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FAIR WORK AUSTRALIA

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 32297-1

SENIOR DEPUTY PRESIDENT ACTON
DEPUTY PRESIDENT IVES
COMMISSIONER BLAIR

AM2010/232

s.158 - Application to vary or revoke a modern award

Application by Australian Nursing Federation
(AM2010/232)
Nurses Award 2010

(ODN AM2008/13)
[MA000034 Print PR986375]]

s.158 - Application to vary or revoke a modern award
Australian Industry Group, The
and
No Respondent for AM2010/237
(AM2010/237)

Manufacturing and Associated Industries and Occupations Award 2010

(ODN AM2008/5)
[MA000010 Print PR985120]]

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error
Liquor, Hospitality and Miscellaneous Union
and
No Respondent for AM2010/238
(AM2010/238)

Cleaning Services Award 2010

(ODN AM2008/20)
[MA000022 Print PR986363]]

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error
Liquor, Hospitality and Miscellaneous Union
and
No Respondent for AM2010/239
(AM2010/239)

Security Services Industry Award 2010

(ODN AM2008/11)
[MA000016 Print PR985126]]

s.158 - Application to vary or revoke a modern award
"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
and
No Respondent for AM2010/244
(AM2010/244)

Manufacturing and Associated Industries and Occupations Award 2010

(ODN AM2008/5)
[MA000010 Print PR985120]]

s.158 - Application to vary or revoke a modern award
Finance Sector Union of Australia
and
No Respondent for AM2010/247
(AM2010/247)

Banking, Finance and Insurance Award 2010

(ODN AM2008/16)
[MA000019 Print PR986360]]

Melbourne

9.31AM, WEDNESDAY, 24 NOVEMBER 2010

Reserved for Decision

PN1

SENIOR DEPUTY PRESIDENT ACTON: Can I have the appearances, please.

PN2

MR S. SMITH: If it pleases the tribunal, I appear for the Australian Industry Group in all the matters. Also I appear for Chubb Australasia in matter AM2010/239. Smith, initial, S., with MS G. VACCARO from AI Group.

PN3

SENIOR DEPUTY PRESIDENT ACTON: Thank you, Mr Smith.

PN4

MR M. HEALY: If the tribunal pleases, my name is Healy, initial M. I seek permission to appear in matter AM2010/237. That's the application by the AI Group. I'm instructed by the attorney-general and the minister for industrial relations in Queensland. I'm instructed by the crown solicitor. I'm to appear today, if granted permission, with MR A. HORNEMAN-WREN SC. He is in transit and we expect him to be here at any moment.

PN5

MS E. McCOY: Your Honour, my name is McCoy, initial E. I appear on behalf of the Australian Council of Trade Unions. Our submissions today go to the approach that the tribunal should adopt generally in relation to public holidays and (indistinct)

PN6

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN7

MR G. NOBLE: Your Honour, Noble, initial G., for the AMWU. We have the matter AM2010/244 and also responding to AI Group's 237 matter.

PN8

MR S. MAXWELL: If the tribunal pleases, my name is Maxwell, initial S. I appear on behalf of the Construction, Forestry, Mining and Energy Union in matters 244 and 237.

PN9

MR N. SWANCOTT: Your Honour, I appear in matters 237, 238 and 239, for the LHMU. My name is Swancott. Thank you.

PN10

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN11

MR A. McCARTHY: If the tribunal pleases, my name is McCarthy, initial A. I appear on behalf of the Australian Nursing Federation in the matter 2010/232.

PN12

MR M. PERICA: If the tribunal pleases, I am Perica, initial M., for the CPSU. We have a general interest in all the matters before you today.

PN13

MR A. LESZCZYNSKI: Your Honour, if it pleases the tribunal, Mr Alex Leszczynski, appearing on behalf of the Finance Sector Union of Australia for matter AM2010/247.

PN14

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN15

MR A. KENTISH: If it pleases, Kentish, initial A., appearing in matters 237 and 244, for the CEPU.

PN16

MR C. DELANEY: Your Honour, Delaney, initial C. I appear on behalf of the Australian Security Industry Association Ltd in matter number 239.

PN17

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN18

MR M. RAHILLY: Your Honours, Commissioner, I seek leave to appear in matter number AM2010/232, with MR D. AINSBURY, for the aged care employers comprising Aged Care Association Australia Ltd; Aged Care Association New South Wales; Aged Care Queensland; Aged and Community Care Victoria; Aged and Community Services Association of New South Wales and ACT Inc; Aged and Community Services Australia; Aged and Community Services South Australia and Northern Territory Inc; Aged and Community Services Tasmania; Aged and Community Services Western Australia.

PN19

SENIOR DEPUTY PRESIDENT ACTON: Thank you, Mr Rahilly.

PN20

MS R. FRENZEL: Your Honour, Frenzel, R., appearing on behalf of the Building Services Contractors Association of Australia in matter number 238.

PN21

MR D. GREGORY: If the tribunal pleases, I appear on behalf of the Chamber of Commerce and Industry of Western Australia in respect of the matters involving the ALHMWU, the AMWU, the ANF and the application by AIG. I also appear on behalf of the Australian Chamber of Commerce and Industry. My name is Gregory, initial D.

PN22

MR D. TRINDADE: If the tribunal pleases, Trindade, initial D. I'm a solicitor. I seek permission to appear in response in relation to matter number 238, the Cleaning Services Award.

PN23

SENIOR DEPUTY PRESIDENT ACTON: Is there any objection to the applications for permission to appear? Permission is granted. I think the most convenient way of dealing with this is for each advocate to say all they want to say in respect of all the applications, rather than deal with the applications separately. Mr Smith?

PN24

MR SMITH: Your Honour, prior to the proceedings beginning we did have some discussions with the unions and I understand we did agree that given that in a number of cases the union haven't submitted anything other than their application and the order that we agreed upon was that subject to the support of the full bench of course, we would go first with our submissions in response to our application; but given that we haven't even heard any of the arguments yet in support of the unions' applications, it would be extremely difficult to respond to something that we haven't yet seen.

PN25

SENIOR DEPUTY PRESIDENT ACTON: Yes, okay. No objection to that course? Mr Smith?

PN26

MR SMITH: Thank you. If I could, just to begin, provide the bench with a bundle of authorities and also a bound copy of our submission with all the attachments.

PN27

SENIOR DEPUTY PRESIDENT ACTON: We'll mark the submissions of the AIG as AIG1.

PN28

EXHIBIT #AIG1 SUBMISSIONS OF AUSTRALIAN INDUSTRY GROUP

PN29

MR SMITH: Thank you, your Honour. As the bench will see, we filed a detail written submission, so in the light of that I didn't intend going through everything in there; but by way of introduction, the application that we've made seeks to clarify the operation of a standard Public Holidays Test Case clause which appears in the Manufacturing modern award, and clarifying it in the context of removing ambiguity and uncertainty given the introduction of the NES and modern awards.

PN30

This clause, in our submission, is vital and it needs to continue to operate in the way that it has operated for many, many years. In fact, since 1998 when it was first put into the Metal Industry Award. This modern award clause, clause 44.2, allows states and territories to decide what days should be public holidays and attract NES entitlements, but the clause preserves the long-standing and essential role that Fair Work Australia has had in deciding what days public holiday penalties are payable and what days weekend penalties are payable. In the past the clause has delivered a consistent and fair approach to public holiday penalties, notwithstanding the long-standing, fairly diverse way that states and territories have proclaimed particular days as public holidays.

PN31

As set out in the summary to our submission, the application followed detailed discussions that we've had with the Office of the Fair Work Ombudsman which led to us forming the view that there is ambiguity and uncertainty about the clause. As we submit in the summary, it seeks to do nothing more than to clarify

what we say is the intent of the provision. It will preserve the long-standing interpretation of the identical clause in the Metal Engineering and Associated Industries Award. It would preserve a similar outcome to what occurred last year with Boxing Day and it would preserve a similar outcome next year when Christmas Day and New Year's Day fall on the Sunday; so we'd urge the bench to not just think of this issue as what will apply in four weeks' time, of course, but what will apply next year and beyond.

PN32

The clause and the variation seeks to ensure that employers and employees throughout Australia have similar obligations and entitlements when it comes to public holiday penalty rates and weekend penalty rates on Christmas Day, Boxing Day, New Year's Day and Australia Day when they fall on a weekend. In addition to the variation we're seeking to 44.2, we're seeking a minor variation to clause 44.4 given that the existing wording seems to have created some confusion, particularly with employers who may not have the clause that was in the Metal Industry Award that that clause was drawn from. We'd urge the full bench to vary the award as we're seeking, but also to remain open to varying other modern awards in similar terms where a modern award contains a provision similar to clause 44.2 or where a modern award covers an industry or occupation. The pre-modern award in that industry included a similar clause to clause 44.2, but for some reason the clause was omitted from the modern award.

PN33

In chapter 2 of our submission we highlight the interaction between the Fair Work Act, state public holiday legislation and modern awards. As highlighted there, state and territory governments retain the power to declare public holidays on particular days, but state governments do not have the power as set out in section 27(2)(j) to determine the rights and obligations of national system employers and employees in respect of public holidays. This point has been made very clearly by the New South Wales Industrial Relations minister just 10 or 12 days ago in a speech to the New South Wales parliament where that government has just introduced a bill to reflect its outcomes that it's seeking from the inquiry that was carried out by Ms O'Reilly. As the Honourable Paul Lynch said:

PN34

> *It is essential to emphasise that the state's power over public holidays is limited to providing only for the days on which they occur. The Fair Work Act 2009 makes it very clear that providing for the rights and obligations of employers and employees is not a matter that state law can deal with. The industrial consequences of public holidays are matters dealt with under the Fair Work Act, both under the National Employment Standards relating to public holidays and under modern awards and enterprise agreements made under the act.*

PN35

As the bench is aware, the only public holiday entitlements and obligations which the National Employment Standards deal with are those in section 114 and section 116, with 114 dealing with the entitlement of an employee to be absent on a public holiday if reasonable and the right of an employer to make a reasonable request that someone work on a public holiday, and section 116 obligates an

employer to pay the employee at the base rate of pay if the employee's ordinary hours fall on the public holiday and the employee is absent on the day.

PN36

The NES does not provide any rights or obligations relating to penalty rates for people who work on a public holiday. Penalty rates are provided for in modern awards, but they're not, as the tribunal knows, in all modern awards. It depends on the particular modern award. Fair Work Australia is empowered to decide that penalty rates are payable on all days which are public holidays under the NES, on some days or on one of the days. There are some awards - for example, the Professional Employees Award - that doesn't have any specific penalties for public holiday work, and the higher classifications in the Telecommunication Services Award and the Contract Call Centres Award do not extend public holiday penalty rates to those higher classifications. Clearly this power is an important one that the tribunal maintains to decide what penalty rates are appropriate in terms of quantum and in terms of what days those penalty rates might be payable. It's a completely different issue to the issue of the NES obligations and what is or is not a public holiday under the NES.

PN37

We move on to chapter 3 of our submission to deal with the definition of a public holiday. I won't go through all of that, but clearly section 115, paragraphs 1, 2, 3 and 4, operate to determine what days are public holidays in terms of the actual days, the substitute days, additional days and so on. As a consequence, what days attract the NES entitlements in section 114 and 116. In chapter 4 of our submission, we go on to highlight the extremely confusing and complicated situation which has been created this year through state and territory governments coming up with five different approaches to proclaiming public holidays for the Christmas/New Year period.

PN38

New South Wales and Queensland have decided there will be five holidays, including Saturday, the 25th, but not including the 26th. Victoria has decided to include the 26th as a public holiday, but not the 25th. South Australia has decided to also favour the 26th rather than the 25th, but have declared four holidays. WA is the most generous in this area and has inflicted the most costs upon employers in some ways through declaring six public holidays. Tasmania, the ACT and the Northern Territory have declared substituted days on Monday, the 27th, Monday, the 28th and Monday, 3 January, as the public holidays rather than the original days.

PN39

That would mean that of course the NES entitlements under 114 and 116 would apply to those days that have been declared as public holidays, so if someone's ordinary hours fall on those days and they're absent, they would be entitled to be paid at their base rate. If they are requested to work on those days, they would have to respond to a reasonable request, but they have the right to the day off if reasonable in the circumstances. That is entirely consistent with the framework of the act and the logical interpretation of section 27. As we've said, award entitlements - particularly public holiday penalty rates - are not automatically payable on those days. That is entirely a matter for this tribunal to determine what days public holiday penalty rates are payable, what the quantum of those

payments is and indeed whether or not any payments should be paid on those days depending upon the nature of the occupation.

PN40

In chapter 5, we go on to deal with the specific award variation sought by AI Group and our application is pressed under section 160 of the Fair Work Act on the basis that the proposed variation would remove ambiguity and uncertainty. We also submit that it is obvious, in our submission, that the variation that we're seeking is consistent with the modern award's objective in that the confusion and uncertainty that is now present about the way that this clause 44.2 operates in relation to the NES and in relation to state laws, is not consistent with the modern award's objective and needs to be remedied.

PN41

The variation sought simply, as I said earlier, clarifies what we submit is the intent of the clause and that would be that where Christmas Day falls on a Saturday or a Sunday, 27 December is observed as the public holiday for the purposes of penalty rates, whether they be penalties for working ordinary days or shifts or penalties for working overtime, and 25 December is not a day that attracts public holidays penalty rates, but of course it would attract weekend penalty rates. Where Boxing Day falls on a Saturday or Sunday, the clarified clause states that 28 December would be observed as the public holiday for the purposes of the public holiday and penalty rates, and not 26 December. Similarly with New Year's Day or Australia Day, 1 January and 26 January wouldn't have the public holiday penalty rates applied, but the weekend penalty rates would still apply. We believe that our modified clause simply clarifies the intent and updates the provision to reflect what it needs to say in the light of the NES.

PN42

In 5.2, we've gone through and identified word by word all the changes that occurred from the Metals Award 98 to the Manufacturing modern award. What that table shows is that the wording of the relevant penalty rate clauses in the modern award are virtually identical to the wording of the equivalent clauses in the Metals Award 1998, so we submit that that is clear evidence and support for the argument that there was no intention by the tribunal or the industrial parties to change the intent. There certainly wasn't any discussion about a change of intent in the negotiations that took place between AI Group and the unions.

PN43

In terms of 44.2, the wording in the Metals Award is identical to the wording in the Manufacturing Award, other than a slightly changed title. The wording of clause 44.4 is very similar to the wording of the equivalent clause in the Metals Award, but there has been a minor change in terminology which seems to have confused some employers. It seems that some employers are uncertain whether in reading the sentence "except as provided for in clauses 44.4(b) and (c) and where the rostered day off falls on a Saturday or Sunday" means that the clause applies - or does not apply when an RDO falls on a weekend. When the old clause is looked at, it's very clear that it means that the clause doesn't apply when a public holiday falls on the weekend, but the inclusion of an additional "except" in there will certainly clarify that.

PN44

In section 5.3 of our submissions, we go on to explain what a sensible, fair clause this is and why it needs to be maintained. The clause ensures that employers are required to pay public holiday penalties on three days - for the Christmas Day, Boxing Day and New Year's Day public holidays - plus weekend penalties on the other days. Now, under that clause, Saturday penalties would be payable for time worked on Saturday in circumstances where one of the relevant holidays fall on the weekend. Sunday penalty rates would be payable for time worked on Sunday and the public holiday penalty rates would be payable for the time worked on Monday and Tuesday, and that would apply in every state.

PN45

As we state in the table on page 22 of our submission, it has the effect of making sure that all employees and all employers are treated fairly in all states when it comes to obligations and entitlements with penalty rates, but it doesn't take away from the rights of the states to declare public holidays and the NES entitlements would apply. What in effect that would mean this year is that in Tasmania, the ACT and the Northern Territory, NES entitlements would apply on three days; in WA the NES entitlements on six days; in New South Wales, Victoria and Queensland, the NES entitlements would apply on five days; in South Australia, on four days. In all states and territories for all employers and employees under the federal system, the penalty rates would be payable in a similar way for all employees who work that weekend.

PN46

Now, as we go on to deal with in a moment, we have had some quite detailed discussions with the Office of the Fair Work Ombudsman about this issue. Those discussions have led to us forming the view that the clause is ambiguous and uncertain. In section 5.4 of our submission, we deal with the authorities relating to the concept of ambiguity and uncertainty, and we submit that clearly this is a circumstance that fits squarely within the circumstances that have been identified as meeting the relevant test. There are, in our submission, two competing interpretations and as set out in the TENEX decision in paragraph 43 of our submission - and it's included in the bundle of materials at tab 2 - the tribunal has had an approach of generally erring on the side of finding an ambiguity or uncertainty to exist where there are rival contentions advanced and an arguable case is made out for more than one of those contentions.

PN47

If I can deal now with the discussions that we've had with the Office of the Fair Work Ombudsman. We do see this as relevant background because in early October, AI Group started receiving queries from member companies about what they would have to pay for people who work on the Christmas/New Year weekends. We looked at the issue in some detail and, as we're all aware, it's not an easy analysis because this year we've got the modern award system that has come in, we've got the NES and we've got this quite ridiculous situation where all these different approaches have been taken in every state. But, we considered the issues carefully, we developed our view and we circulated that view to our team of people who are there all day every day advising employers about their obligations.

PN48

Because of the importance of this issue, we wanted to make sure that we are giving the correct advice, so we forwarded our written view to the Office of the Fair Work Ombudsman at a senior level. We think the FWO's view of course is extremely important, because they're a very well resourced and active agency, and we didn't want to be in the position where we're giving companies one advice and a separate view is being delivered by the Office of the Fair Work Ombudsman; so we sent our internal advice off.

PN49

On 3 November, we received a preliminary opinion, and it was very much a preliminary opinion from the chief counsel of the FWO - and the preliminary view of the FWO which had been set out for discussion purposes with AI Group and other peek bodies - was that clause 44.2 in its current form would operate in a way that is detrimental to an employee when compared to the NES and hence would have no effect as a result of section 56 of the act. Now, we strongly disagreed and we still strongly disagree with that. Our response to the FWO's preliminary opinion is attached as annexure C. We disagree with it because the NES and the Fair Work Act do not deal with penalty rates for time worked on a public holiday, so how can an award provision which is aimed at determining what days penalty rates are payable, be in conflict with the NES? We still hold that view.

PN50

In some further discussions that we had with the FWO after the preliminary opinion was provided, it became apparent to us that we were not going to convince the FWO with the existing wording that it was sufficiently clear for the FWO to confidently support our view of it. Our view, as the bench is aware, is consistent with the long-standing existing interpretation, so we decided, given the proximity to Christmas, that we needed to move quickly and apply to vary the award. In the light of the application, the FWO has decided not to provide a final view, but we did specifically request the FWO's view on the amended clause that we were seeking because there is no point of course in us applying to vary the award to only find that if the variation is made, that the FWO continued to have the opinion that the clause was not operative. As set out in annexure D, the chief counsel of the FWO has confirmed that if the bench decides to vary the award as we have sought, that the Office of the Fair Work Ombudsman would interpret that clause as not being detrimental to the NES and as requiring public holiday penalties to be payable on the Monday and Tuesday, and not on the original days.

PN51

In section 5.6 of our submission, we looked at the history of clauses like this and we managed to track that back to 1938 in fact where Beeby J varied the Metal Trades Award to deal with a situation where Christmas Day fell on a Sunday, so this issue has a long history. This is confirmed by again that "agreement in principle" speech of the New South Wales IR minister, because it confirms in that speech that:

PN52

It has been a long-standing practice to grant an additional day when Christmas Day falls on a Saturday in New South Wales. A similar approach

was applied to Saturday occurring Boxing Days on six of eight occasions since 1959 and to eight occasions since 1955 for New Year's Day.

PN53

We'd submit there's nothing particularly unusual that's happening this year. The states have had a long-standing inconsistent practice in this area. It has perhaps been taken more to the extreme this year, but very vitally this tribunal has had the essential role of standardising arrangements across industries and occupations for the payment of public holiday penalties, notwithstanding what the states have done in terms of the proclamation of particular days. In the 1994 Public Holidays Test Case decision - there's a quote set out there in paragraph 59 of our submission where the full bench said:

PN54

Further, the commission does not trespass on the state's authority if it prescribes that when a specified day such as Christmas Day or Australia Day falls on a Saturday or Sunday, there will be a holiday on the next Monday in lieu of the actual day. Such a prescription is limited of course to the commission's awards.

PN55

That's still central to our arguments, that this is an issue about award entitlements and obligations. The tribunal's draft order in that decision, Print L4534, which is in our bundle of authorities, is very similar and identical in all meaningful respects to the clause that we're dealing with here, clause 44.2, in the modern Manufacturing Award. Now, the Metal Industry Award was not one of the awards that were vehicles for that test case and tracking back through the history, it's evident that the clause didn't go into the Metal Industry Award until the award simplification decision of March 1998. The clause that was put in by Marsh SDP at that stage with the agreement of the industrial parties, AI Group and the six unions, is the clause that is still there and now numbered 44.2.

PN56

In section 5.7 of our submission, we deal with relevant award modernisation decisions. A central point here is that the full bench in the award modernisation decisions throughout the various stages of the award modernisation process had to, and very much did, look in detail at this issue of whether or not any clauses that were proposed to be included were inconsistent with the NES. In our submission, the fact that this clause , 44.2, and similar clauses have been inserted into various modern awards means that the full bench formed the view - and we say the correct view - that the clause is not inconsistent with the NES.

PN57

SENIOR DEPUTY PRESIDENT ACTON: Can I just raise an issue about 44.2? You will recall that as part of the award modernisation process, in the award modernisation request a set of National Employment Standards were promulgated prior to them taking legislative effect in the Fair Work Act. When the modern Manufacturing Award was made and indeed clause 44.2 was inserted, the then National Employment Standards in respect of public holidays provided in section 54 of those promulgated standards that:

PN58

A modern award may substitute (or provide for the substitution of) a day or part-day for a day or part-day that would otherwise be a public holiday because of subsections (1) and (2).

PN59

Public holidays of varying descriptions and additional days and substitute days by state and territory governments. That provision that a modern award may substitute, doesn't seem to be in the public holidays provision in the National Employment Standards as they appear in the Fair Work Act.

PN60

MR SMITH: Excuse me one moment. Your Honour, I'd have to go back - and I can certainly do it in perhaps one of the breaks - and have a look at the difference between that provision and what we've ended up with in section 115. As you're aware, section 115(3) and (4) which talks about modern award - section 113 in particular which talks about a modern award providing for substitution in certain aspects. We're happy to respond to that specific question, but despite that, regardless of what the answer to that particular issue is, we still think there is nothing anywhere in the legislation which prevents Fair Work Australia determining public holiday penalty rates in whichever way it chooses to. As we said earlier, you can decide that they're payable on all days, some days or no days, but I'm happy to take that question on notice, your Honour, and respond to it specifically.

