



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT**

**AM2020/103**

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

**Award Flexibility – Hospitality and Retail Sectors  
(AM2020/103)**

**Restaurant Industry Award 2020**

**Hospitality Industry (General) Award 2020**

**Registered and Licenced Clubs Award 2010**

**Melbourne**

**9.34 AM, THURSDAY, 4 FEBRUARY 2021**

PN1

JUSTICE ROSS: Good morning. I might go through the appearances that I have and if you can let me know if I've missed anybody. Mr Redford for the UWU.

PN2

MR B REDFORD: Yes, good morning, your Honour.

PN3

JUSTICE ROSS: Ms Lawrence, for ACCI.

PN4

MS T LAWRENCE: Yes. Good morning, your Honour.

PN5

JUSTICE ROSS: Mr Song and Mr Ward for the Restaurant and Catering Industry Association.

PN6

SPEAKER: Yes, your Honour.

PN7

JUSTICE ROSS: Ms Shaw for Clubs Australia Industrial.

PN8

MS N SHAW: Yes, your Honour.

PN9

JUSTICE ROSS: Mr Harris for COSBOA.

PN10

MR S HARRIS: Yes, we're here, your Honour.

PN11

JUSTICE ROSS: Mr Crawford for the AWU.

PN12

MR S CRAWFORD: Yes. Good morning, your Honour.

PN13

JUSTICE ROSS: Good morning. Mr Kemppi for the ACTU.

PN14

MR S KEMPPI: Yes, your Honour.

PN15

JUSTICE ROSS: Mr Ryan for the AHA.

PN16

MR P RYAN: Yes, good morning, your Honour.

PN17

JUSTICE ROSS: Good morning. Mr Cooper for the Club Managers Association.

PN18

MR P COOPER: Yes, your Honour. Good morning.

PN19

JUSTICE ROSS: Good morning. I've got Ms Durbin and Ms Lace Wang from the Department. Is that right?

PN20

MS A DURBIN: Yes. Good morning, your Honour. We're here.

PN21

JUSTICE ROSS: Thanks, Ms Durbin. Ms Bhatt observing for Ai Group. I've also got a Sam Cahill from ABI. Is that right?

PN22

MS S CAHILL: Yes, your Honour.

PN23

JUSTICE ROSS: Okay. Have I missed anybody? No? All right. I put out a statement on 1 February providing a brief summary of the submissions that had been put in respect of the collection of Hospitality Awards and the Retail Award. I wonder if I might start with the Hospitality Award, with you, Mr Ryan. I had some questions by way of clarification that I wanted to put to you and it's also an opportunity for others with an interest in the award if they can raise any questions that they had for you, as well. Are you content with that process, Mr Ryan?

PN24

MR RYAN: Yes, your Honour.

PN25

JUSTICE ROSS: So there are four broad propositions. There is the consolidation of junior rates between the two streams of junior rates; the simplification of hours of work arrangements; an amendment to simplify late night, early morning penalties; and the introduction of a number of loaded rates. If I can just go through those. If we go to the junior rates proposition, I wonder do you have any idea about how many employees might be affected by the proposal, Mr Ryan?

PN26

MR RYAN: No, we don't, your Honour. We would say it would not be a significant number and any that would be employed pursuant to that scale would generally be in the upper age groups. That would be our best estimate.

PN27

JUSTICE ROSS: All right. Ms Durbin, can I just ask you on that issue whether you would mind making some inquiries about whether the Commonwealth is able to access any data. I would say I'm not optimistic because often ABS data doesn't match well with particular awards and we're at a level of granularity in looking at particular juniors in particular streams in one award, but, nevertheless, would you mind making an inquiry about whether there is any of that information available?

PN28

MS DURBIN: No, that's fine, your Honour. As you said, we are probably reasonably cautious but we may be able to look at broader industry data by age, by occupation, so again there might be some level of proxy so we'll have a look.

PN29

JUSTICE ROSS: Okay. Thank you. Look, Mr Ryan, the other way of getting the information is an approach we have adopted in some other matters. It doesn't give you perfect data, but we could develop a short survey instrument that you could then distribute to your members. The results would come to the research section within the Commission and they would prepare a short report for all the parties about the results of the survey which would just identify how many employees in each age group within each of the streams.

PN30

MR RYAN: Yes, we would be open to that approach if that was to assist the process.

PN31

JUSTICE ROSS: Okay. Thank you. Can I just go to the junior office employees' percentages. I just want to understand better why you say those rates should change. There is the alignment with the other junior rates in the award, but how do those junior office rates - proposed rates in hospitality - align with the Private Sector Clerical Award?

PN32

MR RYAN: Yes, your Honour. If I could draw your attention to annexure A, which is on page 8 of our submissions.

PN33

JUSTICE ROSS: Yes, just bear with me for a moment. Annexure A?

PN34

MR RYAN: Yes, which is using the page numbers in the bottom right corner.

PN35

JUSTICE ROSS: Yes.

