRIGHT: Mr Wright, Deputy President.

PN1225

DEPUTY PRESIDENT O'NEILL: Mr Wright. Sorry.

PN1226

MR WRIGHT: No problem. Generally, we wouldn't oppose annual leave at half pay but what we would like the Commission to reflect upon is that under the SCHADS Award there is a great propensity to have as part-time or casual. The rates of pay are not large and our members rely on shift penalties, weekend

penalties, et cetera, et cetera. I would think the uptake of annual leave at half pay would be very low but it is not inconceivable that some of our members would want to avail themselves of that opportunity if it was there. Thank you.

PN1227

DEPUTY PRESIDENT O'NEILL: Thank you. Ms Tinsley?

PN1228

MS TINSLEY: Thank you, Deputy President. As you noted, we've certainly got in principle support for a - for this proposal. Moving to the comments that have been made before me, I guess we'd generally be open to this concept of only being available at the employee's request, we wouldn't have a problem with (indistinct). What we would have a problem with, though, and this is something that we've mentioned in our reply submission, in our primary - initial submission, is the concept of reasonableness. So we'd only support - our support is contingent on it being a genuine agreement. So while that agreement can be at the request of an employee we couldn't support a mechanism that would have a situation where an employee can be absent from work, for potentially double the time, even if it is at half pay, which would be an extraordinary imposition on an employer, regardless of any reasonableness factor. So I think maybe, as a way of compromise, yes, if it is at the employee's request, but we'd be really, really concerned if there was some sort of reasonableness element included in there.

PN1229

Now, we all know this will be potentially quite complicated (indistinct) interaction with the NES and a few conditions to go through so moving on to those details, that they could obviously be worked through, potentially, at a - during the application of the Commission's own motion, but, yes, I think our support is very much contingent on an absence of this reasonableness - the reasonable refusal test. That's all I'll say about that, thank you, Deputy President.

PN1230

DEPUTY PRESIDENT O'NEILL: Thank you. Mr Arndt?

PN1231

MR ARNDT: Thank you, Deputy President. Ms Tinsley's covered most of what I would say.

PN1232

DEPUTY PRESIDENT O'NEILL: Just hold five, I just want to make sure that Morris is picking up.

PN1233

MR ARNDT: I can sit back down. Perhaps this is the universe telling me to sit back down. We are open to the proposal - - -

PN1234

DEPUTY PRESIDENT O'NEILL: You really can sit down.

PN1235

MR ARNDT: No, please, Deputy President. It may very well be contingent on some industry specific considerations, noting Mr Maxwell's submissions just previously. There has been some mild criticism by the unions, I think it was upgraded to mischief, by Mr Maxwell this morning, about how complicated the employers are making this proposal. The short point is, it was done in the pandemic so why - it shouldn't be too straightforward. It should be straightforward to do it again. It has got some complexity to it and it's mainly about that trigger point.

PN1236

Obviously much of this working care stream has veered between discussions about award variations and then, occasionally, some of the proposals, the items, the content of the Senate Report, talks about changes to the NES. Obviously the NES has a different framework for assessing annual leave requests and it incorporates this idea that you can reasonably refuse to do something, to reasonably refuse requests but otherwise you can take annual leave.

PN1237

It's my understanding that Schedule X was based on agreement. It is, as Ms Tinsley says, a significant thing to double someone's time off work and to place both the condition that it both be by employee request and that it can't be unreasonably refused would go too far for us, as it seems as well as ACCI.

PN1238

The other thing, and I might say this in the absence of Ms Bhatt. The other thing that would that would need to seriously be reviewed and thought about, in the context of a full proceeding into this question is what accruals, in relation to other entitlements, are undertaken while someone's off on half pay. There are - - -

PN1239

DEPUTY PRESIDENT O'NEILL: Superannuation being one of the obvious.

PN1240

MR ARNDT: Correct. But also a lot of other accruals where the fact that people are off work for a particular time, whether they're accruing, in a pro rata sense, because they're being paid in a pro rata way, or because, obviously, the Act and awards don't contemplate this at the moment.

PN1241

The last thing I'd say, and this is just more out of completeness rather than anything. Section 55(4) where employees in awards can include terms that are additional to the NES but they can't be detrimental to employees in any way, had some superficial traction on this point. It seems like, during Schedule X, the Commission made a determination that these terms were allowed by section 55. So, just for completeness, I just note that for the transcript.

PN1242

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Ms Palmer?

PN1243

MS PALMER: Thank you, Deputy President. It was the ANMF, obviously, who supports the proposal for annual at half pay. This was widely utilised by our members during the operation of Schedule X. And we're not aware of any unreasonable or excessive requests by employees to take annual leave at half pay. In fact, we would say that for both ANMF members and employers who continue to deal with the ongoing impacts of COVID in health and care workplaces, it's made fundamental changes, that this was a really effective means to managing work and life and the wellbeing of others, and self, be that in private life of the workplace. It didn't seem to be an overly cumbersome agreement to put into action.