PN61

SENIOR DEPUTY PRESIDENT ACTON: Well, it does raise the question indeed about whether clause 44.2 should indeed remain in the modern Manufacturing Award and perhaps even the few other awards that it's in, having regard to the change in the terminology with respect to the National Employment Standards. If that's the case, the ambiguity that it causes might best be ameliorated by deleting clause 44.2.

PN62

MR SMITH: Well, your Honour, that would have a significant impact on employers of course, because it would - in the case of some states at least - lead to huge cost increases where people worked that day or any of those public holidays that fall on the weekend. This is an agreed provision that has been retained. Even though, yes, the modern Manufacturing Award was stage 1, the clause has gone in other awards during different stages of award modernisation.

PN63

There are identical clauses in the Contract Call Centre Award, for example, which was stage 2 of award modernisation. It has gone into the General Aviation Award, which if I recall correctly was stage 3 of award modernisation. It wasn't just a feature of the timing, as there are number of full bench decisions which support the view that this clause does - you know, is lawful and would not operate in a way that is inconsistent with the NES.

PN64

Your Honour, it comes back to that central point. This is a clause that doesn't conflict in any way with the NES. Yes, there is ambiguity and uncertainty, but in our very strong submission it shouldn't be remedied by taking out a clause that the

tribunal has inserted into the award with the agreement of the parties and a clause that has important work to do and has been in the system for many, many years. It leaves the employer with the situation where whatever happens in states automatically then translates into award obligations, and that in our submission is not fair and not correct.

PN65

SENIOR DEPUTY PRESIDENT ACTON: As I understand the attachment to the letter from the Fair Work ombudsman, the suggestion is that a clause the same as or like clause 44.2 is in six out of 122 awards.

PN66

MR SMITH: Yes, that appears to be correct, your Honour, although we haven't gone through award by award and checked them.

PN67

SENIOR DEPUTY PRESIDENT ACTON: If that's the case, does that mean in every other award the situation will be that where a day is declared a public holiday, the public holiday penalty rates will apply?

PN68

MR SMITH: We believe this issue until now has not received sufficient attention. The clauses that have gone into various modern awards dealing with public holidays differ quite significantly award to award. As we're all aware, there was just such a massive amount of work to be done during the award modernisation process. Any particular area like public areas was an area that if, you know, in other circumstances with more time, might have been focused on in more detail; but in the case of that clause, it is a very important clause.

PN69

As we said at the start of our submissions, we believe that it shouldn't be a case of that clause being taken out. It should be a case of, yes, in the Manufacturing Award the issue has come up specifically. The clause should be clarified. The bench and the tribunal more generally should be open to dealing with applications for any of those other awards to clarify the clause and in any of those awards where there were similar clauses - and there are plenty of them - that were in the pre-modern awards that didn't find their way into the modern awards, in our submission it wasn't a conscious thing in particular. It was just the way those public holiday clauses have been drafted.

PN70

The tribunal should be open to dealing with applications which would do nothing more than preserve the long-standing existing arrangements. Last year, Boxing Day fell on the weekend and the interpretation that applied widely to that was the FWO's interpretation. If I recall correctly, there was media focus on it. It's consistent with what we're asking for here. We don't see any reason and it would be inconsistent with the award modernisation request and with the act, to be imposing these significant additional costs on employers for no good reason - - -

PN71

DEPUTY PRESIDENT IVES: But the difference, Mr Smith, is, isn't it, that last year the award prescribed the days in totality that were public holidays? There

was no equivalent of section 115(1)(b) of the act which says the effect of "and any other day prescribed by a state or territory".

PN72

MR SMITH: We did have, your Honour, the AFPC standard that was in operation at least for Boxing Day last year, which did take a relatively similar approach to - you know, it set out those that were public holidays for the purposes of the reasonable obligation to work, so it was the same issue last year, in effect, but this year it has got a bit more confusing because modern award clauses have been cut back significantly in this public holidays area.

PN73

DEPUTY PRESIDENT IVES: Yes, but the point I'm making is that your submission about the effect of this in terms of the imposition of costs on employers would be the case if a state or territory promulgated any particular day over and above those are promulgated already as a public holiday. Is that not the case?

PN74

MR SMITH: Well, if it was just an additional day that applied generally in a state, territory or region - for example, the APEC holiday in New South Wales - then, yes, that's an additional holiday, but this is a very specific one. This is a - - -

PN75

DEPUTY PRESIDENT IVES: Yes, but the point is that if is the APEC day, as an example, then it would attract the penalty rates, would it not?

PN76

MR SMITH: It would.

PN77

DEPUTY PRESIDENT IVES: Yes.

PN78

MR SMITH: That's correct. Well, it depends, of course, on whether this tribunal decides to - - -

PN79

DEPUTY PRESIDENT IVES: But absent any approach to this tribunal, purely on the words of the award and act as it exists, would attract the penalty rates.

PN80

MR SMITH: Yes, that's right. It would, but in terms of the Christmas Day, Boxing Day, New Year's Day and Australia Day holidays, there has been a very long-standing, consistent approach to this. We submit that where is there any logical reason for this tribunal to vacate its powers, if you like, in respect of that issue? The states have always done what they've done on substitute days, additional days and so on. Nothing has changed in that respect other than here we're talking about the potential loss of a long-standing approach. Even though those clauses have been not inserted into a number of other awards, there's no good reason in our submission why in some of those industries and occupations, that clause is missing.

PN81

DEPUTY PRESIDENT IVES: How would it be open though to - if, for example, a state did declare a public holiday other than the days we're talking about here - like the APEC day you mentioned - how would it be open to anybody to approach this tribunal regarding the penalties to be paid for that day? On what basis would you approach the tribunal?

PN82

MR SMITH: I believe employers in those circumstances would - you know, if the public holiday is one that fits the criteria in 115(1)(b), it's declared across a state or region. Unless there's anything unusual in a particular award - and clearly you've got the power to put something in an award about it, but unless there's anything unusual in there, then penalty rates would be payable. In the case of these special holidays, there's no reason why the long-standing existing approach shouldn't continue to apply, in our submission. We see no public interest in the tribunal vacating what it has done for many, many years in achieving fairness and consistency in this area.

PN83

The federal and state governments have negotiated - and we all know the negotiations were quite tough ones, but the negotiations led to a position where the states get to the declare the public holidays, the NES obligations apply, but the issue of what people get paid is the responsibility of this tribunal and the long-standing existing approaches shouldn't be readily discarded. It's a vital role for this tribunal.

PN84

SENIOR DEPUTY PRESIDENT ACTON: Was that the long-standing existing approach under the Metals Award in New South Wales and South Australia?

PN85

MR SMITH: It was, yes. That clause has been there since 1998 and has had this effect. It certainly had this effect last year for Boxing Day. The 26th was paid at the weekend penalty rates and the Monday was paid at double time and a half.

PN86

SENIOR DEPUTY PRESIDENT ACTON: Are you saying that under the Metals Award is the New South Wales State Metals Award, the NAPSA - - -

PN87

MR SMITH: Sorry, I thought you were talking about the Metal Industry Award, your Honour. Under the NAPSA, I'd have to have a look at what that said. I'm not sure, off the top of my head, but I can check that.

PN88

SENIOR DEPUTY PRESIDENT ACTON: Similarly, the NAPSA in South Australia. I'm not sure about the NAPSA in Queensland. Queensland might be able to enlighten me at some stage.

PN89

MR SMITH: In the manufacturing industry, the overwhelming majority of manufacturers - particularly larger ones and many thousands of smaller ones - are in the federal system. There aren't many significant manufacturers who are

covered under that NAPSA compared to those that are covered under the federal award.

PN90

SENIOR DEPUTY PRESIDENT ACTON: Have you done any analysis of the other federal awards and NAPSAs that were subsumed into the modern Manufacturing Award and what their previous holiday provisions were?

PN91

MR SMITH: In terms of the major ones, like the Rubber, Plastics and Cable Making, the Metal Industry Award and so on, this clause in the federal awards was extremely common because it came out of the Public Holidays Test Case, but in terms of the state awards, they vary quite significantly award by award. That is one of the problems. We believe this tribunal, in an area that clearly is within its powers, should operate in that area and preserve the existing arrangements rather than leaving employers exposed to whatever a state government might choose to do. A lot of the debate about this issue has been about the concept of the NES entitlements and a reasonable requirement to work and refuse and so on. Those provisions aren't going to change. The states have the ability to determine where they will apply, but the issue of penalty rates, this clause is vital.

PN92

Just going back to your point, your Honour, about the timing, as we've said in our submission, there was a recent decision of Harrison C in the timber industry area where the CFMEU and a number of employer groups, not including AI Group, agreed to insert that clause into the Timber Industry Award as well as a number of other clauses that they agreed upon. In our submission we've extracted the relevant section from the transcript of those proceedings where Harrison C states that he's satisfied that the variations are necessary to give effect to the modern award objectives and of course he must have been satisfied to put the clause in there that it wasn't inconsistent with the National Employment Standards.

PN93

Unless there are any further questions from the bench - we've got plenty to say about the unions' applications, but those are the submissions that we make on the AI Group application, if it pleases the tribunal.

PN94

SENIOR DEPUTY PRESIDENT ACTON: Thank you, Mr Smith. Who is next? Queensland?

PN95

MR HORNEMAN-WREN: Thank you, your Honour. Might I first apologise to your Honours and Commissioner for my late arrival this morning. Your Honour, we've endeavoured to reduce the submissions that the minister wishes to make to a written outline, to which I might speak briefly if I might in respect of the key elements. I apologise to our learned friends at the bar table - we weren't quite sure how big the party was that we were inviting ourselves to. We, I think, have distributed some limited numbers of those and we'll endeavour to do so to other interested parties in the course of the day.

PN96

SENIOR DEPUTY PRESIDENT ACTON: Okay. I'll mark this outline as Queensland1.

PN97

MR HORNEMAN-WREN: Thank you, your Honour.

PN98

EXHIBIT #QUEENSLAND1 OUTLINE OF SUBMISSIONS

PN99

MR HORNEMAN-WREN: Thank you, your Honour.

PN100

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN101

MR HORNEMAN-WREN: Your Honour, then just dealing with some matters briefly, you'll see that under the second heading that appears on page 1 of our submission, we address some issues concerning the jurisdictional basis of the application that's made by AI Group. We do so because, although it's been developed somewhat more this morning by my friend, Mr Smith, there is, perhaps at its best, a tangential appeal to what might be thought to be section 157 considerations, as opposed to what we submit is the way in which the commission would have approached the application, which is one pursuant to section 160 for variation or the removal of ambiguity or uncertainty.

PN102

I say it's tangential because - might I take you to the grounds of the AIG application. You will see, your Honour and Commissioners, there that at paragraph 7 on page 3 of the application, there is the oblique or tangential reference to section 157. It says in express terms that the application is made under section 160 of the act. It then says not that it's made pursuant to section 157 but also that the variation is consistent with modern award objective and meets the requirements of section 157 of the act. Now, the point that we seek to make in relation to that is that, insofar as there may be thought to be some appeal to section 157, it doesn't in any way elucidate or develop why it is that the determination for a variation sought is necessary to achieve the modern award objectives, and that's what the jurisdiction concern under section 157 requires, that the tribunal be satisfied that it's a determination necessary to achieve that purpose.

PN103

Our learned friends' submission this morning has made some reference to section 134, which we've set out in paragraph 4 of the written outline, and has, in a general way, submitted to you this morning that there is some necessity in relation to that objective but without really developing in any way what the necessity is. We would submit that, given the variation sought and the disclosed grounds upon which it is sought, it's very difficult indeed to imagine what basis it could be said that it's necessary to make this variation in order to achieve the objective, and unless that's clearly made out then one shouldn't proceed as though it's an application under section 157 and you would deal with the application as it is expressly said to be made under section 160 of the act.

PN104

We then, at paragraph 7 and following, develop some submissions concerning the approach to be taken by the tribunal in relation to addressing applications for variation for ambiguity or uncertainty and we've recited some extracts from a number of familiar cases and we won't take the tribunal through those in any detail. At paragraph 18, we come to a summary of, effectively, what we say the approach was in Tenix and I just emphasise what we submitted at subparagraph (c) there, that when looking at the context, one looks at that context including, for example, other provisions of the award and related awards or (indistinct) not relevant here. But not, for example, legislative provisions and the like.

PN105

The gravamen of our submission really starts at paragraph 20 and the issue that we raise is that, on its face, we say this application really doesn't identify ambiguity or uncertainty in the clause that is central to the variation, clause 44.2. In fact, the submissions really proceed this morning and it's reflected in the table that's in our learned friends' submissions, that this is a well-known provision in relation to the prior existing awards and, that being so, it was in an unambiguous and certain form, we would say, before its transposition into this modern award. Our submission really is that the application, rather than asserting ambiguity or uncertainty, asserts uncertainty and confusion that's arisen in relation to the effect of the application of the award in the context of different state jurisdictions declaring different days as public holidays, and it's in the effect, rather than in the terms of the award, that any ambiguity or uncertainty, as it's said to be, arises.

PN106

Our submission is that that's not what section 160 is directed towards; section 160 is directed towards the identification of ambiguity or uncertainty within the relevant provision and then the variation to remove that identified ambiguity or uncertainty. We make that submission plain at paragraph 22, that it's not the clause itself that gives rise to the asserted uncertainty or confusion, but rather the declaration of those various dates as public holidays in respect of state jurisdictions. What then follows is our submission concerning both section 27(2)(j) of the act and section 115 subsection (1)(a) and (1)(b) and, with respect, our submission echoes somewhat that which had already been raised this morning by Commissioner Ives in relation to the declaration under section 151(b) by states of other days to be public holidays.

PN107

Our submission is that the right to declare dates as public holidays is expressly preserved to the states and territories by operation of section 27(2)(j). True it is that it says that as part of the non-excluded matters is not the setting of the rights and obligations of employers in respect of those days. But the NES and the awards serve to serve that function. Pardon me. Central to our submission is that, if the application of the AIG were to be granted, it effectively renders nugatory that preservation to the states of the ability to declare certain days as public holidays because, notwithstanding that power being preserved to them, the effect in terms of any conditions that might be applied would simply be removed.

PN108

SENIOR DEPUTY PRESIDENT ACTON: Well, I presume they'd argue that the effect is that employees can say they don't want to work.

PN109

MR HORNEMAN-WREN: I apologise, your Honour.

PN110

SENIOR DEPUTY PRESIDENT ACTON: Employees can say they don't want to work on the prescribed public holiday.

PN111

MR HORNEMAN-WREN: If it be the further day. But it also gives rise to the situation that, on the day, Christmas Day as we know it, it would be nothing more than a regular Saturday and they wouldn't have that right in respect of - - -

PN112

SENIOR DEPUTY PRESIDENT ACTON: Well, if they prescribed an additional day, let's say in Victoria, Christmas Day was prescribed as a public holiday then, as I understand the AIG's submission, on Christmas Day, Saturday penalty rates would apply but employees, pursuant to the NES because it's a prescribed public holiday, could say, "We don't want to work."

PN113

MR HORNEMAN-WREN: Would have preserved right of refusal. Quite right, your Honour. That's the contention that would be placed against us. We say that's not a complete answer by any means. We say that the structure that's preserved under section 27(2)(j) and under section 115(1)(a) and (1)(b) is to permit the states to declare further days, these days or any other days, and that the NES operates - and this is recognised in clause 44.1 of the award - to declare what those days are as public holidays and that there are the eight in 115(1)(a), which are, no matter how they're treated by any particular state jurisdiction, preserved as public holidays, and then there are the others.

PN114

DEPUTY PRESIDENT IVES: Well, taking a bit further what I said to Mr Smith, in the case that a state declares - pick a date - 14 June as a public holiday then, under the current circumstance as it exists, that would attract penalty rates under the award and it's hard to see where there would be any basis, even if you accept the fact that it's Fair Work Australia that provides for penalty rates in respect of public holidays, to receive any submissions that it should not do so. There would be no basis that I can see in the award to approach the tribunal because there's no ability to vary unless there's an ambiguity or uncertainty, or unless it's necessary to meet an objective of modern awards.

PN115

Therefore, on any day other than the ones we're talking about specifically here, the fact is that, if a state declares those a public holiday, they will attract the award penalty rates.

PN116

MR HORNEMAN-WREN: I respectfully concur with all of that.

PN117

DEPUTY PRESIDENT IVES: Yes.

PN118

MR HORNEMAN-WREN: That is the fact in relation to any other day. What has happened under the state of Queensland's Holidays Act 1983 is that the additional days have been declared as public holidays. So 25 December and 28 December and 1 and 3 January have been declared as public holidays. Any other date that was prescribed for any other reason, "We're going to give you two agricultural holidays", et cetera, would have the effect that they would simply be, under section 115(1)(b), public holidays and they would draw the penalty rates that are prescribed by an award that simply applies to public holidays, and so all this application seeks to do is treat differently those particular days.

PN119

In our respectful submission, that's not to cure an ambiguity; that's to appeal to some unfairness which is said to arise across jurisdictions by virtue of the fact that different states have declared different dates to be public holidays and, with respect, we submit that the possibility of that is well and truly contemplated by the structure and the scheme that's established under section 115 of the act. We point out also at paragraph 33, and I think earlier in another provision - it's at paragraph 25 and 33 - that section 115(1)(b), in fairness and to be complete, is not an unrestricted issue concerning the states declaring public holidays and then them being public holidays for NES purposes, because it provides that a regulation under the act might exclude particular dates.

PN120

So there could be a date which is declared by a particular state to be a public holiday and, by regulation, the Commonwealth might exclude that for the purposes of section 115(1)(b). That hasn't happened here, but the effect of the AIG's application would be to grant that which the Commonwealth hasn't done by regulation. In our submission, the fact that there is a mechanism whereby the dates might be excluded, which hasn't been invoked, would weigh against the granting of the application. So in short form, we say that the application fails to really invoke the jurisdiction at all in the sense that the ambiguity and uncertainty to which the appeal is made is one that's not a product of the term, but it's a product of the external matters.

PN121

That's not the proper invocation of section 160. Even if it was thought that there would be ambiguity or uncertainty, even if there was an erring on that side of finding that, in our respectful submission, for discretionary reasons which we've raised, the application would be refused.

PN122

DEPUTY PRESIDENT IVES: Do you make any submission at all as to whether penalty rates would apply to those days that have been prescribed or not? Ie, if Christmas Day is prescribed on the Saturday as a public holiday by the states, do you make any submission as to whether penalty rates would apply on that day?

PN123

MR HORNEMAN-WREN: We do and we submit that they would.

PN124

DEPUTY PRESIDENT IVES: That they would. So what do you say then to the argument that I think is put by WACCI in their written submissions - and I admit

to only having a brief look at it, but I think what they're saying is that the wording in 44.2, where it talks about where Christmas Day falls on a Saturday or a Sunday, 27 December is observed as the public holiday instead of the prescribed day, and I think what WACCI says is that that, in their view, is not something that is ambiguous or uncertain and, if one looks at the words "prescribed" and "observed", that - in the circumstance where Christmas Day is prescribed as a public holiday by the state, the award says, "Okay. Well, it's prescribed but, for the purpose of the award, it will only be observed, presumably observed in respect of the award - that is, the payment of penalties - on the 27th."

PN125

MR HORNEMAN-WREN: I perhaps have crossed purposes in answering your first question, I apologise for that.

PN126

DEPUTY PRESIDENT IVES: Yes.

PN127

MR HORNEMAN-WREN: I thought the question that was being proposed was in relation to the declared days by Queensland, whether we would say then - if that matter remained unaffected by a variation, that penalty rates would be payable in respect of both those days. That was the basis on which I answered before which I think was an incorrect understanding of the question as I now understand it.

PN128

DEPUTY PRESIDENT IVES: Right.

PN129

MR HORNEMAN-WREN: Our submission in relation to whether 44.2 has the effect that penalties would be payable - and as I understand, rather than Saturday penalties, overtime penalties - penalties for public holidays - - -

PN130

DEPUTY PRESIDENT IVES: Public holiday penalties, yes.

PN131

MR HORNEMAN-WREN: Our submission is that the effect of section 44.2 is that they would not be payable on Christmas Day, 25 December.

PN132

DEPUTY PRESIDENT IVES: The public holiday penalties would not be under the present - - -

PN133

MR HORNEMAN-WREN: Under the present regime.

PN134

DEPUTY PRESIDENT IVES: Yes, okay. Thank you.

PN135

MR HORNEMAN-WREN: That it requires, in order for there to be such payment, a declaration to the effect that's been made by Queensland.

PN136

DEPUTY PRESIDENT IVES: Yes.

PN137

MR HORNEMAN-WREN: So, in fact, as is - perhaps I should provide your Honours with copies of the Holiday Act 1983 as amended.

PN138

DEPUTY PRESIDENT IVES: Yes, that - can I just go back to my question for a moment. Queensland has declared Saturday, 25 December, as a public holiday so it is prescribed. That's correct?

PN139

MR HORNEMAN-WREN: That's so.

PN140

DEPUTY PRESIDENT IVES: Yes. So the argument that I think is being advanced by WACCI, and I might be correct on this later but at least as I read it, was that that day - even though that day is prescribed, payment or observation which, in their submission is observation under the award, means that, even though that day is prescribed, the observation of it for award purposes is on 27 December. That seems to be their submission. So in other words, they seem to be saying, "Well, there's not necessarily any ambiguity here because the provision says that, despite the fact - or instead of the prescribed day, which in this case is 25 December, that is being prescribed by Queensland, then 27th is the day under which there will be an observation of the public holiday," "observed" going to mean from, in their submission as I understand it, the observance under the award which is for the purposes of penalty payments.

PN141

MR HORNEMAN-WREN: Yes. Haven't yet read the submission so I'm trying to deal with it as we go.

PN142

DEPUTY PRESIDENT IVES: Have I made that clear - - -

PN143

MR HORNEMAN-WREN: I think you have.

PN144

DEPUTY PRESIDENT IVES: Yes.

PN145

MR HORNEMAN-WREN: If you just bear with me for a moment. As I understand the submission that's said to be put, it's that, notwithstanding the declaration by Queensland of both days, there would still only be the award observation of it one day.

PN146

DEPUTY PRESIDENT IVES: That's right.

PN147

MR HORNEMAN-WREN: My respectful submission - and this perhaps echoes something that her Honour raised in relation to what might have been the NES provision at the time which 44.2 was formed - is that what it's really doing is dealing with the substitution of days; not the circumstances where there are, in fact, two public holidays. Now, we don't make a submission in relation to what her Honour raised about whether 44.2 is currently supported by the NES, that's

not a matter for the minister's interest, with respect. However, we do say that what was raised is consistent with what our construction about the scheme is.

