TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/21

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

Modern Awards Review 2023–24
(AM2023/21)

Making awards easier to use stream – Consultation 3 – Clerks—Private Sector Award 2020

Melbourne

9.00 AM, WEDNESDAY, 13 MARCH 2024

Continued from 12/03/2024

PN1391

JUSTICE HATCHER: We'll take the appearances. Mr Rabaut and Mr Robson, you appear for the ASU?

PN1392

MR RABAUT: Yes, your Honour.

PN1393

JUSTICE HATCHER: Ms Bhatt, you appear for the Australian Industry Group.

PN1394

MS BHATT: Yes, your Honour.

PN1395

JUSTICE HATCHER: Mr Izzo, you appear for ABI and Business New South Wales.

PN1396

MR IZZO: Yes, your Honour.

PN1397

JUSTICE HATCHER: Ms McKennariey, McInnes and Ms Windsor, you appear for the Australian Workforce Compliance Council.

PN1398

MS McKENNARIEY: Yes, your Honour. Ms McInnes and Ms Windsor will be an apology.

PN1399

JUSTICE HATCHER: Yes, all right. Thank you. And Mr Morrish, you appear for ACCI.

PN1400

MR MORRISH: Yes, thank you, your Honour.

PN1401

JUSTICE HATCHER: I think by now the participants will be familiar with the procedure. I will go through the items in the summary of submissions that was published on the website for these matters, and again, I'll endeavour to confine parties to explaining the purpose of their proposals, including the problems they're trying to fix and identify whether there's any matters that might be the subject of consensus or further discussion.

PN1402

I think we can just pass over the ASU's submission that there's no changes required, so the first one is - and I'll deal with these together - the ABI's proposal for an exemption rate, which is on the first page of the document, and the AiG competing proposal which is at page 13 of the document. So do you want to start, Mr Izzo?

PN1403

MR IZZO: Thank you, your Honour. Your Honour, if I could start with the problem that we're trying to address here.

PN1404

JUSTICE HATCHER: Yes.

PN1405

MR IZZO: We've identified now for the Commission that approximately 50 per cent of clerical workers generally are engaged on rates of pay above the award. In a number of cases those rates of pay are substantially above the award, and what we say is that for a large number of these clerical workers who still may be covered by the award, they are likely to be engaged on annual salaries. So they receive a contract or a letter of offer that has an annualised sum that they receive for an ordinary working week, which notionally is your typical 9 to 5, Monday to Friday, but with built-in additional payments for extra hours that might be worked.

PN1406

The experience that we've had in dealing with members, both members of ABI/BNSW, (indistinct), having dealings with its clients, there is almost a universal experience that these employers are not utilising the annualised wage arrangement provisions in the award. The reason that they're not using the annualised wage arrangement provisions is they have a degree of difficulty in applying safeguards. We had a brief exchange about that last week. I don't seek to cavil with the safeguards in place; there's reasons that the Bench sought to put those safeguards in place, but the difficulty we have is that is making those annualised wage arrangements unapproachable for many employers.

PN1407

By way of example, something that you might consider to be inherent in setting an annualised salary, something like a reconciliation, employers are not very good at doing them, at doing them periodically, and so what's happening is that salaries are being set in a way that may expose employers to breach of the award in terms of underpayment, but more importantly, salaries are certainly being set in a way that breaches record-keeping obligations, and the reason for that is because of regulation 3.34 of the Fair Work Regulations.

PN1408

I don't need to take you to it, but what that regulation says is that whenever any employee in any industry works an hour that attracts an overtime rate or penalty or loading, just one single hour, a record must be kept of that. So if you're employing someone well over award, they might work 38, 40, 45 hours a week, but you've satisfied yourself the salary is sufficient. You can nevertheless breach record-keeping obligations if you have not kept a record of each and every single hour over the ordinary span in a day or over 38 in a week.

PN1409

The experience that we seem to be having is that employees on salaries of 70, 80, 90 thousand, around about that point, there may be a question as to whether the award is sufficiently being offset, all the obligations are sufficiently being satisfied, but there is certainly concern about a record-keeping breach.

PN1410

We say we need a solution to this, because it's unsatisfactory that we have so many employers engaging employees in breach of the record-keeping provisions in particular, and the impetus for this is the massive increase in fines that have recently been introduced by the federal government. A single record-keeping breach now gives rise to a $469,000 fine. These are not small figures.

PN1411

There's two ways to resolve this. One is we go back into the annualised wage arrangement clauses, but we're reticent to do that, because I think there's an interminable contest about how you set the safeguards and what's appropriate and what's too onerous. The better solution, we say - - -

PN1412

JUSTICE HATCHER: What's that? Say that again?

PN1413

MR IZZO: Sorry, what was that, your Honour?

PN1414

JUSTICE HATCHER: What's too onerous?

PN1415

MR IZZO: Trying to set appropriate safeguards in an annualised wage arrangement that sufficiently address the concerns that employees will not be left worse off overall but equally practical enough for employers to apply. That is a very difficult task, and we say that whilst certain safeguards - - -

PN1416

JUSTICE HATCHER: But employers who aren't using the clause but are just paying a salary to satisfy conditions, don't they need to do that anyway? That is, I don't understand how you get around the problem that you need to calculate a salary which will ensure the person doesn't get less than they would under the award.

PN1417

MR IZZO: So there's two responses to that. (1) we're going to do that for them in the award. So we're going to tell them the salary, and I'll come to that as part of our exemption rate. So that way we take away that exercise from the employers, but secondly, there are other safeguards as well. For instance, I think you have to notify the employees of the formula you've used to set up the salary, I think you need to set an outer limit of the number of hours that were covered by the salary and then the hours to which penalty rates apply. There's a variety of protection mechanisms beyond just mere reconciliation that employers are finding very difficult to apply.

PN1418

But even at the most basic level, we are trying to help employers set the right salary so that they don't end up in (indistinct) in the first place, which is setting a salary that's not sufficient to cover the award entitlements, and that's where the exemption rate comes in. So if we set a properly structured exemption rate that's

easy to follow, then the task of reconciliation will largely fall away, provided the employer stays within the ambit of the exemption rate, and if I could perhaps take you to our exemption rate, your Honour. The easiest way to do that is to take you to our reply submissions at page 16, if you have a copy of them handy.

PN1419

JUSTICE HATCHER: Just give me a second.

PN1420

MR IZZO: Yes. I'll just say - - -

PN1421

JUSTICE HATCHER: What was the date of that?

PN1422

MR IZZO: The reply submissions were filed on 19 February this year.

PN1423

JUSTICE HATCHER: Yes.

PN1424

MR IZZO: Before I take you to that, I just want to explain our exemption rate at a very high level. The proposal is you pay 55 per cent above the full-time weekly rate, and that compensates all hours of work, up to 50 hours' work, each week. That's the simple proposal, and the reason we're attracted to that is because it's easy for employers to understand and follow. It's a simple rule. You could see it being applied in shorthand. It's 55 per cent more for 50 hours a week. Ideally we would have said 50 per cent more for 50 hours, but the maths doesn't work out, but 55 per cent more for 50 hours is something we think we can easily educate employers about, and I just want to show you how it works. You will see a table at paragraph 4.8.

PN1425

JUSTICE HATCHER: Yes.

PN1426

MR IZZO: What we've done is, to identify the right exemption rate, we've said you need to assume there's 45 weeks a year of just 38 hours a week. I'll explain why it's 45 weeks in a moment, but 45 weeks a year you get your ordinary 38 hours. We then build on top of that 10 public holidays.

PN1427

JUSTICE HATCHER: Yes.

PN1428

MR IZZO: We build on top of that a week of personal leave. So we haven't assumed two, but we've assumed what we think is fair and reasonable, is likely, that a week will be taken a year or thereabouts, and four weeks of annual leave, plus the leave loading. So that's just the ordinary hours, and then this is the critical part. We've then built in 45 weeks' worth of overtime. The overtime attaches to the ordinary working hours, so it doesn't attach to the public holidays

or the annual leave or the sick leave, but we've got 45 weeks' worth of overtime, 12 hours a week.

PN1429

The majority of that is double time. Eight of that is double time and four of that is time and a half. Again, these are reasonable assumptions over how overtime might fall, but the vast majority, you will see, is double time, and then we've built in a meal allowance. Just to explain the meal allowance, meal allowances are payable under this award when an employee's been required to work overtime when they haven't had the provision of a particular period of notice. The notice, I think, is 24 hours' notice of the requirement to work overtime.

PN1430

We say for these salaried employees, being paid what they are, they're actually likely to have a high degree of control over their work anyway. It's not like they're told each day, 'You must do tasks A, B and C.' A salaried full-time employee is likely to have discretion over their work pattern, but nevertheless, we've brought out 45 meal allowances a week. So that aligns to every week of actual ordinary work we've assumed one meal allowance would be payable at some point in the week.

PN1431

We say if you add all of those entitlements together for a weekly worker, you land at a particular sum. It doesn't matter which grade you use, because ultimately the percentage required will be the same, but we've taken, I think, a level 5 employee in this case and we got to $92,256 will be payable. We then worked out, okay, well, what do you have to pay to get to that amount, and it is 55 per cent above the weekly rate. If you pay that each week you will get to pretty much exactly the same figure or slightly better off.

