



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY

AM2014/227

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/227) and Others
Fitness Industry Award 2010**

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Melbourne

9.44 AM, TUESDAY, 9 AUGUST 2016

PN1

THE DEPUTY PRESIDENT: Yes can I take appearances? I'll start here in Melbourne.

PN2

MS M MOLONEY: Thank you Deputy President, Moloney initial M from K&L Gates, appearing on behalf of Tennis Australia and Gymnastics Australia.

PN3

THE DEPUTY PRESIDENT: Thank you Ms Moloney. In Sydney please?

PN4

MS R WALSH: Walsh, initial R, appearing for the Australian Worker's Union.

PN5

THE DEPUTY PRESIDENT: Thanks, you can all remain seated, thanks. Yes, thank you Ms Walsh.

PN6

MR D WILKINSON: Wilkinson, initial D on behalf of Fitness Australia, thanks.

PN7

THE DEPUTY PRESIDENT: Thank you.

PN8

MR A JONES-VALLEDOR: Jones-Valledor, initial A, for AFEI.

PN9

THE DEPUTY PRESIDENT: Thank you Mr Jones-Valledor.

PN10

MS M SHAW: Shaw, initial M for AFEI.

PN11

THE DEPUTY PRESIDENT: Thank you Ms Shaw. Yes, in Brisbane please.

PN12

MR M TAYLOR: Michael Taylor and Mr Ross Gage on behalf of the Australian Swim Schools Association Ltd.

PN13

THE DEPUTY PRESIDENT: Thank you. All right, so we're starting with the - I'll start with the Sporting Organisations Award and what I propose to do is work through the updated summary of submissions that has been produced by the Commission's award modernisation team on 22 July 2016.

PN14

And more particularly, I'm just going to go to the matters in the awards this morning that appear not to have been agreed as yet. So in the Sporting Organisation's Award, my understanding is that the only item that hasn't been agreed as between the parties - and I should say that agreement between the

parties, does not necessarily translate into agreement by the Full Bench, but it is something that will be had regard to.

PN15

The only item that appears to require further discussion at this point is item number three and it's a claim for a submission made by the AWU in relation to clause 6.5(a) in the exposure draft.

PN16

Ms Walsh, I might get you to address this one first and with any update that you can provide. I note that when we've previously discussed - this claim has been opposed by Business SA, AFEI and Tennis Australia. So Ms Walsh, I'll hear from you first please.

PN17

MS WALSH: Thank you, Deputy President. I mean this is a clause that we spoke about at the last conference before you and the parties I should say haven't spoken about this further since then. I suppose my understanding is that the claim itself was not necessarily substantively opposed, but that perhaps the wording could be reworked and AFEI will have to correct me if I'm wrong on that.

PN18

So I had been thinking about that, because we had phrased of course the amendment to be 'and works less than 38 hours per week'.

PN19

THE DEPUTY PRESIDENT: Yes.

PN20

MS WALSH: There was a comment there by AFEI and perhaps yourself that that would imply that a casual worker can't work more than 38 hours. So we wondered if phrasing to 'up to' rather than 'less than', that that might resolve that issue. Did you want me to speak more broadly about our claim?

PN21

THE DEPUTY PRESIDENT: Only if it's not understood by the parties, but as I understand it, at the conference before the President on 6 June, there was a discussion along the lines that you're now outlining and Mr Jones-Valledor had something to say and so did Ms Moloney. So I'm happy to take up the discussion with either of those two parties.

PN22

MS WALSH: I mean, there's probably a new issue now. I just saw an email this morning from K&L Gates that they are also opposing that change and as that - well there's new issues now of whether or not casual employees are entitled or governed by the idea of ordinary hours and overtime and that applying to clarifying the administrative side.

PN23

THE DEPUTY PRESIDENT: All right.

PN24

MS WALSH: So I don't know if we're having that discussion now, but we'd be happy to as well.

PN25

THE DEPUTY PRESIDENT: All right, well thank you. Mr Jones-Valledor, where's your thinking on this, at this stage?

PN26

MR JONES-VALLEDOR: Yes, your Honour, I know in the past - at the past conferences, we may have been open to some kind of re-tinkering or something like that in discussion with the AWU. However, as Ms Walsh just mentioned, new issues have arisen since then in terms of casuals and a potential entitlement to overtime under the award and so it's certainly becoming less likely that AFEI would be open to any sort of tinkering of any sort of wording. So we'd be opposing the variation being sought outright.

PN27

THE DEPUTY PRESIDENT: Thank you. Now these issues relating to casuals and overtime under the award, do they apply to item 3 or other items, or both?

PN28

MS WALSH: I don't think they apply to other items.

PN29

THE DEPUTY PRESIDENT: Well, is there something that arises?

PN30

MS WALSH: Well, I mean to the extent that the AWU are obviously trying to have the ordinary hours firmed up for casual employees and for that to be made clear under the award, that reflects our understanding that a casual employee is indeed governed by ordinary hours.

PN31

And so, K&L Gates have noticed that that's our position by making this claim about the 147 issue and have said we'll hang on casual employees aren't actually governed by ordinary hours and they wouldn't be entitled to overtime as a clerical and administrative staff. So, I suppose that's how we're here, and that's how it relates.

PN32

THE DEPUTY PRESIDENT: All right, well I might hear from K&L Gates.

PN33

MS MOLONEY: Thank you very much Deputy President. This is an issue that is similar in substance to the issue that's been flagged by numerous parties in relation to the Fitness Industry Award and whilst some of this issue arises as a result of item 3, and the introduction of the conflict of 38 hours for casual employees, the issue also arises when that particular submission is taken together with the drafting of the exposure draft.

PN34

In particular there has been a shift from the current position where under the current clause, hours of work and the concept of ordinary hours at clause 22 of the award. Those provisions relate only to full time and part time employees at 22.1(a) and (b).

PN35

THE DEPUTY PRESIDENT: Sorry, which award are we on now?

