



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 4 – Social, Community, Home Care and Disability Services Industry Award 2010

Sydney

1.30 PM, WEDNESDAY, 13 MARCH 2024

PN1

JUSTICE HATCHER: I'll take the appearances. Ms Harrison and Ms van Gent via Teams, you appear for the UWU.

PN2

MS L HARRISON: I appear for the UWU, thank you, your Honour.

PN3

JUSTICE HATCHER: Yes. Ms van Gent is not here?

PN4

MS HARRISON: She's here.

PN5

JUSTICE HATCHER: There she is, right. Mr Rabaut and Mr Robson, you appear for the ASU?

PN6

MR C RABAUT: Yes, your Honour.

PN7

JUSTICE HATCHER: Mr Milligan, you appear for the HSU?

PN8

MR J MILLIGAN: Yes, your Honour.

PN9

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

PN10

MS R BHATT: Yes, your Honour.

PN11

JUSTICE HATCHER: Ms Rafter, you appear for ABI/NSW Business?

PN12

MS A RAFTER: Yes, your Honour.

PN13

JUSTICE HATCHER: And Mr Morrish, you appear for the ACCI?

PN14

MR J MORRISH: Yes, your Honour.

PN15

JUSTICE HATCHER: And Ms McKennariey, you appear for the Australian Workforce Compliance Council?

PN16

MS J MCKENNARIEY: Yes, your Honour.

PN17

JUSTICE HATCHER: Might I dispose of two matters at the outset. Firstly, Ms Bhatt, the AI Group – and again, I'm proceeding on the basis of the summary of proposals that was published on the website – so the AIG has raised an issue about the classifications within this award and whether they require review to discuss where disability employees fit in with other employees. Can I indicate that I anticipate that the aged care decision will be issued this week and, upon a perusal of that, I think it is likely that it will be necessary for the Commission to undertake a wider scale review of all the classifications in this award, so perhaps we might defer that until the parties have had the chance to review that.

PN18

MS BHATT: Yes, your Honour.

PN19

JUSTICE HATCHER: In a similar vein, I'm just trying to find it, there was a union proposal about the way in which wages are set out in the award with respect to those employees who are covered by the equal remuneration order. Can someone remind me who raised that?

PN20

MR M ROBSON: Yes, your Honour.

PN21

JUSTICE HATCHER: Yes, the ASU.

PN22

MR ROBSON: The ASU.

PN23

JUSTICE HATCHER: Again, a review might be required in the context of the aged care decision. I'm aware that at a stage, I think, during the four-yearly review there was an issue about whether the ERO rates could be in some way incorporated into the award. I think I would like to revisit that situation, and I'm not expecting an instant response now, but one option – and again, this will be illuminated by the aged care decision to some degree – one option may be that we put the ERO rates into the award, but if we do that, it would be necessary to revoke the equal remuneration order because it is expressed as a percentage above the award rates, and that is another matter which I anticipate will require consideration in the context of a review of the classifications and rates of pay in this award.

PN24

So, I would simply invite you to have a think about that and consider your position about that. It's obvious we can't put the rates into the award proper unless we revoke the ERO because the ERO is expressed as a percentage above the award rates.

PN25

MR ROBSON: Yes.

PN26

JUSTICE HATCHER: We'd be chasing our tail if we left the order in place.

PN27

MR ROBSON: Look, your Honour, I wouldn't oppose an 80 per cent increase in people's wages but we understand that would be a necessary outcome. I suppose, our application is just really changing the position of the notes so that it - - -

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JUSTICE HATCHER: Yes.

PN29

MR ROBSON: Because it falls below the page on the website and people don't see it.

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JUSTICE HATCHER: Yes.

PN31

MR ROBSON: That's all we're getting at.

PN32

JUSTICE HATCHER: Well, when the decision comes out, you might want to have a look at that and then consider whether a more fundamental solution should be considered. And all the parties should consider that. So, beyond those matters, I don't propose to discuss those proposals further today. So, Ms McKennariey, we then have a number of proposals by you starting with a new title for the award; is that right?

PN33

MS McKENNARIEY: Correct, your Honour.

PN34

JUSTICE HATCHER: Do you want a longer title, do you?

PN35

MS McKENNARIEY: Absolutely not, it's about ensuring the inclusiveness and more modernly reflecting the diverse nature of the industry that it covers and considering revising the name to something to the effect of 'Social and Community Services Industry' based on feedback from individuals working in the sector. That would be a more inclusive title that encompasses the various sectors and could have a further definition that provides the clarity as to the span of coverage that further defines the disability and aged care aspect, but just as an overall title, it was suggested through the feedback that's been received that the title of the award be varied.

PN36

JUSTICE HATCHER: Well, I think that has some merit. Does any other party see some merit in having a bit more – obviously it's not altering the coverage of the award, but just the title, that's more user friendly?

PN37

MR ROBSON: Look, your Honour, I would see some merit in a shorter title, it is very long. I would note that the social and community services sector is just covered by one of the schedules of classifications covered by the award. I'm sure those people who represent the interests in home care might see some need to see it represented. Then, on the other hand, family day care is also covered by this award and it's demonstrated that it's not represented in the title. We don't have a strong view about what the award should be called.

PN38

JUSTICE HATCHER: All right, I'll simply advise the parties to think about that.

PN39

MS HARRISON: Your Honour, just on that point, sorry, we – I guess, would support the continued inclusion of the word 'disability' within the title. It's an entire industry, sort of, in itself, particularly in a circumstance where the coverage is potentially up in the air. It's quite a large sector.

PN40

JUSTICE HATCHER: The coverage is what?

PN41

MS HARRISON: So, that way, there's no questions as to where the coverage would fall.

PN42

JUSTICE HATCHER: Well, there's no suggestion we're altering the coverage of the award. I should make that clear. All right, so after that, there's 11 proposals advanced by your organisation, Ms McKennariey, which aren't accompanied by specific drafted proposals. So, again, can I invite you to, if you wish, file within six weeks drafts of specific variations to the award that might give effect to the issues you raised in those matters?