PN1432

So we've identified that a sum of 55 per cent more than the weekly rate satisfy 50 hours of work a week, and the simplicity to this solution is the employee gets one rate of pay for all their hours, up to 50, and we say for most employees that will cover all their hours. They get one rate of pay up to 50, thereafter it's double time. Whatever they work beyond 50 is double time, which would align with the award requirements, so there's no underpayment. It's simple to follow and they get some added benefits. For instance, their annual leave, personal leave and super will all be paid on the higher rate, whereas the Act does not require that. The Act would require that to be paid on their base rate. So there's an advantage there to the employee.

PN1433

There is naturally an attraction for obtaining finance and other things from banks, because they'll have a higher rate to rely upon, and we say, also, very importantly, this will provide an incentive to employ people on higher sums. So where someone's engaged just below this figure, you will likely see employers attracted to the notion of bumping their salary up somewhat to hit that level.

PN1434

The only issue the employer needs to grapple with from a record-keeping perspective, and this is, we say, the immense benefit of this clause, they have to grapple with one issue - 'How do I work out whether someone's going to work more than 50 hours a week?' We say because that number's quite high, there's a variety of mechanisms an employer might adopt. Those mechanisms might not need to be as rigid or proscriptive as when you're monitoring every hour after 38. They could start to rely on managerial oversight, they could have rules about, 'You can't work more than X.'

PN1435

Because we're allowing so many overtime hours in each week, that's the only thing they need to worry about, and as long as they stick with that, no record-keeping breach at all. Because this award will not require an extra payment to be made for the 39th hour, 40th hour, there's no record-keeping obligation for the 39th, the 40th or the 41st hour. The record-keeping obligation will only kick in for the 50th hour.

PN1436

JUSTICE HATCHER: This assumes Monday to Friday work.

PN1437

MR IZZO: It assumes Monday to Friday work, but even - and I think we could still address that your Honour. Because of the number of overtime hours worked, even if - or at least one weekend - let's say an employee was working Sunday to Thursday, I mean, you still would have a high level of loaded hours in there. We've got 12 hours of penalty rates to work with to satisfy times in which penalties might apply.

PN1438

Perhaps the issue might arise - if they're working Saturday and Sunday as well as three week days, we might need to have another look at the calculations, but the reality is, that's very unlikely for the vast majority of clerical workers. In our submission, most clerical workers who work a weekend will probably be doing that as an additional hour, an extra hour, and that's clearly captured by our overtime, because the first couple will be time and a half and then into double time.

PN1439

JUSTICE HATCHER: There is an issue which AiG raises about the span of hours which feeds into this, but - - -

PN1440

MR IZZO: Is that the possibility that they'd be working outside the normal span? Is that what - - -

PN1441

JUSTICE HATCHER: 13.3 has a span of 7 am to 7 pm, Monday to Friday and then 7 am to 12.30 pm on Saturday, but that's subject to - I'll call that a majority clause, where if the majority of the workplace is on a different award with a wider span, then the wider span applies, and I note that the penalty rates clause sets penalty rates for ordinary time on Saturday and Sunday in any event.

PN1442

MR IZZO: So in terms of the span, I mean, there's a couple of ways to deal with that. Again, the vast majority of workers would be working mostly within that span. To the extent they work beyond it, it's more likely to be extra hours in the day, and we have 12 of them to play with, effectively, as a buffer, so I think propensity for some clerical worker to be substantially left worse off is unlikely.

PN1443

In terms of weekends, if they were regularly working Saturday and Sunday as their ordinary hours, we could re-do the numbers on that. It's possible there may need to be some mechanism guarding against Saturday and Sunday as a regular pattern, but as I said, even if they're only working one weekend day, there's probably sufficient buffer in the penalties, but given that that is likely to be quite rare, we'd be content in talking about some safeguard in relation to someone working Saturday and Sunday as their regular pattern.

PN1444

JUSTICE HATCHER: And how do you see this comparison interacting with section 62 of the Act, in terms of ordinary hours and reasonable overtime?

PN1445

MR IZZO: In the way that any other salary currently would. There's no provision here that says an employee must work those hours. This is simply dealing with the payment entitlement for those hours. So if an employer asks an employee to work a 45th hour and that's unreasonable, section 62, I think, if I remember - section 62 would still have effect. Now, if you needed a note to make that clear, that can be done, but this would not in any way be inconsistent with section 62. It's just about what payment you get, not whether you can be compelled to work.

PN1446

JUSTICE HATCHER: All right.

PN1447

MR IZZO: Can I just say one thing? So that's the way in which the clause operates. The question that arises, when Ms Bhatt comes to her feet, really is, is our proposal the right proposal? I think Ms Bhatt shares our view as to the problem, and I think there is consensus amongst employers. ACCI made a similar comment last week, that the annualised wage arrangements are not getting the take-up necessary to have a practical solution, putting people on salaries. The question is, is this the right solution?

PN1448

We say that our proposal is more conservative than Ai Group's, because our solution assumes employees will actually work 50 hours each week. That's what we've compensated for. Whilst that's theoretically possible, Ms Bhatt will probably say that it's unlikely that they will work 50 hours each week, and we acknowledge that the Ai Group model tries to be more realistic by making accommodation for the fact that employees won't always work such substantial hours, and so we do support the Ai Group proposal.

PN1449

We think the Ai Group proposal is fairer to employers, but the reason we've advanced our proposal is because it must be acknowledged that the Ai Group model exposes itself to criticism that hypothetically an employee somewhere could be left worse off. They have a sliding scale of payments to ensure that the lowest paid are most protected, but higher up the classification scale there's still a prospect of extra hours being worked, and so we suspect there might be some hesitancy on the part of unions and the Commission.

PN1450

We don't say their model is wrong. We support it and think it would broadly assist employers engaging people in a fair and relevant safety net, but we're mindful of the reality of the modern awards objective and how the Commission determines these matters, and so we've tried to adopt a more conservative proposal in the hope that anxieties of the unions and the Commission will be better addressed by our proposal. So that's why we support theirs as well but why we've advanced our own, which is somewhat different. That's all I propose to say at this stage, your Honour, unless there are any questions.

PN1451

JUSTICE HATCHER: All right. Do you want to address your proposal, Ms Bhatt?

PN1452

MS BHATT: Yes, your Honour. To some extent, I think Mr Izzo has made the case for our proposal. Certainly there is a shared view about the problem that we're trying to solve, and as has been identified, the solution that we've proposed is different. It reflects what, I think, was, once upon a time, the standard under the New South Wales NAPSA, in particular. It operates by reference to a rate that exceeds the highest base rate prescribed by the award by 15 per cent, and so it creates an inverse relationship between the classification level and the exemption rate, which does, as Mr Izzo has identified, create a greater safeguard for employees that are classified at the lower levels.

PN1453

I think we have various concerns about the proposal that's been advanced by ABI, which we've set out in our reply submissions to some extent. We're just not convinced that it is necessarily the most appropriate way of dealing with the problem. In particular, there are a number of assumptions that appear to underpin that model which I think in some circumstances will result in the exemption rate or the provisions simply being inaccessible to a number of employers and employees who are, nonetheless, paid rates that well exceed those prescribed by the award.

PN1454

If your Honour has our submissions to hand, at page 93 there's a table in which we've calculated the difference between the exemption rate and the minimum rates prescribed by the award that identifies the difference, and you can see that particularly at the lower end of the classification level, there is a significant difference or buffer, if you will, that sits between those two rates.

PN1455

JUSTICE HATCHER: Yes.

PN1456

MS BHATT: Beyond that, we echo the sentiments that Mr Izzo has expressed about the obvious benefits that will flow from a provision of the nature we've proposed, including the certainty and predictability of earnings for employees, as well as the obvious benefits for employers in terms of record-keeping and so forth.

PN1457

JUSTICE HATCHER: Where does the 15 per cent come from?

PN1458

MS BHATT: The 15 per cent was reflected in various pre modern awards. I think we've set out the history in our written submission as it was dealt with during the part 10A award modernisation process. It was identified as reflective of the standard that applied across many of those pre modern instruments that contained exemption rate provisions, particularly in New South Wales, and that history starts at page 85 of our submission and goes on until about page 90.

PN1459

JUSTICE HATCHER: Regardless of the history, at least at level 5, 15 per cent doesn't buy you much, does it? Only a few hours' overtime, isn't it?

PN1460

MS BHATT: Quite obviously the buffer gets smaller as you reach the higher end of the classification structure. We say that one of the benefits that flows from the introduction of an exemption rate provision is this idea that it creates an opportunity for an employer and an employee to strike what was described in some of those earlier decisions as a notional bargain and will result in employees being paid a salary that is higher than what they might otherwise be paid, because it results in these benefits for employers, that is, that they no longer need to comply with the various record-keeping requirements.

PN1461

JUSTICE HATCHER: The 15 per cent amount in the former awards did not include overtime, I understand.

PN1462

MS BHATT: I would need to take that on notice, your Honour.

PN1463

JUSTICE HATCHER: I'm looking at the old Clerks State Award, which makes it clear that the wage is not inclusive of overtime payments or shift allowances.

PN1464

MS BHATT: I'd need to take that on notice. We can give that some further consideration.

