



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT O'NEILL

AM2023/21

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

**Application by
(AM2023/21)**

Sydney

9.41 AM, WEDNESDAY, 3 APRIL 2024

Continued from 20/03/2024

AUDIO COMMENCED**[9.42 AM]**

PN1

DEPUTY PRESIDENT O'NEILL: So in no particular order, for the SDAEA Ms Biddlestone. For the CEPU Ms Abousleiman; AMWU Mr Amoresano; for the ACTU Ms Peldova-McClelland; Ai Group Ms Bhatt. For the Flight Attendants' Association Mr Cope and Max Gale. I'm not sure if that's male or female. For the NTEU Ms Wells and Mr Campbell Smith, and the CFMEU Mr Maxwell. For the UWU Mr Orr and Ms Debarera. For the Australian Chamber of Commerce Ms Tinsley and Mr Morrish. For the Mining and Energy Union Ms Delpiano. For Australian Business Lawyers and Advisers Mr Arndt. For the Australian Retailers Association Ms Wilding. For Club Managers Ms Goldthorpe and Mr Cooper, and for the ASU Mr Robson. Have I missed anybody? No.

PN2

MR YIALLOUROS: Apologies, Commissioner, this is Paul Yiallouros from the ANMF. We're having trouble getting our sound working, so we're not sure if our appearance has been noted.

PN3

DEPUTY PRESIDENT O'NEILL: I don't think it has, and I missed your name, I'm sorry.

PN4

MR YIALLOUROS: Paul Yiallouros, Y-i-a-l-l-o-u-r-o-s, and joined by my colleague Lauren Palmer.

PN5

DEPUTY PRESIDENT O'NEILL: Thank you for that. Is there anyone else? No. All right. This is the first day of consultation in the work and care stream of the review. I issued a statement last week with just a slight modification to the sequencing of the consultation discussions that I had previously flagged. A couple of other things by way of update. There was a data profile prepared by Commission's staff that was published I believe on 28 March, and along with my most recent statement hopefully for the assistance of parties summary documents of each of the days consultation was published.

PN6

A couple of points by way of clarification, I guess, in terms of issues that have come through some of the submissions. I can confirm that the review is not confined to the 25 awards identified in the discussion paper. They are simply the awards that were the subject of some analysis in the discussion paper.

PN7

Secondly, I have noted in the submissions from multiple interested parties concerning whether the review can result in any reduction of any employee entitlements, and there was a question you might recall last time as to whether that was confined to making awards easier stream, or related to the whole of the review process; submissions about the weight to be given to the literature review that was published; submissions about whether the Full Bench should express any

view about the merits or otherwise of any specific proposals that have been put forward to vary any of the awards. I just wanted to say that all of those submissions will be fed into the considerations of the Full Bench leading to the outcome of the review. It's obviously a matter for parties, but I'm not sure there's anything to be gained from spending significant time arguing those points through a consultation process.

PN8

Of course following the report of the Full Bench, the outcome of the review, it may be that there are applications to vary one or more modern awards by any of the parties, or indeed the Full Bench may indicate an intention to initiate some proceeding or otherwise. In either eventuality then there will be opportunities for the filing of submissions and evidence which may go to these, and indeed a raft of other issues.

PN9

Having said that I just also wanted to note that there had been a number of submissions about the literature review, and there has been a request by the Australian Industry Group for an extension of time to make submissions about the literature review, and I am minded to grant that extension as requested to 26 April. It doesn't impede on the timetable for the remainder of the review. So if any other interested person wishes to avail themselves of the same opportunity that is open.

PN10

Now turning to how the days of consultation will run, the truth is that many of you in the room today and appearing remotely have more experience in this process than I have, having participated in the consultation process in one or other of the other streams. My understanding is that generally what's been happening is that parties have been invited, who have made submissions, to speak to their submission and the consultation session generally concludes after that exercise, which has often been to be less than a full day.

PN11

I am open if anyone from their experience in other sessions has a particular suggestion about how this might be done differently, and we can see how we go over the days. Simply you can take the submissions that have been filed and the responses to them as having been read, and I can tell from the reply submissions that everyone has obviously read each other's material. But of course if anyone wants to say anything in addition or expand on or highlight particular elements of their written submissions then there's obviously an opportunity to do so. Perhaps if there's any clarification or discussion about another party's proposal that would be useful then that's obviously something that we can do.

PN12

Again by way of clarification one of the issues that has come through about the process is whether the consultation days are confined to a narrow discussion of specific proposals that have been put. I am not going to confine it in that sense. I am not going to cut people off from speaking. I know that you're all conscious that we have limited time and we will seek to use that in the best possible way.

PN13

If anyone at any stage considers that it would be helpful or useful to either break into smaller discussion groups, or engage in some off the record discussions, then we will do our best to accommodate any such request. We have certainly got some facilities available for that to happen over the course of the days.

PN14

Then the final matter that I just wanted to note is I have been keen to identify from the written material where there are any potential areas for some potential consensus. Now, I have got a list of those, but I want to check in whether (a) that's right, and (b) if I have missed anything. What I am thinking at this stage is that I have flagged that 11 April would be available if necessary for any further discussions. I am certainly minded to use that day to progress any potential areas of discussion, but we will see how we go over the course of the next few days.

PN15

The areas that I have identified that there may be some consensus around is in respect of variations to provide for annual leave to be taken at half pay. I am not quite so confident about this, but there seems to be perhaps some scope for agreement around provision of ceremonial leave, or some form of it. In relation to the General Retail Industry Award, and I think it's confined to that award, an amendment in relation to provision of a four day working week. And I just by way of passing comment note that a number of the submissions in relation from the ARA and the SDAEA and others relate to and refer to a separate application that has been made and is before the Commission to vary the General Retail Industry Award. So I propose to skip over that essentially because that will be dealt with its own separate proceedings.

PN16

In relation to the higher education sector there seems to be some scope for agreement around the need for a day minimum engagement period for part-time employees, and two week notice of roster, and some issues in relation to eligibility for unpaid parental leave. That's my tally of where it seems that there may be some scope for agreement, but as I said I am keen to check in if I have got that right and if I have missed any others. All right. Who would like to - Ms Bhatt, you're rising to your feet.

PN17

MS BHATT: Can I deal with a few of the issues that the Deputy President has just raised. I might deal with the last one first. In terms of that list of matters that the Deputy President has just identified certainly in respect of annual leave at half pay it also seemed to us that there might be some scope for discussion in respect of that issue, and we'd be keen to explore that further at the appropriate time.

PN18

In relation to the issues concerning the Retail Award our understanding is the same as the Deputy President's, and indeed the ARA's application is listed for conference at the end of this week on 5 April. So I anticipate there will be some discussion about such issues then.

PN19

DEPUTY PRESIDENT O'NEILL: Do you know offhand - I haven't carefully looked at the application to vary that award - whether it provides for a four day week, or are you suggesting that it might be able to be incorporated?

PN20

MS BHATT: Mr Wilding is here and he's appearing for the ARA. He might be better placed to answer that question. He's obviously closer to the detail of that application, but I will say is that there a number of issues arising from that application concerning the way in which ordinary hours can be arranged, and some of them touch upon the number of days that employees must be given off, or the corollary of that is that they can be required to work. To that extent at least there's some overlap. But the Higher Education Award is not an award in respect of which we appear, so I won't comment on that.

PN21

In respect to ceremonial leave there's a specific proposal that's been advanced in the ACTU's reply submissions, a specific form of words. That's something that we are still giving some consideration to, but we're always happy to talk about anything, and it might be that at the very least we can make some comment about that if that's scheduled for discussion on that last day that's been set aside.

PN22

So far as the process that we might follow these consultation proceedings in the matters in which we have been involved, namely job security and making awards easier to use, it's being conducted in two ways. In the making awards easier to use stream summaries of submissions similar to the ones that were published last week were prepared, and they were effectively used as a guide for the discussion. The discussion worked through each item at a time for each proposal at a time, and moving parties were given an opportunity to say whatever they wanted to and to perhaps reply to what has been put in response in writing, as well as an opportunity for anyone else to be heard.

PN23

This is admittedly a somewhat selfish proposal because on the basis upon which I have prepared for today's proceedings, but it did seem to us that that was a useful way to go about the exercise if the Deputy President is minded to conduct the proceedings in that way. Some might say it's a more laborious way for going through the exercise, but it just seemed to us that the summary has a way of focusing one's mind on each of the proposals. So that might be an effective way to use the time.

PN24

I take on board the comments that the Deputy President has made today about some of the general issues, including this proposition that any proposals advanced in this part of the review should not result in a reduction in employee entitlements, and I of course agree that there's probably not a lot of merit in dwelling on that issue for too much time. Having said that I did at some point seek an opportunity to say something brief about what the ACTU has put in its reply material about that when that's convenient.

PN25

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

PN26

MS PELDOVA-MCCELLAND: Thank you, Deputy President. I don't have anything particular. I'm happy with the consultations to run as you have suggested and as Ms Bhatt has suggested, learning from the easy to use stream, which I think is probably the one that's most useful in this stream given the number of proposals to get through.

PN27

The only thing I would add is that there may be a number of our affiliate unions who wish to speak on the proposals who aren't sitting at the table, and so just to allow for them to pop in and out as they need to speak to various issues.

PN28

DEPUTY PRESIDENT O'NEILL: Of course, and it's a standing invitation. If anybody who's appearing remotely wishes to be involved then perhaps the most effective way might be to raise your virtual hand so that we will get that flagged, and certainly have an opportunity to say what you would like to. All right. Then working through the summary documents seems to be a pretty good approach. So the first relates obviously to discussion question 1 which are variations relating to part-time provisions. Perhaps if we start with the ACTU in terms of the specific proposals, which is at their row of the summary document.

PN29

MS PELDOVA-MCCELLAND: Of course, Deputy President. I won't seek to say too much given it's all been set out in our submission, but perhaps just to clarify a couple of points from the reply submissions. So obviously this recommendation in our proposal is aimed at trying to look across issues that our affiliates have identified in various awards with part-time employment provisions and suggest some themes arising from those issues, and that's why that recommendation is quite broad and includes a number of different things in it.

PN30

We say that it's necessary to look at all of these things to make sure that workers have as much certainty and predictability about their hours week to week as possible, and to deal with the negative impacts that not having that predictability has on their ability to manage their caring responsibilities and their economic security.

PN31

Just going to a couple of the points. I think from Ai Group's reply submission they make a point about our recommendation on the right to elect conversion of additional hours and how this wouldn't apply, or would be difficult to apply where there's a mechanism for overtime rates to be payable for work outside agreed hours. That's correct, and to clarify, the position we put forward in our submission, again a summary of different proposals that have been put forward by our affiliates, our primary position in these consultations and in this review is that overtime should be payable for work outside agreed hours, which would fix many of the issues we've identified with part-time work, including this pernicious issue of low base hour contracts that can be flexed up and down. And we say the

payment of overtime would disincentivise the use of those contracts in a number of industries where they're currently used.

PN32

A review mechanism is a secondary position that we put in the alternate if that primary position isn't accepted. We say it wouldn't be as effective in fixing the issues we've identified with part-time employment. However, as an alternative we would advance that to be some form of protection for workers.

PN33

There is also an issue raised in our group's reply submission on minimum engagements on a weekly basis. I might defer to a couple of our affiliates who have experience with these provisions in enterprise agreements and how they work there. We note that Ai Group say that these provisions would disincentivise the employment of people with caring responsibilities and also with younger workers. Again we defer to our affiliates, but note that the Retail Award - is it the retail award - some of the agreements carve out shifts for students, so that they're not subject to the same number of minimum weekly hours.

PN34

In relation to Ai Group's reply on our proposal, our recommendation that employees who work hours that are irregular, sporadic or unpredictable can express their interest in working hours which are regular, and an obligation to provide those hours where operational requirements allow. Ai Group say, you know, employees can express that desire at any time. This shouldn't be a matter in awards, it interferes with the employer's prerogative.

PN35

We just say in response that employees may be able to express a desire at any time, but employers obviously currently have no obligation to respond or to do anything in particular with that request, and also that employees may not realise that they have that ability and may not feel comfortable to do so, given the structure of their work. There's a lot in the submissions about how employees currently don't feel comfortable to exercise legal entitlements given how their working arrangements are structured. Nothing about that would interfere with the employer's prerogative as employers would only need to provide those hours where operational requirements allow. So things like skills and competencies and efficiencies and productivity would all be a part of that calculation. So we say it wouldn't interfere in the way that Ai Group says it would. I think I will leave it at that for our comments in relation to the proposal, unless of course you had any questions, Deputy President.

PN36

DEPUTY PRESIDENT O'NEILL: I was curious about the 15 hour minimum, but your affiliates might want to say something about that, and also the question about the students and the minimum engagement kind of point that you've covered there. Were there any other of the union parties that wanted to speak to this particular issue?

PN37

MS BIDDLESTONE: Thank you, Deputy President. Just in relation to the retail

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DEPUTY PRESIDENT O'NEILL: I'm sorry if you wouldn't mind just - I'm not going to know everyone, if you can - - -

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MS BIDDLESTONE: Biddlestone, initial K.

PN40

DEPUTY PRESIDENT O'NEILL: Ms Biddlestone?

PN41

MS BIDDLESTONE: Yes, from the SDA. In relation to retail and the issue of setting a minimum number of hours for part-time employees we just note that several enterprise agreements do provide for a minimum weekly number of hours for part-time employees which provides the base. It's not currently in the award, but we think that it is important for employees, particularly workers who also have caring responsibilities, to have some certainty and predictability in terms of the number of hours that they work, which is why we've made the recommendation in our submission around a minimum of 15 hours as a weekly number.

PN42

DEPUTY PRESIDENT O'NEILL: And does 15 come from anything in particular?

PN43

MS BIDDLESTONE: There are some linkages with some Social Security payments in relation to the number of hours that people need to work to then have eligibility around that. It's also about a meaningful number of hours to earn a living wage and what people need to live on in terms of their household incomes. We have done research in relation to how our members manage work and care. They typically come from very low household income families. So setting at that fair and reasonable minimum number of hours is really important for them to be able to earn a living wage. So that's where the 15 hours comes from.

PN44

In terms of the minimum payment or shift provision increasing to four hours I think the AiG submissions went to some concern about that number of hours, and that for some employees, particularly students, that a reach in four hours might be difficult for them. I just wanted to clarify that in a couple of awards there are minimum shift provisions for students.

PN45

DEPUTY PRESIDENT O'NEILL: Awards or agreements?

PN46

MS BIDDLESTONE: Awards, sorry. Yes, I just wanted to clarify that, at one and a half hours for students after school.

PN47

DEPUTY PRESIDENT O'NEILL: (Indistinct) a significant issue in relation to school students.

PN48

MS BIDDLESTONE: Yes. So that issue is already fixed in terms of the awards. Thank you.

PN49

DEPUTY PRESIDENT O'NEILL: Thank you. All right. Ms Bhatt, did you want to speak to this proposal?