PN43

MS McKENNARIEY: Yes, your Honour.

PN44

JUSTICE HATCHER: So, the first one, which is specific, is the variation to clause 10.2. Why might that variation be necessary?

PN45

MS McKENNARIEY: So, the issue that 10.2 presents is a lack of clarity around how full-time equivalent hours are calculated which leads to confusion with employers and employees and, without any clear guidelines for that calculation method, employers struggle to determine when overtime or time in lieu applies resulting in compliance issues and disputes between employers and employees. So, to set that out further and make sure that, for example, the average of 38 hours per week within a defined pay period or fortnightly or some alteration option. As long as we're covering that there is, I guess, more clarity around the calculation side is really the core of this as to the interpretability of how we calculate the time.

PN46

JUSTICE HATCHER: Isn't it made sufficiently clear in clause 25.1?

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MS McKENNARIEY: 25.1.

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JUSTICE HATCHER: Do you just want a cross-reference to 25.1, do you?

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MS McKENNARIEY: Pretty much, that's where the addition is. It's just to make that really clear and call it out.

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JUSTICE HATCHER: All right. Do other parties see merit in this?

PN51

MS BHATT: We're not sure that it's necessary. Don't take it any further than that.

PN52

JUSTICE HATCHER: Ms Rafter?

PN53

MS RAFTER: We have no strong view on it either.

PN54

JUSTICE HATCHER: So I understand the unions are willing to consider it, do you have a view about it?

PN55

MR RABAUT: We're willing to consider it, yes, sure.

PN56

JUSTICE HATCHER: All right. And then the next one is a proposal for an equivalent variation to clause 10.3. The difficulty I see with this is that I don't read 25.1 as applicable to a part-time employee because it talks about 38 hours work, Ms McKennariey.

PN57

MS McKENNARIEY: Our proposed variation that we're putting forward, effectively, is more focused on – because of the start and finish times not being able to be guaranteed within the industry, and those can change day by day, but there can still be a pattern of work – we need to get rid of the requirement for the start and end time finishes to be mandated. It would be more appropriate - - -

PN58

JUSTICE HATCHER: But that's with respect to a completely different proposal. I'm talking about your proposal to vary 10.3(a).

PN59

MS McKENNARIEY: Okay, so 10.3(a) is just addressing the potential misinterpretations about the calculation of part-time employment and clarifies the reference to clause 25.1.

PN60

JUSTICE HATCHER: Yes, what I was pointing out to you is clause 25.1 doesn't apply to, as I read it, part-time employees because it's talking about a 38-hour working week.

PN61

MS McKENNARIEY: I'll have to clarify that one. I take that on notice.

PN62

JUSTICE HATCHER: But you're raising a separate proposal, are you, to modify 10.3(c)(2)?

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MS McKENNARIEY: Yes, so that was just with respect to the start and finish time restrictions not being necessarily fit for the industry practices.

PN64

JUSTICE HATCHER: Well, that would be a major substantive change to the award so I'm not sure that this necessarily fits within the scope of this review but what do other parties think about that?

PN65

MR MILLIGAN: Certainly opposed to that one, your Honour. It would certainly result in a detriment to members.

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JUSTICE HATCHER: All right.

PN67

MS HARRISON: Your Honour, our position would be the same as the HSU.

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MR RABAUT: Same with the ASU.

PN69

JUSTICE HATCHER: So I note, although they're not here, the CCIWA also made a proposal to order 10.3 which would alter paragraph F but I'm not sure precisely how. Does any other party have a view about that?

PN70

MS BHATT: I think that's the observation we've made; that it's not clear what effect the variation would actually have.

PN71

JUSTICE HATCHER: So, Ms Rafter, you've also proposed a change to that clause, but I'm not sure what you're actually changing.

PN72

MS RAFTER: Yes, we're happy to clarify that, your Honour. So what we were looking to do with that amendment and joining in with the chamber on that proposal was to remove some of the prescription from that paragraph because, on our reading of the clause 10.3, it appears to be clear that no change can happen to the guaranteed hours without agreement from the employee and no variation can occur without agreement from the employee so, in effect, when we look at paragraph F, the primary purpose of that clause is to really highlight that the employee can take on additional hours if they make that agreement – if they pursue that agreement.

PN73

JUSTICE HATCHER: But it currently also makes it clear that the employer can't require that, so why should that be deleted?

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MS RAFTER: So when we looked at it, we thought it is clear, on the face of the clause itself, that that currently is something that cannot occur. I note, we're not -
- -

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JUSTICE HATCHER: Well, that's because those words are there.

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MS RAFTER: I'll take your - - -

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JUSTICE HATCHER: The point may be it is clear now, but it may not be clear if you take out those words.

PN78

MS RAFTER: We're not prepared to die on the hill of this proposal, so I'll make that clear, but I'll just note that it wasn't our intention to reduce entitlements of employees in any way.

PN79

JUSTICE HATCHER: And then the next one is yours, Ms McKennariey. So what is this trying to achieve? This is 10.5, minimum payments. What are we trying to address here?

PN80

MS McKENNARIEY: So this is to address the clarity on payment requirements. The original wording in clause 10.5 may be a bit ambiguous about minimum payment requirements and the undertaking of disability services work. Additionally, there's not clearly specific consequences of breaching that clause which is creating a bit of uncertainty for employers. So, as a practicality, social and community services employees working part-time, occasionally they're assigned to undertake disability services work. Under that existing wording in the clause, it is not explicitly clear for them as to whether or not the minimum payment requirement of three hours applies to shifts that involve disability services work.

PN81

JUSTICE HATCHER: Well, it doesn't now, as I read it, but if we made your amendment, it would be increased from two hours to three. Is that the intention?

PN82

MS McKENNARIEY: I believe – Yes, I believe so. Yes, so that would provide the employees with a slightly higher level of compensation for each of the instances of work and reflect the nature of their role and the specific requirements that apply to the sector.