PN1244

But I would just like to reiterate the safeguards that Ms Peldova-McClelland raised, being that it would be at the employee request, it cannot be unreasonably refused, it must be recorded in writing and retained as an employee record and would be subject to proportionate leave loading, as it was during the operation of Schedule X as well. But, again, this was all undertaken during the acute time of COVID-19, so there's no reason or expectation, from the ANMF's point of view, that it couldn't be re-implemented. Thank you.

PN1245

DEPUTY PRESIDENT O'NEILL: Thank you. So I think that takes us to item 62, which covers some of the same ground but there may be a couple of different elements to this.

PN1246

MS PELDOVA-McCLELLAND: Thank you, Deputy President. Just on the annual leave at half pay, just noting the comments of Mr Maxwell that maybe there are other affiliates who have specific reasons for opposing this, due to the implications in their industries, and obviously not all of our affiliates are a party to these consultations so I would just say some precaution would be subject to any similar opposition for those industry specific reasons.

PN1247

In relation to the employers today have said, you know, that the combination of at the employee request and the unreasonable refusal would be a bridge too far. Again, this is something that we'd need to consider further but, as an initial response, I'd say the combination of those two things we thought was important to ensure that this is genuinely meeting employee needs and that they can take that leave when they most need it to manage work and care, rather than a time that's convenient to the employer. So that was the thinking behind the combination.

PN1248

DEPUTY PRESIDENT O'NEILL: So what I take it you're saying is that the support for the proposal is based on those two safeguards and if they're not present, then the position may change?

PN1249

MS PELDOVA-McCLELLAND: That's correct. I'm not saying we wouldn't consider this further, but that was why we were putting it forward in that way.

PN1250

DEPUTY PRESIDENT O'NEILL: I understand.

PN1251

MS PELDOVA-McCLELLAND. Thank you. So annual leave loading, item 62. Deputy President, I might rely, for once, on my written submissions in relation to this, and note that some of our affiliates may wish to comment in some more detail.

PN1252

DEPUTY PRESIDENT O'NEILL: Yes. Does anyone wish to take up that invitation? Ms Biddlestone?

PN1253

MS BIDDLESTONE: Thank you. I will, Deputy President. I'm not going to go over the submissions we've already made in relation to this, but I will just clarify and respond to the reply submissions of the Ai Group.

PN1254

So in relation to the suggestion that the proposal would result in double dipping, we understand the original purpose of leave loading but we submit that with the proliferation of weekend work and work in unsociable hours that the payment of the higher of the penalty rate or the 17 and a half per cent loading no longer satisfies the consideration in section 134(1)(DA)(ii) and (iii), that awards ensure workers be compensated for working unsociable hours, weekends and public holidays.

PN1255

I also do note that the decision relied upon in the Ai Group's submissions was handed down in 1977, so in terms of when workers actually work unsociable hours, that has vastly changed.

PN1256

So what we have now is a large proportion of workers working unsociable hours and weekends but those workers not getting the benefit of the 17 and a half per cent loading, in addition to their ordinary rate of pay, if the ordinary rate is higher. However, workers working standard hours, Monday to Friday, do get the benefit of the 17.5 per cent loading. So we say that there is now an unfairness built into the awards, in relation to that, which is why there needs to be a fresh assessment of whether or not it still meets the Modern Awards objectives.

PN1257

The Ai Group also suggests that the proposal imposes an unacceptable regulatory burden on employers because it can be difficult, if not impossible, for employers to calculate the relevant penalties that would have applied to an employee's hours during a period of annual leave.

PN1258

I must admit we are a little bit perplexed by this issue. We submit that an employer should know what an employee would have been rostered to work, had they not been on annual leave. So they should have no problem in calculating

their ordinary hours and if they don't know what they would have been rostered in that period, they are potentially in breach of the award, in relation to notification of rosters, so we're not quite sure what those submissions relate to, in terms of complexity. Thank you.

PN1259

MS DELPIANO: Thank you, Deputy President, Ms Delpiano, on behalf of the Mining and Energy Union.

PN1260

Just in respect of the ACTU's proposal, we are broadly supportive of it. Just for noting, we'd just like to note, on the record, that in awards, such as the Black Coal Mining Industry Award, it does actually provide for a higher annual leave loading of 20 per cent, and we certainly would not want to see employees go backwards in those circumstances. So we would just ask that the Commission includes in its proposal notes those awards that do, in fact, have a higher annual leave loading.

PN1261

DEPUTY PRESIDENT O'NEILL: Thank you. All right.

PN1262

SPEAKER: Mr Wright has his hand up.

PN1263

DEPUTY PRESIDENT O'NEILL: Yes, sorry. Mr Wright.

PN1264

MR WRIGHT: Thank you, Deputy President. We rely on our written submissions, on the whole, and just would like the Commission to consider cost of living pressures which we're all facing. Under the SCHADS Award, as previously mentioned, the rates aren't high and so when it comes to the leave loading, we would seek that as slow adjustment to the provisions of the award, relating to the automatic payout of the annual leave loading if an employee has not taken a block of annual leave. Currently the SCHADS Award provides for no payout.