PN50

MS BHATT: Yes, thank you, Deputy President. We have dealt with it in detail in our written submissions, so by and large we rely on those, but to deal with some of the points that have been advanced today. By and large the standard model of part-time employment that's found in a vast majority of awards does require the payment of overtime outside of agreed hours.

PN51

This idea that employers have the ability to flex up and flex down is really only found in a fairly small number of awards, and generally the part-time employment provisions in those awards reflect careful consideration that was given in the context of a specific proposal that was brought to vary those awards. So our principal position is that to the extent that those - - -

PN52

DEPUTY PRESIDENT O'NEILL: Sorry, just bear with me, I'm just trying to turn my channels down. There, done. Sorry.

PN53

MS BHATT: To the extent that those sorts of provisions are found in a small number of awards they shouldn't be lightly disturbed. Some argument has been made today about this idea of a minimum weekly amount, and as has been outlined by my colleagues one of the concerns we have raised about that is the extent to which in fact that would preclude certain employees from being able to be engaged on a part-time basis.

PN54

There might be any number of reasons why an employee is not available for 15 hours or 10 hours or any smaller amount that you might come up with. So I think any such proposal would need to be given very careful consideration. I'm not close to the detail of the enterprise agreements that have been referenced by the SDA today, but I would question whether for example minimum based hourly requirements on a weekly basis arise in those agreements because overall they provide a more flexible model of part-time employment. You see that in the award system.

PN55

The Hospitality Award and the Restaurants Award I think contain more flexible part-time employment provisions that allow this ability to flex up and flex down, but one of the safeguards, one of the trade offs is that there is a minimum amount. I think it's eight hours in those awards that those employees have to be engaged for. The vast majority of awards contain a very different model of part-time employment, whereby all hours must be set by agreement upon engagement with the employee, and in our view it's not necessary in that context, in the context of awards that operate in that way, to stipulate a minimum, and in some cases it will simply serve as a barrier to engage an employee on a part-time basis.

PN56

As for minimum engagement periods I'm aware of at least the Retail Award that makes some provision for school children. I'm not aware that other awards do, which is not to say that they don't, but for example the Fast Food Award under which many young people are employed does not make any such exception, and the concerns that we have raised about increasing the minimum engagement and payment periods go beyond concerns about any dis-employment effects. That's one of the issues that we have raised, but of course there are a myriad of circumstances in which employers need to be able to engage employees for short periods of time.

PN57

The Fast Food Award and the Retail Award, there are a number of examples that come immediately to mind. Employers in the fast food sector will say that there are peak meal periods for example where for two or three hours at most they need additional employees to assist to deal with higher customer demand. So some of the concerns that we've raised also relate to the very obvious impact that they would have on employers. That's all I wish to say about this issue.

PN58

DEPUTY PRESIDENT O'NEILL: All right. Mr Wilding?

PN59

MR WILDING: Thank you, Deputy President. I will be brief, but just because it has been said about the Retail Award we support what Ms Bhatt said about the opposition to 15 hour minimum. There are any number of reasons why employees may wish to work for less than 15 hours in a week to meet their personal circumstances.

PN60

Similarly for the minimum engagement we don't support an increase to the minimum engagement period. Again that's not confined to school students. There are any number of reasons why it may suit employees to work less than four hours, and employers have a large number of operational reasons why a four hour minimum engagement period is not appropriate.

PN61

Then on the issue of additional hours I do think it's important to note that those additional hours that are worked are agreed hours. They're not sort of beyond agreement, they are agreed hours. Where they're not agreed that is when they tip

into overtime. Our position is that part-time employees should be able to access additional hours where they agree to do so, and it's appropriate that those be paid at the same rate as other employees receive. Thank you, Deputy President.

PN62

DEPUTY PRESIDENT O'NEILL: I'm tempted, because I want to dive into the detail and start asking all sorts of questions about the proposals, but in fact I don't think that's actually very helpful. Are there any of the other employer interests that wanted to say anything about this proposal of the ACTU? Ms Tinsley?

PN63

MS TINSLEY: Thank you, Deputy President, I will be brief. Just to reiterate the points made by the employer organisations before me. Thank you.

PN64

MS BIDDLESTONE: Sorry, Deputy President, I would just like to make a couple of observations following the submissions made by the employer groups, particularly the Ai Group and also the ARA. Just in relation to the payment for additional hours, but also how employers use rostering of additional hours, we have a bit of a wicked problem in awards at the moment which allow for low base contracts for part-time employees with the option for them to agree to additional hours paid at ordinary rates, because at the moment the situation we have is that our members are severely underemployed. They are not given the opportunity or the roster to earn the amount of income they need to support themselves and their families.

PN65

So rather than agreeing by choice to additional hours paid at ordinary rates versus overtime they take it at ordinary rates because they have no other choice. So we have a problem with the away that the awards are structured that allow for that. There is no incentive currently in the awards to make employers consider higher base rates for part-time employees when they are able to increase the rostered hours of part-time employees, admittedly by agreement, but we would say not by choice, to higher rates where there is absolutely no additional payment or compensation made to those people.

PN66

So effectively what we have is we have a quasi casual workforce who are contracted to work a base number of hours and who at the whim of the employer are offered additional hours with absolutely no compensation for the unpredictability and uncertainty of working those hours. So just want to make it clear that this is not about ordinary versus overtime in terms of agreement from employees. Thanks.

PN67

DEPUTY PRESIDENT O'NEILL: Sorry, just that last point again?

PN68

MS BIDDLESTONE: Because for our members it's not a choice.

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DEPUTY PRESIDENT O'NEILL: No, no, I understand that.

PN70

MS BIDDLESTONE: They might agree, so it's not really about an agreement to work additional hours at ordinary versus, 'No, I'm sorry, boss, I'm not going to work additional hours unless you pay me overtime.' Our members don't have that luxury. They take the additional hours because they need the money and they will take it paid at ordinary rates, because that's the position they're in. They don't have the luxury of choosing between whether or not they will get that paid at ordinary rates or overtime. That is just not what happens. Thanks, your Honour.

PN71

DEPUTY PRESIDENT O'NEILL: The SDA has a somewhat related proposal, which is that the additional hours are not paid at overtime, they were paid at at least 25 per cent. And I take it that - - -

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MS BIDDLESTONE: Plus the accrual of leave.

PN73

DEPUTY PRESIDENT O'NEILL: Yes. And I take it that is essentially a response to claims by employer interests that requiring payment to be at overtime rates is a disincentive to part-time employment and the advantages of that and would encourage employers to engage people on a casual basis, and that's essentially what you would say neutralises that argument.

PN74

MS BIDDLESTONE: Yes.

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DEPUTY PRESIDENT O'NEILL: Have I got that right?

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MS BIDDLESTONE: Yes, that's correct.

PN77

DEPUTY PRESIDENT O'NEILL: All right. Unless there's anything further in relation to that proposal the next proposal is by the AHA - - -

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MS BHATT: I think there's a raised hand on the screen.

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MR YIALLOUROS: Apologies, Commissioner.

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DEPUTY PRESIDENT O'NEILL: Mr Yiallouros.

PN81

MR YIALLOUROS: Thank you. Sorry, I didn't want to sort of jump in too prematurely. I just want to make some brief comments about the part-time employment provisions. I've had some involvement in the job security stream as

well, and I think it goes without saying that the overlap between the issues raised in those two streams is pretty significant, you know, in the way in which it interacts with work and care issues around gender equality.

PN82

This has been sort of an interesting sort of intellectual exercise looking at other awards and realising how stunningly deficient the Nurses Award is when compared to other awards when you look at the part-time employment provisions. I think it was AiG who said only moments ago that for example the issue around whether or not part-time employees with guaranteed minimum hours who work additional hours ought to get overtime payments for those additional hours. That is an issue that's confined to only a certain number of awards who don't have that overtime provision.

PN83

The Nurses Award is one such award, and the issue around to sort of carefully plan, how use of balance work and care is hugely affected by that. Our view is that the Nurses Award should be amended to be in line with other awards that do provide overtime in those circumstances.

PN84

I think just to sort of take a step back and look at the rates at which part-time employees, particularly in a female dominated industry such as nursing, and even more so midwifery where the uptake of part-time employment is so large, it would be, I think, a mistake to assume that because employees either want to or need to work part-time hours that that necessarily also means that they thoroughly support all aspects of what part-time employment entails and the way in which it presents in the modern award. I think that's sort of a misguided way of thinking.

PN85

Our view is that, yes, certainly many employees want to or need to work part-time hours, but the way that the award is framed should provide for the ability to balance work and care and where that is deficient in the award that that's really what we should be looking at sort of tinkering with.

PN86

Now, in relation to sort of, you know, any issue around sort of guaranteed minimum hours, I note that the SDA has proposed a 15 hour minimum for guaranteed part-time hours, and certainly that's a proposal worthy of consideration. In terms of our award and our industry I think the preference would be, and it's set out in our submission, is that again the overtime provisional hours should be provided, but there should also be a separate mechanism whereby where employees are often working additional hours that they can apply to have their guaranteed minimum hours varied to more accurately reflect the hours that they are technically working, taking into account the additional hours that they are being given.

PN87

Now, I can't remember who said this, apologies, but it was also sort of previously stated that people want to work additional hours and that there should be no penalty attached or whether it should essentially be treated as ordinary hours. I

think the reasons for people wanting to work additional hours, or agree to work additional hours, can be numerous.

PN88

Certainly there is a financial incentive to take on additional hours, but that doesn't necessarily mean that those hours should just be paid at ordinary rates, because what you lose as a result of that is the certainty and predictability that comes with having guaranteed hours. To equate the two would I think would be somewhat misguided. But I also think that, you know, when we look at it for example in a profession such as nursing and midwifery the compulsion to accept additional hours occurs in the context of the workplace.

PN89

If you are doing the rounds in a ward and you can see that there are people who - and you're sort of approaching the end of your shift and you can see there are heaps of patients who still need to be fed, provided medication, assisted with sort of cleaning and other sort of caring responsibilities, it is very difficult to sort of walk out of that workplace and say, 'My shift is done', when you are approached saying, 'Look, can you stick around for a bit longer.' It's not a simple decision-making process of going, well, 'You're on the additional income, you have to accept the additional hours at ordinary rates.'

PN90

People may also be thinking about, 'Well, I've got a child in childcare and if I stay longer that means that I need to pay this much more in terms of childcare fees.' There are so many factors that go into that moment of accepting or declining additional work. So hence we say that because it is so fraught it is appropriate that additional hours should attract overtime rates, or otherwise there be a mechanism to what those additional hours and where they are being worked on a pretty consistent basis. That was all from me, Commissioner.

PN91

DEPUTY PRESIDENT O'NEILL: All right, thank you for that. Is there anyone else?

PN92

MR ROBSON: Thank you, Deputy President, Michael Robson appearing for the Australian Services Union. Thank you. I realise now I might not have been heard by my colleagues appearing online. I want to speak and address some of the issues in respect of the disability sector. This is the largest growing area of employment in Australia, and that employment growth has been driven by the issues that have been addressed by the ACTU in their proposal.

PN93

We have put proposals that mirror those in our submissions. I note that they haven't been captured in the summary of issues, but I will send an email to chambers after this. Our experience, and I think this comes to the overtime issue, is that without the overtime payment there is no incentive on employers to properly plan work, and what we see are very short hour contracts, as few as 10 hours, sometimes 20. And then we have workers working anywhere between that minimum 10 hours and 30 or 40 or 50, depending on the needs of the business.

PN94

Now, there's no overtime payable under that award until someone reaches 10 hours in a day or 38 hours in a fortnight. There is a recently introduced obligation in the award on employers not to require someone to attend work, but when members speak to us the economic compulsion that comes with a short part-time hours contract means that it is very difficult to refuse that work. And then in some circumstances that situation is somewhat of a dead letter because of the employer's obligations to the person in their care.

PN95

If you are supporting someone in a group home where that person requires 24 hour attendance for their safety that's a human rights obligation, not merely a practical one, that our members take very seriously, you can't walk out the door the moment your shift finishes just because there's no obligation to keep you there. So what we have seen is an enormous amount of churn in the industry, it's between 17 and 25 per cent. This was identified by the NDIS review and it was mirrored by a survey of members that we conducted in early 2022 that had about a thousand respondents, and I can provide a summary of that to the Commission.

PN96

What members told us in that survey was the reason they're leaving the industry or thinking about it is because of the insecurity of work, because the working patterns are so changeable, and it can't just simply be said that that's the nature of the industry and there's nothing more we can do to change it. Echoing the comments of the ANMF there's a specific subset of awards that were captured by the health services stream in award modernisation. These include age care, the SCHADS award, nurses, where there was consideration of this issue where the unions had a claim for overtime being paid on all additional hours.

PN97

The employers didn't want any overtime paid, is my reading of the submissions, and the position at modernisation was that there should be an opportunity to take on additional hours at base rates of pay, giving people the opportunity to take on more work balancing the needs of the employer and employee. We attempted to address this issue during the four yearly review, and we got the clause that said there's no requirement to SCHADS, the employer may not require someone to work additional hours. But we say that this needs revisiting in light of the new gender equity objects of the Act for the new gender equity considerations in section 134.

PN98

There is a clear difference between the male dominated awards that are being subject to decades of arbitration, and our awards that cover the sector that weren't even recognised as employees until the 1980s. I think that's the point to end it, but we've had 40 years of being told that it's too difficult, there's needs to be balanced, and we have seen that in the thousands of workers leaving the sector at the same time that it needs to attract hundreds of thousand workers to meet the growing demand. Thank you.

PN99

DEPUTY PRESIDENT O'NEILL: All right.

PN100

MS BHATT: Can I just respond to a couple of points that have been raised. As Mr Robson has just alluded to the issue under the Social, Community, Home Care and Disability Services Industry Award was the subject of major proceedings just a couple of years ago, and of course it's open to any party to seek to have that issue reconsidered, but it has been the subject of some very recent consideration, and it was a strongly contested issue in those proceedings.

PN101

A proposition that's been advanced by Mr Robson and by Ms Biddlestone is that in the absence of an obligation to pay overtime for additional hours there is no incentive for an employer to agree to guaranteeing a higher number of hours for a part-time employee. We contest that proposition. There is an incentive. The incentive is certainty. And the difficulty in some of these sectors, and the disability services sector is a very good example of this, is that employers are inherently limited in the extent to which they are able to guarantee hours of work to a part-time employee on a permanent and ongoing basis, because for example, staying with the same example of that sector, clients' needs change. They change regularly, they change day to day.

PN102

Clients exert a degree of choice and control over what services they receive and when they receive them, and that necessarily requires (indistinct) in the preparation of those rosters. That is a real challenge. It's a real challenge for employers in the sector, and these are employers that rely on government funding for the provision of those services. So I just want to highlight that I think any idea that there is no incentive is not correct. The incentive for employers would be to have that certainty if they could offer it, but the limiting factor is that because of the nature of the services or their operations they can't.