PN83

JUSTICE HATCHER: And what's the basis for making that change?

PN84

MS McKENNARIEY: From an industry standards perspective, the proposed change, I guess – what we're trying to say is that the industry standards or common practices within social and community services sector would be a bit better reflected. Three hours would be a better alignment to the work being undertaken, the tasks, the responsibilities that are undertaken and associated with social and community services roles, aged care and disability are a bit more complex and time consuming from other types of employment that are covered inside of the same award. So, for that reason, increasing that minimum payment to three hours would reflect the additional effort required for each shift or period of work.

PN85

JUSTICE HATCHER: All right, and what do other parties say about the current meaning of this provision?

PN86

MS BHATT: Your Honour, we agree with the interpretation that your Honour articulated. This provision reflects the outcome of major proceedings during the four-yearly review and it was inserted as a product of those proceedings. There was significant contest between the parties in those proceedings as to what the appropriate minimum engagement period would be. We would oppose any increase to the existing minimum periods.

PN87

JUSTICE HATCHER: I mean, on one view, it's badly drafted in the sense that the reference to 'all other employees' in B may be read as all other employees except the social and community services employees which may lead to interpretation that, when social and community services employees perform disability services, there is no minimum payment.

PN88

MS BHATT: I can understand how that concern might arise, and if I variation was made to simply make that point clear, we wouldn't necessarily oppose that.

PN89

JUSTICE HATCHER: All right.

PN90

MS BHATT: It doesn't change the substantive entitlement.

PN91

JUSTICE HATCHER: What do the unions say about it?

PN92

MR RABAUT: Your Honour, while we broadly support it because it increases minimum work entitlement, we will concede that it does (indistinct).

PN93

JUSTICE HATCHER: Right. The next one – Well, we've dealt with the ASU's proposal about expression of the pay rates, so the next one is, Ms Bhatt, your proposal about annualised salary.

PN94

MS BHATT: Yes, your Honour. As we've sought in some other awards, we've proposed the introduction of a model annualised wages arrangement provision in this award, subject to some modifications that I've spoken to earlier today in the context of the Clerks Award. The provision would apply only to certain classification levels which are identified in the first paragraph of the proposed clause which is set out at page 149 of our submission. Those classification levels don't include employees who are typically engaged in the provision of direct care to these organisation's clients, rather their employees that might perform, for example, various sorts of managerial roles.

PN95

Of course, this award covers a range of sectors. There are some employers covered by the award that don't provide those sorts of services at all, in certain streams, so it might also cover those employees. It's our understanding that, in various parts of the sector, these sorts of employees – particularly very senior employees who can be covered by this classification structure – are, as a matter of practice, are being paid by way of a salary and it's on that basis that the provision is sought.

PN96

JUSTICE HATCHER: All right, so to the extent that the provision departs from one of the model terms; how does it depart?

PN97

MS BHATT: It departs in the following respect: it would apply to part-time employees.

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JUSTICE HATCHER: Yes.

PN99

MS BHATT: And it departs in respect of the reconciliation process. That is, it would allow for the streamlining that I described this morning and it would provide a period of 28 days instead of 14 days to pay any shortfall that is

identified. It also contains an award-derived obligation on employees to comply with any requirement to keep records of their hours.

PN100

JUSTICE HATCHER: All right. So does any other party want to comment about this?

PN101

MR RABAUT: Thank you, your Honour. The ASU opposes – just to clarify, your Honour, we actually did address this in our submissions in reply at paragraph 23.

PN102

JUSTICE HATCHER: Yes.

PN103

MR RABAUT: But we oppose AIG's proposition that they're putting forward. We believe that substantial change like this would need to be tested and be evidenced and, obviously, the suite of employees that are covered by this need to be aware (indistinct) which has been done previously (indistinct).

PN104

JUSTICE HATCHER: What about if the proposal was simply to add one of the model terms for annualised wages to the award for employees classified at level 4 and above?

PN105

MR RABAUT: I would need to seek further information on that, your Honour.

PN106

JUSTICE HATCHER: Okay. Ms Harrison?

PN107

MS HARRISON: Your Honour, we would have concerns in relation to the annualised salary provisions without proper testing of it. I think the question for us would be what the actual need of it is in circumstances where we know that there's been, sort of, let's say rampant – the annualised salary provisions are a cause of underpayments quite widespread across multiple industries.

PN108

JUSTICE HATCHER: Well, they were changed to ensure that doesn't happen.

PN109

MS HARRISON: Yes, but they often still require back payment and calculations and there's a lot of advocacy that goes into the behind-the-scenes to ensure that people are paid correctly.

PN110

JUSTICE HATCHER: That's not non-compliance, that's compliance.

PN111

MS HARRISON: I guess, from the union perspective, we often get contacted by members who have been underpaid on those annualised salary provisions and with advocacy they may comply but there's obviously a whole range of employees that often are not paid correctly after those annualised salary provisions.

PN112

JUSTICE HATCHER: So, just to clarify that, you say that there's employees on annualised salary provisions where the current provisions haven't been complied with? Or are these common law arrangements you're talking about?

PN113

MS HARRISON: I can't say specifically in relation to this particular award but in relation to the general annualised salary provisions.

PN114

JUSTICE HATCHER: In which awards?

PN115

MS HARRISON: Certainly within – well, I'm personally aware of things in relation to the Hospitality Industry (General) Award and those types of provisions where you often get contacted by members who are not being paid correctly but there's a problem with the reconciliation process and I guess, in the context of insertion of annualised salary provisions, we are pretty – it would be the position of the UWU that there should be some restriction in terms of the usage of those provisions because of the way in which they're often applied in practice.

PN116

JUSTICE HATCHER: HSU?

PN117

MR MILLIGAN: Thank you. Our response to this is that we don't see it having much applicability for the HSU members, but on the specific proposal, we find certain elements problematic, those being the 28 days to remunerate employees and the employer's ability to unilaterally bring in the annualised wage arrangement but happy to take some further information about the bottom clause and any potential applicability.