PN36

MS MOLONEY: So I'm looking at the Sporting Organisations Award, the current award at clause 22.

PN37

THE DEPUTY PRESIDENT: Yes.

PN38

MS MOLONEY: And you'll see under the heading ordinary hours of work and rostering at 22.1 there is a reference to clerical and administrative staff.

PN39

THE DEPUTY PRESIDENT: Yes.

PN40

MS MOLONEY: And it refers only to full time employees and part time employees, suggesting that the concept of ordinary hours do not apply to casuals.

PN41

THE DEPUTY PRESIDENT: Yes.

PN42

MS MOLONEY: Then the concept of overtime, although it's not particularly clear, but it seems that generally, overtime will be paid to full time and part time employees who work outside of their ordinary hours. The shift is that under the exposure draft and in particular at clause 8.1(a), so I've moved to part 3, hours of work under the exposure draft.

PN43

The concept of ordinary hours is no longer limited to full time and part time employees, but at 8.1(a), it reads ordinary hours of work between 6am and 6pm Monday to Friday. It does appear to suggest that that span of hours will now, for the first time, apply to casual employees and that, read together - I'm sorry to be jumping all over the place here to clause 13, where the definition of overtime is. "Overtime is any work performed outside of ordinary hours" appears to suggest that casual employees who work outside the span of hours set out in clause 8.1(a), could now have an entitlement to overtime.

PN44

Similarly, it may well be that if we introduce this concept of casuals working less than 38 hours per week and that is nominated as their ordinary hours, that that could also have the unintended or perhaps intended effect of meaning that casual

employees who work more than 38 hours would be entitled to overtime. So we have flagged that issue on the basis that we say that represents a substantial variation to the existing award terms, and flagged Tennis Australia's objection if that is in fact the intended effect.

PN45

It is correct that we haven't yet had an opportunity to speak to the AWU about this matter, but as I mentioned at the start of my submission, this is a similar issue to what has happened in the Fitness Industry Award with the exposure draft - the redrafting in the exposure draft and accordingly, their position may well be the same.

PN46

MS WALSH: I'm happy to respond to that Deputy President.

PN47

THE DEPUTY PRESIDENT: Yes.

PN48

MS WALSH: So, we note that there's a change from the current award to the exposure draft, but our position is definitely that the exposure draft is clearer as to how the provisions work. We don't see it as surprising that there would be more aspects or - surprising that full time and part time employees are described in the way that they are, given that they are, or have an expectation of ongoing employment.

PN49

I mean, the full time ordinary hours' provisions are about averaging of ordinary hours. So of course, that's peculiar to the fact that they have full time work and that they expect to continue work. The part time provisions that are in the current award are about having an agreement in writing so that you have that expectation of how many hours you're going to work from week to week.

PN50

The fact that those provisions are in there, doesn't, in our view, exclude casuals from other features of ordinary hours, such as 38 hours per week, as well as the span of hours. So, on the reading of the award, the exposure draft and the current award, that would be our interpretation and I think outside of that, I suppose we can't see a rationale for why a casual employee, as a clerical and administrative staff member, wouldn't be entitled to overtime, where part time and full time employees would be.

PN51

I haven't heard from the employer groups actually in relation to either of these awards. What exactly the rationale is in this industry or in these industries, for why casual employees aren't entitled to overtime.

PN52

THE DEPUTY PRESIDENT: Yes, well, I just make this observation. The exposure draft was first published in December 2015 and here we are in August

and it seems as though there's an issue that's being ventilated now that should have been ventilated some time ago.

PN53

MS WALSH: Yes.

PN54

THE DEPUTY PRESIDENT: The issue, or the dispute seems to be that there will be employer parties that say that casuals haven't been entitled to overtime in the past in this and the Fitness Industry Award and the union submissions are understandable that there is no reason why there shouldn't be. There will be an argument about why the current is drafted the way the current award is drafted and how the exposure draft has changed things.

PN55

Now, this should have come to light earlier. Where does that leave the - Ms Walsh, where does that leave your claim in 6.5 for clause 6.5(a)? Is that one that you intend to press still, or are you going to put up an alternate form of wording?

PN56

MS WALSH: We were taking into account the conversations we had at the last conference. I suppose I'd be interested to see what the parties think of the wording to change to 'up to' instead of 'less than'. However - - -

PN57

THE DEPUTY PRESIDENT: Aren't you going to run into the same objection? Not wanting to pre-empt what the employer parties say, but the objection as I understand it is that sort of form of wording would place an employer - I don't know whether it would or it wouldn't, but the objection as I understand it, is that it would place an employer in breach if they worked a casual for more than 38 hours a week, a breach of that award terms.

PN58

MS WALSH: Up to 38 ordinary hours.

PN59

THE DEPUTY PRESIDENT: Well what happens if they work in excess of 38 hours? Are they in breach of that term?

PN60

MS WALSH: No, they would need to be paid overtime because they would be working overtime hours. They can work up to 38 ordinary hours.

PN61

THE DEPUTY PRESIDENT: Well, that's slightly different. If it's 38 hours or 38 ordinary hours. If it's 38 hours - - -

PN62

MS WALSH: Yes, sorry, yes that's right. So our amended proposition would be that we insert 'and works up to 38 ordinary hours per week'.

PN63

THE DEPUTY PRESIDENT: Then that seems to me to lead us to the second part of the discussion, which is the dispute about whether there is an entitlement to overtime for casuals under these awards which is unlikely to be resolved by consent.

PN64

MS WALSH: Yes, unfortunately we weren't aware that that was - - -

PN65

THE DEPUTY PRESIDENT: I'm not suggesting it's your issue.

PN66

MS WALSH: Right.

PN67

THE DEPUTY PRESIDENT: You've had your claim on foot, but anyway there's a dispute now and it won't be resolved by consent it would seem. The Full Bench will have to give consideration as to how it deals with it.