PN1265

In this industry there are a lot of workers from culturally and linguistically diverse representations. It is conceivable that somebody may wish to save a block of annual leave to take a long trip back home overseas. As the SCHADS Award stands right now, they will forfeit their annual leave remedy because they have not taken a block of leave within the calendar year.

PN1266

We also note too, Deputy President, that there is a provision for higher payment than 17.5 per cent for shift workers, and our submissions do not seek to change the current provisions for the calculation of leave loading. So, for example, if a worker's entitled to 17.5 per cent we say no change there. If a person's a shift worker, and predominantly that is the case in the disability sector, which is where our members are working, they would be entitled to an additional payment

because they are shift workers. We have proposed, as part of our submission, some wording for consideration of the Commission.

PN1267

DEPUTY PRESIDENT O'NEILL: Yes, I see that.

PN1268

MR WRIGHT: Thank you, Deputy President.

PN1269

DEPUTY PRESIDENT O'NEILL: Thank you, Mr Wright. All right. I think the next is the UWU again, it's the Cleaning Award specific provision, in relation to leave loading for part-time employees, unless, Mr Orr, you wish to say anything additional in relation to that. The next is the AMWU proposal for five weeks' annual leave, including - Mr Orr, did you want to add to your - - -

PN1270

MR ORR: No, I was just going to - sorry, Deputy President, I was just going to say, no, nothing further from us. Thank you.

PN1271

DEPUTY PRESIDENT O'NEILL: Terrific. All right. So, Mr Amoresano, in relation to item 66, did you wish to say anything in relation to that?

PN1272

MR AMORESANO: Thank you, Commissioner. No, we're relying on our written submission. Thank you.

PN1273

DEPUTY PRESIDENT O'NEILL: All right. There's the proposal at item 67 from the ANMF, it's around the definition. Did you want to speak to that? And a similar proposal for a greater entitlement by the SDA, at item 72. Did you want to speak to that, Ms Biddlestone?

PN1274

MS BIDDLESTONE: Deputy President, I'll just make the clarification that, because I'm not sure it was clear in the writing of our submission, our claim is just in relation to the awards that our members work in. So I just wanted to confine that. I think I said, 'all awards', so just clarifying that it's confined just to the awards where we have an interest. Thank you.

PN1275

DEPUTY PRESIDENT O'NEILL: Of course. All right. And noting that these proposals are opposed by the Ai Group. Did anyone else wish to speak to - - -

PN1276

MS PELDOVA-McCLELLAND: I'll just briefly clarify something, Deputy President. I figure I should do this while I have the opportunity. The Ai Group, in its reply submission, referred to the ACTU proposal to increase the quantum of annual leave to five weeks, and we just seek to clarify that our submission was that the Commission consider variations, responding to specific affiliate

submissions about annual leave in their awards. We haven't put forward a proposal for all awards.

PN1277

DEPUTY PRESIDENT O'NEILL: Thank you. All right. Then unless anyone has anything further to say, in relation to annual leave, we move on to question 18, ceremonial leave. It's an ACTU proposal.

PN1278

MS TINSLEY: Thank you, Deputy President. We have obviously outlined this proposal in our initial and then our reply submission and we thank the Commission for allowing us to put a proposal in reply, it was important for us to undertake some consultation with our Aboriginal and Torres Strait Islander community in relation to this.

PN1279

So just to make a few comments, many First Nation Australians care for community members, according to the cultural expectations and provisional kinship responsibilities. This obviously offers many benefits to those communities and for the community more broadly, but it also means that First Nations people, especially women and girls, are much more likely to be unpaid carers than non First Nations Australians.

PN1280

So some awards, as noted in the discussion paper, recognise the cultural rights and needs of First Nations employees through the provision of cultural or ceremonial leave while the vast majority of Modern Awards do not provide for such leave.

PN1281

Of the 25 awards examined in the paper only four provided for cultural leave provisions and so we say that given the significant overlap in care giving and cultural responsibilities, the lack of entitlements across Modern Awards represents a large gap in the safety net for First Nations employees and their caring responsibilities outside of work.

PN1282

We've also commented that the existing ceremonial leave provisions in the awards where it does exist are insufficient in a few clear ways. So only unpaid leave is provided. The phrase, 'legitimately required by Indigenous tradition' is unnecessary, burdensome and over complicated threshold and additional to the existing threshold of 'for ceremonial purposes'. It's subject to the approval of the employer and the employer's discretion is not limited or qualified in any way.

PN1283

So our proposal is that awards should be varied to insert new ceremonial leave provision into all awards. As I mentioned, wording for a clause we developed with our affiliates and in consultation with the ACTU's Aboriginal and Torres Strait Islander community. That wording is set out in our reply submission and the proposed clause would add, 'Five days of paid leave on top of the 10 days of unpaid leave' and address the deficiencies of the current provisions that we identified in our initial submission.