PN118

JUSTICE HATCHER: All right.

PN119

MS RAFTER: Your Honour, sorry for not getting on my feet earlier. I would just flag that one of the reservations we have with respect to the proposal was its extension to include part-time employees as well. We think that might add some additional complication but, again, maybe with further testing and looking at it closer, that's something we could explore, but as we said in the other consultation session, we prefer the ACCI's proposal.

PN120

JUSTICE HATCHER: What's ACCI's proposal?

PN121

MS RAFTER: They proposed it – I might withdraw that as that was proposed and did not apply to the SCHADs Award. But in the context of the other awards.

PN122

JUSTICE HATCHER: Well, what other awards were they?

PN123

MS RAFTER: So that was for the Clerks Award, the Hospitality Award and the Restaurants Award, and the proposal is in proposal C of their submissions.

PN124

JUSTICE HATCHER: All right. The next one is yours, Ms McKennariey. What's the change you're making here?

PN125

MS McKENNARIEY: So we're seeking to address the issues relating to clarity and consistency in measurement terms and ambiguity regarding the definition of a week to avoid the misinterpretation. So just to confirm that there isn't a proposal to reduce any employee entitlements, instead it's about clearer wording and more consistent measurement terms for uniform and laundry allowances, ensuring that the employees are actually receiving that in a transparent and fair manner.

PN126

With respect to the opposition point around not all uniforms being required – sorry, more than one uniform being required in a day due to working multiple shifts, that scenario could also potentially be catered for. I didn't see that that would potentially affect all roles providing services or where they'd be undertaking more than one shift in a day that they would necessarily need to change uniform dependent on situation, but where applicable, due to the nature of the work undertaken or what happens during a shift, that could be provisioned for.

PN127

JUSTICE HATCHER: What's the difficulty with the current reference to 'per shift' and 'per week'?

PN128

MS McKENNARIEY: So the example that we have for, I guess, employer interpretation of 'shift day' to mean a working day which could vary depending on the duration of the employee's schedule and that leads to confusion about the appropriate rate of the uniform or laundry allowance and inconsistent payments to employees.

PN129

The ambiguity around a week and the clear definition of a week, an employee is interpreting that different from employers. Some consider a week to run from Monday to Sunday and others align it with the employer's pay period, so there's ambiguity like that that results in inconsistencies in the interpretation and calculation of weekly allowances as a result.

PN130

JUSTICE HATCHER: If it's per shift, it's a flat amount per shift, so I'm not understanding the problem.

PN131

MS McKENNARIEY: I think it's the wording that's used to define 'shift' more than anything and the definition of a week and what that aligns to.

PN132

JUSTICE HATCHER: A week is a week, isn't it? I'm not quite sure.

PN133

MS McKENNARIEY: That's the question. It would vary from employer to employer or employee to employee what the perception of that is depending on if their organisation has a weekly pay run, often that's perceived to be the alignment week to week as opposed to a Monday to Sunday. Sometimes the perception is it's around rosters, so depending on roster publication, practices can also drive the perception differently if it's not defined clearly.

PN134

JUSTICE HATCHER: But your variation doesn't change the expression 'per week', does it?

PN135

MS McKENNARIEY: For 20.2(b)?

PN136

JUSTICE HATCHER: Yes.

PN137

MS McKENNARIEY: You're referring to changing the definition of a week?

PN138

JUSTICE HATCHER: Where have you done that?

PN139

MS McKENNARIEY: Probably actually need to revise that to provide further clarity on those definitions in light of I can't see where that is specified elsewhere in the clauses.

PN140

JUSTICE HATCHER: All right, well I invite you to do that and likewise to advance a specific proposal about meal allowances at clause 20.5.

PN141

MS McKENNARIEY: Sorry, your Honour, that one was to delete clause 20.5.

PN142

JUSTICE HATCHER: To simply delete it, okay, sorry.

PN143

MS McKENNARIEY: Correct. So that was just in relation to the paying on day of overtime work and the practicalities too around the administration and

monitoring requirements. There's a bit of variability across workforces when they're not centralised, so we propose deleting 20.5 as it currently stands.

PN144

JUSTICE HATCHER: All right, so what do parties think about that? Does this ever actually happen? I mean, I can understand the logic of it in the cash days but I find it difficult to believe that anybody actually does this.

PN145

MR RABAUT: That's a good question, your Honour. I haven't received any information as to whether it does or does not occur but our concern would be not imposing a limit in which the employer would be required to pay the allowance. So our first position is, of course, that we oppose it, but second to that, it would be uncapped, there's no particular timeframe in which the employer be required to pay that allowance.

PN146

JUSTICE HATCHER: Well, I think with all allowances, it's necessarily implicit that you get it in the relevant pay period.

PN147

MR RABAUT: Obviously, it could change from what the award currently says.

PN148

JUSTICE HATCHER: Well, in theory. How would this work in practice? The employee would ask for the amount and then someone would have to do a bank transfer or ring up their payroll provider and do a special payment or something?

PN149

MR RABAUT: I'll concede it.

PN150

JUSTICE HATCHER: All right, well perhaps you might have a sensible look at that. I mean, if this has some real-life work to do then that's one thing but I suspect it doesn't. All right, so the next one deal with the first aid allowance. I think a number of the allowances are – for example, the on-call allowances in 20.11 – quantify the allowance by reference to a percentage of the standard rate but then put the actual amount in brackets. Is there any reason why we shouldn't do that to the first aid allowance?

PN151

MS HARRISON: We'd support that, your Honour. It would make it easier to read.

PN152

JUSTICE HATCHER: Is there any reason why we shouldn't do that?

PN153

MS BHATT: No, your Honour.

PN154

JUSTICE HATCHER: Would that suit your purposes, Ms McKennariey? That we keep the percentage so we know the calculation method but put the actual amount in brackets?