PN103

DEPUTY PRESIDENT O'NEILL: Okay. All right. Now, the next proposed variation is from the AHA for a standard definition of part-time employment across awards based on the Hospitality Industry Award. We don't have an appearance from the AHA. Is there anybody that wanted to speak at all on that proposal?

PN104

MS DEBARERA: Deputy President, N Debarera for the United Workers' Union. We have spoken to this in our submissions in reply, but in brief we oppose the proposition of AHA. The part-time provisions in the Hospitality Award were introduced as part of the four yearly review, and the idea behind the introduction of these provisions was that they would make part-time employment more attractive in the sector, and it would reduce the incidents of casual employment, which is quite high in hospitality.

PN105

We haven't seen that occur in the sector. Casual employment is still quite high, and all these provisions have done is made part-time work more casualised and less predictable and less certain, which is a concern for workers who have caring responsibilities. So we would oppose the AHA's proposal. Thank you.

PN106

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

PN107

MR MAXWELL: Deputy President, Maxwell, initial S, for the CFMEU Construction and General Division. I just made a comment that I'm surprised that the AHA is proposing this clause for all awards. We would definitely oppose it being introduced into the Construction Awards. I thought I better make our position clear on that.

PN108

DEPUTY PRESIDENT O'NEILL: You have done so. Thank you. All right. Now, the next one I believe is the Ai Group's proposal reference 6 to again provide a standard definition for part-time employment, but in a different form.

PN109

MS BHATT: Deputy President, the submission we've advanced is that part-time employment provisions in a raft of awards are overly rigid. And in order to make it easier to employ employees on a part-time basis, and for the benefits of that then to flow, that is permanent and ongoing employment that comes with entitlements to leave for example and the like, that at least some of the restrictions associated with engagement on a part-time basis should be relieved.

PN110

Now, we haven't proposed a specific form of words or a specific model, because to some extent the solution might necessarily need to differ between different awards taking into account the nature of the relevant industry or occupation that the award covers. One of the specific proposals that we have advanced in other aspects of this review, and we've mentioned it in the submission we filed in this three member review, is this idea about additional hours and creating greater capacity for agreement to be reached to work those additional hours.

PN111

The other issue we've raised, and this is at item 7 of the summary document, is that there is going to be a significant change to the definition of casual employment which will commence operation later this year. It will have the effect of narrowing the extent to which employees can be engaged on a casual basis. Now, that of itself might give rise to reasons why as a matter of merit part-time employment provisions in awards need to be revisited, because on the one hand you're left with a lesser scope to engage employees on a casual basis, and then particularly rigid part-time employment provisions in at least some awards.

PN112

The other submission we've advanced is that indeed it might be that there are employees that are currently engaged on a casual basis that cannot be engaged on a casual basis under the new definition. Nor would they meet the part-time employment definitions in some awards because of the way in which they are structured. It's a proposition that we've advanced in some detail, particularly the job security stream of the review.

PN113

Now, my recollection is that there are particular provisions that will be introduced in the Act that would give the Commission power to vary award provisions if there is some difficulty or ambiguity or uncertainty that arises in how they interact with the new casual employment definition. And I might not have articulated that precisely, but there are provisions to that effect and that can be done on application by parties or of the Commission's own motion.

PN114

It might be that these issues have to be revisited further down the track once we see the practical operation of the new definition. We've been consulting our membership about what the ramifications will be. To some extent it's a little early to say. I think some are still wrapping their heads around what the practical implications will be, but we've sought to flag it in this review, because we think that it is almost inevitable that at least in some sectors it is likely to be an issue.

PN115

DEPUTY PRESIDENT O'NEILL: All right. Is there anyone else that wants to speak on either reference 6 or 7 of the Ai Group?

PN116

MS TINSLEY: Deputy President, if I may - - -

PN117

DEPUTY PRESIDENT O'NEILL: Yes. Sorry, Ms Tinsley, I didn't see your hand.

PN118

MS TINSLEY: That's okay. Thank you, Deputy President. I just wanted to reiterate some of the points that Ms Bhatt mentioned. I didn't make any comments in terms of the AHA's proposal, although would note that very much sympathetic to the concerns they've raised, especially with the hospitality industry in terms of what is a perfect example industry where you do have overlapping awards. So I do think generally we do have - certainly sympathetic to this idea of standardising some sort of part-time arrangements, but I resisted raising it within that proposal, because we do support what Ms Bhatt said in terms of the need to really wait and see what the impact of the legislative changes around casual employment are.

PN119

So rather than weighing in and whether ACCI would prefer the AHA for the Hospitality Award or what Ai Group's supporting we would like to perhaps hold off on this discussion generally and revisit once we understand what the proper consequences, or the impacts are of those casual changes. But certainly sympathetic and we do believe there will be some changes that will be needed. We just don't know exactly what those are yet. Thanks, Deputy President.

PN120

DEPUTY PRESIDENT O'NEILL: All right.

PN121

MS PELODOVA-MCCELLAND: Deputy President, if I may respond very briefly to Ai Group's proposal. This is obviously mostly already set out in our reply submissions, so I won't go on for too long, but just to make the point that this proposal regarding part-time provisions would, in our submission, strip rights and entitlements from workers and exacerbate the problems that you've heard about this morning from all of our affiliates in the various sectors, and also the problems that have been identified, not just by workers and unions over a long period of time, but also the Senate Select Committee and the literature that the literature review refers to.

PN122

So we say that this proposal rather than being genuinely interested in helping workers balance work and care is essentially that in order to manage the caring responsibilities workers have to give up their basic rights and give employers even more control over their working hours and conditions. We say this flies in the face of the problems we've identified. They would essentially casualise part-time workers, and they go against the new considerations in the modern award's objective of gender equality and job security.

PN123

And we note that they not only would lead to less stability and predictability in hours, but also worsen the gender pay gap, for example by not providing appropriate compensation for hours worked outside of agreed hours. So they're antithetical to those new considerations, and we say they should be rejected. Instead as you've heard we say the provisions in awards regarding part-time employment need to be strengthened to deal with all of the issues we've identified.

PN124

And just briefly I'd note that there are a number of references in the literature review to these issues; the issue of poorer working time security in some sectors for part-time workers, the use of those low base contracts, the porous conditions they refer to it in the care economy that have made it difficult for worker carers who require predictability. And they also have a large number of indicative proposals for change in appendix 1 of the literature review, many of which I would note are aligned with what the ACTU and its affiliates have put forwards in our recommendations for change.

PN125

DEPUTY PRESIDENT O'NEILL: All right. Now, the next proposal under the (indistinct) is the ANMF's proposal for definition in the Nurses Award in particular. Mr Yiallouros, did you want to speak to that?

PN126

MR YIALLOUROS: Sorry, Commissioner, I didn't quite catch that.

PN127

DEPUTY PRESIDENT O'NEILL: Well, we're moving on to item 8 which is the ANMF's proposal to vary the Nurses Award for a particular definition of part-time.

PN128

MR YIALLOUROS: Yes, of course. I think sort of it really does go back to the comments that I made earlier, which is that the Nurses Award, and particularly in that (indistinct) it's a female dominated industry profession, and even more so when you consider (indistinct). The way in which part-time employment is framed doesn't actually deal with the issue of achieving gender equality in the workplace, as is now a requirement under the modern award's objective, specifically looking at the way in which gender equality is achieved through, I suppose the focus of this review, which is to look at work and care and how the award system can best promote and assist with that.

PN129

We say that you could do a few things through the way in which specifically the Nurses Award - (indistinct) specifically the Nurses Award that would improve gender equality. This sort of does - and I don't want to go through too much history - this does go back through proposals we made in previous tribunals around concerns we had at the time in setting of the modern award and the modern award modernisation process, which really (indistinct) persisted to this date.

PN130

I mean I commented about the lack of overtime for employees who work additional hours and how that sort of reinforces uncertainty around working hours, I think previously discussed by other parties and other affiliates, the ACTU, the way in which that incentivises contracted hours which feature minimum contracted hours which reflect something (indistinct), in particular penalty, the way in which - pardon me for a second - the way in which that sort of really means that minimum hours don't reflect the actual hours the employee can - they're required to work.

PN131

Similarly it will be addressed by the ability to convert someone to a high hours contract through a review process. It can sort of exacerbate underemployment of workers, which again (indistinct) uncertainty. I think one of our main concerns, and this is flagged in our submission, is that that problem around the uncertainty of hours, the overlap with both job security as I previously said, but also balancing work and care is one that sort of - even though most nurses working in the profession are not award dependent, even if they are covered by enterprise agreements negotiated by the ANMF, we see (indistinct) the past enterprise agreements, because we simply can't get it and negotiate into enterprise agreements, and the award presents a low base, so it sort of creeps into almost every part of the profession.

PN132

We are seeking a specific definition that would in many ways bring the Nurses Award in line with many other awards. I think that's probably all I need to say on that, unless (indistinct).

PN133

DEPUTY PRESIDENT O'NEILL: All right. Thank you for that. I note that's opposed by the Ai Group. Is there anything you would like to say about that, Ms Bhatt?

PN134

MS BHATT: I'm content to rely upon what we've put in writing.

PN135

DEPUTY PRESIDENT O'NEILL: Okay. All right. So the next is the Centre for Future Work. We don't have an attendance from them. It's a fairly broad proposal and unless there's anything anyone wishes to say about that I think we will move to the next item, which is a proposal by the CPSU about conversion between full-time and casual. We don't have an appearance from the CPSU, but is there anyone that wishes to say anything about that? Well, it's at 10 and 11, in respect of which at least 11 it's opposed by the Ai Group. No takers? All right.

PN136

The next is item 12, which is a proposal by the Health Services Union in relation to the Health Professionals and Support Services Award. Anyone want to speak to that? Okay. Item 13 is a proposal by NECA who aren't here today, but note that that proposal at item 13 is opposed by the CEPU. Does the CEPU wish to be heard?

PN137

MS ABOUSLEIMAN: Thank you. We just rely on our written submission with respect to that proposal, which is pretty similar to the proposal by Ai Group at item 6. Thank you.

PN138

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Abousleiman. Now, item 14 relates to a proposal by the UWU covering some similar ground to what we have talked about. Ms Debarera?

PN139

MS DEBARERA: Thank you, Deputy President. I won't repeat what other unions have said regarding part-time employment and the issues relating to underemployment, only to say that our members have very similar issues, which we've raised in our submission. We put a proposal in relation to the Cleaning Award, and that's really just a matter of improving clarity around minimum ordinary hours for part-time employees. Currently there is a little bit of - we have had some members raise issues in relation to that which have led to some disputes that need to be resolved on the ground and we think this variation would assist in terms of clarity. Thank you.

PN140

DEPUTY PRESIDENT O'NEILL: All right. Thank you for that. I note that's opposed by the Ai Group. Did you wish - - -

PN141

MS BHATT: No, I'm content to deal with what we have already said.

PN142

DEPUTY PRESIDENT O'NEILL: All right. So item 15 is an ACTU proposal - sorry, that's not the case, it's simply noting agreement with the various recommendations of the Senate Select Committee report. So item 16 is the CPSU, which is a fairly high level, and given there's no appearance is there anyone who wishes to be heard about that matter? All right. Now, the next is in relation to the SDA's proposal for a right to say no to additional hours. In some senses we have covered that, but is there anything further you wanted to say, Ms Biddlestone?

PN143

MS BIDDLESTONE: No, Deputy President, I'm not going to go over on our submissions, because I think we've clarified in there, but happy to take any questions or clarify any points in relation to that.

PN144

DEPUTY PRESIDENT O'NEILL: All right. And I note that's opposed by the Ai Group on the basis largely that it relies on anecdotes (indistinct) were given ---

PN145

MS BIDDLESTONE: Sorry, Deputy President, I might address that. It doesn't rely on anecdotes. What we have quoted in our submission is from a piece of research that the SDA commissioned in 2021, which was conducted by the University of New South Wales. They published a report in relation to that research which was a survey of more than 6500 SDA members. There has since been an article published in relation to that, so it's had peer review as well. So it's not anecdotal. Some of the quotes from members come from responses in that survey, but the research itself is absolutely not anecdotal, and what it shows is that under the framework of the awards currently we unfortunately have a situation, as we pointed out earlier, where people have to make choices about accepting additional hours, which is very problematic, particularly for workers who are also carers, and they face discrimination, particularly in relation to where they cannot accept additional hours. So the claim in here is in relation to making sure that there's a positive obligation on employers to ensure that workers have a right to say no to those additional hours and won't face repercussions because they have to decline hours.

PN146

DEPUTY PRESIDENT O'NEILL: The survey that was the basis of that piece of work can you just remind me roughly when that was undertaken?

PN147

MS BIDDLESTONE: The survey itself was undertaken in April of 2021, and the report was published in October of that year.

PN148

DEPUTY PRESIDENT O'NEILL: Thank you.

PN149

MS PELODOVA-MCCELLAND: May I just add something very briefly, Deputy President?

PN150

DEPUTY PRESIDENT O'NEILL: Of course.

PN151

MS PELDOVA-MCCELLAND: Thank you. We did flag in the initial directions hearing in February that we may seek to include case studies of member stories in our submissions. That's what we've done. Obviously that's a significant piece of research. So we really reject Ai Group's submission that they shouldn't be given any weight, because we flagged that we would do this partly in response to the fact there's going to be an employer survey.

PN152

DEPUTY PRESIDENT O'NEILL: Yes.

PN153

MS PELDOVA-MCCELLAND: Thank you.

PN154

DEPUTY PRESIDENT O'NEILL: No, understand and I remember that. Ms Tinsley?

PN155

MS TINSLEY: Thank you, Deputy President. Just briefly, and considering the ACTU and a number of unions have raised this, (indistinct) we've put it in our reply submission, but just opposing this general concept we know that there needs to be agreement. I think if we were to take that to a (indistinct) conclusion across a number of different areas it's completely unnecessary that an employee would need a positive right to say no when there is a requirement to agree in the first instance. So I just wanted to note that general opposition, considering a number of unions have raised it.

PN156

DEPUTY PRESIDENT O'NEILL: Okay. All right, thank you for that. And Mr Wilding?

PN157

MR WILDING: Thank you, Deputy President. Just very briefly to note that the ARA is opposed to this proposal and supports the position of Ai Group and what Ms Tinsley has raised. We say it's inherent in agreement that an employee has a right to say no and there's no need to include those provisions in the award. Thank you.

PN158

DEPUTY PRESIDENT O'NEILL: All right.

PN159

MS BHATT: Deputy President, the comment that we've made about the report, the survey that's being relied upon, is really just one of the grounds upon which we've sought to oppose these proposals. As Ms Tinsley has said to some extent this issue of additional hours arises where an employer and employee might agree that the employee is going to work those additional hours, and so the provision

operates by agreement. We would say it's not necessary for the award to then stipulate that the employee has a right to say no.

PN160

The other context in which it might arise is that the additional hours in fact constitute overtime. So they're hours that are in addition to the employee's ordinary hours for the week, and there is then a protection under the NES, section 62 - - -

PN161

DEPUTY PRESIDENT O'NEILL: To refuse.