PN148

In response to the particular issue, my submission would be that that is not directed to circumstances where, in fact, any number of days may also be prescribed as extra days, and that just simply has the effect that, notwithstanding the declaration of further days under 115(1)(b), this simply has the effect to say it's only ever going to be one. That's perhaps as best I can deal with that at the moment.

PN149

DEPUTY PRESIDENT IVES: Thank you.

PN150

MR HORNEMAN-WREN: I should perhaps provide copies also of the explanatory notes to the Holidays Amendment Bill 2010, which introduced those amendments. This perhaps is resonant of my misunderstanding of the question that was previously asked but, to make full the submission, I probably should refer to it. You will see from the policy objectives, that are set out at the start of the memorandum, particularly in the fifth paragraph, that the position of Queensland is that, without the amendment that has now been made, workers would have only received their usual Saturday payment for the day and not have the right to refuse the work.

PN151

So that was the issue behind the making of the amendment. We hasten to add that it's not an act which ventures into the carved out field reserved to the Commonwealth, it doesn't purport to make rights and obligations in respect of employers and employees; it simply does that which is permitted and contemplated by 115(1)(b). Those are the submissions of the minister.

PN152

SENIOR DEPUTY PRESIDENT ACTON: I'll mark the Holidays Act 1983 that you've handed up as Queensland2.

EXHIBIT #QUEENSLAND2 HOLIDAYS ACT 1983

PN153

SENIOR DEPUTY PRESIDENT ACTON: And the explanatory notes to the Holidays Amendment Bill 2010 as Queensland3.

EXHIBIT #QUEENSLAND3 EXPLANATORY NOTES TO HOLIDAYS AMENDMENT BILL 2010

PN154

MR HORNEMAN-WREN: Thank you, your Honour.

PN155

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Mr Gregory?

PN156

MR GREGORY: Your Honour, I'm wondering if it might be appropriate - and I'm not too sure what my union colleagues are intending to say - but my

submissions are broadly in support of the submissions that have been made by Mr Smith this morning. It might appropriate in the scheme of things if I go next.

PN157

SENIOR DEPUTY PRESIDENT ACTON: Yes, Mr Gregory.

PN158

MR GREGORY: I want to make some specific comments in regards to the submissions that have been made by the Chamber of Commerce and Industry of Western Australia. I understand the bench has already received a written submission that they have provided. I have some additional copies here that I'll hand up. I also want to make some general comments as well on behalf of the Australian Chamber of Commerce and Industry and, in doing so, perhaps to go straight to the point that's been raised by the Deputy President. What we do say generally in our submissions is that really, in terms of the derivation of public holiday entitlements, we're really talking, under the current framework, about those entitlements really deriving from three specific sources.

PN159

We have the traditional roles the state governments have played in regards to all of this, we don't seek to derogate from that. State governments have been given the traditional role of determining on what particular days public holidays will occur. They have also had a role, from time to time - as have already been referred to - on occasions creating additional days. Somewhat coincidentally this morning, I heard that the UK, for example, is perhaps contemplating an additional public holiday on 29 April next year. Now, whether we decide to pick that up as well - we accept that that is a role of state governments to play from time to time and they determine what are the public holidays.

PN160

They also make decisions from time to time about whether there perhaps will be additional days. We don't seek to challenge or derogate from that responsibility. Under the framework of laws that we operate under at the moment, we also have two other sources of public holiday entitlements and obligations: we have the provisions obviously in the NES. We say that they are specific in regards to the safety net of public holiday minimum entitlements that they provide. They essentially indicate what those particular days are and, in large part, reflecting the traditional state government practice. They also acknowledge that, from time to time, state governments may create additional days.

PN161

They provide entitlements for employees when they are to be absent from normal work on those particular public holidays. They also contain provisions dealing with the circumstances in which an employer might request work on a particular day and they talk about when employees might have a right to refuse those requests. So the NES has a particular role, but we say its role is limited. Its role is focused on those particular safety net entitlements, end of story. We then have the provisions that exist in awards. They have a range of particular functions but now their function is essentially limited to when penalty rates apply on those particular days and what those penalty rate provisions are.

PN162

So in terms of the discussions that have just taken place, our submissions are that the award provisions do nothing to remove existing public holidays that have been created by state governments. I'll have more to say about this shortly. We're not necessarily entirely excited about what state governments have done in recent times, particularly in regards to what we would see as doubling up in terms of the number of days. That situation reaches its peak, if you like, in WA where we have Christmas Day, Boxing Day, New Year's Day all being observed as public holidays on the actual calendar date but also additional days being created. So over that period of, say, 10 days or so, there are in fact, in WA, as we understand it, six public holidays that exist.

PN163

Now, whilst we might not necessarily agree with it, we don't challenge the right of a state government to do what the Western Australian government has done, what the New South Wales government has done this time around, Queensland, Victoria. There have been a series of variations on a somewhat similar theme where we've seen state governments taking decisions to move from what has been a more traditional practice of: days fall on weekend, they're substituted, to now, as I say, doubling up. But whether we agree with that or not, we don't seek to challenge the rights of states to do that. We simply say that what the award provisions do is not to challenge the right of state governments to determine when and how many public holidays will be.

PN164

What the awards do is indicate on which of those particular days penalty rates will attach and what those particular penalty rate entitlements will be. So the NES has a function, it goes up to a particular point. From there, we're saying that the award provisions operate as well, as they are entitled to do under the Fair Work laws where there is specific provision made, the ability for awards to set public holiday rate - penalty rate entitlements. That's what the awards do. Against the background of those initial comments, if I could perhaps make some other broad comments before coming back, particularly to the submissions that have been made by the Chamber of Commerce and Industry of Western Australia.

PN165

From our point of view, it is most unfortunate that we are having to deal with these issues somewhat at the eleventh hour, if you like, in regards to the Christmas/New Year holiday periods so close to the event. Many businesses do trade and operate during this particular period. Some because they have to. Perhaps the health sector would be a good example of businesses in that category. Others because it's a particularly important time (indistinct) for them. The tourism, hospitality sector, the retail sector and others who operate because there is quite clearly a particular customer demand at that time. The hospitality industry and all of the activities associated with functions on Christmas Day would be an example of that as well.

PN166

It's obviously though at a different time of the year from normal. We do have different entitlements applying as a result of public holiday observance. It's in, for many businesses, a significant time of the year in regards to rostering. Most of those rostering arrangements need to be settled, put in place well in advance

because of some of the difficulties associated with the time of year. Businesses, quite clearly in response to that situation, want certainty. They want some clear understanding about the particular provisions that are to apply through that period, if for no other reason than they can do their appropriate costings in regards to their business activities at that time. Certainty is an important feature.

PN167

Unfortunately, we are not in that position; we're in a whole range of award areas at the moment. There are a range of different views, different opinions about the situation that we are in at the moment about the particular provisions that are to apply over the Christmas/New Year period. I perhaps summarise that by saying that there is, on the one hand, an air of perhaps reluctant resignation or realisation that, in some circumstances, there are going to be additional cost imposts over the 2010-2011 Christmas/New Year holiday period because of the actions of state governments. If I could perhaps just briefly, by way of example, make reference to the Hospitality Industry (General) Award to illustrate the case in point.

PN168

This is not an award that is obviously the subject of the current application, but I think it is one that does shine some light upon the issues that are being confronted at the moment. That particular award does not contain a substitution provision like that found in the manufacturing award. It does contain though the 50 per cent additional penalty rate provision that is the subject of some applications before the tribunal today. So it's an example of an award that has a range of public holiday provisions in it, different from the manufacturing award but not dissimilar from those that exist in other awards as well.

PN169

There have been a range of views provided to employers in that particular sector about what is to apply over the Christmas New Year period this year. On one interpretation which I think probably from our point of view would seem to be the correct one. If I used the Western Australian example where we had those six public holidays the award simply states that payment for work on a public holiday will be at double time and a half, double time and three quarters for casual employees. I think the common understanding in regards to that award is that because of what the Western Australian government has done that that particular penalty rate entitlement will apply across all six public holidays over that Christmas New Year period.

PN170

As I've said, it also contains the additional 50 per cent provision which based on my understanding when it was determined back in the '90s in the public holiday test case proceedings was a particular one off penalty provision that was established when substitution occurred for Christmas Day, the actual day remained on a weekend for people working on that particular day in acknowledgment that Christmas Day was different they would receive an additional 50 per cent penalty over and above the normal weekend penalty that would otherwise apply on that day. In terms of the advice that's been provided in regards to the hospitality award, the worst case scenario if you like is that there has been advice provided that people are entitled to the double time and a half penalty, plus the 50 per cent if they're actually working on the Christmas Day.

PN171

In my view that is totally misrepresenting the situation, it is demonstrating ignorance with the background as to how these particular provisions were developed. But I simply make the point to establish that we are in a situation at the moment not just in respect of the awards that are currently before the Tribunal at the moment, but in a whole range of areas we are in a situation where there is a significant degree of uncertainty about the particular provisions that are to apply over the Christmas New Year period as regards public holiday observance. If I could ask perhaps the rhetorical question which I think I've already answered, as have others, why has this situation arisen, it has primarily arisen because of the action of state governments.

PN172

I have already referred to those particular decisions which in our view have departed from what has been the longstanding situation that where a particular day linked to a calendar date fell on a weekend, Christmas Day, Boxing Day, New Years Day, that day for the purposes of penalty rate entitlements would be substituted to a Monday to Friday weekday. The rationale obviously going way back was that there were generally more people working on those particular days, therefore the penalty rate would have a greater application. As I say, we seemed to have regrettably moved away from that situation. We seem to have moved way from the broad position of fairly common understandings that I think did exist in the early 1990s, assisted by the series of test case decisions before the Industrial Relations Commission which I think did come to a fairly reasonable position in regards to some common understandings about the number of public holidays that would exist across a calendar year and in particular what would occur in regards to substituting arrangements when those particular days fell on a weekend.

PN173

Why the state governments have acted in the way that they have done in recent times in terms of the decisions that have been taken, I am obviously not privy to those particular decision making processes. On the one hand I suspect that perhaps some of those decisions have been simply motivated by a desire to create additional penalty rate obligations over the Christmas New Year period, but perhaps some of those state governments have perhaps also been motivated by an issue that's already been canvassed today. The fact that if public holidays are determined that that of course does bring into vogue the employee right to refuse provisions which would otherwise not apply unless the day had been designated as a public holiday.

PN174

As I say, it's not for me to speculate as to the reasons why different decisions have been made by state governments. But as I say I think it is regrettable that we have moved away from what have been fairly longstanding traditional practices. I think that some of these decisions have also been taken without necessarily a keen understanding about all the implications that then flow from those particular decisions, some of which I have referred to. There are quite clearly a whole range of implications arising either advertently or inadvertently as a result of what state governments have done in recent times in regards to public holiday observance. To come back to some of the issues that have been raised by Mr Smith in particular and in regards to the award that is currently before the Tribunal at the moment.

PN175

There is clearly some divergence of view. We have seen those views expressed by the FWO. We also have participated in some of those discussions. There has been some divergence of view about where the NES starts and finishes and where award provisions then act to supplement those minimum safety net entitlements contained in the NES. There is a view around, not one quite clearly that we agree with, there is a view that substitution provisions in awards are inconsistent with the NES and therefore of no effect when both actual and additional days have been created in respect of one particular public holiday, the argument being that those particular provisions provide in effect that the actual days are not to be observed as public holidays.

PN176

As I have already said, we don't agree with that particular viewpoint. We say that award conditions do nothing to change days that have been declared by state governments as public holidays. They are simply about determining what penalty rates will apply and on which of those particular days those penalty rates will have application. So as we say that award conditions operate to vary the days that are to exist as public holidays is incorrect. In short, the NESS deals with entitlements to be absent from work on public holidays and as part of that it describes what public holidays are, how additional days might be created, what employees are entitled to when they're absent from work on the day and also, as I have already said, deals with the ability of employers to require employees to work on the day and when it is reasonable in particular circumstances to refuse such requests. That is the safety net that the NES establishes in regards to public holidays. As I say end of story, in our view it's then that award provisions take over.

PN177

The NES contains no reference to penalty rates or to entitlements in that area. They are not part of the national employment standards. Those entitlements and how they apply are sourced from awards, contracts of employment, enterprise agreements, whatever it might be. Section 139 of the Fair Work Act sub-section 1(e)(ii) quite clearly confirms this role for awards, modern awards may include terms about penalty rates or employees work on public holidays, that's what they do. Those provisions are then additional entitlements dealt with in awards to supplement the NES obligations. We say it's entirely legitimate for an award to specify or describe which days those entitlements should attach to. That is what the award conditions do. Again we say it is entirely appropriate for payments to attach to one particular day and not necessarily to both in the circumstances I have described where a state government takes a decision to declare both the calendar day and additional day as both public holidays.

PN178

We say that is entirely consistent with the longstanding traditional approach. Those provisions in our submission are not about removing or denying public holidays, they are about when public holiday penalty rates - entitlements apply. In summary then, our position is similar to that in terms of ACCI and in terms of CCIWA, the position that has been put. Our position is that we don't necessary believe that the variation sought by AIG to provide further clarification is absolutely necessary in this particular matter. We say that the provisions that already exist in the Manufacturing and Associated Industries Award already do what we said that they intend to do, to determine when public holiday penalty

rates apply on which particular days. However, we are certainly supporting the position if the Tribunal believes that it is appropriate to provide further clarification in regard to this issue that the variations sought be made. We also believe that the Tribunal should be prepared to consider similar applications if they come forward in the future, particularly when substitution provisions have been contained in the pre-modern awards.

PN179

DEPUTY PRESIDENT IVES: Sorry, Mr Gregory, just so I understand that submission. To the extent that this is under section 160 of the Act, you say that there is no uncertainty. So if there is no uncertainty there is no jurisdiction for this Tribunal to vary as the AI Group seek, but then you seem to have sort of an each way bet on it and say, but if the Tribunal was of a mind to sort of operate somewhere outside of that jurisdiction well, we will be happy with that. What are you saying?

PN180

MR GREGORY: Deputy President, that is probably a pretty fair summation of the position. I might turn off, thank you for the opportunity to provide some clarification. There is no doubt there is uncertainty about the operation of these particular provisions. There is a significant debate going on in a whole range of areas in regards to these issues, the points that I highlighted at the outset about the role of state governments, where the NES starts and finishes, the role of award conditions. So there is no doubt in our view that there is a significant degree of uncertainty about a whole range of award provisions including the particular provisions in this award. As I say, we believe though that a considered view based on an understanding about how these provisions were established, about the various roles of state governments, about the operation of the NES, the award conditions, does lead to a particular view about how that particular award clause is to be interpreted. But as I say that's one particular view, there are others out there. There is uncertainty. We are certainly prepared to support a variation of the kind that has been proposed if it provides that clarification and removes that uncertainty.

PN181

DEPUTY PRESIDENT IVES: Thank you.

PN182

SENIOR DEPUTY PRESIDENT ACTON: Let me just tease you out further on that. Am I to understand that you say the effect of clause 44.2 in the modern manufacturing award is that where a public holiday has not been prescribed, for example on Christmas Day, then the Saturday penalty rates will apply?

PN183

MR GREGORY: That's right, yes, your Honour. Sorry, as to where a state government has not - - -

PN184

SENIOR DEPUTY PRESIDENT ACTON: Take Victoria for example. Christmas Day has not been declared a public holiday by the state government as I understand it. What do you say the effect of the modern manufacturing award is in respect to then the payment on that day, what penalty applies?

PN185

MR GREGORY: The effect of payment being the day under the award is simply treated as a day that simply a normal weekend trading day, the weekend penalty rates apply.

PN186

SENIOR DEPUTY PRESIDENT ACTON: So the Saturday penalty rate applies.

PN187

MR GREGORY: That's right.

PN188

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN189

MR GREGORY: The effect is obviously that the award deems that there will be a substitute day observed in regards to when the public holiday penalty rate entitlements fall due.

PN190

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN191

MR GREGORY: If the Tribunal pleases I would have some brief comments to make in response to the other applications, but that completes the submissions that I have to make in regards to the particular application that has been put before the Tribunal by AIG.

PN192

DEPUTY PRESIDENT IVES: But it is your position, Mr Gregory, is it not, and I took the liberty of putting that previously as you heard, it is your position is it not or at least WACCIs position that where a state has declared Christmas Day as a public holiday, then the current award provisions are such that the public holiday penalties would still only apply on the Monday, not also on the Saturday. That is your position.

PN193

MR GREGORY: That is correct. Where the award contains a substitution provision.

PN194

DEPUTY PRESIDENT IVES: Yes, and that's the case in the manufacturing award.

PN195

MR GREGORY: Yes, and that's really why I made reference to the hospitality award which is not directly relevant to this proceeding is it does not contain the substitute provisions and the view seems to be that in that area employers will be lumbered with penalty rate obligations on both the actual and the additional day.

PN196

DEPUTY PRESIDENT IVES: I see, thank you.

PN197

MR GREGORY: If the Tribunal pleases.

PN198

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Who is next?

PN199

MS McCOY: I appear on behalf of the Australian Council of Trade Unions.

PN200

SENIOR DEPUTY PRESIDENT ACTON: Just before you do, Ms McCOY, I'll mark the WACCI submission.

PN201

EXHIBIT #WACCI1 WACCI SUBMISSION

PN202

SENIOR DEPUTY PRESIDENT ACTON: Yes, Ms McCOY.

PN203

MS McCOY: At the outset I should say that the ACTU supports each of the applications that have been made by the unions. Our submissions today deal generally with the approach the Tribunal should adopt in relation to public holidays. No doubt members of the bench are intimately acquainted with public holiday pay and just briefly by way of background the first (indistinct) case was brought by the ACTU in the early 1990s and was prompted by the removal of substitute public holidays in Victoria. In that first decision published on August 4 1994 the Australian Industrial Relations Commission provided a minimum safety net of 11 public holidays plus substitution of certain public holidays.

PN204

The bench envisaged that state legislation and awards could provide for additional public holidays over and above the award standards. In a number of subsequent decisions, most notably print L9178 the Tribunal developed principles in relation to employees with non-standard work arrangements. These principles was to ensure that full time, part time or casual employees received equivalent public holiday entitlements to employees working Monday to Friday. In addition the Commission recognised the special significance of Christmas Day and provided special loading to apply to work performed on Christmas Day or 26 December for (indistinct). The modern award objective requires the Tribunal to provide for a fair, relevant, minimum safety net.

PN205

The public holidays test case decisions established a minimum safety net standard that in our submission clearly remains relevant. Christmas Day, for example, remains a day of special significance. Relatively few employees work on Christmas Day and those that do should, in our submission, be entitled to a loading. The ACTU submits that the public holiday test case standards should generally be included in modern awards, even if the underlying awards do not typically include such entitlements. The coverage of modern awards is much broader than any of the underlying instruments and as such it is likely there will be employees in almost every industry required to work on public holidays. During award modernisation the Full Bench adopted a balancing exercise taking into account the terms and conditions and the underlying instruments.

PN206

While this approach was certainly appropriate in determining the minimum safety net with respect to most entitlements it should not be used as the basis for excluding federal test case standards which the predecessor to this Tribunal has decided form part of a safety net. In our submission unless modern awards provide adequate compensation for work performed on public holidays, including Christmas Day, the modern award objective is not being satisfied. We know that the application of public holiday entitlements to employees with non-standard work arrangements is complicated and requires a case by case approach consistent with the original decisions.

PN207

We acknowledge that late November is not the best time to do this and it is appropriate for the Tribunal to deal with the applications that are currently before it, rather than seeking to review the public holiday provisions in all modern awards which would certainly be an extensive exercise. However, we believe that modern awards should adopt the consistent approach to public holidays which fall on weekends and I should say that we foreshadow our intention to revisit this matter in the future. As a preliminary step you may be aware that we are currently attempting to get some consistency across state and territory legislation, particularly in relation to Christmas Day.

PN208

We note that a number of employers have suggested there has been no change in circumstances which would warrant reconsidering the issue of public holidays since award modernisation. We find this submission rather surprising, given the extent to which employer organisations have sought to vary minimum engagement provisions. But in any event we submit that applications to vary modern awards to insert public holiday test case standards should be distinguished from applications which seek to re-litigate matters that were the subject of extensive submissions and consultations and were in our submission finally settled in award modernisation.

PN209

The issue of public holidays falling on weekends was not given due consideration during the proceedings and I acknowledge that it did not really occur to the ACTU to look at this issue in any particular detail. Variations to deal with problems that have since been identified should be considered on their merits. We believe there are strong grounds for inclusion of the 50 per cent Christmas loading in modern awards pursuant to either section 157 or section 160 and note that the Tribunal has already made a number of variations to deal with public holiday matters. There are a number of matters that form part of the public holiday test case standard that as a general rule do not need to be included in modern awards as these matters are dealt with by the NES in combination with state legislation.

PN210

These matters include the entitlement to be absent from work on ordinary pay and the substitution of public holidays falling on weekends. I note that the Tasmanian parliament only recently amended their legislation. Since the public holidays test case was decided a number of states have declared an additional day in lieu of Christmas Day, Boxing Day or New Year as I think someone mentioned earlier in WA six public holidays have been declared in relation to these three celebrations

or events. This admittedly complicates the question of public holiday entitlements in awards. However, in the first public holidays test case decision the Commission recognised the possibility that states could create additional public holidays and that the minimum standards outlined in their decision fell below existing state standards.

PN211

The Tribunal went on to say, "The unions propose that the additional leave should be provided in the Commission's awards." This implies that the state and territories could add to but not subtract from the safety net leave provisions. Upon consideration we have decided to accede to this proposal, notwithstanding its inconsistency (indistinct) the principles. We do so because it is not open to us to prevent a state or territory from creating extra public holidays and further on in the decision they noted, "In effect our decision allows a state or territory autonomy subject to meeting as a minimum a safety net standard." We submit that this reasoning is broadly consistent with the public holiday provisions of the Fair Work Act. The Act provides for a number of specified public holidays and enables the states to provide for additional days.

PN212

There is no restriction on the state providing public holidays in excess of minimum standards, although we don't acknowledge that any of the states have apparently done this. While this may not be entirely consistent with the concept of a safety net, it is clearly envisaged by the Fair Work Act. Section 139(1)(e) of the Fair Work Act enables modern awards to include penalty rates for employees working on public holidays and there is clearly no disagreement about that. Your Honour has raised some questions about whether it is actually open to the Tribunal to provide that public holiday rates applied to some public holidays although not others that the operation of the NES provisions is a matter which we would like to consider further and perhaps provide a written response to the Tribunal if possible.