PN68

Do any of the other employer parties want to make any comment about this issue?

PN69

MS MOLONEY: Deputy President, I might just acknowledge the fact that we have raised this issue 8. It has come to my - obviously we've previously objected in relation to item 3, but it has come to light that once you introduce the concept of 38 ordinary hours in relation to the AWU's proposed amendment, that has flow on effects, as does some of the change in drafting initiated by the Fair Work Commission. So I do apologise for the late notice.

PN70

I do note that this is an issue that is very similar to the Fitness Industry Award whether casuals are entitled to overtime issue and therefore I don't think any of the parties will have suffered prejudice by the late raising of the issue.

PN71

MR WILKINSON: Sorry, I missed that point. Also, we can't necessarily see you Mikailah in Melbourne. There's a shot of Deputy President but not of yourself. We couldn't hear that.

PN72

MS MOLONEY: Okay, can you hear me now?

PN73

MR WILKINSON: That's a lot better. Thanks, Mikailah.

PN74

MS MOLONEY: I've probably moved, but I don't think that means you can see me.

PN75

MR WILKINSON: No, there's not a picture of you.

PN76

MS MOLONEY: That's fine; you can probably do without that. I was apologising for the late notice of the objection and said that whilst it wasn't immediately obvious in the exposure draft until the ASSA had put in their submission in relation to item 3, it now has become obvious and we have prepared and yesterday filed a submission in relation that that, having flagged it in the May conference.

PN77

My other point was that this is an issue that is very very similar to the issue that has previously been flagged in relation to the Fitness Industry Award and accordingly, I don't consider that any of the parties would suffer any prejudice as a result of this issue not being flagged prior to May.

PN78

MR WILKINSON: I agree with that point because with - not in this award as such, but certainly on this issue, from the Fitness Industry Award point of view, from Fitness Australia, we're acutely aware of this particular issue as well. We'll leave that to when the Fitness Award is to be reviewed this morning.

PN79

THE DEPUTY PRESIDENT: Thank you Mr Wilkinson. Now, are there any other issues that need to be discussed in relation to the Sporting Organisation's Award?

PN80

MS WALSH: Deputy President, Ms Walsh for the AWU.

PN81

THE DEPUTY PRESIDENT: Yes.

PN82

MS WALSH: We spoke about item 6 last time when we were all before you which was about the reference to grade one or two. I just want to confirm that we had an agreed point, but also a point that AFEI and Business SA had opposed. Are we leaving that as partly opposed and partly agreed?

PN83

THE DEPUTY PRESIDENT: Well, Ms Walsh, I'm working off the transcript from the 6 June proceedings before the President and when the question was asked about item 6, Ms Van Gorp from Business SA indicated they were withdrawing their submission.

PN84

MS WALSH: Right, sorry.

PN85

THE DEPUTY PRESIDENT: I've got someone from Business SA now in Adelaide. Who have we got in Adelaide?

PN86

MR C KLEPPER: It's Klepper, initial C from Business SA and apologies to all parties for my late arrival.

PN87

THE DEPUTY PRESIDENT: Thank you Mr Klepper. Is that the position, do you know?

PN88

MR KLEPPER: Yes, that is the position. Business SA did withdraw that submission.

PN89

THE DEPUTY PRESIDENT: Okay, now - - -

PN90

MS WALSH: I've got the AFEI were silent at that hearing.

PN91

THE DEPUTY PRESIDENT: Yes, Mr Jones-Valledor, what's your position with item 6?

PN92

MR JONES-VALLEDOR: Yes, our position remains that we'd like to see the current award wording retained where it is a percentage of the grade one or two rate for the particular junior. So I'm instructed that it is our view that a junior can't be paid any more than a grade two, albeit there is an exception that they'll only stay on that rate of pay for the one year. So that's AFEI's position that the current award wording be retained.

PN93

THE DEPUTY PRESIDENT: All right, so Ms Walsh, it seems as though the difference now is between yourselves and the AFEI on item 6 as it relates to clause 10.2(b) in the exposure draft.

PN94

MS WALSH: Yes, okay.

PN95

THE DEPUTY PRESIDENT: All right. Are there any other matters with the Sporting Organisation's Award?

PN96

MS WALSH: That's all to my knowledge.

PN97

THE DEPUTY PRESIDENT: Thank you. Any of the employer parties please?

PN98

MS MOLONEY: Nothing more.

PN99

THE DEPUTY PRESIDENT: Thank you, all right, well I'll now call on the Fitness Industry Award. In that award I've got a few notes of what might be outstanding. The first one being a clarification question for the parties. Again I'll work off the updated summary produced by the Commission on 22 July.

PN100

The first question I had was to do with item 5. This was a discussion that was had around the way in which allowances should apply to part time employees. The question I had was it seems as though agreement had been reached in relation to all allowances bar the first aid allowance which was a position put by the ASEI that that should still be a pro rata allowance, for part time employees. Is that the position Mr Jones-Valledor?

PN101

MR JONES-VALLEDOR: Just a moment, your Honour. Your Honour, I believe that we actually took a step back from that and said that it was okay to pro rata the first aid allowance. Is that correct?

PN102

MS WALSH: We plead the point that we thought the first aid allowance was not pro rata-ed, correct and that you'd undertaken to consider that.

PN103

MR JONES-VALLEDOR: Given I think the small amount that it is, we were fine with that, your Honour, that it couldn't be pro rata-ed, the first aid allowance.

PN104

THE DEPUTY PRESIDENT: All right, so just to confirm then, this one involves reading a couple of clauses together with a schedule. Originally this one arose out of a submission, as I understand it, by Aussie Aquatics.

PN105

MS WALSH: Aussie Aquatics - Deputy President, if I could assist.

PN106

THE DEPUTY PRESIDENT: Yes.

PN107

MS WALSH: Yes, it started with Aussie Aquatics who spoke with the AWU and we agreed upon some wording which was eventually amended between all of the parties, and I believe we have agreed wording in relation to part time employees and allowances.