PN1465

JUSTICE HATCHER: The other difference between your proposals and Mr Izzo's is that, if I've read it correctly, yours is by employer right, not by agreement.

PN1466

MS BHATT: That's correct.

PN1467

JUSTICE HATCHER: Yes. All right. Anything else?

PN1468

MS BHATT: No.

PN1469

JUSTICE HATCHER: What does the ASU say about this?

PN1470

MR RABAUT: Thank you, your Honour. We oppose the employers' proposals based on two particular criteria. (1) we say it creates complexity, and the second criteria is we say it reduces the workers' entitlements. So on the first point, we say it creates complexity, based on the fact that it introduces three provisions that deal with regulating overtime, penalty rates, allowances, leaving loading and the arrangement of hours, and those particular provisions are the IFAs, annualised salaries and, as the employers would put forward, the exemption provision.

PN1471

We also say that the annualised salaries and the IFA provisions provide important protections for the employees, in terms of calculating what those boundaries might look like, to ensure an underpayment doesn't occur.

PN1472

JUSTICE HATCHER: You're talking about the annualised salaries provisions, aren't you, not the - - -

PN1473

MR RABAUT: Yes, correct. Sorry.

PN1474

JUSTICE HATCHER: Yes.

PN1475

MR RABAUT: Our second point is the proposal obviously excludes a number of entitlements that workers currently receive - obviously things like breaks, break penalties, public holidays, minimum rates and rostering arrangements, and we say, in fact, an exemption that applies to the rostering arrangements runs contrary to the job security stream currently being examined by the Commission.

PN1476

In addition to that, the Clerks Award also covers call centre workers. The call centre workers often work fixed evenings, night or weekend shifts, and we say that the employer proposals don't adequately consider those particular variants.

PN1477

JUSTICE HATCHER: As a matter of concept, if you come up with a number that ensures that the worker is not worse off financially, why isn't that a good thing? That is, it effectively locks in a higher rate, which may mean the worker's better off in some weeks and can't be worse off in other weeks and has all the benefits of a high guaranteed income.

PN1478

MR RABAUT: There may be some benefit for a worker in that particular aspect, but we say the appropriate mechanism for that is the annualised salary or an IFA provision.

PN1479

JUSTICE HATCHER: Okay.

PN1480

MR RABAUT: Thank you, your Honour.

PN1481

JUSTICE HATCHER: Mr Izzo, can your proposal be done as an IFA?

PN1482

MR IZZO: I think there's - - -

PN1483

JUSTICE HATCHER: I mean, it allows you to substitute for overtime penalty rates, et cetera.

PN1484

MR IZZO: There's two difficulties with that, your Honour. We're trying to help employers who cannot grapple with this themselves at the moment. The common experience is, people being put on salaries, there's an element of set and forget, and employers are struggling with the obligations around something as simple as reconciliation to something more complicated, like setting outer limits and things like that that are mentioned in the annualised wage arrangements. I think - - -

PN1485

JUSTICE HATCHER: No, I'm not talking about annualised wages, I'm talking about an IFA - - -

PN1486

MR IZZO: I understand the proposal.

PN1487

JUSTICE HATCHER: - - - under clause 5.

PN1488

MR IZZO: What I'm suggesting is that I think some - the answer is technically yes. Practically, is that something employers can achieve, some maybe yes, some not, and when I say some not, that's because they don't necessarily have the sophistication to grapple with all these issues. We're trying to - - -

PN1489

JUSTICE HATCHER: But that's what people like you do.

PN1490

MR IZZO: What's that, sorry?

PN1491

JUSTICE HATCHER: That's what people like you do. You tell them how to do it.

PN1492

MR IZZO: We do, but either they're not listening or they're not coming in advance enough. They're just not - the message is not resonating.

PN1493

JUSTICE HATCHER: But that's a communication problem, it's not an award term problem. If an IFA allows you to do this by agreement, I don't understand why we'd set up some elaborate new mechanism which you will probably tell us in three years doesn't work.

PN1494

MR IZZO: The IFA is - - -

PN1495

JUSTICE HATCHER: If we adopt your proposal, Ms Bhatt will be telling us in three years that no one took it up because it cost too much.

PN1496

MR IZZO: The way I see it is that there's two concerns with the IFA. The first I think I've already put, which is simply doing the maths, conducting the exercise, signing everyone up to individual flexibility arrangements. That itself, at an administration level, may be beyond some employers.

PN1497

JUSTICE HATCHER: Let's break that up. You've done a proposal which has done the maths. If I understood your submission correctly, you would say the employee would be better off overall.

PN1498

MR IZZO: I do. To come to my second concern, I mean, there's - - -

PN1499

JUSTICE HATCHER: So you can just roll that out as a template, if you had that as a model, and secondly, like your proposal, it's by agreement anyway, so no difference in that respect.

PN1500

MR IZZO: The second concern that I think arises, is that we are still trying to ensure a model that is better off broadly, in the aggregate. So I imagine the advance that's going to be made at some point is that there is some small allowance that hasn't been thought off, or there's some propensity for some issue, somewhere, to have not been picked up. Our position is not that in every single

hypothetical case no employee is left behind, but our position is in the vast majority of the cases this will be more beneficial.

PN1501

If we go by IFA, there's still a prospect that someone, somewhere, might - if they work close to 50 hours each week, there might be an allowance somewhere that's been left off. We've tried to do this in the aggregate, and I think in the aggregate is a fair solution. Is it the case that every single IFA will be better off overall? I can't say that it would be.

PN1502

The third issue relates to the record-keeping. Would the IFA have the effect of exempting the employer from the obligation to keep records after 50 hours? Possibly.

PN1503

JUSTICE HATCHER: I think it would, because clause 5.1 talks about varying the application of the identified terms, including overtime, and then that's required to be kept as a time and wage record.

PN1504

MR IZZO: Yes, so they'd need to keep the IFA as a record, but perhaps not - - -

PN1505

JUSTICE HATCHER: But that, in effect, would establish the new benchmark, on your - if your proposal was adopted as an IFA, it seems to me that it would change the application of the overtime clause to apply only after 50 hours.

PN1506

MR IZZO: So that being the case then, it's the first two matters I raised which we see as not being - - -

PN1507

JUSTICE HATCHER: Which are what?

PN1508

MR IZZO: The first is we're not convinced the employers have the administrative ability, the sufficient resources, to even put that in place. That was the first.

PN1509

JUSTICE HATCHER: They might not, but you can just write a template that would do this.

PN1510

MR IZZO: That assumes, your Honour, that I have reach into every business in the country. I don't. There's many employers that come to us when they've set up arrangements without the benefit of my organisation or Ms Bhatt's organisation's input, and then we're left to unscramble the egg. Not every business comes to my firm to get advice before setting up - or any other firm, before setting up their arrangements.

PN1511

JUSTICE HATCHER: Your proposal has some attraction, but I think we need evidence that somebody actually wants to use this. I'm not inclined to put another page of text in the award and then find out years down the track that nobody's used it. What's the evidence that somebody would actually see this as a good idea?

PN1512

MR IZZO: The attraction to me is the sellability, the simple solution. As I said, 55 per cent above the 50 hours is something simple - - -

PN1513

JUSTICE HATCHER: I mean, you can't even sell an IFA. Why should I take your word that you can sell this? You just said to me that they're not listening to you. I mean, if there's a - - -

PN1514

MR IZZO: (Indistinct) start listening, your Honour, but we don't have reach to every business. It's a (indistinct).

PN1515

JUSTICE HATCHER: I understand that, but I think you'd really need evidence that there's a whole range of businesses who want to do this. (Indistinct) - - -

PN1516

MR IZZO: It may be that we need to present - - -

PN1517

JUSTICE HATCHER: - - - that would actually take this up - leaving aside what employees might say about it, the starting point, it seems to me, that employers would actually want to use this.

PN1518

MR IZZO: If it comes to it, we are more than prepared to try and put together that evidence. In terms of the seriousness with which we bring this application, that's why - sorry, this proposal, was why we accompanied it with an application. We certainly think this is the solution. And it's not just one for Clerks. Our view is Clerks was the only award within the seven that was permitted to be considered, but there's others that - big outfits - banking, finance, insurance is another classic example where this would, we think, readily be taken up, because some of those employers do pay higher amounts.

PN1519

So we're prepared to put together evidence, if we need to, as part of a more formal process, absolutely. We just think the current solution's not working. The problem still exists, and we think this is an easier concept to understand. And Ms Bhatt's right, we've set it at a rate that not everyone's going to be able to take advantage of.

PN1520

One of the questions is if the Commission is not minded to accept Ms Bhatt's proposal, do you need two versions of ours, one at 50 hours and one at 45,

because then you can have the lower award approach for salary? That's possible. Someone's going to say, 'That now becomes more complicated', but at the very least we need something, and we think it will get take-up, and if we have to file evidence to that effect, then we'll embark upon that activity.

PN1521

JUSTICE HATCHER: All right. Ms Bhatt, I think you need to address the overtime question. There's a big difference between 15 per cent, which - - -

PN1522

MS BHATT: Yes, sir.