PN162

MS BHATT: - - - to refuse, and the general protections attached to that right, which I think is set out in our reply submissions, but I just seek to highlight that that's the other context in which this issue might arise.

PN163

DEPUTY PRESIDENT O'NEILL: No, I wasn't trying to summarise your entire submission - - -

PN164

MS BHATT: Of course. I understand.

PN165

DEPUTY PRESIDENT O'NEILL: - - - in the crude way that I did. All right. Now, next is the proposal by the Australian Retailers Association. I'm not sure, perhaps this can be clarified where this is part of the separate application to vary the Retail Industry Award or not.

PN166

MR YIALLOUROS: It is, Deputy President.

PN167

DEPUTY PRESIDENT O'NEILL: All right. Given that and my comments at the start is there anything that you wish to say about that in this context?

PN168

MR YIALLOUROS: No, Deputy President, we're happy to advance that in the consultation on Friday.

PN169

DEPUTY PRESIDENT O'NEILL: All right. Then we might move directly to the next matter, which is a proposal by the CPSU, but there's the three specific proposals in relation to the SCHADS Award. In the absence of any appearance does anyone want to say anything about that? All right. The next is a proposal by the Flight Attendants' Association, and we do have appearance from Mr Cope and Mr Gale. Did either of you wish to - there you are. I was looking in the wrong direction.

PN170

MR COPE: It's Michael Cope for the Flight Attendants' Association, Deputy President. So I will be talking to items 20 and 21 in the summary document. I propose to make just some introductory remarks about the aims of the FAAA submissions and then address key aspects of the FAAA submissions in response to question 1, but obviously references at 20 and 21 in the summary proposal.

PN171

From the outset the FAAA appreciates that the Commission has been predominantly focused on award (indistinct) issues and clauses as they are reflected in the 25 identified awards, and you did point out earlier that you confirmed that the award review is not confined just to those 25 awards. The FAAA proposes throughout these consultations to address major deficiencies in the Aircraft Cabin Crew Award before the Commission all relevant appearances in this particular stream.

PN172

By deficient I mean in terms of providing fair and relevant safety net for adequately promoting a sustainable balance between work and caring responsibilities of cabin crew in consideration with the modern award objective. The FAAA does not propose to address all the proposed variations that we have, but obviously we will confine it to items 20 and 21.

PN173

We understand that the Commission will be deciding what issues it takes forward on its own initiative and what issues are made by the parties to make their own application to vary a modern award. The submissions are aimed - - -

PN174

DEPUTY PRESIDENT O'NEILL: I am not sure that's quite the case. This is a process where the outcome is simply a report. A compilation of information and material doesn't necessarily dictate what any outcomes flow from it.

PN175

MR COPE: That's completely plain. Thank you, Deputy President. The FAAA's submissions are aimed at supporting the Commission to perform its duty of ensuring modern awards, along with the NES provide a fair and relevant safety net in the case of flight attendants across Australia. I don't propose to repeat much of the detail that we have in our submissions. However, just relevant to briefly outline some general characteristics of flight attendants and then just move on to addressing items 20 and 21.

PN176

The FAAA will be appearing on all four days of these consultations. So hopefully we don't repeat ourselves at length over those four days. I will be speaking to question 1 and 9 and 10 of the discussion paper whilst - sorry, today the FAAA will be speaking to those three questions and what's been identified in the summary.

PN177

We do seek to tender an additional bundle of documents for the Commission. We've got copies of those here that we'd like to - we've already

submitted it to the Commission as well - to be uploaded to the website, and I believe that's been done this morning. I do have copies of the bundle documents for any party who wishes.

PN178

DEPUTY PRESIDENT O'NEILL: That's news to me, I am not aware of that. What's the nature of the - - -

PN179

MR COPE: They're an additional bundle of materials that just support our submissions going forward across these four days, as we did in the job security stream as well.

PN180

DEPUTY PRESIDENT O'NEILL: All right. Just forward those to my chambers, which I think you may have already done.

PN181

MR COPE: Yes, I believe they have been uploaded to the website now as well. I do have copies - - -

PN182

DEPUTY PRESIDENT O'NEILL: Then I don't think we need to formally tender them.

PN183

MR COPE: Sure. So turning to the characteristics of cabin crew, the cabin crew workforce in Australia is highly feminised. There's about 77 per cent in women. The Jobs and Skills Australia reports that 42 per cent of cabin crew work part-time with 8 per cent of the workforce working on a casual basis. Cabin crew work under exceptional conditions which have adverse impacts on managing childcare and other caring responsibilities. The reliance more insecure working arrangements under the Aircraft Cabin Crew Award, the ACCA, significantly compounds the difficulties faced by cabin crew in their caring responsibilities.

PN184

In response to the summary items 20 and 21 I draw the Commission's attention to paragraph 61 to 64, pages 18 and 19 of our submissions. We propose that the Commission varies clause 10.2 to specify that the number of rostered days off in a roster is pro rated in reverse, whereby part-time crew would receive more rostered days off than full-time crew in recognition of part-time hours.

PN185

The variation proposed ensures that the part-time employee drafted to work on a blank day, that is a non-duty day or non-rostered day off, receives the entitlements attached to working on a day off, such as penalty rates. If they are rostered to work on a rostered day off they attract entitlements attached to working on that rostered day off.

PN186

Under current clause A.4 of schedule A, which is domestic flying, and clause C.4 of the schedule C, which is international flying with the ACCA, full-time crew are entitled to eight rostered days off in a 28 day roster. Where the employee works on a calendar month roster they are to have a minimum of nine days off in every month. An employee may be contacted by the employer to work on a rostered day off. They can refuse if reasonable to do so having regard to health and safety or caring responsibilities.

PN187

Rostered days off support the ability to manage work and care arrangements of cabin crew, and the proposed pro rata for that entitlement provides a part-time employee working half the time of a full-time employee an entitlement to an additional eight rostered days off in a 28 day roster, on top of the eight days which are provided to full-time cabin crew. The other days would be duty days or blank days. This is essentially just a summary of what our submissions are just in regards to amending clauses 10.2 and 10.3.

PN188

If I could draw the Commission's attention to paragraphs 65 and 66 of the FAAA's submissions. This is on limiting the changes to the agreed patterns of hours. We propose that the Commission vary clause 10.3 of the award to include a provision standard to other modern awards, being that all changes to agreed regular patterns of work be in writing and with transparency to protect part-time cabin crew from having unilateral conditions imposed upon them their terms of employment.

PN189

A requirement to vary a pattern of work in writing would provide stability in cabin crew being able to manage their expected number of days that they may work. This has obvious benefits for planning caring responsibilities. We note the discussion paper's analysis at paragraph 100 indicate that most of the 25 awards contain guaranteed hours provisions, and at paragraph 102 noted that each of the 25 awards being observed allows regular patterns of work to be altered by agreement in writing. The ACCA is an outlier in this respect, which will be a common theme I think throughout this. It's a rather unique award.

PN190

So the FAAA submits that the Commission should on its own initiative commence consideration of these deficiencies in the ACCA, and other deficiencies in our submissions which we will present through our consultations. The Commission has the resourcing to undertake the historical research information necessary for the Commission to satisfy itself of the work value considerations in this respect.

PN191

The FAAA is committed to fully participating in any process initiated by the Commission and would also consider its capacity to make an application to vary the award were the Commission to invite the FAAA to make such an application on its own initiative. If the FAAA does make its own application it is likely that industrial officers of the FAAA would be drawing on the Commission's library to locate materials on the history of cabin crew wage decisions and orders.

PN192

The FAAA has proposed many variations, which have also been proposed in work and care consultations. So we propose those in job security as well, this stream, and that document that's also been uploaded to the website has a summary of our proposed variations and which streams they actually fit under, much like what the Commission has done.

PN193

If the Commission is minded to discharge its duty to ensure that the modern award objective is achieved on its own initiative it may be efficient for the FAAA's proposed variations to be dealt with in its own proceedings. This concludes my comments on items 20 and 21. If there's anything else going forward.

PN194

DEPUTY PRESIDENT O'NEILL: I don't have any questions. I think I am right in that there's been no submissions that have been responsive to the FAAA's submissions. So can I take it nobody wishes to be heard in response? All right. Well, thank you very much.

PN195

MR COPE: Thank you.

PN196

DEPUTY PRESIDENT O'NEILL: The next is a proposal by NECA. We don't have any appearance from them. Is there anyone who wishes to be heard in relation to that? All right. The next is a proposal by the SDA in relation to a right to convert regular additional hours to the guaranteed hours. Ms Biddlestone, did you want to be heard about this?

PN197

MS BIDDLESTONE: I don't have anything really further to add in addition to our written submissions.

PN198

DEPUTY PRESIDENT O'NEILL: All right. I note this is opposed by the Ai Group at least. We will go to Mr Wilding in a minute. Is there anything - - -

PN199

MS BHATT: I won't add - - -

PN200

DEPUTY PRESIDENT O'NEILL: (Indistinct.)

PN201

MS BHATT: And I didn't need to earlier.

PN202

DEPUTY PRESIDENT O'NEILL: No.

PN203

MS BHATT: I'm content to rely on what we put in writing for those issues.

PN204

DEPUTY PRESIDENT O'NEILL: All right. Mr Wilding?

PN205

MR WILDING: Thank you, Deputy President. Just very briefly this proposal is opposed by the ARA. We say that the existing provisions provide an appropriate framework and there's no need for those to be amended in the manner that's being sought. Thank you.

PN206

DEPUTY PRESIDENT O'NEILL: All right. Thank you. The next is a proposal by the WFPR, and I can't quite immediately recall what that acronym stands for, but I know we don't have an appearance from them. It's a very broad high level submission, and I take it nobody wishes to be heard in relation to that. Okay. Turning to number 27, a proposal by the ACTU. That's endorsed by a number of affiliates specifically. Do you want to speak to that?

PN207

MS PELDOVA-MCCELLAND: Perhaps just briefly, Deputy President. I won't go into the details, but just to clarify a few matters arising from Ai Group's reply submission. So this discussion paper question was specifically in relation to rostering outside of availability or an excess of guaranteed regular hours. In our submission it has arisen in the context of part-time employment. So we confirm it relates to part-time employees.

PN208

It's not intended to advance a model of part-time employment that's more flexible than either some award terms or what we've recommended in relation to question 1 about part-time provisions. It's simply addressing the specific context that the discussion paper raised this issue in. So those recommendations we say can be read together, in our submission. This is really targeted at addressing those low base hour contracts for rostered workers.

PN209

DEPUTY PRESIDENT O'NEILL: It's not an alternative proposal - - -

PN210

MS PELDOVA-MCCELLAND: That's right. That's correct, Deputy President. So we say that implementation of this proposal will give those workers more security and predictability and appropriate compensation for working outside their agreed available hours, and protect them from being rostered when they're undertaking caring responsibilities, and that's why we say the award should be amended in the ways in which we have recommended.

PN211

DEPUTY PRESIDENT O'NEILL: All right. Ms Bhatt, does that (indistinct) open to further discussion to strongly oppose - - -

PN212

MS BHATT: It very much does. We had somewhat optimistically questioned whether what was in fact being advanced was a more (indistinct) model or part-

time employment, but unsurprisingly the answer to that is no. I think that the SDA has advanced a submission that's similar to what the ACTU has just articulated, and we've dealt with that in writing, so I think that that also deals with our position in response to the ACTU.

PN213

DEPUTY PRESIDENT O'NEILL: Okay. No other hands up in relation to that matter. The next couple are proposals by the ANMF at items 29 and 30. Mr Yiallouros, did you want to be heard further in relation to those two - - -

PN214

MR YIALLOUROS: Yes, thank you, Commissioner. I will deal with them sort of jointly, but maybe start off by saying I think we have already spoken to the issue of guaranteed minimum hours, and the ability to review additional hours a feature of part-time employment. I think we sort of take a sort of (indistinct) holistic view of what the ANMF submission broadly is trying to achieve, is that we want to see a scenario where employees are - essentially evidence of (indistinct) awards, more predictable and secure forms of employment.

PN215

It's partly achieved or will be achieved shortly due to the (indistinct) sort of changes to casual employment, the ability to convert from casual to part-time. And similarly if there were a provision in the award that allows for part-time employees who work additional hours more regularly to be able to increase their guaranteed minimum hours by way of six monthly application to the employer, and (indistinct) every six months to apply to their employer to have those hours locked in.

PN216

The reason we sort of made comment in our submission around full-time employment is that it seems somewhat illogical for an employee to find themselves employed full-time and, yes, all the entitlements that you would expect to get as a full-time employee suddenly disappear, and I'm referring to for example (indistinct) around the days of work, start and finish times, and (audio malfunction) for part-time employees (indistinct) that are carried through to full-time employment. Essentially they should be in many respects (indistinct) each other, with the obvious exception of provision around overtime for additional hours for part-time employees. That would naturally be the case for a full-time employee who's only worked beyond 38 hours.

PN217

If I can also just touch on some comments made by I think both - apologies if I do get this wrong - I think both AiG and ACCI made comments around uncertainty at this stage (indistinct) about what the impact of the casual employment definition and the ability to convert to permanent employment under the Act, which is yet to (indistinct) full operation.

PN218

We don't accept that the outcome of that is currently unknown. I think it's pretty obvious what the outcome of that will be, which is that casual employees will presumably exercise that option and in many instances may be converted to

permanent employment. That shouldn't be a surprise to anyone. So I think in terms of - I don't think the Commission should accept a suggestion that any decision making around, you know, this review and this process should be held off until those items come into operation. I think we would be missing the opportunity presented by this review to overlook providing certainty and security around predictability in hours of work if we were to hold off any changes until the casual conversion provisions had been fully implemented.

PN219

DEPUTY PRESIDENT O'NEILL: All right. Does anyone wish to be heard in relation to these ANMF proposals? All right. The next item 31 is the AUS's proposals. Mr Robson, did you want to say anything additional in relation to that?

PN220

MR ROBSON: Thank you, Deputy President. I just note that that proposal is made in respect of all the awards that the ASU has noted in its submission, not just the SCHADS Award. That's a particular example that we've highlighted in the submission. We support the ACTU's proposals and we think alliance with what a lot of the other unions have said about the issues associated with part-time work.

PN221

In relation to the SCHADS Award we do already have a review course. It operates over a period of 12 months. We think that needs to be a shorter reference period. Twelve months is just too long a period of time to look at it. It's unfair to the employee who is preparing their case. That's 52 weeks as opposed to 26 weeks of rosters.

PN222

And certainly what we have seen is that it hasn't necessarily changed the way employers are engaging part-time employment, because there isn't the overtime issue where people work in additional hours at their base rates. They're getting what they need; it's not working for employees, and we think the ACTU's proposal of having regular review terms in all awards, plus the strong backstop of overtime to balance the needs of employers and the needs of employees is the best way forward. Thank you.