PN213

In any event we submit that this approach should be rejected as it would tend to undermine the operation of the NES, that is the approach of restricting penalties to only one day in those states where an additional day has been declared. The Fair Work Act clearly envisages that public holiday rates will apply to all public holidays as defined by state legislation, despite the fact that the number of public holidays varies from state to state. We note that this approach is consistent with the practice that has developed in a number of industries since the public holidays test case, that is penalty rates apply to the actual day as well as the additional public holiday. It is also consistent with the approach adopted in relation to the vast majority of modern awards. Just more specifically the ACTU supports the submissions of the AMWU with respect to the (indistinct) of clause 44 of the manufacturing award. Substitution provisions were intended to benefit employees.

PN214

AI Group's proposal would ensure that employees in New South Wales, Queensland, WA and Tasmania are required to work on either Christmas Day, Boxing Day or New Year's Day do not receive public holiday penalty rates on the proscribed days. In our submission perhaps the easiest solution is just to simply

remove the clause. We strongly oppose AIGs proposal that other modern awards should be varied to restrict the application of public holiday rates in those states where an additional day has been declared. Substitution provisions in awards such as the Timber Industry Modern Award may need to be reconsidered, however, it is not in our submission appropriate for the Tribunal to conclude that substitution provisions should be varied as a general rule other than simply removed from modern awards.

PN215

In summary the ACTUs position is that applications to deal with public holidays should be dealt with on their merits as there was insufficient discussion during award modernisation in relation to these entitlements. Modern awards that apply to employees working on Christmas Day should provide a fair and relevant minimum safety net and should be able to be varied on application to ensure the employees receive adequate compensation for work performed on Christmas Day and other public holidays for that matter. Employees working on Christmas Day where that day falls on a weekend and is not a public holiday within the meaning of the NES should generally receive an additional loading of 50 per cent. Employees working on Christmas Day where that day falls on a weekend and is a public holiday within the meaning of the NES should generally receive normal public holiday rates consistent with we say the operation of state legislation.

PN216

DEPUTY PRESIDENT IVES: You say these applications should be dealt with on their merits. Presumably you mean not under 160, under 157 of the Act.

PN217

MS MCCOY: Under either. In our submission the Full Bench has previously made clear that they will deal with any applications to vary modern awards on the merits and that they won't refuse to consider an application simply because - well, unless the matter was sort of dealt with conclusively in award modernisation. I can provide you with the relevant paragraph.

PN218

DEPUTY PRESIDENT IVES: Yes, but the point I'm making is that under section 160 obviously it's incumbent upon the applicant to show that there is some ambiguity or uncertainty or some error.

PN219

MS MCCOY: Or an error. We would say that the failure to include these provisions in the safety net is an error and if the Tribunal does not have the power to do it under 160 they should seek to do it under section 157.

PN220

SENIOR DEPUTY PRESIDENT ACTON: When you say "these provisions" this is the 50 per cent loading provision.

PN221

MS MCCOY: At this particular point of time the 50 per cent of loading, but my submissions are directed more broadly to any provisions that deal with public holiday entitlements for employees working non-standard hours. It's been five years since Christmas Day I think fell on a public holiday and I suspect that a number of parties may not have given consideration to these issues for some time,

certainly not in the award modernisation process. So we believe that there is a basis for reconsidering the modern awards to the extent that they provide public holiday entitlements and just ensuring that they actually operate as a fair minimum safety net. The final point that I wish to make is probably unnecessary but I will raise it anyway.

PN222

The AI Group made reference in their original application for relief to advice received from the Fair Work Ombudsman and in the further submissions and then again today to discussions held with the Fair Work Ombudsman. These discussions were conducted on a without prejudice basis and in our submission should not be taken into account in these proceedings. We are certainly not happy that the private discussions with the ACTU are now the subject of submissions, although we don't actually think there is anything particularly prejudicial in the submissions of AIG. We welcome efforts by other parties to resolve these issues by consultation with the Fair Work Ombudsman but we fail to see the relevance that applies to he current proceedings. The Tribunal is not confined in any way by the advice provided by the Fair Work Ombudsman. If it please the Commission those are the submissions.

PN223

SENIOR DEPUTY PRESIDENT ACTON: Thank you. We will take a five minute adjournment.

PN224

<SHORT ADJOURNMENT [11.29AM]

PN225

<RESUMED [11.42AM]

PN226

SENIOR DEPUTY PRESIDENT ACTON: Who's next?

PN227

MR NOBLE: It's been decided that I go next.

PN228

SENIOR DEPUTY PRESIDENT ACTON: Mr Noble.

PN229

MR NOBLE: I'll try to be brief as well as not go over ground that's already been brought to your notice (indistinct) touch on. There are a couple of cases I'd like to hand up which (indistinct) bundle. Rather than doubling up with what you already have, I have got three additional (indistinct) I'll refer to only briefly. Now, in the grounds, the single variation in the (indistinct) I think it's in paragraph 1 (indistinct) significant uncertainty and confusion has arisen regarding the effect of clause 44.2 in the context of five different approaches between various states and territories regarding the usage of the word "additional" or substitute.

PN230

They say that it's the different approaches that give rise to this alleged uncertainty and then summarises in paragraph 2 and then in paragraph 3 it's stated that the

existence of ambiguity and uncertainty has been confirmed about the meaning of clause 44.2 and it's interaction with the next because detailed discussions have taken place between AI Group and the office of the Fair Work Ombudsman. That's all that's said in the application in relation to uncertainty and ambiguity. The application itself is silent really in regards to what that ambiguity and uncertainty regarding clause 44.2 actually is, or indeed the effect of clause 44.2.

PN231

I would say on the face of it the application - it would appear that the uncertainty and the ambiguity exists simply because we live in a Commonwealth or federation of states and territories and that they're simply the differences as a result of the structure of the nation. The legislation through the NES accepts that those differences exist. Section 115(1)(b) and (2) and also (3) go to that point. I'd say that the - I don't want to dwell on NES because that's been pretty much covered off except that our view is that there is a difference of view between additional as provided for under section 115(b) and substituted under section 115(2).

PN232

Also the NES does contain the new point at 153 which wasn't previously in work choices legislation I don't think which allowed substitution by agreement between the employer and employee. I think that's a new (indistinct) so that clause actually allows the parties by agreement to revert back to the original holiday or the actual day or maybe to substitute another day. This clause is at 44.3 in the MA10 Manufacturing Award and it's in most of the other - or in a lot of the other modern awards as well.

PN233

As has been alluded to earlier by Mr Gregory I think it was, there is an argument that there is no power to include a general substitution clause in the modern award as the NES alone, or only the NES provides for awards and also agreements of course to have substitution clauses by agreement at the workplace and there's also a further argument that clause 44.2 as it currently stands may be characterised as a general substitution clause and as such could be deemed to be contrary to the NES as it's neither incidental nor supplementary which, as your Honour I think pointed out earlier on in the matter, that as a consequence it would be of no effect. Now, whether to remove that clause as a result, I think that's very much a matter for the bench. There is some logic to taking that approach, but we're not taken to that position one way or the other because maybe it is one of those matters which could be dealt with at a later stage.

PN234

Now, back to the AI Group's application. We think that if effect is actually given to the variation as is proposed it's arguable that some uncertainty would remain if you accept that there is some uncertainty there and as a consequence of that their application wouldn't actually achieve the stated goals of removing that uncertainty. What I have in mind there is if an award isn't to contain terms that are detrimental as compared to the NES, as per I think it's section 55(4), so as a result of that is the whole clause of the award of no effect as required under section 56, or is it possible to, say, hive off the offending part of that so that the rest of the clause will actually remain.

PN235

Presumably it's the AI Group's opinion that it is possible to have - well, no, I won't put the words into their mouth, but their application and the proposed clause doesn't actually deal with the issue of entitlement to be absent on public holidays. It's just asserted that if it is a public holiday then you will be entitled to be absent. They say that the NES provides this and that the clause has no effect on the entitlement to be absent on the actual holiday. Now, I'm not sure about that when it comes to use of the word "substitution" as opposed to "additional days" in this claim. They say that the professed aim is to seek clarity about entitlements to workers employed on the actual day, that is that they will not be entitled to the penalties associated with working on public holidays even if it is (indistinct)

PN236

We submit that this is not really about clarity. It's more about imposing uniformity and again I would say that this is contrary to the legislation. It's essentially up to the states in that regard although we do concede that there may be some desirability for uniformity throughout the nation in relation to public holidays generally but that this clause won't achieve that. It's too narrow. It only applies to three public holidays. Doesn't apply to any other days like the Queen's day for example and of course it only applies to one award, although there's the argument that if the clause exists other awards are going to actually flow on. Of course we don't think it should.

PN237

The clause as proposed we argue removes the primary purpose of the original intent of that clause and imposes instead a right to undercut the safety net which we would argue is contrary to the award objective. The primary purpose was of course to allow Monday to Friday regular workers the benefit of a public holiday when it fell on the weekend so then the substitute days, the Monday, Tuesday, Christmas Day, Boxing Day and New Year's Day would be taken as a holiday instead.

PN238

One of the case that I've handed up there I'd have to call the Anzac Day variation case and this is a full bench decision which goes I think to some of - although it's dealing in terms of public holidays, I think that there are some perspectives in relation to public policy considerations which are of relevance in that case. In that case at paragraph 38 they held that unions are (indistinct) for a common observance of public holidays and they said that, "We have no doubt there would be some public policy (indistinct) observance of national public holidays," and they say so much so was recognised by (indistinct) go back to 1921.

PN239

However they say, "For the reasons recorded above in relation to equity" - which I'll get on to in a minute, they say that it's not desirable or possible that the commission only dealing with these awards to include that and they see no reason to depart from the 1994 public holiday test case which said that the commission ought not to trespass on the authority of the states and territories. I won't take you to those decisions.

PN240

Now, we concede that historically the effect of clause 44.2 was to allow for substitution and that is how it has acted in the past but the NES wasn't around in

the past. This is a new provision. It's a new statute. We would argue that the main aim, as I said before, was to ensure that regular full-time Monday to Friday workers didn't miss out (indistinct) on a public holiday where the actual day fell on a weekend and that was the view of the full bench also in the hospitality (indistinct) decision which I think Mr Swancott will be handing up or has already referred to in their submissions. At paragraph 16 in that decision they say that essentially what was aimed at in the first - in the 1994 case was that restrictions of holidays (indistinct) decision concentrated on the situation of regular Monday to Friday workers. So we say that was the original intent of clause 44.2. It wasn't all about penalties.

PN241

Now, the AI Group advise you that all they want to do is maintain the status quo but we would argue that if effect is given to their draft clauses as proposed in their application it would also mean that where state governments have proclaimed additional dates as public holidays, payment of penalty rates would be precluded in those states where additional days have been proclaimed as opposed to a substituted day. We believe this is a new claim as this is not what the current clause does. I'm sure AI Group will argue against that, but that's our position. We would argue that this is not an application which is seeking to preserve the status quo as a result, or one simply to remove uncertainty and confusion, or if that is the actual intention we don't think that will be the actual result.

PN242

We note that although the application itself carefully avoids the language of having the award rather than the states or territories declaring what days are and what days are not public holidays, we say the practical effect of not allowing penalty rates for the specific days, whether they be substituted or additional, is to allow an employer to avoid actually (indistinct) benefits associated with working on one of those public holidays.

PN243

It's our view that in any event the primary purpose of having (indistinct) public holidays isn't to reward employees additional income. Rather it's to act as a disincentive to employers to require employees to work on a public holiday and I note that at page 21 in the first decision in the public holiday test case that was the point that they were arguing, although that was in relation to the Saturday clauses specific to Good Friday - Easter Saturday. But as a point of principle I think that should be borne in mind (indistinct) so the clause as proposed by the AI Group would mean essentially that there is no disincentive for an employer to require an employee to work on Christmas Day.

PN244

We acknowledge that the fixing of penalty rates under the award is not the states. It's also not dealt with in the NES, but we would say the proclaiming of holidays and fixing the penalties for work performed on holidays isn't performed in a vacuum. This application will in a sense have the effect of circumventing obligations on employers and we would say the general public out there would actually accept that if you do work on a public holiday or a day such as Christmas Day, one which the full bench has accepted on many occasions being a special day, penalty rates should be provided.

PN245

One of the cases that I handed up to you, your Honours, Commissioner, was that of O'Shea C in the Graphic Arts Award. It's print number L7112. He talks about the purpose of public holidays and what the full bench is driving at and I think it's on pages 4 to 5. I won't go through the whole thing (indistinct) I suppose but he was saying that these are - the main purpose of the governments to make decisions which have the effect of (indistinct) holiday generally or in a local area and the Graphic Arts Award which he is talking about (indistinct) provides such a (indistinct) effect in the community be as reflected in the federal award and makes the point that these matters are completely in the hands of the state governments. If they were to choose to discontinue declaring such holidays then any such entitlements under federal awards (indistinct) cease. But while the state governments do prescribe holidays on days other than those identified in the federal award, then they become additional holidays for the purposes of determining entitlements under the federal award.

PN246

I think the point that's trying to be made is essentially that the full bench's decision provides for a minimum award safety net standard as well as recognition of other circumstances. The full bench decision does not assume any standard number of days in the state awards or by virtue of state description. These are matters for other tribunals and state governments. I won't go on about the effect and the differences between the (indistinct) and public holiday test case. Just back in relation to the Anzac Day full bench decision now, when they were considering the union's argument for a substitution day on the grounds of equity - I think it's round about paragraph 36 - they say:

PN247

We accept that at present the public holiday safety net provision does, in leaving the proclamation of substitution days for public holidays to state and territory governments create a differential outcome between the federal award for employees in different states and territories in the present circumstances where some, but not all such governments, proclaim a substitute holiday. We accept that this creates particular problems for employees and residents on border locations where different approaches apply on either side of the border, or the boundaries.

PN248

It goes on to say that the 1994 full bench recognised these differential outcomes when it fixed the safety net standard but did not usurp the prerogative rights of states and territories of declaring Australia Day, Anzac Day and Labor Day, as well as local holidays such as Melbourne Cup, Proclamation Day, et cetera, and they say the question arises as to whether we should depart from that approach in respect of Anzac Day. At 37 they say, "We are satisfied that we should not depart from that approach." I had a look for Fair Work Australia's attitude towards public holidays during the award modernisation process. The only references that I could find were in (2008) AIRCFB 1000 on 19 December 2010 decision, paragraph 105 they say:

PN249

A number of requests were made that we supplement the public holiday entitlements in the NES by including in awards some days that are observed as

public holidays but not gazetted as such. We have decided against that course as it is apparent that the NES governs the question of the number of public holidays to which employees should be entitled.

PN250

There's also the full bench decision in (2009) AIRCFB 826 where they say at paragraph 88, "The specification of a day as a public holiday is a matter for government. We are not prepared to increase the number of public holidays by a variation to the exposure draft as suggested by the unions." It should be remembered that under some awards, some unions in some states, or some people - employees, rather, have lost certain public holidays which they have had for decades. But it's a new system, we accept that. So in relation to equity I would ask is it fair that the AI Group remove the right to substitution days from Monday to Friday workers as currently indicates in the award as that clause stands?

PN251

More generally, is it fair that some awards provide the penalty for working on Christmas Day and others do not? But it's just the way it is at the moment. We say that AI Group's proposal is a new claim, removes the original intent, it removes the right to Saturday and Sunday (indistinct) works that receive the public holiday penalty where the payment has been created by the states and territories as an additional day. It also attempts to restrict unions claims that the (indistinct) loading on Christmas Day where the states and territories do make a substitute day. We say that the application removes the existing award rate for non rostered workers. They have the benefit, and inserts there in lieu the right of rostered workers to not be paid a public holiday test case standard of the Christmas Day 50 per cent as well.

PN252

Now, I note in the AI Group submissions at 5.5 and in paragraph 46 onward that they refer to some discussions about clause 44.2 in FWA taking place. That was seeking advice of the ombudsman as to their view of whether or not the clause accorded with AI Group's (indistinct) we'd like to point out, as reference is made later in the AI Group's submissions (indistinct) our application that the AMWU were never conferred with in relation to this clause. Our view was not sought by any party until we received a preliminary view of FWA's chief counsel in November from the ACTU.

PN253

The AMWU believes it would be more appropriate and constructive for parties to confer amongst themselves in the first instance rather than with the Ombudsman. Further it’s inappropriate for the ombudsman to be used in the matter that has been - as it has been (indistinct).

PN254

SENIOR DEPUTY PRESIDENT ACTON: One of the variations posed by the AIG is to clause 13.9 of the manufacturing award. To an essence it could be clear reference to a travelling allowance payment in respect of public holidays for part-timers. What's your position on that variation?

PN255

MR NOBLE: I think that variation just breaks down the clause that exists in two parts already. It seems to be clearer, I think.

PN256

SENIOR DEPUTY PRESIDENT ACTON: Well, I think the existing clause leaves out the reference to the travelling allowance. The existing clause 13.9 makes reference to four clauses, 36.2(f), 37.5 and 40.9. As I understand it, the AIG was going to add another clause to that group which was, Mr Smith, because I can't turn it up quickly. It's related to clause 32.4(e), and 32.4(e) is to do with payment of travel allowance.

PN257

MR NOBLE: I think when we examined that we didn't actually have a problem with that amendment, your Honour. That's the same with - - -

PN258

SENIOR DEPUTY PRESIDENT ACTON: Excess travelling time and fares.

PN259

MR NOBLE: Yes.

PN260

SENIOR DEPUTY PRESIDENT ACTON: You don't have a problem with that variation?

PN261

MR NOBLE: No.

PN262

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Okay. Mr Noble, on your claim in respect of the additional loan, are you putting anything on that further?

PN263

MR NOBLE: Would you like me to do that now?

PN264

SENIOR DEPUTY PRESIDENT ACTON: Well, I think so because you're then going to go back to the others so they can comment on it, so I think it's more efficient than - - -

PN265

MR NOBLE: Okay. Sure. I've got a little bit more material to hand up.

PN266

SENIOR DEPUTY PRESIDENT ACTON: I'll mark this outline, Mr Noble, as AMWU 1.

EXHIBIT #AMWU1 AMWU OUTLINE OF SUBMISSIONS

PN267

MR NOBLE: Your Honours, Commissioner. Now, we are seeking to adjust (indistinct) Christmas Day. We acknowledge that. Now, I do have also an alternative variation prepared which is probably easier that I hand up now, plus we also have a couple of other - I have a table and some graphs. Would you like me to hand those all up at the same time so we don't have to - - -

PN268

SENIOR DEPUTY PRESIDENT ACTON: Sure.

PN269

MR NOBLE: Okay.

PN270

THE SENIOR DEPUTY PRESIDENT: I'll mark the draft determination in respect of the loading sought as AMWU 2.

EXHIBIT #AMWU2 DRAFT DETERMINATION IN RESPECT OF LOADING SOUGHT

PN271

SENIOR DEPUTY PRESIDENT ACTON: The graph on patterns of work is AMWU 3.

EXHIBIT #AMWU3 GRAPH OF PATTERNS OF WORK

PN272

SENIOR DEPUTY PRESIDENT ACTON: On Casualisation of Australian Manufacturing is AMWU 4.

EXHIBIT #AMWU4 CASUALISATION OF AUSTRALIAN MANUFACTURING

PN273

SENIOR DEPUTY PRESIDENT ACTON: Yes, Mr Noble.

PN274

MR NOBLE: We recognise that this clause didn't exist in the old (indistinct) award. I've tried to ascertain why that is the case or was the case, and the best answer - sorry, what we say is that it wasn't of such concern when the test cases were originally rung. What was of concern was maintaining the substitution days. The nature of the industry, people worked generally Monday to Friday, and so there was an overall interest or (indistinct) to actually being there. Now, I don't intend to revisit the holiday test case and what the purpose was in relation to that in any detail.

PN275

I'd just like to point out that at present, if you're required to work on Christmas Day in the ACT, the NT, South Australia and Victoria, those are the only employees who stand to gain if they're employed under the conditions of this award. That's our reading of it anyway, unless the AI Group's application gets up, then they might be entitled to any additional payment (indistinct)

PN276

SENIOR DEPUTY PRESIDENT ACTON: You've made mention there of the Tasmanian Statutory Holidays Amendment Bill 2010. I'm not aware of this bill. What does it do, do you say?

PN277

MR NOBLE: The Tasmanian (indistinct)

PN278

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN279

MR NOBLE: We don't say anything.

PN280

SENIOR DEPUTY PRESIDENT ACTON: Mr Swancott is going to do - go to that, is he? Yes, thank you. No, that's okay, you can do that later.

PN281

MR NOBLE: Essentially it's a late adjustment. It's gone through both houses and they (indistinct) December so it will be (indistinct) yes Christmas day will become a public holiday. Although I don't intend to go over the public holiday test cases, the case that I've handed up there, the WA local government test case, it's in the pure full bench one with Munro J, DP Bryant and O'Connor C. We say that they're presently observed under the heading by (indistinct) that the manifest practice of a full bench decision, and this is picked up in later full bench decisions I believe was to declare a safe net standard for public holidays across a broad point of reference for all federal awards.

PN282

The applications before the commission were applications for award variations which would counter losses of leave entitlements consequent on governmental decisions in Victoria or applications by the Victorian government to reduce the number of days. Now, the full bench determined that the safety net perspective was the appropriate approach to be followed in relation to (indistinct) awards, and associated with that approach a mechanism for the implementation of holidays flexible. The safety net standard reflected the commission's judgment as to the minimum acceptable entitlement (indistinct) and for that purpose determined 10 days (indistinct) in rejecting the union's claim for the extra public holidays above the safety net standard, which have existed for some time in other state or territory, their continued observance should be enforced by the commission. A commissioners' committee is the safety net, not the status quo, however defined, in effect that decision allows a state or territory's autonomy subject to meeting as a minimum the safety net standard.

PN283

Now, that case unsurprisingly concluded that the public holidays case was essentially about the national safety net standard and that to set another standard does not entail a judgment that no extra generally observed holidays and public holidays should be available. It's based on the conclusion that the setting of the extra public holidays should be a matter within the autonomy of the - either by the state government by the parties by agreement.

PN284

That standard was set in circumstances which gave consideration to a levelling out between awards. Now, penalties for Christmas day, in relation to the amount of penalties the four-page - commission, in the March 95 decision fits below (indistinct) Christmas Day if it falls on Saturday and Sunday at 50 per cent. In relation to the appropriate rate of payment, if worked on Christmas Day in circumstances where it falls on Saturday or Sunday, the full bench stated - it's at 22 and 23, I think this has all been repeated, but that Christmas Day should be regarded differently from other days which is subject to substitution, a non-standard full-time worker required to work on the actual day should receive

the public holiday rate for that day rather than the standard - rather than the Saturday or Sunday rate.

PN285

The ACTU argues the proper recognition of the significance on Christmas Day in the lives of many others in the community. We agree with the underlying contention of the ACTU but then they phrase it slightly differently. Now, in the hospitality's industry full bench case in 98, the full bench refer back to the 20 March decision in 95 where they stated at paragraph 39 that:

PN286

In our view the bench identifies Christmas Day as a public holiday of special significance and a higher penalty is provided while working on this day and would apply to work on another public holiday falling on the Saturday or Sunday.