PN1284

In terms of the Ai Group reply, they have referred to our recommendation regarding foster and kinship care and I think perhaps there's been a misunderstanding there. They thought that that was part of the ceremonial leave provisions. Just to clarify, that proposal, regarding foster and kinship care, is not going to form part of ceremonial leave but is recognised for the purposes of accessing personal and carers leave and making sure those care arrangements are recognised properly in those entitlements so they're accessible to First Nations employees.

PN1285

Ai Group also talk about the limitations of the current clauses being appropriate, that it's appropriate there are limits of when the entitlement is available and it's appropriate that it's subject to employer approval, consistent with other forms of leave provided for in awards.

PN1286

In response we'd say our proposed clause does have limitations. It's only available for First Nations employees for ceremonial purposes, as outlined in the clause. There are several subclauses about what purposes it can be used for. There's no need for an additional threshold that the leave be legitimately required. And we just note that that phrase is a peculiar one. It sort of implies that there be illegitimate reasons to use the clause for ceremonial leave.

PN1287

We also say employer approval should not be required and that would be consistent with the entitlement to compassionate leave that employees already have the benefit of.

PN1288

Finally, Ai Group talks about - we said in our submission that an entitlement to ceremonial leave in awards was previously been found to be consistent with the Modern Awards objective, in particular the consideration regarding social inclusion. Ai Group have said that was only in relation to one word and that it was on the basis of the evidence before the Commission at that time. Yes, of course, that is all the case, but we don't see any clear basis on which to distinguish the awards which currently contain ceremonial leave from those that don't. It's obvious that First Nations workers are employed across industries, across the economy and an entitlement to ceremonial leave will further assist to facilitate and promote their participation in the workforce. That is why we say it is necessary to achieve the Modern Awards objective.

PN1289

DEPUTY PRESIDENT O'NEILL: I think, just in the absence of the Ai Group, the other point of their position is in relation to any allowance for cultural responsibility or language that they are not supportive of those.

PN1290

MS BIDDLESTONE: That's correct, Deputy President. And again, just to clarify, that is a separate - it wouldn't be included in the ceremonial leave provisions but we put forward that it should also be considered.

PN1291

DEPUTY PRESIDENT O'NEILL: As an allowance.

PN1292

MS BIDDLESTONE: Yes.

PN1293

DEPUTY PRESIDENT O'NEILL: Ms Tinsley.

PN1294

MS TINSLEY: Thank you, Deputy President. I just wanted to just briefly wanted to - so our position, similar to the Ai Group, is that we have concerns around this - well, specifically in the interim, about ceremonial leave, but I think you can take my comments as consistent with the other leave proposals (indistinct words).

PN1295

Indigenous ceremonial leave, in particular, I don't see how it is there are specific industry specific considerations so (indistinct) a few of them in there. So we think this is something better dealt with under the NES. At a particular point of time obviously (indistinct) that that would be the appropriate place to consider this.

PN1296

Additionally, this is something that - this sort of leave is increasingly being included as part of the bargaining as well. So to the extent where there's employers, and (indistinct) it's large employers (indistinct) anyway, as a way of trying to attract the best staff and that's fantastic and they should be able to have the ability to do that as well. So we're not saying that we oppose this sort of leave generally, we're just sort of concerned about this one size fits all approach, except for, and that a consideration like that should be dealt with under the NES, if that makes sense.

PN1297

In terms of ceremonial leave, I also wonder about - I can kind of see some points here, but as a whole I think I fall on the side of I'm not sure if ceremonial leave is necessarily a specific work and care type consideration as well, although I wouldn't rely too heavily on that point. Our main thrust of our concern is something like this applying across all awards where that really should be dealt with by the NES, so I'll just pause there. Thank you, Deputy President.

PN1298

DEPUTY PRESIDENT O'NEILL: All right. Thank you. There are similar proposals by the ANMF, the ASU, the NTEU and the UWU, for the attraction of paid ceremonial leave. Does anyone wish to speak to any of those specific proposals? Mr Robson.

PN1299

MR ROBSON: Thank you. Our proposal is supporting the ACTU's proposal. What I'd add to what Ms Peldova-McClelland just said is that the experience of our members is that leave is necessary, not just because of the extent or obligations an Indigenous person may have, but also because often these activities take place in remote or regional parts of Australia and there's a

significant amount of travel involved. We say this is connected to work and care stream because care doesn't just mean looking after children or sick, it means looking after your family or friends or community and must necessarily extend beyond the very bare task that someone might consider as personal leave. I'll leave it at that. Thank you.

PN1300

DEPUTY PRESIDENT O'NEILL: All right. Thank you. That takes us to the catch all of other proposed leave. Now there's a number of proposals here, from the ACTU and affiliates. Ms Wells.

PN1301

MS WELLS: Apologies, your Honour, I was just about to step up to talk briefly about cultural and ceremonial leave.

PN1302

DEPUTY PRESIDENT O'NEILL: Sorry.

PN1303

MS WELLS: My laptop has just died, I was wondering if I could take a short break.