PN223

DEPUTY PRESIDENT O'NEILL: All right. I don't know if that's opposed by the Ai Group. The next is a fairly broad or two fairly broad indications from the Centre for Future of Work and the Circle Green Community Legal Centre. The next is another FAAA matter. Does the FAAA wish to speak about this matter? This is to reduce the maximum hours from 90 to 72.

PN224

MR GALE: Yes. Thank you, Deputy President. If it pleases the Commission Mr Max Gale speaking for the Flight Attendants' Association of Australia. The FAAA thanks the Commission for its time thus far and for the opportunity to speak in this morning sessions, and I might just mention to the Deputy President that this is the first time I have appeared before the Commission, and how proud I

am for my first appearance to be advancing these important submissions, if I might say so myself.

PN225

Our submissions in relation to question 9 are fairly brief. As flagged to the Commission this morning by my colleague I will be going through that today. Our submissions in respect to availability and guaranteed regular hours is quite straightforward and focuses on ordinary hours provisions for regional cabin crew under schedule B of the award. The award currently provides for 90 ordinary hours in a fortnight.

PN226

The FAAA proposes that the ability for schedule B cabin crew to be rostered to 90 ordinary hours be varied to ensure consistency with the 36 ordinary weekly hours for full-time workers within the NES. The award just should not provide for 90 hours in a fortnight. The award is failing to achieve the modern award's objective for regional cabin crew while such a term remains in the award especially for regional cabin crew with caring responsibilities.

PN227

Before I yield I just wanted to note that our response, our submissions to question 10 are not in the summary, so I'm happy to address them now or at another time as the Commission sees fit.

PN228

DEPUTY PRESIDENT O'NEILL: Look, if you just send a note to that effect to my chambers we will deal with that.

PN229

MR GALE: Perfect. Thank you. May it please the Commission.

PN230

DEPUTY PRESIDENT O'NEILL: Well, Mr Gale, for your first time you did very well. You are now formally inducted. I must say the very first time I appeared, it was a very long time ago, I think all I had to do was basically get my name out and 'We consent', and (indistinct) I think I mucked that up. So congratulations. All right. Now, the next is the proposal by the Health Services Union at item 35. We don't have them present. I note that it's opposed by the Ai Group significantly. Does anyone want to be heard in relation to that? All right. The next is item 36, 37 and 38, some of which we have touched on around the minimum engagement earlier, but did you want to say anything additional, Ms Biddlestone?

PN231

MS BIDDLESTONE: Thank you, Deputy President. I won't say anything further in relation to the minimum engagement. I will just address my comments in relation to the next two items, 37 and 38, which goes to the issue of availability, and just noting Ai Group's submission in reply in relation to an employer's ability to deal with availability for workers.

PN232

In the context of the Retail Award and a few of our other awards, given their high reliance on low base minimum contracts for part-timers and additional hours the issue of availability is a valid consideration, because it really goes to how employees can manage their work and care. Because if workers don't have access to a predictable base roster that they can then arrange their care outside of that it makes it very difficult. So being able to confine any additional hours to a set availability, which they can then arrange caring responsibilities, is very important in the context of the awards as they're currently constructed.

PN233

It's also in the context of awards that have extremely expansive standard hours, which I know we will address later on in the consultations, but in terms of rostering it's very important that it's considered in light of the expansive standard hours, which again goes back to things like the way that these awards are constructed from a gender perspective as well.

PN234

In terms of operationally how a business may manage availability we see examples of that in retail. It's very common that workers notify their availability in terms of additional hours. Casuals typically do that. So extending that to part-time workers is not difficult. For medium to large business many have moved to technology for those sorts of solutions, so they're able to do that within their systems. They're very sophisticated. They're able to get employees to agree to a whole range of things. So managing availability as part of that rostering should not be a stretch for those businesses. So we don't really accept the arguments raised in the reply submissions from the Australian Industry Group in relation to that.

PN235

I won't add anything further than that. I have set out the reasons why in our submission, but it's all linked back to the way that part-time work is currently operating, particularly in the awards that our members are working in. Thank you.

PN236

DEPUTY PRESIDENT O'NEILL: All right. Ms Bhatt?

PN237

MS BHATT: I was just going to respond to some of that. Stepping back from some of the detail to some extent it's difficult to understand how or why the issue of availabilities arises in the context that's just been described. A part-time employee under the Retail Award for example and their employer must reach agreement upon engagement about their start and finish times and days of the week that they're going to work, and that's fixed.

PN238

They might be offered additional hours of work, but they're not compelled to accept them by terms of the award. There's nothing under the award that requires them to accept, so the employee can refuse because for example they have caring responsibilities. And again as I have referenced earlier under section 62 of the Act additional hours must be reasonable if they're offered or required. An

employee can refuse them where they're not reasonable, and the existence of family or caring responsibilities is specifically called out as a factor that is relevant to that reasonableness assessment.

PN239

This concept of an employee communicating their availability to the employer and the employer then taking that into account I think might feature in some enterprise agreements, and potentially some awards like again the Hospitality Award model which has a very flexible model of part-time employment. There's agreement reached just to the number of ordinary hours that an employee is going to work, but not when they're going to work them. I can see the inherent merit in having provisions that deal with the employee's availability in that context, but most of the awards we're talking about operate very differently.

PN240

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

PN241

MR WILDING: Thank you, Deputy President. We oppose these proposals. Ms Bhatt has already covered, I think, the key reasons for that. There's already restrictive rostering provisions for base hours of work for part-time employees in the Retail Award. Any further hours are solely by agreement, and so if they're outside of the hours that an employee wants to work at they have the right to not work those hours.

PN242

In terms of the allowance or compensation that's been talked about they're not required to keep those hours open or available. It is simply a matter for them to agree or not to agree to those hours, so we don't see that there should be any compensation for that.

PN243

DEPUTY PRESIDENT O'NEILL: Essentially it's not analogous to an on call type arrangement?

PN244

MR WILDING: That's right, Deputy President, there's no obligation to accept that call. The employee always has the right to refuse to work those hours.

PN245

DEPUTY PRESIDENT O'NEILL: Okay.

PN246

MR WILDING: Thank you.

PN247

DEPUTY PRESIDENT O'NEILL: All right.

PN248

MS BIDDLESTONE: Deputy President, sorry, if I can just address one point. Just in relation to Ms Bhatt's - I just note a comment made earlier about the

fact that - we say that there's no disincentive built into the award at the moment for businesses to offer meaningful regular part-time rosters and contracts to people. I think Ms Bhatt earlier said that there is an incentive inherently in the way businesses operate in that they need certainty, so that's why they do this. So I'm not sure that the incentive for certainty aligns with opposition to knowing what someone's availability is and being able to roster them within availability so there's more certainty over whether or not they can actually accept the additional hours. I would have thought that that provides some certainty to employers if they know that when they roster the worker will actually be available to accept those additional hours.

PN249

DEPUTY PRESIDENT O'NEILL: Even though there's no obligation on the employee to actually agree to any hours within that availability window?

PN250

MS BIDDLESTONE: Yes, because it still gives them some certainty around the fact that the person is likely to be available during those times, rather than outside of their stated availability.

PN251

DEPUTY PRESIDENT O'NEILL: All right. Now, the next is a proposal in relation to three awards by the UWU. Ms Debarera, did you wish to speak to that?

PN252

MS DEBARERA: Deputy President, we think those issues have been covered in the consultation already. Thank you.

PN253

DEPUTY PRESIDENT O'NEILL: I think that's probably right. A very broad proposal by Work and Family Policy Roundtable, so I think we can move beyond there. That brings us to the end of question 9. Now, I noted - it might have been - I can't remember if it was you Ms Peldova-McClelland or Ms Bhatt that just made the point of still seeking an opportunity to speak to a couple of other matters outside the particular summary. You can raise that whenever you wish to. Don't wait for an invitation. All right, well it's 11.30, we might just take a 10 minute break and then come back and resume and start with question 10. Thank you.

SHORT ADJOURNMENT

[11.27 AM]

RESUMED

[11.39 AM]

PN254

DEPUTY PRESIDENT O'NEILL: All right, on to question 10. On 42, it's a proposal by the ACTU. Did you want to speak further to that Ms Peldova-McClelland?

PN255

MS PELODOVA-MCCLELLAND: Thank you, Deputy President, perhaps just briefly, given we have already covered some of this territory this morning. To our

point that the span of hours, which we will deal with I think tomorrow, we say, as a result of the discussion paper, this issue has come to light of span of hours tending to be far more expansive in female-dominated industries than male-dominated industries, which obviously has an effect on overtime and when it's payable to employees, and all of the issues we have explored this morning regarding part-time employment.

PN256

There are some examples given in our submissions of male-dominated industries and awards covering those industries that have narrow spans of hours and when all hours of work beyond ordinary hours are payable as overtime, so awards like the Building On-site Award and the Electrical Contracting Award, and we contrast that with some female-dominated awards where overtime is only payable for part-time or casuals where they work in excess of 38 hours per week, or an equivalent amount per fortnight. We say this is very clearly a big gap in the safety net that has big gender equality ramifications and it needs to be rectified to ensure that awards are meeting the modern awards objective.

PN257

We note that Ai Group, in their reply, have taken issue with this characterisation and said that, you know, there are good reasons for those awards and those industries having different spans of hours. In relation to that, we would just say there are many 24/7 or extended-hour operations in male-dominated industries that those awards cover, such as civil construction and big infrastructure projects where, for example, work might need to be undertaken at night because that is the only time it can be undertaken. Workers under those awards are paid overtime rates for that work.

PN258

So the demands of industries are not necessarily the reason why the span of hours and overtime rates payable are differing, and we say there are big gender equality implications here that should be really looked at carefully and taken seriously.

PN259

I will leave it at that, Deputy President.

PN260

DEPUTY PRESIDENT O'NEILL: All right. It might come up later, but just while you are on your feet, I know that there's opposition to your proposals that have been put forward by some of the employer interests for a combination of - for various changes to time off in lieu, make-up time and issues that are here. I think your submissions say something to the effect of such proposed changes considered individually, but especially in combination, posed by the ACTU.

PN261

I am just curious in particular about make-up time and whether that is - because in reading some of the material, I wondered whether that was an area where there might potentially be some agreement, but I'm not sure that's the case.

PN262

MS PELDOVA-McCLELLAND: If I may take that question on notice, Deputy President? If we can deal with that when it arises in order, that would be

- - -

PN263

DEPUTY PRESIDENT O'NEILL: Yes, that's a very good idea.

PN264

MS PELDOVA-McCLELLAND: That would be appreciated.

PN265

DEPUTY PRESIDENT O'NEILL: All right.

PN266

MS PELDOVA-McCLELLAND: Thank you.

PN267

DEPUTY PRESIDENT O'NEILL: I think in terms of the broader kind of point and the Ai Group's - so the position that's put that the analysis reveals a gendered dimension to flexibilities based on the type of award, and the Ai Group's position as well, you can't assume that, there may be all sorts of reasons for those changes, industry-specific, and so forth, and I think both propositions may well be true.

PN268

I think, as far as we can say in this process, it is curious and something that, you know, is worth looking at in some detail, but the answers may be many and varied.

PN269

MS PELDOVA-McCLELLAND: Indeed. Thank you, Deputy President.

PN270

DEPUTY PRESIDENT O'NEILL: All right.

PN271

MS BHATT: The only thing I would add to that is that, in addition to taking into account the nature of the work that's performed under a particular award, it would also be necessary to take into account how that award more broadly regulates hours of work. It might be, for example, that some awards that have been described as male-dominated awards, at the very least, have shift work provisions that enable ordinary hours to be worked through the night, for example. Yes, there's a payment of a loading that is required, but it's certainly not to the same extent as overtime rates generally payable.

PN272

If you look at an award like the Fast Food Award, for example, one of the criticisms that has been made of that award through this process is that it does not contain a span of hours, and so the argument goes that employees can be required to work any time of the day or night. Now, of course, we know that there are a number of fast food operators that do operate 24/7.

PN273

The award also doesn't contain shift work provisions, so, you know, these things necessarily need to be considered more holistically.

PN274

The other thing I would say is that, although some of these awards contain either no span of hours or a broad span of hours, they, nonetheless, at least in some cases, require the payment of a penalty for working at what might be described as unsocial hours. The Fast Food and Retail Award I think are both examples of that. There is a penalty - - -

PN275

DEPUTY PRESIDENT O'NEILL: And the Hospitality has - - -

PN276

MS BHATT: I think that's right.

PN277

DEPUTY PRESIDENT O'NEILL: Thank you. Did anyone else wish to say anything in relation to this proposal? All right.

PN278

Item 43 is an ANMF proposal. Did anyone wish to say anything in relation to that?

PN279

MR YIALLOUROS: Not really, Deputy President. I think we have already sort of outlined the reasons for seeking this in our earlier submissions. I will just add an apology to you that I have mistakenly been addressing you as 'Commissioner' until now. That was an oversight of mine.

PN280

DEPUTY PRESIDENT O'NEILL: I didn't even notice.

PN281

MR YIALLOUROS: It was certainly not an intention to take you down a peg.

PN282

DEPUTY PRESIDENT O'NEILL: There's plenty of other ways to do that, I think. All right. Thank you for that.

PN283

The next is an Australian Retailers Association proposal for standing consent for additional hours. Mr Wilding, did you want to say anything in relation to that?

PN284

MR WILDING: Just briefly, Deputy President. I won't go into the details of that - I'll save that for Friday - but just to say, I think just more broadly in the context of other proposals that have been made, we do support there being a mechanism for part-time employees to be able to access additional hours. We think that's important to increase workforce participation through that mechanism, and our proposal really goes to ensuring that that's able to be done in an administratively

workable way that works for the modern workforce. So that's the intent of this proposal, and that's why we are pressing that.

PN285

DEPUTY PRESIDENT O'NEILL: Ms Biddlestone, did you want to speak to that?

PN286

MS BIDDLESTONE: Thank you, Deputy President, and noting that this will be discussed on Friday as well, but our concern with something like this is that it will just entrench the problems that already exist in the award in relation to low base part-time contracts, and what members need is predictability, not broad flexibility, in their rosters, and in an awards' perspective, we don't think that standing consent would provide that.

PN287

It also could potentially disincentivise increasing part-time contracts of hours or, indeed, putting people on full time, which is almost non-existent in retail at the moment. So, yes, we would oppose this variation.

PN288

DEPUTY PRESIDENT O'NEILL: All right. I think the next matters - leaving aside consent for work, 45 and 46 are simply two proposals. I don't think anyone wants to say anything in relation to those matters? Okay.

PN289

Item 47 is the HSU proposal in respect of the SCHADS Award. Does anyone want to speak to that?

PN290

SPEAKER: No.

PN291

DEPUTY PRESIDENT O'NEILL: Then back to the SDA in relation to overtime above all base hours. Did you want to say anything?

PN292

MS BIDDLESTONE: No, I think that's been covered, thank you.

PN293

DEPUTY PRESIDENT O'NEILL: All right. Mr Wilding, did you want to say anything about that?