PN36

MR RYAN: We have put a table which compares other than office juniors for hospitality, the junior office employees for hospitality and the junior scale from the Clerks - Private Sector Award. I think in the junior other than office in the first column, it's 16 years and under, but we have just replicated the 16 years and under in the 15 years and under so there is an equal comparison of age groups between the three different categories.

PN37

As we said in our submissions, having those two scales equates to about 980 different pay points in schedule B out of 1760 in the award, so merging those will simplify that schedule and reduce the number of pay points, and make it easy for

employers to run their payroll and understand entitlements under the relevant provisions of the award.

PN38

JUSTICE ROSS: Just so I can understand it, if I look at annexure B on page 9 - yes, I'm not quite following, Mr Ryan. Are you proposing to have one schedule of junior rates?

PN39

MR RYAN: One schedule of junior rates, your Honour, which matches the first column in annexure A. However, the additional clause in annexure B retains the existing ones due to the transitional provision, so - - -

PN40

JUSTICE ROSS: I follow. Yes, yes, I follow. Okay.

PN41

MR RYAN: So essentially proposed clause 18.4(b) is a transitional provision which retains an office junior at their existing percentage until their next birthday.

PN42

JUSTICE ROSS: No, I follow. You're adjusting minimum wage rates as a consequence of the application - or the proposal, so presumably you contend that the work value of junior employees, whether in an office or otherwise covered by the Hospitality Award is the same.

PN43

MR RYAN: Yes, and if there was an argument that the work value of a hospitality office junior was different to a hospitality other junior, that the correct comparison would be the work value in the Clerks - Private Sector Award. I note when you compare those provisions with the office juniors, the hospitality juniors other than office, the first column - - -

PN44

JUSTICE ROSS: Yes.

PN45

MR RYAN: - - - it's the same as the clerks junior scale but is more favourable for employees at 19 years and 20 years.

PN46

JUSTICE ROSS: Yes. I notice that on your annexure A the hospitality junior office employee scale at present differs from that in the clerks junior employee scale.

PN47

MR RYAN: Correct.

PN48

JUSTICE ROSS: My recollection is that the minimum wage rates in the Private Sector Clerical Award are higher than the Hospitality Award, so the percentages might be lower but the rate of pay they would be getting would be higher.

PN49

MR RYAN: We may need to have a look at that more closely, your Honour.

PN50

JUSTICE ROSS: No, that's fine. Okay. If I go to the simplification of the hours arrangement, I think what you're seeking there seems clear. In relation to the simplification of late night, early morning penalties can you just explain the problem with the current language which is expressed as "per hour or part of an hour".

PN51

MR RYAN: Yes, your Honour. Within that time frame if an employee was to work and finish, say, at 8.30 on a Monday to Friday, so one and a half hours into that time frame, their hourly wages would be one and a half hours but they would receive two units of the 2.27. What we're proposing is that the application of those late night and early morning penalties is pro rata'd, similar to the Registered and Licensed Clubs Award.

PN52

We understand, where there has been some noncompliance with that clause in the past, employees get confused whether it is a pro rata or a per unit basis and we're seeking to streamline that across the modern award system as per our submissions.

PN53

JUSTICE ROSS: Yes, all right, but the language you've chosen - at least as I read it - isn't the same as in the Clubs Award. I thought the Clubs Award uses the language "per hour for such time worked" and you're just proposing "for such time worked". If I'm right about that isn't the risk that you might interpret "for such time worked" as meaning however many hours you work between 7 pm to midnight. you're only getting what's now \$2.31?

PN54

MR RYAN: If the wording needs to be finessed, your Honour, through this process, we're open to making any amendments to make that clearer that it should be \$2.27 per hour for such time worked on a pro rata basis.

PN55

JUSTICE ROSS: Okay, but do I take it that you're intention is to deal with this in the - I understand how you've identified the problem as you see it and you think the solution is to adopt the same wording as in the Clubs Award?

PN56

MR RYAN: Yes, your Honour.

PN57

JUSTICE ROSS: As I understand it, that was inserted in the Clubs Award by consent.

PN58

MR RYAN: That's our understanding, your Honour. That's correct.

PN59

JUSTICE ROSS: Okay. Can I go to the loaded rates, Mr Ryan. As I understand the general approach and please stop me if - I'm not intending to put words in your mouth, I'm just trying to test my understanding with the approach you've adopted. You've got six particular loaded rates based on six patterns of work, if I can put it that way. You have calculated the loaded rate and the pattern of work that you describe has certain constants on it. It can only encompass whether it's so much overtime or so much working time at a particular - on a weekend or - and within the span and spread of hours provided for in the award.

PN60

You have then calculated essentially, well, if someone was working their normal week subject to those constraints, then how much would they be paid applying all the penalties and different provisions in the award. You have then calculated the loaded rate so that they don't receive less than they would receive if all those various award provisions apply. It's sort of a bespoke model inasmuch as I understand it you've tried to put in the constraints to make sure that you don't have a sort of better off overall issue. Is that a fair assessment of what has been attempted, Mr Ryan?

PN61

MR RYAN: That's correct, your Honour, and I should say that the scenarios are only intended to apply to full-time employees.

