TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1053288-1

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
COMMISSIONER LEE

AM2014/305

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/305)

Sydney

10.10 AM, WEDNESDAY, 13 APRIL 2016

Continued from 12/04/2016

PN27207

JUSTICE ROSS: Mr Wheelahan.

PN27208

MR WHEELAHAN: Thank you, your Honour. With respect to the proposition put regarding a section 114 type provision in the awards, the employer parties would like until 29 April which also aligns with the date for the update to their document dealing with the public submissions, and then the union parties thereafter a further 14 days to 13 May for both those items.

PN27209

JUSTICE ROSS: I might get you to just submit some consent directions that deal with those so we can publish them. It might be convenient to raise another issue that might fit within that timeframe. When you review the material there's a clear contest about what took place during the award modernisation proceedings and to put it, I suppose, in a broad sweeping way, the employer interests are contending that while really penalty rates weren't considered at all and what took place was a critical maths type exercise, where you grant the award with it seemed the pre-eminent award in the area, and that was the one that came out. The union submissions contend that there was a detailed consideration - might not be put quite in those terms - and that there were either testimonials or statute declarations in support of particular penalty rate contentions.

PN27210

It occurs to us that there are two ways that we can deal with that. We can go back and look at all the material but there's a risk in that that we might be looking at material that you haven't referred to, or we might be incorrect in gathering some of that material. The major parties here clearly have that material because you've referred to it. So what I want to put to you, and perhaps you could discuss it during one of the breaks. We'll take a mid-morning break at a convenient time in Mr Moore's submission.

PN27211

What we'd be assisted by is this, that if you take the hospitality award just as an example, but the same proposition applies equally to the other awards, and you might want to add to this list of material. But it seems to us that we would want to have a look at the exposure draft, the award modernisation request as it applied to that particular - the modernisation of that particular award, the submissions that were made in the proceedings, any transcript in relation to the modernisation of that particular award and the Commission decision.

PN27212

It does seem that it was dealt with largely by submission. The submissions may have attached some material, so on its face it seems that having a look at that material we would then be able to make a decision about which of the propositions we favour; either the critical mass or the detailed consideration, or somewhere in the middle. But I think it would be better if the parties jointly put that material together and then submit it.

PN27213

Now you've already said what you want to say about the process but in the event that something new comes in and I wouldn't want to foreclose an opportunity for you to - I don't want you to repeat essentially what you've already put about that. But if there's something unexpected in the material that you weren't previously aware of that you want to say something about, I wouldn't want to foreclose that opportunity. So can you have a think about that?

PN27214

The alternative, Mr Moore, and I'd marked up a series of fairly tedious questions to ask you about that - can you produce a copy of that submission or et cetera - but I think that's a bit piecemeal, and each of you, that is, both the employer and union parties have understandably enough sort of selectively quoted from different aspects of the material and the decisions, and we're going to want to look at all of it so we can look at that material in context. So if you can have a think about that and we'll deal with it probably after the luncheon adjournment, and if you can perhaps weave that into the dates that you've already discussed and agreed. Okay?

PN27215

MR MOORE: Yes.

PN27216

JUSTICE ROSS: Thanks.

PN27217

MR MOORE: Thank you, your Honour. If the Commission pleases, the SDA resists the variations proposed by the employer organisations to each of the Fast Food Award, the Pharmacy Award and the General Retail Industry Award, and it does so for the reasons set out at length and in detail in its written submissions of 21 March 2016 upon which we rely. As is apparent from the hearings to date and the submissions which have been exchanged, the parties join issue upon many of the legal and evidentiary issues in the review. To a considerable extent, the competing positions of the parties are properly ventilated or fulsomely ventilated in the written submissions and so it's not my intention to go over that terrain. The approach I wish to adopt today is to reply to the key points made by the employers in their reply written submissions and in their oral submissions over the last two days, insofar as the points raised orally or in the reply submissions give rise to further points not already addressed in the SDA's submissions.

PN27218

In doing so, there are two matters I should note at the outset, which in my submissions today I won't address but which we do intend to reply to, and the reason for that is that my intention is to adopt Mr Dowling's submissions in relation to two matters which he is going to address, one to identify the topic broadly, the submissions about the disemployment effects associated and caused by penalty rates, and secondly, submissions about the question of necessity and section 138 of the Act.

PN27219

Can I commence by giving a broad outline of the SDA case?

PN27220

JUSTICE ROSS: Sorry, Mr Moore.

PN27221

MR MOORE: Yes.

PN27222

JUSTICE ROSS: When you said there are two matters you wanted to reply to later, what was that a reference to?

PN27223

MR MOORE: The two matters I just identified, and the intention is that - - -

PN27224

JUSTICE ROSS: I see, Mr Dowling will go and then you'll say something following that?

PN27225

MR MOORE: Indeed, and hopefully, it's intended that what I'll say is I adopt Mr Dowling's submissions on those points.

PN27226

JUSTICE ROSS: I see. All right, see what it is before you buy it.

PN27227

MR MOORE: I have a good sense, I've checked the tyres.

PN27228

JUSTICE ROSS: Yes.

PN27229

MR MOORE: Your Honour, the SDA's opposition to the proposed variations, given the three awards in question - the retail group, is rather complex because their case runs through and moves through the three awards, and it's convenient if I just give a broad overview. The SDA opposes all of the variations on the basis of certain common grounds and then on certain grounds which are specific to each of the awards. It's convenient if I first deal with the common grounds of opposition and then deal with what remains, as it were, of the SDA's opposition to the cases put in relation to the other awards, which are not otherwise dealt with in the written submissions and which call for reply.

PN27230

As to the common grounds, the argument is put- as has been noted and it's in the SDA's submissions - the argument is put that to enliven its discretion to vary a modern award in the review, the Commission must first be satisfied that since the making of the modern award there has been a material change in circumstances relating to the operational effect of the modern award with the consequence that having regard to the considerations in section 134(1) it is no longer meeting the modern awards objective. That is in shorthand I'll refer to the material change argument, and it's been canvassed to date. It's contended that the need to show material change in circumstances, as I've just described, is a requirement which

emerges from the proper construction of the statutory regime governing the 4 yearly review because of parliament's acceptance that when the modern awards were made they were consistent with the modern awards objective, and I am going to develop the argument in a moment.

PN27231

The alternative argument that's put on a common basis, that is, it applies in relation to all of the awards, is that if that construction of the Act doesn't find favour and instead it is only to be presumed that the awards when made met the modern awards objective, it is contended that that presumption is as a matter of fact made good from an examination of the award modernisation proceedings relating to each of the awards, and in particular to the subject matter of penalty rates dealt with in this review. If the Commission so finds that that presumption is made good, the requirement to show material change in circumstances would be engaged on that alternative basis.

PN27232

They are the common arguments if I can call them that. Can I deal with the first, which is the need for material change and circumstances, and the primary basis upon which is put, namely by reference to a statutory regime? We've noted in our submissions, which I won't repeat, at paragraphs 15 to 17 that the need to identify material change finds support in the decisions of the Full Bench in the Stevedoring Award, which is [2015] FWCFB 1729, and the 4 yearly review relating to transitional provisions concerning accident make up pay. As we outline in the submission, in those decisions the proposition that the award in question achieved the modern awards objective when made was identified as a specific matter to guide the approach to the 4 yearly review, and that recognition in those authorities was drawn from the Full Bench's consideration of, amongst other things, the preliminary jurisdictional decision.

PN27233

In that decision, the relevant extract, which has been canvassed in the hearing today, is at paragraph 24 and the Full Bench stated that awards made as a result of award modernisation were deemed to be modern awards for the purposes of the Act and that:

PN27234

implicit in this is a legislative acceptance that at the time they were made, the modern awards now being reviewed were consistent with the modern awards objective. The consideration specified and the legislative test applied by the AIRC in the Part 10A process is in a number of important respects identical or similar to the modern awards objective in section 134 of the FW Act. In the review, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

PN27235

And I should have noted for the Bench's benefit that that extract is set out in paragraph 13 of the SDA's submissions. Various arguments are mounted against the SDA's contention and I propose to develop the SDA's case in a responsive way by engaging with the employer arguments that are put against us.

PN27236

The Ai Group's submissions contain a number - which I apprehend or understand that a number of the other employer organisations adopt - the Ai Group's submissions contain a number of arguments put against us. The first is that there was no legislative acceptance that a modern award was meeting the modern awards objective when made. The Ai Group submits at paragraph 5 that:

PN27237

There was no legislative acceptance implicit or otherwise that a modern award was meeting or deemed to meet the modern awards objective at the time of its making.

PN27238

We say that that submission is directly contrary to the express recognition by the Full Bench in the preliminary jurisdictional decision, to which I have already referred, and the deeming of those awards as modern awards pursuant to item 4 of schedule 5 of the Transitional Act implicitly conveying a "legislative acceptance that at the time they were made, the modern awards now being reviewed were consistent with the objective." We say that it's not open now for the employers to challenge that approach stated by the Full Bench, given that the proceedings are being heard and determined rationally on the basis of the guidance provided in that decision.

PN27239

The second argument that the AiG advances is that the only legislative assumption evidence in the regime is that on a prima facie basis an award made under the modern award - award modernisation process or a modern award was meeting a modern award's objective and that not some absolute acceptance that such awards met some an objective. That submission, as we understand it, is based upon the remark by the Full Bench in the preliminary decision that to the effect that prime facie the modern award being reviewed achieved the modern award's objective at the time it was made.

PN27240

That submission raises the question about how one reconciles that remark, referring to prima facie, with the unqualified statement earlier in the paragraph identifying the legislative acceptance that when made the awards were consistent with the objective. We say that properly understood the reference to proceeding on a prima facie basis cannot be understood as relevantly altering or qualifying the analysis which identified the legislative acceptance, that when made the awards achieved the objective.

PN27241

Instead, the reference to proceeding on a prima facie basis appears to us, with respect, to be a recognition of the general principle that a Court of Appeal might depart from an earlier decision only cautiously, when compelled to the conclusion that the decision is wrong. Now that interpretation is supported by the summary given by the Full Bench at paragraph 60 of the preliminary decision, point 3, in which the Full Bench relevantly stated, and this will recall if the Commission pleases was a part of the summary of the approach - of the matters considered in the decision:

PN27242

In conducting the review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered.

PN27243

We emphasise the following sentences:

PN27244

Previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieves the modern award's objective at the time it was made.

PN27245

We apprehend from that summary that the Full Bench was making clear that in referring to proceeding on a prima facie basis, the Full Bench was referring to the establish principle that Full Benches generally follow previous Full Benches, absent cogent reasons for departing from them. So we say that the reference to prima facie doesn't derogate from the clear recognition, as we understand it with respect, by the Full Bench with the legislative acceptance that when made the awards achieved the objective.

PN27246

It was open for the employers to contend in this proceeding that there were cogent reasons for not following the Full Bench decisions and to apply the approach of the type set out in Nguyen v Nguyen about when a Court of Appeal might depart by showing in effect that the earlier decision was wrong. They haven't run a case of that type. They haven't run that sort of argument and as such the Full Bench should not depart from those decisions.

PN27247

That's what we say about that issue. The third argument put by the employers, by the Ai Group is that as a matter of construction, and this really comes to the heart of the matter, it's not necessary for there to be a material change in circumstances before the Commission can conclude that an award is not achieving the objective. True it is that there's no such express requirement in section 156. It his however we say an essential requirement which emerges from the subject matter, the scope and purpose of the provisions, statutory provisions relating to the review. We note that the Ai Group recognises the applicability of that principle of statutory construction in paragraphs 18-19 of its primary submissions.

PN27248

So we say this; the subject matter of the review is self-evidently the review of modern awards by reference to the objective. It would be entirely artificial and erroneous in my respect submission for the Commission to proceed on the basis that the relationship between existing modern awards and the objective is unchartered and uncertain. That relationship has as its genesis the deeming by item 4 of schedule 5 of the Transitional Act that awards made in award modernisation - I'm sorry, that awards made in award modernisation are modern

awards, the corollary of which is as recognised by the Full Bench in the preliminary decision, the legislature's acceptance that when made the awards achieve the objective.

PN27249

We say that the error in the Ai Group's submission is to consider the Commission's task by looking at section 156 in a vacuum divorced from its statutory historical context. That context critically includes the Transitional Act, and in particular item 4 of schedule 5. The effect of that provision is to provide a datum point or a reference point for the periodic four yearly review of awards.

PN27250

Now that approach of reading section 156 in the context and by reference to the Transitional Act provisions to which I've just referred, is an application of orthodox principles of construction which I'll provide to the Bench copies of three authorities which I've distributed to parties at the Bar table. There's three authorities that have been distributed, if the Bench pleases. If I could ask the Bench to turn to the decision in the New South Wales Law Reports, it's a decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* [1987] 9 NSWLR 719.

PN27251

Now in this particular field of - or sub-field of statutory construction is something of a seminal judgement and forgive me if its principles are well known to members of the Bench. Here the court was dealing with, amongst other things, about how to construe legislation in the context of a legislative scheme, dealing with I think it was four pieces of legislative to do with revenue law and stamp duty. If I could ask the Bench to turn to page 722 and under the heading "Interrelationship of Legislation" I commend to the Bench all of the first two paragraphs but emphasise the following statement by President Court of Appeal Kirby, as his Honour then was.

PN27252

At about point (e) of the page it states:

PN27253

Upon the hypothesis which is admittedly often sorely tried that there is a rational integration of the legislation of the one parliament, it is proper for courts to endeavour to so construe interrelated statutes as to produce a sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation. This is the approach which I take to the task of statutory interpretation at hand.

PN27254

Over the page at 723 after some further consideration of the authorities in the legislation in question, his Honour at the bottom of page 723 at point (g) continued:

PN27255

The result is that in construing the legislation under consideration here, I will prefer that construction which is available in the language used and which

facilitates the sensible operation together of the four statutes mentioned, avoiding inefficiency and the capricious operation of revenue law, which would seriously impede or discourage the availability of beneficial statutory provisions for the sale or partition of property held by co-owners. In the case of ambiguity of legislation, I consider this to be the modern approach which this court should adopt in implementing the will of parliament. We should presume that parliament intended its legislation to operate rationally, efficiently and justly together.

PN27256

That view, his Honour's statement in Permanent Trustees has been endorsed and applied by at least two other superior appellant courts and they are in the two other authorities that I tendered to the Bench. If I could ask the Bench to look at the decision of the Victorian Court of Appeal in Maroondah City Council v Fletcher, and all I want to take the Bench to there is at page 177 of the report, at paragraph 85. Warren CJ and Osborn AJA stated:

PN27257

Where construction of separate but related legislation is simultaneously required, the object is to arrive at the construction of the provisions which assumes the Parliament intended its legislation to operate harmoniously, or in other words, rationally, efficiently and justly together.

PN27258

There's a footnote to the decision in Commissioner of Stamp Duties v Permanent Trustees. The last authority is - - -

PN27259

JUSTICE ROSS: Did Redlich J deal with the point, or he dissented on a separate issue?

PN27260

MR MOORE: I'll look at that in the break, your Honour. I don't think he does, but I'll confirm that, if I may. The next decision is the decision of the Court of Appeal of Western Australia in *Donohoe v The Director of Public Prosecutions* (2011) WASC 239. The reference is to page 27, the decision of Buss JA. It's at paragraph 82 his Honour states:

PN27261

It is well-established that where two or more statutory enactments comprise an overlapping legislative scheme, the enactments should be construed accordingly.

PN27262

And there's a reference then to a number of authorities including the Commissioner of Stamp Duties. There are five key reasons why the requirement to show material change in circumstances relating to the operation and effect of the award is a requirement consistent with the subject matter, scope and purpose of the Fair Work Act relating to the 4-yearly review, and a construction which is conducive to the rational, efficient and just operation of the scheme commenced

under the Transitional Act and which continues to apply, operate under the FW Act.

PN27263

First, as already outlined, in light of Parliament's implicit acceptance that modern awards, when made, achieve the modern awards objective, it logically follows, we say, that some material change in circumstances pertaining to the award must be shown in order for the Commission to then form a view at a later time that the award is not meeting the modern awards objective. Now, we say that that interpretation is a rational and sensible one. We're met, though, with the Ai Group's argument that that's not right and that a modern award may cease to be fair and relevant for the purposes of section 134, even though there's not been any change in the industry since the making of the modern award.

PN27264

They posit four examples. Three of the examples given involve circumstances where it is posited, for the sake of the examination, that at the time of the making of the modern award, penalty rates were adopted by the Commission "without examination" of the fairness or relevance of those rates. We say that those scenarios are flawed because they proceed from a false premise. That is, that in making the modern awards, the Commission didn't fix fair and relevant minima.

PN27265

If one looks at what the Commission did in award modernisation, that function was set out in section 576B of the Workplace Relations Act, and the Commission must be taken to have exercised its power in accordance with the objects of part 10A of that Act which, amongst other things, provided that modern awards, together with legislated employment standards:

PN27266

- must provide a fair minimum safety net of enforceable terms and conditions of employment for employees.

PN27267

That's in 576A(2)(b). Although the objects don't expressly refer to the fixing of relevant minimum terms and conditions, it's impossible to understand that award modernisation involved anything else other than the fixing of what the Commission regarded as relevant minimum conditions. We say no different result flows, where in award modernisation there was no or limited controversy in relation to a particular matter. Unless the Bench has been shown to be in error, the Commission must be taken, we say, to have exercised its powers in accordance with the objects of part 10A and thereby to have fixed fair and relevant minima.

PN27268

So we say that that analysis debunks three of the four examples advanced by the Ai Group because they are examples premised upon the scenario where the Commission determined penalty rates without examination of the fairness and relevance of those rates. Now, the further example provided by the Ai Group - this is paragraph 6(g)(iii) of the Ai Group's submissions - as to how it's said that a modern award may cease to be fair and relevant even though there's not been a

change since the making of the modern award, is the scenario where, at the time of the making of the award, the Commission may have adopted a level of penalty rate from a related modern award and may have reduced the level of penalty rate in the related modern award.

PN27269

So the scenario where in relation to award A in award modernisation the Commission adopts a penalty rate referable to the penalty rate in award B. Subsequent to award modernisation, the penalty rate in award B has changed. It's said that that could be a circumstance where a modern award may cease to be fair and relevant, even though there's not been any change in industry. Now, we accept in a qualified way that that is a scenario which is arguably capable of falling within the approach of that by the SDA. That is, the need to establish the existence of material change in circumstances.

PN27270

It is arguably the case, we accept, that if a penalty rate in a modern award was originally fixed as being equivalent to a penalty rate in a related modern award, the subsequent production in the penalty rate in the related modern award may arguably be a change in circumstances relating to the operation or effect of the modern award in question. We say, in making that qualified concession, that that points up the sensible and practical operation which our construction is amenable to.

PN27271

JUSTICE ROSS: Does it follow from that, that Ai Group's submission that the late night penalty in the Fast Food Award should be moved to 10 pm on the basis that there was the Full Bench's previous finding about the relationship between the Fast Food Award and the Restaurant Award?

PN27272

MR MOORE: We see where your Honour goes and we accept that a corollary of the submission I have put is that that is an analysis that is arguably open. Now, the second reason we advance as to why the requirement to show material change is a requirement consistent with the subject matter, scope and purpose of the Fair Work Act relating to the review and which is conducive to the rational, efficient and just operation of the scheme, is that the alternative approach would lead to an unworkable result and one that Parliament could not have intended.