PN294

MR WILDING: Thank you, Deputy President. Just very briefly to note that we oppose these extra payments, and I do want to raise the point that, in respect of the proposal for a 25 per cent rate to be paid that's sort of seen as being analogous to the casual rate, that's proposed to also be paid alongside leave accrual. Now, it is acknowledged that the casual loading is paid in lieu of those leave entitlements, and so our position is that if there was going to be something, and it's not a position we do support, it certainly wouldn't be that you would get both the leave

accrual and the entitlement that is intended to compensate for those leave arrangements. Thank you, Deputy President.

PN295

DEPUTY PRESIDENT O'NEILL: Did you want to - - -

PN296

MS BIDDLESTONE: Yes, sorry, Deputy President. The ARA haven't made submissions in reply in writing, so I just thought it would be useful if I respond to their verbal submissions.

PN297

DEPUTY PRESIDENT O'NEILL: Sure.

PN298

MS BIDDLESTONE: Just in relation to that, I just wanted to clarify our position is primarily that overtime should be payable on additional hours.

PN299

DEPUTY PRESIDENT O'NEILL: Yes.

PN300

MS BIDDLESTONE: I just wanted to make that point. In terms of the 25 per cent plus the accrual, what this is about is we understand that leave is accrued on ordinary hours and we also understand that part of the 25 per cent loading for casuals is to compensate for that accrual, but currently for part-timers working additional hours, there's no compensation for the fact that they are basically working casual hours of employment, they are unpredictable, they don't know when they are going to be offered, their income changes from week to week, so it's about ensuring that, if they're not being paid overtime, that they are properly compensated for that form of employment, which, at the moment, the only beneficiary of that from an economic and operational perspective is employers, not workers.

PN301

DEPUTY PRESIDENT O'NEILL: Understood. All right. There's a NECA proposal at 49 that's opposed by the CEPU.

PN302

MS ABOUSLEIMAN: I guess just with respect to the NECA proposal, we oppose it at large, but I think it seems to be two-fold, the first being that, whether the prohibition on overtime for part time, that should be left in, and also that overtime - employees should be given the right to have time off instead of payment of overtime.

PN303

Our submissions then deal with that second limb of the proposal, if I'm reading it correctly. It seems to be almost such as a time in lieu proposal. We would oppose that as well, and the ACTU reply submissions at paragraphs 50 to 51 go to some length at explaining the reasons why time in lieu is opposed instead of payment.

PN304

Our position would be that that's largely beneficial, and our experience is that that's largely beneficial for the employer but disadvantageous to the employees because often employers will allow them to use this time more to their advantage of when it's available for them, as opposed to when the employee actually needs to access their leave arrangements. So any change to the way overtime should be paid is highly opposed by the CEPU.

PN305

That's as far as that submission goes. Thank you.

PN306

DEPUTY PRESIDENT O'NEILL: Thanks, Ms Abousleiman.

PN307

Question 2, relating to individual flexibility agreements.

PN308

MR GALE: Sorry - - -

PN309

DEPUTY PRESIDENT O'NEILL: Sorry?

PN310

MR GALE: Would the Commission like to hear from the FAAA in relation to question 10?

PN311

DEPUTY PRESIDENT O'NEILL: Is that one of the areas where you made the point that your submissions weren't noted?

PN312

MR GALE: (Indistinct.)

PN313

DEPUTY PRESIDENT O'NEILL: Yes, please. You're a beggar for punishment.

PN314

MR GALE: Thank you for the opportunity to speak, Deputy President. If it pleases the Commission, the FAAA have submissions in relation to overtime.

PN315

The award's overtime provisions that are in the Aircraft Cabin Crew Award are limited to schedules A and C. So just by way of broader context, schedule A refers to domestic cabin crew flying, for instance, from Sydney International to Brisbane or to Melbourne, and things like that; schedule B is for regional flying, so you have flights to regional centres and to cities from regional centres, and then, obviously, international flying as well. Overtime provisions are only in schedules A and C; there are no overtime provisions in the regional schedule of the award, so I will speak to A and C first and then speak to B.

PN316

The daily hour limits under the award are represented by planned duty and unplanned duty, so basically planned hours per your roster and then you can have unplanned extensions if there are delays and things like that. Daily hour maximums under the award are linked to those specific duties for short haul planned hours, which range from eight to 14, depending on whether you have a combination of flying and non-flying duties.

PN317

Many duties under schedule A can be up to 12 hours, and in excess of 12 hours, a significant number of daily working hours by any measure. For international flying, planned duties can range from 10 to 24 hours, and with the expansion of ultra-long haul flying, that could even increase. Unplanned work hours can blow out to 15 or 16 for short haul and up to 26 for long haul accordingly.

PN318

The FAAA's proposal provides for daily overtime to be paid between the planned and unplanned maximum, so essentially a base level of overtime. Our proposal also includes a specific rate for overtime when unplanned, that is, over 18 or over 26 hours is exceeded.

PN319

Daily overtime is included in the recently concluded Virgin Cabin Crew EBA and was also included in the pre-modern occupational and enterprise awards. The pre-modern Flight Attendants Domestic Airlines Award daily overtime provisions are replicated, save for overtime commencing after 8.5 hours in the Qantas Short Haul EBA. The Qantas QD EBA provides for additional per hour base rate payments for daily overtime of between \$14 for up to 10 hours and \$85 for between 12 and 14 hours.

PN320

Daily overtime is an industry standard in most modern awards. Including it in the Aircraft Cabin Crew award facilitates choice for employees in accessing secure work and beneficial and predictable conditions, whilst recognising unpredictable hours and compensating for those hours, including for cabin crew who have their caring responsibilities interrupted by unplanned overtime.

PN321

Deputy President, we have many members who, due to delays, have to arrange, at the last minute, extremely expensive child care arrangements, for instance, if they need to pick their children up from school, or if they've got family members with disabilities who they must care for. The lack of overtime provisions has a perverse incentive for employers to not really worry about whether they require their employees to work additional hours, and that comes with both the personal costs but also the financial costs, and it is especially important from a work and care perspective.

PN322

So the current clause enabling extensions beyond the unplanned limit is inconsistent, in our view, with the facilitative provisions as well, which should contain a safety net floor.

PN323

This clause operates in an environment where cabin crew have been working 15 or 16 hours for domestic and then up to 26 for international when they commenced negotiating with management regarding additional unplanned hours. So there's no minimum floor there; you're supposed to sort of negotiate as an individual employee against, say, Qantas or Virgin as to how much extra you might be receiving and, as you have heard earlier today, there is not a lot of power in being able to get any, if at all, additional compensation. In these circumstances, the FAAA respectfully submits that an appropriate floor is necessary.

PN324

To that end, coming now to schedule B, where there are no overtime provisions whatsoever, we respectfully submit that this also be replicated in schedule B as well, and that specific proposal is at paragraph 128 of our submissions.

PN325

The FAAA thanks the Commission for its time this morning. Subject to any questions from yourself, we conclude our submissions.

PN326

DEPUTY PRESIDENT O'NEILL: Thank you for that.

PN327

Now turning to discussion question 2, the first proposal is from ACCI at item 51. Ms Tinsley, did you want to speak to that? You're on mute, Ms Tinsley, so if you did want to speak to it, you will need to change that.

PN328

MS TINSLEY: I'm sorry, Deputy President, I was just noting where we were. Are we up to reference 26?

PN329

DEPUTY PRESIDENT O'NEILL: Hang on, sorry. No, we're at the end of question 10 and moving to question 2, and the line item 53.

PN330

MS TINSLEY: Yes, of course. Sorry, Deputy President, you caught me.

PN331

So, no, we would propose - we note here that we have made a proposal to make it more simple but fair. We believe the IFA clauses - we have advanced this proposal primarily in the award simplification stream, so we are - we note the obvious link between IFAs and making them easier to use in the work and care sector, and we have set that out in our written submissions, but because it has been dealt with at length in various other streams, I wouldn't propose to spend any more time on it today.

PN332

Unless you have any questions, I would be content to leave it there.

PN333

DEPUTY PRESIDENT O'NEILL: No, I didn't have any questions. Did anyone else want to be heard in relation to that matter?

PN334

MS BIDDLESTONE: I would just note really briefly that we oppose the proposal, Deputy President, for the reasons set out in our reply submission, including the introduction of a number of uncertain, untested and ambiguous tests.

PN335

DEPUTY PRESIDENT O'NEILL: Yes. Thank you.

PN336

MR MAXWELL: Deputy President, likewise, we refer to our written submission in reply on this matter.

PN337

DEPUTY PRESIDENT O'NEILL: All right. Thank you. At the other end of the spectrum, everyone is in furious agreement that the current IFAs are not highly utilised. Disagreement about the reasons for that. There's certainly very big disagreements about the solution to that issue.

PN338

Ms Peldova-McClelland, in relation to the ACTU's proposal at item 52 to remove IFAs from modern awards, did you want to be heard about that?

PN339

MS PELODOVA-MCLELLAND: Not particularly. I think this has been reserved. It's been the subject of detailed submissions in the job security stream. We have also set out our views again in our submissions and we rely on those. Unless you have any questions, Deputy President?

PN340

DEPUTY PRESIDENT O'NEILL: No, I don't. Thank you.

PN341

MR MAXWELL: Deputy President, we didn't address this issue in our reply submission, but I do note that in our submission in the job security stream, we did oppose the retention of IFAs.

PN342

DEPUTY PRESIDENT O'NEILL: Okay. Thank you. Is that the same in relation to items 53 and 54, Ms Peldova-McClelland?

PN343

MS PELODOVA-MCLELLAND: Apologies - - -

PN344

DEPUTY PRESIDENT O'NEILL: Did you want to be heard about those?

PN345

MS PELODOVA-MCLELLAND: Apologies, Commissioner, I am just - - -

PN346

DEPUTY PRESIDENT O'NEILL: The first is about requiring reporting on IFAs. That's in the alternative - - -

PN347

MS PELDOVA-McCLELLAND: Yes, sorry.

PN348

DEPUTY PRESIDENT O'NEILL: - - - if you're not successful in having them entirely abolished.

PN349

MS PELDOVA-McCLELLAND: Indeed, yes. Sorry, Deputy President, I should have said those comments relate to all - I think there are three proposals.

PN350

DEPUTY PRESIDENT O'NEILL: Yes.

PN351

MS PELDOVA-McCLELLAND: Yes. Thank you.

PN352

DEPUTY PRESIDENT O'NEILL: Terrific.

PN353

Next is the Ai Group's proposal that IFAs can be offered to prospective employees. Ms Bhatt.

PN354

MS BHATT: I'm not sure that I need to add much to what we have said about this in writing. One of the arguments that has been put against this proposal I think is from the CFMEU, and the argument is that the Act would not permit a variation to the award that allows for an IFA to be struck between an employer and a prospective employee. That's an issue that we have acknowledged in our written submissions in chief. I think there is, at the very least, some ambiguity as to whether or not an award provision of that nature can be developed.

PN355

If it's something that the Commission is minded to do as a matter of merit, we would welcome the opportunity to be heard in relation to the issue of power in more detail. Of course, if it can't be done, then it necessarily becomes a need for some sort of legislative change to be able to facilitate that, but I just wanted to acknowledge that that is an issue that we have called out in our written submissions.

PN356

DEPUTY PRESIDENT O'NEILL: All right. Understood.

PN357

Mr Robson, do you want to say anything in relation to items 57 and 58?

PN358

MR ROBSON: No, thank you, Deputy President.

PN359

DEPUTY PRESIDENT O'NEILL: Item 59 is the Carers Tasmania proposal which is opposed by the Ai Group. Other than noting that, I think we can likely move on.

PN360

Item 64 is the SDA separately supporting the removal of IFA provisions from awards, with an alternative set of variations. Did you want to speak to that?

PN361

MS BIDDLESTONE: No, Deputy President, thank you.

PN362

DEPUTY PRESIDENT O'NEILL: All right. Unless anyone wishes to say anything further about individual flexibility agreements, we will move on to facilitative provisions. You look as though you are in two minds?

PN363

MR ARNDT: Deputy President - - -

PN364

DEPUTY PRESIDENT O'NEILL: Go on.

PN365

MR ARNDT: I feel like I'm very late to the conversation about IFAs. There is some weariness from all in the room and on the screen about IFAs, those who have participated in the previous consultations. I just thought I would provide the perspective of ABI and BNSW.

PN366

The overwhelming agreement and the impression from our membership is that IFAs are very rarely used and they are not, as might be inferred from the unions' submissions, a device that's used to strip away conditions. They are just very rarely used for all kinds of reasons that have been canvassed very extensively in the submissions and probably discussed at length in the previous consultations.

PN367

I guess the observation from our membership is that the lack of utility in IFAs seems an ideal subject to deal with in this stream. Work and care, it's a very difficult balance, it's a very difficult issue that our industrial relations system needs to grapple with. It seems like a conversation between an individual and their employer about how their individual care needs, and they are always individual care needs, might be accommodated. It seems that's an appropriate mechanism to at least explore how that would work and how that could better serve individuals and employers.

PN368

The fact that IFAs aren't used is a problem with the system. The answer, in our submission, wouldn't be just to dispense with IFAs or make them more difficult to

use or more administratively burdensome because the use of IFAs would just go down. It seems particularly relevant for this stream, appreciating the fact that it has been raised in other streams for various other contexts and for other reasons, but it seems like if there was ever a stream where there was ever a use for IFAs, it is in balancing work and care, and that's borne out by the Explanatory Memorandum, which uses the example of a work and care type request to say, 'I need to undertake care responsibilities, so I am going to make an IFA request.'

PN369

That's all I wish to add on that issue. I think it would be unfortunate if IFAs were simply dismissed in this stream as either too hard get rid of them, or we're talking about it in other areas, so we don't need to talk about it here, or we don't need to consider it here. They seem relevant, particularly so in this stream.

PN370

DEPUTY PRESIDENT O'NEILL: Although it might be that, at a practical level, that role might be being utilised more through the section 65 requests rather than this device. I am not going to open this up because it's clearly - everyone else has obviously talked about this at length.

PN371

It's all fresh to me, so I'm ready to start, but I am a little curious as to the submission that part of the reason for employers' reluctance to use IFAs is because the current mechanisms are burdensome and administratively complex. I guess I'm assuming that what you are referring to there is less burdensome and more certain, in that employers, as some of the submissions say, find it clear as to what they are required to do to ensure that employees are better off overall under the IFA, but that doesn't speak to administrative complexity or burdensome; it may be, perhaps, lack of clarity.

PN372

MR ARNDT: I think that's correct, Deputy President. I mean, I think, to jump ahead to a proposal that will be ventilated, I think tomorrow, around working from home and whether spans of hours and those things apply, the reason why employers, generally speaking, are not using IFAs to cover those types of scenarios is because it's not clear to the employer that the employee, despite the fact that it has been requested and despite the fact that that's what the employee wants and it perfectly fits with their care arrangements and allows them to do the things they need to do, it's not clear that they are better off overall if they are working, for example, slightly later at night.