PN155

MS McKENNARIEY: Yes, I believe so. I'd agree with that.

PN156

JUSTICE HATCHER: All right. In the next one, the proposal is to remove the requirement for agreement to work a broken shift and make it an employer right; is that correct?

PN157

MS McKENNARIEY: Correct.

PN158

JUSTICE HATCHER: I mean, that seems to be a substantive change. Why does that make the award easier to read?

PN159

MS McKENNARIEY: We're looking at - - -

PN160

JUSTICE HATCHER: At 20.12 broken shift allowance. Subclause B.

PN161

MS McKENNARIEY: I'm just looking, subclause B. Yes, so there's some challenges in accurately capturing what that agreement looks like from a technology perspective in recording and tracking employee agreements for broken shift allowances in particular.

PN162

JUSTICE HATCHER: (Indistinct)

PN163

MS McKENNARIEY: Sorry?

PN164

JUSTICE HATCHER: I think the pay technology is supposed to serve the award, not the other way around. Is there any substantive reason not to require agreement to work a broken shift?

PN165

MS McKENNARIEY: From a health and safety perspective, work/life balance perspective, it can be quite disruptive. Leads to fatigue and significant disturbances, having the broken shifts.

PN166

JUSTICE HATCHER: Yes, you seem to be arguing against your own variation. The current requirement is for agreement, you want to remove the requirement for agreement.

PN167

MS McKENNARIEY: Yes, we will have to revisit and clarify on that point because I think we were really focussed on more of the technology challenges and the aspects around accurately capturing it as the primary driver for this proposal.

PN168

JUSTICE HATCHER: I think the same applies to the following proposal?

PN169

MS McKENNARIEY: Correct. I would question how it reduces the entitlement based on some of the feedback that has been received.

PN170

JUSTICE HATCHER: The next one concerns clause 25.3.

PN171

MS McKENNARIEY: Regarding the rostered days off, there's ambiguity what constitutes a full day, effectively, and how that impacts the calculation of employee entitlements. So is it a 24-hour period of time? When does that restart? The lack of clarity on whether a 'full day' refers to a 24-hour period and what day cycle it works with.

PN172

JUSTICE HATCHER: But your proposed clause still has the expression 'full days' in there. That is, I don't understand how you resolve that problem.

PN173

MS McKENNARIEY: We can amend that proposal to provide a clearer, more specific definition and outline what constitutes 'full day' for that purpose.

PN174

JUSTICE HATCHER: All right, well I invite you to do that within six weeks. So the next two from yours and the Western Australian Chamber concerns clause 25.4. What are you trying to achieve here?

PN175

MS McKENNARIEY: So the aim from AWC's proposal is to enhance the clarity and ensure proper payment practices, particularly around sleepover-related shifts, explicitly not reducing entitlements for employees. The wording at the moment lacks clarity regarding minimum work hours, rest breaks and compensation rates for the sleepover-related shifts and that's leading to misinterpretations and non-compliance with the award based on the interpretability.

PN176

JUSTICE HATCHER: So how does your variation do that?

PN177

MS McKENNARIEY: So the current clause wording, we think having those particular terms around the specificity around minimum work hours, around the intervals between shifts in particular need to be clarified so that it's not interpreted as back-to-back shifts. So the tweaks in wording, I think it's points 1 and 2 under

B, so B1 and 2, in particular clarify those points around conclusion and initiation of shift.

PN178

JUSTICE HATCHER: So I'll address this to the other parties: is there any merit in replacing words 'contiguous with 'directly following?' Is that clearer?

PN179

MS BHATT: Your Honour, can I raise a slightly different point and then answer your Honour's question? The manner in which this provision interacts with the sleepover provisions is that it will be the subject of, I think, some contest between the parties in the context of an application we have filed to vary the SCHADs Award in relation to sleepovers in particular.

PN180

JUSTICE HATCHER: So that application I've got listed on 22 March at this stage, and I'm told that the discussions before Wright DP haven't been fruitful so far.

PN181

MS BHATT: Different parties might have different views about that but - - -

PN182

JUSTICE HATCHER: Right, well it hasn't resulted in agreement, anyway.

PN183

MS BHATT: No, they have not to date resolved the matter, but the point I'd make is there is an interrelationship between those two provisions. If the matter proceeds to arbitration, we expect that that will be the matter of detailed submissions before the Commission and so, to that extent, we just reserve our rights at this stage on any proposed variations to that provision.

PN184

JUSTICE HATCHER: But is there any dispute that 25.4(b)(ii) is talking about the break after a shift that follows a sleepover? I can see the lack of clarity in the use of the word 'contiguous.'

PN185

MS BHATT: I can take some instructions on that narrower point that your Honour has just raised.

PN186

JUSTICE HATCHER: I mean, if it's agreed that we're only talking about sleepover shift, length of break following shift, then it seems to me 'directly following' might in fact be clearer than 'contiguous with.'

PN187

MS HARRISON: Your Honour, we would agree with the AIG's submissions just before in terms of - - -

PN188

JUSTICE HATCHER: Sorry, who are you agreeing with?

PN189

MS HARRISON: With the AIG's submissions in relation to the correlation between this particular clause and the sleepover matter that is also before your Honour and, in that respect, if we could also take this question on notice as well and provide submissions to the Commission.

PN190

JUSTICE HATCHER: All right.

PN191

MR ROBSON: Yes, your Honour, we'd like that opportunity as well to provide submissions.

PN192

JUSTICE HATCHER: All right. Well, just consider whether this specific little drafting issue can be disconnected from the AIG application or whether you think it can't be. The other Western Australian Chamber proposal simply seems to be to reduce the break to eight hours. Ms Rafter?

PN193

MS RAFTER: Yes, we support that proposal because the feedback from our members has been that, if the period of time is an eight-hour rest break rather than the ten-hour rest break, it would make rostering simpler, and as to the argument that it's reducing an entitlement, we'd say that the break itself is still enshrined but also it opens up an opportunity for an employee to potentially access work slightly sooner. That's what we'd say for that.