PN62

JUSTICE ROSS: Yes, that was my next question. I want to try and facilitate a discussion between yourselves and the relevant union about this issue. It occurs to me that, look, if we got one of these proposals, Mr Ryan, in an agreement, for example, then we would do a BOOT assessment on it and advise the parties of whether it meets that or it doesn't and identify any particular issues, and perhaps suggest some undertakings that might be of assistance. I'm happy to do that in relation to your proposal and provide the results to yourselves and to Mr Redford. That might assist in discussions between you about the way forward.

PN63

I understand your intent. It's just to - and I don't say this critically, Mr Ryan - test whether that intent has been reflected in the calculations, because it can be a complicated exercise and there may be an unintended omission or a consideration. It would just bring that to your attention and you can give some consideration to that. Are you amenable to that course, Mr Ryan?

PN64

MR RYAN: Yes, your Honour. I should say that Mr Redford and I had some preliminary discussions yesterday regarding these proposals. We're open to having further discussions to ascertain whether or not we can reach an agreed position in relation to those.

PN65

JUSTICE ROSS: Okay. Are you content with that process, too, Mr Redford?

PN66

MR REDFORD: Well, your Honour, we wouldn't be opposed to it and I should say Mr Ryan is right, we have had some discussions about these matters. We plan to have further discussions and perhaps some light will be shed on what I'm about to say in those discussions, but the other problem for me is sort of a conceptual problem which is that I just don't understand how these, what Mr Ryan describes as scenarios, would be applied to employees and how the parties would figure out which scenario to apply to which employees; whether or not that would be a matter for the parties to be able to agree about or whether it would be dictated by the terms of the award.

PN67

I'm not opposed to the course of action you suggest, your Honour, but I think in addition to that it's fairly crucial that draft determinations in relation to the loaded rates proposal be filed in relation to this part of the proposal. There are draft determinations filed in relation to the other aspects of the AHA's proposal, but not this one, and I just sort of don't understand the mechanics of this idea.

PN68

JUSTICE ROSS: No, no, I follow that. Look, I think in the first instance, you should have those direct discussions with Mr Ryan and Mr Ryan can provide a draft determination for you to consider. Despite what I put in the statement, on 1 February, I think my inclination is to adopt a more cautious approach to any requirement to file draft variation determinations at this stage. I think it runs the risk that parties end up locking themselves in to a particular position when, after further discussions with the other interested parties, they may take on board some suggestions. They may not reach agreement, but at least they are in a better position to try and craft a determination that addresses some of the concerns.

PN69

But look I have similar questions, Mr Redford, how it would operate in practice. I think we'll do it sequentially, we'll run a BOOT analysis, provide that to you. You can have the discussions with Mr Ryan, tease out what's the intention and then we can look at whether something can be drafted to meet that.

PN70

I had, for example, an issue around there was a proposal that disputes would be dealt with by arbitration. I'm trying to conceptualise, "Well, what sort of disputes?". For example, if a schedule said, "The intention of this schedule is that employees would be better off overall under the payment in this schedule than under the award provisions", then you can see, "Well, okay, the subject matter of a dispute might be circumstances in which an employee is not better off" and they want to argue that point and it can provide a mechanism to resolve it.

PN71

I think we need to think about if working on one of these scenarios results in a change in an employees shift pattern or roster, how does that interact with the consultation provisions that are in the award as well.

PN72

I think, if you look at the concept, leave aside your concerns about implementation for the moment, Mr Redford, I'm not doing that out of any



suggestion that they're not legitimate concerns, I think they are issues that need to be worked through, but at least, conceptually, the idea of perhaps a number of loaded rates addressing particular working scenarios with a number of constraints is a much easier proposition to get an assessment about whether or not people are going to be disadvantaged under that arrangement than a broader proposition which simply provides a loaded rate and no constraints that apply. It just makes it easier for parties to assess it.

PN73

So I think if we can do that one step at a time. We'll get you the survey instrument and the BOOT analysis shortly. I'd encourage you to have those discussions. I'll list the matter for further conference early the week after next and at that point we can perhaps crystallise where we are, in respect of each of the proposals. It may be, given the union's approach in the Clubs award, it may be that the simplification of late night and early morning penalties is not opposed.

PN74

It's not immediately apparent to me that there are any particular issues around the simplification of the hours of work arrangements, but I've not looked at that closely and I haven't heard from the other parties. We'll find out how many employees might be impacted by the proposal around junior rates and Mr Ryan is going to have another look at that issue, in the light of the comments I've made about the Private Sector Clerical Award.

PN75

Is there anything else anyone wishes to raise about the Hospitality Award?

PN76

MR REDFORD: Your Honour, it's Ben Redford. Please don't think I'm looking at trying to go back over this matter, but just going back to the BOOT analysis, I think, largely, I want to raise this just because you may well have an answer about it that deals with my concern about this. If, for example, your Honour, you take the first of the versions of the loaded rates proposed, so this is a 10 per cent rate applying to a Monday to Friday 40 hour worker.