PN1304

DEPUTY PRESIDENT O'NEILL: Yes, of course. No problem. Just let me know when your back with power.

PN1305

MS WELLS: Thank you so much.

PN1306

DEPUTY PRESIDENT O'NEILL: So starting with item 82 and 83 and 84.

PN1307

MS PELDOVA-McCLELLAND: Yes. Thank you, Deputy President. I won't say too much about these proposals. These proposals are obviously all part of our response to the any other variations question, which is quite a broad (indistinct) and we didn't have time to fully elaborate on - - -

PN1308

DEPUTY PRESIDENT O'NEILL: This is the letter to Santa kind of section.

PN1309

MS PELDOVA-McCLELLAND: Yes. We didn't have time to fully elaborate and consider these. Obviously it was put forward as a well, we may as well include them, we think that they're important and it's something that should be considered by the Commission.

PN1310

In relation to 82, the paid community service leave and paid disaster management leave for employees who are volunteers with emergency management organisations. I would just say that given the increasing frequency of, for example, climate change related extreme weather, we say these provisions will

become increasingly important and would be appropriate to include in the safety net, as it would allow for workers to assist their community and care for their community during such emergencies and times of need, with clear benefits for employees and employers alike, as well as benefits for living standards, social inclusion and the economy.

PN1311

I note that the CPSU may wish to speak to this proposal further. I note Mr Deguara has his hand up, so I might pause there and they can do so.

PN1312

DEPUTY PRESIDENT O'NEILL: Mr Deguara?

PN1313

MR DEGUARA: We have virtually comprehensive inclusion of emergency management disaster leave in most of our enterprise agreements and also state awards and state agreements as well. It actually enables the workers and their employer to be part of the community in which they suffer their ups and downs and also it pays back to the employer in that the workers that are involved in emergency management have - they go over and above for things like first aid and even if it's on the allowance list, things like managing their clients in points of emergency in their premises or the broader emergency in taking the community. So it actually works in giving skills to that workforce because of the ability to contribute that to the emergency services in those areas and we found, in a number of disasters across the country, it's worked really well and also creates, in some places, the sole of almost the majority of the emergency volunteers in small towns are members who readily use these clauses. So by including these, I think it enables the employer to also protect themselves, as well as the community in which they serve. These are pretty vital clauses to enable the emergency services to operate, especially in the regions. Thank you.

PN1314

DEPUTY PRESIDENT O'NEILL: Thank you.

PN1315

MS PELDOVA-McCLELLAND: Thank you, Deputy President. In relation to 83, the proposal there is to provide entitlements of paid leave to attend appointments that are associated with pregnancy, adoption, surrogacy, and permanent care orders.

PN1316

These kinds of appointments aren't currently covered and they are a significant part of the picture of work and care, especially, I would say, given the increasing reliance on assisted reproduction and other fertility methods and treatments, reflecting the very diversity of families that now exist in the community. It's important that workers can attend those appointments that are necessary on their journey towards creating a family.

PN1317

I'll move on to 84, which is the proposal for grandparental leave. Our proposal is that there would be 52 weeks unpaid leave for a grandparent, for each grandchild,

during the period up to the child's fifth birthday, with 12 weeks provided with pay and that this would recognise the significant and, again, increasing role that grandparents are playing in the care of children and without which many families wouldn't be able to participate in the workforce, as much as they do and can due to the provision of this care. The component of paid leave is important, given that many grandparents providing this care will be women and regard needs to be had to the impact on the income and retirement savings of accessing this kind of leave. I note you said the SDA has a similar proposal so I'll see if they can (indistinct).

PN1318

MS BIDDLESTONE: Thank you, Deputy President. Just very quickly, because I'm happy to rely on our written submissions, but although it does look a little bit like a wish list, I do want to point out that in terms of the research that was undertaken by the University of New South Wales, in relation to retail workers, it did find that there is an extremely heavy reliance on grandparents to assist in the care of children of retail workers. But, equally, it also showed that 17 per cent of our members in that age range that they would be grandparents are providing regular care to grandchildren. So for them to have the ability to be able to do that, with access to either paid and unpaid leave, is very important for the whole way that the retail industry works really. And we think it is important that carers are properly supported to do that.

PN1319

The other just brief point that I would make is that, again, this is a gendered issue because it's more likely that it is the grandmother who is doing that. They're also providing that regular care at a time where they're foregoing potential ability to earn an income and also contribute to their superannuation. We know that the fastest growing cohort of people in Australia that are homeless are older women, so we do have to make sure that when we're looking at supporting people to work and care, that it is not leading to adverse outcomes and that it's actually supporting them, in terms of their income and ability to save for retirement as well.

PN1320

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Biddlestone. All right. The next is a CPSU proposal for gender affirmation leave.

PN1321

MR WRIGHT. Thank you, Deputy President.

PN1322

DEPUTY PRESIDENT O'NEILL: I was just going to also mention it goes over. The next item is also yours, which is menstruation and menopause leave.