PN194

JUSTICE HATCHER: Don't they need to sleep between shifts?

PN195

MS RAFTER: I'm reiterating that's the feedback from our membership.

PN196

JUSTICE HATCHER: Well, I'm not sure it would be easier but that's not the entirety of the matter, that is is eight-hour breaks sufficient for employees to go home, sleep and come back to work? I wouldn't have thought so and that's why it's ten hours and not eight hours. I mean, how do we take into account that?

PN197

MS RAFTER: I think it's something we need to look into, probably, a bit further and - - -

PN198

JUSTICE HATCHER: I mean, unless you can persuade me otherwise, I would just consider that to be a substantive change of a fairly major - - -

PN199

MS RAFTER: The alternative that we were looking at there is something that would likely have to await what's happening – sorry to repeat – the AI Group, where you do a simplification of paragraph B, for example, by agreement between

an employer and employee, the period of ten hours may be reduced to not less than eight hours, but I wouldn't want to pre-empt that. It would have to be subject to what's happening in the other application.

PN200

JUSTICE HATCHER: Mr Morrish, did you want to say something about this?

PN201

MR MORRISH: Very briefly, your Honour, just to echo what Ms Rafter said in that we are generally supportive of exploring this further.

PN202

JUSTICE HATCHER: The next one is yours, Ms McKennariey. So, again, what is the proposed change trying to achieve?

PN203

MS McKENNARIEY: This is for 25.5(d)?

PN204

JUSTICE HATCHER: Correct.

PN205

MS McKENNARIEY: So for 25.5(d), we've had instances of failure to provide adequate notice and employers interpreting the existing clause as allowing them to change the rosters without seven days' notice and without consequences, so employees haven't been adequately informed to changes in their work schedule, there's been additional hours that employees have felt compelled to do, and that clause hasn't explicitly outlined their rights to refuse in the absence of proper notice and has also had inconsistencies for rostering changes for part-time employees, so we're seeking to clarify and reword to remove the final part of the clause, 'Where practical, days off will be displayed on the roster.'

PN206

But additionally, I think there's further proposal around what could be considered similarly to what was discussed in previous matters around 'full day' definition and where that commences from.

PN207

JUSTICE HATCHER: Right, so what do people think about this?

PN208

MR RABAUT: Your Honour, the ASU opposes the variation put forward. We say it's unclear as to what the proposal is trying to achieve, but, particularly, it includes a provision which allows employees to refuse additional work without proper notice but what we say is clause 10.3(f) of the award actually deals with that matter because it prohibits employers from requiring part-time employees to work beyond the guaranteed hours.

PN209

JUSTICE HATCHER: So, 10(f) what?

PN210

MR RABAUT: 10.3(f).

PN211

JUSTICE HATCHER: What's that clause? Sorry, what was the subclause? F what?

PN212

MR RABAUT: Apologies, your Honour. The particular provision that – so 10.3(f):

PN213

*An employer must not require a part-time employee to work additional hours -
- -*

PN214

JUSTICE HATCHER: Sorry, you're looking at 10. Clause 10.

PN215

MR RABAUT: Yes, sorry.

PN216

JUSTICE HATCHER: All right. Well, that's part-timers, but I would have thought 25.5 would apply and is much more relevant to full-time employees? That is, a part-time employee's roster will be determined by their part-time agreement, won't it?

PN217

MR RABAUT: Apologies?

PN218

JUSTICE HATCHER: A part-time employee's roster will be determined by their part-time employment agreement.

PN219

MR RABAUT: Yes.

PN220

JUSTICE HATCHER: So, this is more about full-time employees, isn't it?

PN221

MR RABAUT: If I might just refer to – so section 62 provides the right to refuse additional hours under the Act, so we would say also that's relevant even for a full-timer (indistinct).

PN222

JUSTICE HATCHER: But the proposal as a provision which says that if the employee is not provided seven days' notice, the employee can refuse to work additional hours. Now, under section 62, it would be a question of whether it's reasonable or not. This would give an absolute right-of-refusal of a full-time employee. Do you agree with that or not?

PN223

MR RABAUT: Your Honour, if I may take that question on notice.

PN224

JUSTICE HATCHER: All right. I mean, both the summaries (indistinct) because it's not marked up but anyway. What do employers say about this?

PN225

MS BHATT: To the extent that it's proposed that subclause E be deleted, we wouldn't necessarily oppose that. But, beyond that, we'd oppose the changes that have been proposed.

PN226

JUSTICE HATCHER: All right.

PN227

MS RAFTER: We join in with AI Group on that, we don't see the proposal as necessary as part of this review but, as to the deletion of paragraph E, we don't see that having much – no problem with that.

PN228

JUSTICE HATCHER: And then, related to this, we have the Western Australian Chamber says they want it extended to 28 days' notice. How's that going to work?

PN229

MS RAFTER: We are very much opposed to the requirement for consultation to be 28 days' prior to implementing a change to the roster, we say that that's just simply not workable and, as to some safeguards that exist, we would highlight that clause 10.3 that we were just looking at has a lot of safeguards built in it for part-time employees already that limits the opportunity to simply vary the roster without agreement and, also, we would note that in other awards, seven days' notice has very much been recognised as an appropriate period of time.

PN230

We have seven days in the Childrens Award at clause 21.7(b)(i), Clerks Award and Hospitality Award just to name ones that are under consideration right now. But we very much oppose this, it just won't be practical from an employer perspective.

PN231

JUSTICE HATCHER: They say there's a conflict with the consultation clause, do you - - -

PN232

MS RAFTER: The model consultation clause? We'd say that's approach that is directed at two different issues. So, the awards that I just mentioned – so, let's say for the Clerks Award, for example, has clause 26.4(a) and that refers to a seven-day notice period. It also has the model consultation clause separately, as well, that has the seven-day notice period as well for that. We would say they're two different issues, but there's not an inconsistency there from our view.