PN77

JUSTICE ROSS: Yes.

PN78

MR REDFORD: What I'm sort of now - I don't - how do you run a BOOT analysis, which is a comparative exercise, against that proposal until we understand the machinery provisions that will allow us to identify the appropriate employee to use to conduct that analysis?

PN79

JUSTICE ROSS: Well, they would probably do it against all employee classification levels and I'm not suggesting that - we may have to do the process more than once, Mr Redford. I'm just interested in what it shows up initially on what we do know. Now, that might also inform your discussions around - I mean once you see it, if the BOOT is more narrowly constructed, on the scenarios they look at than you think the provision might lend itself to, that then goes to a

process question and who it might apply to. So I'm not suggesting that this will be a once-off go and we can move on from the BOOT issue. It's more designed to inform you both about if there are any issues or things that have been missed and to highlight some questions to facilitate your discussions, that's all.

PN80

That's why I'm only proposing that it be provided to yourself and Mr Ryan at this stage. I think until there's a more formed proposal we wouldn't provide a broader document. At some point, once all the processes have been put in, whether you reach a resolution or not, but once Mr Ryan's got a settled proposal we would do the exercise again.

PN81

MR REDFORD: Yes, your Honour. Thanks.

PN82

JUSTICE ROSS: Thanks, Mr Redford. Is there anything else for hospitality? No? All right.

PN83

If I can move to restaurants? Look, there are three aspects to the proposal: exemption rate, classification structure and definition and a sort of rolled up allowance proposition.

PN84

Can I address my understanding about those issues and just raise some questions with you, I take it, Mr Ward?

PN85

MR WARD: Yes, your Honour.

PN86

JUSTICE ROSS: All right. On the exemption rate proposition, it's by agreement between an employer and an employee. Is it intended that agreement would be an employee record?

PN87

MR WARD: Yes.

PN88

JUSTICE ROSS: Can I make it clear, I think this will be an iterative process with each of these awards. If there's anything that I raise that anyone wants to take more time about, that's fine, I'm not - it's not intended to be trial by examination, it's more intending just to ask some questions.

PN89

My reading of the submission was that it was to be available to employees at grade 3 and above, but the actual determination doesn't limit it in that way.

PN90

MR WARD: No, it doesn't, your Honour. I would simply say this, at this stage, your Honour's statement on 1 February, we took that to suggest that following a

determination before this conference would be helpful. Can I just say that we anticipated that our draft determination would be the subject of refinement. That refinement obviously will reflect what arises from today but also ongoing dialogue with United Workers Union.

PN91

JUSTICE ROSS: Yes, okay. So, as I understand it, it's that they'd be paid no less than 150 per cent of the grade 3 rate?

PN92

MR WARD: That's correct, your Honour, and how it's drafted.

PN93

JUSTICE ROSS: So it's sort of, and I don't say this critically, Mr Ward, I am just trying to understand the differences, but when you look at other exemption rates they're often a percentage above the minimum rate for that particular classification, whereas you have tended to pick what is really a dollar amount and said that's the exemption rate amount rather than - it's not for example 30 per cent of Grade 3, 30 per cent of Grade 4, it's 150 per cent of Grade 3. That might mean that the exemption rate - well, it will mean that the exemption rate as a percentage will be higher for Grade 3 than for Grade 4.

PN94

MR WARD: Yes, as currently drafted that would be the case.

PN95

JUSTICE ROSS: Okay. Is it the intention of the proposal that an employee party to the proposed exemption rate would be better off overall under the exemption rate?

PN96

MR WARD: Well, I don't - I would like to say this with some care. I don't necessarily want to concede at this stage that that is a requirement of section 157, but I do want to say that my client is working to try and ensure as much as possible that people are not disadvantaged by this process.

PN97

JUSTICE ROSS: Yes. I should make it clear in asking the question it was the same proposition to Mr Ryan to try and understand the nature of it. I shouldn't be taken to be expressing the view that the BOOT requirement is a necessary element of 157. I am sure I will be hearing plenty of argument about that as the matter progresses. In the exemption, in the clauses to which would not apply if you're the subject of the exemption rate, one of those is annualise salary arrangements, and that seemed different to the - my recollection was it was different to the current exemption rate arrangements in hospitality and clubs, and I was curious as to why that was exempt, why would you exempt that?

PN98

MR WARD: I just think it was a concern my client had about ensuring that there wasn't any confusion as to the distinction between an exemption rate and an annualised salary arrangement.

PN99

JUSTICE ROSS: Okay. Is it intended that the exemption rate would apply to all employees?

PN100

MR WARD: No, your Honour. We will obviously need to clarify that in due course, but our intention was to apply to full-time employees only.

PN101

JUSTICE ROSS: All right. In relation to the classification structure and definitions you identify in the submissions a number of employees will receive a wage increase as a result of the proposal. Can I just step back from that for a moment. Do I understand the proposal that, look, you have had this in a schedule and this is a schedule which through whatever mechanism, individual agreement or agreement and enterprise, however it's framed, but it would come in by consent, and so it's not something that would apply generally, it would be sort of an opt in arrangement. If employers wanted to do it then they would follow the process in it accepting everything that comes with it. Is that the idea?