PN1523

JUSTICE HATCHER: - - - makes things administratively simpler and 15 per cent which just takes out the overtime entitlement, and the same might apply for weekend penalty rates, but - - -

PN1524

MS BHATT: I understand, and we'll give all of that some more thought. I think in relation to the issue of IFAs, to add to what has already been put, if nothing else, then to most employers it would not be apparent from a review of the award that this is an arrangement that can be implemented by way of an IFA. Yes, many of them seek advice from many of the organisations appearing before you today and might ultimately obtain that advice and look to implement those sorts of arrangements, but if we're looking to make awards easier to use, it is not apparent or obvious that that is an option that is readily available.

PN1525

As for the question of evidence, I think repeatedly we have been provided with feedback from employers that the annualised wage arrangement provisions are imposing very complex record-keeping requirements in particular, and indeed that many employees resist or are resistant to directions to maintain the kinds of records that are required for an employer to then be able to satisfy their obligations under that clause. Some of these are employees that are quite senior, that have autonomy and enjoy having that autonomy, and they sort of perceive that any requirement to keep records of their hours is reintroducing a Bundy clock mentality or in some way impeding upon their autonomy or independence.

PN1526

JUSTICE HATCHER: Well, perhaps, but, I mean, I remember we heard about all this in the Legal Services Award, where we introduced a clause and various employers came before us and said that, 'We're paying these higher salaries and this covers everything in the award and this is bureaucracy gone mad', and as soon as the thing was implemented there's all these underpayments that had to be rectified. So you need to persuade me that this is just about administrative simplicity and not just about saving a little bit on wages.

PN1527

MS BHATT: Yes, I understand, and I think the circumstances will necessarily be different between different industries and occupations. We might get into all of that further down the track, but I take your Honour's points.

PN1528

JUSTICE HATCHER: All right. We might park that for the time being. Ms McKennariey, the next four proposals raise matters which you've raised in a number of awards. Unless you want to say anything additional now, I just propose to put those to one side but again invite you, if you want to, to make specific proposals for variations of the awards and to do so within six weeks. Is that suitable?

PN1529

MS McKENNARIEY: Yes, your Honour. Happy to take that approach.

PN1530

JUSTICE HATCHER: All right. The next one, which you actually have got a detailed proposal for, is the variation to clause 5, individual flexibility arrangements. Do you want to explain what this is intended to address?

PN1531

MS McKENNARIEY: Yes. The proposal is basically aiming to simplify language and offer additional guidance on assessing employee benefits under clause 5. The aim is to provide a clearer guidance on assessing employee benefits under the IFAs. In summary, it's clarifying the agreement terms, the requirement for genuine agreement and making sure that no coercion has occurred and a conversation of some kind enabling understanding has happened so there's good employer proposal and understanding, tone of the agreement and adherence to better off overall requirements and ensuring the understanding as to whether or not the IFA qualifies, and what is required for inclusion in the agreement and how to go about assessing the employee benefits.

PN1532

It also guides to seek clarification and advice, which I think also speaks to the point that Mr Izzo raised around employers not seeking guidance, where there may be assumptions made around what constitutes better off overall under an IFA. So for that reason we feel that those types of - whilst they might be perceived as small changes and potentially not highly impactful, we think that may drive different behaviour and bring out more to the attention that there is complexity, and a need to seek guidance where there is complexity, with the benefits assessed in April.

PN1533

JUSTICE HATCHER: All right. Does anyone want to comment upon this proposal? Mr Rabaut?

PN1534

MR RABAUT: Your Honour, just to make a very brief point around removing the - apologies, your Honour. That's okay. I withdraw that.

PN1535

JUSTICE HATCHER: All right.

PN1536

MS BHATT: We've dealt with that carefully in our written reply submission. We're content to rely on that.

PN1537

JUSTICE HATCHER: All right. In relation to the next one, clause 6, again I'll invite you to file a detailed proposal, Ms McKennariey. In relation to clause 7, can you just explain what you're trying to do there?

PN1538

MS McKENNARIEY: So the current clause lacks particular examples or scenarios, which makes it challenging for the employers and employees to understand how facilitative provisions can be applied in practice, so providing some basic examples enhances that understanding and demonstrating some real world situations that employers and employees can then utilise facilitative provisions to tailor their arrangements according to specific needs.

PN1539

It fosters a bit more flexibility between a mutual agreement between employers and their employees and encourages them to explore more customised, more implement customised arrangements that suit their circumstances in both ways. So effectively what we're looking at is just some additional examples. Happy to take the point from ASU around better suited to guidance, so as far as where that fits, but providing that guidance nonetheless we feel is important.

PN1540

JUSTICE HATCHER: I'm just looking at your first example, 13.4. I'm not sure that's even allowed by 13.4, because 13.4 is confined to moving the spread forward or back one hour by agreement, but I think you're talking about something different from that, aren't you?

PN1541

MS McKENNARIEY: I think it should be 13.4, allowing spread of ordinary hours.

PN1542

JUSTICE HATCHER: But 13.4 allows the spread to be moved one hour forward or one hour back, by agreement.

PN1543

MS McKENNARIEY: Yes.

PN1544

JUSTICE HATCHER: I'm not sure that is the same thing as the scenario you've got in your proposal.

PN1545

MS McKENNARIEY: Sorry, just checking 13.4 wording against it as well. I believe it does align with 13.4. It allows for flexibility in the spread of hours worked and it should enable them to put in the alternative work arrangements to suit both parties. What is it that you see as being outside of that boundary?

PN1546

JUSTICE HATCHER: 13.4 allows, by agreement, an earlier start or a later finish, but that's all it does. It doesn't, as I read it, allow for what you're talking about.

PN1547

MS McKENNARIEY: Compression of days, specifically. So if we changed that specific scenario to be more appropriate for a spread of hours example - - -

PN1548

JUSTICE HATCHER: Yes, but again, I'm not sure what value this is adding. I think, from my perspective, the clause is pretty clear. I'm not quite sure what value this is adding.

PN1549

MS McKENNARIEY: So the clarification itself, because of it not having those potential scenarios, it's just the lack of context, really, and understanding, from different employers. We find that there's different interpretations as to what's intended under the facilitative provisions.

PN1550

JUSTICE HATCHER: Sure, but what are the different interpretations? I mean, if somebody doesn't understand what it means, or there's some ambiguity in language, that can be fixed, but that doesn't appear to me what you're trying to do.

PN1551

MS McKENNARIEY: It's more of a lack of recognition of its purpose and where the scope applies. We find that there's misinterpretation or skipping over that from an employer's perspective, or they neglect the importance of ensuring employees' rights and entitlements are adequately protected. So having those examples we felt would put some clearer boundaries as to what the intention was and provide extra context.

PN1552

JUSTICE HATCHER: All right. Does any other party want to comment on this? Mr Izzo?

PN1553

MR IZZO: We just wish to note our opposition, your Honour, primarily for the reason that we do think that the provision is easy to follow, and we have a hesitancy to have any examples introduced, because then you have to make sure the example works in all scenarios. As you pointed out, the first example doesn't appear to align to clause 13.4. So we're just not satisfied there is a need for this particular clause to be introduced. We didn't respond in writing, so I just wanted to put our position on the record today.

PN1554

JUSTICE HATCHER: Ms Bhatt?

PN1555

MS BHATT: We've responded in writing.

PN1556

JUSTICE HATCHER: Mr Rabaut?

PN1557

MR RABAUT: We've responded, and don't think it's necessary.

PN1558

JUSTICE HATCHER: In relation to the next three, Ms McKennariey, again I'll simply invite you to file more specific proposals within six weeks. The next one is Ai Group, clause 10.5. Ms Bhatt, do I understand this correctly to say that - to make it clear that if you don't actually have three hours' work, you still have the option of paying three hours?

PN1559

MS BHATT: And that would satisfy - - -

PN1560

JUSTICE HATCHER: And that would satisfy the obligation. I think there was a not unrelated proposal raised by the AHA yesterday in relation to the Retail Award. So what's wrong with this, Mr Rabaut?

PN1561

MR RABAUT: Your Honour, our concerns primarily stem from the second limb of the proposal, which relates to the fact that the obligation stands provided that the employee is ready, willing and able to perform such work. So our concern is whether there's appropriate safeguards in the scenario of whether an employee suggests that they're not ready or capable to complete the work, therefore the first limb of the proposal no longer stands. So broadly speaking, there's no concern around how Ms Bhatt's just summarised her proposal, but our concern primarily stems from the second limb of it.

PN1562

JUSTICE HATCHER: Ms Bhatt, why are those words necessary?

PN1563

MS BHATT: They're to deal with circumstances that might arise whereby an employee is not available or able to perform the work. It's not an issue that relates to their capability to perform the work but rather their availability to do so.

PN1564

So you might have situations in which there's three hours of payment that is required to be made but the employee leaves work early because they're not well. The requirement to make the minimum three-hour payment, we say, shouldn't apply in those sorts of circumstances. They're not likely to arise very often, but we've tried to introduce a descriptor in the provision to deal with those sorts of scenarios, and which I believe were taken from some other awards that contain minimum payment provisions.

PN1565

JUSTICE HATCHER: But that scenario would just be dealt with by the sick leave provision, wouldn't it?

PN1566

MS BHATT: Generally it would.

PN1567

JUSTICE HATCHER: That applies to every payment obligation. An employee could go home sick and it needs to be accommodated by sick leave.