PN373

The administrative burden is probably - I don't see that as much - giving evidence from the Bar table. Certainly, adding additional administrative complexity, reporting obligations and so forth, I mean that's just going to further disincentivise their use, but it seems like, as I have stated before, it seems like IFAs could be utilised better and, if they are not, then it's an opportunity missed.

PN374

DEPUTY PRESIDENT O'NEILL: That might be an educational base, as much as anything else, the awareness of them. Anyway, Ms Biddlestone.

PN375

MS BIDDLESTONE: Sorry, Deputy President, I just wanted to note that awards, together with the NES, are there to establish a minimum safety net for workers, so there are genuine and legitimate reasons why there are regulations around an employee entering into an individual flexibility agreement, and that is because, in some cases, what they are agreeing to is to be paid below what has been set by the Fair Work Commission as a minimum standard, so there needs to be those protections.

PN376

DEPUTY PRESIDENT O'NEILL: Although, presumably - I mean that scenario wouldn't be a valid - well, leaving aside the effect of it, but that wouldn't be a permitted IFA because the employee wouldn't be better off overall.

PN377

MS BIDDLESTONE: No, and that's why protections around whether or not someone is better off overall need to remain in place, and removing that type of burden wouldn't be appropriate for an IFA.

PN378

The other point I just wanted to make in terms of the utility for people who are working and also undertaking care, what we don't want to see is workers being penalised for trying to manage their work and care through having to give up penalty rates, or whatever it might be that they are foregoing, to get the kind of predictability and security they need to both work and care.

PN379

Section 65 of the Fair Work Act has been strengthened, and that is a more appropriate vehicle for someone who is working and caring to try and achieve the appropriate roster or work arrangement to enable them to do that.

PN380

DEPUTY PRESIDENT O'NEILL: All right.

PN381

MS PELDOVA-McCLELLAND: I just emphasise the submissions of Ms Biddlestone, and also just in response say that we do set out in our submission quite extensive excerpts from the general managers' reports about the use of IFAs. The evidence does show that they are used to vary entitlements such as overtime most of the time. The evidence also shows that around half of surveyed employers who make more than one are varying the same conditions, so this suggests template arrangements rather than actual genuine efforts to meet employee needs that are tailored to them.

PN382

I just wanted to make those points and, sorry, also one final one, that there have been many examples provided where IFAs are offered to avoid paying penalty rates in response to shift patterns that were first requested via a flexible working arrangement under section 65. So just the interaction of those two things, I would emphasise, you know, what Ms Biddlestone said about section 65 is the appropriate avenue. We think IFAs have operated to really undermine terms and

conditions, and that's why we have recommended what we have in our submissions.

PN383

DEPUTY PRESIDENT O'NEILL: Okay. Thank you.

PN384

MS BHATT: One of the limitations of section 65 as compared to the implementation of an IFA is that an IFA has the effect of changing the application of award terms.

PN385

DEPUTY PRESIDENT O'NEILL: Yes.

PN386

MS BHATT: And, indeed, the inability to do so where an employee makes a section 65 request for a particular arrangement might constitute a reasonable business ground for declining a request.

PN387

DEPUTY PRESIDENT O'NEILL: Yes.

PN388

MS BHATT: So I wanted to make that point. The other is the ACTU has just referred to the general managers' reports concerning IFAs. I think those reports also reveal that a significant proportion - I can't quite recall the specific data point - significant proportion of IFAs are initiated by employees, which I think is set out in our written material.

PN389

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

PN390

MS TINSLEY: Deputy President, can I sort of weigh in considering a little bit more detail on the IFA point. I just want to clarify, as has been mentioned before, the difficulty for employers in applying IFAs is very much their usability, but, as everybody knows, it's not necessarily administrative burden, I think it's the application of the better off overall test. I think there was a characterisation from the unions' side earlier that we're looking to do away with the better off overall text, and that's certainly not the case.

PN391

All we are looking to do is to interpret the better off overall test in a way that is more consistent with the purpose that an IFA is meant to do. We believe that the way that the BOOT has been applied for IFA cases is more fitting for bargaining purposes, so in a situation where you're trying to work out what's better off overall in the context of a large number of employees, as opposed to just one.

PN392

In our proposal, as you would see in our submission, what we are talking about here is it clearly would be better off overall if the disagreement does not

disadvantage the employee overall, which is an important protection so they are not disadvantaged overall considering the base level of the award, but, importantly - and this is where the slight difference is - the IFA - what's being entered into, is preferred by the employee in comparison with the relevant award terms because it better meets their genuine needs.

PN393

We say here that this is more appropriate and more consistent with the purpose of IFAs because it's so simple and so easy to determine what the needs are of one individual. You can't do that when applying the better off overall test in bargaining because it's a large group, but you know exactly what the individual employee wants because it's what they are saying.

PN394

So we are not looking to do away with the BOOT, we're not looking to change the structure around the standing of it; we just believe that the way that it has been interpreted previously isn't consistent with the purpose of the - the intent behind the IFAs. I just wanted to make that point of clarification, Deputy President.

PN395

DEPUTY PRESIDENT O'NEILL: When you say it's been interpreted in that way, i.e. the BOOT test has been interpreted as analogous to, or the same as, in a bargaining context, do you mean by employers and advisors, or is there some judicial decision or some other, you know, decision that clarifies that that is the way - what the BOOT means in the context of an IFA?

PN396

MS TINSLEY: Deputy President, this has been ventilated in the (indistinct) implication stream. I had a back and forth with the President on this point, and the same issue - he raised the same point here. It certainly is the case that it's the employers' understanding of it in terms of what the law states. So I think some sort of clarification would be useful in terms of how they should be applied.

PN397

So it would be fantastic if we had some commentary around that, perhaps in your report, Deputy President, but, yes, this is certainly a point that was raised by the President as well, and it's our understanding employers really see it as a rigid test, and we can't necessarily say that's wrong because there really isn't anything to go by on that point.

PN398

DEPUTY PRESIDENT O'NEILL: Well, they say great minds think alike, so - - -

PN399

MS TINSLEY: Absolutely.

PN400

DEPUTY PRESIDENT O'NEILL: All right. That does bring us to the end of the individual flexibility agreements, and we will move on to question 3. All right, let's start. So the first the proposal by the ACTU at item 67. Did you want to say anything further in relation to that?

PN401

MS PELDOVA-McCLELLAND: No, not a whole lot, thank you, Deputy President. I think maybe it's just worth noting that our proposals in this space were largely responding to issues that were identified in the discussion paper about how facilitative provisions aren't subject to some of the same safeguards, such as the BOOT test, and that, you know, we are concerned that these provisions, even though they are very different in purpose and scope, as has been pointed out in some of the replies, and I don't seek to go into the detail and respond to all of that in detail, but just to make the point that any kind of change to how IFAs work should be resisted because there's already the ability to have facilitative provisions that don't have a BOOT test apply, so this is another avenue, and we do think that there should be some further commentary in awards about the intent and how facilitative provisions are intended to operate, as was set out in the decision that we have referred to in our submissions.

PN402

DEPUTY PRESIDENT O'NEILL: All right. Thank you for that. Does anyone else wish to be heard in relation to that proposal? All right.

PN403

The next is the Ai Group proposal at item 69.

PN404

MS BHATT: I think that items 69 through to 72 cover similar ground.

PN405

DEPUTY PRESIDENT O'NEILL: Yes.

PN406

MS BHATT: The basic proposition is that we say that, by agreement between an employer and an individual employee, there should be an ability to expand the span of hours on both ends. We see this as being a flexibility that would enable, in at least some cases, employees to work at times that better suit them and to perform ordinary hours of work at that time.

PN407

One of the obvious arguments that has been put against us in the written reply submissions from the unions is that that would result in a reduction in entitlements because employees would otherwise be paid overtime for working at that time. I think that assumes that the employee would be working at that time.

PN408

I mean, if this is a flexibility that is sought by an employee, 'I want to start work an hour early so I can finish an hour early because that means that I get to spend an extra hour with my children when they come home from school', that is something that might not otherwise be accommodated by the employer if it results in the employer having to pay, effectively, a penalty for that and, indeed, it might create other broader issues, if, for example, the employee is a full-time employee, is engaged to work 38 hours a week and needs to be given 38 ordinary hours of work. I mean there's a second issue that arises from that.

PN409

The unions have also argued that we are seeking to reagitate an issue that was dealt with during the four-yearly review. Yes, to some extent, it was dealt with through the plain language redrafting process in the four-yearly review. Much, but not all, of the argument in that process related to the proper interpretation of some of these provisions, that is, whether existing facilitative provisions of this nature allow you to vary the span at one end or both ends. The conclusion that the Commission reached there was, in relation to the relevant provisions, it applied only at one, but not the other, and there was also some consideration of the merits of a provision that would allow you to do it at both ends, but the argument we would make is that the statutory scheme, in particular the modern awards objective, has been amended since then and this review is looking particularly at ways in which care responsibilities can be better facilitated, and this is something that comes to mind in that context.

PN410

DEPUTY PRESIDENT O'NEILL: The same points are made by companion parties in a number of respects in other instances that the matter has already been dealt with fairly recently.

PN411

MS BHATT: Yes.

PN412

DEPUTY PRESIDENT O'NEILL: All right. I understand that. Does anyone else wish to be heard in relation to those proposals?

PN413

MS PELDOVA-McCLELLAND: Deputy President, I rely on what we put in our reply, but perhaps highlight the observations made in the literature review around the importance of provisions that discourage employment in non-standard or unsocial hours during the week and on the weekends and how for worker carers they are particularly important, and they do refer to a number of studies about how it is especially difficult for parents to achieve that balance working non-standard hours, including weekend work, really increases work/life conflict, and far more so for mothers than for fathers. So I just wanted to highlight those. Thank you.

PN414

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

PN415

MS TINSLEY: Thank you, Deputy President. Just noting our support for Ai Group's proposal. Thank you.

PN416

DEPUTY PRESIDENT O'NEILL: All right.

PN417

MR MAXWELL: Deputy President, I would point out that we have dealt with this in our reply submission.

PN418

DEPUTY PRESIDENT O'NEILL: Yes. Thank you. I note that. I think it's page 9.

PN419

MS BIDDLESTONE: Sorry, Deputy President.

PN420

DEPUTY PRESIDENT O'NEILL: Yes.

PN421

MS BIDDLESTONE: I just wanted to note that a couple of the awards that relate to SDA members, so the Retail, Hair and Beauty and Pharmacy Awards are called out in relation to 71, and I just wanted to note that, in terms of those three awards, they have extremely broad span of hours already, so I'm not sure what the utility would be in terms of facilitative provisions around a span for those awards. Hair and Beauty is seven days a week with varying hours, but they are expansive; the Pharmacy Award is 7 am to midnight seven days a week, and the Retail Award is across seven days from 7 am up until 11 pm, depending on the trading hours.

PN422

DEPUTY PRESIDENT O'NEILL: What was the middle one?

PN423

MS BIDDLESTONE: The Pharmacy Award.

PN424

DEPUTY PRESIDENT O'NEILL: Pharmacy.

PN425

MS BIDDLESTONE: So, yes, in terms of how that would support someone's ability to work and manage caring arrangements, I'm not sure within that span that that would be of much utility.

PN426

DEPUTY PRESIDENT O'NEILL: Okay. Thank you. Mr Robson.

PN427

MR ROBSON: Thank you, Deputy President. A very similar submission to the SDA's. We have an interest in the SCHADS Award and the Local Government Award, and again both of those awards provide a very broad span of hours. Local Government's a little bit more complicated, but depending on the work that you do under that award, it could be anywhere between a fairly standard set of hours between, you know, normal business hours, but, in some cases, ordinary hours can be worked on weekends or up to quite late in the evening. Similarly in the SCHADS Award, the span of hours for a day worker is between 6 am and 8 pm in the evening. That is already pushing that span of hours into work that in many other industries would be considered shift work.

PN428

I think there is a problem with the AiG submission in this space that says there's no other way for employers to achieve the outcome here, whereas we do actually have a fairly well-developed way of providing flexibility of hours of work about when hours are worked in the Australian industrial relations system, and that is called shift work, and I think it's echoed by some of the submissions made in, say, the Clerks Award. There is a new stream where there's a proposal by AiG to expand the span of hours for a day worker to include Saturday afternoons - ordinary hours can be worked up to 12.30 on a Saturday - and to Sundays.

PN429

Now, there is some contention there that this is to accommodate the needs of businesses that operate on seven days of the week or 24 hours of the day, but that award, like the SCHADS Award and like the Local Government Award, provides for shift work. That's the appropriate way to do this, and we say this is something of a furphy to say this is about addressing the needs of people with caring responsibilities.

PN430

Certainly, if you take SCHADS, pushing the start time to 5 am in the morning, I am just unsure of how starting that early in the morning could assist someone with their caring responsibilities when that is probably a time that would either be spent sleeping or a time that they will have caring responsibilities before or after school days.

PN431

It just seems very strange to us this idea that we can start work at all hours without compensation, without recognition of the disutility of working those hours is balanced out by the fact that this might be desirable to some employees in certain circumstances when they are presented with no other alternatives, and we say that we should be looking in this process at ways that, not that we can turn life into bare care and work and sleep, but how we actually address that problem that there is an intrusion of work into the very important work people do in the home or in their community caring for others and how that affects someone's quality of life, their ability to participate in society and, you know, just generally their ability to function as a human being.

PN432

I think the union proposals address those concerns. It's a vision of genuine human life rather than just robotic work and production, and I think that is the contest. Thank you.

PN433

DEPUTY PRESIDENT O'NEILL: All right. There's a proposal by NECA to oppose working from home in the facilitative provision. Nobody wants to be heard in relation to that? All right.

PN434

Now, 75 is the ACTU proposal. This is about the right to request flexible work to be extended to be available to all employees. Did you want to say anything further?

PN435

MS PELDOVA-McCLELLAND: I can, Deputy President, but I just note - are we breaking for - - -

PN436

DEPUTY PRESIDENT O'NEILL: Well, this is exactly what I'm thinking about at the moment. We are actually not too far off the end, so we could either keep going and likely finish by one for the day, or if people want to spend more time, we can break now and resume at two, as planned.

PN437

MS PELDOVA-McCLELLAND: Speaking for myself, my preference would be for at least a short break.

PN438

DEPUTY PRESIDENT O'NEILL: Okay.

PN439

MS PELDOVA-McCLELLAND: I'm not sure if anyone else - - -

PN440

DEPUTY PRESIDENT O'NEILL: First in best dressed. That kind of decides it. How about we break and, rather than until 2 o'clock, make it until 1.30. All right. On that basis, we will adjourn and resume at 1.30.

LUNCHEON ADJOURNMENT

[12.31 PM]

RESUMED

[1.31 PM]

PN441

DEPUTY PRESIDENT O'NEILL: All right. So I think we were onto - about to go onto item 175, the ACTU proposal.

PN442

MS PELDOVA-McCLELLAND: Thank you, Deputy President. If it's convenient, I can deal with 75 and 76 at the same time.

PN443

DEPUTY PRESIDENT O'NEILL: Yes, please.