PN287

The bench clearly rejects any notion of additional penalty work for work on any other public holiday, that is a public holiday other than Christmas which falls on a Saturday or Sunday. At page 22 of the decision the commissioner said, "Further questions arise as to rates of payment with (indistinct) consideration for Christmas day." That's when they reject additional benefits for working on a Saturday or a Sunday. The 98 decision stated at paragraph 40 that they say, "It's implicit in the above statement that the commission intended to vary the decision of 14 December in relation to the ETA in each state for all public holidays except Christmas Day."

PN288

The commission specifically rejected that proposition (indistinct) so at 21 they say, "Christmas Day is accorded different treatment because of its significance in the lives of many members of the community, New Year's isn't." We say that it's appropriate for workers employed under the manufacturing award to receive this recognised standard, that it is a community expectation. The (indistinct) 98 award may not have had the additional 50 per cent loading incorporated for working Christmas Day weekend when the actual day was substituted, but that of itself, we would argue, does not mean that the modern manufacturing award should not contain that provision or indeed arguably any modern award, but I'm not arguing that here today, that point.

PN289

We would say that times have changed in relation to the number of people who are required on weekends. The earliest statistics that we managed to find in the time available, there was a rush, go back to 1997, the earliest of which - ABS figures that we could find. Now, that's in - I can't find my list, it's the weekend work - patterns of work. In 97 the percentage of employees working weekends stood at 16.5 per cent, in 2009 the figure was 33.1, that's more than double and this trend will probably continue. Likewise those working Monday to Friday stood at 83.4 in 1997 but by 2009 it declined to 65.6. We say that these changes are significant and that it is - as a result it's appropriate that the variations should be granted.

PN290

As outlined above the underlying purpose of the holiday test cases was to act as a safety net, not to preserve the status quo. You have the table and the graph which reflect those figures (indistinct) commission. I would say that the - although the members 98 award didn't provide they warrant a 50 per cent - there were a number of awards which had come into the manufacturing - which did (indistinct) I've been only able to so far identify three, they're the Optical Employees Award, Tanning Industry Award, and the Christmas Island Building Construction Award.

PN291

But there were a significant number of awards which provided for a penalty rate of at least triple time, the effect of which, we would say, would be certainly to recognise the importance of Christmas to be a special day. Those we have identified so far - I don't really need to preach (indistinct) but artificial fertilisers, building products, manufacturer, clay products, electronics. The Engineering State Award 2002 which was (indistinct) driving school employees, trades and allied trades or glass industries, glass makers, marine vessels, optical manufacturing, and tanning state awards.

PN292

We had sought some information from our state branches as to whether or not they were aware of any instances of people working on Christmas Day before we publish an award, but in the limited time available we haven't been inundated but we have found a few workplaces where people will be working and - I only received notice of these last night so I haven't prepared one to hand up, I'm afraid. But I can state that in Victoria there's a company called AES Environmental Resources Group, they will be requiring some workers to work on Christmas Day.

PN293

NEC Australia, they have a number of staff in their local response centre and customer care divisions who will be working, CHC Helicopters, they have got 20 or so engineers who will be expected to work. In New South Wales there's a number of people working on continuous shift rosters, Impress Entirety, UDI Rail at Kooragang and Port Waratah, UDI Rail's maintainers at (indistinct), One Steel Rod Mill, Downer EDI, State Transit Authority - bus maintenance, Qantas, and maintenance contractors at the airport such as United Air Services and VOC infrastructure will be working.

PN294

SENIOR DEPUTY PRESIDENT ACTON: Well, we don't know whether they're award-reliant.

PN295

MR NOBLE: We think most of these won't be award-reliant, your Honour, but in some of the awards they pick up - under some of the agreements, rather, they pick up the Santa Clause in the award when it comes to Christmas Day in a number of ones that I have looked at, not that I've had time to actually go thoroughly through and check all these. But there is one, for instance, in Victoria, we've got a member who works for Hospira Australia who was informed that she will be working on Christmas Day. I think Christmas Day isn't going to be recognised as a public holiday on the day it occurs which means she is going to miss out on her enterprise. In that agreement Hospira Australia (indistinct) maintenance and laboratory - AMWU see the new maintenance enterprise

agreement 2010. That does set up the manufacturing award that - no, sorry, it doesn't.

PN296

It sets out that effectively the members of the award and the draft and production planners award, that is the predecessors of the manufacturing award, those public holidays with sufficient (indistinct) as of the award and they don't provide for that loading which means she's going to be working that day but not get any additional loading.

PN297

SENIOR DEPUTY PRESIDENT ACTON: Well, is anything we do to the award going to affect that?

PN298

MR NOBLE: Not immediately, but if the award is changed the references in many agreements which pick up the references in the award to public holidays - they will pick that up. Although it only comes around every six or seven years in relation to Christmas Day that 50 per cent loading will have an effect. We would say that it is basic safety net standard which you would expect nowadays even though it wasn't in the original award, you've seen that.

PN299

We also have a number of workers in Queensland and also a few others in New South Wales, those doing lifts, for instance, and airconditioning - most of those will be on standby, motoring support associations, they will be working, that's the NRMA in New South Wales and the RACQ in Queensland. Also (indistinct) contractors such as Trans Pacific (indistinct) Rio. In the Northern Territory I understand that the DAEC (indistinct) will be expecting staff working on that date as well.

PN300

Now, irrespective of the industries and the agreements, admittedly we haven't been able to find as many as we would like to in the short time available, but we thought that we should have brought the application on while the AI Group application has also been - it makes sense to do so. Even though it may well be appropriately dealt with at a later stage, we recognise that, but we would like to make the point that in some industries such as those working in hospitality and in health and so on, maintenance people, irrespective of whether or not they're (indistinct) working, they will be expected to have worked or to at the very least be on standby in those industries.

PN301

We note that FWA has recognised a number of awards where that special condition should be made on Christmas Day when it hasn't been designated as a public holiday, including the Hospitality Industry Award, the Manikins Models Award, Marine Tourism and Charter Vessels Award, registered licensed (indistinct) Restaurant Industry Award, Road Transport and Distribution Award, Textile, Clothing and Associated Industry Award, Consumer Award, and the Waste Management Award.

PN302

We also say that the principles under section 578 shouldn't be forgotten. Of course if you're not inclined to seek the first draft determination that we handed up and we would request that you look at the alternative that we handed up because that falls in line with the (indistinct) decision and also the full bench decisions. We would argue that we have standing under section 158 to bring the application under 157 to achieve the modern awards objective. Which in section 134 relevantly states that FWA must ensure that modern awards together with national employment standards provides fair and relevant minimum safety net in terms of conditions. We say that by approving our application will bring effect to that objective.

PN303

I would just like to briefly mention casuals. Now, I understand the holiday test case was a 50 per cent loading - sorry, at every single standard and penalty provisions of the public holiday test, but there are a lot more people now who are working on a casual basis or precarious - have precarious terms of employment than was the case 15 years ago. In 94 17.84 per cent of people were employed on a casual basis and manufacturing was only 11 per cent, just under 11 and a half. In 2009 it's over 20 per cent and 14 and a half per cent in manufacturing. It would appear that if the AI Group's application did get up then casuals wouldn't be provided for in relation so penalty rates on actual Christmas Day as well. We think that casuals -if that is to occur then maybe they should be able to have the 50 per cent loading on their ordinary wages as well. They are our submissions.

PN304

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN305

MR SWANCOTT: Thank you, your Honour, the LHMU in matters 238 and 239 has filed written submissions. I understand they have been up on the web site for a couple of days. It's not my intention to read them to you but to summarise the basis upon which those applications are made. Before I move to those I should indicate that the LHMU supports the submissions of the ACTU and the AMWU in relation to the manufacturing award and the application of the former commission's test case provisions on public holidays generally. Your Honour, I propose to deal with the applications relating to the cleaning services award and the security services industry award together.

PN306

SENIOR DEPUTY PRESIDENT ACTON: Have you got members covered by the modern manufacturing award?

PN307

MR SWANCOTT: Yes, your Honour, including the tanning industry.

PN308

SENIOR DEPUTY PRESIDENT ACTON: You supported the submissions of the ACTU and AMWU. In one sense at least they were different: as I understand it the ACTU said the appropriate course might be to delete clause 44.2 from the modern manufacturing award and the AMWU said, "We just leave that issue up to the bench." What is your position?

PN309

MR SWANCOTT: Well, your Honour, I should indicate that clause is not in either of the cleaning or the security awards.

PN310

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN311

MR SWANCOTT: Nor is it in the hospitality award.

PN312

SENIOR DEPUTY PRESIDENT ACTON: The reason I suspect is that the NES has taken over the responsibility if you like of that kind of clause.

PN313

MR SWANCOTT: We would tend to support the position of the ACTU but without bagging out friends and comrades from the AMWU.

PN314

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN315

MR SWANCOTT: Your Honour, the - that point of course leads to the areas I think of agreement that LHMU has with CCIWA and to a certain extent with AIG and that is that we accept that the identification of public holidays is a matter for the NES and that the penalty rates that apply in respect of them is a matter for the award. Now, in relation to the security services award for example clause 26.3 of that award states that the penalty rate for work on a public holiday is specified in clause 22.3. So our view is that if a day is a public holiday within the meaning of the NES then clause 26.3 lifts the award penalty rate up and applies it to work on that day. There are similar provisions in the cleaning award. In our submission we've identified New South Wales, Queensland, Western Australia and Tasmania at paragraph 8 where Saturday, 25 December 2010 has been declared a public holiday, an additional day, and we say thus attracting award-based public holiday penalty rates for work on that day.

PN316

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN317

MR SWANCOTT: But in respect of Victoria, Northern Territory, Australian Capital Territory and South Australia, there's been no similar declaration and the effect is that those days are not days that attract public holiday penalty rates under either of these awards because those - because 25 December is not a public holiday within the meaning of the NES in those jurisdictions.

PN318

Now, I understand that there are behind the scenes various negotiations to see if there can be some greater level of conformity amongst the state jurisdictions. The Tasmanian government in the past week has - the Tasmanian parliament in the past week has amended the state's statutory holidays Act, the Statutory Holidays Amendment Act 2010 which was bill number 55 passed through the Legislative Council a couple of days ago.

PN319

Now, I have asked my Tasmanian branch to produce me a copy of the act. It hasn't arrived yet. When it does I'll post it on the web site. But I am reliably informed that the relevant part of that legislation that passed the Upper House and was finally approved by the parliament declared Christmas Day to be an additional public holiday in Tasmania. If I can say that the relevant minister representing the government in the Upper House Mr Parkinson, leader of government business in the Legislative Council, gave reasons - and I have access to the Hansard of the day - reasons supporting that amendment to the Statutory Holidays Act almost identical to those that were included in the submission of the Queensland government today. Otherwise - and I'll quote from the minister in Tasmania:

PN320

The fundamental issue is that when a public holiday is substituted due to it falling on the weekend the applicable penalty rates are likewise transferred and where workers are required to work on the actual day they are denied the appropriate penalty rates. The bill proposes an additional day to be observed as a public holiday when Christmas falls on Saturday. The costs associated with an additional holiday for Christmas for the hospitality and services industries are legitimate.

PN321

However, it needs to be noted that these costs would have had to be paid if there was no substitution arrangements like those currently contained in the Statutory Holidays Act. Last month the Queensland government passed legislation to provide employees this year with two additional holidays to compensate for the fact that both Christmas and New Year's Day fall on a Saturday.

PN322

These changes brought Queensland into line with New South Wales and Western Australia. It also rejects the perverse situation this year where people working on Christmas Day received Saturday wages which can often be no penalty rates and workers on the 27th when the Christmas Day holiday is observed receive public holiday rates which can be as much as triple time. I believe that this amendment will ensure that workers would receive fair compensation for having to sacrifice special time with family and friends this Christmas.

PN323

And I end the quotation from the Hansard there.

PN324

SENIOR DEPUTY PRESIDENT ACTON: So what has happened to the substitute public holiday for Christmas Day on 28 December in Tasmania?

PN325

MR SWANCOTT: Your Honour, the table I've set out in paragraph 10 of our written submissions deals with that situation in Tasmania, and if the substitute day for Christmas Day is Monday the 27th the substitute day for Boxing Day is Tuesday the 28th and as I indicated Christmas Day itself, Saturday the 25th, is an additional public holiday.

PN326

SENIOR DEPUTY PRESIDENT ACTON: So they're proposing to declare the 25th a public holiday and the 27th will be a substitute public holiday for Christmas Day, is it?

PN327

MR SWANCOTT: Yes, those days had already been part of the Tasmanian legislation as I understand it and the alteration was to the status of Saturday the 25th.

PN328

SENIOR DEPUTY PRESIDENT ACTON: Okay.

PN329

MR SWANCOTT: Now, your Honour, I haven't dealt in these tables with New Year's day for the reason - and what the consequences of that are for the reason that our claim is a very narrow one confined to the narrow circumstance of an employee required to work on Christmas Day in circumstances where but for the variation we seek they would be paid Saturday rates of pay and no more. So that's in the four jurisdictions that have yet to declare Christmas Day this year to be a public holiday which would then allow the public holiday rates to lift up.

PN330

Your Honour, this is - it's true that this is not new in the sense that every five years approximately Christmas Day falls on a Saturday. I note that part of the, as I understood the AIG's submission, was that on previous occasions the kind of provision made for the additional public holiday created by the state had not been dealt with by way of award variation in the metals industry award. Well, it has on a regular basis been dealt with in other industries and I only have one copy of the document that was in my bundle. But a variation for example to the hospitality industry award in December 2005 included a paragraph - because in 2005 Christmas Day fell on a Saturday - included a paragraph which read as follows - I'm sorry, Saturday fell on - Christmas Day fell on a Saturday and the New South Wales parliament in 2005 declared Christmas Day to be an additional day and also substituted holidays for the Monday and the Tuesday.

PN331

So the situation in New South Wales in 2005 was the situation in Tasmania: Saturday was a public holiday, Monday and Tuesday were public holidays, Sunday was an ordinary day payable at Sunday rates for our purposes. The new clause inserted into the hospitality award in 2005 was clause 34.18 and the reference is PR966502 and it read, "To avoid doubt public holidays in New South Wales in December 2005 are the following: Sunday, 25 December; Monday, 26 December, Tuesday, 27 December" - sorry, that was Sunday not Saturday, I'll correct that, "because Sunday, 25 December 2005 has been declared or prescribed in that state as an additional public holiday."

PN332

So the - we'll go back and say that it was Sunday that was - that Christmas Day fell. The declaration of Sunday as an additional holiday, it was reflected in an award variation in a public holidays clause to avoid doubt, and it was inserted in the award for the reason that an additional day had been proclaimed in the state

which meant that the public holiday rates of pay for employees would attach to the Sunday, the Monday and the Tuesday.

PN333

Now, that's one of a number of examples because the LHMU at that time applied to vary a whole range of awards to remove any ambiguity about the operation of the public holidays clause in 2005. Now, your Honour, because there are five years between weekend Christmas days and weekend Boxing days it is true that this matter was overlooked in relation to some of the LHMU's award modernisation activities last year. We have submitted that it's an error of the kind that attracts section 160 of the act and of course that's a matter ultimately for the bench to determine.

PN334

At paragraph 24 of our written submission we make the observation in relation to the private security industry that it operates seven days a week, 24 hours a day, meaning that at any given time, security employees will be engaged to guard persons or property. We're advised by employers and employees, and accept, that employees of security contractors who are award-reliant will be required to work on Christmas Day in sectors including, but not limited to, public hospitals, casinos, venues, airports. Now, that list is longer than that but they are given as examples.

PN335

Employees who are required to work on Christmas Day and who will be this year fall into three categories: those whose shifts start on Christmas Eve and penetrate into Christmas Day, those who work a day shift on Christmas Day and those who work a shift that starts on Christmas Day and penetrates into Boxing Day. Your Honour, the LHMU understands that that description of the nature of the work that we anticipate on Christmas Day this year is not disputed by the representatives of the employers, and we appreciate the fact that they agree with that because that avoided the need for us to call extensive evidence to say, "I'll actually be working on that day. I would prefer to be home with my kids."

PN336

The special nature of the day is also, in the normal course of events, an element that you might expect us to call evidence on, but in view of the findings of a series of full benches of the Australian Industrial Relations Commission, we believe that this full bench should accept that it is an accepted industrial finding and a truism that Christmas Day is a day of special significance for workers required to work on it. Your Honour, as I indicated, we regard this as a modest claim in relation to these two awards. Although arguably under section 139(1)(e) of the act we could in due course mount a case, we are not seeking public holiday rates for anybody who works on Christmas Day, whether it's a public holiday or not.

PN337

We're not seeking that for the reason that we feel constrained by the full bench public holiday test case decision and we are seeking instead what is, in effect, for both groups of employees, cleaners and security officers or workers, double time in those states where Christmas Day is not a public holiday. Their brothers and sisters who are working in those states where Christmas Day has been declared a public holiday under both awards will be paid double time and a half, but we

acknowledge that the effect of the NES is to leave the decision on designation to the states and territories, and in the absence of the declaration of Christmas Day as a public holiday, we are entitled on our view, under the test case provisions of the former commission, to seek the supplementary 50 per cent of ordinary wages and not public holiday rates that would otherwise be applicable on a public holiday.

PN338

Your Honour, in relation to the cleaning industry, at paragraph 18 of our submission we indicate there that employees of cleaning contractors will be required to work on Christmas Day this year in sectors including public holidays, aged care facilities where that work is done by contractors, casinos, venues, and they are given as examples. Your Honour, I propose to close my submissions there. I indicate that I will seek to load onto the commission's web site the Tasmanian legislation confirming the submissions I've made in relation to Christmas Day.

PN339

SENIOR DEPUTY PRESIDENT ACTON: I'll mark your filed submissions as LHMU1, the revised draft determinations in respect of plannings LHMU2 and in respect of security as LHMU3.

EXHIBIT #LHMU1 LHMU SUBMISSIONS

EXHIBIT #LHMU2 REVISED DRAFT DETERMINATIONS IN RESPECT OF PLANNING

EXHIBIT #LHMU3 REVISED DRAFT DETERMINATIONS IN RESPECT OF SECURITY

PN340

MR SWANCOTT: Thank you, your Honour.

PN341

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN342

MR McCARTHY: If the tribunal pleases, I appear on behalf of the Australian Nursing Federation in relation to application for hearing (indistinct) nursing award (indistinct) nurses award, AM2010/232. First of all I'd just like to say we support the ACTU's submissions that were made earlier. The basis for our application is - and I don't think it will be controversial - there will be some nurses working on Christmas Day in public and private hospitals, in aged care homes and in medical practices - those that are open on that day. Those in hospitals will largely be covered by collective agreements. However, many in aged care and in medical practices will remain covered by the award.

PN343

What we're applying to do is vary the nurses award to insert an additional clause, 32.5. The clause would provide for an additional 50 per cent loading for full-time and part-time employees who are required to work on Christmas Day where it falls on a weekend and where a substitute public holiday has been declared by state or territory legislation. Our application does not seek the loading where an additional rather than a substitute day has been declared. I say that just in

response to the written submissions of the CCIWA which seem to suggest that we're asking for that additional 50 per cent loading where an additional day has been declared, but if you look at the wording of our clause, it just deals with where a substitute day has been declared.

PN344

SENIOR DEPUTY PRESIDENT ACTON: So for those who are award-reliant, your application would have effect in Victoria, South Australia, the ACT and the NT. Is that right?

PN345

MR McCARTHY: In the other jurisdictions and (indistinct) New South Wales, Queensland, Western Australia (indistinct) Tasmania as well, legislation provides for an additional public holiday, so in those jurisdictions where an additional day is declared, 25 December remains a public holiday and public holiday rates would be payable for work on that day, which in the case of the nurses award is double time, 200 per cent. In those jurisdictions where a substitute day has been declared, the actual day, Saturday, is no longer a public holiday, thus the only penalty rates that are applicable for working on the actual day are the normal Saturday or Sunday shift penalties - in this case this year, 50 per cent for Saturdays, and next year when Christmas Day falls on a Sunday, it will be 75 per cent.

PN346

So the proposed (indistinct) clause does provide for double time - ie, 200 per cent - for working on the actual day where a Christmas Day falling on a Saturday has been substituted, so 50 per cent for Saturday and 50 per cent Christmas (indistinct) and then for 225 per cent, which is 75 per cent Sunday (indistinct) 50 per cent extra (indistinct) Christmas Day falls on a Sunday. As we've noted in our written submission, we submit that the variation is necessary to achieve the modern award's objective to provide a fair and relevant safety net. In the alternative, we also say the variation would correct an error in that the issue was inadvertently overlooked in the award modernisation process.

PN347

As has been mentioned previously, this issue only crops up every five years or so, and there seems to be a rush of applications each time it happens, so it's not surprising that it was overlooked in all the detail of the award modernisation process. Without the variation that we seek, employees will be treated differently for working on 25 December depending on which jurisdiction they work in. Some will receive the 200 per cent public holiday rate while others will receive 150 per cent. Introducing a 50 per cent loading would create a fair and consistent safety net across Australia.

PN348

In addition, it would be consistent with a fair and relevant safety net for employees who are required to work on Christmas Day to receive public holidays on that day and regardless of whether an additional or substitute day has been declared. As have been noted, of all the public holidays, Christmas Day is seen as a particularly important occasion to spend time with family, and as such, there should be a premium for being required to work on this day. Without the

amendment, the existing clause 32 leads to an unfortunate result for non-standard workers, that is, those not working standard Monday to Friday shifts.

PN349

The declaration of the substitute day by governments is really directed at standard workers, providing them with a public holiday when they would not otherwise receive it because of it falling on a weekend. The problem is that this then leads to disadvantage for non-standard workers. A nurse who normally works on a Saturday is deprived of the benefit of a public holiday (indistinct) substitution of days and deprived not only of the opportunity for a paid day off but also for a higher rate of pay if he or she is to work on that day. This was essentially the basis of the reasoning in the public holidays test case decision in the mid-90s referred to in our written submissions, and in particular the decision we have quoted in our application - it's been referred to earlier - print L9178, which dealt specifically with the situation of non-standard workers.

PN350

In that decision the AIRC thought it appropriate that an employee required to work on a substituted Christmas Day should receive a loading of one half of a normal day's wages for a full day's work and remain entitled to a substitute day. The ANF's proposal merely seeks to apply that decision to the nurses award. Several of the major awards that governed wages and conditions of nurses prior to the making of the modern nurses award contained provisions similar to, or had the same effect as, the clause that we are proposing be inserted, so without including such a clause, such nurses are actually worse off compared to the pre-reform awards.