PN27273

It would mean that an award made in award modernisation, which Parliament can properly be understood to have achieved the objective, could later be revealed to not in fact meet that objective without that different character being caused by change in circumstances. That is an analysis which leads to an outcome where an award could in effect move in and out of achieving the modern awards objective without any change in circumstances relating to the operation of the award. We say that that sort of outcome is antithetical to the notion of providing stability in the award safety net.

PN27274

The third point we make is that the alternative approach to the construction of the Act would leave to an inefficient and impractical approach in determining whether in truth, an award really did meet the modern award's objective. That becomes a detestable question. It involves ignoring the datum point constituted by the making of the modern awards and the associated acceptance by parliament that they then met the modern award's objective.

PN27275

Fourthly, we say that the approach contended for by the union is consistent with the fundamental and profound recasting of the national award system brought about by award modernisation, in light of the scale and significance of that change which is no doubt well understood by those in this room. It is readily understandable why a parliament sought to draw a line in the sand, to fix a datum point, to say that when made the awards achieved the modern award's objective. To do otherwise is to overlook the nature and scale of award modernisation and what it was designed to achieve.

PN27276

Fifthly, the requirement to show material change in circumstances relating to the operation and effect of an award, is also conducive to the efficient and sensible operation of the fourth yearly review scheme provided for by section 156. Absent the requirement which we submit emerges from the Act, there is no impediment to an industrial party requiring the Commission and other industrial parties to devote their resources to hearing claims for changes in award conditions, without any change in circumstances pertaining to the operation and effect of an award. Even though the provisions were fixed in award modernisation. I think Mr Wheelahan said yesterday - his words were as I understand that each time it's a fresh assessment, fresh re-assessment of these awards. I'll say something more about that in a moment.

PN27277

So they're the five reasons why we say as a matter of statutory construction the union's argument is sound and should be adopted, with respect, by the Bench. The fourth point that the Ai Group refers to is some references made to a number of authorities and we say that the authorities referred to at paragraph 6 of the Ai Group submissions don't assist the Bench in resolving the present controversy.

PN27278

Firstly we say that the two Federal Court decisions referred to in paragraph 6, (f) of the Ai Group's submission. The fact that in those decisions there's no reference to whether the Commission must be satisfied that there's material change is irrelevant.

PN27279

JUSTICE ROSS: Can you just refresh my memory as to what two Federal Court - - -

PN27280

MR MOORE: I'm sorry, I think it's the NRA decision - excuse me, your Honour.

PN27281

MR DIXON: The SDA Number 2, it's in paragraph 6(f) of our reply submissions.

PN27282

JUSTICE ROSS: Can we just go to the NRA submission for a moment. In the Commission proceedings - - -

PN27283

MR MOORE: I'm sorry, your Honour?

PN27284

JUSTICE ROSS: In the Commission proceedings that led to the NRA proceedings in the Federal Court, the union was contending for a change in the rate of pay for 20 year olds.

PN27285

MR MOORE: Yes, this is the decision of Tracey J.

PN27286

JUSTICE ROSS: Yes. I'm looking back at - - -

PN27287

MR MOORE: In the Commission.

PN27288

JUSTICE ROSS: Yes.

PN27289

MR MOORE: Yes.

PN27290

JUSTICE ROSS: What did the Commission decision say about this datum point argument? Did the union there contend that it had to show a difference - a material change in circumstance from when that modern award had been made?

PN27291

MR MOORE: Well I think not because that was a case which proceeded under - not section 157. It was an application for a variation outside of the four yearly review.

PN27292

JUSTICE ROSS: I thought it was a transitional review case. I might be wrong about that.

PN27293

MR MOORE: I'm corrected. I might just grab the submissions for a moment.

PN27294

JUSTICE ROSS: Because look, certainly in the Federal Court the court looked at the transitional review provisions, so I assumed that that was the context. You can come back to that if you wish.

PN27295

MR MOORE: Yes, the two decisions. I will come back to that in a moment, your Honour. Now can I deal with the Restaurants decision, which is relied upon by the Ai Group and others, and the relevant part is contained in the folder of documents provided by the ABI. I need to take the Bench through this decision because it's of some significance.

PN27296

At paragraph 91 - - -

PN27297

JUSTICE ROSS: Which tab, sorry?

PN27298

MR MOORE: Tab 1, your Honour, of the ABI folder.

PN27299

JUSTICE ROSS: Yes.

PN27300

MR MOORE: The Full Bench - this is the majority in the Restaurants decision. In paragraph 247 of the decision, which we have earlier set out, the Deputy President concluded that:

PN27301

Cogent reasons had not been established because the grounds on which they, the 18 applicants, seek the variations did not identify a significant change in circumstance. Rather they are largely merits considerations which existed at the time the award was made. That conclusion, with respect, appears to have established a criterion for the determination of the penalty rates case, namely a significant change in circumstances, which was not derived from item 6 of schedule 5 of the Transitional Act. Although in the following paragraph of the decision the Deputy President stated a general conclusion that the variations to the penalty rate provisions sought by the applicants were not warranted on the basis that the Restaurant Award was not achieving the modern award's objective, or operating other than effectively without anomalies or technical problems arising from the award modernisation, we consider that it appears to emerge from the Deputy President's chain of reasoning that this conclusion was a consequence of the earlier finding that no significant change in circumstance had occurred.

PN27302

Now I won't read from the commencement of 92 but the relevant part I want to take the Bench to is about two thirds of the way down 92 and the majority stated:

PN27303

Although the Deputy President made some findings about these aspects of the applicants' case, her adoption of a significant change in circumstance is the apparent criterion for variation, including at paragraph 226 in relation to the specific issue of disabilities associated with working unsociable hours, meant that the alternative case was not considered in accordance with the

requirements of item 6 of schedule 5 of the Transitional Act, and that the exercise of the discretion was artificially confined and thereby miscarried.

PN27304

The United Voice has advanced a submission which I don't think is put in our written submissions, that the - to the effect that the error identified by the Full Bench majority in Restaurants was the identification of first instance of a single criterion of a significant change in circumstances. That the error was the identification of that criterion being unanchored or disconnected from any assessment about whether the award is achieving the objective.

PN27305

It was the identification - I pause there. That as I understand it is an argument advanced by United Voice and upon further consideration of the Restaurants decision, in my respectful view, that is indeed the third analysis which emerges from a fair reading of the paragraphs to which I've referred. We say that it was the single member's identification of that single criterion which was in error, rather than any rejection by the Full Bench in the setting of the interim review of the proposition now put by the SDA.

PN27306

JUSTICE ROSS: Did they later adopt the proposition that you have to show a significant change in circumstances?

PN27307

MR MOORE: No.

PN27308

JUSTICE ROSS: So they don't apply that test?

PN27309

MR MOORE: No.

PN27310

JUSTICE ROSS: Were they wrong?

PN27311

MR MOORE: We don't advance any argument as to whether or not the Full Bench was right or wrong in the Restaurants case.

PN27312

JUSTICE ROSS: They didn't apply the test that you say has to be applied when you are conducting a review?

PN27313

MR MOORE: No, I would accept that that's so, your Honour. We say that the decision is - and I think the decision in the two paragraphs, it is, with respect, not pellucidly clear exactly what error is identified. We say that the error - - -

PN27314

JUSTICE ROSS: Isn't it really an error that the discretion was confined by the adoption of the test?

PN27315

MR MOORE: Well it was confined by the adoption of the test in terms which divorced it or made no connection with the objective.

PN27316

JUSTICE ROSS: But don't they say in 91 in the second sentence that that test, the posited test, a significant change in circumstance, it was not derived from item 6 of schedule 5?

PN27317

MR MOORE: Well that's the point, your Honour, that it was - - -

PN27318

JUSTICE ROSS: If it's not derived from there and that's the power, isn't it really implicit in that in saying that's not the test? If the contrary was right that they're not saying that and then that is a relevant test, then why didn't they deal with it later?

PN27319

MR MOORE: I accept that that's one way with respect of considering the matter, your Honour. That's as high as I can put as to the reading of the Restaurants decision with the majority on this issue. Our submission is as we've put it. If we're wrong - if that submission doesn't find favour as to the interpretation of what the Full Bench did there, our submission is, for the reasons I've already outlined, that the decision was wrong and ought not be adopted or followed.

PN27320

Can I move to the next point? I have dealt with the arguments advanced by the Ai Group on the material change argument that we wished to reply to. The ABI, their arguments overlap to some extent. The only additional contention that we can identify, which we've not already addressed, is the claim - and this is in paragraph 6.3(b) of the ABI submissions - that because a variety of different permutations and combinations of terms could meet the objective, this militates against concluding that a significant change in circumstances is required because a different formulation of terms might still meet the objective. That may well be the case, we would submit, where the Commission is asked to revisit a whole range of terms in an award, and in effect strike a new balance between them so as to ensure that the award achieves the objective. But it is not the case where, as here, what the Commission has before it is a review to reduce, in effect, one entitlement, namely penalty rates, and leave the other entitlements unaltered.

PN27321

The ARA contends - they reject the SDA's argument on the basis that:

PN27322

Subject to the statutory requirements considered in the preliminary jurisdictional decision being met, as long as there is sufficient material before the Commission to form an opinion as to what terms of the review are necessary for the award to meet the objective, then the Commission has properly its jurisdiction.

PN27323

That's at paragraph 5 of the ARA submission. We say that this argument is flawed for several reasons. First, we say no attempt whatsoever has been made to address or reconcile the effect of item 4 schedule 5 of the Transitional Act and the Full Bench's observation in the preliminary decision that implicit in that provision was a legislative acceptance that, when made, the awards were consistent with the objective - that key issue of construction's just ignored. Secondly, the argument put by the ARA is said to spring from a number of sources, none of which support the contention advanced. The first is one which Mr Wheelahan adverted to yesterday and is the claim that the Commission's determination as to whether or not to vary an award is necessarily a temporal one. The authority which is cited for that proposition is a decision by Justice Tracey in SDA and NRA number 2, and this is one of the decisions that your Honour raised with me before and I'm reminded - - -

PN27324

JUSTICE ROSS: I wasn't referring to NRA/SDA number 2.

PN27325

MR MOORE: I'm sorry, your Honour.

PN27326

JUSTICE ROSS: I was referring to - - -

PN27327

MR MOORE: The Full Court decision?

PN27328

JUSTICE ROSS: The Full Court decision, yes.

PN27329

MR MOORE: Yes, I'm sorry, your Honour. I'll come back to that.

PN27330

JUSTICE ROSS: I was really referring to the Commission decision that gave rise to the Full Court decision.

PN27331

MR MOORE: I understand that.

PN27332

JUSTICE ROSS: Yes.

PN27333

MR MOORE: And I can confirm that that Full Court decision was a decision which arose in the interim review indeed, yes. The decision relied upon by the ARA for this point around temporality, that case did concern the exercise of power under section 157, so it's not this case at all. At paragraph 36 of his Honour's judgment, which is referred to by the ARA, in which his Honour refers to "a temporal requirement," his Honour is expressly referring to subsection 157(1) and the requirement that in that section for the Commission to be satisfied

that it's necessary to vary an award at a time falling between the system of 4 yearly reviews. So the reference to the temporal requirement that his Honour makes is that which is evident in the words of section 157, so we say that doesn't provide any support for this temporal argument.

PN27334

The second source of the argument put by the ARA is the claim that, so long as the requirements have met and there is sufficient material to form an opinion as to what the terms of the award at the time of the review are necessary for it to meet the objective, then the Commission must properly exercise its discretion. We say that that submission fundamentally begs the question by not identifying or addressing what the statutory requirements are, and in any event the proposition is again drawn from the decision of Justice Tracey in SDA and NRA number 2 in which his Honour was addressing a judicial review ground of no evidence, so his Honour's observations, with respect, do not apposite to the issue at hand.

PN27335

The third source of the ARA's argument is the claim that an award containing different terms at each review may still meet the objective at that time. A reference is made to the notion that reasonable minds might differ as to what terms might be necessary, either based upon the same or different material. It is correct that the Commission has recognised that there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net; different combinations or permutations may still meet the objective, that's acknowledged. But it is another thing entirely to say, as is the effect of the ARA's argument, that each 4 yearly review is to occur unencumbered by the historical context applicable to each modern award, and the Full Bench in the preliminary jurisdiction, with respect, appeared to expressly state otherwise at paragraph 24.

PN27336

The effect of the ARA's submission is to advance a construction of the provisions which sees the Commission's statutory function in the 4 yearly review as being completely untethered from both the historical context of an award and previous Full Bench decisions. Apparently, on the ARA's case, each 4 yearly review we start again from a clean slate, and we say that that's, for reasons I've already outlined, cannot be what parliament intended and is neither a rational or efficient outcome.

PN27337

So that's what I want to submit about the primary argument about material change. If I can go to the alternative basis for why it is said in the circumstances of the awards at hand material change is required, and this proceeds from a view that the Commission is against me on the primary point and instead adopts the view that the modern awards, when made, are only presumed to meet the objective.

PN27338

We say, as your Honour alluded to at the beginning this morning, there's been a lot of submissions, a good number of submissions about what was said and done in award modernisation, and we say, in summary, that the question of penalty

rates to apply at various times and in particular on Sundays, was a matter of substantial controversy in relation to the making of the awards of each of the three retail group awards. We have sought to make good that proposition in relation to the Retail Award with our submissions at paragraphs 74-77; in relation to the Pharmacy Award at 432-436, and in relation to the Fast Food Award at paragraphs 670-683. I'm not going to go through those submissions.

PN27339

We say that in determining those controversies which arose and which led to the making of each of those awards, the Commission must be taken to have exercised its power in accordance with the objects of part 10A, which as I stated before, included providing a fair minimum safety net of enforceable terms and conditions. Now, this frames what the Full Bench meant in the Retail Award, the award modernisation in the Retail Award, when it stated in relation to the controversy about penalty rates, that it had attached weight to the critical mass of provisions and "terms which are clearly supported by arbitrated decisions and industrial merit."

PN27340

The employer submissions, we submit, proceed from the extraordinary proposition that in award modernisation the Commission disregarded its statutory task and failed to fix a fair minimum safety net of enforceable terms and conditions. We say that the Commission plainly did not do that and that that is made clear by the reference to deciding the claims by reference to arbitrated decisions and industrial merit. The position, then, is this, we say; the fixation of fair and relevant penalty rates was a substantial and live controversy in each of the retail group awards in award modernisation.

PN27341

The Commission must be taken to have resolved those controversies in fixing the terms of the awards by determining fair and relevant terms and conditions as they are currently prescribed in respect of penalty rates and other matters. If that follows - if that is accepted, I'm sorry - it must follow that the prima facie position that the awards achieve the modern awards objective when made, is made good and validated in relation to penalty rates, and that as a consequence, it would be incumbent for the employers to show material change in the operation of the effect of the awards since the awards were made.

PN27342

There's been some very late attempt by the employers to say, in the alternative, "Well, there has been material change since the making of the modern awards" and I want to deal with that briefly. The ARA, at paragraph 9(a) of its submissions, refers to the structural break in employment aggregate hours and persons employed as a result of the Retail Award in New South Wales has constituted a material change. It's hard, with respect, to give that claim any credence in circumstances where it was first raised in reply submissions and is premised upon Ms Pezzullo's evidence in reply to Ms Yu very late in the proceeding, just before Christmas.

PN27343

In any event, though, for the reasons given in our submissions in paragraphs 248-280, the highest the evidence rises is Ms Yu's recognition that the introduction of penalty rates in New South Wales - I'm sorry, the commencement of the transitional provisions for penalty rates in New South Wales - had adverse employment effects in only the first year of the transitional arrangements. We say that that effect could not constitute material change.

PN27344

The Ai Group contends there has been material change in circumstances and it points to three things; first, it said the publication of the Productivity Commission Report itself constitutes a material change by reason, it would appear, of the conclusion contained within the report, that the level of penalty rates under the Fast Food Award is excessive and that the Sunday rate should be equalised with the Saturday rate. We say that the expression of opinion by a Commonwealth agency as to what award minima should be is not and cannot constitute any change in the operational effect of the award.

PN27345

It's said that the finding by the Full Bench in the Restaurants decision, that the Restaurant Award overcompensated non-career casual employees and thus ceased to be fair and relevant by providing for a combined casual and Sunday penalty rate of 75 per cent was a material change. We say that without more it's not conceded that what is advanced constitutes material change in the operational effect of the award.

PN27346

It's said by the Ai Group that significant change is made out by the significant increase and the prevalence of 24/7 trading and Sunday trading in the fast food industry in the past six years, with the number of McDonald's restaurants operating 24/7 virtually doubling between December 2009 and May 2015. Now, the source of that claim is Ms Limbrey's evidence in paragraph 48(a) of her statement in which she states:

PN27347

In December 2009, approximately 320 McDonald's restaurants traded 24 hours of the day for seven days of the week. As at 19 May, approximately 601 McDonald's restaurants traded 24/7.

PN27348

Now, on its face, that would appear to be a change of some note, but the evidence doesn't tell the Commission anything about the trading hour patterns operated by those restaurants which now run 24/7, but did not run 24/7 in 2009. In other words, it may be that many of the additional 280-odd stores that now trade 24/7 previously traded 24 hours over six days a week. The evidence just doesn't indicate the previous trading patterns of the additional 280 stores. So the Commission doesn't have before it in the evidence, in order to identify it, which would allow any assessment of the character of that change to be made. It might be a material change in relation to McDonald's, or it might not be.

PN27349

I want to move now, if I may, to the question of the disability associated with Sunday work. We say that the evidence does establish that there is a disability associated with Sunday work which is over and above that experienced by employees when they work on a Saturday. Before coming to that evidence I want to deal with three important matters. First would support a finding to the effect proposed that the level of disability associated with Sunday work is greater than that associated with Saturday work.

PN27350

First, the Commission, in my respectful view, must not lose sight of this critical fact, that the assessment of Sunday work disability needs to occur in the context of prevailing community standards and experiences of weekend and Sunday work. The Commission must not, in my respectful view, lose sight of the fact that across the community as a whole, weekend work, and in particular Sunday work, remains very much the exception. As the Productivity Commission Report notes in appendix F, page 1116, only 30 per cent of Australians do some work on weekends, and around 90 per cent don't work on Sundays.

PN27351

But we're here dealing with, when one steps back from the industries per se, the fact that across the country, only 10 per cent of people work on a Sunday. The second matter which we ask the Commission to consider in appraising the existence of the nature of disability of Sunday work is that at least in relation to the retail sector, the disability associated with Sunday work, which is over and above that associated with Saturday work, was identified in 2003 in the $2 and Under case, in which the majority accepted - I withdraw that - the Commission accepted the expert evidence showed, "A very substantial disability endured by persons working on a Sunday."

PN27352

The majority then went on to assess the appropriate penalty rate for some 17,000 retailers as double time. We deal with this at paragraphs 57-66 of our submissions. We want to emphasise five points about that. The task undertaken by the Full Bench 13 years ago, in 2003, was akin and quite similar to that currently being undertaken. It was, as the Full Bench itself identified, and we refer to this in our submissions, that the majority referred to their task as "assessing a fair minimum standard so the penalty for work in ordinary hours on a Sunday in the context of living standards generally prevailing in the Australian community."