PN1323

MR WRIGHT. Thank you, Deputy President. We rely on our written submissions that are quite comprehensive and to assist the Commission we proposed some reading for both of these leaves.

PN1324

The general observation, Deputy President, I'd like to make, as in the SCHADS Award, is the funding constraints that the disability providers are bound do. Now, they receive funding from the NDIA only on provisions that are contained in the SCHADS Award and not necessarily 100 per cent of the entitlement. In the main we have managed to get in principle agreement for both these forms of leave, gender affirmation leave, because we understand that it's not going to be a large proportion of a workforce that would want access to this leave. That was pretty easy to get over the line.

PN1325

The menstruation and menopause leave, on the other hand, will be more challenging because providers are limited to using personal carers leave, as stipulated in the SCHADS Award. Anything above - any entitlement above what the SCHADS Award specifies is virtually impossible because of their funding constraints. So while enterprise bargaining may be a vehicle that works in other industries, and we do have great success with more wealthy employers, so to speak, such as universities. We can get a lot of benefit to our members where the employers do have a business, as such, but when we come to the disability support sector, largely, the workforce comprises of women, we think that the introduction of menstruation and menopause leave would meet the equity requirements that the Commission is considering.

PN1326

If the Commission was of the view that this leave should be inserted into the award we would be able to more successfully push the inclusion of this leave into enterprise agreements, because the NDIA would need to provide this funding to cover it.

PN1327

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN1328

MR WRIGHT: Thank you, Deputy President.

PN1329

DEPUTY PRESIDENT O'NEILL: Ms Wells, how's the power supply going?

PN1330

MS WELLS: Good, thank you.

PN1331

DEPUTY PRESIDENT O'NEILL: That would be an encouragement to speak quickly before you lose power again.

PN1332

MS WELLS: Thank you very much.

PN1333

The NTEU has made a proposal for cultural and ceremonial leave and I'd like to address that briefly in our submissions. Specifically I'd like to thank the work of the Aboriginal and Torres Strait Islander policy committee of the NTEU who have

developed and pursued in bargaining rounds provisions for cultural and ceremonial paid leave and have led, in various universities, campaigns in which NTEU members have lost pay, gone on strike, in pursuit of these provisions.

PN1334

So happily, in the higher education sector, at this point in time, cultural and ceremonial leave provisions have been incorporated into all university enterprise agreements and the minimum provision for such leave are five days paid leave, with many agreements providing much more.

PN1335

So in order to maintain a fair and relevant safety net in the higher education sector we propose the clause submitted to the Commission, or the elements of a clause submitted to the Commission on 12 March.

PN1336

These leave provisions recognise the need for Aboriginal and Torres Strait Islander members and university staff to participate in vital cultural business on country. The five days paid and 10 days unpaid ceremonial leave can be utilised by Aboriginal and Torres Strait Islander staff in a traditional urban nature for birthing and naming ceremonies, initiation ceremonies, funerals, smoking cleansing ceremonies, cultural business on country and in respect of cultural leave, participation in NADOC, in the Apology Day, Sorry Days, in Reconciliation Week activities and other significant cultural activities are recognised in the elements of our claim.

PN1337

We say that cultural business is significant business and cannot simply be rescheduled, due to operational requirements of employers and in pursuing these claims in the higher education sector and recognising the stories of Aboriginal and Torres Strait Islander members in these campaigns we recognise that some staff members have reported being forced to resign their employment to enable attendance at culturally significant events, prior to being able to access cultural leave.

PN1338

So we consider that employers should recognise that employees' attendance at significant events at the Aboriginal and Torres Strait Islander communities would be viewed positively by these communities and would foster a greater respect and trust between employer and employees and, of course, our community in general.

PN1339

The AHEIA has advised in its submissions in reply, on 26 March, that they are supportive of the safety net change for First Nation employees for paid ceremonial leave. This is in their submissions, your Honour, and in response to the NTEU proposal. The AHEIA advises they would be supportive of a safety net term, setting out a maximum of five working days of paid ceremonial leave per year.

PN1340

At page 7 of the NTEU submissions of 12 March, however, in respect of our question 18, we note that all the enterprise agreements, as discussed, have a form of paid cultural and ceremonial leave, the minimum being five days paid leave.

PN1341

So in order to provide a fair and relevant minimum safety net, we recommend that both higher education awards be amended to ensure that employees who identify and are accepted as members of the Aboriginal and Torres Strait Islander communities be entitled to paid leave of at least five working days for ceremonial purposes and leave without pay of at least 10 working days per calendar year, for the purposes of fulfilling ceremonial obligations.

PN1342

The higher education awards should provide that ceremonial obligations may be traditional and urban in nature and may include the ceremonies, as discussed previously and that, further, higher education award provisions should ensure that employers provide at least five paid working days per calendar year for employees who are members of the Aboriginal and Torres Strait Islander communities to prepare for or attend to community organisation business, as noted in the National Aboriginal and Islander Day observation committee week functions, all other relevant cultural events and we would propose an employee may elect to use annual leave in lieu of any unpaid leave granted in accordance with these provisions.