PN108

THE DEPUTY PRESIDENT: Where would that fall into the exposure draft then, Ms Walsh?

PN109

MS WALSH: So it would be a new clause 11.1.

PN110

THE DEPUTY PRESIDENT: Yes.

PN111

MS WALSH: To confirm that the leadings hands and supervisor's allowance is paid on a pro rata basis and we've got the exclusion of - sorry, and there's also been agreed wording in regards to broken shift allowance.

PN112

THE DEPUTY PRESIDENT: All right then, where's the broken shift allowance?

PN113

MS WALSH: That's at 11.(b) of the exposure draft.

PN114

THE DEPUTY PRESIDENT: The latest version, or?

PN115

MS WALSH: I don't have the amendments - that's gone is it?

PN116

MR WILKINSON: If you put it there, as you correctly say, it would cover a new clause - leading hand broken shift.

PN117

MS WALSH: Well this was the agreed wording.

PN118

MR WILKINSON: Yes, but it hasn't appeared - that was one of the issues.

PN119

MS WALSH: Right.

PN120

MR WILKINSON: It hasn't been updated, so I mention that to the Commission.

PN121

MS WALSH: There's an agreement that it's only the leading hand and supervisor's allowance that is paid on a pro rata basis, but there was a finer point in relation to broken shift allowance which was that an employee other than a casual engaged under subclause 7.4(c)(ii), which I think is that peculiar type of (indistinct) would be paid the full amount.

PN122

I haven't been following proceedings as closely as I should be, but I think K&L Gates wrote to the Commission wondering why that hadn't been included in the updated exposure draft. Is that right, K&L Gates?

PN123

MS MOLONEY: No.

PN124

MS WALSH: Sorry.

PN125

MS MOLONEY: No, that's fine. We flagged something in relation to the gymnastics classification. It might assist the Commission. I have a document it has got my writing on it, that I think was previously provided by the Commission that has this wording, which I can hand up. I'm sorry, I only have the one copy.

PN126

THE DEPUTY PRESIDENT: So the question is whether - this hadn't made it into the latest version of the exposure draft, but it's agreed between the parties.

PN127

MS WALSH: Yes. Well, I should say the AWU don't oppose the incorporation of these additional clauses, but we don't necessarily see them as necessary.

PN128

THE DEPUTY PRESIDENT: All right then, if we're talking about this proposed wording, take it back to AFEI. Is your position now Mr Jones-Valledor that you don't have an issue with the proposed wording?

PN129

MR JONES-VALLEDOR: Your Honour, as yet, AFEI has not yet fully considered the wording, so I'd need to go away and seek instructions and I'm happy to do that as a matter of priority. My apologies for that your Honour. Apart from that it appears that we do agree in principle, it's just the wording.

PN130

THE DEPUTY PRESIDENT: Look everyone, there's been very little follow up done on this prior to the last conferences. If the Commission asks you to go away and attend to things and have discussions, we're not saying it because we just feel like saying it, it has a purpose behind it. I'm not just drawing Mr Jones-Valledor into this, it's really a comment about - this now then holds up what I can then report back to the Full Bench at this point.

PN131

MR JONES-VALLEDOR: Yes, your Honour, I've just been passed the wording. I'm happy to have a quick look at it with my colleague.

PN132

MR KLEPPER: Sorry, it's Klepper here from Adelaide, is that proposed wording on the Commission's website, because I haven't seen that one either, unfortunately. I'm not sure if Mr Jones-Valledor able to read it out loud or anything like that.

PN133

MS WALSH: It's the document that K&L Gates circulated to all parties, but you can read it.

PN134

MR JONES-VALLEDOR: Yes, I'll read it out. So it's "employees engaged other than on a full time basis under clause 7.2 be paid pro rata the wage related allowance detailed in paragraph (a) leading hands and supervisors; and (b) broken shift allowance be amended as follows. An employee other than a casual engaged

under subclause 7.C3 working a rostered broken shift must be paid per day \$12.24 extra and for excess fares an expense related allowance of \$1.89 per day."

PN135

Just to correct myself, it's 7.C3 engaged under subclause 7.C2. And just having had a look at that, your Honour, AFEI, sees no issue.

PN136

THE DEPUTY PRESIDENT: Sorry, Mr Jones-Valledor?

PN137

MR JONES-VALLEDOR: We agree with the wording.

PN138

THE DEPUTY PRESIDENT: Thank you.

PN139

MR KLEPPER: Having heard the wording, thank you Mr Jones-Valledor for that, Business SA wouldn't oppose that wording either.

PN140

MR WILKINSON: And neither does Fitness Australia, thanks Deputy President.

PN141

THE DEPUTY PRESIDENT: Thank you.

PN142

MR TAYLOR: Mr Deputy President, Michael Taylor, given that the Aussie Aquatics organisation initiated this issue, I would confirm that it's our understanding that that wording was to be incorporated in the exposure draft and we obviously therefore support it.

PN143

THE DEPUTY PRESIDENT: Thank you.

PN144

Thank you, all right, well that takes care of item 5. The next one please could we look at is item 6. Now this I think is the same issue that we've just been discussing in relation to the Sporting Organisations Award. Is that correct?

PN145

MS MOLONEY: Yes Deputy President, we would say that the addition of the wording again brings up this issue of whether casuals are entitled to overtime and on that basis we have instructions from Gymnastics Australia to oppose the variation.

PN146

THE DEPUTY PRESIDENT: Thank you. Ms Moloney, I've noted that. Other employer parties please, could you address me on that?

PN147

MR WILKINSON: Yes, Wilkinson on behalf of Fitness Australia, Deputy President. We're in the same situation as Gymnastics Australia, we oppose it. I had put in a submission back on 26 May that brought up this issue as well. I note that it hasn't been brought up in the summary as such in this area, but it's brought up at another spot in the award summary.