PN351

SENIOR DEPUTY PRESIDENT ACTON: Which awards were they?

PN352

MR McCARTHY: I might just hand up an example of our pre-modern awards. So there's three excerpts that I've provided there. As you can see, there's the South Australian Private Sector Award, the Northern Territory Private Sector Award, and the one without a heading is the Victorian Health Services Award 2000. Now, I might just take you to the Victoria award first, the Victorian Health Services Award. At clause 24.2 it provided for substitute dates on Christmas Day. Christmas Day was basically substituted where the wards, units or services operated only on a Monday to Friday basis.

PN353

However, in 24.3, in relation to all other employees including casuals, Christmas Day was to be observed on 25 December, so in Victoria the public holiday was observed on Christmas Day itself, not on the substituted day, even if it was substituted by legislation, so the issue didn't arise. The issue (indistinct) did not arise. So those working on Christmas Day did receive public holiday rates, even if the day fell on a weekend (indistinct)

PN354

SENIOR DEPUTY PRESIDENT ACTON: Hang on. Those who worked on Christmas Day got the public holiday rate?

PN355

MR McCARTHY: If there was two different types of - it depends on whether the employer operated on a Monday to Friday basis or not.

PN356

SENIOR DEPUTY PRESIDENT ACTON: It would depend on whether the employee was engaged Monday to Friday.

PN357

MR McCARTHY: 24.2 says, "Full-time (indistinct) Monday to Friday employees and/or part-time employees engaged - - -"

PN358

SENIOR DEPUTY PRESIDENT ACTON: In essence, if you're a Monday to Friday worker, you got the substitute day?

PN359

MR McCARTHY: That's correct.

PN360

SENIOR DEPUTY PRESIDENT ACTON: Other employees?

PN361

MR McCARTHY: If you worked Christmas Day, you receive public holiday rates (indistinct) Christmas Day (indistinct)

PN362

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN363

MR McCARTHY: So in that instance, there was no need for 50 per cent loading because the employees working Christmas Day received the public holiday rates (indistinct) a similar situation applied in the Nurses (Northern Territory) Private Sector Award, under clause 34.2, which again said something similar:

PN364

Employees must observe the public holiday on the actual day of occurrence rather than on any substitute day.

PN365

So basically it overrode any legislation to the contrary; if you worked on a public holiday, you received public holiday rates.

PN366

The other award that I'll refer you to is slightly different and a bit more like the (indistinct) now, and that is the Nurses (ANF - South Australian Private Sector) Award 2003. Clause 7.3.2(e), "Payment for work performed by full-time or part-time employees on 25 December when Christmas Day falls on a Saturday or Sunday". It says:

PN367

This clause applies when Christmas Day falls on a Saturday or a Sunday and a substitute public holiday has been proclaimed.

PN368

Additionally:

PN369

An employee who works on 25 December shall be paid an additional 100 per cent of the ordinary rate for the actual hours worked on that date. This payment is in substitution of other penalties that would usually apply to work performed on a Saturday or Sunday.

PN370

So that would apply in lieu of the usual Saturday or Sunday rate. So basically they would receive double time (indistinct) working on Christmas Day.

PN371

DEPUTY PRESIDENT IVES: The usual rate being time and a half?

PN372

MR McCARTHY: Double time for public holidays.

PN373

DEPUTY PRESIDENT IVES: No. Yes. What I meant on the Saturday penalty would have been Saturday or - the Saturday penalty at least would have been time and a half.

PN374

MR McCARTHY: Yes, correct.

PN375

DEPUTY PRESIDENT IVES: Yes.

PN376

MR McCARTHY: In fact you - no, I might leave it there. Yes, that's correct. So also I hadn't got the law with me but the South Australian (Medical Practitioners' Rooms) Award provided pretty much the same clause as that so they also applied to the medical practices in South Australia.

PN377

DEPUTY PRESIDENT IVES: Yes.

PN378

MR McCARTHY: There were several - three modern awards that basically provided for public holiday penalty rates to be paid on Christmas Day itself (indistinct) substituted.

PN379

SENIOR DEPUTY PRESIDENT ACTON: Several is two, is it?

PN380

MR McCARTHY: That's four awards, Victorian one, Northern Territory one.

PN381

SENIOR DEPUTY PRESIDENT ACTON: The Victorian one doesn't have any additional (indistinct) nor does the NT one, does it?

PN382

MR McCARTHY: It doesn't have?

PN383

SENIOR DEPUTY PRESIDENT ACTON: It doesn't have what you're seeking.

PN384

MR McCARTHY: It doesn't have a 50 per cent loading, but it wasn't needed because if you worked on a 25 December or substituted, you would get public holiday rates because the award specified it, whatever the legislation said the actual day was - Christmas Day shall be observed on that day. So there's at least four awards pre modern awards that cover nurses that provide public holiday rates on a substituted Christmas Day which I might note, these are South Australia, Victoria and the Northern Territory are three of the states that are jurisdictions where no additional day has been proclaimed. So nurses in these states and territory are actually worse off then they were under their old agreement.

PN385

DEPUTY PRESIDENT IVES: Those nurses in those states that were covered by the award that you've mentioned, not all nurses in those states necessarily because they wouldn't have all been covered by the ones that you've put in front of us.

PN386

MR McCARTHY: Most nurses would have been covered by the Private Sector Award in the Northern Territory. The Victorian award basically covered nearly all nurses in Victoria, and the South Australian Private Sector Award of the Medical Practitioners Award, which I haven't provided a copy of, but which is substantially in the same terms as the South Australian Private Sector Award will cover most nurses (indistinct) in South Australia.

PN387

So as noted in our application Fair Work Australia has included a similar type of provision in several other modern awards. The LHMU in its submission has listed nine other modern awards which contain similar provisions including, for example, the Textile Clothing Footwear and Associated Industries Award. In a variation to the TCF award on 3 March this year a seven-member full bench varied the award to include the TCFUA's proposed clause for several reasons, including that the pre-modern awards contained such a clause and the provision was included in other modern awards.

PN388

We also support the LHMU's point in paragraph 18 of the submissions that refer to a recent case of Fair Work Australia which demonstrates the continuing elements of the public holidays test case in the modern awards era. So for these reasons the ANF submits a variation is necessary to achieve the modern award objective (indistinct) provide a fair and (indistinct) safety net and/or would correct an error and that the issue was overlooked when the original award was made. If there's any further questions, those are the submissions.

PN389

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Today Fair Work Australia has received a one-page letter from the HSU saying they support the ANF, and they're considering filing a similar application shortly to vary the Aged Care Award and the Health Professionals and Support Services Award, and they indicate the nature of the variation that they're supporting and that they believe the omission of the public holiday test case provisions is a drafting error in the creation of other modern award, as such section 160 of the act provides the tribunal with power to correct the error or grant the application in the terms sought by the ANF. I'll mark that letter as HSU1.

EXHIBIT #HSU1 LETTER RECEIVED FROM HSU

PN390

SENIOR DEPUTY PRESIDENT ACTON: I should also indicate that filed before today was a letter from the AWU indicating their support from the AMWU submissions and opposing the AIG's application. I'll mark that letter AWU1.

EXHIBIT #AWU1 LETTER FROM AWU

PN391

SENIOR DEPUTY PRESIDENT ACTON: We'll now take a luncheon adjournment.

PN392

MR HORNEMAN-WREN: Before your Honour adjourns, might I raise something concerning our position. Your Honour, the rights the minister has to exercise in respect of each matter is a right to make a submission which is all that's conferred under section 597A. It's a contradistinction to a right of intervention whereby the minister becomes a party, as would be the case in a matter before the court. Having made our submission, without any disrespect to the tribunal, might we be excused. We've spent our rights, as it were, and the other matters that are effectively being dealt with are not matters in which the minister expresses an interest.

PN393

SENIOR DEPUTY PRESIDENT ACTON: Certainly.

PN394

MR HORNEMAN-WREN: It might create some space at the bar table for others in so doing.

PN395

SENIOR DEPUTY PRESIDENT ACTON: Certainly. We'll now adjourn.

<LUNCHEON ADJOURNMENT [1.10PM]

<RESUMED [2.21 PM]

PN396

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN397

MR LESZCZYNSKI: Your Honours, and the Commissioner, I represent the FSU for matter number 247 which is an application to vary the Modern Banking and Finance and Insurance Award 2008. Section 157(1) of the Fair Work Act provides Fair Work Australia with the ability to vary a modern award if it is necessary to achieve the modern award's objective. Section 134(1) of the Fair Work Act defines the modern award objective as:

PN398

Fair Work Australia must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net terms and conditions taking into account -

PN399

and then lists from (a) to (h) those things to be taken into account. Item 1 of section 158(1) of the Fair Work Act also provides for the Finance Sector Union of Australia as an organisation entitled to represent the industrial interests of employees covered by the Modern Banking Finance and Insurance Award 2010 with standing to apply for the making of a determination varying the award. The Insurance Industry Award 1998, at clause 26.10 - your Honours and Commissioners, I have actually got a number of documents here which I have bundled together for the sake of making sure that the associates don't have to jump up every five minutes. At the top I have numbered the documents as Document 1 or it has Document 2 on the side for ease of reference.

PN400

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN401

MR LESZCZYNSKI: As you will see in document 1, at 26.1A:

PN402

The Insurance Industry Award contains a clause that provided the staff that worked non-standard hours, that were required to work a Christmas Day on a Saturday or Sunday to be paid double time for that work plus a Christmas Day loading of half a day's pay as well as receiving the substitute public holiday.

PN403

This was in recognition of the significance of Christmas Day to most people regardless of whether a substitute public holiday had been declared or not. This, in essence, is the clause that we seek to include in the Modern Banking Finance and Insurance Award 2010. There was another 99,500 people employed in services to finance and insurance, some of whom were either being employed by insurance companies and/or covered by the Insurance Industry Award. By contrast, according to Abacus, the industry body for credit unions and building societies, in March 2009 there were 10,522 employees employed by 129 credit unions and building societies and this is found in document 3 down the bottom of the page.

PN404

However, the Abacus web site shows there are only 113 credit unions and building societies and that's in document 4. The vast majority of people in the finance industry are employed in finance largely in the banks which have enterprise awards such as the ANZ Award, Westpac and NAB. The only major bank that doesn't have an enterprise award is actually Members Equity and that is actually covered by the Insurance Industry Award, or was covered by the Insurance Industry Award, so the Insurance Industry Award covered more than just insurance companies. However despite this the Modern Banking Finance and Insurance Award 2010 does not contain a clause providing for staff working non-standard hours that are required to work a Saturday or Sunday to be paid double time for that work plus a Christmas Day loading of a half day's pay as well as receiving the substitute public holiday.

PN405

This will actually have significant consequences as there will be staff that are required to work Christmas Day in the insurance industry. Many large insurance

companies have call centres that are open 24 hours a day seven days a week including public holidays so that customers can make claims for emergencies that may arise that cause loss or damage to cars, home and contents or while they're on holiday so that they can get authorisation for emergency repairs or replacements. Now, the QBE Mercantile Mutual Ltd Certify Agreement 2000-2002 which still applies states at clause 5.5, and this is document 5 in the bundle that I have handed up:

PN406

The terms and conditions of employment for employees as specified in this agreement will operate in conjunction with the award and the successors of the award. The award being defined as the Insurance Industry Award. As the agreement contains no clauses relating to public holidays the public holiday provisions in the Insurance Industry Award would have applied including the clause that provided for staff who work non-standard hours who are required to work Christmas Day on a weekend being entitled to double time plus the Christmas Day loading plus the substituted holiday.

PN407

However as the Modern Banking Finance and Insurance Award 2010, which is a successor now applies and contains no such provisions, any staff working non-standard hours who are required to work Christmas Day would no longer receive the benefit, and it is in fact the case the QBE does operate a call centre that is open 24 hours a day all year round to allow people to make a claim when immediate repairs or replacements are required including Christmas Day, and this is document 6 which shows that they are open 24 hours a day.

PN408

SENIOR DEPUTY PRESIDENT ACTON: Where are they open? Which state?

PN409

MR LESZCZYNSKI: I'm not entirely sure, your Honour. I'm just trying to see whereabouts they are predominantly located. I suspect it would either be in New South Wales or Victoria. I'm not too sure which state.

PN410

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN411

MR LESZCZYNSKI: A number of other insurance companies have contact centre staff that work 24 hours a day seven days a week all year round for emergencies including Zurich has a 24 hours a day seven days a week contact line for credit, card and travel insurance claims which is document 7; CGU, which is an IAG brand, and this is shown in document 8, has a 24-hour seven day a week contact, client proposal insurance claims, including home insurance, as does SGICWA for claims which is document 10, as does SGIO South Australia, another IAG branch, which is open 24 hours seven days a week, in document 11, as does NRMA Insurance which is document 12, for claims.

PN412

There are thus a number of insurance companies previously covered by the Insurance Industry Award 1998 that have parts of their business that are open 24 hours a day every day of the year to enable customers to make claims as soon

as an accident or incident occurs. Some of these insurance companies would have employees subject to clause 26.1 of the Insurance Industry Award 1998 prior to the commencement of the modern award. As a result employees would have been-paid in accordance with that clause on Christmas Day but it is those working non-standard hours, working on a Saturday or Sunday were entitled to the double time payment plus a Christmas Day loading of half a day's pay as well as a substitute public holiday.

PN413

With the commencement of this award, with the modern award, which contains no such provisions, these employees will be disadvantaged and their safety net of terms and conditions reduced. When they work on a Christmas Day that falls on a Saturday or Sunday a day that traditionally people spend with their family or loved ones, or which has significant religious meaning to them, they are no longer compensated by being paid double time for that work plus the Christmas Day loading as well as the substitute public holiday. The Finance Sector Union of Australia therefore submits that it is necessary to vary the Modern Banking Finance and Insurance Award 2010 to include the clause from the Insurance Industry Award 1998 found at clause 26.10 to maintain the safety net for these employees, and that this is necessary to achieve the modern award objective of providing a fair and relevant minimum safety net of terms and conditions.

PN414

The term is a relevant safety net term and condition as employees covered by the Banking Finance and Insurance Award 2010 will have to work on Christmas Day when it falls on a Saturday or Sunday, and it is a fair safety net term and condition of employment as it replicates the clause found in the Insurance Industry Award 1998 that applied prior to the commencement of the modern award which reflected the decision of the 1994 public holiday test case. The FSU supports the submissions of the LHMU, ACTU and AMWU on the relevance and importance of the public holiday test case. We also note, as did the ANF, that a number of other awards have had this provision included in their terms.

PN415

This test case recognised the special significance of Christmas Day when people traditionally spend time with family or loved ones or because it has significant religious meaning to Christians by compensating those employees required to work Christmas Day with the special loading even if a substitute date has been declared. By excluding this provision from the Banking Finance and Insurance Award 2010 the minimum safety net terms and conditions for those employees required to work on Christmas Day when it falls on a Saturday, a Sunday, ceases to be found. The FSU submits that only by including these provisions can the modern award provide a fair and relevant minimum safety net of terms and conditions. The FSU also submits that it appears that the reason why the three credit union awards, the industry awards, namely the Credit Union Award 1998, the Queensland Credit Union Award 1999 and the Western Australian Credit Union's Award 2001, did not contain the clauses that provided for the Christmas Day loading is that the clause had no work to do in the credit union industry. Namely it appears that the operations of the credit unions did not require staff to work 24 hours a day seven days a week including Christmas Day, unlike some insurance companies.

PN416

This appears to be the case if one, for example, takes a look at the three largest credit unions in Australia. CUA is Australia's largest credit union. If you go to document 13 under the heading of 1999 to 2007 you will see that it states there the largest credit union in Australia. If we then go to document 14 it shows their call centre is only open 8 am 8 pm Monday to Friday and 8 am to 5 pm Saturday. Savings and Loans, Australia's second-largest credit union, has the call centre and again this is on document 15. If you go to the merger background it indicates that it's the second largest, and in document 16 it shows that they're open from 8 am to 8 pm Monday to Saturday and it explicitly says, "It is not open on public holidays." It should be noted that while phone banking is available 24 hours a day this is an automated service that does not require staff to answer calls while Visa runs the 24-hour line for credit cards, not the credit union.

PN417

Teachers Credit Union, Australia's third-largest credit union, and again this is in document 17, the second-last paragraph, and document 18 shows their call centre is open 8 am to 7 pm Monday to Friday and 9 am to 3 pm Saturday and again says it is not open on national or New South Wales public holidays. Again it should be noted that while phone banking is available 24 hours a day, this is an automated service that does not require staff to answer calls, thus it appears that the operations of the credit unions do not require staff to work 24 hours a day seven days a week including Christmas Day. As such the three credit union awards did not contain clauses that provided for the Saturday loading, we submit, as the clause had no work to do.

PN418

We submit that this would also likely mean that the insertion of clause 26.10 from the Insurance Industry Award 1998 into the Modern Banking Finance and Insurance Award 2010 would not increase costs to those credit unions covered by the award as it appears they do not operate on Christmas Day anyway. The inclusion of clause 26.10 from the Insurance Industry Award 2010 will therefore not increase costs for the insurance employees who were previously covered by this award as those entitlements have previously applied anyway, and will not increase costs for those employers previously covered by the three credit unions awards as these will most likely not be operating on Christmas Day anyway.

PN419

The impact on business which Fair Work Australia is required to take into account under section 134(1)(f) we submit is minimal or non-existent. We may be pre-empting some of the arguments that some of the employers may argue that while the clause by itself may not increase costs when one looks at that entire award modernisation process that this will further add to the increased costs of award modernisation. The FSU response to that would be, "No, it's not." For the most part the terms of the Modern Banking Finance and Insurance Award 2010 significantly reduced the terms and conditions of employment for employees in the insurance industry and those covered by the Insurance Award. So, for example, it expanded the span of hours thereby reducing penalty rates. Some penalty rates were also reduced. There was no getting a payment for weekend work, no minimum engagements for part-time and casuals in the modern award. The rates at which TOIL accumulated decreased, allowances were reduced and some eliminated.

PN420

The classification with the higher rate of pay was eliminated and the reduction of some penalties for shift work. For the most part award modernisation in the insurance industry has significantly reduced the costs of operating business for those in the insurance industry as well as for banking, finance and insurance industry as a whole. The maintaining of an existing term and condition from the Insurance Industry Award in the modern award will not result in any significant financial costs to the employers. If it pleases, your Honours, and Commissioner.

PN421

SENIOR DEPUTY PRESIDENT ACTON: Do these companies actually have call centres or do they contract them out?

PN422

MR LESZCZYNSKI: Generally speaking the insurance ones have them in Australia.

PN423

SENIOR DEPUTY PRESIDENT ACTON: But we don't know where?

PN424

MR LESZCZYNSKI: CGU has it in Australia. IAG has it in Australia as does Zurich.

PN425

SENIOR DEPUTY PRESIDENT ACTON: But we don't know where.

PN426

MR LESZCZYNSKI: Look - no, your Honour.

PN427

SENIOR DEPUTY PRESIDENT ACTON: Did you seek this clause as part of your draft award for the finance industry?

PN428

MR LESZCZYNSKI: We did put it up, your Honour, but it wasn't included and we were given no reason as to why it wasn't included in the modern award.

PN429

SENIOR DEPUTY PRESIDENT ACTON: Which clause was it as part of your draft?

PN430

MR LESZCZYNSKI: It was in the draft that we put forward in response to the commission's draft so it would have been the second draft we put in. I'm not sure whether it was actually in the first draft but it was definitely put in the second draft.

PN431

SENIOR DEPUTY PRESIDENT ACTON: There's only one draft on the web site. That's 31 October 2008.

PN432

MR LESZCZYNSKI: It was attached to our submission that was lodged. As I said, it would have been lodged after the first exposure draft was put forward by the commission.

PN433

SENIOR DEPUTY PRESIDENT ACTON: So it was put forward by you but it wasn't included.

PN434

MR LESZCZYNSKI: No, your Honour.

PN435

SENIOR DEPUTY PRESIDENT ACTON: All right, thank you. Yes, Mr Maxwell.

PN436

MR MAXWELL: Thank you, your Honour. Your Honours and Commissioner, we do not have an application before the tribunal. However we have an interest in the matters involving the Manufacturing Award and matters generally.

PN437

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN438

MR MAXWELL: Your Honours and Commissioner, the position in the CFMEU is that we support the submissions of the Queensland government, the ACTU and the AMWU to the extent that they deal with matters other than in clause 44.2 of the Manufacturing Award and we differ slightly from the AMWU in that we say that that clause should be deleted, and we support the submissions of the LHMU. Your Honours and Commissioner, I don't intend to be too long here today but generally for the whole, I suppose, history of the public holidays issue goes back to 1993 when the Victorian government decided to reduce the number of public holidays that were available in Victoria and that led to a flood of applications before the then Australian Industrial Relations Commission to protect what a number of unions saw as their existing safety net in the awards.

PN439

Importantly arising out of that decision, and this has been referred to by a number of the other parties, the full bench decided that they would recognise a safety net of public holidays but they also recognised that the determination of the number of public holidays was a matter to be decided by the states in regard to any additional days that they wished to apply. The other important aspect of the decision in Print L4534 was that that decision mainly dealt with the position of workers who were standard week which, in those days, was standard Monday to Friday, and in that decision on page 22 where the full bench said that:

PN440

There are problems in applying the standard provision to the circumstances of employees whose working arrangements differ from the norm; one which supports on notice concerns employees who normally work on Saturdays. The substitution provision may affect such persons harshly. We take it as an example a year, where when Christmas Day falls on a Saturday, a person who works on Christmas Day will receive the amount normally paid for Saturday work and if he or she does not work on the substitute day the higher rate prescribed for work on that day will be irrelevant.

PN441

So it's when dealing with the issue of substitution they recognise that a day working Monday to Friday would get the benefit of the substitute day, but if the person worked different arrangements and normally worked Saturdays, then they wouldn't obviously get the benefit of the public holiday. The full bench decided that that matter needed attention. That led to the subsequent decision in which I think is commonly referred to as the Fourth Public Holiday Test Case which is found in Print L9178 where the commission decided that those employees who work on a Saturday, but where the day is not substituted, should receive an extra 50 per cent to the normal rate that they receive for working on a Saturday or a Sunday.

PN442

In regards to the application by the AIG, in effect what they seek to do is to only provide for substitute days. Now, what that means in effect is that you have a person who works, I suppose, a non-standard week, and I note that now under the Manufacturing Award it is allowable for an employee to work ordinary - or their ordinary hours to be considered to be hours worked on a Saturday or Sunday, even though they have a penalty rate applying, but a person could therefore work a Wednesday, Thursday, Friday, Saturday and Sunday under that award. Now, in that situation if the existing provision remains then those people would not be entitled to a public holiday in terms of the AIG's proposal where the substitution only occurs on a Monday or Tuesday. So if those employees worked on Christmas Day and Boxing Day effectively if their normal work days were not Monday or Tuesday they would not receive the benefit of working on a public holiday.