PN1568

MS BHATT: Yes, and so generally I expect that that is how it would be dealt with, particularly in the context of part-time employees to whom this provision applies, as opposed to casual employees, but as I say, it was intended to guard against those sorts of scenarios where perhaps an employee doesn't have a leave entitlement.

PN1569

JUSTICE HATCHER: All right. The next one is yours, Ms McKennariey. Casual conversation is dealt with in the NES. I don't understand what you want the award to say about it.

PN1570

MS McKENNARIEY: We can have a look at that.

PN1571

JUSTICE HATCHER: Yes, because I think - and this applies to a few later on, I think. The Commission's approach, broadly speaking, is that it's not going to try to summarise what the NES says, because there's a danger that it will be inaccurate or inadequate and will mislead employers, but can you elaborate what you want the award to do?

PN1572

MS McKENNARIEY: It was just providing a little bit more clarity within the award around the process and the request for casual conversions, so we can potentially elaborate on that a little bit further in a further proposal.

PN1573

JUSTICE HATCHER: But again, that would involve trying to somehow paraphrase or summarise the NES, wouldn't it? That is, the award itself doesn't contain a casual conversion provision, it just points the employer in the right direction.

PN1574

MS McKENNARIEY: Yes. I think it's more around the offer process that the context within the - - -

PN1575

JUSTICE HATCHER: But again, that's in the Fair Work Act. That is, that's not an award provision, that's in the Fair Work Act.

PN1576

MS McKENNARIEY: And then or referencing the Fair Work Act with respect to that process for offers.

PN1577

JUSTICE HATCHER: All right. Again, the next two, I'll invite you, Ms McKennariey, to file more a specific proposal. The next one is the span of hours.

PN1578

MS BHATT: Yes, your Honour. The proposition is simply this. Under the award currently, ordinary hours can be worked on a Saturday up until 12.30 pm but not beyond that, and they can't be worked at all on a Sunday. It is becoming increasingly common, of course, for many businesses who are covered by the Clerks Award to operate seven days a week, particularly in call centre environments, and so the proposal is that span of hours be changed so that ordinary hours can be worked on a weekend, and we've proposed some consequential changes which will result in a certain penalty rates applying to that work.

PN1579

If your Honour has the award open, or to hand, if we look to clause 24, clause 24.2 would apply to ordinary hours worked on a Saturday - as it does presently to any ordinary hours worked on a Saturday morning, and then clause 24.3 would apply to a Sunday. So it's 125 per cent on Saturday and a 200 per cent penalty on the Sunday. That's the proposal.

PN1580

JUSTICE HATCHER: Those provisions are already there. They don't need any change. If you got your wider span, they just operate in conjunction with these provisions as they stand, don't they?

PN1581

MS BHATT: They would. That's right.

PN1582

JUSTICE HATCHER: Just going back to the hours clause, so leaving aside call centres, I would have thought that it would be fairly common for 13.5 to apply at many clerical - for example, an office attached to a warehouse or a manufacturing establishment. Is that your experience?

PN1583

MS BHATT: I can't comment on that without instruction. The specific instance in which this has been put to us does relate to call centres, where I think clause 13.5 might have some limited application, but it may well be that in many other scenarios employers are able to rely on 13.5, and so the necessity to vary clause 13.4 doesn't (indistinct).

PN1584

JUSTICE HATCHER: So then if you had your proposal, we could take out 13.5 or - - -

PN1585

MS BHATT: The other issue that clause 13.5 deals with is the span of hours that is the start and end time on given days of the week. There might be other modern

awards that have a different span of hours, and it's relied upon to that extent. We'd express some caution about removing that provision without considering those issues further.

PN1586

JUSTICE HATCHER: All right. So what's wrong with this proposal, given that, perhaps somewhat discongruously, the penalty rates clause already sets ordinary time penalties for Saturday and Sunday?

PN1587

MR RABAUT: Your Honour, if I may take that question on notice, for a moment. Your Honour, I wouldn't want to mislead you, so do you mind if I just take that question on notice?

PN1588

JUSTICE HATCHER: Yes, of course.

PN1589

MR RABAUT: Thank you.

PN1590

JUSTICE HATCHER: Would I be right in saying, Ms Bhatt, that a lot of call centres would utilise the shift work rules?

PN1591

MS BHATT: Certainly some do. I'm not sure if a lot do or many do.

PN1592

JUSTICE HATCHER: And I right in saying that allows for ordinary hours on Saturday and Sunday at which the same weekend penalty rates would apply?

PN1593

MS BHATT: The weekend penalty rates for shift workers appear to be set in clause 31.1, and that is 150 per cent for Saturday, Sunday.

PN1594

JUSTICE HATCHER: Yes. So if they use shift work, a call centre would have access tot hose penalty rates, which are, arguably, in aggregate, lower than the other penalty rates in clause 24, so the only application would be if they're just confined to day work.

PN1595

MS BHATT: That's right.

PN1596

JUSTICE HATCHER: Can I invite the ASU to have a think about that? It may be then that if this is implemented in some fashion, there might need to be some consideration of aligning the weekend penalty rates so that you don't get this continuity. It would be odd that someone on an afternoon shift is getting 50 per cent on a Sunday but someone doing day work is getting 100 per cent.

PN1597

MS BHATT: I'll give that some further thought.

PN1598

JUSTICE HATCHER: How long might the ASU need to have a think about this?

PN1599

MR RABAUT: Your Honour, we'll be able to respond by the end of the week.

PN1600

JUSTICE HATCHER: All right. I wasn't suggesting you do it that quickly, but I think it's a serious proposal, so can I ask you to file a short document setting out your considered position say within four weeks?

PN1601

MR RABAUT: Absolutely, your Honour.

PN1602

JUSTICE HATCHER: The next one, I think we've talked about this in another context, Ms Bhatt.

PN1603

MS BHATT: Yes, we have.

PN1604

JUSTICE HATCHER: I think as Mr Izzo explained in one of the earlier consultations, this might lead to the annoying result that employees are flooded with an inundation of 15-minute training things they have to do in their own time. I mean, is there some sensible limitation that could be placed on this?

PN1605

MS BHATT: We can give that issue some further thought. This proposal is not directed towards those sorts of scenarios. It's intended to deal more generally with circumstances in which employees are working from home and creating mechanisms by which their hours can be arranged more flexibly. If the question is about what limitations need to be placed on it so that it doesn't apply in those sorts of scenarios, we can give that some further thought. That's certainly not what it was intended to do.

PN1606

JUSTICE HATCHER: All right. So for the ASU's benefit, and this has come up in some of the earlier consultations, one option which the Commission might consider is calling on a matter of its own motion, and the Clerks Award would be the most sensible award to start with, I think, to develop a facilitative working from home clause, which would involve agreements between individual employees and employers which give them a right to work at home on certain days but would require modification or non-application of certain clauses in the award. The most obvious example is the requirement to work hours continuously, because we know as a matter of practice that one of the benefits of working from home is employees don't have to do that and they can do things in the middle of the day, et cetera, et cetera.

PN1607

There's an issue about span of hours. I'm not sure but I think it meant engagements. But there may be other things. For example, I'm not sure whether meal allowances would have any relevance to working from home. And there's a bigger issue as to how we deal with overtime entitlements and how to record those and pay those if the employee is, in effect, in control of their own working hours when they're at home.

PN1608

So, I'm not asking the ASU at this stage to come up with all the answers to that. But I'm just wondering whether those who would have any opposition to the notion that we would specifically support a clause of that nature in a proceeding to follow the review.

PN1609

MR ROBSON: I might address this, your Honour.

PN1610

JUSTICE HATCHER: Yes.

PN1611

MR ROBSON: From our perspective we are unsure of the need for a facilitated provision from working from home, other than perhaps the term that we're seeking through the work and care stream that we'd like to request. I think it's very unclear what the extent that the circumstances that AiG has brought up in its submissions are common or if they apply to (indistinct) workers.

PN1612

I think a significant problem with the proposal they've made is the use of the word, 'designated workplace.' I'm unaware of any working from home arrangement that applies to a broader EBA for a worker that allows them to work anywhere. Quite usually, if someone is permitted to work from home they are permitted to work from home. They can't work in Bali. They can't work in a café. They have to work from that location.

PN1613

But then I think there's also the point of 13.8 which allows an employee to take off time during ordinary hours and make up that time later. We say that addresses a lot of the concerns about employees' flexibility to work during the day. I think it's also worth considering the amount of time that a person, perhaps in an office, and this might be covered, would spend attending directly to their duties at all times of the day, that that needs to be considered and whether there's some space in working from home to acknowledge that employees permit people to talk to their colleagues over a coffee. Why would that not apply at short, similar - you know, intervals between periods of work, apply at home.

PN1614

And I think when we get into some of the issues about meal breaks, the recording of overtime, I think they were cognisant of relevant issues there but I think you're quite right, your Honour. This is something that needs to be a matter of evidence and more detailed consideration.

PN1615

JUSTICE HATCHER: I'm not asking you to respond specifically, necessarily to the AiG proposal.

PN1616

MR ROBSON: Yes.