PN148

But certainly, we gave a background as to why it was not to be included for casual's overtime with the history of the award. And it was dealt with also in the two year award review, as I set out in my submission on behalf of Fitness Australia on 26 May 2016. So I think to bring it up to take it to the Full Bench is probably not really appropriate, because I believe it has been dealt with in prior proceedings.

PN149

THE DEPUTY PRESIDENT: Thank you. Yes, Mr Jones-Valledor, any comments?

PN150

MR JONES-VALLEDOR: AFEI's in the pretty much the same boat as was - and in terms of rational, pretty much the same as the previous award for sporting organisations. So yes, that's our position as well.

PN151

THE DEPUTY PRESIDENT: Thank you. Mr Taylor?

PN152

MR TAYLOR: Mr Deputy President, our position, that is the ASSA's has been consistent to support Gymnastics Australia and we've not changed our view on that, so we would oppose the concept of any interpretation being written into the award that required payment of overtime to casuals.

PN153

THE DEPUTY PRESIDENT: Thank you. Mr Klepper.

PN154

MR KLEPPER: Yes, the summary of submissions accurately notes that Business SA withdrew our support at one of the previous conferences and that position stands, so we would also oppose.

PN155

THE DEPUTY PRESIDENT: Thank you. Ms Walsh, I think the issues are reasonably clear in this one and it looks as those there won't be a consent position reached on this, so I'll report that back to the Full Bench, unless there's any other comments you'd like to make.

PN156

MS WALSH: I don't think so. I think that's right, I think a consent position would be incredibly difficult. It is an issue, however, that we haven't spoken about between the parties. We've kind of each time that we have gotten together decided it was beyond - well it was something that we wouldn't be able to agree

upon but we would be happy to actually discuss this issue just between the parties, if parties saw that as a fruitful discussion to be had.

PN157

THE DEPUTY PRESIDENT: Well we encourage discussions. I think the - from what I've heard this morning the issue seems to be that there's a view that has been expressed on behalf of the employer organisations that there's been no entitlement for casuals to get overtime under the award, and they won't that position to be maintained. But if the parties see some virtue in having a discussion or discussions, that would be encouraged. I'll leave it to the parties on that. But it seems to be on what's been said this morning that the two views are a long way apart.

PN158

MS WALSH: Yes.

PN159

THE DEPUTY PRESIDENT: Right. The next one if we could deal with please is just a question I had about item 9, and that is whether it's been resolved. Is this matter still in - item 9 there was a question raised as to ambiguity.

PN160

MS MOLONEY: That's correct, Deputy President. If I could just note that that was raised by the Fair Work Ombudsmen - - -

PN161

THE DEPUTY PRESIDENT: Yes.

PN162

MS MOLONEY: - - - in a submission back in March 2015 and please correct me other parties, I believe the issue is that the majority of the parties did not see any ambiguity but to the extent that it related to the concept of a casual entitlement to overtime as that relates back to public holidays, it was likely to be an area of dispute.

PN163

MR WILKINSON: Wilkinson from Fitness Australia, Deputy President. I totally agree with that comment by Ms Moloney from Gymnastics Australia.

PN164

THE DEPUTY PRESIDENT: To that extent it doesn't seem as though the position's changed from the report of 3 June. I'll then move onto items 10 and 11, now these were noted as being areas of dispute that were unlikely to be overcome. Has there been any movement in relation to either of these items?

PN165

MS MOLONEY: Deputy President, I think this raises the same issues in terms of whether casuals will going forward be entitled to overtime, and there's been no movement from the perspective of the parties that I represent; Tennis Australia and Gymnastics Australia.

PN166

THE DEPUTY PRESIDENT: Thank you.

PN167

MR WILKINSON: Again, there's been no movement - Wilkinson on behalf of Fitness Australia. There's been no movement from us on those as well.

PN168

THE DEPUTY PRESIDENT: Thank you.

PN169

MS WALSH: I can confirm that from the AWU's perspective. Yes, it was a question by the Commission that obviously investigated some of the same issues, the interaction between ordinary hours and overtime. So of course the parties haven't been able to agree, although we agree on small interpretations and how the clauses operate overall we're obviously in disagreement as to whether the overtime applies.

PN170

THE DEPUTY PRESIDENT: Yes. The original position on item 10 seems to be put forward by Aussie Aquatics. I'll note that items 10 and 11 remain in dispute. Now the last one I have on my list was item 16(a), and I have it on my list because there was some correspondence received from Gymnastics Australia on 1 August querying whether the summary was updated. Do you want to speak to that, Ms Moloney? Is that - - -

PN171

MS MOLONEY: Yes, thank you, Deputy President. We did write to the Commission on 1 August just querying the fact that the revised exposure draft while it did include the new classifications proposed by Tennis Australia, it did not include the classifications proposed by Gymnastics Australia which, as I understand, at item 16 of the report to the Full Bench it was agreed to vary the classifications to better reflect the nature of the work performed by gymnastics coaches, as set out in our submissions of 12 November 2015. I understand that Aussie Aquatics has a similar issue with their classifications, and we just queried that issue.

PN172

THE DEPUTY PRESIDENT: Right. I'll follow that up then. They're the matters that I have noted. Now Mr Taylor you've written to the Commission in recent days, you've raised a couple of things. Do you want to address those please?

PN173

MR TAYLOR: Yes, if I may at this juncture, Mr Deputy President, and just in relation to the Schedule A classification issue, I'd just like to confirm that the ASSA has corresponded with you directly and also through (indistinct) in relation to our concern that we had understood the classification descriptors contained in as far as they relate to swim teachers, assistants, coaches and their assistants were agreed matters.

PN174

If I could be audacious even given your previous comments to raise correspondence of 4 August to you, where I have identified three issues of concern, which I must confirm I have not discussed with other parties present before you today who have been active participants in this discussion to this point in time. However, they do go to issues of drafting and possible clarification required in relation not only to the exposure draft versions 1 and 2 but upon reference and I concede now my correspondence, in relation to the wording of the current award provisions.