PN444

MS PELDOVA-McCLELLAND: Thank you. And thank you for indulging me in a break. I will make a few general points that I would like to highlight about these proposals and why we say they're necessary as well as then respond to a couple of issues the employers have raised in reply. So by way of the most general statement, flexible work is a really crucial way in which carers can balance their care responsibilities with paid work. Excuse me.

PN445

And the evidence shows that people with access to flexible work before having children are more likely to remain employed after having children and that when flexible work isn't available, people with care responsibilities are more likely to

leave work and the workforce altogether. I think it's really important to remember that after the age of 35, women are at least three times more likely than men to work part time, and this demonstrates a really strong need for stronger flexible working arrangements in order to encourage a fairer share of caring responsibilities and to prevent women being forced into insecure work right at that crucial moment they're taking on caring responsibilities.

PN446

So we've pointed out in our submission that flexible work is only available to certain cohorts of workers rather than all workers, and that the definition of carer in s65 is limited to carers recognised as such under the Care Recognition Act. We say this is unduly narrow. It excludes many workers with caring responsibilities. For example, it excludes kinship care arrangements and care for people who aren't immediate family or members of the employee's household.

PN447

In relation to the 12-month period, we say it's arbitrary and unfair for an employee to have to wait that time before being able to request flexible work. It acts as a disincentive for workers to change jobs, and thereby have access to things like pay increases and promotions. And it's also disincentive for women returning to the workforce, but to a different job that they had prior to parental leave, and it may mean they can't return at all.

PN448

And again, we'd note and point to research to demonstrate just how prevalent discrimination against pregnant women and women returning to work already is. And so removing that eligibility based on length of service would help women who have been discriminated against and lost their job return to the workforce, and therefore increase female workforce participation. We note the approach of other countries, such as the UK, where the right to request flexibility is available to all employees without a waiting period. And the aim of this is to really destigmatise the utilisation of flexible work, especially for men and for fathers.

PN449

We say that adopting such an approach would make flexible work a normal and accepted part of working life; ensure that men and women can contribute more equally to care; and to remove the stigma attached to its use, because it is mostly confined and used by carers at the moment. And this would help to normalise and mainstream flexible work across a range of different industries and workplaces where perhaps it is not so commonly used. In the alternative to flexible work being available to all workers, we've said that it should be available to all employees with caring responsibilities, and also to employees for reasons relating to their reproductive health.

PN450

To move to item 76, this is the reasonable business grounds point. So we propose that requests could only be refused on the basis of unjustifiable hardship. This would bring this provision in awards in line with concepts on anti-discrimination law, and allow many more workers to access flexible work. It's an objective and a more rigorous test, which is well understood, and we say it will deal with the problem of employers who can currently dress up inconvenience as a reasonable

business ground, and use it as a reason to reject flexible work requests. Moving to a few points - - -

PN451

DEPUTY PRESIDENT O'NEILL: Just before you move off that, you say it's a well-recognised test, unjustifiable hardship. Can you say anything about the genesis of it, or where else it might be found?

PN452

MS PELDOVA-MCCELLAND: It's found in the anti-discrimination legislation at a common law level. Probably also at a state level, although I haven't looked into that. And its interpretation in those contexts is subject to a lot of judicial consideration about the kinds of issues that need to be taken into account. I don't have them to hand, although I can look into that.

PN453

DEPUTY PRESIDENT O'NEILL: No, that's helpful.

PN454

MS PELDOVA-MCCELLAND: All right.

PN455

DEPUTY PRESIDENT O'NEILL: I mean, you don't need to do that. Your explanation has been helpful.

PN456

MS PELDOVA-MCCELLAND: All right. No worries. So moving to a couple of points in reply. There was one issue that AI Group raised, that we haven't referenced a particular proposition in our submission that a large percentage of requests for access to flexible work are refused. There is a reference at footnote 51. It was in relation to the two sentences, so apologies for the confusion, but I thought I'd clarify that. It was a report provided to the Fair Work Commission in 2017. AI Group also raised a concern about the operation of section 65 of the Act, and whether our proposals would be allowed under section 55. We don't think there's a problem with section 55. The variations we proposed would not exclude the NES, but rather supplement it in a way that isn't detrimental to employees when compared to the NES, as is permitted under section 55(4)(b).

PN457

By way of example, that section contemplates terms, for example, that increase the amount of paid annual leave to employees, or pay them at a higher rate. And finally, AI Group talk about, it can't be said to be necessary for the safety net to give employees rights to attend yoga or have breakfast with their friends, in response to our point about this being available to all workers. And I would just lean on the comments I made earlier, about the destigmatisation value of this, and flexible work being normalised and mainstreamed. Carers would absolutely gain the benefit of that, without the stigma and begrudging approach that is currently adopted and is the current culture in many places, especially when it comes to men's use of flexible work and encouraging, and indeed requiring employees to take men's requests more seriously, so we can shift the dial on unpaid care. I

think I'll leave the comments at that, Deputy President, unless you have any questions.

PN458

DEPUTY PRESIDENT O'NEILL: No, I don't. Thank you. Does anyone else wish to be heard in relation to either proposal 75 or 76?

PN459

MS BHATT: To some extent we've dealt with this in our written submissions. I think the central proposition we've advanced against the ACTU's proposal and the similar proposals that have been advanced by some of its affiliates is that any scheme that facilitates the making of a request for flexible working arrangements needs to strike an appropriate balance, and the proposals that have been advanced by the unions would disturb the balance that is presently struck by section 65 of the Act. The ACTU has today said that, in at least some contexts, there is this begrudging approach that is adopted by employers. I'm not sure that there's any real evidence about it.

PN460

We've referenced a report by the general manager, concerning specifically section 65 requests, and it reveals that, overwhelmingly, requests made pursuant to that part of the Act are granted. In some cases, that's after some discussion with the employee, in accordance with the consultation provisions of that part of the Act. It's also not our experience that employers adopt that kind of attitude or approach. Indeed, there are many, many employers who (indistinct) to enable flexible working arrangements, in circumstances where they are not required to by the safety net. They go well beyond where their capacity and the relevant circumstances allow them to do so.

PN461

The NES does of course identify specific groups of employees who are entitled to make a request for flexible working arrangements. The ACTU's proposal seeks to expand that scope. As I said earlier, we think that that list strikes an appropriate balance between who is or is not able to make such a request. I would also observe that the definition of a carer under the Carer Recognition Act, which is referenced in section 65 of the Act, is quite broad. I'm not sure that it is as narrow as what the ACTU has suggested today.

PN462

DEPUTY PRESIDENT O'NEILL: I think it's laid out in the discussion paper, from memory.

PN463

MS BHATT: I think it is. The point is that it doesn't seem to me – and I'll come back to this if I'm wrong about this – that is limited to situations in which one is providing care to a person that is within their household or their immediate family. It seems much broader than that. The same can be said of the group of the employees who are entitled to make a request where they have care for a child. You don't necessarily have to be the parent of the child when you can make that sort of request. There's then this idea that a period of time has to pass before you become eligible, that is 12 months generally. And our response to that is that

it's reasonable that an employee might be expected to perform a particular role on the basis upon which it was offered to them for a period of time, a defined period of time, before the eligibility arises to make this request.

PN464

As for this notion of unjustifiable hardship, if you put any technical arguments about section 55 to one side for now – and I'm not resiling from them, but they've obviously complex and will need to be explored in more detail. But if you put them to one side for now, it is obviously undesirable, and we would say not appropriate to have a different test or a different scheme for dealing with flexible working arrangements in awards sitting alongside the NES. It apt to confuse. It's not consistent with the creation of a simple award system, or one that is stable. I would also observe that the NES relatively recently has been amended to create a fairly robust regime for dealing with any disputes that arise.

PN465

Indeed, the Commission has been given the power to go so far as to require an employer to grant a request that's been made in certain circumstances. Obviously, we would also observe that this notion of an unjustifiable hardship would place a greater onus on employers. It goes much further than the reasonable business grounds test. And in normal circumstances, particularly taking into account the reports that are available about the extent to which these requests have already been accommodated, we would say that that's not necessary.

PN466

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Did anyone else wish to say anything in relation to these proposals, 75 and 76? All right. Well, the next proposal is somewhat similar, the proposal by the NTEU at 77.

PN467

MS WELLS: Thank you very much, your Honour.

PN468

DEPUTY PRESIDENT O'NEILL: I've gone from Commissioner to 'your Honour'.

PN469

MS WELLS: Thank you for the opportunity. Certainly the NTEU hopes to dramatically move provisions for workers with caring responsibilities in award provisions, and are proud to do that. We have made a suggestion, like the ACTU, for an individual and collective right to flexible work. And I'd like to thank the work of Professor Charlesworth and Professor Smith, who have collated and commented on a range of literature that recognises that in respect of rights to flexible work, universality is the key. I should also note, when I have the opportunity to do so, just a couple of points for the NTEU while I'm standing.

PN470

And that is that we note the opportunity for being able to explore further some of the issues we have in common, and some of the differences that we have with considerations of minimum engagement for part-time workers for the higher education awards. It's worth noting that we oppose the proposal of the AHA to

insert a definition of part-time work that they propose for all awards. We support the position of the ACTU in respect of the abolishment of individual flexibility agreements. And obviously, we warm to opportunity of the literature review recognising universal access to flexible work will go a long way to removing the stigma involved in accessing flexible work, regardless of the individual rights or entitlements under discrimination law or under general protections law at the moment.

PN471

In terms of changing our workplaces, we can see that these individual entitlements have been insufficient at this point in time to make the change that we need. So in respect of recognising the recommendation of Professor Smith and Professor Charlesworth in having a universal right to flexible work, and the benefit of that being both an individual employee entitlement and a collective entitlement, we consider the work that has already occurred across decades, really, here and elsewhere, in trying to change workplaces to provide workers with caring responsibilities better access to the workplace in the first instance, and to be able to balance work and care obligations.

PN472

We want to rest on the submissions that we made – or rely upon, rather – the submissions that we made in our initial submissions on work and care, because, like our submissions in the job security stream, the first thing we'd like to have the Commission consider is that job security is obviously a critical factor in being able to balance work and care. So you don't even get to put your hand up in the first instance. And workers are smart; they recognise this. You don't get to access rights to flexible work or request rights to flexible work, unless you first have an element of security in the workplace. And so recognising, in the higher education sector, the huge numbers of insecure workers, but also of course in the economy broadly, as recognised in the ACTU's submissions and in the job security stream.

PN473

Firstly, obviously, we have much work to do to ensure that the majority of workers in the higher education sector or in the economy generally are in secure work, in permanent work, that would enable them to ask and have a right to dispute or pursue rights to flexible work, and then, of course, thinking about individual rights versus collective rights, and the impact that that would have on workplace culture and accessing individual entitlements or collective entitlements. Firstly, as ACTU's submissions have identified, and the literature review identifies, having access to flexible work for all workers has been around for many decades in Europe, and now in the UK.

PN474

Twenty years ago, when some of us were making submissions to the Family Test Case, Professor Jill Murray identified at the time that from 2001 onwards, in the Netherlands and Germany, and subsequently in Ireland and many other EU nations, arising from an EU directive which sought to increase women's participation in the workplace, that rights to part-time work and rights to flexibility were introduced in legislative schemes. And in the Netherlands scheme, the adaptation of working time scheme, which has been available to those

workers since 2001, they have had a system where the employer has to demonstrate that they cannot accommodate a request for flexible work.

PN475

All workers have access to that right. And in fact, from that time, they have been able to access remote working or flexible work, working from home, with the same test, that the employer has to demonstrate that a change in work location would not be able to be accommodated. So Netherlands and Germany have had that right since the early 2000s. Of course, these examples were provided to the Commission, but unfortunately, in the 2005 test case, the minor changes resulted in a right to request parental leave extensions, or a right to return to the workplace part-time post-parental leave. So at that time, while other countries were looking to boost women's participation in work, in particular obviously workers with caring responsibilities' participation in the workplace, we were making these minor changes.

PN476

Otherwise, the employer managerial prerogative allowed the engagement of part-time workers or the introduction of collective application, flex time, that managerial prerogative, managerial discretion. So then, obviously, in around 2007, 2008, 2009, we have these discussions again, and we end up with an unenforceable right in the National Employment Standards. So 20 years after submissions were being made to the Family Test Case provisions, we can now see that there is a universal right to apply for right to flexible work for individuals in the UK and numerous other jurisdictions. And the literature review and the resources cited in that review identify all of the reasons why that's valuable for changing workplace culture, for reducing the stigmatisation of workers with carer's responsibilities, for ensuring – and think this has come up in numerous discussions today – for ensuring that the employer has an obligation to organise work and the allocation of work to recognise that workers will live in a community and have caring responsibilities, whether they have young children or care for their family members, or care for friends, or care for elders in the community.

PN477

So we think that this is more than reasonable. We think that it is more than possible. And in the same way that there is managerial prerogative and rights to introduce where employers determine rights to flexible work through collective flexi-time schemes, et cetera, we think that it is more than possible to have individual workers or groups of workers, collectives of workers in work units or workplaces, as determined, to be able to make individual or collective applications for working from home, or working remotely in general, or changing starting and finishing times to suit those employees. And we know that this is possible, because some of these individual and collective rights exist in enterprise agreements for workers' benefit in the higher education sector.

PN478

We have individual and collective processes in that industry for the purposes of work allocation, to look at workload issues for professional staff and academic employees, and of course for the benefit of the employer. So we think it is more than possible for employers in the higher education sector and in general to

consider the allocation of work for the purposes of part-time work, for the purposes of the consideration of the application of overtime when a part-time work period has finished, for the purposes of giving genuine consideration and only declining applications for flexible work provisions in the circumstances of being an unreasonable request or an unjustifiable hardship on the employer. And we would hope that the report arising from this review would make this recommendation, and make a great change for workers with carer's responsibilities after these many decades of discussion. Thank you so much.

PN479

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Wells. Now, I'm aware that Ms Pugsley from the Australian Higher Education Industrial Association has joined us this afternoon. Ms Pugsley, did you want to say anything in relation to this particular proposal?

PN480

MS PUGSLEY: First of all, thank you very much for accommodating us, and I think we have notified the change of appearance from Mr Miller to myself previously. We don't seek to provide anything further in reply, other than in our reply submissions filed on 26 March, at pages 2 to 4, with regard to flexible working arrangements, and then at appendix 1 to that submission, on pages 12 to 13, where we respond to the literature review.

PN481

DEPUTY PRESIDENT O'NEILL: All right. Well, thank you, Ms Pugsley. Does anyone else wish to say anything about this proposal? All right. Well, that's the end of the matters for discussion today. So I think because we've set the timetable, it's not really appropriate to move into subsequent days' agendas. Is there anything that anyone wishes to say before we close for the day about any of the matters relevant to today? All right. Well, on that basis, thank you all for your attendance and participation today, and I shall see you at 9.30 tomorrow. The Commission is adjourned.

ADJOURNED UNTIL THURSDAY, 04 APRIL 2024

[1.56 PM]