PN27353

Now, obviously that's not exactly the same as the modern awards objectives, but it was directed at the element of fairness which is plainly at the heart of the modern awards objective. The second point we want to note is that the assessment made by the Full Bench about the existence of a substantial disability endured by workers who work on a Sunday, and then the fixing of a rate of double time, that penalty rate, it is clear, was fixed on a purely compensatory basis. The first point we want to make is that the assessment adopted by the Commission in $2 and Under was accepted by the Full Bench - the majority, I'm sorry, in the Restaurants decision, as "A contemporary general assessment of the disabilities associated with working on Sundays as compared to other days of the week."

PN27354

Now, the fourth point we make is that in making that assessment in 2003, the Commission expressly had regard to employer arguments that the extent of the disability was less because of the greater incidence of Sunday trading in Victoria since 1992. It rejected that argument and found that that factor did not affect the disabilities endured by employees working on Sundays. We say this is a very important point that the Commission, with respect, should bear in mind. Much of the employer case in this proceeding, as it was in $2 and Under, is built around the proposition that Sunday trade is the new normal, it's an established normal, get used to it, everyone.

PN27355

It may be accepted that that is so, from the perspective of the consumer, and that there's nothing novel in going shopping on a Sunday, and the consumers want to get access to services on that day, but that fact is logically and substantively different to the question of the, in economic terms, dis-amenity, the inconvenience, the losses associated with the employees have to work that day, particularly in circumstances where 90 per cent of the workforce are not working on that day, and let us not overlook the fact that the employees under these three awards, where they might, as economic actors, be retail workers, fast-food workers, pharmacy workers, they are individuals and people who have lives in the community and family and friends.

PN27356

And it's at that point that the disconnection occurs. So we do want to emphasise that point. The fifth point we want to emphasise arising from the $2 and Under case is that putting to one side the need to show material change, as I've argued earlier, the employers in retail face a particular hurdle in this case in the face of the decision in $2 and Under which was characterised by the Full Bench as a contemporary general assessment of the disabilities associated with working on Sundays as compared to other days of the week. What has changed since 2003?

PN27357

The employers have largely, to some considerable extent, advanced a strawman argument and said, "Look back at 1919." Well, we say that is of some interest, we don't say it's of no relevance to the proceeding, but in terms of disposing of the controversy in retail at least, these matters, the standard of penalty rates for Sunday work in retail, was fixed by reference to contemporary standards in 2003. There is a gaping hole in the employer case in retail. They have not advanced any case to show that there has been any change since 2003 in the incidence which affect the assessment of the disability of Sunday work, bearing in mind of course that Sunday trade has been deregulated across the - I withdraw that - at least in the Victorian context, has been deregulated since 1996 and largely across the country, with some exceptions, since the very late 1990s.

PN27358

The third matter I want to deal with before coming to the evidence about disability associated with Sunday work, this picks up a point which the Full Bench - arose in proceedings in the last couple of days. The Commission should not overlook the nature of the claims advanced by the employees in retail and pharmacy. In those claims, those claims contain and preserve a differential in penalty rates as between

Saturdays and Sundays in pharmacy and retail. That is, time and a quarter on Saturdays and time and a half on Sundays.

PN27359

Now, implicit in that, we submit, in the absence of any explanation for why they put their claim forward in that way, is an acceptance not just that weekends are different, but that Sundays are different from Saturdays.

PN27360

JUSTICE ROSS: Sorry, can you just identify what kinds are preserving the differential?

PN27361

MR MOORE: I'm sorry, your Honour. I've rolled them all up, but I've gone through all the claims, and in relation to the Pharmacy Award and in relation to retail, if the employer claims were granted, there would be higher penalty rates for workers on Sundays compared to Saturdays, time and a half to time and a quarter. Now, I just want to say two other things in relation to submissions put by the ABI about award modernisation and the history before I move to the evidence about the disability of Sunday - Mr Izzo made a submission about the words - this is an award modernisation point, and the words referred to in the Retail Award Modernisation decision:

PN27362

The fixing of terms which clearly are supported by decisions in industrial merit.

PN27363

It's suggested by Mr Izzo that the Commission may have delegated its task. Now they were the words that I noted Mr Izzo used and I take it that he means by that, that is that the Commission simply left - picked up earlier decisions and thereby delegated its task.

PN27364

We say that that submission can't be accepted duly for the reasons that I have already outlined, the task of the Commission in award modernisation was to make awards which further the objects of the Act, which included the establishment of fair minimum.

PN27365

Mr Izzo also submitted that - he submitted that:

PN27366

There have been a history of cases which assume a big difference between Saturdays and Sundays but now it's markedly different.

PN27367

Well in retail at least, it wasn't the case - it's not the case that arbitrary minimum standards in this country have proceeded on an assumed basis as to what the penalty rates for Saturday and Sunday should be, thereby in effect picking up ancient standards derived from when the awards and penalty rates were first set.

I've already made submissions about the $2 and under proceeding. We also refer to paragraphs 54 to 56 of our submissions, the decision in award simplification all those years ago in 1999, in which there was again a substantial controversy about penalty rates. Of course there's the award modernisation proceedings themselves.

PN27368

We make the point in relation to the award modernisation decision - this isn't referred to in our submissions but I'll note it just for the purposes of emphasis. That following on the decision on 2 September 2009 in award modernisation when an award was made, two applications were made very shortly thereafter to reduce penalty rates, including on Sunday. They were brought in in late 2009, these are referred to the submissions. It was a hot controversy in award modernisation and once the Commission made a decision in relation to the awards, straight away applications for variations were brought in relation to penalty rates. So we say that there is no assumption in retail in contemporary times that there's a big difference in the disabilities, if you like, between Saturday and Sunday works. These have been, we say in our submissions, they have defined the zone of arbitrary controversy in modern times in relation to the retail industry.

PN27369

Now the evidence establishes that there is a special or a particular disability associated with Sunday work over and beyond Saturday work - - -

PN27370

JUSTICE ROSS: Is that a convenient time? Are you moving to a new topic?

PN27371

MR MOORE: Yes, thank you, your Honour.

PN27372

JUSTICE ROSS: We'll adjourn for 15 minutes.

SHORT ADJOURNMENT **[11.28 AM]**

RESUMED **[11.53 AM]**

PN27373

JUSTICE ROSS: Yes, Mr Moore.

PN27374

MR MOORE: Just to deal with two matters arising from before the break. The decision of the Court of Appeal of Victorian Maroondah City Council, your Honour asked me about what position Redlich JA adopted in the matter. His Honour did dissect in the result.

PN27375

JUSTICE ROSS: Yes.

PN27376

MR MOORE: He didn't deal with the point that their Honours dealt with in the joint judgment to which I referred. I think his Honour agreed with the statutory construction adopted by the majority.

PN27377

Now your Honour also asked me about the other decision in the Full Court of the Federal Court which involved adult rates of pay for 20 year olds, and in particular what position was adopted below in the Commission. We have obtained copies of their decision which perhaps we can distribute.

PN27378

JUSTICE ROSS: Sure.

PN27379

MR MOORE: I don't propose to take - I haven't had a chance to go through it in any detailed way, your Honour, but I can cast a little bit of light. I can say that the SDA didn't advance a significant change-type argument, it's there.

PN27380

JUSTICE ROSS: Is that because it didn't fit with the proposition you're putting there? It's a bit like Ai Group, if it can put it this way. In the preliminary jurisdictional decision, Ai Group argued a different position to the one contended for here. It in fact argued for quite a high threshold for change and presumably in this case, you're advancing a proposition for change, whereas here, you're defending against one.

PN27381

MR MOORE: At global level, I suppose that's right, your Honour, but there was a difference in the setting there in relation to how the award had been set and the way in which the Full Bench and award modernisation had dealt, or in particular, not dealt, expressly dealt with comprehensively the question of junior rates. I'll take your Honour to that in just a moment, but the effect of it was really that the question of the right fixation of junior rates was fixed - the ultimate resolution of that controversy vis-à-vis the modern awards objective was deferred to another time in award modernisation. So one can see that if - - -

PN27382

JUSTICE ROSS: Yes. Is that expressly? Like for example, I think the - - -

PN27383

MR MOORE: I paraphrase the effect of the decision and the - - -

PN27384

JUSTICE ROSS: I think the same position was taken on accident make-up pay. There was an express reference in the Modernisation Bench to, well, these issues should be dealt with later.

PN27385

MR MOORE: Yes, and that's the sort of category this case is in, and that's at paragraph 26, where the Full Bench in the Junior Rates case referred to the Full

Bench in relation to in award modernisation at 71 and the fourth line, the Full Bench stated:

PN27386

It is not possible to standardise these provisions on an economy-wide basis, at least not at this stage. We have adopted the limited objective of developing new rates which constitute -

PN27387

- and so on.

PN27388

JUSTICE ROSS: Right.

PN27389

MR MOORE: So there were some - I've been shown in the break - submissions that we put at that time and - - -

PN27390

JUSTICE ROSS: But that's essentially, you say, the distinguishing characteristic that - - -

PN27391

MR MOORE: Yes, that's right.

PN27392

JUSTICE ROSS: And I suppose that goes to your datum point argument that you say the award modernisation process in respect of these issues currently before us create a datum point because those matters were given particular consideration in that process and the issue of the 20-year old rate wasn't.

PN27393

MR MOORE: That's right.

PN27394

JUSTICE ROSS: Yes. I follow, all right.

PN27395

MR MOORE: That's the distinction. If I can proceed to deal with the question of the evidence that established the additional disability associated with Sunday work over Saturday work. The best evidence of that is given by Prof Charlesworth. The two key findings Prof Charlesworth made, and these are referred to at paragraph 286 of our submissions, but I don't trouble the Bench to open those, but I put them here. The two key findings based on the 2014 AWALI data was, number one:

PN27396

That employees who sometimes, often or almost always work Sundays, whether alone or in combination with Saturdays, experience worst work-life interference than employees who sometimes, often almost work Saturdays alone.

PN27397

Secondly:

PN27398

There is no significant difference between retail and non-retail employees in the impact of working on Saturdays or Sundays. Retail employees have similar work/lift interference patterns in respect of Saturday and Sunday work as non-retail employees.

PN27399

There's a lot been said about Prof Charlesworth's evidence and I'm going to say some more to address some of the criticisms advanced, but they are the central parts of Prof Charlesworth's evidence that we rely upon. We say that her evidence should be accepted for a range of reasons. It ought not be overlooked that the AWALI data set is a large, internationally peer reviewed, nationally representative survey, and it does form the most substantial body of evidence before the Commission on the effect of unsociable working hours and work-life interference.

PN27400

By way of comparison, just to understand the scale and we say calibre of the data set, Prof Rose's survey - it was simply a question about numbers, but it was a much smaller undertaking. There were 443 respondents of Prof Rose's experiment, AWALI's, the results of that which has been a survey which has proceeded over time, was drawn from 2279 respondents. Prof Charlesworth's evidence, which I don't think has been challenged, was that it has a high level of statistical significance and low level risk of bias, statistical bias.

PN27401

Now, I want to deal with some of the criticisms advanced of Prof Charlesworth's evidence. We say that most of these criticisms are either misconceived or overstated. The point was made by Mr Izzo on Monday about the failure of the AWALI data to include information about the non-work activities interfered with by weekend work, or the number of survey participants who worked on weekends as part of overtime. We say that one can always aspire to perfection in surveys and research, particularly when you're running a case and it would be nice to posit a perfect bit of research, bit of data.

PN27402

One can always improve research. AWALI is what it is. These points made by Mr Izzo don't detract from the quality of its data and its probative value. It's primary objective is to compare weekend and non-weekend workers in terms of the degree of work-like interference each group experiences, rather than to examine or to provide insights into the various other matters to which ABI and other employers referred.

PN27403

JUSTICE ROSS: Was it the AWALI data set that Mr Dixon went to yesterday, that it doesn't cover employees under the age of 18?

PN27404

MR MOORE: And that is true.

PN27405

JUSTICE ROSS: Yes.

PN27406

MR MOORE: We accept that that's so, and that is a limitation on its applicability.

PN27407

JUSTICE ROSS: Depending on the age profile of the employees under the particular awards we're considering.

PN27408

MR MOORE: Yes, and I think Mr Dixon submitted that 60-odd per cent of McDonald's employees were aged under 18.

PN27409

JUSTICE ROSS: Well, there was a high proportion, whatever it was.

PN27410

MR MOORE: Yes. I'm not going to make Mr Dixon's case for him, but I can understand - - -

PN27411

JUSTICE ROSS: He probably doesn't want you to make his case for him either, Mr Moore.

PN27412

MR MOORE: I'll stop now. That is one of the limitations of AWALI. The ARA and ABI rely on Prof Charlesworth's evidence to support a submission that although there is some statistical difference between the interference caused by Saturday compared to Sunday work, it is more significant that Saturday and Sunday together - the weekend - stand above weekday work in terms of interference. We say that that submission involves a misapplication and an impermissible interpretation of the AWALI data.

PN27413

First, Prof Charlesworth did not undertake any detailed analysis of aggregated weekend work as against weekday work. The focus was on comparing Sundays to Saturdays. Second - - -

PN27414

JUSTICE ROSS: But how does that fit with 286(a) of your submission? I thought Prof Charlesworth did make some findings about those who work on either Saturday and Sunday versus those who don't?

PN27415

MR MOORE: Yes, that's true. Yes.

PN27416

JUSTICE ROSS: That wasn't the primary - is that - - -

PN27417

MR MOORE: No.

PN27418

JUSTICE ROSS: I see. Yes.

PN27419

MR MOORE: Yes. More fundamentally, no valid comparison can be made between the raw data - and this is - I withdraw that. No valid comparison can be made between the raw data in tables 15-24 of appendix 1 of the Charlesworth report about the level of work-life interference experienced by those who work on Saturdays with those who work on Sundays, and Prof Charlesworth gave evidence about this, that there are different numbers of employees in each group, leading to different and incomparable percentage outcomes on the AWALI index, and there's an overlap between each group, many survey participants falling within both. So one can't simply slice and dice the data in a way which isn't proper and has regard to the actual responses and the composition of responses from which the AWALI index is drawn, so we say that that submission proceeds on the basis of a use of the data which, according to Prof Charlesworth, is not one which is properly open.

PN27420

The employers have also, we submit, impermissibly sought to rely on the data from the AWALI survey to support the proposition that retail employees compared to employees generally are more likely to identify lower AWALI scores. We say that's not a valid analysis in light of Prof Charlesworth's evidence that there was no statistical difference between the degree of work-life interference experienced by retail employees when compared to all other employees. The employers are advancing an argument where the data shows there is no statistical difference in the relevant measures. The employers have also impermissibly sought to disaggregate AWALI data into the individual measures; that's at paragraph 97 of the ARA submissions, for example. And as we explain in paragraph 225 of our submissions, that approach is unsound because the evidence establishes that it's not reliable due to the small cell sizes. So the Commission needs to be very careful in the way in which it considers the criticisms advanced of the AWALI data. The employer parties, with respect, are not at large to simply slice and dice that data in a way which have helped their case. It needs to be considered and approached having regard to conventional statistical methods and having regard to the way in which the data itself is compiled.

PN27421

The Ai Group advanced a criticism of Prof Charlesworth for her failure to report on the fact that a majority of workers were satisfied with their work-life balance according to the AWALI data. Prof Charlesworth gave a clear explanation for this in her cross-examination. This is at transcript paragraph 23684, and we say this stands as a complete answer to this criticism, and I'll read the transcript:

PN27422

The AWALI index is an index and it's made of five different questions, of which this is one. Now, job satisfaction data on its own is notoriously unreliable because if you ask people whether or not they're satisfied, everything depends on context; for example, women, for whatever reasons, are always more satisfied than men. So in terms of it, if you're just looking at satisfaction, you

need to be doing longitudinal studies to see changes in satisfaction. That's when you can pick it up.

PN27423

But this is one question. It's set out there:

PN27424

They are the accurate findings and I stand by them, but they don't disqualify the AWALI index.

PN27425

What it would tell us, if people are generally satisfied, or a larger proportion of people are very or somewhat satisfied with working on Saturdays and Sundays. It tells us that in measuring the AWALI index at the other factors - so the frequency of work interferes with responsibilities and activities outside of work, interferes with your ability to develop and maintain friendships, keeps you from spending the amount of time you want with friends, et cetera - they have, if you like, overwhelmed that more positive one to produce an overall negative work-life balance.

PN27426

Criticism was also made by the Ai Group for Prof Charlesworth failing to report that part-time workers consistently report better work-life outcomes than full-timers, that long work hours are consistently associated with poor work-life outcomes, that a preference to reduce hours but an inability to do so is associated with work-life outcomes, and that caring responsibilities are also associated with those outcomes. In paragraph 3 of Prof Charlesworth's report - I think the point we make here - we make two points - as Prof Charlesworth noted in the outset of her report:

PN27427

This report addresses the relative impact of working on Sundays compared to Saturdays on the work-life interference experienced by employees.

PN27428

So it's unsurprising, we say, in light of that task that Prof Charlesworth did not touch more broadly on every contributing factor to work-life interference generally, and in any event, each of those matters were addressed, or addressed in SDA 45, which is the Skinner and Pocock article which was indeed tendered through Prof Charlesworth. And we reject the Ai Group's criticism for those and other reasons, that Prof Charlesworth had a strong tendency to overstate the negative. That, we say, reflects unfairly on Prof Charlesworth's professionalism and the approach in which she has adopted to the task at hand.

PN27429

While I'm dealing with Prof Charlesworth, can I also refer to the employer criticisms of Dr McDonald's work? We've sought to address those at paragraphs 219 to 221 and 291 to 296 of our submissions, but I want to emphasise one matter which reveals why the criticisms of her evidence are largely misdirected. The aim of Dr McDonald's research, as she explained, was to generate knowledge about the nature of work-life interference and the way it was experienced, not whether

or not or to what extent such interference existed. It assumed, in effect - it started from the premise that there was work-life interference, and her task, to paraphrase, was to probe the nature of that. Employers have sought to attack her evidence on a false basis.

PN27430

We're turning to the evidence that supports a finding that the disability for Sunday work is greater than Saturday. We've noted the contextual matters which we emphasise. We've referred to Prof Charlesworth's evidence. We rely upon the employee lay evidence. We accept, I think as Mr Izzo outlined the other day, that that evidence is all one way. I think if one takes a global view of it, the evidence from three - three out of six - indicates that the level of interference, if you like, disability for Sunday work was greater than Saturday, but the other three, their evidence doesn't permit that finding. So it's not all one way and that's unsurprising.

PN27431

We also rely on Dr Muurlink's evidence, and we've addressed this in the submissions. The point we want to make now is simply this, that Dr Muurlink's evidence about the difference between Saturday and Sunday was based on a thorough and comprehensive review of the literature on the subject. The employers isolate some of the papers to which Dr Muurlink referred and they say that Dr Muurlink agreed with certain propositions put to him in cross-examination about findings from the paper by Craig and Brown, and by Bittman, and that his answer to these questions substantially changed his evidence. We refute that, and we say that that sort of argument proceeds from an unfair or incomplete reading of those articles. The Commission has those articles. I'm not going to belabour the point unduly, but we want to make two points, at least one in relation to the Bittman article, and the other in relation to the Skinner and Pocock article.