PN443

We note that in the AIG's submission they've attached at annexure B an opinion from the Fair Work Ombudsman. Now, we don't generally or necessarily agree with everything that the Fair Work Ombudsman has to say in regard to their opinions, however I think in regard to these proceedings what they do have to say is fairly relevant. On page 1 of that opinion they say that the current view relates to the states and territories where Christmas, Boxing or New Year's Day has not been substituted by that state or territory and those days remain public holidays. So this opinion relates to that situation.

PN444

Over the page they say that clause 44.2 of the MA, which is the Manufacturing Award, which provides for substitute days for Christmas, Boxing and New Year's Days, the actual holidays, when these fall on a weekend it is inconsistent with the National Employment Standards, the NES, where these days are public holidays. The clause provides in effect that the actual holidays will not be observed as public holidays. I know that your Honour the Deputy President raised the issue about the meaning of the word "observed" as opposed to "prescribed" in relation to the submission from the Western Australia Chamber of Commercial and Industry. Well, we know it's on the second page of that opinion from the Fair Work Ombudsman they deal with that issue of what is meant by the term "observe" and I would refer the full bench to that section of their opinion. On the third page the Fair Work Ombudsman, or the opinion, goes on to state:

PN445

We have assumed that clause 44.2 of the MA is ancillary or incidental to the NES for the purposes of this analysis but note this assumption is not without controversy. In any case clause 44.2 of the MA is detrimental to an employee when compared against the NES in that by its terms it would operate to exclude the entitlement of employees to not attend work on a public holiday which has not been substituted by the state territory and be paid for that day.

PN446

They then explain that in further detail and conclude, "Accordingly our current view is that clause 44.2 has no effect where additional days have been declared public holidays." We note the AIG then put some further clauses to the Fair Work Ombudsman and they responded in I think a two-paragraph or three-paragraph email, but we believe that that initial opinion of the Fair Work Ombudsman is correct in that the current clause in the Manufacturing Award which only provides for the substitute days and does not recognise the additional days contravenes the National Employment Standards and therefore if it has no effect then it should not remain within the award.

PN447

Your Honours and Commissioner, the other matter I wish to briefly address the tribunal on is that we support the application by the AMWU to vary the Manufacturing Award to put in the additional provision in regard to working on Saturday or Sunday when Christmas Day falls on that day and there has been no additional day proclaimed or prescribed by state government. In doing so we would also submit that should the tribunal decide that there is an error in modern awards pursuant to section 160 by the non-inclusion of such a provision, then we would seek that the tribunal act on its own motion to vary the Building and Construction General On-site Award 2010.

PN448

We do so on the basis that such a provision was contained in the National Building and Construction Industry Award 2000. I seek to hand up a copy of the order varying that award to insert that provision. Your Honours and Commissioner, that provision, which is 36.2.2 - which provides that:

PN449

Where a substitution occurs as in 36.2.1, work on 25 December will attract an additional loading apart from a normal day's wage for a full day's work in addition to the Saturday/Sunday rate and the employee will also be entitled to the benefit of the substitute public holiday.

PN450

Your Honours and Commissioner, that provision was inserted by the order of Harrison C on 4 July 2001 and the transcript of the proceedings, particularly the transcript of 6 June 2001, show that that application was made on the basis of the fourth public holiday test case, being print L9178, and also the reasoning of the full bench in the Shop Distributive and Allied Employees Association Food and Liquor Stores Interim Award 1994, a decision of the full bench comprising his Honour Ross VP, McBean SDP and Lawson C dated 1 June 1999, which is found in print R5429. So, your Honours and Commissioner, we submit that if the tribunal is mindful to make any corrections to the modern awards to restore a safety net, then the safety net should be restored to the Building and Construction

General On-site Award 2010. Your Honours and Commissioner, they're the brief submissions we wish to make today.

PN451

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Mr Kentish?

PN452

MR KENTISH: Thank you, your Honour. If it pleases, the CEPU has an interest in two of the matters that are before the full bench, specifically in relation to the application of the AMWU that has been assigned number 244. The CEPU supports the AMWU application. We support the submissions of the AMWU in relation to that, and the other parties who have also supported the application. The second matter that we have an interest in is number 237, the application by AIG to vary the Manufacturing Award 2010. The CEPU opposes the application by the AIG. We agree however that clause 44.2 of the Manufacturing Award could usefully be amended. Our concern is the extent to which the clause appears to purport to remove by way of substitution of an alternate day public holidays which are guaranteed under the NES.

PN453

As the tribunal would be aware, under the NES public holidays in section 115(1)(a) are guaranteed unless they are substituted by a state or territory law or by agreement between the employer and employee pursuant to a relevant industrial instrument or under section 115(4) for those workers who are not covered by an industrial instrument. We say subclause 44.2 of the modern Manufacturing Award can be best interpreted to be purporting to mean that the award removes the right to the observance of a public holiday even where that public holiday has not been relevantly substituted in accordance with the NES and to the extent that it does so clause 44.2 is not effective and must give way to the NES. In this way we believe the operation of the clause is potentially uncertain and possibly reflects error on behalf of the award modernisation full bench.

PN454

We do not however support the proposed AIG solution to this issue. We note that the AIG application does not attempt to remove public holidays that have been properly declared in accordance with the NES. Instead the AIG application seeks to remove public holiday penalty rates from certain public holidays. We say the removal of penalty rates for public holidays is a departure from the so-called status quo under the Metal, Engineering and Associated Industries Award of 1998. We say that it is unfair and should not be accepted by the tribunal.

PN455

For employees rostered on to work public holidays falling on weekends, and in particular Christmas Day in New South Wales, Queensland and WA, the AIG proposal would effectively create two classes of employees. The first class are those who enjoy the full benefit of the public holiday as declared under the NES. This includes employees who are rostered on but entitled to be absent from their employment on that day under section 114 of the act. These employees receive ordinary time earnings for the public holiday under section 116 of the act.

PN456

This first class would also appear to include employees who are on paid personal or carer's leave who under section 98 of the act are not taken to be on personal

leave that day. It would also appear to include employees on annual leave who under section 89 of the act are not taken to be on annual leave that day. Such employees in New South Wales, Queensland and Western Australia will also get the benefit of course of another public holiday following the weekend.

PN457

At the same time the AIG application creates a second class of employees and this class of employees are employees for who it is for whatever reason, and the reasons can include the nature of the employer's enterprise, the type of employment, the notice given to employees and the employees' personal circumstances, reasonable to insist that employees work on the weekend notwithstanding that it is Christmas Day. Rather than having a right to a paid absence on what is an NES public holiday like the employees in the first class, these employees in the second class who can be directed to work on the day receive no additional penalty at all for working on the public holiday other than the usual weekend penalty and we say that this creates an unfairness as between employees which is not consistent with the general scheme of the NES, nor the modern award objectives.

PN458

We say it also fails the first objective of the act under section 3(a), that is that the act is to provide workplace laws that are fair to working Australians. Under section 138 of the act a modern award may only contain permitted terms to the extent necessary to achieve the modern award objective. We say that there is no evidentiary material before the tribunal supporting the creation of two classes of employees: those who get the benefit of public holidays on weekends by being paid for their absence; and those who do not, being those who may be directed to work on the public holiday for no additional penalty rate.

PN459

We say there is no evidence to show why it is necessary that the award contain the clauses proposed by the AIG. We do not believe it is enough to point to the federal Metal, Engineering and Associated Industries Award of 1998. The current situation did not arise under that award. The NES has changed the circumstances in which the award operates and in that way it is not about maintaining a status quo because the NES has changed the status quo so that certain employees are now entitled to be absent on Christmas Day for instance where previously they weren't.

PN460

Also we say it is relevant that the Metal, Engineering and Associated Industries Award of 1998 did not provide for penalty rates for some public holidays and then not provide for penalty rates for others nor, we say, does the modern Manufacturing Award. In this way it cannot be said that the AIG application is seeking to maintain the status quo by removing penalty rates from an observed public holiday. Moreover, the federal Metal Award is not the only instrument that was replaced by the modern Manufacturing Award as your Honour noted earlier.

PN461

How the issue was dealt with in the other instruments is generally not before this tribunal in these proceedings and we note in this regard that it's our general understanding that the New South Wales award or NAPSA, the Metal,

Engineering and Associated Industries State Award does not appear to have a substitution clause in the same manner as the federal Metal, Engineering and Associated Industries Award of 1998. In such circumstances the CEPU submits that the AIG's claim to be maintaining the status quo needs to be treated very much with caution. Further, we say that the AIG has brought no evidence of the employers and employees actually affected by the proposed changes in terms of their number or the likely effect of those industry participants.

PN462

We submit such material would be necessary if this tribunal is to consider whether a variation of the kind sought by the AIG is necessary to meeting the award modernisation objective. So in summary we agree that there is uncertainty surrounding the current operation of clause 44.2. Indeed we say that it may have been made in error. We submit, however, that there is not sufficient evidence or other material before the tribunal to warrant the AIG's solution to correcting that uncertainty or error.

PN463

Other solutions to clarifying the position of the industrial parties are available and would not alter the payment of penalty rates or create unfairness as between employees. Principally the tribunal could amend clause 44.2 to make it not inconsistent with the NES but not so as to remove penalty rates. One approach to doing this would be to delete clause 44.2 and we would support that. Another might be to amend the clause so that it does not apply to the extent that it would remove the public holiday under the NES.

PN464

In any case the CFMEU submits that the AIG has not made out a sufficient case to show that it is necessary to meet the modern award objective that penalty rates be removed from Christmas and other NES public holidays. The CFMEU otherwise relies on the submissions of the other unions who have spoken in this matter, including the ACT, if it pleases.

PN465

SENIOR DEPUTY PRESIDENT ACTON: Thank you, Mr Kentish. I'll mark the documents that Mr Leszczynski handed up, this document which is in regard to Insurance Industry Award 1998, as FSU1

EXHIBIT #FSU1 DOCUMENTS REGARDING INSURANCE INDUSTRY AWARD 1998

PN466

SENIOR DEPUTY PRESIDENT ACTON: Mr Gregory?

PN467

MR GREGORY: Your Honour, sorry to interrupt you again, if I could just - I have another commitment elsewhere, if I could ask to be excused, the CCIWA has prepared witness submissions in response to the applications by the ANF, the LHMU, and the AMWU and I'm happy to provide those to the other parties that rely upon those witness submissions. I also note that Mr Maxwell appears to have made an application somewhat on the run in terms of variations to the Building and Construction Award. I simply ask that appropriate industry organisations

with a particular interest in that award be provided with the opportunity to respond to that particular application he seems to be making.

PN468

SENIOR DEPUTY PRESIDENT ACTON: He has invited us to act on our own motion I think.

PN469

MR GREGORY: Well - - -

PN470

SENIOR DEPUTY PRESIDENT ACTON: I'm not sure if we've got power to do so, but - yes.

PN471

MR GREGORY: The tribunal pleases.

PN472

SENIOR DEPUTY PRESIDENT ACTON: I'll mark those two other WACCI submissions in respect of AM2010/232 and 244 as - the one in respect of 232 and 244 as WACCI2 and the one in respect of AM2010/238 and 239 as WACCI3.

EXHIBIT #WACCI2 SUBMISSIONS IN RESPECT OF AM2010/232 AND 244

EXHIBIT #WACCI3 SUBMISSIONS IN RESPECT OF AM2010/238 AND 239

PN473

MR GREGORY: Thank you.

PN474

SENIOR DEPUTY PRESIDENT ACTON: Who's next? Mr Smith?

PN475

MR SMITH: Your Honours and Commissioner, I'm happy to respond to the points made about our application even with our view on the union applications and the other matters. I'll try to be as brief as possible. Firstly, your Honour, you asked a question about the earlier version of the NES and during the break we copied the NES discussion paper which I would like to just hand up and deal with that question that you asked.

PN476

Your Honour, as I understood the question there was a query about whether when the full bench made the modern manufacturing award during stage one that the version of the NES that it was looking at was in any material respect different from the final one in a way that would have influenced on clause 44.2. If I can take the bench to the second last page of that document, VII - actually VI, VII, VIII. On the issue of the public holidays clause on VII - sorry, not VII, XVII, sorry, XVII.

PN477

SENIOR DEPUTY PRESIDENT ACTON: XVII is it?

PN478

MR SMITH: Yes, it's the second last page. As you will see clause 47 - or section 47 of this draft NES had a clause which determined which days were the public holidays. It had a list of the public holidays similar to the one that is now in section 115. It had a clause B, which is similar to what is now 115(2), this is the state substitution provision, even though it's buried within what is now 115(1).

PN479

Then it has another provision which talks about the additional days which is similar to what is now 115(1)(c) - sorry, 115(1)(b). What it doesn't have is a provision like section 115(3) and (4), which are the enterprise substitution provisions and I can explain to the bench the background to that. When this came out AI Group made detailed submissions and met with politicians and departmental officials about the NES and we lobbied strongly for substitution provisions to go on there that would allow clauses to go into modern awards permitting substitution at the enterprise level, either by agreement with the individual or the majority.

PN480

Those provisions went in 115(3) and in 115(4) there was a provision put in about non-award payments. They were very much put in in response to submissions from AI Group and other employer groups and we would submit that there's nothing in the version of the NES in the discussion paper that differs from the final version in a way that would influence any of the interpretations that we have been debating today. We would also like to highlight some paragraphs in this discussion paper. In particular paragraph 246, which is on page 45 of the discussion paper.

PN481

SENIOR DEPUTY PRESIDENT ACTON: What's the date of this discussion paper?

PN482

MR SMITH: This came out in - I'll just see, your Honour, the closing date for submissions was April 2008, so it came out early in 2008.

PN483

SENIOR DEPUTY PRESIDENT ACTON: Subsequent to this there was an actual set of national employment standards - - -

PN484

MR SMITH: Okay.

PN485

SENIOR DEPUTY PRESIDENT ACTON: - - - pre-Fair Work Act. They were issued - - -

PN486

MR SMITH: The exposure draft of the provision?

PN487

SENIOR DEPUTY PRESIDENT ACTON: No, they were issued on 16 June 2008.

PN488

MR SMITH: Okay. Would your Honours question that there was something in that document that - - -

PN489

SENIOR DEPUTY PRESIDENT ACTON: Yes.

PN490

MR SMITH: - - - goes to this? Was it the same about the - where - - -

PN491

SENIOR DEPUTY PRESIDENT ACTON: It's the same point and that form of the national employment standards issued on 16 June 2008 has this provision about substitution. The difference between the form on 16 June 2008 and the final form in the Fair Work Act is that it provides, as at 16 June 2008, that a modern award may substitute as opposed to - and it goes on to say, "Or provide for substitution of." It seems that in the Fair Work Act the second part was picked up but not the first.

PN492

MR SMITH: Sorry, I misunderstood your question. But in response to that I guess we would simply rely on our earlier submission which is that, notwithstanding that change that has occurred, that doesn't mean that the submissions that we have been making which are entirely about penalty rates, as opposed to substituting the days have any less force. Because this clause, in our submission, isn't a clause that leads to substitution and public holidays, it is a clause that deals with the penalty rates payable on public holidays, which we say is very much a matter for award.

PN493

In paragraphs 246, 250, and 262 of that discussion paper it makes it very clear that the issue of penalty rates for working on a public holiday is an issue that is the responsibility of this tribunal and modern awards. The issue in many ways goes to the number of that point that was raised by Mr Maxwell about the FWO's advice, where in that preliminary opinion and it - I stress again it was a preliminary opinion for discussion - for the purposes of a discussion at a meeting. There's a view put that through the use of the word "observe" it was somehow or other seeking to change the day that becomes the public holiday for the purpose of the NES.

PN494

As our letter, which is in annexure C, points out, that is not the intent of that clause. That's the issue of ambiguity between that interpretation and the alternative one that was just about the issue of penalty rates. Your Honour also asked a question about how many of the pre-modern awards have a similar clause to clause 44.2. During the lunch break we had a look at about 15 of them and started with the state NAPSAs and so on, of those 15 about half of them have a clause like 44.2 and about half of them don't.

PN495

But there's 150 industry awards that were replaced as you know, your Honour, by that award and we suspect that's a pretty fair sample, so it would take some time to dig through them all. But there are - in short, there are plenty of the state NAPSAs that have an identical clause, not including the New South Wales one,

but a number of the other state NAPSAs. With the Queensland Government's submission, they made a point that we need to identify two competing interpretation and we believe that we have and therefore we meet the requirements for establishing ambiguity and uncertainty.

PN496

Those two competing interpretations are the ones set out in annexure C in quite a lot of detail where the FWO's preliminary view and our view are set out there, including summarised in dot points. The Queensland Government also made the point that it's the effect of the clause, not the clause, that's ambiguous. With respect to the Queensland Government we can't accept that point of view. If the clause is having all of these uncertainties and ambiguous effects then in our view the clause is uncertain itself.

PN497

But we don't accept that the clause itself is not ambiguous and uncertain, we think it's extremely obvious that it is by virtue of the fact that we're all here today with so many different debates going on about what that clause means. The ACTU sought the removal of the clause and supported the inclusion in the manufacturing award, and other awards, of this clause that deals with a special penalty rate for Christmas day. We would argue strongly that that position is completely inconsistent.

PN498

Both clauses are about special penalty rates for public holidays over the Christmas period and the nature of the clauses, in our submission, are exactly the same. They provide special arrangements for public holidays and Christmas in terms of penalty rates, and it is completely illogical, in our submission, for unions to argue for one and to argue that the other clause doesn't belong in the modern award system, and it would be extremely unfair on employers to remove clause 44.2 and to keep the other clause, because one of them is a clause about special penalty rates for Christmas that benefits employers, and the other one is a clause about special penalty rates at Christmas that benefits employees.

PN499

The other point that we'd like to make in response to the ACTU's submissions is, we take a dim view of the ACTU arguing for the removal of that clause when in the negotiations for the contract call centre industry, we reached agreement with the ACTU and all the ICT unions involved in that sector to include that clause, and jointly submitted it to the tribunal.

PN500

The ACTU also made some comments about allegedly tendering some confidential materials. Now, we advise the tribunal that we would not have tendered the FWO's preliminary opinion if it were not for one of the unions advising us that they intended to tender it, and therefore obviously the bench needs to not only see the middle bit of the picture, which is the preliminary opinion, you would need, we believe, to see what the opinion was about in our original document, and we very much wanted, if you were going to see the preliminary opinion, to see what our opinion is about the preliminary opinion. So we absolutely refute any suggestion there's been any breach of confidentiality. We take great pride in our record in that respect, and there's nothing in any of the

materials that we've presented that are not in the preliminary opinion that the unions intended to tender themselves.

PN501

DEPUTY PRESIDENT IVES: Well, isn't that a bit of a submission, Mr Smith, that if somebody else is going to do something improper and you find out about it, then you lob in and do something improper before that?

PN502

MR SMITH: No, your Honour, because in this case we advised the FWO before these proceedings of the situation, and this occurred several days ago, and the FWO are well aware that that correspondence was being tendered in these proceedings. So we just make the point that we don't think there has been any breach of confidential materials. This is a debate that very much has a public interest, and for the unions, mainly the ACTU, that seem to point this out, we think they have misunderstood the situation.

PN503

With the AMWU's position, very helpfully, the AMWU has set out the competing interpretations in similar terms to what we've set out. So we think the points that were made about those competing interpretations supports our view about ambiguity and uncertainty. We recognise the AMWU's position of not seeking the removal of that clause, because in paragraph 67 of our written submission on page 33, the clause from the joint draft is reproduced, and as the bench will see, it has agreed on it. So we take, again, a dim view to the LHMU, the CFMEU, the CEPU, all the other unions that were involved in the negotiations and participated in a joint draft, to come along here to day and seek the removal of an agreed clause. We recognise that the AMWU at least has not done that.

PN504

On that issue that your Honour raised about the travel allowance, we thank you for raising that. I just forgot to mention it, it was a relatively minor point, but the reason for the change was to align it with the list in the other clauses. One other point that the AMWU was that rather than going to the FWO, we should have gone to the unions for a discussion about how this clause should be interpreted. You know, we're always happy to talk to the unions, but we, like all other employer associations at the moment, have regular discussions with the FWO about modern award interpretations. We have a call centre, as does the FWO, and we're all trying to get parity about how modern awards should be interpreted, in some cases with quite complex provisions, like the transitional arrangements.

PN505

So we don't think there's anything untoward in the discussion that we had in good faith with the FWO. As soon as it became clear that we were going to make this application, we rang the ACTU and the AMWU in particular and alerted them to the fact that we were going to make the application before we lodged; only just before we lodged it, we recognise, but time was getting away before Christmas.

PN506

The AMWU also said that it had started to go through how many of those 150 or so pre-modern awards that are replaced by the modern award have this provision in. We were able to identify the Tanning Award, the Optical Employees Award, one of the state NAPSAs, and the Christmas Island Building and Construction

Award, which of course is a construction award, not a manufacturing award anyway. But that's three out of 150. The bit about triple time being in a number of the other awards, that of course is a provision that's subject to the take-home pay protections and other arrangements. So we don't accept that it has any alignment to this issue. This is a clause that does not commonly appear, it is extremely aware in manufacturing awards.

PN507

The LHMU supported the position of the ACTU, and I made some comments about their position. Mr Maxwell from the CFMEU talked about our application only providing for substitute days in certain circumstances, and used the example of people who work Tuesday, Wednesday, Thursday, Friday and Saturday, or Wednesday, Thursday, Friday, Saturday and Sunday, and alleged that it wouldn't be a case where workers would automatically get a substituted day.

PN508

But that is an argument about clause 44.4, as we see it, and that clause 44.4 in its version in the Metal Industry Award was a clause that AI Group and the AMWU negotiated during the award simplification process in 1998. Myself and Julius Rowe negotiated the clause, and of all the clauses in the Metal Industry Award, that one was the subject of the most negotiation. It clearly says that a substitute day is not provided for where the day off in the cycle occurs on Saturday or Sunday, so it's a different argument, and no-one is suggesting, as we understand it, that 44.4 should be removed.

PN509

I've talked about the issue of "observe", and I just reiterate the points that Mr Gregory has made about the CFMEU's request that you act on your own motion and vary the building award. I mean, in admission to AI Group, the tribunal is aware there are many employer associations and many employers large and small involved in the building industry, and it's completely wrong to be seeking a variation to a major award like that on the run without going through the appropriate process.

PN510

The CEPU has made some submissions that we take exception to about the two classes of employees. We don't accept that that characterisation is right. To the extent that there are two different categories of employees, they're the same categories that have always been there with the way this clause has always operated. I think the point was made that this would, with the second class, allow employers to direct employees to work on, say, Saturday the 25th without any penalty rates.