PN1343

In respect to the final question and other provisions that we would suggest to facilitate workers with work and care obligations in their household, their family, in their community, in respect of our submissions on 12 March, we also suggested that a relevant award safety net for the higher education awards would also provide improved minimum paid leave entitlements to accommodate employees. We recommend that higher education awards provide for a minimum entitlement to employees needing to access paid family and domestic violence leave of at least 20 days per annum.

PN1344

We suggest that this is a fair and relevant Modern Award entitlement in the higher education sector, given, again, due to various rounds of campaigns in pursuit of a minimum entitlements of paid family domestic violence leave for workers needing to access this provision, that generally in higher education enterprise agreements the minimum provision would be 20 days. In some instances that would be 25 or 30 days per annum, for those workers. We suggest that a fair and relevant safety net provision in the award would be at least 20 days per annum.

PN1345

We also have noted, as other unions have identified today, that unions have commenced work over recent news in pursuing paid menopause and menstrual leave and we would suggest that in addition to existing personal leave entitlements that a fair provision would be 20 days paid per annum, for the higher education awards.

PN1346

I note that the union movement has long campaigned and pursued minimum entitlements for paid family domestic violence leave and made submissions today to have - this year, in various forums, in respect of this provision and paid menopause and menstrual leave.

PN1347

I'd like to make just a few points in respect of our other claim on 12 March 2024, in recommending that higher education awards are amended to provide an entitlement of at least 20 days of paid gender affirmation leave, per annum, in order to achieve a fair and relevant safety net in our awards.

PN1348

There's numerous things that we could say about the benefits of such a claim, but to be brief today, your Honour, firstly recognising the work, again, of the national caucus within the National Tertiary Education Union, and (indistinct). We have again pursued a gender affirmation leave in the most recent round of bargaining. We are still working on pursuing these claims in (indistinct) are still bargaining, relevant to the university site and claims in question.

PN1349

In a prior round we saw the introduction of paid gender affirmation leave at the University of New South Wales, of five days, which featured in the 2018 University of New South Wales Professional Staff and Academic Staff Agreements.

PN1350

In this round, thanks to the work of (indistinct) tertiary education in the NTEU and NTEU members campaigned for these provisions and have achieved, generally, a minimum entitlement of 20 days per annum, 20 paid days per annum. The majority of enterprise agreements reached so far would feature at least 30 days paid per annum and some agreements have achieved even higher than this. One agreement recently agreed to in Victoria, including a 50-day per annum outcome.

PN1351

We think this is a critical Modern Award entitlement to maintain a fair and relevant safety net in higher education agreements, given just a few points. We note that transgender Australians are more likely than cisgender Australians to experience marginalisation and violence and are more likely to be unemployed. And when transgender people are employed more likely to earn less than cisgender employees, despite attaining higher levels of education. For this research we cite Couch et al TranZnation Report on the health and wellbeing of transgendered people in Australia and New Zealand, the Australian Research Centre in Sex, Health and Society at La Trobe University in 2007, pages 18 to 19.

PN1352

These experiences of marginalisation and violence mean that members of the transgender community are more likely to experience a range of mental health issues and recent research has suggested that access to gender affirming procedures or provisions, particularly those which help improve the person's perception of their ability to live as their gender can have a positive impact on

mental health outcomes of transgender employees and transgender workers who undergo surgery to affirm their gender identity may need significant consultations with a range of medical professionals, as well as time off work to recover from their surgery. Transgender workers who are undertaking the process of having official documents recognise their identity may need time off work in order to attend to meetings with legal practitioners, liaise with government departments and organise statutory declarations for themselves or for other persons.

PN1353

In summary, these unique issues, as well as others, which I don't have time to address today, essentially mean that transgendered workers are more likely than cisgender workers to need time away from work. And while recovery from surgery would entitle a worker to use their personal leave, in many circumstances, it is likely that the worker would not have sufficient personal leave to cover the recovery period, meaning they may need to use other forms of leave, including unpaid leave. It's inequitable that a worker should have to be forced to use their leave accruals to affirm their gender, which is one means of affirming their gender. As valued members of the university community and I'm sure wider communities, their employer should assist transgender workers to take important steps in their lives, if they have chosen to do so.

PN1354

A worker attending to the change of legal documentation in order to reflect their gender will unlikely have personal leave to rely upon and in respect of different practices and steps to attain affirmation of gender, we could give further information if need be, in industry specific consultations in respect of the provisions that we've agreed to in enterprise agreements for this purpose.

PN1355

Again, in respect of these affirmation steps, necessary affirmation steps, this would mean that other forms of paid leave or unpaid leave would have to be used. Annual and long service leave we hope is for rest and recuperation, not for attending lawyers and liaising with government departments and organising documentation, as necessary steps in chosen paths of affirmation.

PN1356

So we also note that while the number of transgender workers in Australia and in the higher education sector in particular is difficult to determine, this is not such a significant amount that accepting a fair and relevant minimum claim for higher education awards would cost employers a substantial amount of money.