PN1617

JUSTICE HATCHER: But just the concept that we should have a proceeding in which we have some detailed consideration of a working from home clause which might actually be an encouragement for employers to allow people to work at home by taking away some of the inflexibility of the act. For example, if the award has a 7am start time for ordinary hours but someone has to take an hour to drive to work, it might suit them to start at 6.00, work two hours, go to their yoga class, come back, work three hours, go to lunch with somebody, come back and I'm sure many employees would be perfectly happy accommodating that. But there may be a whole range of award provisions which stand in the way.

PN1618

MR ROBSON: Yes. The first thing I have to say is I'm unsure that's something that employees' work who's covered by this award are necessarily going to be interested in. I imagine that's an issue that's relevant to more highly paid employees who might be at executive level who aren't covered by it.

PN1619

Our starting point, in any case, will be that this is a safety net entitlement and any departure from minimum engagements, spans of hours, would need to be very carefully considered and subject to evidence from employers. It is certainly not a demand from our members asking to change the span of hours so that they can start earlier if it's just not a commute.

PN1620

If there's a clause that allows them to do it you can push that back to 6am. We'd say that's as probably as early as you should do if it's going to be day work. Otherwise it probably should be shift work. If there is a proposal to enforce from employers to seek a clause like this the appropriate case to do it is in a future case in the Commission. And similarly, if the Commission believes there is a need to address this issue then the appropriate place to do it would be future proceedings after the conclusion of the review.

PN1621

JUSTICE HATCHER: Yes. All right. Ms McKennariey, I think I'll – the next proposal of yours, I think again I'll invite you to file a specific proposal. Then in relation to breaks, clause 15, do you want to explain what your variation is intended to achieve?

PN1622

MS McKENNARIEY: Yes, your Honour. So, the intent of this is to improve clarity and consistency and make sure that we're addressing all of the various points that are needed within the breaks clause, given that there's been a lack of

guidance in scheduling rest breaks around – meal breaks, particularly for employees that have two paid rest breaks.

PN1623

And the ambiguity has been creating some confusion and inconsistencies with break scheduling and the interpretation of it by employers and this is having impacts on employee wellbeing, and we say also operations and productivity.

PN1624

We feel that the clarification would potentially provide a little bit more context around that for employers, as well as adding some context around other considerations.

PN1625

JUSTICE HATCHER: Your proposed 15.5 doesn't actually establish any new legal obligation, does it?

PN1626

MS McKENNARIEY: No. No, there is absolutely no intent to establish any new obligation, only clarify the existing. Upon further consideration after reading it a couple of times, and the feedback from Ai Group I was considering with a further submission that we revise that proposal to make sure that it is clear that all matters that are required are taken into consideration from a business requirements perspective.

PN1627

So, making sure that we have the safety considerations but also peak workload periods, the employee references are in there and the operational needs are covered. But I think we may be able to just tweak the wording in the note a little bit further to make it clearer we have zero intent to narrow the types of matters, or risk narrowing the types of matters as that isn't the intention.

PN1628

JUSTICE HATCHER: I mean, just as a general observation, when you say these things may be conceded in, say, various things the employer may do, just a matter of words it means the employer doesn't have to do any of this, in which case, what's the point of putting it in the award? And if you're going to - - -

PN1629

MS McKENNARIEY: If we change to - - -

PN1630

JUSTICE HATCHER: If you're going to establish new legal obligations, that's one thing but if it's all voluntary it's just a bunch of words which nobody needs to comply with.

PN1631

MS McKENNARIEY: We didn't feel that we wanted to establish new legal obligation, but be clear on the intent behind it and what should be considerations in those matters around scheduling breaks, to make it clear. That's really what the

boundary was and the softening of the words to 'may.' I would love 'must' but obviously that would be an implied prescriptive consideration.

PN1632

JUSTICE HATCHER: Well, again, from my perspective, speaking for myself, the purpose of awards is to establish legal obligations and entitlements. And if you're not doing that, this just becomes voluntary guidance which people may just reject and ignore, in which case it begs the question, what's its purpose? But all right, so – are you going to tweak that?

PN1633

MS McKENNARIEY: Yes. We can tweak that a little bit further. I'd just like to make sure that we've addressed any concerns around the risk of narrowing the matters, as per the feedback.

PN1634

JUSTICE HATCHER: Yes. All right. Ms Bhatt, clause 15.4?

PN1635

MS BHATT: Yes. The issue relates to meals breaks. And the proposal is that a facilitative provision is introduced to allow in some limited circumstances for an employer and employee to agree that the employee will work a period of up to six hours and forfeit their entitlement to a meal break. That entitlement arises once one works five hours under the award.

PN1636

JUSTICE HATCHER: Why would an employee agree to that? What - - -

PN1637

MS BHATT: Because it might result in circumstances in which it allows them to essentially finish work earlier than would otherwise be the case. So, for example, if someone is rostered to work a five and a half hour shift and they're entitled to a half an hour break, that results in a total duration of six hours in circumstances where they might in fact want to work five and a half continuous hours and finish work. It results in an earlier finish time for their shift.

PN1638

A similar facilitative provision was advanced by Ai Group during the four-yearly review in the context of the Nurses Award and the Health Professionals Award. We advanced substantially similar arguments and those proposals were adopted in the context of those awards.

PN1639

JUSTICE HATCHER: Of which awards?

PN1640

MS BHATT: The Health Professionals & Support Services Award, and the Nurses Award.

PN1641

JUSTICE HATCHER: All right. So, what does the ASU say about it?

PN1642

MR RABAUT: Thank you, your Honour. The ASU opposes Ai Group's proposal based on the back that it's diminishing employees' entitlements, which is self-evident on the words of the document.

PN1643

JUSTICE HATCHER: All right. The next three ones, Ms McKennariey, I'm going to invite you to file a more specific proposal. Ms Bhatt, we then come to your proposal about annualised wage arrangements. So, speaking for myself, I have difficulty understanding how they would work for part-time employment. I don't really understand the point of it.

PN1644

MS BHATT: The feedback that we have received from some members is that part-time employees are paid by way of a salary or they seek to be able to pay part-time employees by way of a salary. And so the question arises as to whether the annualised wage arrangement provision can be adapted for that to work.

PN1645

The way we have sought to do that is to provide essentially a review mechanism that would need to apply where a part-time employee's hours are altered on an ongoing basis.

PN1646

JUSTICE HATCHER: But the model says the employer and employee agree on a pattern of hours and a number of hours to start off with. And obviously there'll be a weekly wage based on that. And if they change it and agree to work more hours the weekly wage goes up. So, I don't understand what this is trying to achieve.

PN1647

MS BHATT: In those circumstances there are two parts of the model clause that would apply that we say would operate as safeguards. So, the way the model clause operates - - -

PN1648

JUSTICE HATCHER: But if both these are safeguards I don't understand what the point is. What would it allow that's not currently allowed?

PN1649

MS BHATT: It would allow for that provision to be applied to part-time employees which is, on its face, not contemplated by the provision. So, it would allow the setting of a salary that contemplates paying for ordinary hours of work which are agreed upon engagement, and presumably make some accommodation for the potential performance of additional hours of work.

PN1650

JUSTICE HATCHER: But doesn't the employee have the right to refuse additional hours?

PN1651

MS BHATT: Yes.

PN1652

JUSTICE HATCHER: Unless you delete that clause how could it work?

PN1653

MS BHATT: I think, as we have conceived of it, it would apply in the same way as it might to a full-timer. I mean, a full-timer, if they're offered overtime, also has a right to refuse to work the overtime. So, in the context of a part-timer, it might arise in two contexts. One is, they agree to work additional ordinary hours. That is, there is a variation to an agreed pattern of work. And the proposal we have advanced is that where that occurs on an ongoing basis, so if the initial agreement is the part-time employees will work 20 hours in a week, but then there's an agreement that they will instead work 30 hours in a week - - -

PN1654

JUSTICE HATCHER: Yes.

PN1655

MS BHATT: There is an obligation in the proposal we have advanced for the employer to review the annualised wages arrangement. They must review the salary that has been set and the assumptions that were communicated to the employee from the outset as to the basis upon which that salary was set. Because quite obviously, a substantial change of that nature might necessitate a provision to the salary that was described at the beginning.

PN1656

So, an employer would need to review the arrangement and the provision contemplates that the employer can then alter the arrangement and not communicate any such alteration in writing to the employee.

PN1657

JUSTICE HATCHER: But if a part-timer changed their arrangement from 20 hours to 30 hours and their weekly wage goes from 20 to 30 hours, what's the problem we're trying to fix?

PN1658

MS BHATT: The problem we're trying to fix is that there might be circumstances in which an employer seeks to pay part-time employees by way of a salary. And currently they can only rely on common law arrangements to do that. They're not able to engage in annualised wage arrangement provision the way you might in respect of a full-time employee.

PN1659

JUSTICE HATCHER: Yes.

PN1660

MS BHATT: I anticipate that one concern that might arise in respect of part-time employees is that the extent to which they might work additional hours is, at least theoretically, greater than it is for full-time employees. Because they're working less than full-time ordinary hours. But what we've said in our submissions about that is two things.

PN1661

The first is that the salary is set by reference to certain assumptions that are communicated to the employee and certain parameters. And if an employee works hours that exceed those parameters there's an obligation to make an immediate top-up. And then of course, there's the twelve month – twelve-monthly reconciliation process that would also ensure an employee is not left any worse off in the event that they worked those additional hours.