PN102

MR WARD: In its current construction it is a substitute or an alternative in the context of the COVID recovery schedule that could be opted into. The opting in process is currently described on the basis of consent between the employer and the individual employee. Obviously we might be exploring that (indistinct) a little more. The actual machinery of that might evolve, but it clearly is an opt in process, yes.

PN103

JUSTICE ROSS: Okay. As I mentioned you explain in the submission that a number of employees if the simplified structure, if I can describe it that way, I think that's the way you describe it, if that applied then they would receive a wage increase. I was wondering does anyone receive a decrease or is there any what might be conceived as an adverse impact?

PN104

MR WARD: Your Honour, as I am presently instructed the answer is no to that. I must say I hadn't personally tested that myself, but my instructions are no, and on a rudimentary understanding of what's been consolidated I can't see that that could occur. What has essentially happened here is that the association have identified a basket of activities that are normally undertaken in restaurants or in particular cafes. That basket of activities currently traverses different elements of the structure. They have sought to bring those elements together so there is a multi skilling factor that's being considered here, and in that context the highest rate of pay in that basket has been adopted. Therefore somebody who moves into one of these classifications would on my understanding either maintain their rate of pay or they would receive an increase to the next level that otherwise would have been in the award.

PN105

JUSTICE ROSS: Yes, okay. Can you have a look at whether there is an impact on a capacity for an employee to move from the introductory level. Is that intended to remain the same?

PN106

MR WARD: Your Honour, at the moment we have left that out because that just seems to me it's there, it operates, it's not particularly controversial. So we are currently assuming that we will just leave that where it is. We had two options in framing this I think. One was to almost replace in total the classification structure so you could say, well instead of adopting what's currently schedule A here is the entire alternative schedule A. We ultimately didn't do that and we simply adopted the process where you can adopt the specific alternatives for particular roles. But the introductory classification at the moment we anticipate that that stay what was, because it's operated successfully.

PN107

JUSTICE ROSS: Yes, all right. Can I go to the industry allowance proposition. So broadly the idea is that you would be paid however it's described, but some all purpose allowance, in lieu of some seven particular allowances and penalties. Just bear with me for one sec, I just missed a question I wanted to ask you around the - I don't think it arises in the industry allowance one, but in the exemption rate proposition it's in lieu of overtime rates, clause 23.

PN108

MR WARD: Yes.

PN109

JUSTICE ROSS: Does that also mean that they don't get any meal breaks at all?

PN110

MR WARD: No, it wouldn't mean that, Your Honour, no.

PN111

JUSTICE ROSS: No. But just have a think about how they - - -

PN112

MR WARD: Yes.

PN113

JUSTICE ROSS: I understand it's the allowances or the penalty component, but does that mean they don't get a break, and when you look at the industry allowance it covers what it seems to me three types of payment, what are regarded as penalty payments which are the meal break penalties, late night, early morning penalty rates, and what might be considered a disability allowance split shift, some reimbursement allowances, meal and tools. So it's sort of a - I was searching for, without success, but some of you might be able to find for something similar to this elsewhere. The most recent consideration of all purpose allowances has been in relation to the Construction Awards, and there are a range of decisions, I think pre 2018/2019, where they consolidated a range of disability allowances. That process might assist.

PN114

I guess the challenge here is, and I note there's no rate struck in the current proposal, I'm not sure - there's also the question of an overlap with your exemption rate proposition. How would you strike a rate to encompass all of these various payments?

PN115

MR WARD: Well, that might be why we haven't struck one yet, your Honour.

PN116

JUSTICE ROSS: Okay.

PN117

MR WARD: I think the answer goes this way, your Honour, to be candid. My client's members saw this as a very attractive proposition. That is, there are a series of allowances played in the award which arise in very particular and, let's acknowledge, different circumstances and it would be, for many of them, simpler and convenient and more likely to ensure compliance if those could be substituted for a single payment. I think that's the attraction.

PN118

JUSTICE ROSS: Yes.

PN119

MR WARD: We obviously then have to get some acceptance of the concept, within the context of the modern awards objective.

PN120

I think after that then we get to what is probably the most problematic element, which is the one your Honour's raise, which is just the mathematics. My client's working on that at the moment. Ultimately, the substituted allowance, the single allowance, at the moment we've expressed it as all purpose because, I'll be candid, we thought that might be more attractive to United Workers Union if it was expressed that way. That obviously involves some delicacy in mathematics to understand, first of all, how often the other allowances are paid to individual employees, what the algorithm is for taking non all purpose allowances and consolidating them potentially with things that are all purpose.

PN121

So I appreciate that there is a relatively complex mathematic exercise to make sure that the final single rate is reasonable and meets the requirements of the legislation. So we don't have that at the moment. My clients are trying to do some research, with its membership, around this so that it can propose an appropriate substituted single allowance. I can't commit, at this stage, to do that in the next week.

PN122

JUSTICE ROSS: No, no, I'm not - - -

PN123

MR WARD: It's just my client's working on it.