PN175

The first one and it's probably the substantial one, Mr Deputy President, relates to clause 3, Coverage. It relates to the structure of clause 3 in regard to the definition of the fitness industry and clause 3.1 in the award and 3.2 in the exposure draft. The fitness industry is defined as means, "the operation of a) fitness centres", and the position - and it goes onto I think through to n) to indicate the various types of operations covered by this proposed award and the current award. But the point of concern is that 3.4 reads in the exposure draft, as indeed it reads it in the current award:

PN176

This award does not cover an employee who is employed by the employee to provide administrative and other operational support outside of fitness centres.

PN177

Now that causes concerns to the organisations I represent in as far as swim schools use the classification descriptors and the structure in the current Fitness Industry Award and indeed the proposed 2015 version to employ persons who do things or perform roles that could reasonably be described as administrative and other operational support. For instance the front desk support role in a swim school is basically one where you're dealing with the public, collecting funds, also processing bookings and membership applications and the like.

PN178

It strikes me that the drafting of the award would be suited to the parties if the expression "fitness centres" in 3.4 as it currently reads be expanded to include other organisations. For instance, and I've suggested this in my correspondence, aquatic services or classes. In other words, make it quite clear that the folk who perform operational support roles in all of the operations covered by the industry award are not precluded by the rigorous application of the current 3.4.

PN179

Now I do concede humbly that this is an issue that should have been raised as a threshold probably at the point that the 2010 was at the discussion draft stage. But unfortunately this is the way of the world. It's only become obvious to me that this is an area of concern and possible disruption to the current operation of many of the organisations that would operate in good faith under the auspices of the current award.

PN180

As I say, I've not canvassed this with any other party. I don't know if other people see it the same way, Mr Deputy President, but I just take this earliest opportunity

to seek the issue being discussed and hopefully resolved by consensus. The second issue, if I may hold onto it, it's not of major import but just a point of clarification. It relates to again the same clause in the modern award of 2010 as the proposed award of 2015. It relates to 19.3 job search in the exposure draft, 14.3 of the current award. It reads:

PN181

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking employment.

PN182

This is an issue that touches upon the clarification of the way the award is intended to operate in relation to permanent casuals or casuals in this industry. The question I ask is should there be an exemption in the drafting of 19.3 to clarify whether or not this clause relates to casuals and if it does relate to casuals, I think it should state that if it doesn't there should be an exemption incorporated into the award. I have a view on that but I've not entertained that debate with others as I stressed.

PN183

The final point is really just - without being too pedantic about the wording of 18.3, which is the similar and identical terms 26.3(c) in the current award. It reads:

PN184

A full-time or part-time employee must be paid at the rate of 250 per cent of the minimum hourly rate for all hours worked on the public holiday. An employee required to work on a public holiday must be engaged or paid for at least for hours work at the rate of 250 per cent of the minimum hourly rate.

PN185

Now to my eye and ear that would probably benefit by a bit of a snipping exercise and could easily be truncated at the word of work, to delete "at the rate of 250 per cent at the minimum hourly rate", for the simple reason that reference is already made at the beginning of the clause or provision, and it seems we've just doubled up on it for no particular for no particular benefit to the operation of explanation or the intended operation of that provision. They are the three issues that I would look to have the opportunity of discussing with our colleagues in the context our their review, if the Commission pleased

PN186

THE DEPUTY PRESIDENT: Thank you. Well you have can half an hour now. I'll adjourn until quarter past 11 and the parties can report back on those three issues. I'll adjourn for half an hour.

SHORT ADJOURNMENT

[10.46 AM]

RESUMED

[11.17 AM]

PN187

THE DEPUTY PRESIDENT: Thank you. Who wants to report back on these matters

PN188

MS MOLONEY: Deputy President Clancy, I have offered to do that given I'm in the same room with you.

PN189

THE DEPUTY PRESIDENT: Right.

PN190

MS MOLONEY: Just in relation to the ASSA submissions we thank you for the opportunity to have a discussion regarding those matters. We have had some fruitful discussions. We are in a position where the employer groups and associations and the AWU do need to seek confirmation through consulting with the members, but Michael Taylor from ASSA has committed to circulating proposed wording to the parties in relation to the first submission made in his letter of 4 August 2016, namely relating to clause 3.4 coverage. In relation to the submissions relating to 19.3 and clause 18.3, my understanding is those submissions will not be pressed following discussions as a group.

PN191

We have canvassed today the issues of casuals and overtime - - -

PN192

THE DEPUTY PRESIDENT: Sorry, just we go to that.

PN193

MS MOLONEY: Yes.

PN194

THE DEPUTY PRESIDENT: So the position is there'll be some proposed wording circulated by Mr Taylor in relation to the coverage clause 3.4 for the parties to consult on with their members.

PN195

MS MOLONEY: That's correct. We can then convey to the Commission whether or not we have reached an agreement in relation to that wording.

PN196

THE DEPUTY PRESIDENT: Now is a timetable for a report back on that by the parties of 14 days acceptable?

PN197

MS MOLONEY: I'll be guided by others.

PN198

THE DEPUTY PRESIDENT: If I was to say feedback by close of business on 23 August, how would that leave people?

PN199

MR TAYLOR: Michael Taylor, I have no concerns with that deadline, Mr Deputy President.

PN200

MS MOLONEY: That's fine for Tennis Australia and Gymnastics Australia, thank you.

PN201

THE DEPUTY PRESIDENT: Parties in Sydney please?

PN202

MS WALSH: That's fine for the AWU as well, Deputy President.

PN203

MR WILKINSON: Yes, fine for Fitness Australia too thanks, Deputy President.

PN204

THE DEPUTY PRESIDENT: Thank you. Mr Jones-Valledor.