PN27432

It's suggested that the paper by Prof Bittman demonstrated that time spent on various leisure and social activities was broadly equivalent between Saturday and Sunday, and we say that that characterisation is a misleading impression. It is true of course that Bittman sets out data in the graphs based on the ABS time use survey demonstrating the allocation of various activities by day of the week, but he does not devote specific analysis to this data, to looking at the equivalence or otherwise of Saturdays or Sundays for each of the activities listed. Prof Bittman's focus in the article is on the effect of Sunday working - Sunday working - on times spent with family, friends, colleagues and neighbours, and he finds - and it's worth focussing upon this conclusion:

PN27433

In terms of social contact, Sunday is the most important day of the week for Australians of working age. Time spent with immediate family, spouse and, where applicable, children on Sunday is roughly 70 per cent higher than in mid-week. As could be expected a similar pattern holds for time spent with children with parents devoting 70 per cent more time to leisure activities with their children than mid-week. Sunday is also the day that adults devote the greatest amount of time to eating with other members of their family, 50 per cent more than the time spent on that activity than on a weekday. Taking these

findings together, it is reasonable to conclude that Sunday is the most critical day for families to spend time together. Although not quite as important as Saturday, Sunday is also an important day of social contact with friends, colleagues and neighbours as working age Australians devote roughly 60 per cent more time to these activities than on a weekday.

PN27434

We just want to make the point that the attempt by the employers to use the Bittman article to bring into question Dr Muurlink's evidence is over-stated and doesn't pay fair regard to what Prof Bittman actually found, which was that Sunday is the most important day of the week, in relation to various activities.

PN27435

I omitted to say that Prof Bittman's paper at page 78 he concludes that;

PN27436

Sunday is still a very special day in Australia. Many activities are especially reserved for Sundays, notably rest, recreation and association with significant others. The overwhelming majority of the workforce does not work on a Sunday.

PN27437

Reference is also made by the employers to the piece written by Skinner and Pocock based on the 2014 AWALI survey. The ABI accepts that that report or that piece shows that Sunday workers have worst work-life interference than Saturday workers, with regular Sunday workers recording significantly worse work-life interference than Saturday workers.

PN27438

The ABI also argues that the same study shows that the biggest difference is not between Saturday and Sunday but between weekend and weekday work. That's not the case and page 29 of the article, Skinner and Pocock say as follows;

PN27439

Regular often/almost always working Sundays is clearly associated with high work-life interference, whether employees work regular Sundays but not regular Saturdays, index score 51.4, or regular Sundays and regular Saturdays, index score 52.5. Work-life interference is significantly lower for employees who work regular Saturdays but not regular Sundays, 43.8, with the lowest work-life interference for employees who do not work regular Saturdays or Sundays.

PN27440

So we say that those figures confirm that the biggest difference in work-life interference occurs between those who work regular Sundays, whether with Saturday or not, and those who work regular Saturdays but not regular Sundays. Contrary to the ABI's contention, the biggest difference is not between those who work weekends and those who do not.

PN27441

Now I want to now move to some more specific submissions to do with the Retail Award. Can I deal with Prof Rose and at the outset raise an issue about Prof Rose's work, which is evident on the face of his report, but which we think it important that the Commission steadily bear in mind in considering what, if any, weight should be given to the task at hand. I'll just hand up a copy of the relevant extract for convenience.

PN27442

This is pages 42 and 43 of the Rose Report. Looking at table 13, what this table sets out is the results of the experiment in absolute monetary terms, in terms of the willingness to accept expressed by employees about working at different times, averages of that willingness to accept. So to look at those retail workers under the heading "General Retail Industry Award 2010", the results of the experiment show that in absolute monetary terms the average hourly rate required for retail employees to work on a weekday was $24.60 an hour, and the same on Saturday and $34.40 on Sunday, just looking at the first column.

PN27443

What Prof Rose goes onto identify at the bottom of page 42 is that the average hourly rate actually paid to the survey participants was actually higher than the award. That is it was $21.92 in relation to those employed under the Retail Award and $21.95 for those under the Restaurant Award. That's considerably greater if one bears in mind that at the time the survey was conducted the level 1 Retail Award rate was some $18.

PN27444

So to address that what Prof Rose did is to produce table 14, which is the one which received the emphasis in the submissions today, and that's the table which shows on its face, looking at the Retail Award, that for Sunday on average - that is on average survey respondents required 156.93 per cent of their average reported hourly rate to work on a Sunday. Now the point I want to make is that the Commission ought not overlook the fact that that percentage is not a percentage of the award rate. That is a percentage of a substantial over-award rate, $21.92.

PN27445

The issue gets I think muddied in the submissions at times and it's perhaps understandable why the parties and the Commission might, given the way the headings that appear in these tables refer to the awards. One can glancing at a table easily be led into error to think well, that's telling the Commission that on average workers under the award will work for 156 per cent of the Sunday rate. But it is not telling the Commission that fact.

PN27446

The point we want to make is that putting aside - let's assume the unions are wrong in every one of their criticisms they make of Prof Rose and the research, what the research is showing is that on average the threshold hourly pay rate to work in the case of a Sunday, without a public holiday in that week, is 156.93 per cent in relation to retail workers, but that is a percentage of the average hourly pay rate.

PN27447

The second point we make is that once that is appreciated the analysis strongly suggests that in relation to award workers the rate they would require, in this perfect choice experiment Prof Rose conducted, to offer themselves for work on Sunday is in fact substantially greater. If one looks at the percentages for Monday to Fridays where - bearing in mind that the award rates as at 2015 for level 1 retail were $18.52 for ordinary time. That was the ordinary time level 1 rate. If one goes back to table 13 and looks at the absolute numbers there in relation to retail, for weekdays, on average, workers want to be paid, rather amazingly, in order to offer themselves for work, $24.60 a week. Now, that is a rate of 32.8 per cent more than the award rate. The same percentage arises in relation to the comparison with Saturdays.

PN27448

For Sundays, the difference between the award rate and the rate of $34.40 which appears in table 13 is actually 85.75 per cent.

PN27449

DEPUTY PRESIDENT ASBURY: That's the award rate for level 1?

PN27450

MR MOORE: Correct. One needs to be very careful in considering this data. It's important that the Commission not misinterpret it as reflecting the differential that retail workers or hospitality workers would, in this hypothetical, perfect choice scenario, require to be paid over and above the award. If one wanted to identify that on the data identified, it would suggest that in Prof Rose's context of his experiment, award level 1 workers would require 185 per cent of the award rate.

PN27451

Now, can I deal with Mr Izzo took the Full Bench to that part of the Rose report, page 22 of the Rose report, where Prof Rose states that there's very little variation that exists between days of the week and that more variation exists within each day. Now, we've addressed that in our submissions and I don't want to unduly repeat it. The point we make there is that the analytical methodology which Prof Rose deployed to generate that table on page 22 of the report is fundamentally flawed, as explained in our submissions.

PN27452

In short, that is because the identification of the relative importance of time, which is what it purports to be, was derived from asking respondents to rank an activity's importance defined as an ability or desire to change that activity should a conflicting event occur. Participants were not asked how important a particular time of the day was to them. They just were not asked that. The analysis assumed that the importance a person attributed to an activity was a meaningful proxy for time. I put to Prof Rose the example of walking a dog on a Sunday afternoon.

PN27453

Prof Rose rates the importance of that time by having regard to whether or not the respondent could easily change the time they walk the dog. We say that that simple example shows up the underlying lack of utility or sense in that measure of time. We've made other extensive criticisms of Prof Rose's work, the

methodology, with all respect to the professor, between paragraphs 159-185 of our submissions and I don't want to repeat them. Mr Izzo made the suggestion that one reason why the premiums required by survey participants were higher for Sundays is that loss aversion may have been at play.

PN27454

Now, that's another surprising submission from the employers since if one reads Prof Rose's report, I don't think you'll find the words "loss aversion." That came in once Prof Altman revealed to the Commission there is this thing called loss aversion and which Prof Rose then embraced. We submit that that submission by my friend should be rejected. It's the ABI's speculation as to what might have informed and led to the percentages. It's not based on any evidence. All it is based on is an assumption that they knew the award rates.

PN27455

I refer the Bench to the transcript at 9272-9283, where it's clear when I cross-examined Prof Rose, that in conducting this experiment he made - he did assume that respondents knew their own actual rate of pay, and I accept that that's a reasonable assumption to make, but he also assumed that they knew what the current award rate was for ordinary time and that they knew what the current and applicable penalty rate was for different times. Now, that's just an assumption he made. There's no evidence that participants knew that.

PN27456

Can I deal now with a submission put by the ARA, that the disability of Sunday work is not four times that of Saturday. The ARA contends that any disability associated with working on Sundays is not four times that of working on Saturdays and the SDA is called upon to answer that claim, that argument, which we now will. We say there's a number of problems with that argument. First, I just want to make clear, it's misleading and inaccurate to say that the Sunday penalty rate is fourfold that of the Saturday penalty rate for all employees.

PN27457

Under the Retail Award, casuals get a loading of 35 per cent for Saturday work. That's the aggregated loading between casual and penalty rate. They get 35 per cent on a Saturday, and on a Sunday, the aggregated total penalty payment is 100 per cent. So for that group of employees at least, of whom there are many, we're talking about weekend workers, the difference is a degree of three, rather than a degree of four. I just make that point to begin with.

PN27458

Secondly and most importantly, this argument put by the ARA presumes that the Commission is able to discern and identify the extent to which the disability of working on Sunday is greater than working on Saturday, so as to conclude that the fourfold or threefold difference is not justified. We say there's no evidence which would enable the Commission to make a finding of the type upon which the ARA's argument is premised. That is, for the ARA to make good this argument, they'd need to say - they can't simply say, "Well, whatever it is, it's not fourfold", because to make good that proposition as a matter on a logical, rational basis, one needs to identify, well, what is the difference?

PN27459

We say that what the evidence that I've gone through before and the other contextual matters establish, is that the disability associated with Sunday work is significantly greater than that associated with Saturday work. That's what Prof Charlesworth concludes. The evidence does not, however, enable the Commission to make a finding about the specific extent to which Sunday disability is greater. So the evidence which, theoretically at least, might be most conducive to a specific assessment, quantification of the type that the ARA presumes, is again the evidence given by Prof Charlesworth.

PN27460

But her evidence indicates that the AWALI measure is not amenable to discerning the specific extent to which the work-life interference from Sunday is greater than Saturday. As she stated, and this is in her report, exhibit SDA43, paragraph 6 and paragraph 3, it was a survey designed to reveal patterns, trends and observations. With an average AWALI score of 42.1 in 2014, that was the average score, she stated that scores above that level:

PN27461

Indicate a work-life interference that is worse than average and scores below this level indicate a better than average work-life relationship.

PN27462

She dealt with the comparison between Sunday and Saturday working and table 3 and 4 of appendix 2 of her report showed that the adjusted AWALI scores for all employees, that is controlling for hours worked, were 41.961 for those work worked on Saturdays but not Sundays, 48.824 for those who worked on Sundays but not Saturdays and 50.322 for those who worked both Sundays and Saturdays.

PN27463

She sets out in her report whether or not those differences in scores were significant using post hoc tests and they showed, as she set out in her evidence, that average AWALI scores for those working Sundays and not Saturdays were significantly higher - that's her words - than for those who worked Saturdays and not Sundays, and likewise average AWALI scores for those who work Sundays and Saturdays were:

PN27464

Significantly higher than those who work Sundays and not Saturdays.

PN27465

So what can be deduced from Prof Charlesworth's evidence, we say this. The level of work-life interference is significantly higher for those who work Sunday as compared to those who work Saturday only. That is a small comparison between 48.824 and 41.961, and it is also significantly higher for those who work Sundays and Saturdays as against those who only work on Saturdays. That's a score of 50.322 versus 41.691.

PN27466

The evidence only goes so far as establishing a basis for a finding that the disability for Sunday work over Saturday work is significantly higher. There is no

evidence, we say, which would enable the Commission to find that, for example, that significantly greater disability is twice that of Saturday work, or four times, or five times. Well that's what we say about the ARA's argument on that score.

PN27467

The last point we make about this fourfold argument is simply to say, we say the argument is objectionable because it in effect places on those opposed to the proposed variations an onus to justify the existing provisions of the award. For the reasons we have said, these are entitlements fixed by the Commission in award modernisation, and as the Commission observed in the preliminary jurisdictional decision, where significant change is proposed and plainly we're not all sitting around here talking about insignificant change. This is a significant change. It needs to be supported by probative evidence, properly directed to demonstrating the facts supporting the proposed variation, and the effect of the ARA argument is in effect to reverse the onus or put an onus, I'm sorry, on the unions.

PN27468

Now if I might turn to the controversy between Ms Pezzullo and Ms Yu, this has been dealt with at some length in the written submissions and I don't want to traverse that ground unnecessarily. The ARA says in its reply submission that Ms Yu's analysis is fundamentally flawed for two reasons; first, it's said that her analysis was undertaken by reference to all industries and not confined to the retail industry, thereby undermining any contentions able to be advanced about conclusions re the Retail Award.

PN27469

That is wrong. Yu's analysis was not undertaken by reference to all industries and thereby not confined to the retail industry. As is set out in footnote 7 on page 11 of her first report, exhibit SDA39, her work was undertaken by reference to the retail industry as defined according to the ANZSIC 1 classification retail trade level.

PN27470

The second fundamental flaw is that it's said that the control group was not identical and it said that the SDA has softened Ms Yu's evidence in saying well, the control group doesn't need to be identical, it just needs to be comparable when her evidence was that it needed to be identical. Now this is an important point because it strikes at the heart of the DID methodology which she deployed.

PN27471

The submission is misleading and inaccurate with respect because it proceeds from a selective reading of Ms Yu's evidence and ignores the substantial evidence given to the Commission about the nature of the DID methodology.

PN27472

I need to take the Commission briefly through that evidence. First, in her primary report, which is exhibit SDA39, she identified at page 10 the, "the important assumption" that the control group:

PN27473

exhibit a common trend with the treatment group prior to the policy's implementation.

PN27474

At page 16 she stated that:

PN27475

The key assumption for the model is that employment trends would be the same for both states in the absence of the reform.

PN27476

Dealing with this chronologically, Ms Pezzullo then considered Ms Yu's report. What Ms Yu said in her report that I've just said out, was not contested by Ms Pezzullo. She stated, that is Ms Pezzullo stated, at 3.5 in Retail 12:

PN27477

A critical assumption which the author has rightfully highlighted in the paper, is that in order to identify a control group the trends exhibited in this group, Victoria, should be identical to those in the treatment group, New South Wales.

PN27478

She, Ms Pezzullo, footnotes page 10 of the Yu report which is what I referred to before. Then in this tennis match between experts, Ms Yu considered Ms Pezzullo's report in exhibit SDA40 and Ms Yu stated at paragraph 7:

PN27479

As Pezzullo recognises, paragraph 3.5, the key assumption underlying the DID methodology is that New South Wales and Victoria employment exhibits similar trends. This is known as the common trend assumption.

PN27480

She then went onto say in paragraph (a) that:

PN27481

The common trend assumption requires that the New South Wales and Victoria employment trends be similar in the period before the treatment.

PN27482

At paragraph 7(b) she stated:

PN27483

The standard in the literature does not require that the parallel trends be precisely the same. Rather, that substantial grounds for invalidating the methodology be ruled out, e.g. Hastings 2004.

PN27484

Ms Pezzullo then responded to Ms Yu in her report of 2 December. Although Ms Pezzullo, it will be remembered, contended that there had been a structural break in the trends, clearly that is a debate between them, she did not contest Ms Yu's evidence that similarity in trends was sufficient and that it is not necessary for the trends to be precisely the same. She didn't engage with this latter point at all. As she put it at 3.2(a):

PN27485

The basic questions were whether the trends are the same in New South Wales and Victoria.

PN27486

Now in her oral evidence, Ms Pezzullo expressed her conclusion, this is paragraph 25839 that they were not, "the same trends". In response to that at PN25893 Ms Yu referred to her earlier evidence and explained why the trends prior to the increase in penalty rates were "comparable" and therefore why the control groups were comparable.

PN27487

In summary then we say this, that journey through the evidence shows that there is a substantial level of agreement between the two experts about what the common trend assumption requires. Namely, the existence of the same trends in relevant indicia, employment in this case, between the treatment and control group before the treatment occurs. Secondly, the evidence does not require that the trends be precisely the same or identical.

PN27488

Now this is the punchline as it were, the ARA fix upon an answer given by Ms Yu in cross-examination in which she did agree to the proposition put to her that it is critical to have an identical control group. Ms Yu did give that evidence but it is submitted that that evidence needs to be understood in the context of all of the evidence that I've just gone through.

PN27489

We say that, properly considered, that evidence should not be treated as Ms Yu accepting that the control group - that the trends needed to be precisely the same or identical because if that were so, that would be at odds with both her own evidence and Ms Pezzullo's evidence, in which they were in agreement. It may be ultimately a question of language but in any event, I wanted to take the Commission through that evidence.

PN27490

The ARA also contends that Ms Yu's analysis failed to take into account a number of factors which undermined its reliability and usefulness, what are referred to as the "omitted biases". Now, it's true that Ms Yu did not take into account a number of factors; the announcement by the Commission in 2009 of impending penalty rate increases, the demand for retail goods in each State and regional and metropolitan factors. But her evidence, at PN22,694, was that her analysis was based on the best available data and that she was unable to control for factors at this level of detail.

PN27491

This is another example of the employers' imposing on experts an unattainable level of perfection. Of course, research could be improved. Perhaps Ms Yu might see if further evidence can be - I withdraw that. Now, it's also said that Ms Yu's analysis did not consider the proposition that reductions in penalty rates may have a positive effect on employment of aggregate hours of work. Well, it's

self-evident that her analysis was not considering the effects of a reduction in penalty rates. That was not the natural experiment that she was examining.

PN27492

We accept, as we do in our submissions, that Ms Yu's evidence cannot stand as a definitive account of the reverse scenario involving a reduction in penalty rates, but we say that her evidence is probative of the direction and strength of the relationship between penalty rates and employment. We point out that the employers' reliance on Prof Lewis's evidence about the effect of increases in penalty rates on employment indicates that they, too, accept the relevance of looking at the counterfactual in determining the effect of cuts in penalty rates on employment.

PN27493

We say that Ms Yu's evidence should be accepted by this Commission. It fills an important gap in terms of the understanding about the relationship between employment and penalty rates and it provides critical empirical support for the analysis, on a theoretical level largely, given by Prof Borland and Prof Quiggin which we say amounts to establishing that cuts in penalty rates will have no measurable impact on levels of employment. What makes Ms Yu's work unique, amongst other reasons, is that this is empirical work in an Australian context in the retail industry.

PN27494

So we say, to conclude on this point, Ms Yu's evidence undercuts and is inconsistent with the employer case that there's a positive relationship between cuts in penalty rates and employment, such that a reduction in penalty rates will increase employment and/or hours of work. There are one or two other points to make about Ms Yu's evidence. The employer parties submit that Ms Pezzullo's modelling establishes that there has been a structural break or statistically significant and enduring reduction in both employment and hours worked in New South Wales from the Sunday penalty rates being increased.