PN1662

JUSTICE HATCHER: So, what additional hours are these? You said 'additional hours.'

PN1663

MS BHATT: Yes. If that arises. The point is just that the clause already allows for that, already contains mechanisms to deal with those sorts of circumstances. And in the same way they apply to full-time employees, they would also apply to part-time employees.

PN1664

JUSTICE HATCHER: That treats part-time employees with having an analogous model to full-time employees, which they don't.

PN1665

MS BHATT: But it doesn't change anything in respect of the basis upon which additional hours can be offered to them and their ability to refuse those additional hours. It just deals with the methodology by which consideration needs to be given to any additional hours work where they're being paid an annualised wage. It's just ensuring that those mechanisms would apply to them if this clause was amended to also apply to part-time employees.

PN1666

JUSTICE HATCHER: So, this would be calculated at the overtime rate?

PN1667

MS BHATT: If it's overtime, yes.

PN1668

JUSTICE HATCHER: Well, I mean, that's why I'm getting confused. You've got a basic agreement for ordinary hours. The award says anything above that is overtime.

PN1669

MS BHATT: Yes.

PN1670

JUSTICE HATCHER: So, if you're trying to work out an annualised salary it would be calculated by reference to overtime rates.

PN1671

MS BHATT: Yes. That's right. The only situation in which a part-time employee might work additional hours that are not overtime is if there is an agreed variation to their original hours.

PN1672

JUSTICE HATCHER: Yes, all right. Mr Rabaut, go on.

PN1673

MR RABAUT: Thank you, your Honour. The ASU opposes the position put forward by the AiG based on a lot of the reasons that your Honour has already examined, particularly the fact that part-time workers have fluctuating hours, making it a challenge in determining their annualised salaries.

PN1674

We also heard this morning in support of the exemption put forward by the employers that they are already having a lot of difficulty in administering a lot of their annualised salaries arrangements. We would not want to include a new provision that has a risk of further complicating and exposing workers to underpayments, in light of the fact that their employer has already put forward about the difficulties in employers administering these provisions.

PN1675

JUSTICE HATCHER: All right. Thank you.

PN1676

MR IZZO: Your Honour, I would say I agree. We understand the problem that Ms Bhatt is engaging with it, which is that my part-timer with a relatively regular set of hours that might benefit from salary arrangement, that might change on occasion. It changes all the time. This would lose its utility with changes on occasion there'd be some attraction to expanding the annualised wage arrangement provisions.

PN1677

Our concern is, and this will also be consistent being what we talked about with exemption rates. Our concern is that these clauses are not being taken up by employers. They are not the solution to engaging people on salaries. We don't think it's working. That's why we want a different solution. So, that's why we're not proposing something like this, ourselves.

PN1678

We want to find a better solution to have employees engaged on salaries on a sustainable basis. And so that's why we're not supporting the claim because we think the focus should be elsewhere.

PN1679

JUSTICE HATCHER: And what about the other aspects of it, Ms Bhatt? Do you want to say anything about that?

PN1680

MS BHATT: The other aspects of it are intended to, in effect, allow an employer to streamline the reconciliation process that's required to be undertaken every

twelve months. The way those provisions currently operate that process must be undertaken exactly twelve months after the arrangement was first put in place, and every twelve months thereafter.

PN1681

Employers have indicated to us that in circumstances where a number of their employees are being paid an annualised wage there would be significant benefit from their perspective in being able to undertake that reconciliation process simultaneously. So, the idea here is that essentially in the first year that that arrangement is put in place for an employee, the reconciliation process must be undertaken within twelve months. So, that allows employees to essentially line up that reconciliation process for the subsequent years.

PN1682

JUSTICE HATCHER: Why do you need, 'as soon as practicable thereafter', then?

PN1683

MS BHATT: To make some accommodation for the fact that for example, it might be made shortly after the twelve month period. So, you know, we envisage that more often than not it would be undertaken within the first twelve months. But so that that doesn't apply as a sort of hard outer limit, it needs to be undertaken within a very short period after that.

PN1684

I think the second proposition that falls from that, and this is another various we've proposed, is that the clause currently requires that if there's any shortfall, the shortfall must be paid within a period of 14 days. We'd propose that that be extended to 28 days, particularly in circumstances where you might be dealing with a number of employees. We envisage that the slightly longer period of time might be required to process those payments.

PN1685

JUSTICE HATCHER: Okay. In respect of the concept that you could do it within twelve months, so that you can align all your employees and do it at the one time - - -

PN1686

MR IZZO: In respect to that concept I don't think there'd be any big objection, your Honour.

PN1687

JUSTICE HATCHER: And Ms Bhatt, what's the purpose of the – posed in 18.2(3)(e)?

PN1688

MS BHATT: This is an issue that falls from the obligation of employers to keep records, and again some of the feedback we have received is that an employer, in order to ensure that they can comply with those obligations, will require an employee to keep a record of their hours, which might involve completing a timesheet and so forth. But there are some circumstances in which employees simply fail to do so.

PN1689

What's been put to us is that there should be an award derived obligation on an employee to comply with any reasonable requirement made by the employer to keep those sorts of records, and that should be very clearly identified in any award. That's the basis for that proposal.

PN1690

JUSTICE HATCHER: But that's always been regarded, hasn't it, as a reasonable direction the employer can give in any context. Now, why do we need to adjust this content? Whether it's Bundying on or off or keeping timesheets, or whatever?

PN1691

MS BHATT: I think it has two benefits. One is that it is clearly identified as tied up with safety net, and you know, any element of this (indistinct). The second is that if any dispute were to arise in relation to it, it is clear that any dispute arises from the terms of the award and could be dealt with through the dispute settlement procedure as provided by the award.

PN1692

JUSTICE HATCHER: Well, it won't excuse the employer's obligation in any context, would it?

PN1693

MS BHATT: And it hasn't been drafted in that way.

PN1694

JUSTICE HATCHER: All right. The next one, Ms McKennariey, I'll again invite you to make a more specific proposal if (indistinct) to make a proposal. The next one, this is about clause 21, again I'll invite the AWCC to make a more specific proposal within six weeks. Then there's your proposal, Ms Bhatt, in relation to clause 21.5.

PN1695

MS BHATT: Yes, your Honour.

PN1696

JUSTICE HATCHER: I think we've addressed that in other contexts. Is there anything more we need to that?

PN1697

MS BHATT: Only to say that clause 21.5 – it deals very specifically with circumstances in which one is recalled to duty. We say that that provision was is intended only to apply in circumstances where an employee is required physically to return to a workplace as opposed to performing some work remotely, but more specifically from home. And essentially that should be clarified in the provision.

PN1698

JUSTICE HATCHER: But why would working at home make a difference?

PN1699

MS BHATT: Primarily because this provision prescribes a minimum payment of three hours.

PN1700

JUSTICE HATCHER: Yes.

PN1701

MS BHATT: We say that minimum payment provisions of this nature, which are found in a number of the recall provisions, are intended to ensure that an employee receives the minimum amount of pay where they are – you know, basically there is the inconvenience associated with having to physically go back to the workplace.

PN1702

But if what you're asked to do is take a five minute phone call or log on to your laptop to undertake some tasks that require less than half an hour of your time, that of course you should be paid for the time spent working but that a minimum payment of three hours shouldn't apply.

PN1703

JUSTICE HATCHER: What does the ASU say about this?

PN1704

MR ROBSON: Thank you, your Honour. We're opposed and I object to the proposal. We would take your Honour to the words of the provision itself which don't deal with recall to a workplace. They deal with where an employee is required to attend to duty after the usual finishing hour of work for that day.

PN1705

We say that contemplates any return to duty, not specifically a return to a physical workplace. And we note that in other awards there is an explicit mention of an actual workplace and we will quibble that's how that's intended to apply there.

PN1706

JUSTICE HATCHER: All right. And some of them would also have an additional requirement for payment for travel to and from the workplace.

PN1707

MR ROBSON: Indeed they do. We say that this is appropriate given the nature of the industry. If AiG has an alternative proposal it would be something that's going to require greater consideration than we can get to in these proceedings. And certainly evidence about the type of work that's being performed and how they'd expect it to apply in practice.

PN1708

JUSTICE HATCHER: Yes. So, the way you described it, Ms Bhatt, is it may also interact with the right to disconnect.

PN1709

MS BHATT: It might do, yes.

PN1710

JUSTICE HATCHER: Perhaps we need to consider it in that new statutory context. All right. I think this one's yours, Mr Izzo, (indistinct) which is too complex.

PN1711

MR IZZO: Your Honour, that one's ACCI's.

PN1712

JUSTICE HATCHER: Sorry, that is not ABI's?

PN1713

MR IZZO: Yes. Yes.

PN1714

JUSTICE HATCHER: All right. Yes, go ahead. Why is the clause too complex?

PN1715

MR MORRISH: Thank you, your Honour. We've just heard from time to time that as it currently stands it can be slightly confusing to read, and require more than a single read through. So, all we're seeking to do is simply improve that readability thereby making it more user friendly. We don't intend to change the operational provision. So, where there are concerns that what we propose does that, we'd be more than happy to have discussion.