PN205

MR JONES-VALLEDOR: Yes, fine, thank you.

PN206

THE DEPUTY PRESIDENT: Mr Klepper.

PN207

MR KLEPPER: Business Australia is fine with that date.

PN208

THE DEPUTY PRESIDENT: Thank you. Well I'll note that that the parties will report back on that proposed wording and obviously we'll need to see the proposed wording as well by close of business by Tuesday, 23 August.

PN209

MS MOLONEY: Thank you, Deputy President.

PN210

THE DEPUTY PRESIDENT: The other two items aren't pressed so then we return now to the casual part-time issue. Yes.

PN211

MS MOLONEY: The parties have committed to have a telephone conference to discuss that issue, to see if there can be any meeting of minds in relation to the issue of casuals and overtime.

PN212

THE DEPUTY PRESIDENT: Yes.

PN213

MS MOLONEY: We will do that in a way that enables the parties to discuss the fitness industry first and then those that aren't involved in the Sporting

Organisations Award will - can leave the conference and we'll then discuss the Sporting Organisations Award.

PN214

THE DEPUTY PRESIDENT: Yes.

PN215

MS MOLONEY: I don't think there would be an issue with reporting back on that by 23 August as well.

PN216

THE DEPUTY PRESIDENT: That would be good.

PN217

MS MOLONEY: The other two items that I had was just to confirm that all parties are comfortable with the wording read out today, in relation to part-time allowances.

PN218

THE DEPUTY PRESIDENT: That's item 5.

PN219

MS MOLONEY: Yes.

PN220

THE DEPUTY PRESIDENT: Yes. Yes.

PN221

MS MOLONEY: The final issue I had was just in relation to item 16(a) and 16(b), which relate to the classifications for Gymnastics Australia and ASSA, that the Commission will look into that issue and let us know.

PN222

THE DEPUTY PRESIDENT: Yes. I think the material is with the award modernisation team and we'll follow up that.

PN223

MS MOLONEY: Thank you very much.

PN224

THE DEPUTY PRESIDENT: If there's no other matters, I'll adjourn now and thank the parties for their attendance and their assistance this morning.

SHORT ADJOURNMENT

[11.22 AM]

RESUMED

[11.37 AM]

PN225

THE DEPUTY PRESIDENT: I will just confirm I have Mr Klepper in Adelaide for Business SA.

PN226

MR C KLEPPER: Yes, that's correct.

PN227

THE DEPUTY PRESIDENT: Thank you. In Sydney, Mr Crawford for the AWU.

PN228

MR S CRAWFORD: Yes, your Honour.

PN229

THE DEPUTY PRESIDENT: Mr Jack for AFEI.

PN230

MR K JACK: Yes, your Honour.

PN231

THE DEPUTY PRESIDENT: Thank you. Can I assume that all three of you are in attendance for both the Gardening and Landscaping Services Awards and Nursery Award? Yes?

PN232

MR KLEPPER: Yes.

PN233

MR CRAWFORD: Yes.

PN234

MR JACK: Yes, your Honour.

PN235

THE DEPUTY PRESIDENT: We'll have a look at the Gardening and Landscaping Services Award first please. We will work through the latest summary prepared by the Commission. Now I've just made a few notes that arise out of the summary and the proceeding that was before the President on 6 June. The first note I've made is in relation to item 2 and just to confirm the position in the summary was that there's no agreement on the claim and it is a matter that the parties will await the Full Bench decision in the Casual Part-Time case. Is that correct?

PN236

MR CRAWFORD: That's correct.

PN237

THE DEPUTY PRESIDENT: So we'll leave that one there. In terms of the next one, my notes on item 4 which relates to clause 6.4(b) and a position put by the AFEI in this clause. Now this is as I understand it arising, Mr Jack, out of a word change from the current award. Is that right?

PN238

MR JACK: Yes, Deputy President. A word has been deleted in the exposure draft and we would prefer the award go back to the current wording.

PN239

THE DEPUTY PRESIDENT: Right. Yes. Mr Crawford, I've noted in the summary of the objection of the AWU. Is there any change in your position?

PN240

MR CRAWFORD: We don't really see this as a particularly major issue but we're just not - we're yet to be convinced that the word "regular" serves any useful purpose, other than potentially creating confusion. Because we don't understand there's any difference between a regular part-time employee and a part-time employee in a legal sense.

PN241

THE DEPUTY PRESIDENT: Yes, I guess it's one of these ones that begs the question why regular has disappeared from one version of the award to the next. I think it comes down to what a regular part-time employee is. I mean if the requirement for part-time employee is to have their hours agreed in writing and that establishes a roster, and the roster is worked that that would seem to suggest they're a regular part-time employee. Then you've got the use of the word regular in the second line there, "regular pattern of work", which has come through from the current version of the award. Mr Jack, do you regard it as a change of substance or - - -

PN242

MR JACK: Yes, our view is that it is a substantive change under the current award you wouldn't be required to get (indistinct) or part-time employees only regular part-time employees.

PN243

THE DEPUTY PRESIDENT: Right. Well, in the absence of agreement I guess it will fall to both parties arguing their position before the Full Bench if the Full Bench is going to hear argument on it. I'll just note that the position remains unchanged. My next one is in relation to item. Just to confirm whether or not this position is now agreed. My question arises out of - I think there was an email from the AWU dated 31 May, noting that at the 6 June hearing that it may be now that the AFEI do not press an objection anymore?

PN244

MR JACK: Yes, that's correct.

PN245

THE DEPUTY PRESIDENT: All right, so I'll just note that that is in fact now agreed, that change in item 5. Shall we move to, please, item 7? There was going to be some exchange between the AFEI and ABI and NSW Business Chamber and the AWU on some alternate wording. Has that occurred?

PN246

MR JACK: I'm not sure if the summary is correct. I don't recall if we did suggest that we would put forward alternate wording, but the ABI did. They're not here today, and I didn't receive any proposed wording. I'm not sure if any of the other parties did.