PN27495

We say that that submission rests on a conclusion reached by Ms Pezzullo which is not in fact supported by the tests she conducted, and this was identified by Ms Yu in her final statement in which she stated, at paragraph 18 - - -

PN27496

JUSTICE ROSS: What is the exhibit number for that?

PN27497

MR MOORE: It's referred to as the Yu rejoinder in - we'll find the exhibit number, your Honour. This is paragraph 18 of the Yu rejoinder:

PN27498

The modelling set out in part 4 of Pezzullo report B does not yield any significant results or a conclusion about the employment effects arising from higher Sunday penalty rates. The only concluding statement in paragraph 4.2(g) is that "behaviour in New South Wales may have moved towards that in Victoria as Sunday penalty rates in New South Wales have moved to a level in

Victoria." This statement is unclear in its meaning, however, more importantly, it is based on line G in table 4.5. This result, a P value of 0.2, indicates that the model was unable to establish a statistically significant difference between retail employment in New South Wales and Victoria post 2010.

PN27499

It's SDA55, if the Commission pleases. Now, critically, although Ms Pezzullo read SDA55, she did not give evidence challenging the evidence I have just read given by Ms Yu. So we say that beyond this fatal flaw in Ms Pezzullo's evidence, for other reasons the modelling undertaken by Ms Pezzullo is seriously flawed in relation to Ms Yu's work. The following unchallenged evidence was given by Ms Yu outlining the key weaknesses in the modelling. One, "The model failed to incorporate variables controlling for the impact of the GFC." Those were variables shown to be highly significant in Ms Yu's analysis:

PN27500

Not only were these variables omitted from the model, Ms Pezzullo failed to test the impact of excluding them. Further, controlling for labour market conditions and the business cycle in something as significant as the global financial crisis is standard in studies employment effects. Further, Ms Pezzullo excluded the time/trend variable in her model without explaining why. As a result, the model does not account for employment effects across different years, including the adverse employment changes in 2009 during the GFC.

PN27501

Furthermore, Ms Pezzullo did not perform most of the specification tests that she herself identified as being necessary to evaluate the robustness of Ms Yu's analysis. Now, what I've just summarised there was unchallenged on the evidence given by Ms Yu. One last point in relation to Ms Yu's evidence. The ABI asserts in their oral submissions from Monday that a different trend can be identified from 2008, and Mr Izzo noted Ms Yu's response that this would be a case of cherry-picking, but he submitted that even if that's right, it doesn't change the fact that at the time Victoria and New South Wales were divergent.

PN27502

We say that that submission just misses the point and the requirement is for there to be common trends. It's contrary to the methodology to engage in a process of effectively data mining, by filleting up data for self-serving purposes to advance a hypothesis. One looks for a trend. One doesn't just take a particular small part of the trend and say, well, you've got that divergence, therefore, the rest doesn't follow. Now, in relation to - I just want to say a couple of brief things about Dr Sands' evidence and I need to say this because although I think Mr Waller had addressed it, it is dealt with in the employer reply submissions.

PN27503

There are two key issues in contention in relation to the Sands' survey. The first concerns the question of response rate. I think it's agreed between us that there's no evidence before the Commission about what the response rate was for the Sands' survey. That is the position; there is no evidence of what the response rate

is. Now, in light of that, what the ARA submits is to say, well it's not open for the SDA to advance this criticism that there's no response rate, because the absence of a response rate was the subject of criticism in proposed reply evidence to be given by Dr Bartley, and that in response to those criticisms, Dr Sands filed a reply statement in which he identified the response rate, but which was never tendered. It said that:

PN27504

The SDA can't make a submission about the absence of the response rate because it -

PN27505

the SDA:

PN27506

Did not read into evidence that relevant part of Dr Bartley's evidence which criticised the Sands report and did not cross-examine Sands in relation to the response rate.

PN27507

But the problem with that submission is this. It was the ARA which elected not to read into evidence Dr Sands' statement as to the response rate in the survey, and it adopted that course in light of other evidence given by Dr Bartley which was read into evidence and which included the unchallenged statement that an adequate response rate is an essential condition in order for reliable conclusions to be drawn from the survey. So the SDA's submission is not that the response rate was inadequate, because there's no evidence of what it was; it's simply to say that it's not good enough for there to be no evidence of a response rate, and that in the absence of a response rate, in light of Dr Bartley's evidence as to the essential requirements for reliable survey results to be drawn, it can't be given any weight.

PN27508

There is a point raised, secondly, about substantial overestimates compared to HILDA data - this is paragraphs 19 to 22 of the ARA reply - and the ARA takes issue with the SDA's contention that the Sands report, in relation to the employee survey, contains substantial overestimates in relation to the proportion of retail workers who work on weekends and on Sundays compared to HILDA data. We say about that, there can be no controversy about it. Dr Sands unconditionally accepted that the HILDA data is more reliable than his survey, based on comparative sample sizes, and we refer to PN9921 and PN9924.

PN27509

The next point to say about Dr Sands' survey, the SDA submits that its primary position is that the Sands report and particular survey is deeply flawed and ought not be given any weight. If that submission is not accepted, well the Commission must, in my respectful view, give weight to all of the results of the survey and they include results which the ARA appears to want to play down, and it's important that the Commission note what emerges from the Sands report, and these are set out in paragraph 194(a) of the SDA submissions.

PN27510

There's four points that emerge from the Sands survey, which are the following four points: first, the vast majority of non-Sunday employees state there is nothing that would motivate them to work on a Sunday; secondly, the main difficulty with Sunday work among shop floor employees is its impact on their ability to spend time with family and friends, 54 per cent, and that 67 per cent of Sunday employees are hardly ever or never able to make up that time during the week; thirdly, 86 per cent of Sunday employees are hardly ever or never able to make up that time to attend community sporting or cultural events during the week; fourthly, 29 per cent of Sunday employees who have children believe that Sunday work has an adverse impact on the health and development of their children.

PN27511

So the ARA can't have it both ways. If it wants to rely on the Sands survey and draw the conclusions and findings it proposes, in its submissions, it can't cherry pick. The Commission also should, on the ARA's case, make those findings, and they are findings extraordinarily which include a perception that Sunday work adversely affects the health and development of Sunday workers' children. We say that those findings would strongly support the SDA's case of the additional disability attached to Sunday work.

PN27512

I'm about to move to another topic.

PN27513

JUSTICE ROSS: Is that a convenient time?

PN27514

MR MOORE: Yes, your Honour.

PN27515

COMMISSIONER LEE: Just a question before we break. I just want to go back to Prof Rose and the document that was handed up, table 14.

PN27516

MR MOORE: Yes.

PN27517

COMMISSIONER LEE: You took us to that issue about the gap between the award rate that's paid and the actual rate that the respondents indicated that they were working for. Assuming you're right about that and as you put it that would mean - I think you gave the example of the Sunday rate which is at 157, that probably reconstructed mathematically that would be at 170 cents say - - -

PN27518

MR MOORE: 188 per cent, I think it is, Commissioner.

PN27519

COMMISSIONER LEE: 188 per cent, sorry. Assuming that that would flow through to all of those figures, that wouldn't change the fact that one could look at the relationship between those numbers as indicators of what the individual's

WTAs were for the different days of the week - for the Sunday, for the Saturday or the week day - notwithstanding the absolute values are different, but the relationship between those numbers would still tell us something, wouldn't it, about the way they value - coming back to this key issue about Saturday and Sunday?

PN27520

MR MOORE: At risk of being circular on this analysis, Commissioner, can I say this. One's left with a percentage difference, that's identified, but it is a percentage difference relative to the actual rates paid. That's what it's derived from.

PN27521

COMMISSIONER LEE: Yes.

PN27522

MR MOORE: Query whether one can assume that that percentage difference can then be applied to a different comparator group of award workers, those who are paid the award rate. So if - as I understand the question, Commissioner, it really goes to saying, does 156 per cent differential, does that still assist and guide the task at hand presumably, and there's a - - -

PN27523

COMMISSIONER LEE: In terms of assessing that willingness to work on a Saturday as opposed to a Sunday, whether we've got 112 on a Saturday and 156 on a Sunday, what you were putting, it should have been 188 on a Sunday and presumably some high number for the Saturday. The point I'm just making is can't one still look at those numbers, adjusted or non-adjusted, and look at the relationship between the two?

PN27524

MR MOORE: Yes, I understand the point, and I might take it on notice, if I may, Commissioner?

PN27525

COMMISSIONER LEE: Yes.

LUNCHEON ADJOURNMENT **[1.03 PM]**

RESUMED **[2.19 PM]**

PN27526

MR MOORE: If the Commission pleases, can I deal with two matters arising prior to the luncheon adjournment before I come to the matter raised by the Commission before we broke. I just want to deal with the following issue in relation to the union's submissions relating to Dr Sands. I'm not sure if members of the Bench have in front of them the union's written submissions. The relevant page is page 65. The union withdraws its submissions in paragraphs 189 and 191. It also withdraws its submissions in paragraph 188 insofar as the submission there made relates to the employee survey conducted by Dr Sands.

PN27527

JUSTICE ROSS: I'm sorry, what was the last one?

PN27528

MR MOORE: Paragraph 188.

PN27529

JUSTICE ROSS: Yes.

PN27530

MR MOORE: We don't withdraw that in its totality but we withdraw it insofar as it relates to the employee survey conducted by Dr Sands.

PN27531

JUSTICE ROSS: So the SDA's primary submission is the design and conduct of the employee survey.

PN27532

MR MOORE: Well - - -

PN27533

JUSTICE ROSS: In the Sand's report?

PN27534

MR MOORE: No, your Honour. The way - the criticism made in 188 is directed at the totality of the Sands report, which includes - - -

PN27535

JUSTICE ROSS: Yes, I see.

PN27536

MR MOORE: So I'm just wanting to make clear that we withdraw the criticism there made insofar as it relates to the Sands survey, the employee survey.

PN27537

JUSTICE ROSS: Does that also for your submissions before lunch which went to the absence of the response rate?

PN27538

MR MOORE: Correct.

PN27539

JUSTICE ROSS: So it's your oral submissions as well as these ones.

PN27540

MR MOORE: Correct, your Honour.

PN27541

JUSTICE ROSS: Right.

PN27542

MR MOORE: Now I trust that's sufficiently clear. In relation to the question asked by the Lee C before lunch, I'm advised by my juniors that I think I misheard

what you were asking of me, Commissioner. But as I understand it, the substance of your inquiry is whether it is open for the Commission to compare the percentages - perhaps if I can illustrate this and my understanding by looking at table 14, to compare the percentages there set out, and also to compare the percentages which I referred to before lunch, if one does the analysis by reference to the difference with the award rate. That is the differences between - I think they were - on the alternative analysis of the numbers I'd indicated that the difference between the willingness to accept for ordinary time and the award rate was 32.8 per cent.

PN27543

COMMISSIONER LEE: Yes.

PN27544

MR MOORE: Likewise it was 32.8 per cent for Saturdays, and 85.75 per cent in relation to Sundays. As I understand the question it is whether it's open to the Commission to compare between the percentage differences in relation to the table 14 percentages, within those percentages, so a comparison for example between the Saturday percentage of 112 per cent and the Sunday percentage of 156 per cent. Also a comparison between the Saturday award percentage of 32.8 per cent and the Sunday award percentage of 85 per cent. The answer to that question is that in our view, such a comparison is properly able to be made by the Commission. That comparison would suggest on its face that looking at the difference between the - looking at table 14, the difference between 112 per cent for Saturdays and Sundays of 156 per cent is in the order of a fourfold difference. The award comparison, the same differences in the order of a threefold difference.

PN27545

COMMISSIONER LEE: Thank you.

PN27546

MR MOORE: The one other point to note before I move off the Sands report, it should be noted that the - I'm sorry the Rose report. It should be noted that the nature of the experiment - I'll just hand up an extract from - this is page 9 of the Sands report. The Commission might recall that the way in which the experiment proceeded is that participants were presented with four scenarios, and this is a screenshot of scenario one. Scenario one contains within it seven offers, and offer for work on a Friday and a Saturday - and a Saturday, I think that says, and so on, and participants are invited to then accept or reject each of those offers within that scenario. Then there are a further three scenarios.

PN27547

The point we just want to make is that in the way in which these scenarios were presented, they were presented as a sweet or if you like a package within which employees were to make choices. So employees conceivably would have made choices given the experiment design, considering how to maximise their own welfare, in the face of the seven offers in front of them. They would have made whatever choices they saw as appropriate in the face of each of those offers.

PN27548

I raise this point because one of the novel numbers that comes out of the analysis is the fact that in table 14 the weekday rate willingness to accept is 112 per cent. Well I don't say anything more than that but we just wish to draw that to the Commission's attention.

PN27549

Can I proceed with the submissions. The last point I want to make about the Sands employee survey, in paragraph 27 of their submissions the ARA makes the point or submits that the Sands survey demonstrates that the substantial percentage of current non-Sunday employees would be prepared to work on Sundays, including a combined 26 per cent who don't require any increased benefits to be motivated to work on Sundays.

PN27550

Can we just draw the Commission's attention to that because that evidence, that conclusion would support the SDA's alternative submission in this case, which I'm about to come to, namely that if there is to be a reduction in Sunday penalty rates, Sunday work should be voluntary because there is a - in the employer case - a surplus of volunteers willing and able to work on Sundays at the lower rate. The evidence to which - the submission the ARA makes is consistent with that alternative submission.

PN27551

Can I come to the alternative submission now which I've just articulated in short, and we say that in the event that the Commission determines to reduce the Sunday penalty rates, it should as the necessary corollary to any such change also vary the Retail Award to provide that Sunday work is voluntary. Under the terms, and we deal with this in paragraph 67-73 and paragraph 42 of our submissions. Under the award in its present terms an employer may require an employee to work the ordinary hours on a Sunday, subject to employees having one Sunday off in four. That's clause 28.13.

PN27552

The basis of the argument that the current entitlement to double time - sorry. The basis of the argument we put, this alternative argument we put is that the current entitlement to double time reflect that the contemporary assessment as I've outlined undertaken by the Commission with the AIRC in $2 and under, in which case some 17,000 employers were roped into the Victorian Interim Award.

PN27553

In doing that roping in exercise, the Commission altered a number of pre-existing award entitlements, in particular two of them, which are presently relevant, by making a general provision for the working of ordinary hours on Sundays, between 9 am and 9 pm and secondly, by making work in ordinary hours on that day non-voluntary for all shops.

PN27554

In fixing the Sunday penalty rate at double time, the Commission explicitly did so by identifying the substantial difficulty associated with work on a Sunday and stated - and this is at 95 of $2 and under at paragraph 95 that the disability associated with work on a Sunday;

PN27555

Would be heightened in the context whereby provision is made in the roping in award for the non-voluntary working of ordinary hours on a Sunday.

PN27556

So on that basis, we contend that the modern standard identified by the Commission for Sunday work in the retail industry at double time has been in part underpinned by recognition that the work may be required to be performed. So we say that if the Commission is minded to alter that bargain and to reduce the Sunday penalty rates a necessary corollary would be removing the involuntary nature of Sunday work.

PN27557

We say there's a number of good reasons why the Commission should adopt that course on a merit basis. We note firstly it would involve the application of the principle identified in the preliminary jurisdictional decision at paragraph 34, that the broad nature of the modern awards objective and the range of considerations encompassed by it means that there's not one set of provisions which can be said to provide a fair and relevant safety net, and the different permutations and combinations may meet the objective.

PN27558

We say that in this alternative argument, the context in which I am putting this submission, the rendering of Sunday work as being voluntary having regard to the decision in $2 and under, would involve an appropriate recasting of the fair and relevant safety net in the face of a reduction in Sunday penalty rates.

PN27559

We say that secondly, such an approach would be consistent with the evidence before the Commission about the disabilities associated with Sunday work. It is readily apparent that the various manifestations of those disabilities are caused by a requirement for employees to work on a day which for some employees is against their preferences. Rendering Sunday work as voluntary would suit a step suitably adapted and directed at striking at what must be taken to be an underlying cause of the disability of Sunday work.

PN27560

The third point we make is that voluntary Sunday work would be a step entirely consistent with the employers case in this proceeding. The ARA have submitted that many retail employees choose to work on Sundays, that's paragraph 103 of their submissions. They have submitted that the evidence establishes that many retail employees choose to or are happy to work on Sundays, that's 103(a). Submitted that many retail employees choose to work on Sundays because it suits their personal circumstances and allows flexibility in relation to their non-work commitments. They have submitted, at paragraph 106, that:

PN27561

Retail employees will continue to work on Sundays if the Sunday penalty rate is reduced to an additional 50 per cent.

PN27562

And they have submitted that the evidence establishes that 53 per cent of non-Sunday retail workers would work on Sundays if they could, with the substantial majority of these not requiring increased pay to do so. That's paragraph 109. So the ARA's overall contention is that because retail employees would continue to work on Sundays for 50 per cent, are generally willing to work and satisfied with 50 per cent for Sundays, and a number currently receive 50 per cent loading for work on Sundays, a loading of 100 per cent is not necessary. That's paragraph 114.

PN27563

In their written submissions, the ARA made some short reference to being given leave to provide further evidence in relation to this issue. I don't understand from Mr Wheelahan's submissions that that is pressed, but in any event, for the record, we would oppose that course. We've not had any indication of what that further evidence would be. Presumably, it would be evidence directly contrary to the employers' case, that voluntary work on Sundays would be an outcome not well-adapted and inconsistent with the evidence - I'm sorry, inconsistent with the needs of retailers.

PN27564

Can I hand up to the Bench an extract of the Shop Distributive and Allied Employees Association - Victorian Shops Interim Award 2000. This is clause 19. I raise this because your Honour the President mentioned, as a possibility in the event that the Commission was minded to go down this path, consideration of an arrangement akin to or analogous to the provision in section 114 of the Act. It would be the SDA's preference, for reasons that I'll explain now, that a more appropriate course would be to emulate, perhaps in more modern terms and perhaps in a more streamlined way, the provisions which were formerly contained in the Victorian Shops Interim Award as set out in clause 19. That's why I have provided this to you, for the Bench's assistance.

PN27565

JUSTICE ROSS: To the extent that we've got a process where there will be submissions in relation to the issue that I raised, that would provide you with an opportunity to put what you wanted to say as the alternative.

PN27566

MR MOORE: Certainly.

PN27567

JUSTICE ROSS: That may mean that, in looking at those consent directions, the employers might want an opportunity to respond to that, but I'll leave that with you to come up with something. But when you said in a more streamlined, modern way, this will give you a chance to redraft this clause in a more streamlined, modern way and you could advance that as your proposition if you wish in response.

PN27568

MR MOORE: Certainly, your Honour. Happy to proceed that way. I won't say anything more about that at this time.

PN27569

JUSTICE ROSS: Yes, I thought it may because it will arise in both anyway, so it might be better dealt with that way.

PN27570

MR MOORE: Yes.

PN27571

JUSTICE ROSS: This is mainly directed at you, Mr Wheelahan. Are you content with that course?

PN27572

MR WHEELAHAN: Yes, your Honour. I would have thought a further seven days in reply would be fine.

PN27573

JUSTICE ROSS: Yes. I'm content to leave it to the parties to sort out what's appropriate. That's fine. I really meant the process, not so much the time period.

PN27574

MR WHEELAHAN: Yes. I agree.

PN27575

JUSTICE ROSS: Yes, okay.