PN124

JUSTICE ROSS: No, no, I understand that. Look, I can appreciate the administrative simplicity argument and I can - I recognise where your clients are coming from, in that sense. I think it's challenging to - I can see why you've left the rate issue because just the range of different circumstances and incidences that these sorts of things would come up would make it challenging to come up with a rate.

PN125

I think it's worth you considering, also, what's the conceptual proposition here. Look, I accept that it's challenging - the same issues arise, in respect of loaded rates, and it's why, at least conceptually, the AHA's proposal on loaded rates has the benefit of transparency that you can assess whether anyone could be affected, because of all the constraints around it.

PN126

The challenge, if I can put it this way, with trying to capture a miscellanea of allowances and penalties in a rate is then, well, how is the Commission satisfied that that rate is fair, in the circumstances, in circumstances where, no doubt, whatever rate you pick those opposing your claim would be able to find an employee that's - or be able to construct this set of circumstances under which an employee might be worse off. Then the problem becomes the rate gets pushed up much higher.

PN127

The alternate is - and each of these have complexities with them, the alternative is that you have - you express that this allowance is intended to compensate employees for all of these payments and to ensure that they're better off under this arrangement, averaged over a period of time.

PN128

Then the questions become, "Well, what if there's a dispute about that, how's that dispute resolved?" and, secondly, how will you be able to resolve the dispute unless you have some sort of (indistinct) way of testing the incidence that they would have received the other allowances.

PN129

That then sort of leads down to a - there's a balance in all of this and that's the challenge with the exercise, I think.

PN130

MR WARD: Your Honour, I'm not going to disagree with that. The utility of this, though, with respect, diminishes materially if one is keeping the records that one would otherwise have kept anyway.

PN131

JUSTICE ROSS: No, no, I follow that. I think that's the challenge, isn't it?

PN132

MR WARD: (Indistinct) so generous that Mr Radford can't resist it.

PN133

JUSTICE ROSS: Yes, you could. I think his number and yours about "so generous" might differ a bit. But certainly that might be one way. The other way might be to look at which allowances and their calculation creates a particular problem for your clients and I suspect it will be a balance between if you're able to reach a point, if not agreement then not - you can at least address some of the concerns. It's likely to be a balance between how you strike the rate and how you deal with any disputes and also what it is intended to encompass.

PN134

MR WARD: Yes, and as your Honour would have seen from our draft (indistinct) filed on the 2nd, we already contemplated empowering the Fair Work Commission to consider and arbitrate the splits.

PN135

JUSTICE ROSS: Yes. I guess the challenge is also a bit like the proposition I put to Mr Ryan, well - - -

PN136

MR WARD: What do you get?

PN137

JUSTICE ROSS: Yes, what are we - what's the benchmark against which we're determining the matter?

PN138

MR WARD: Yes.

PN139

JUSTICE ROSS: What's the objective of the provision. But look, Mr Ward, those were the questions I had. I was going to propose a similar process to that that we explored in hospitality, that I encourage you to have discussions with the union. I'd list the matter for a further conference, the week after next, and I think - look, in yours and, to some extent, in the AHA's as well, and Mr Redford will no doubt correct me if I'm wrong about that, on my assessment there are elements in those proposals which are more likely to raise concern and opposition than others.

PN140

In your case, on how you describe the classification structure and definitions, that may be an issue where there can be a productive and early - productive discussions and early resolution. There are still some issues to be worked out, how it would apply in the process and those sorts of matters. But if, ultimately, it's an opt in levelling up arrangement, well, on the face of it, that's not something that raises the same sort of issues and complexities as the exemption rate and the all purpose allowance proposition.

PN141

MR WARD: I'd probably say two things in response, your Honour. Obviously we appreciate that some of what we're proposing is likely to be less controversial than other things and that my client, as I'm presently instructed, is not putting an



all or nothing proposition forward, so there is an opportunity to move intuitively. As long as we're making general progress my client will entertain that.

PN142

The last thing I would possibly say, without wishing to offend all my colleagues on the call, is when the matter comes back there may be some utility in actually going into private conference in relation to the Restaurant Award in isolation of all the other matters.

PN143

JUSTICE ROSS: Certainly. I would make the observation, in relation to hospitality and restaurants, if in the course of your bilateral discussions at any point you think the Commission may be able to assist, then just contact my chambers and we will organise a private conference to try and facilitate those discussions.

PN144

MR WARD: If the Commission please.

PN145

JUSTICE ROSS: All right. Thank you, Mr Ward. Mr Redford, you have heard the discussion and the proposal. Were there any other particular areas you wanted to identify at this stage for Mr Ward to consider or you're content to have further discussions with them?

PN146

MR REDFORD: No, your Honour. As you can imagine, I have a lot of questions about this one. I think that a lot of them will be answered by the amended draft determination that Mr Ward referred to, so I don't think there is any utility in sort of going into the guts of that now. As you and he have said, we will continue the discussions that we've already been having over the next few days, so I'll get more information through that, as well.