PN233

JUSTICE HATCHER: It's not clear to me what the inconsistency is; does anyone know?

PN234

MS BHATT: We don't think there is one.

PN235

JUSTICE HATCHER: There's no reference to 28 days that I can see in clause 8A.

PN236

MS BHATT: No. I mean, as we see it, the true provisions operate in parallel. There's a requirement to consult and a requirement to provide notice and both of those requirements need to be complied with which ordinarily would mean that the consultation of the proposed change needs to occur before the seven days.

PN237

JUSTICE HATCHER: Well, clause 8A.5 specifically requires the consultation clause to be read in conjunction with provisions concerning the scheduling, work, or the giving of notice, so I can't see what the inconsistency is. So the next three matters all concern the rostering of work around sleepovers, so can we treat those as encompassed and to be dealt with in the context of the AI Group's application?

PN238

MS BHATT: Yes, your Honour.

PN239

JUSTICE HATCHER: Ms McKennariey, I'm not sure if you're aware of this but there's a separate matter on foot that the AI Group has lodged to vary the award in respect of the rostering of work before and after sleepovers so can I invite you, if you wish to ventilate this issue, to raise it in the context of that application which is before me for directions on 22 March and is separately being conciliated by Wright DP. So that's matter A2023/28.

PN240

MS McKENNARIEY: Yes, your Honour.

PN241

JUSTICE HATCHER: So the next one is the Western Australian Chamber about paying for remote trainings or meetings and this interacts with your position, Ms Bhatt. Does anybody want to say anything new about that?

PN242

MS BHATT: This isn't a specific variation that we've called for in the context of this award, we've just responded to the Chamber's submission because we had a view that the proposal that it had put forward didn't necessarily give effect to the submission that it's advanced so, in that context, we've advanced an alternate set of drafting.

PN243

JUSTICE HATCHER: So 25.10, when it talks about 'remote work', what type of work is that contemplating?

PN244

MR ROBSON: I might divulge. So this clause was inserted during the four-yearly review. Parts of it reflect consent position between some of the parties involved in that and other parts of it reflect arbitration. My recollection is that clause 25.10(c)(i)(D) which provides minimum payment one hours pay for team meetings conducted remotely, that was the subject of arbitration and the Commission found that one hour was appropriate.

PN245

For our members, this term had been used quite commonly in disability services where the team members don't necessarily return to base every day and so they conduct a team meeting online using Teams or Zoom and it was a significant issue for our members that this was – before this award was very clear – conducted on unpaid time. This provision makes it clear that this work needs to be paid and, because it doesn't necessarily fit within someone's regular roster, it's very clear that there is a level of compensation built into it if that time is shorter than an hour for the same reasons why we have minimum payment periods that apply in other circumstances.

PN246

JUSTICE HATCHER: Yes, right. Okay, the next two proposals from the Western Australian Chamber and the AI Group involve meal breaks and tea breaks. Ms Rafter, you've responded to the Chamber's proposal, do you want to say anything about it?

PN247

MS RAFTER: We simply say, and this is for item 34, that we support the proposal and the variation that we proposed was simply for a further point of clarification by separating it out into its own separate paragraph if it were to be adopted, but we're supportive of that proposal.

PN248

JUSTICE HATCHER: What does 'awake overnight' talk about?

PN249

MS RAFTER: Sorry, your Honour?

PN250

JUSTICE HATCHER: In your draft, it talks about the employee's required to be 'awake overnight', what's that talking about?

PN251

MS RAFTER: So we were endeavouring to – had it made the clause do more work than we wanted it to do, we're effectively just trying to mirror the clarity of that clause in a separate paragraph. So if the view is that that's adding confusion by keeping the preamble part of it with it, we're happy to stick with the

Western Australia Chamber's point, but that's how we had viewed that it was to be interpreted.

PN252

JUSTICE HATCHER: 27.1(c) currently applies where the employee is required by the employer to have a meal with a client or clients as part of a normal work routine and the Western Australia Chamber in your proposal have added a requirement that they be 'awake overnight.' Now I'm just trying to understand what that means.

PN253

MS RAFTER: I believe that's addressing when it is distinct from a sleeping over but rather being attending to duties whilst, but I might seek some more instructions on that one to make sure.

PN254

JUSTICE HATCHER: I mean, if it's a rostered shift then I think we would presume that they're awake. That is, if it's a rostered shift and not a sleepover, we would assume that they're awake during their shift, wouldn't we? Why would we need to say that?

PN255

MS RAFTER: I'll need to take it on notice, your Honour.

PN256

JUSTICE HATCHER: Then there's your proposal, Ms Bhatt.

PN257

MS BHATT: Our proposal relates to tea breaks rather than the unpaid meal breaks.

PN258

JUSTICE HATCHER: Yes.

PN259

MS BHATT: The requirement under the award currently is that a ten-minute paid break is to be taken every four hours at a time that's agreed between the employer and employee. Our proposal is that there should be some flexibility that is introduced as to when those breaks are to be taken by introducing a facilitative provision that allows the breaks to be taken together. So you could agree that two tea breaks are taken together, notwithstanding anything else that's required by that clause, at a time that's agreed between the employer and the employee.

PN260

It seems that there's at least some circumstances in which it's not practical for a tea break to be taken within a specified four-hour period because, for example, the employee is assisting a particular client. It is better facilitated ensuring that the employer takes a break, albeit, outside that four-hour period.

PN261

JUSTICE HATCHER: But that removes the purpose of the break, doesn't it?

PN262

MS BHATT: Well, it changes when the break is taken. So it might mean that, within a period of four hours, the employee doesn't take a break and they take it at the conclusion of the four-hour period, for example, rather than within it. It can only be instituted by agreement, there's a necessary protection in that.

PN263

JUSTICE HATCHER: The current clause doesn't, on its face, prohibit the tea break being taken immediately before or after a meal break?

PN264

MS BHATT: No, I don't think so.