PN27576

MR MOORE: I'd make two more short points in relation to the employers' submissions in relation to penalty rates dealing with the Retail Award, in particular Sundays. Just briefly, the position with the Baxter evidence relied upon by the ABI, I mean, ultimately it's put, it would seem - or accepted by the ABI - that notwithstanding its obvious weaknesses, it nonetheless represents the view of a significant number of employers. It makes some considerable volume of noise, as it were.

PN27577

We don't accept that the survey should be given any weight, including in that way. If it just stands as the views of a group of employers, that's really what is then suggested, well we haven't had an opportunity to test those views. Those views are entirely untested and we say the ABI shouldn't be permitted to, in effect, elevate or transform a defective survey into untested lay evidence, or something akin to that.

PN27578

They have had an opportunity to put on all their witnesses, they decided to - ABI didn't call any lay witnesses, as I recall. They decided to put on a survey and it's a flawed one. That is, in our view, the beginning and end of the matter. Can I lastly deal with, briefly, the survey relied upon by the Chamber of Commerce and Industry of WA, and just briefly, there was a survey filed by that body as part of its submission to the Commission dated 8 February 2016. The survey was not the subject of evidence in the proceeding and hasn't been tendered.

PN27579

We haven't had an opportunity to test it, and we therefore propose that appendices A and B of the Chamber's submissions which contain that survey material, not be considered by the Commission, together with the following paragraphs in the submission which refer to that survey: paragraphs 47-55 and paragraph 63. Can I turn brief now to the - I'm sorry, your Honour?

PN27580

JUSTICE ROSS: Just in relation to that, I'm conscious that CCI WA is not here or represented, or perhaps industries, they might - - -

PN27581

MR IZZO: They are an affiliate of ACCI

PN27582

JUSTICE ROSS: I'm sorry?

PN27583

MR IZZO: They are an affiliate of the Australian Chamber, that's the extent.

PN27584

JUSTICE ROSS: Yes. Well, perhaps if you can provide them with, or draw their attention to the relevant part of the transcript where Mr Moore has sought to exclude it and we provide them with seven days to respond to that in writing, deal with it on that basis. If anything arises from their response, there's liberty to apply.

PN27585

MR MOORE: Thank you, your Honour. Can I deal now briefly with the public holiday submissions put by the ABI. We rely on our submissions at paragraphs 394-398. I wish to emphasise and make two points which we say are dispositive of this controversy in favour of the unions' case. First, the ABI submission is, in substance, that the Commission should vary the entitlements to public holiday penalty rates because the present statutory regime relating to public holidays is fundamentally different from the regime which prevailed when these rates were set.

PN27586

It's said that section 114 of the Act in effect makes public holiday work voluntary, but the rates for public holiday work were established to compensate employees for when work was required at an earlier time. The difficulty with that submission is that the rates set in the Retail Award and its predecessors have been set in circumstances where, as recognised by the Full Bench in the Interim Review in respect of Public Holidays, and which I'll provide a citation in a moment, but at paragraph 123 of that decision, the Full Bench recognised that:

PN27587

Over many years in New South Wales and Victoria work on public holidays was considered voluntary.

PN27588

The citation is 2013 FWCFB 2168, and it's paragraph 123. So the premise for the ABI's argument in relation to the retail sector simply is non-existent because the standard regulation, certainly in New South Wales and Victoria, certainly in those two States, is that work has always been considered voluntary. So on the ABI's own case, once that factor is acknowledged, there's no change.

PN27589

The second point we make, putting the award history to one side, and looking at in terms of the statutory context, in particular section 114, we don't accept - just looking at section 114 - that in the context of the retail industry, work on a public holiday can really in any sensible way be said to voluntary. In particular, without getting into the detail unduly at section 114, the considerations identified in section 114(4)(a) and (c), which I'll just turn up, the first one is the nature of the employer's workplace or enterprise including its operational requirements and the nature of the work performed by the employee, and (c) is the consideration, whether the employee could reasonably expect that the employer might request work on a public holiday. So these are two of the considerations which must be taken into account in assessing whether a request to work is not reasonable and also whether a refusal is reasonable.

PN27590

Looking at those two considerations, in the context of the retail industry in which there is trade across seven days of the week, I think it can reasonably be said that considerations in (a) and (c) would make it at a minimum very difficult to establish that a request to work is not reasonable and the refusal is reasonable - yes, the double negatives in that provision make it sometimes difficult.

PN27591

JUSTICE ROSS: No, I was just reflecting on when the parties come to consider the issue I raised about 114, when you have a look at the section it's not a straight transposition into the provisions; for example - and to give a straightforward example, (d) probably wouldn't be relevant and, as you've said, the expectation might already be there in these industries. That might mean more of a focus on the amount of notice, both to work and also to refuse, and personal circumstances might loom larger.

PN27592

MR MOORE: Thank you for that indication, your Honour. It had prefigured our concern and why we had put before the Commission the old clause out of the Victorian Shops Award.

PN27593

JUSTICE ROSS: Mm.

PN27594

MR MOORE: The same point I've just made explains why we regard a mechanism like section 114 as very problematic in the context of the retail industry. But thank you for the indication, your Honour, and we'll consider that.

PN27595

I now want to move to the Pharmacy Award. The topics that I'm going to address which are about nine, I'll do so quite briefly, and these are the nine topics which we say arise from the reply submissions and the oral submissions given by Mr Seck. Paragraph 14 of the Guild's submissions, it asserts that:

PN27596

It's reasonable to infer that the declining revenue trend observed in the community pharmacy sector between 2009 and 2014 has continued beyond 2014, or may be expected to continue, because of the adverse impact of simplified price disclosure.

PN27597

The SDA takes issue with that submission. We say that the period of the observed declining revenue trends corresponded with the currency of the fifth CPA and the period in which the pharmacies experienced the effects of price disclosure. We say that the effect of the sixth CPA, commencing from when it started operation, was to insulate pharmacies from the effects of price disclosure and to restore the revenue and profitability that had declined during the currency of 5CPA, and in fact many of the pharmacist witnesses gave evidence to that effect. That is the evidence, yes, so that's what we say about that.

PN27598

Paragraphs 25 to 28, there are some submissions made about the commercial position of pharmacies. We want to say about that that those submissions don't answer the SDA's charge that the Guild has not provided to the Commission material that would expose the Guild's real expectations supported by data and analyses, described by Armstrong, as to the effect of 6CPA upon pharmacy revenue and profitability. It is readily apparent from Mr Armstrong's evidence that the Guild is well-resourced in terms of technical capacity, analytical ability around the operation of community pharmacy agreements and how they affect or might affect their members. What we have not seen, it's been the SDA who has been the party that has been forthcoming in putting evidence before the Commission about the effects of 6CPA from Guild documentation. The Guild has not, in our respectful view, assisted the Commission in providing a detailed account of what the anticipated effects of 6CPA would be.

PN27599

JUSTICE ROSS: But you put material in cross-examination to the Guild's witnesses from their website, is my recollection.

PN27600

MR MOORE: Yes.

PN27601

JUSTICE ROSS: About those very issues.

PN27602

MR MOORE: Yes, and I'm saying - well that's the point we're making, your Honour.

PN27603

JUSTICE ROSS: But it's not as if there's no evidence before us about it. You put it to them and they answered it.

PN27604

MR MOORE: No, I understand that. The point I'm making, your Honour, is simply that it's apparent from Mr Armstrong's evidence that the Guild is able to undertake very detailed examinations of the anticipated effects of community pharmacy agreements. We've put that material to witnesses by reference to material that is publicly available, if you like, or available to members of the Guild. What we haven't had the benefit of is the application of the Guild's arsenal of analytical capacity to actually spell out what the real effects, as they anticipate it, will be of 6CPA. That's the only point I make, your Honour.

PN27605

COMMISSIONER HAMPTON: Well what - - -

PN27606

MR MOORE: Yes, your Honour? Yes, Commissioner?

PN27607

COMMISSIONER HAMPTON: What weight do you say, or what's the purpose of the consideration of revenue and profitability? What does the union say in that respect?

PN27608

MR MOORE: In short, the Guild comes to the Commission and says the variations sought should be approved because the commercial position of pharmacies has deteriorated in recent years, and it has deteriorated because of the award; I mean, that is the essence of the Guild's case.

PN27609

COMMISSIONER HAMPTON: Yes, and I take it you were responding to that, but I'm asking you a broader question.

PN27610

MR MOORE: I'm sorry, I misunderstood.

PN27611

COMMISSIONER HAMPTON: Whether the union accepts that's a relevant consideration at all?

PN27612

MR MOORE: But whether the commercial position of pharmacies is a relevant consideration?

PN27613

COMMISSIONER HAMPTON: Or employers more generally is a relevant consideration?

PN27614

MR MOORE: I would have thought that the commercial position and viability of any employer business is a consideration which would fall within the scope of the

modern awards objective. Our case is simply to say that - well we say a number of things but - and I won't do our written submissions justice here - but amongst other things, we say that they have provided a historical picture, not a current picture, of the commercial viability - the commercial context and operations of the sector, and in fact, given 6CPA, the likelihood is that the commercial position of pharmacies will improve.

PN27615

COMMISSIONER HAMPTON: Do you accept its relevance is to the extent to which it might influence increased workforce participation?

PN27616

MR MOORE: Are you referring, Commissioner, to section 134(1)(c)?

PN27617

COMMISSIONER HAMPTON: I am indeed, yes.

PN27618

MR MOORE: Well, I think the learning from the previous Full Benches here is that (c) captures increases in employment. Yes, and well, at a most general level the commercial position of any employer has a bearing upon the prospects of increases in employment.

PN27619

JUSTICE ROSS: I'm not entirely clear how an employer's capacity to pay can be said to impact on the function of setting minimum terms and conditions.

PN27620

COMMISSIONER HAMPTON: You certainly wouldn't want to presume that penalty rates wouldn't want to fluctuate depending on economic cycles. I'm not sure that anyone's actually postulated to that effect.

PN27621

MR MOORE: I suppose what we say is we certainly wouldn't accept a submission, any suggestion that the framework contemplates some sort of ongoing adjustment between minimum entitlements and the commercial position of enterprises. That's certainly not the effect of our submissions, but simply accepted in the most general way that the commercial position of businesses I doubt could be said to be irrelevant to the suite of considerations embraced by the modern awards objective.

PN27622

JUSTICE ROSS: No, it's directly referred to in one of the items, the impact of the exercise of modern award powers on businesses is relevant.

PN27623

MR MOORE: Yes, that's right.

PN27624

JUSTICE ROSS: I just wasn't sure how the union was putting it about, well, pharmacies have got capacity to pay, therefore, we shouldn't reduce penalty rates. I'm just not - - -

PN27625

MR MOORE: Our case is really to meet the Guild's case, simply meeting the Guild's case, and challenging the Guild's case on grounds including that they have provided a non-current, a historical position and that the current position is in fact much more buoyant. Our case is a responsive one.

PN27626

JUSTICE ROSS: Yes.

PN27627

MR MOORE: Can I deal with one specific submission made by the Guild about 6CPA and my learned friend Mr Seck referred to one particular clause, being clause 6.1.9 of the agreement which provides for, the Bench will recall, increased funding by the Commonwealth in exchange for increased access for patients to community pharmacy services, including by way of extended trading hours. We make a number of points to the effect that the Guild's reliance on that provision is overstated.

PN27628

First, the Commission ought not lose sight of the fact that 6CPA, I think is clearly established on the evidence, provides billions of dollars in new and additional funding for the sector and only a portion of that is relevant to clause 6.1.9. That is, the program funding. Second, the strictness of the conditionality of program funding, the conditional nature of program funding alluded to in 6.1.9, is yet to be seen. The wording of the provision is, as one would expect, I suppose, given the nature of it being an overarching agreement - I withdraw that.

PN27629

The wording of the provision and what it would mean and how it would operate is a bit unclear. Mr Seck, I think, spoke of the need for the Guild and the Department of Health being obliged to work together over time to improve access. Questions arise as to what is the - is that sufficient? Is it sufficient just to work together, for the Guild and the Department to work together to strive towards increased access? That, on one view, would be a sufficient compliance with that clause. The extent of any obligation to extend trading hours isn't defined in the provision.

PN27630

The third point we make is that we do agree with the Guild that regulation is a key difference between retail and community pharmacy. Plainly, the pharmacy sector is subject to a unique set of regulatory arrangements. But the question of regulation doesn't distil to just a single term in the latest agreement, namely clause 6.1.9. The key issue we make about regulation is that unlike other retail enterprises, the revenue line of the Guild's members is very substantially determined by the regulated fluctuations in prices for dispensing services.

PN27631

The revenue line and profit line of a pharmacy enterprise can turn dramatically in response to the provisions of agreements such as 6CPA. So it's for that reason that our criticism that the Guild's evidence about revenue and profitability as being out of date, why that's so important, we say, because the revenue and profitability can be volatile and reflects regulatory change. That's why it was so important, to rather than look in the rear-view mirror about what went on three years ago, to look at the current arrangements and what they might conceivably mean going forward.

PN27632

There's no doubt that 6CPA, on the evidence, has brought about and will bring about significant, positive change. We've noted that on its face, 6CPA includes terms providing for billions of dollars in new funding directly to pharmacies. Ms Pezzullo conceded that 6CPA introduces substantial changes. The Guild has spoken of the substantial positive changes brought out by it in its publications which are in evidence, and the number of the lay witnesses who are office-holders in the Guild conceded that it would bring substantial increases to revenue and profitability. This is dealt with in our submissions.

PN27633

I think the next point to make is we make a complaint in our submissions about bias being introduced in relation to the survey of pharmacy proprietors in the Deloitte's Pharmacy Report. We make a number of complaints about that which are set out in our submissions. The SDA's submissions - and I just want to focus on one of those complaints which is the effect of banner groups. The Commission will hopefully recall the evidence around the participation of banner groups in that survey.

PN27634

The SDA's submissions identify the concessions made by the Guild concerning the extent to which banner group head offices submitted uniform expressions of opinion purportedly on behalf of banner group member pharmacies. We say it's perfectly safe to infer that a batch of uniform expressions of opinion is unreliable. The fact of the uniform expressions of opinion emerged on the last day of evidence in the proceeding through the cross-examination of Ms Pezzullo on 16 December, and the Guild's explanation of the extent of the uniform expressions of opinion was only offered by correspondence in late December.

PN27635

If I can make some submissions about particular findings in relation to the surveys, so the Deloitte pharmacy survey. The SDA in its submission took issue with the Guild's original bold submission that most survey respondents had decreased their trading hours since December 2009, which is in paragraph 98 of the Guild's submission. The Guild has now retreated from that submission, paragraph 44, to the statement that a majority of respondents, 66 out of 74, who had reported changing their hours since December 2009, have decreased their hours on one or more days per week.

PN27636

We say that, fundamentally, the Guild's revised submission still overstates the effect of the survey results. The position is this: there are about 5 and a half

thousand pharmacy enterprises in Australia. About 302 made any kind of response to the Deloitte's survey. About 76 per cent of those enterprises answered the question about trading hours, that's 231. Most of those respondents who answered that question, namely 68 per cent, had not changed their trading hours at all. Some had increased their hours without any other change, 8 out of 74. Some had decreased their hours without any other change, 33 out of 74, and some had increased their hours on some days, while decreasing hours on others, that's 33 out of 74.

PN27637

So an equally correct statement of the survey results in relation to this issue concerning changes in trading hours is that most, or 56 per cent of those respondents who reported changing their hours since December 2009 have increased their hours on one or more days of the week. Another aspect of the survey were the reasons for changes in trading hours. In the Guild's original submission, paragraph 98(h), was that close to two-thirds of respondents explain the reduction in their trading hours by reference to the need to reduce expenses on wages.

PN27638

We've criticised that submission in our submissions and the Guild has now retreated to the proposition that only two-thirds of the subset of respondents who had reported changing their hours and giving reasons for changing their hours, had attributed wage expenses as a reason for changing hours. So what that means is 56 proprietors reported having that reason among their reasons for changing hours out of 78 who reported any reason at all.

PN27639

Can I deal with the regression analysis. The Commission will recall that the regression analysis undertaken by Deloitte was said to be conducted to test a number of different hypotheses. The evidence from Dr O'Brien was that the use in the regression analysis of the PIA dummy variable which was assigned the value of zero in 2009 and one in 2014 for every pharmacy, that no attempt was made to measure or account for anything specific to the Pharmacy Award in that dummy variable.

PN27640

Now, the Guild has submitted at 49 of its submissions, and confirmed that the regression analysis control for other factors external to the PIA, and that the results:

PN27641

- *took into account changes in terms affected by the Pharmacy Award.*

PN27642

But the point of Dr O'Brien's criticism and about which he was not cross-examination was that the Deloitte analysis identified no such changes in terms affected by the Pharmacy Award which were capable, as a matter of economic analysis or bare logic, of causing changes in cost, trading hours, full-time employees, proprietor hours works. The Guild's reply submissions really just duplicates and repeats that failure in the Deloitte analysis, and the submission at

paragraph 49 confirms that the internal logic of the regression analysis was to strip away the factors external to the PIA and attribute any resulting effects to changes in terms affected by the award in 2010.

PN27643

The Guild, like Deloitte, failed to identify any change in terms. No term is identified which changed in 2010, such that it may have contributed to changes in wage costs, et cetera. Now, sophisticated regression analysis can be more or less precise or persuasive in controlling for factors to be excluded, but a precise measurement of those other factors doesn't do anything to validate the fundamental assumption that underpins the regression analysis, that the award affected specific changes to specific employment terms and that those changes are logically capable of explaining the change to the conditions under investigation.

PN27644

The progression analysis proceeded from the assumption that the introduction of the award caused a material change in operative employment terms, and that the change had some effect. All that the regression analysis does, though, given the way the dummy variables were used according to Dr O'Brien's evidence, was to achieve nothing more than to account for and correct for other things that might have influenced that effect. Dr O'Brien observed that the PIA dummy variable captured anything that had changed between 2009 and 2014, other than the specified factors for which the regression controlled.

PN27645

Ms Pezzullo accepted that proposition. Dr O'Brien didn't attempt to identify everything that might have affected those things. He suggested the GFC as one possible example, and Ms Pezzullo gave evidence as to why she didn't agree that the GFC was capable of explaining changes to annual wage costs and so on. So I suppose the point that we want to end on in dealing with the regression, if the Commission pleases, is that the penalty rates changes brought about when the award commenced operation were very mixed. Some of the awards that existed before the Pharmacy Industry Award provided for the same penalty rates as exist in the award now, and others were lower, and that's set out in the background paper in a table in that document.

PN27646

So for example, there was no increase in Sunday penalty rates for Victoria and South Australia under the Community Pharmacy Award 1998 or under the SDA Victorian Pharmacy Assistants Award 2000, or the Queensland Pharmacy Assistants Award 2003, or at least the South Australian Retail Pharmaceutical Chemists Award. For at least those States, there was no increase in penalty rates as a product of the introduction of the award and the changes attributed to the dummy variable cannot be explained by reference to the award.

PN27647

Just one last point in relation to pharmacy. We take issue with Mr Seck's submission that the evidence of Prof Borland was limited to cafes and restaurants. I think any fair assessment of Prof Borland's evidence was that it was at the level of economic principle, as well as at times dealing with particular circumstances of

cafes and restaurants. We say that that's no adequate answer to the SDA's submissions at paragraph 634.