PN147

JUSTICE ROSS: Okay. All right, Mr Redford. Anything further in relation to the Restaurant Award? No? Can I then go to - perhaps just before I do, Ms Durbin, can I raise one issue with you. This is a proposal in relation to the Restaurant Award and the Clubs Award, and it's the issue around exemption rates. I think it may assist, if the Department was able to, to look at the arbitral history of exemption rates and see where they have been considered in other decisions and which awards they operate in presently. I can recall the award modernisation request dealt with it.

PN148

I'm not sure - I don't want to excite an argument about to what extent does that award modernisation request have any sort of enduring impact, but I think something on the history and prior to a modernisation what did exemption rates look like and what did they cover would be helpful. It would assist if you were able to, Ms Durbin, have the Department do some work on that.

PN149

MS DURBIN: Certainly, your Honour, we will have a look.

PN150

JUSTICE ROSS: Okay. Thank you. Well, let's go to the Clubs Award. Ms Shaw?

PN151

MS SHAW: Yes. Thank you.

PN152

JUSTICE ROSS: Look, I don't say this critically, Ms Shaw, so don't take it that way, but as I read your outline it was really that you're expressing interest in - or your organisation is expressing interest in a range of possible options, but you haven't advanced a particular detailed proposition. It's perhaps consistent with the association's earlier remarks in the earlier conferences that you've just been through - the review mill if we can call it that - and may, a bit like the rest of us, have been suffering a bit of review exhaustion and you didn't want to foreclose doing anything with the Clubs Award.

PN153

If I can paraphrase the position at that point, that you were interested to see how the issue developed and you would see what other proposals were put up in other award areas. Is that broadly accurate?

PN154

MS SHAW: Yes, that's broadly correct. I think with our discussion last time it was to put down ideas on potential changes and that's kind of where we got to at this stage, and haven't developed those much further. Yes, that's kind of where we are, but we're still, you know, looking to potentially take it further and see where we go with it, yes.

PN155

JUSTICE ROSS: Okay. Have you had any discussions with the unions with an interest in the award?

PN156

MS SHAW: We have had a brief discussion with the CMAA about it and some of the changes. They don't seem to have too much of any issues with the drafting change that we would want to do to 18.4(a).

PN157

JUSTICE ROSS: Yes.

PN158

MS SHAW: And have suggested that we will get them a draft variation to review, and it might be able to be done by consent.

PN159

JUSTICE ROSS: Yes.

PN160

MS SHAW: Then with anything further - we have had a bit of a discussion with them about the VAs that have been there previously and understand there wasn't a huge take-up of those for levels 1 to 5 employees in the past, but we will do some further research into why that was the case. Our suggestion with that is that that's something that the Clubs Award has used previously and it might be an easier alternative to loaded rates because, as we've seen in the discussions and coming up with figures, it's not an easy task.

PN161

JUSTICE ROSS: Yes.

PN162

MS SHAW: So that could be something that could be as an alternative, but we of course would need to do some further work looking at those and why they weren't taken up previously. With the trade qualified chefs, our award currently has the same classifications as the Restaurant Industry Award and if they're looking to put exemption rates in for those levels, then that would be something that we would potentially be interested in going into our award.

PN163

JUSTICE ROSS: Yes.

PN164

MS SHAW: Yes, so that's were our submission were at the moment.

PN165

JUSTICE ROSS: Okay. Look, I would make the same observation I made in relation to restaurants, that if there are areas that can be progressed more quickly that the parties see as being perhaps less contentious or by consent, then I would certainly encourage you to move on those matters. I don't want the process to be one where we're waiting until the end of it before anything is done in relation to it. Ms Shaw, I would encourage you to have those discussions.

PN166

I would also encourage you to have discussions in addition to the club managers, to the UWU and the AWU, because some of your proposals will affect horticultural and maintenance employees. The trade qualified chef with the UWU, I must confess when looking at this issue early on in the process I did wonder about the chef level and the exemption rate because - and, look, I did have the Hospitality Award and the Restaurant Award for a long time, but it was a long time ago. I remember at that time that chefs were often paid well above the award rate and certainly they could enter into a common law arrangement to have set-off, et cetera, against other provisions.

PN167

The challenge was always if you were paying two or three times the award rate - which was not that unusual in some parts of the industry - and you were also going to be subject to late night penalties and everything else, most of the small operators weren't going to be drafting some sort of offset clause, they were just working on the assumption that they were paying well above, so they didn't have to pay for it. That might be a dangerous assumption.

PN168

I did wonder whether there was scope to - it may not be the proposition you're advancing, but I thought there may be scope for productive discussions around, "Well, what do we do about that circumstance?". There might be a debate about what the level is and what it doesn't cover. There might be a debate around, "Well, it only covers X number of additional overtime hours or X number of night penalties", however that might be framed. It may, as Mr Ryan's proposal does, exclude public holiday penalty rates from any exemption rate.

PN169

So there's a lot of detail to sort through but it is an area where the market rates seems to be well above the minimum rate, at least it was when I last looked at it. For all I know, the market for chefs has collapsed and they're all now on minimum rates, but that was my understanding before.