PN265

JUSTICE HATCHER: All right, well I don't think we need to discuss that. The next one is the Western Australian Chamber, this is about the TOIL usage period, they want to extend it to 12 months but my question is: in most awards, I thought it was six months, but in this award it's three months. Why is it three months in this award? So this is 28.2(d)(i). My quick survey of other awards suggests it is usually six months.

PN266

MR ROBSON: Yes, your Honour. We'll undertake to find the answer to that but it may just be that this was the balance and regulation of predecessor awards.

PN267

JUSTICE HATCHER: All right, well, can you consider whether – maybe not 12 months - but whether there's any reason it shouldn't be six months in line with most other awards?

PN268

MR ROBSON: Yes, your Honour.

PN269

JUSTICE HATCHER: Do the employers here want to say anything about this?

PN270

MS RAFTER: We'd need to take it on notice as well, your Honour.

PN271

JUSTICE HATCHER: The next one is about cashing out leave. Does anybody support the notion that the cap should be removed? I mean, this was effectively a test-case provision.

PN272

MS RAFTER: Looking at that, I note that on the summary document it says that we oppose but broadly I'm clarifying that we do not oppose the variation and our basis for that was we saw that in the Clerks Award there appeared to be equivalent provision relating to cashing out annual leave as well at clause 32.9, and it's recognised as a facilitative provision in that award, so we support increasing flexibility.

PN273

JUSTICE HATCHER: What were you referring to in the Clerks Award?

PN274

MS RAFTER: So we noted that there is a cap in the Clerks Award at clause 32.9(h) where it says:

PN275

The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is two weeks.

PN276

JUSTICE HATCHER: Yes.

PN277

MS RAFTER: But what we were noting is that that clause 32.9 is also a facilitative provision, so there was a mechanism for potentially an employee to enter into a more flexible arrangement, obviously, with agreement, and so that's why we weren't strictly opposed to the proposal by the Chamber as we think there's room there to potentially increase the flexibility, thereby removing the cap or otherwise introducing - - -

PN278

JUSTICE HATCHER: Sorry, are you saying these clauses are different?

PN279

MS RAFTER: Apologies, your Honour. I missed that.

PN280

JUSTICE HATCHER: Is the clause in the SCHADs Award, 31.5, in some respect different to the one in the Clerks Award? Aren't they the same clause?

PN281

MS RAFTER: Yes, your Honour, at a quick glance they do appear to be the same but in the Clerks Award it's a facilitative provision and it is not a facilitative provision in the SCHADs Award. So, on our reading, there was view for an individual employee to - - -

PN282

JUSTICE HATCHER: But both clauses require agreement in writing. I'm confused, Ms Rafter, because to me these clauses are identical.

PN283

MS RAFTER: I'm not saying they're not the same, I'm saying that, in the Clerks Award, it's also identified as a facilitative provision such that an employee may enter into different arrangement by agreement pursuant to - - -

PN284

JUSTICE HATCHER: I don't think that's what the Clerks Award says, with respect. That is clause 7 of the Clerks Award just sets out the clauses which operate by agreement of which cash out of annual leave is one. It doesn't provide some separate capacity to make agreements of a separate nature.

PN285

MS RAFTER: If I was wrong in that reading, your Honour, I'll accept that.

PN286

JUSTICE HATCHER: I think that's just a cross-reference clause, it's not a substantive. Mr Morrish, did you want to say something?

PN287

MR MORRISH: Thank you, your Honour. We didn't canvas the Western Australian Chamber's proposal in our reply submissions so just seek to register our support for this particular proposal.

PN288

JUSTICE HATCHER: Mr Morrish, this is effectively a test-case clause so I'm not sure that we would proceed on the basis that it should be varied in one particular award. If parties want to reopen it, they can if they really want to. All right. On the same subject matter, Ms McKennarley, what's your proposal?

PN289

MS McKENNARIEY: This proposal is pretty much identical to what we put forward with other award submissions with respect to the cashing out of annual leave and TOIL, with the proposed amendment to the cashing out of annual leave clause making mention of the TOIL cash out applicable rules and making sure that there is sufficient clarification that it can't be incorrectly paid out. The main considerations that we had around this was that the current version lacked clear guidelines regarding the cash out of annual leave and didn't specify the conditions or frequency under which it could be cashed out and the differentiation of compensation rates where, incorrectly, employers have not understood that TOIL is not annual leave or the same category of leave, in an oversimplification, just reading this clause in isolation, so making reference to the TOIL compensation rates as part of that proposal.

PN290

JUSTICE HATCHER: I don't understand how anybody could think this clause applies to overtime. It's titled 'cashing out of annual leave.' I just don't understand how that could be misinterpreted.

PN291

MS McKENNARIEY: I think really, it's probably more with respect to the guidance notes with regards to the minimums, record keeping and ensuring that there's adequate understanding of those requirements but referring to it as 'cashed out leave.'

PN292

JUSTICE HATCHER: All right. Does any other party think this clause requires variation? I think there's agreement that we can delete Schedule A?

PN293

MS BHATT: There seems to be, your Honour.

PN294

JUSTICE HATCHER: Yes. All right, well that's something.

PN295

MS BHATT: I think we have also proposed that clause 10.5A can be deleted. It too is a provision that applied only for a limited period of time following a decision issued in the four-yearly review concerning part-time employees.

PN296

JUSTICE HATCHER: Do other parties agree with that?

PN297

MR RABAUT: Yes, your Honour.

PN298

MS RAFTER: Yes, your Honour.

PN299

JUSTICE HATCHER: All right, well I thank everybody for their attendance. As I said in the other matters, I'll consider, after completion of the consultation process, whether it would be productive to have a further session in relation to this award about some specific matters but I note that I've invited parties to provide additional information in respect to specific matters to follow up from today's discussion and, obviously, I'll take into account those further responses before deciding whether to have any further consultation sessions. Right, if there's nothing further, we'll now adjourn.

ADJOURNED INDEFINITELY

[2.46 PM]