PN27648

I just want to move now to the Fast Food Award, about which I'll be brief. Dealing with the National Retailers Association, brief submissions were made by the NRA about the Fast Food Award. That Association did not submit a proposed determination to the Commission. It hasn't led any evidence. The submissions advanced were pitched at a very high level of generality and largely did not engage with the submissions advanced by the unions, or at anything to what has otherwise been advanced.

PN27649

Insofar as they were directed at the evidence and the submissions put by the union parties, we rely in answer to them on the written submissions filed and our oral submissions today. The RCI has applied for variations to the Fast Food Award in terms that essentially mirror the application made by the Ai Group. The RCI led evidence from two fast food establishment operators. The RCI has made submissions that were primarily directed to its separate application concerning the Restaurant Industry Award.

PN27650

That appears to be the focus, and was the focus of its submissions, both orally and in writing and to the extent that the RCI has made submissions concerning the Fast Food Award, those submissions were largely restatements or submissions put by the Ai Group, and we deal with them on that basis. In its submissions, the Ai Group calls in aid of its position the Full Bench decision in the Restaurants decision [2014] FWCFB 1996 and it does so to justify the proposed reduction of the level of the Sunday work penalty which it seeks from 75 to 50 percent for all classifications of casual employees and that's inclusive of the casual loading.

PN27651

The point we want to make is that the Restaurant and Fast Food Awards, are quite different. At a base level that's recognised by the existence of those two awards and that fast food is not simply covered by the Restaurants Award. More particular, the Restaurant Award has a classification structure quite unlike the Fast Food Award. The Restaurant Award has an introductory rate and then five grades. By comparison, the Fast Food Award has a flat classification structure comprising only three levels.

PN27652

The point that we make is that the variation approved by the Commission in the restaurant's case was limited. The reduction of the level of the Sunday work penalty was confined to the lowest two classification levels and those classification levels as we understand it, were in relation to no or minimal training. The evidence by Ms Limbrey is that there's a well-established and sophisticated regime of training which McDonalds provides its employees. These are not untrained employees. As we understand the evidence put by McDonalds, the employees even at there is grade 2? The lowest grade - grade 2, receive some amount of training which is a distinction with the Restaurant's decision.

PN27653

So the Ai Group wants to translate, as we understand it from the Restaurant's case, reasoning that was directed to the most junior or untrained classifications in that award and apply it to a different classification structure and to different employees who receive a different level of training. Virtually all of the employees under the Fast Food Award would, we submit, share characteristics with employees at level 3 of the Restaurants Award who were not the subject of the variation in 2014.

PN27654

We would submit that the Ai Group has not advanced a sufficient case for how or why the approach of the Full Bench in the Restaurant's Decision should be translated to the Fast Food Award or why that approach is particularly pertinent.

PN27655

Two final matters and then I will sit down. I want to make some brief remarks about the Commission's approach to the Productivity Commission Report. I don't propose to address the contents of that report. Really just to have regard or remind members of the Bench about the approach that has been adopted in relation to the ruling on its receipt in this proceeding.

PN27656

In the ruling at paragraph 22, the members of the Bench identified with respect, that the opinions expressed as to the appropriateness of penalty rates are being received as submissions and not evidence. At paragraph 11, members of the Bench identified that no reliance is placed by the employer on those parts of the report in which consideration is given to expert evidence given in the proceeding.

PN27657

The ruling also identifies that the Productivity Commission Report is not tendered or received in this proceeding as expert evidence. Not that last point in particular is significant because the Commission has before it, expert evidence about some of the matters dealt with by the Productivity Commission Report. At least two of those are the question of the employment effects of penalty rates or changes in penalty rates and the other is the AWALI data.

PN27658

In light of the fact that the Productivity Commission Report is not received as expert evidence, in relation to those matters, the Commission has the benefit of expert evidence and it's to that which the Commission should have regard when considering those issues rather than the expressions of opinion about the matters, the subject of expert evidence in this proceeding.

PN27659

The only submission I want to make is about the submissions lodged with the Commission by other interested parties. Here we're referring the 5,000 off submissions which have been referred to earlier in the proceeding. We will take up the opportunity to respond to the joint employer submissions on those matters, which we understand are to be revised once the further submissions received are provided.

PN27660

In general terms though, the position of the SDA in relation to the submissions received by other interested persons, is that the Commission should no disregard those submissions. It is a question of weight. They are not evidence, plainly, and they cannot be treated as such. Nor should the Commission, having regard to its statutory function and its capacity to inform itself in the ways suited to it, nor would it be appropriate for the Commission to simply disregard those comments received.

PN27661

The use which can be made of the submissions received by the interested persons and how we put it in our written submissions, is that the views there expressed can be confirmatory of the evidence in the proceeding about the effect of unsociable hours of work and the rationale and need for penalty rates, as elucidated in the evidence which is before the Commission. Those submissions, can provide some confidence for the Commission to make the findings which we say should be made on the basis of the evidence that is before it.

PN27662

The last matter to note and I understand Mr Wheelahan said this morning, referred to a proposed timetable for the provision of further material. I think there's a number of matters that that might embrace, as submissions about the treatment of the other submissions or by other interested persons.

PN27663

JUSTICE ROSS: Also the award modernisation issue that I raised that might impact on the time frame as well.

PN27664

MR MOORE: Award modernisation issue. And there's the Sunday voluntary work issue as well. As I understand it, I think there might be three loose ends as it were. The timetable that had been suggested would involve the employers providing further submissions or material by 29 April and the Unions providing material by the 13th. That's what's been suggested at the moment.

PN27665

We would, for our part, the SDA would seek some additional time to provide its material.

PN27666

JUSTICE ROSS: I think from our perspective, we'd leave it to the parties to have a discussion about that. As well, they mentioned an opportunity to respond. I think we may as well build into that the CCIWA, just to make sure it's wrapped up in the one set of directions and then it can be published on the website, so everyone's aware of what's happening in the case.

PN27667

But if the parties can confer about that and submit something. Is there's some issue that we need to deal with on the timing, then let my chambers know, but I'd expect you'd be able to reach an agreement about those issues.

PN27668

MR MOORE: Thank you, your Honour. Unless there's anything else from the members of the Bench, they are the submissions of the SDA.

PN27669

JUSTICE ROSS: Can I take you to page 156 of your written submissions.

PN27670

MR MOORE: Yes, your Honour.

PN27671

JUSTICE ROSS: It's the proposition at paragraph 419 that I want to take you to.

PN27672

MR MOORE: Yes.

PN27673

JUSTICE ROSS: This seems to proceed on the basis that 55.4 per cent of the retail workforce is female, and you therefore say that any cuts in penalty rates will disproportionately affect women and in that way contribute to the gender pay gap. Leave aside for the moment whether that directly arises for consideration under 134(1)(e), but just that general proposition, doesn't it depend on the proportion of women that work on Sundays, because that's the impact?

PN27674

MR MOORE: Yes.

PN27675

JUSTICE ROSS: It's that class of people - retail workers that work on Sunday.

PN27676

MR MOORE: Yes. Your Honour, I think, with respect, that's forcing that point. It makes me wonder whether the evidence given by Dr Watson, where he gave evidence about the profile and composition of the retail workforce - - -

PN27677

JUSTICE ROSS: Yes, I'm not sure whether I went down to the Sunday.

PN27678

MR MOORE: There was evidence I think he gave about the extent of weekend working and I'm not sure if that evidence went to the divide between the genders.

PN27679

JUSTICE ROSS: I can't recall but let me give you an illustration in relation to United Voice exhibit 28, and this is the Oliver report.

PN27680

MR MOORE: I'm sorry, what was that, your Honour?

PN27681

JUSTICE ROSS: United Voice exhibit 28.

PN27682

MR MOORE: Yes.

PN27683

JUSTICE ROSS: So there it looks at the impact of penalty rates on hospitality workers.

PN27684

MR MOORE: Yes.

PN27685

JUSTICE ROSS: I accept it's not dealing with retail, but at paragraph 122 on page 38 it looks at the issue of gender by whether a respondent usually worked on weekends, and what that shows is that it appears that female workers are in fact under-represented, so in fact it would have the opposite of your contention. In relation to all hospitality workers on that survey - and the source is the HILDA data - there are 49.8 per cent are women; and 42.6 per cent of the workers who work on either a Saturday and/or a Sunday, it's 42.6 per cent of women and 57.4 per cent are male. So it would seem to follow from that that in fact in that sector - I'm not sure, as you say, what the issue is in relation to retail - but the same point's not taken by United Voice; they take a different point on this issue. But the proposition that the gender pay gap will be widened because of it, well I don't think - the proposition you put at 419 doesn't support that. It really depends on the gender breakdown of those who work on Sunday and, at least in relation to hospitality, the material in the Oliver report suggests that in fact it might narrow the gender pay gap.

PN27686

I'm not saying that's not necessarily a relevant issue. It may go to fairness. I don't want to forestall a consideration about it. I'm not sure that it arises under 134(1)(e), in the sense that it's not put that there would be for Sunday work female workers performing work of equal or comparable value would get the same rate of pay. It's not proposed there would be any different outcome, but you raise the gender pay gap in 420 and I'm not sure what the evidentiary basis is for that proposition.

PN27687

MR MOORE: Your Honour, I see the point. I don't have a good answer for it, as I stand here.

PN27688

JUSTICE ROSS: Let's see if there's anything - - -

PN27689

MR MOORE: We will revisit the evidence to see if there's any - - -

PN27690

JUSTICE ROSS: I'd be amazed, given the volume of material in this case, that there isn't something somewhere that touches on that issue.

PN27691

MR MOORE: It might be in the Productivity Commission report. I'll have to change to change my submission again.

PN27692

JUSTICE ROSS: Let's hope it's not in the bit that's just been excluded. Look, there may be - there certainly there was material about retail profile, the difference in the age profile, particularly in relation to retail, fast food, so there may well be something that's specific on this issue.

PN27693

MR MOORE: We will consider that. We appreciate you raising it, your Honour, and if there's anything of note we will draw it to the Commission's attention as a priority.

PN27694

JUSTICE ROSS: Thank you.

PN27695

MR MOORE: Thank you.

PN27696

JUSTICE ROSS: Thank you, Mr Moore. Do you want five minutes to rearrange yourselves?

PN27697

MR MOORE: Thank you, your Honour.

PN27698

JUSTICE ROSS: Just before we do, well this should probably go to you, Mr Dowling - how are you looking for 4.30? Do you think that - - -

PN27699

MR DOWLING: I'm not confident, your Honour.

PN27700

JUSTICE ROSS: It would be helpful for us if we can also get an indication and perhaps while we take a five or 10 minute break from the employers. And I appreciate you'll need to hear from United Voice as well but what you collectively think might be the time in relation to any issues that have arisen that weren't previously put. I'm not raising it as an invitation to repeat what you've already said in your response to what's been put, but it's where an argument's been put orally that hasn't previously been ventilated in writing. Okay? Thanks. We'll adjourn.

SHORT ADJOURNMENT **[3.31 PM]**

RESUMED **[3.42 PM]**

PN27701

JUSTICE ROSS: Yes Mr Dowling.

PN27702

MR DOWLING: Can I start by confirming that United Voice relies on its written submission dated 21 March 2016 and the submissions that I'll make today and maybe some of tomorrow will primarily be responsive to the written reply submissions of the employer parties together with the oral submissions that were made on Monday and Tuesday of this week.

PN27703

Can I also say that United Voice supports and adopts the submissions of the SDA that I will give as I go, particular reference to those particular parts of the SDA submissions that apply in respect of the Hospitality Awards and are particularly relied upon.

PN27704

And I then, before I commence, make one correction to the written submissions, or clarification more correctly, to the written submissions that were filed on 21 March. There was a reference in paragraph 16(d) appearing on page 8 to 70 percent of Australian workers do not work on weekends and 90 percent do not work on Sundays. There's a footnote there that simply cross references to section 7 of the submissions. That in fact should be a cross reference to section 6 of the submissions, large Roman vi and particularly to paragraph 117 where the footnote for those statistical propositions is set out. Can I say in respect of the footnote - if I said section 6, I meant section 4 as the cross-reference. Can I say in respect of those two figures, in respect of the 70 percent who do not work on weekends, the reference for that, which is referred to at paragraph 117 is the ABS Working Time Arrangements publication of November 2012 which has a catalogue number of 6342. The Commission will find the reference to the 70 percent on page 28 of the report.

PN27705

JUSTICE ROSS: I take it that's the most recent version of that report?

PN27706

MR DOWLING: Yes. The 90 percent, a figure that's referred to in paragraph 16(d) and also in paragraph 117, is referred to in the Productivity Commission Report at schedule F, page 1016 and 1017. The Productivity Commission Report there relies upon the ABS publication Forms of Employment, November 2013 which has a catalogue number of 6395 and again my understanding is that is the most recent publication. It was published in 2014 of the Forms of Employment publication.

PN27707

Can I then thirdly, just identify those matters, at least the structure of those matters that I'll cover in these oral submissions. Firstly, I'd like to take the Commission to the changes sought in the three awards with which United Voice is dealing and some matters of particular note that arise from those changes.

PN27708

Secondly, the legislative provisions. To which I'll largely deal with only three matters. Section 138 and the question of necessity. The question of changed circumstances which has largely been covered by Mr Moore and the question of section 134(1)(d)A, a number of matters we'll have to say about it.

PN27709

Nextly, the issues arising from the labour economists and the disemployment effect, as it's been referred to.

PN27710

Fourthly, the matters of note that we will rely upon from the lay evidence of the impact of the variation in penalty rates that are sought. Then the impact of the weekend work. Our submissions in that regard will be divided into two parts, firstly dealing generally with the negative impact of weekend work and secondly dealing with the differential between Saturday and Sunday.

PN27711

Then the applications that are made to vary the penalty rates in respect of public holidays. Our submissions under that topic will be divided into three parts. Firstly, that part that deals with the reductions that are sought in respect of the public holidays. That part that deals with the two tier system or the implementation of a two tier system sought by the AHA and the AAA.

PN27712

Lastly, those applications that seek the complete removal, at least in respect of some employees of penalty rates for public holidays.

PN27713

Lastly, there are a number of miscellaneous matters that I'll deal with and in particular, a number of variations, we say, that are sought that are not supported by any evidence and in fact, have not been supported by any submissions made, either in writing or this week. I'll identify those lastly.

PN27714

Then as I said, I'll firstly address the changes that are sought in respect of the three particular awards that concern United Voice. Those three awards are the Hospitality Awards of course, the Restaurant Industry Award, the Hospitality Industry General Award and the Registered and Licensed Clubs Award.

PN27715

There are, on our reckoning, six parties that seek variations in respect of those three awards. The RCA makes application in respect of the Restaurant Industry Award, ABI and the NSW Business Chamber, represented by Mr Izzo, also make application to vary that award. The AHA/AAA represented by Mr Stanton make applications in respect of the Hospitality Industry General Award and Mr Warren representing Clubs Australia makes an application in respect of the Registered and Licensed Clubs Award.

PN27716

An easy point of reference to identify what is sought in the matters of note that arise from what is sought is if the members of the Commission have it, Appendix A to the background paper which sets out the summary of claims.

PN27717

Now I'll deal firstly with the applications made in respect of the Restaurant Industry Award and the members of the Commission will find a summary of those

claims at page 28 of 45 of the background paper and it is Appendix A, schedule 1.2.

PN27718

Can I deal then firstly with the claims that are made by ABI and NSW Business Chamber, represented by Mr Izzo. What the Commission should firstly note, and is made clear by the schedule, is that no change is sought with respect to the Saturday. Importantly with respect to ABI and NSW Business Chamber, no change is sought with respect to the Sunday.

PN27719

JUSTICE ROSS: Except they're support RCI's claims. So what difference does it make whether they've made a separate application?

PN27720

MR DOWLING: Well, that's a rather curious submission that's made for the first time in reply. There's no application made by their client with respect to the differential between Saturday and Sunday. Nothing has been said about that.

PN27721

JUSTICE ROSS: Sure, but what flows from any of that? It's a review, they've seen that another party has agitated that point. Why would they need to make an application?

PN27722

MR DOWLING: Only this, your Honour, if - Mr Izzo has made a number of submissions about there being no longer the need for a disparity between Saturday and Sunday. Now, if his clients were properly motivated by the need to reduce that disparity, one would have expected that a claim would have been made to change the Sunday because in the present circumstances the application made by Mr Izzo's clients leave in place the disparity between Saturday and Sunday.

PN27723

Certainly in respect of the full time and part timers and the casuals, level three to six. At it presently stands the claim made by his clients has Sunday at 150, Saturday at 125 which is its current level. Has casuals levels three to six Sunday at 175 and on Saturday 150. Certainly, at the time it made its application, it was content to leave in place the disparity between Saturday and Sunday.

PN27724

JUSTICE ROSS: I'm not sure how you can know that. You don't know for example, neither do we, whether there were any discussion between ABI and RCI about how they would diving responsibility in relation to the matter. They haven't made a claim. It almost harks back to a respondency based award type of argument.

PN27725

MR DOWLING: Yes.

PN27726

JUSTICE ROSS: Ultimately, it turns on the merit of the argument in support of a reduction. I don't think the force of the merit argument depends on whether the particular party making it has themselves agitated a claim. Ultimately it turns on the merit arguments and the evidence, doesn't it?

PN27727

MR DOWLING: It does, it does, we accept that your Honour. I mean - you're right, we don't know the details of the discussion that took place. You would expect of course they would all make the same application and then divide the work load. You wouldn't expect that the NSW Business Chamber and ABI would not have included at all and then at some later point, just hitched their wagon. We accept that we can only take that so far.

PN27728

Can we say lastly, the only other issue of note and we'll come to address this, is that in respect of the claim made by ABI and the NSW Business Chamber for casuals on public holidays, that has changed from 250 to 125, and of course I think it's clear to everyone that that 125 is inclusive of the casual loading, and the effect of that claim is the complete removal of penalties at all for that class of employees with respect to public holidays and we'll address that when we come to look at section 134(1)(d)(a).

PN27729

Can I then deal, whilst we're at schedule 1.2, the claim made by RCI, which the Commission will find in the column one from the left - one from the right-hand end? The only comment that we make of a general nature in respect of this claim, and some questions were asked of Mr Stanton in respect of his claim for his award in circumstances that were slightly more egregious, but what it does do is seem to create a different ratio between the treatment of full-time and part-timers and casuals for a Sunday as opposed to a public holiday. For some reason not explained, casuals and full-time and part-timers are treated the same on a public holiday but they are not treated the same on a Sunday. You'll see it's 125 versus 150 on a Sunday; it's 150 for each in respect of the public holiday. There may be some explanation for that but none have been given to date.

PN27730

Can we then deal with the claims that are made under the Hospitality Industry General Award made by the AHA and AAA, represented by Mr Stanton, and they appear at schedule 1.1 of Appendix A? What the table doesn't identify but what's become clear is that the Saturday rates - so that the difference can be highlighted for our purposes, the Saturday rates are for full-time and part-time employees under that award, or 125 per cent, and for casuals are 150 - so what's become clear to everybody is that that applicant in respect of that award keeps in place the disparity between Saturday and Sunday. Your Honour asked a question of Mr Stanton and I think he gave an answer that the explanation for keeping that disparity in place was to be able to maintain the level of employment. Can I just direct the Commission at this point - and we'll come to it in a little more detail - to paragraph 46 of the primary submissions of the AHA where it said the need for the differential is accepted to compensate employees for the disability and to attract labour to work on that day. So in the written submissions, the AHA/AAA

identify it's not simply to attract employees but it's for two reasons, including a recognition of the compensation for the disability.