PN1716

JUSTICE HATCHER: Mr Morrish, can I invite you to – well, I'm only looking at the summary, and it might be in the submissions. Do you have a marked up copy in your submission?

PN1717

MR MORRISH: Yes. So, there is a table at the back of the submission, starting on page 68 which shows the existing clause as to the - - -

PN1718

JUSTICE HATCHER: What's the date of the submission? Is that - - -

PN1719

MR MORRISH: That would be the initial submission date which is 22 December.

PN1720

JUSTICE HATCHER: Right. No, that's not marked up. I was looking for a marked up - - -

PN1721

MR MORRISH: No, it's not marked up.

PN1722

JUSTICE HATCHER: Can I bother you to file a marked up version to make it easier to identify what you've changed?

PN1723

MR MORRISH: Yes, your Honour.

PN1724

JUSTICE HATCHER: So, are parties open to consider the proposed redraft?

PN1725

MR MORRISH: Yes, your Honour.

PN1726

JUSTICE HATCHER: All right. For the next eight matters, again I'll invite you, Ms McKennariey, to file a more specific proposal and give you six weeks if you want to pursue these. And then you've got a detailed proposal about cashing out annual leave.

PN1727

MS McKENNARIEY: Correct, which upon retrospect may also require a title amendment further to what's been proposed to reflect cashing out of leave, as we're seeing a lot of examples where without clear and explicit guidance on the conditions and the limits for cashing out annual leave, employees and employers are misunderstanding the entitlements.

PN1728

For example, employees have unknowingly or without realising, agreed to cash out a large portion of leave without realising that they must retain a minimum accrued entitlement of four weeks. There's a lack of documentation that's also a requirement with regards to cashing out the – well, there's no requirement to document the instance of cashing out separately. So, there's ambiguities that have happened, and misunderstandings that have occurred between employers and employees around the terms of the agreement.

PN1729

For instance, employees might expect to cash out leave again within the same year, unaware of the maximum limit of two weeks in a twelve month period. So, the confusion over the payment side of things is one of the most prevalent. But without clarity on minimum payment for cashed out leave, that the employees might receive less compensation than what they would have if they had have taken leave.

PN1730

So, for instance, if an employer might pay the cashed out leave at the employee's base rate instead of their ordinary rate. But we've also seen an unintentional interpretation around toil in addition to the annual leave cash out. So, unfortunately upon reading annual leave, many employees have incorrectly cashed out toil thinking that this was the same as annual leave or comparable, without reading the toil clauses because they weren't pointed directly to the relevant areas of information.

PN1731

So, for this reason we have tried to address that within the proposal, and more clearly outline and make it more transparent for the employer and the employees what the legal requirements are across both leave types. And we'd probably

suggest that the title be amended to refer to cashing out of leave, just to make sure that that's not misunderstood or missed.

PN1732

Now, just addressing and appreciate Ai Group's feedback regarding unnecessary duplication and similarly ASU's opposition to that point, so whilst we can appreciate that there may be perceived unnecessary duplication there is a necessity of actually emphasising some of this information in the right context paragraph where the employer or the employee will make that deduction.

PN1733

Unfortunately the everyday person who is interpreting this information is taking a very simplistic view and not comprehensively cross-referencing throughout the entire award. So, quite often it is misunderstood quite broadly. So, for that reason we do appreciate there is a little bit of repetition but it has been intentional.

PN1734

JUSTICE HATCHER: Well, just take the very first example. You said that people agreed to cash out annual leave in a way which leaves them with less than four weeks. The current 32.9(g), I don't think would make it any clearer. I mean, if people are not complying, that's one thing. But I don't understand how somebody who made an effort to read the clause could misconstrue or misunderstand that. And I don't know how it would improve the situation by just saying the same thing a second time in another paragraph.

PN1735

You know, it seems to me you're not describing these interpretations, you're just describing non-compliance.

PN1736

MS McKENNARIEY: Correct. It's where that guidance might help avoid some of the repeated non-compliances that we felt were easy to avoid if that guidance was given but it would draw attention to the context of that.

PN1737

JUSTICE HATCHER: What is ambiguous about paragraph 2?

PN1738

MS McKENNARIEY: I think it's reading other areas of the clause in isolation from paragraph (g) or where there's been multiple instances of cashed out leave, effectively, in addition to leave being taken. So, the section around residual balance remaining and also, mandated shut-down periods as a consideration.

PN1739

JUSTICE HATCHER: Well - - -

PN1740

MS McKENNARIEY: Nearly there.

PN1741

JUSTICE HATCHER: Yes, I'm sorry.

PN1742

MS McKENNARIEY: Yes, probably 39 – 32.9(g), the only point that I could see would be around any exceptional circumstances such as that where there may be scenario based interpretations of its applicability, and whether or not it was considered an operational acceptable reason for shut-down effectively could also contribute to a reduction of that four week leave balance being accrued as an entitlement.

PN1743

JUSTICE HATCHER: All right. Does any party want to comment about this?

PN1744

MR IZZO: Nothing further, your Honour.

PN1745

MS BHATT: (Indistinct).

PN1746

MR IZZO: Just to note that it's opposed, your Honour, because in our submission it's (indistinct).

PN1747

JUSTICE HATCHER: All right. The next eight before the final eight proposals are all yours, Ms McKennariey. Just in relation to the first one, I think we discussed this in the context of the Retail Award. And it's whether clause 33 beyond the first sub-clause is necessary having regard to the NES. As I indicated before, our general approach is not to try to replicate or summarise provisions of the NES and it appears to me that with the possible exception of 33.4, that's what the clause is doing. Is there any reason why we need to retain all that?

PN1748

MS McKENNARIEY: We can examiner a further submission around that, your Honour, if we could have an opportunity to elaborate on the previous ones.

PN1749

JUSTICE HATCHER: All right. What do you want to say about it?

PN1750

MS McKENNARIEY: Just around the need to more clearly define the eligibility criteria for requesting longer leave periods, the request procedure outlining casual employees to specifically request for longer leave periods, including format timing, and any supporting documentation to support the record-keeping requirements.

PN1751

JUSTICE HATCHER: Well, given they're not being paid, why does there need to be a record?

PN1752

MS McKENNARIEY: Given that they're not being paid?

PN1753

JUSTICE HATCHER: This is talking about casuals.

PN1754

MS McKENNARIEY: This is assuming no leave payment provision.

PN1755

JUSTICE HATCHER: Yes. So, why would there need to be a record-keeping requirement?

PN1756

MS McKENNARIEY: It's more with respect to cancellation of shift or non-fulfilment of shift, I would expect. I would have to look into that further.

PN1757

JUSTICE HATCHER: The bigger question I'm raising is, why do we need 33.2 to 33.5, at all, given that (indistinct) for these matters?

PN1758

MS McKENNARIEY: Yes.

PN1759

JUSTICE HATCHER: Well, it's a question. Obviously it's not opinion, but is there any reason why the award needs to contain these provisions?

PN1760

MS McKENNARIEY: Not further to what I've mentioned, your Honour.

PN1761

JUSTICE HATCHER: All right. So, does any other party see a reason to retain 33.2 to five?

PN1762

MS BHATT: Not from our perspective, your Honour.

PN1763

JUSTICE HATCHER: Sorry, can you remind me, when was – this seems to be a fairly standard clause – when was this developed? Was it pre some modification to the NES?

PN1764

MS BHATT: I'll have to take that question on notice. I don't know, off the cuff, your Honour.

PN1765

JUSTICE HATCHER: It does record that it's been (indistinct).

PN1766

MR IZZO: We certainly ask for its removal, your Honour, fully support – I should say, we support it.

PN1767

JUSTICE HATCHER: Anyway, would the ASU like to have a think about that? But I should even identify this has been raised in other awards, as well, which have the same clause That is, why those provisions are there. All right.

PN1768

MS McKENNARIEY: Sorry, your Honour, just looking at it, the limitations on absence may be one reason as to why it's called out separately in 33.

PN1769

JUSTICE HATCHER: Yes, well, that limitation is in the NES, as I recall it.

PN1770

MS McKENNARIEY: Yes. I would have to check against the NES, as well.

PN1771

JUSTICE HATCHER: With your next one, 34 already has a cross-reference to the NES. Do we need anything more than that?

PN1772

MS McKENNARIEY: I think this was similar to the one we'd raised previously, is just having a label of context added to indicate what the context is. That would probably assist in drawing people's attention to the relevant information.

PN1773

JUSTICE HATCHER: All right. For the rest of your proposal, Ms McKennariey, again I invite you to file specific drafting proposals for consideration within six weeks.

PN1774

MS McKENNARIEY: Thank you, your Honour.

PN1775

JUSTICE HATCHER: Is there anything else which any party wishes to raise?

PN1776

MR RABAUT: No, thank you, your Honour.

PN1777

JUSTICE HATCHER: All right. As I've indicated, just mainly for the ASU's benefit in the previous conferences, once I finish all the consultations, and having regard to the existing document which the ASU will file, and Ms McKennariey's existing document, I'll then make an assessment as to whether any further consultation session would be productive or not. Thank you for your attendance. If there's nothing further we'll adjourn the court.

ADJOURNED INDEFINITELY **[10.47 AM]**