PN1357

There are many other things that I could say about the commitment of the NTEU and our view about the necessary fairness and equity of this claim but I will reserve those comments to Thursday's session, in the higher education specific discussions and thank the Commission for your time. Thank you.

PN1358

DEPUTY PRESIDENT O'NEILL: All right.

PN1359

MS PELDOVA-McCLELLAND: Deputy President, may I say something, briefly, just in response to ACCI's comments about ceremonial leave? Thank you.

PN1360

We agree with ACCI that there are unlikely to be industry specific reasons why ceremonial leave would be relevant in all awards.

PN1361

DEPUTY PRESIDENT O'NEILL: This is the proposition about whether it should be award or NES?

PN1362

MS PELDOVA-McCLELLAND: Exactly. We really don't agree with their conclusion that it's a matter for the NES, rather than for awards. We did address this, briefly, in our reply, but I just wish to reiterate. The fact that it's applicable across the board shouldn't be a barrier and isn't a barrier to include it in Modern Awards. There's clear recent precedent for this, with the family and domestic violence leave cases, which found it was necessary for awards to insert entitlements to, at first, unpaid leave and then, of course, paid leave several years later. So just because something can be dealt with in the NES doesn't mean it isn't also necessary to vary awards to achieve the Modern Awards objective.

PN1363

We say this is a real opportunity to support workforce participation and social inclusion of First Nations workers. It shouldn't be put off. It's something the Commission can consider now, consistent with the statutory framework and it doesn't need to wait until the government decides to legislate it in the NES. In fact, it may even prompt consideration of the issue by government, as we saw with family and domestic violence leave.

PN1364

Of course it's also open to the Commission to note the desirability of such an entitlement in the NES in its final report but, again, that doesn't preclude the Commission from also finding varying awards to include this leave is necessary to achieve the Modern Awards objective. Thank you, Deputy President.

PN1365

DEPUTY PRESIDENT O'NEILL: Thank you. Ms Tinsley?

PN1366

MS TINSLEY: Deputy President, just really briefly. I thought I'd sort of clarify, off the back of those comments as well, in terms of why I referenced into the NES as well. So obviously it goes without saying the Commission is within its rights to consider leave of this type. We can say it's not preferable and our concern here is really quite holistic. So we use words like 'everyday Australians' that businesses are struggling at the moment. Every type of leave is an additional cost, especially for small businesses. So we know that separately as well, there are a number of claims that we just heard, over the last 40 minutes, or half an hour so was well, that we've got different types of leave claims. Our preference from the NES is that we would like a discussion to be made holistically, which would be better done by government, in our view, about looking at the various different

claims for leave, what the impact that would be on business, across the board. So that's really, I think, in terms of why we think it is preferable.

PN1367

We're not suggesting that the Commission is not within its rights to consider leave as part of an award entitlement, we just think that this is an example of where there is no industry specifics, so there is obviously types of different leave categories different issues there that maybe quite industry specific so that would be better dealt with.

PN1368

We are dealing with something that applies before the board, we'd much prefer to have this discussion within the context of the NES. So that's just clarifying, giving a little bit more information about what our position is there. Thank you, Deputy President.

PN1369

DEPUTY PRESIDENT O'NEILL: All right. Well, that brings us to the end of day 3, unless there's anything - Ms Finlay - Ms Tinsley, I think that was an advertent hand up, was it? Ms Tinsley.

PN1370

MS TINSLEY: Sorry, Deputy President, I didn't mean to cut you off. I thought I'll just bring my hand up because there was one final point I wanted to raise very quickly.

PN1371

Just noting as well, and I think we've already provided this to your associate, but with an unavoided leave tomorrow I'll also be in the peak consult, with the Vice President, as well as the delegate to us, and in the public consult in the afternoon. So ACCI won't have a representative unfortunately with you tomorrow. We don't have any specific proposal we wish to advance in any of the topics that will be covered tomorrow, so we're not particularly, ourselves, concerned about that and to the extent that anything needs to be raised, we can work with Mr Arndt. He tells us he will be here, so I'm happy to give him our instructions, so to speak, if that's okay with you and obviously if something does pop up that's new we can perhaps reply in writing, Deputy President. But since this may be our last consult I also just wanted to thank you and your team for having the benefit of being involved in all the different streams. I think this one has been (indistinct) well run and efficient one, so thank you, Deputy President.

PN1372

DEPUTY PRESIDENT O'NEILL: Thank you. That's very kind. No difficulty if you can't be here tomorrow. I have to say if you're not here and Ms Bhatt is also unwell again tomorrow, there's a big responsibility now resting on Mr Arndt's shoulders.

PN1373

MR ARNDT: I've spoken to Ms Bhatt and I've encouraged her to recover, so we'll see how she goes.

PN1374

DEPUTY PRESIDENT O'NEILL: Unless there's anything further we will adjourn and resume at 9.30 tomorrow.

ADJOURNED UNTIL WEDNESDAY, 10 APRIL 2024

[12.17 PM]