PN170

MS DUNBAR: Yes, if I could provide some - there is a skills shortage in that area and there's applications, from the government level, to change what's required to try and get in some more visa employees around that, so there is some research being done on what chefs are getting paid currently, so that data could be of interest as well.

PN171

JUSTICE ROSS: Yes. Well, Ms Durban, if you're able to track anything down on that, that would be of assistance. If we can see what people - what chefs are actually paid then that might guide the discussions to see if anything could be done in this space.

PN172

All right, thank you. Ms Shaw - sorry, Ms Durban?

PN173

MS DURBAN: We'll talk to the relevant department.

PN174

JUSTICE ROSS: Okay, thank you.

PN175

Was there anything else you wanted to add, Ms Shaw?

PN176

MS SHAW: No, thank you.

PN177

JUSTICE ROSS: Was there anything from the Club Manager's Association, Mr Cooper?

PN178

MR COOPER: No, your Honour. I agree with Nicola's submission in regards to clause 18.4, that we may reach a consent position on that matter.

PN179

JUSTICE ROSS: Okay. Now, I'll go to Mr Redford and Mr Crawford. Look, I mentioned, Mr Redford, it's - there's not a level of particularity in the proposal at the moment that lends it to too many questions or analysis at this stage and I've suggested that there be further discussions between the parties, it will be an iterative process and we'll see what can develop as a result of that. Was there anything you wanted to say, at this stage?

PN180

MR REDFORD: Only to, I suppose, your Honour, repeat to some extent what I probably referred to, in relation to the other two matters, which is that the discussions that we'll have will benefit from there being specificity around precisely what is being sought. There's been no draft determination filed in relation to this matter, so it would be useful, including in relation to those discussions that we'll have, that that occur.

PN181

JUSTICE ROSS: Okay. All right. Is there any other comment - sorry, Mr Crawford, are you in a similar position?

PN182

MR CRAWFORD: That's fine, your Honour. I support Mr Redford's submission and there's nothing additional I'd add at this point.

PN183

JUSTICE ROSS: All right, thank you. What I'll do, Ms Shaw, because there's not a draft at this stage, I won't list the matter for further conference until you let me know that it's a productive time to do that. So I'll be guided by you about when we bring it back. It may also depend, from your perspective, on progress that's made in the other areas as well, and you'll have an opportunity to (indistinct).

PN184

So if you can - so you'll be in control, to that extent, around the timing. If you can let me know when you think it's worthwhile. I'd make the same offer to the parties in clubs, that I've made for hospitality and restaurants. If, in your discussions, you think a private conference, facilitated by a member of the Commission, would assist at some point, then just contact my Chambers and we'll organise for that to happen.

PN185

Nothing further in clubs?

PN186

Was there anything that any other organisation wished to say, before I adjourn the conference? Any from the ACTU, ACCI or COSBOA?

PN187

MR HARRIS: No, your Honour.

PN188

JUSTICE ROSS: Okay, thanks, Mr Harris.

PN189

MS LAWRENCE: No, your Honour.

PN190

JUSTICE ROSS: Okay, thanks, Ms Lawrence.

PN191

MR KEMPPI: No, your Honour.

PN192

JUSTICE ROSS: Thanks, Mr Kemppe.

PN193

Mr Harris, I should note that I don't want you to feel like I've ignored the Pharmacy Guild's correspondence. It's more that the process was really around the identified awards. If the Pharmacy Guild is minded to file an application, then it can go through a conciliation process and that can parallel the current one. But this set of proceedings was really in response to the Minister's correspondence so at this stage I wanted to confine this process to those awards, but I don't want to preclude you from pursuing a variation which you see is in your organisation's interest. So that option is open to you, okay?

PN194

MR HARRIS: Thanks, your Honour. That was the intent of why I was participating here, from the pharmacy side, was to find out what the Bench itself would like to see when we did put forward a variation and what the discussion was between all the other awards.

PN195

JUSTICE ROSS: Yes. Look, I think there's no issue with you keeping in touch, from the Pharmacy Guild perspective, with what's happening with it and when you feel you're in a position that you want to advance a particular thing you're, of course, free to do that.

PN196

MR HARRIS: Thanks, your Honour.

PN197

JUSTICE ROSS: All right. Well, as I indicated, I'll have a further conference, I'll list a further conference for the week after next, in respect of Restaurant and Hospitality. I'll await the outcome of the discussions within the clubs and further advice from Ms Shaw as to the timing of the next clubs conference.

PN198

Anything finally? Any questions or any other issues? No? It's always difficult with these Teams meetings because I can see most of you so I'll know if someone's jumping up and down, but there are some that I can't see and for all I know you're on mute and you're shouting wildly at the monitor. But I'm not seeing anyone raise anything so thanks very much for your attendance and for the spirit in which you're engaging in the process and I wish you well in your discussions and I'll see you in 10 days or so.

PN199

I'll adjourn. Thank you.

**ADJOURNED INDEFINITELY**

**[10.41 AM]**