PN27731

The only other three matters that we identify now about this application is that there is also an application to completely remove the public holiday loading, at least in respect to the additional holidays. The Commission will see in the column in the box - the column on the right, the box one from the bottom of 125, again inclusive of the casual loading, so that's the complete removal, at least for the additional holidays. That also highlights the differential that's proposed between the public holidays that are set out in the NES and the additional holidays as they're referred to in this agreement - or as they're referred to in the submissions of the AHA and AAA, and we'll have something to say about that. That is a system that is issued by the other employer parties in respect of the other awards, where at least Mr Izzo, on behalf of the ABI, described it as an inappropriate mechanism.

PN27732

The only last matter - and this has been highlighted by the Vice President's question to Mr Stanton - unexplained is the difference in the ratio between the casual and full-time and part-time employees. They are treated the same in respect of Sundays; there is a difference of 50 points in respect of the NES public holidays, and there's a difference of 75 points in respect of the additional days. Again, as we see it, there's really no explanation for that.

PN27733

Can I then deal lastly with the application that's made in respect of the Registered and Licensed Clubs' Award, and that's set out at schedule 1.3 in Appendix A, and that's the application made by Clubs Australia represented by Mr Warren. This is the only award that United Voice deals with in which a change is sought with respect to the Saturday, but, again, this does leave in place a difference between the Saturday and Sunday, at least in respect of the full-time and part-time employees. The Commission will see that for those employees, on a Saturday their rate is 150 per cent and on a Sunday the rate is 175 per cent, as presently provided, and as sought in the claim that's to change to 125 and 150, again, recognising the disparity.

PN27734

So in respect of the employers to which United Voice responds, there's at least three of them in our submission, the AHA, the AAA and CA, that recognised that disparity. It may be also but I understand the force of your Honour's comments that ABI NSW tacitly accepted some recognition of it, but they're now joined with the RCA.

PN27735

Can I then deal with the question of the approach to necessity in section 138? We heard and have read the discussion between your Honour the President and Mr Izzo on Monday of this week, and for reference the Commission will find that discussion commencing at PN2613 of the transcript from that day. We disagree with the interpretation proposed by Mr Izzo for reasons I'll come to, but we understood from that exchange that at PN26175 Mr Izzo ultimately accepted that

what the Commission is faced with here is a substantive change requiring a merit-based argument supported by probative evidence about the change, as we understood it, and at PN26179, if we understood what Mr Izzo was conceding correctly, he said there that his submission was not relevant to this case. So for our part, we understood that to be a concession that really the argument put has very little work to do in the present case.

PN27736

JUSTICE ROSS: On the basis that - the submission is that they've put probative evidence in a merit-based case.

PN27737

MR DOWLING: Well that's a submission, I understand you take issue with it.

PN27738

JUSTICE ROSS: Yes.

PN27739

MR DOWLING: But that seems to be the basis on which that proposition was put.

PN27740

JUSTICE ROSS: Yes.

PN27741

MR DOWLING: In any event, I'll deal with briefly what we say in respect of the operation of section 138, and we draw particular attention to three things: the words of the section itself, what was said about it in the Preliminary Jurisdictional Issues decision, and lastly, the manner in which the employer parties have run their case, it has some bearing in terms of the way the test is put. As to section 138 itself, it says "A modern award may include terms that it is permitted to include and must include terms that it is required to include, only to the extent necessary to achieve the modern award's objective and to the extent applicable, the minimum wage's objective".

PN27742

Now, we say it's clear that the reference in 138 to terms that it is permitted to include is a reference to subdivision (b) in which the Act sets out the terms that may be included. The reference in section 138 to terms that it is required to include is of course a reference to subdivision (c) the terms that must be included.

PN27743

That, though, is illustrative, particularly subdivision (c) and we draw on, just for example, for the purposes of an example, those terms that are included in subdivision (c). One of those is coverage terms and what subdivision (c) tells us at section 143 is the modern award must include a term setting out the employer's employees' organisations and outworker entities that are covered by the award.

PN27744

Read with section 138 what that tells us, is the coverage term must be included but it will only be included to the extent necessary to achieve the modern award's

objective. Now in that way, we say section 138 directs the Commission's attention to the formulation or the content of, in this example, the coverage term itself. And I use formulation quite deliberately because that's an expression used in the preliminary jurisdictional issues decision.

PN27745

But we say additionally, it's that term - is really not a term that's conducive to being weighed in the balance in a way that Mr Izzo describes is really the process of section 138. You weigh everything in the balance.

PN27746

JUSTICE ROSS: Well, you'd have a look at 134(1)(g), the coverage term would be relevant to avoiding the unnecessary overlap of modern awards and to ensure that it was simple and easy to understand.

PN27747

MR DOWLING: Yes, your Honour. What we're suggesting is that you'd have a look at those factors in section 134(1) in respect of that particular term. Now, as we understand it, the way the argument is put by Mr Izzo, is it might not matter whether that term itself meets 134(1) at all, it might not. But you just weight the entire modern award, once varied, the submission is put.

PN27748

Once varied, to access whether it, once varied, meets the modern award's objective. But what we're saying, consistent with your Honour's proposition, is we'd look at the terms and the formulation of that particular clause to assess whether it and its formulation is properly directed at achieving the modern award's objective.

PN27749

JUSTICE ROSS: Well, if you look at - I understood the submissions that had been put were that there might be more than one way of meeting the modern award objective. I think there was an exchange where the illustration was you might have no weekend penalties in a particular award. The award might still meet the modern award's objective because it provides for a loaded rate, for argument's sake. That was the way that it was being put.

PN27750

MR DOWLING: Well, we had understood it to be put this way, that the Commission's attention shouldn't be focussed on a particular term.

PN27751

JUSTICE ROSS: Well we'll no doubt find out in due course, how it was put. How does that carry you the distance in relation to the need to show necessity for variation and basing that on 138?

PN27752

MR DOWLING: What we're saying is, in the same way that your Honour directed the coverage turn back to section 134, you'd direct the variations that are sought in this application in respect of the particular clauses, you direct them back

to section 134. What you don't go back to section 134 with is the entire award and see - well our penalty rates clauses might fall short, but the entire award makes it.

PN27753

JUSTICE ROSS: But you look at 138 and for present purposes, if you read it this way "A modern award may include terms only to the extent necessary to achieve the modern award objective". So, as I understand the employer case, they look at the current awards and they say it includes terms to an extent which is not necessary to meet the modern award objective.

PN27754

One way of putting their argument is that the current award terms in relation to the penalty rate provisions they seek to vary are inconsistent with section 138, because they argue that they over-compensate. That's as I understand the submission that's put, or the way it's put.

PN27755

MR DOWLING: Well if that's right, we may not be too far apart, because we're both then directing our attention to -- - -

PN27756

JUSTICE ROSS: You might been okay until you said that you might not be too far apart.

PN27757

MR DOWLING: That submission must be wrong. In some ways, there's a conflation of these issues and that's discussed by the Full Federal Court in the NRA case, because they say well look, you'll look at the variation to test the proposition of whether or not the existing terms meet the modern award objective.

PN27758

JUSTICE ROSS: Yes.

PN27759

MR DOWLING: They say that's permissible. Ultimately, the question for us in the review is the proposition of whether or not the award meets the modern award objective. That allows us - there's nothing to stop us looking at - we don't need to adopt a global approach to that. We consider all of the terms at the one time, that's clear from the NRA Full Federal Court case, albeit, it was decided on the transitional review. The relevant statutory provisions are in the same terms.

PN27760

I'm struggling to see how 138 applies to a variation. Ultimately, and having regard to the review process as well, it requires us to look at a modern award and to see whether the terms that are included are only included to the extent necessary to achieve the modern award objective. In some ways it might be an arid argument because - but it might be if what all the parties are arguing about is, do the penalty rates provisions meet the modern award's objective? The employers are arguing well, they are in fact in excess of.

PN27761

JUSTICE ROSS: That's as I understood it. As I understood the employer argument, it was that the current penalty rate provisions were inconsistent with 138 because they over-compensated and so it was the inclusion in the modern award of a term to an extent that was not necessary to achieve the objective. I don't want to take a straw poll, but just before we go too far wandering down this path, am I mischaracterising what's been put?

PN27762

MR IZZO: No, your Honour, not from our perspective, you're not.

PN27763

JUSTICE ROSS: Okay, well I don't see anyone shaking their head. You were about to Mr Wheelahan?

PN27764

MR WHEELAHAN: I'm only adding, of course, but you put in the curve ball for us, which is well, hang on a minute. Let's not just look at the penalty rate provisions, but let's look at some sort of provision like section 114 in the Act, and that brings you back to looking at the award and not being so narrow as to a specific term. As your Honour said, maybe it is just an arid argument.

PN27765

JUSTICE ROSS: Well the 114 really is, look, it was only agitated when the voluntary point came up.

PN27766

MR WHEELAHAN: Yes.

PN27767

JUSTICE ROSS: And a desire, I suppose, not for it to be a zero sum game - you either have the voluntary or you have nothing, type of thing. But I don't think that changes the proposition. It's really that - your first proposition is that it includes terms to a greater extent than is necessary to meet the modern award objective, because you say they're too high, and you've advanced the merit argument, which also goes to support the proposition - the sort of related proposition that the inclusion of the variations that you seek would mean that the award meets the modern award objective. But what you're resisting is a test that the variations have to be necessary to meet - - -

PN27768

MR IZZO: For our part, we concur with that, your Honour.

PN27769

JUSTICE ROSS: Yes, the 114 isn't a curve ball in a sense, because it's really raising with you, and it might be an opportunity - you know, you might wish to say, well we've considered that and that might mean our variation is adapted in a particular way and - - -

PN27770

MR WHEELAHAN: I was just taking up - Mr Izzo said you'd look at the award as varied. As varied now may well be additional provisions that we may well argue in written submissions should be included.

PN27771

JUSTICE ROSS: Sure. Well I'm not sure where that leads us.

PN27772

MR DOWLING: I think that the - - -

PN27773

JUSTICE ROSS: You can tell it's getting late in the day.

PN27774

MR DOWLING: The concern that my clients had I think was the way it was put. You don't look at the term, you look at the award as varied, and it seemed to be suggesting - 138 makes clear, you can't include a term if it doesn't meet the modern awards objective, we say.

PN27775

JUSTICE ROSS: Well you can't have a term in a modern award.

PN27776

MR DOWLING: Yes.

PN27777

JUSTICE ROSS: You can only have a term in a modern award to the extent necessary to achieve the modern award objective.

PN27778

MR DOWLING: Yes. We don't disagree with that proposition. That's the words of the section, but we really - - -

PN27779

JUSTICE ROSS: I'm just wondering how much I'm going to have to write about this eventually, so for that reason want to be clear about having heard my characterisation of the employer submissions and their acquiescence to that - well with a slight gloss but let's not go too far into that. Are you pressing the proposition that you advance at paragraph 18 in the first sentence, that the variation must be necessary, or do you accept that the way the case is put is that the award terms in relation to these penalty rate provisions, it said, offend section 138 because they go beyond the extent necessary to achieve the objective, and if they were varied in the manner proposed, then those terms could be included because they are terms which are included only to the extent necessary to achieve the objective?

PN27780

MR DOWLING: We're content if the focus of the inquiry is the examination of the penalty rates terms, as proposed.

PN27781

JUSTICE ROSS: The focus of the inquiry really can't be so limited, because the preliminary issue advanced by the employers is that, well, the current award is not consistent with 138.

PN27782

MR DOWLING: The current award, as we understand it, is not consistent with 138 because of this term - this penalty rate term, so we're looking at.

PN27783

JUSTICE ROSS: Yes, sure.

PN27784

MR DOWLING: The focus of the inquiry is the penalty rate term.

PN27785

JUSTICE ROSS: In the award at present, and that - well, as the RA case would suggest, it involves some consideration of the variation that's proposed.

PN27786

MR DOWLING: Yes, well, it's an examination of both sides of the penalty rates clause, I think. But if that's the examination, then we're content. What we weren't content with and what we were concerned about was really the way in which Mr Wheelahan raised the issue and this idea that we have to look more broadly, we've got to balance all of the terms, and that was not the way we understood the case had been - the way we understood the argument was put by Mr Izzo - we may have misunderstood him - but certainly not the way the case has been put. Nobody has been here saying we should be balancing this penalty rates clause as against other terms to determine whether the award as varied meets the modern award objective.

PN27787

JUSTICE ROSS: Mm.

PN27788

MR DOWLING: But if that's not the way it's put, then it's an examination of what might be both sides of an argument about the penalty rates term, then that's the right focus.

PN27789

MR IZZO: Your Honour, if I might add one point just to clarify our position. We do say one has to look at the award as varied in order to determine whether it meets the modern awards objective, but in the context of this case when we're looking at the penalty rate, and as varied doesn't meet it, but one point I would raise is that naturally when one looks at a term to see if it's meeting the modern awards objective, as part of the context you must have regard to what else is in the award. That may have a bearing and that's why I gave the example on the Monday about the example of an annual leave provision. If you have six weeks' annual leave, that might meet the modern awards objective because you proceeded to lower the rate of pay to accommodate for that, so I think the test that we advocate is the one that's been expressed by your Honour, subject to the caveat that when you look at the term, the penalty rate term, you must also consider it in

the context of all the other provisions of the award. I'm not saying you then need to go and re-open coverage and everything and have an entire re-examination of every provision, but it is in context.

PN27790

JUSTICE ROSS: Let's just tease that point out for a moment. What's the practical application of that in this case? I mean, what other provisions has anyone said are going to be brought to bear on this issue?

PN27791

MR DOWLING: That's precisely our concern, your Honour.

PN27792

JUSTICE ROSS: Yes, no well - - -

PN27793

MR DOWLING: It hasn't been put that way.

PN27794

MR WHEELAHAN: Your Honour, that's my submission, that the term now that's being introduced, is this term akin to section 114 however it worked.

PN27795

JUSTICE ROSS: Yes.

PN27796

MR WHEELAHAN: So that is obviously a term, and this is consistent with what the Full Bench has put - and it's put on a jurisdictional decision at paragraph 60.6, that there may be no one set of provisions in the particular award. So you've got to look at - - -

PN27797

JUSTICE ROSS: Well yes - - -

PN27798

MR WHEELAHAN: But that's it. It's the additional provision we're now considering with respect to the voluntary nature.

PN27799

JUSTICE ROSS: Okay, but how does the voluntary nature - I'm sorry, that's it, that's the - when you're talking about other award terms, that's all you're talking about, in this case?

PN27800

MR IZZO: Your Honour, in this case - - -

PN27801

JUSTICE ROSS: You haven't referred to anything else so - - -

PN27802

MR IZZO: We haven't agitated a particular problem with other provisions that would therefore, for instance, dramatically change the Commission's approach, so

in this case, the question about whether the - there's a question about voluntariness in working on a Sunday, that's certainly one matter that is going to be influential. We have not agitated, for instance, that the rates of pay are too high or something like that, but, had we, that would have much greater impact and influence. And that's why, when you have an argument where one side's just saying it has to be at 200 per cent, the other side's saying 150, well, both can't be right; none of it's presently really proposing to offer anything else, so that's going to be the focus of the consideration. But when we're talking about the test generally, we do say it is a contextual consideration.

PN27803

JUSTICE ROSS: To some extent. Why do we need to decide the broader question? We need to decide on the basis that it's put here, and that issue can be left open for when it arises as a factual context as well - not a factual context but - but in the actual submissions you're putting that well these other provisions also bear on this question, and it might arise in another case but it's not this case. Absent the volunteer issue, you're not saying, for example, that the weekly wage rates are so high they included a bit that compensates for working on weekends - that's not the argument put here?

PN27804

MR IZZO: Certainly not by my clients. If my clients were advocating a capacity to pay case, for instance, it might be that one starts to look at the wage rates and things like that, but that's not a position advanced by my clients. So on behalf of my clients I can certainly say that I don't think there's any other award provisions we're pointing to as being problematic and so the focus should be on - - -

PN27805

JUSTICE ROSS: There's nothing in any of the written submissions that suggest that any of the parties are doing that.

PN27806

MR IZZO: And if that's the case then, I wasn't too sure, your Honour, but if that's - - -

PN27807

JUSTICE ROSS: Well I've made that observation and if anyone wants to contradict it they can, but - - -

PN27808

MR IZZO: If that's the case, it may be that the question can more broadly be left open and that one is looking at the penalty rate as varied, whether it goes so far as to meet the modern award's objective, but no further. That could be the approach we adopt.

PN27809

JUSTICE ROSS: It was never going to end well when I said I might agree with Mr Izzo.

PN27810

MR IZZO: I know, I know. It kills any hope of consensus Mr Dowling.

PN27811

JUSTICE ROSS: The more he describes his position, the more it becomes clear to us that what he is talking about is this contextual idea and what he says in his written submissions is what blend of terms and conditions in particular - but really, it's an interesting debate. I'm sure everyone's fascinated in - but do we need to decide that point in this case, is really - - -

PN27812

MR DOWLING: We thought not, your Honour. We thought there'd been a concession to that effect because nobody's take the Commission to, in any evidence or any submissions, other terms that might be said to - - -

PN27813

JUSTICE ROSS: Well, on the fact of it, I don't think so either, but bearing in mind it's raised - look late in the day, I don't want to ambush anyone into it. There might be on reflection some nuance that we have to decide the point, but it doesn't seem to be the case at the moment.

PN27814

MR DOWLING: Yes, well that was going to be our next submission, your Honour, really that there's nothing - if that was so, we would expect that Mr Izzo or the other employers that agree with that approach, would have put before the Commission and directed the Commission's attention to those terms that they say should form part of that contextual part of that balance.

PN27815

And in circumstances where that hasn't happened, there's nothing, the Commission has nothing to provide - or nothing is provided as part of that context, so there really is no debate.

PN27816

I notice the time. That's as much as I really am able to say I think, given the - - -

PN27817

JUSTICE ROSS: Just looking to tomorrow, how long do you think you'll be?

PN27818

MR DOWLING: I expect something in the range of an hour and a half to two hours.

PN27819

JUSTICE ROSS: All right.

PN27820

MR IZZO: Your Honour, we had discussed the timing of submissions in reply after we'd heard the SDA's submission.

PN27821

JUSTICE ROSS: Yes.

PN27822

MR IZZO: My understanding was that it was a cumulative 40 minutes to respond to the SDA. It might be another 20 minutes or something like that on top. We've had an opportunity to replay some things, so somewhere in the order of an hour, maybe a tiny bit more.

PN27823

JUSTICE ROSS: I'm just wondering whether it might be safest just to start at 9.30 so that the proceeding could then conclude by the luncheon adjournment.

PN27824

MR DIXON: That doesn't cause us any difficulty, your Honour.

PN27825

MR DOWLING: Nor me, your Honour.

PN27826

JUSTICE ROSS: All right, everyone content with that? We'll adjourn now until 9.30 tomorrow morning.

ADJOURNED UNTIL THURSDAY, 14 APRIL 2016 [4.28 PM]