PN511

Now, there can be no direction because the NES section 114 applies, so it's about a reasonable request, not a direction. If they do work, they will get the Saturday penalty rates, being either time and a half all day or time and a half for three hours and then double time, depending upon whether it's a normal shift or overtime on the 25th, and they will get the double time and a half on the 27th. Those are the submissions we make in response to the matters with our application.

PN512

If I can now turn to the AMWU's application briefly. Now, as we point out in our written submission, we believe that the application in its original form seems to be based on an acceptance that our interpretation is correct because it builds the 50 per cent penalty on the normal Saturday and Sunday rates. We see it as an attempt to impose new and costly entitlements upon employers. It's not supported by any evidence, and like all these applications, it's made at the very last minute before Christmas, where employers do not have time to adequately respond or even become aware of these proceedings.

PN513

We've gone through in our written submission, and I won't go through it all, the various cases which have set the principles for varying the modern award. We believe it's a ridiculous proposition to say that this variation could be pursued under section 160, so it must be pursued under section 157. I think that's what the AMWU said they weren't relying on anyway. That then requires that it be necessary to meet the modern awards objective, and all the various cases relating to the modern awards objective are set out there, and we say the application doesn't come anywhere close to meeting the burden of proof established by all of those cases.

PN514

There seems to be a couple of decisions that the AMWU relies on: the award simplification decisions in hospitality, the penalty rates decision in particular. There is an error, in our submission, on page 43. The two print numbers there should actually be print L9187 rather than 4534 in terms of the reference to that public holidays decision relating to non-standard arrangements. But as the bench might recall, the Hospitality Industry Award simplification proceedings and the metal industry proceedings took place for a couple of years at a similar time. They were both major exercises.

PN515

To be relying on developments in the hospitality industry we think is not appropriate, because for a start, as set out in the Hospitality Industry Award simplification decision, the LHMU alleged that - I think it was 47 per cent of employees in that industry are casuals, whereas on the AMWU's exhibit today, it's more like 13 per cent in manufacturing. So they're very different industries. Also, in terms of the public holidays decision, as the bench in that case pointed out, they say:

PN516

> *We acknowledge the diversity of practices which have been in place and anticipate the principles pertaining to non-standard work arrangements will be applied sensitively and flexibly with due regard to special circumstances.*

PN517

We see the manufacturing industry as a very different industry to the hospitality industry, for example. Now, of course, we're talking about decisions 15 years ago, and there are some changes. But we're not suggesting that those decisions don't have some relevance. They certainly have relevance in terms of this clause that we are seeking to clarify today. That bench did go on to say that:

PN518

We expect that parties will bring to the hearings proposals which are consistent with our decisions.

PN519

I'm sure that that bench didn't envisage that it would take the unions 15 years to bring to the tribunal their proposals. The unions did not raise this clause in their discussions in 96, 98, they didn't raise it discussions in 2008-2009, and we agreed on a package of public holiday provisions that we put to the tribunal, and as I've said, we don't think it is appropriate that most of the unions come along today seeking to remove a clause that was part of that package.

PN520

One of the key general principles, as we're all aware, that the tribunal has adopted is to base the modern award on the provisions of the key pre-modern awards and in this case the pre-modern awards in almost all cases and certainly in all of the major pre-modern awards, it appears that this 50 per cent extra penalty was not part of the awards. If I could just very briefly deal with the other applications. Perhaps dealing with a few of the ones that we have a lesser interest in first.

PN521

The FSU application. As we see it, this was made only three working days ago. Employers have not had time to respond. We have a large membership for example in the labour hire sector and the finance sector is a very big industry for the labour hire industry. No-one has had any time to consult with the employers. In the case of labour hire companies they will have contracts in place that have already negotiated the prices for providing labour and it's simply unfair to vary an award at such extremely short notice without going through a fair process and we don't blame the tribunal here of course.

PN522

It is an application made by the FSU three working days before this hearing and they're putting up information about companies that don't even presumably know that these proceedings are on and haven't had time to respond, and we see that as very unfair to proceed to vary the award in those circumstances. The Security Award is the one that we'd like to make a few comments on in particular. With regard to the ANF application and the LHMU Cleaning Award application, we'd simply rely on all the arguments that we've put in relation to the AMWU matter. But if I could just tender a copy of a written submission prepared by Chubb who we're representing today.

PN523

SENIOR DEPUTY PRESIDENT ACTON: Certainly. I'll mark the submission by Chubb as Chubb1.

EXHIBIT #CHUBB1 SUBMISSION PREPARED BY CHUBB

PN524

MR SMITH: Thank you, your Honour. Again we will rely on our arguments that we have made in the AMWU matter in relation to this application, including the fact that employers have had little time to respond to these claims and other employers will be making their submissions in a moment. But Chubb is one of the largest security companies in Australia and they point out in their submission

the lengthy negotiations that took place around the Security Industry Award and the fact that it would be completely inappropriate in their view to impose this huge additional cost on their organisation. Of course there are a large number of security guards who do need to work over the Christmas/New Year period. We have also gone and had a look at the various NAPSAs and of the various NAPSAs that we have looked at, which I understand there are 10, we found only 2 that contain this clause. So most of the pre-modern instruments don't include the clause. If the tribunal pleases.

PN525

SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN526

MR DELANEY: Your Honour, I'd like to speak to matter number 239. It's probably appropriate following Mr Smith that (indistinct) make its comments about the application by the LHMU. We presented our submissions to FWA on 16 November 2010 and I don't intend to go through those. I'm not going to read it onto transcript. It's there. I would like to make some comments about the LHMU's application. The first is that this is not a matter about ambiguity or uncertainty. The award clause dealing with public holidays in the Security Services Industry Award 2010 is clause 26.1 and it merely states that public holiday entitlements will be as per the NES, which is what they are.

PN527

Mr Smith alluded to the fact that the pre-reform awards and the pre-reform NAPSAs did not include a clause which the LHMU proposes. In fact the two New South Wales awards, the Security Industry New South Wales Award, the federal award, and the Security Industry State Award, the NAPSA for New South Wales, make no reference to public holidays falling over Christmas in the way that the LHMU would like it to be. The Security Employees Victoria Award in fact was probably the newest made award inasmuch as there was a work value case in 2005 with a decision handed down in early 2006.

PN528

That award at clause 26.2 and the Northern Territory award, the ACT award and the West Australian awards all deal with Christmas Day falling on a Saturday or a Sunday having a holiday in lieu on the 27th, Boxing Day falling on a Saturday or a Sunday having a day in lieu on the 28th, and New Year's Day or Australia Day falling on a Saturday or a Sunday being observed on the next Monday. Now, if this award were to be varied to take into account some problem with public holidays - and we do not suggest that it is varied. Our submissions are that it should remain as it currently is.

PN529

If it were to be varied though, it would be appropriate for it to be varied in terms of what was in place pre-modern award or NAPSA, not in a test case which has never been applied to the security industry even though it dates back to 1995. I was handed I think by Mr Gregory an application made by the Chamber of Commerce and Industry of Western Australia in response to this matter and I would like to say even though we've only had a preliminary glance at it, it appears to support what we say and we would support what it says.

PN530

The only other matter that I would like to raise is that I do have to agree with the LHMU inasmuch as security is a 24-7 365 day a year proposition. Our members have employees who get more involved perhaps at Christmas and New Year than they do in other parts of the year where there are large gatherings, large functions and so on. People who enter the security industry understand that they're going to be working for the most part shift work and when we have discussions with the LHMU about the modern award all of these matters were canvassed. The only matter that wasn't canvassed was the public holiday matter. We left it to the full bench to determine that for the modern award. That decision has been made and we suggest it should remain. Thank you.

PN531

SENIOR DEPUTY PRESIDENT ACTON: I'll mark the submission you filed, Mr Delaney, as ASIAL1.

EXHIBIT #ASIAL1 OUTLINE OF SUBMISSIONS

PN532

MR DELANEY: Thank you.

PN533

SENIOR DEPUTY PRESIDENT ACTON: Mr Rahilly.

PN534

MR RAHILLY: Thank you, your Honour. Your Honours, Mr Commissioner, my client has provided electronically an outline of submission and I seek to tender that.

PN535

SENIOR DEPUTY PRESIDENT ACTON: I'll mark that outline as Agedcare1.

EXHIBIT #AGEDCARE1 OUTLINE OF SUBMISSIONS

PN536

MR RAHILLY: Your Honour, it's not my intention to take the commission to that in detail, or indeed at all. I do want to make a couple of observations. The thrust of the submission is that we oppose the application made by the ANF to include the provision containing a loading of 50 per cent for the Christmas Day on a Saturday or Sunday circumstance. Make the point though the application is made pursuant to section 158 of the act. The submission deals with that and suggests that the commission or the tribunal can't be satisfied that making the determination is necessary to achieve the modern award's objective.

PN537

However through the course of the proceedings today many of the unions have sought to have a bit each way if you like by relying on section 160 and in doing so they seem to suggest that what is being sought is the correction of an error. Now, the explanation of what the error is in most cases, if not all, is that the provision was not included in the modern award by reason of oversight. It is submitted with respect that it stretches the imagination somewhat to think that oversight equals error in the context of section 160. It's my submission with respect it is a long way short of what is intended by the word "error" in section 160.

PN538

However I noted with interest the document provided by the HSU which your Honour marked as HSU1 just prior to lunch. The HSU says that it believes that the omission of the public holiday test case provision was a drafting error in the creation of the modern award. Now, with respect to that we say (a) it is a very different proposition to the one that the ANF makes, but (b) if the commission were to look at paragraphs 5 through 8 of my client's submissions it will be seen that in the drafts that were proposed in the making of the modern award this provision did not appear, so it can't be a drafting error. It's submitted with respect to the ANF that it can't be an error by reason of oversight.

PN539

As a matter of background, the last time that Christmas Day fell on a weekend was in 2004 when it fell on a Saturday and 2005 when it fell on a Sunday. That's not all that long ago and given that the modern award process began I think it was in 2008, it was only three years prior to that. However, last year, 2009, Boxing Day fell on the weekend. Now, one would have thought that that circumstance would have raised the antennae of the respective unions right in the middle of the modern award proceedings but, no, nobody - well, sorry. Nobody with the exception of the FSU, at least here today, put a proposition that this provision should be put in the modern award and as your Honour pointed out that proposal was obviously not accepted by the bench that made that award. In other words it was rejected. Now, we submit with respect that that's what should happen to this particular application, indeed to all of them. With respect if the commission pleases, they're the submissions my client - - -

PN540

SENIOR DEPUTY PRESIDENT ACTON: Thank you, Mr Rahilly. Ms Frenzel?

PN541

MS FRENZEL: Thank you, your Honour. The BSCAA will be putting verbal submissions, albeit brief ones, about the application made by the LHMU to vary the Cleaning Services Award regarding the public holidays issue. Can I firstly indicate, as the bench would be pretty well acquainted with this, that the Cleaning Services Award has or was extensively built off the Building Services Victoria Award 2003 because it was seen as being the most appropriate award to build the modern award off and in fact was the only award which we say properly fixed minimum rates.

PN542

The Building Services Award was simplified in 2003. The provision that the LHMU is seeking now to insert into the Cleaning Services Award was not a feature of the Building Services Award either prior to simplification or post-simplification. It's not been a provision which has been a feature of the contract cleaning industry generally. The claim by the LHMU, and this is conceded by my friend, Mr Swancott, is of a very limited nature and very narrow in its scope, but it is a claim for an additional penalty. There's no escaping that fact, and it is not a common feature and it's not a provision of general application across the country. Cleaners do work on public holidays, Saturdays and Sundays. They are shift workers; perhaps not so much as intensely over the festive period as security employees, but nonetheless there will be cleaners rostered to work.

That's a fact of life, but they were rostered to work in 2003 as well and they were rostered to work when the Building Services Award was made in 1994.

PN543

The matter that is being ventilated by the LHMU was not raised during any of the award modernisation proceedings either with the employer parties or indeed before the tribunal, and now we are told that the lack of the provision in the award is an error. Well, it can't be an error, in my respectful submission, if it wasn't a feature of the industry. There are two former state NAPSAs that had that position but they were the only two, and the main award agreed between the parties as being the building block or the foundation of the modern award had never had that provision. Now, with respect to alleged disadvantage to employees, the LHMU is free, in my respectful submission, to make a take-home pay order application to protect the interests of employees who would have had that entitlement with respect to Queensland and South Australia if they were employed prior to 31 December 2009. No-one has made much mention of that fact but the fact is that that is available to them.

PN544

We say that the tribunal should not confer a new right or obligation on the industry when it has not been a matter which has had common application within it previously and it's not as a consequence therefore of an error. There has also been submissions about the swings and roundabouts, if you like, or the phasing up and down of award provisions of part of the modernisation process. As his Honour Ives DP is well aware the Cleaning Services Award operates somewhat differently to the others. It operates on the basis of saved and transitional rates. Those saved and transitional rates, well, particularly the saved rates, come at a cost to the cleaning industry. We accept that. We accept that we have adopted a different approach. We did that for a variety of reasons, not for the least being that the phasing down would have caused us considerable grief with respect to contract pricing and the like.

PN545

It also provided however a tangible benefit to employees which is not common across the other awards and that is those employees as at 31 December 2009, if they were entitled to a higher particular saved rate they continued to get it. So we didn't have the transitioning down. That's a factor of cleaning and it's a factor that the bench should take into account for the principal reason that this claim has a cost attached to it. So if we have a higher saved rate sitting in this award for Saturday work then that rate will be paid. If we have a higher saved rate for public holiday work that rate will be paid. It won't be the transitional phased rate. It will be the rate the award prescribes, and that sets this award in a different place to the others.

PN546

We don't mind the way the award operates. There are some debates between the parties from time to time, but the fact is with respect to this award it is different. It operates on the basis of saved rates, we acknowledge that, but we do not acknowledge that a provision which is now a new claim should increase the burden of cost on the industry at short notice. I might also indicate that with respect to trying to turn the Hospitality Award into cleaning, the Hospitality Award, as I understand it, was at stage 1 of the award modernisation process and

cleaning was at stage 2. In fact I think also, just as an aside, security was a stage 1 as well.

PN547

The LHMU had the opportunity to raise this provision with the industry parties, and I'm talking specifically here about cleaning, at the time and it didn't do that, and it didn't do that, we say respectfully, because they knew that the clause did not have general application in the contract cleaning industry. For all those reasons, if the tribunal pleases, we would ask that the tribunal reject the application.

PN548

SENIOR DEPUTY PRESIDENT ACTON: Thanks, Ms Frenzel. Mr Trindade?

PN549

MR TRINDADE: If the tribunal pleases the Spotless Group is one of the largest employers in the cleaning industry and has only had one direct interest in the application made by the LHMU in relation to the Cleaning Services Award. Whilst we haven't always agreed in relation to matters of award modernisation my learned friend, Ms Frenzel's submission on behalf of the BSCAA, we are simply at idem on this one, because - - -

PN550

DEPUTY PRESIDENT IVES: He's going to adopt your submissions in a minute, Ms Frenzel.

PN551

MR TRINDADE: And which, as your Honour Ives DP would know, that's a relatively unusual matter in the cleaning area where we have had some interesting discussions. What we would say is this: this is an application under section 160 of the act. We understand it's not seeking - actually we don't seek to say that there is ambiguity or uncertainty in the modern award. They say effectively it is in error. We find that submission to be incredible and one that should not be accepted. This is a provision that they say is in error, and essentially the way I paraphrase it, and I may be doing a disservice, is they say, "This is a common test case standard. It's almost so obvious it goes without saying and it was just forgotten." If so they forgot it when they did the Building Services (Victoria) Award in 2003.

PN552

My friend, Ms Frenzel, points out it was her who was involved in that. They forgot it again 2004 and 2005 when Christmas Day fell on a weekend. They forgot it then when the Cleaning Services Award was being done through the extensive award modernisation process, but they remembered it well enough to remember it to put it in at stage 1 in the hospitality award, which they were intimately involved in, and so they had this amazing sort of revelation of memory where it suddenly became something that was included in an award in hospitality and, yes, it's in there, it's obvious it has to be in there, and then they went back to the feud of this slipping completely into the deep dark recesses of the mind. That's critical to credibility.

PN553

What we would say with respect is that this is clearly not an error. It has not been an industry standard in the cleaning. The LHMU have pointed to two NAPSAs

which have that provision; an extra payment in respect of Christmas Day where it falls on a weekend and then is substituted. They quite rightly though point to the Building Services Award notwithstanding that it was the base award which the modern award was based upon and all parties to the discussion and the consultations before the commission as it then was in relation to the making of the modern award, agreed that it was the basis on which the modern award would be founded, and it wasn't a matter of law. It wasn't in any of the other awards and so therefore in particular in Victoria and the ACT and the Northern Territory, if the tribunal were to accede to the request of the LHMU, it would just simply be adding a direct cost onto employers at a very late stage.

PN554

There was a submission made before in relation to the Anzac Day case which some of us remember perhaps fondly or not so fondly, the Anzac Day case. In that decision in the Anzac Day case the full bench specifically addressed what was a matter raised and that was that it was an application made at a very late stage and it was one which would cause a direct cost to employers and which employers would not have any ability to take any methods or steps to avoid or to mitigate or minimise those costs, and it was a matter that the tribunal took into account at that stage in considering the application that was made. So what we would say is that this is simply an additional cost.

PN555

We also say that there was a lot of adopting of submissions going on. We have been guilty of it ourselves and we have done so too in order to try and avoid the repetition of submissions, but from the union's side of the fence there's simply a lot of adopting of submissions and the LHMU adopted the submissions that were made by the ACTU and by the AMWU including, we would assume therefore, the submission that says, "Look, we recognise and we understand that parliament has reserved to the states the right to determine additional days or substitute days for public holidays." They respect that right and they respect that that has been reserved to the states.

PN556

Then what effectively they are saying in this application is, "We respect that right but if you don't like the outcome of it, well, they have also said that they're off lobbying government and that. That lobbying has achieved a degree of success with state governments, but they're also then going to come to the tribunal and seek a variation to the award," not on the basis of section 157, to try and mount an argument that it's necessary, and we would say it's not necessary, but to try and mount an argument that it's necessary in effect to the award modernisation principles. They have come under the guise of saying it's an error and we would say that's including (indistinct) not something that the tribunal should allow, and people overuse the floodgates argument, but it's a legitimate argument to raise in this case, that if you were to allow this as an application to - as to fix an error then effectively you would be saying that the whole of the award modernisation process can largely be reopened and you would be ignoring the full bench's previous decision which said, "Really you need to be looking at substantive merits or substantive change that would give rise to an application of this sort," which hopefully most parties, and I have certainly looked at this matter on behalf of the parties, and formed the view that that was a very strong indication from the full

bench that you don't want the floodgates reopened. The parties should have addressed these things on award modernisation, and if they didn't the awards essentially should be as they are unless there has been some substantial change, and that's what we say.

PN557

We say we don't like the modern awards in their entirety but we reflect on the fact that it was an extremely difficult exercise undertaken by a large number of parties and Spotless, as a large employer, is engaged in that and put considerable effort and resources into assisting the tribunal with that process. It shouldn't just simply go undone on a case-by-case basis because people think, "Well, here's something that we might have a go at and here's an extra claim in it." We agree with the sentiments expressed previously by the full bench, that it leads to the substantive matter. So in those circumstances we would say the tribunal should reject the application made in relation to the Cleaning Services Award. Unless there is anything further we can assist with, we have made the submissions on behalf of the Spotless Group.

PN558

SENIOR DEPUTY PRESIDENT ACTON: Thank you. Is there anything in reply?

PN559

MR LESZCZYNSKI: Just a quick comment, your Honour. IAG has stated, and obviously I'm putting this in my own words as I don't have the transcript at the moment, but a modern award is largely based on the major awards that were its predecessors, and they claimed that this justifies maintaining the current clause 44.2 in the Manufacturing Award. Now, I won't make a submission on whether that is the case or not. However as I have indicated today the Insurance Industry Award, which contained the public holiday clause we proposed and put in, put in the Modern Banking Finance and Insurance Award, was by far the major award in the banking finance and insurance industry.

PN560

It would thus seem that IAG is actually supporting our application, otherwise it would seem a little bit hypocritical to argue that as the major predecessor awards to the manufacturing award contained the wording in clause 44.2, "This justifies maintaining clause 44.2 and the amendment (indistinct) yet clause 26.10 from the Insurance Award should not be included in the Modern Banking Finance and Insurance Award 2010," even though the Insurance Industry Award was the major predecessor award to the modern award. That's what (indistinct)

PN561

SENIOR DEPUTY PRESIDENT ACTON: We will reserve our decision. We will now adjourn.

<ADJOURNED INDEFINITELY [3.58PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #AIG1 SUBMISSIONS OF AUSTRALIAN INDUSTRY GROUP PN29

EXHIBIT #QUEENSLAND1 OUTLINE OF SUBMISSIONS PN99

EXHIBIT #QUEENSLAND2 HOLIDAYS ACT 1983 ..... PN153

EXHIBIT #QUEENSLAND3 EXPLANATORY NOTES TO HOLIDAYS AMENDMENT BILL 2010 ..... PN154

EXHIBIT #WACCI1 WACCI SUBMISSION PN202

EXHIBIT #AMWU1 AMWU OUTLINE OF SUBMISSIONS PN267

EXHIBIT #AMWU2 DRAFT DETERMINATION IN RESPECT OF LOADING SOUGHT PN271

EXHIBIT #AMWU3 GRAPH OF PATTERNS OF WORK PN272

EXHIBIT #AMWU4 CASUALISATION OF AUSTRALIAN MANUFACTURING PN273

EXHIBIT #LHMU1 LHMU SUBMISSIONS PN340

EXHIBIT #LHMU2 REVISED DRAFT DETERMINATIONS IN RESPECT OF PLANNING PN340

EXHIBIT #LHMU3 REVISED DRAFT DETERMINATIONS IN RESPECT OF SECURITY PN340

EXHIBIT #HSU1 LETTER RECEIVED FROM HSU PN390

EXHIBIT #AWU1 LETTER FROM AWU PN391

EXHIBIT #FSU1 DOCUMENTS REGARDING INSURANCE INDUSTRY AWARD 1998 ..... PN466

EXHIBIT #WACCI2 SUBMISSIONS IN RESPECT OF AM2010/232 AND 244 ..... PN473

EXHIBIT #WACCI3 SUBMISSIONS IN RESPECT OF AM2010/238 AND 239 ..... PN473

EXHIBIT #CHUBB1 SUBMISSION PREPARED BY CHUBB PN524

EXHIBIT #ASIAL1 OUTLINE OF SUBMISSIONS PN532

EXHIBIT #AGEDCARE1 OUTLINE OF SUBMISSIONS PN536