PN247

THE DEPUTY PRESIDENT: Mr Crawford?

PN248

MR CRAWFORD: Yes.

PN249

THE DEPUTY PRESIDENT: With this one, I'm just looking at the transcript from the proceeding on 6 June. The transcript indicates that you had received the proposed wording?

PN250

MR CRAWFORD: Yes, I think that's right, and maybe I indicated I needed a bit more time to review it.

PN251

THE DEPUTY PRESIDENT: Yes.

PN252

MR CRAWFORD: I don't have it in front of me but I think my only concern was there wasn't reference to paid rostered days off, but I'll be able to go away and confirm our position by the end of today.

PN253

THE DEPUTY PRESIDENT: Thank you. That would be good.

PN254

MR CRAWFORD: I think there's a reasonable chance that will be agreed.

PN255

THE DEPUTY PRESIDENT: Thank you. I'll just make a note of that. The next one I have is item 11. This was in relation to rest breaks and clause 9.3. As I understand it there was an alternate position put by the AWU for parties to consider. Did you put that up, and at the conference before the President, ABI NSW said they needed further time to consider. Has there been any feedback to you, Mr Crawford, since 6 June?

PN256

MR CRAWFORD: No.

PN257

THE DEPUTY PRESIDENT: All right. Do either of Mr Klepper or Mr Jack have anything they want to update in relation to this? Have you seen the AWU proposed wording?

PN258

MR KLEPPER: Was that proposed wording available on the website?

PN259

THE DEPUTY PRESIDENT: I'm not sure. Mr Crawford, did you circulate that or was it discussed - - -

PN260

MR CRAWFORD: I think I may have just said it verbally during the last conference.

PN261

THE DEPUTY PRESIDENT: Yes, all right.

PN262

MR CRAWFORD: If it assists, I think the wording is: "The paid rest break of 10 minutes each morning," and then, "or at an appropriate time if water restrictions are in place."

PN263

THE DEPUTY PRESIDENT: Or was it simply adding the word "or shift" after morning, just in that first sentence?

PN264

MR CRAWFORD: I think that was our initial proposal.

PN265

THE DEPUTY PRESIDENT: All right.

PN266

MR CRAWFORD: And then that met with disapproval.

PN267

THE DEPUTY PRESIDENT: Yes.

PN268

MR CRAWFORD: Because there's not actually shift work in this award but there are more flexible working arrangements that can be applied if there are water restrictions in place.

PN269

THE DEPUTY PRESIDENT: All right, so as you recall, what was the alternate wording?

PN270

MR CRAWFORD: So it would read, relevantly:

PN271

A paid rest break of 10 minutes each morning, or at an appropriate time if water restrictions are in place.

PN272

THE DEPUTY PRESIDENT: Yes, and that would be at the end of that first sentence of 9.3?

PN273

MR CRAWFORD: Correct, yes.

PN274

THE DEPUTY PRESIDENT: Yes. We might come back to that because it may give Mr Jack and Mr Klepper some time to think about that, and we'll see where we get to. In any event I'll have to follow up with the ABI and NSW Business Chamber. The next one I had was item 16, and this was regarding the leading hand allowance, the question being whether it's an all-purpose allowance or not. So I don't know whether there's been any further thoughts on that. I'm assuming that your position's unchanged, Mr Crawford?

PN275

MR CRAWFORD: Yes.

PN276

THE DEPUTY PRESIDENT: Are there any observations, Mr Klepper or Mr Jack, that you'd make?

PN277

MR JACK: AFEI remain opposed. Our view is that the leading hand is not an all-purpose allowance.

PN278

THE DEPUTY PRESIDENT: Yes. Mr Klepper?

PN279

MR KLEPPER: I think Business SA will stick with what's noted in the summary of submissions where we believed that the allowance is payable for all purposes.

PN280

THE DEPUTY PRESIDENT: Yes.

PN281

MR KLEPPER: Sorry, may I have a couple of minutes just to clearly review that position?

PN282

THE DEPUTY PRESIDENT: Yes.

PN283

MR KLEPPER: Then we'll come back to this one.

PN284

THE DEPUTY PRESIDENT: all right, well we'll return to that. I note the position of ABI and NSW Business Chamber was that it was not, so this might remain in dispute. The next one I had was item 19 relating to clause 13.3(a) and the 10-hour break.

PN285

MR KLEPPER: Sorry, Deputy President, I will just comment. Having gone back over the comparison with the current award, Business SA would not support the leading hand being paid for all purposes. Apologies for that miscommunication.

PN286

THE DEPUTY PRESIDENT: That's all right. Thank you. Well I think the position is that one remains in dispute. Yes, just item 19, clause 13.3(a), we have a suggestion coming from Mr Crawford where I think the wording would become: "at least 10 consecutive hours of duty between completing the overtime and commencing ordinary hours." The summary position is that Business SA would agree but suggests that the change would be required for both clause 13.3(a) and 13.3(b), and the AFEI did not agree and said the proposal was unnecessary. Can I confirm that's still the position of all the parties?

PN287

MR JACK: AFEI remains opposed to the change.

PN288

THE DEPUTY PRESIDENT: I beg your pardon, I just couldn't catch that.

PN289

MR JACK: AFEI remains opposed.

PN290

THE DEPUTY PRESIDENT: Thank you.

PN291

MR KLEPPER: Business SA say that given that the title of the clause is, "Rest break after overtime duty," I think that the amendment proposed isn't necessary.

PN292

THE DEPUTY PRESIDENT: That's a different position, is it?

PN293

MR KLEPPER: Yes, that is a different position, your Honour.

PN294

THE DEPUTY PRESIDENT: As I recall, and Mr Crawford, you can correct me if I'm wrong, this is a proposal put forward to address the situation where someone might have worked some overtime on a night shift and then are due to commence their next night shift on the same day?

PN295

MR CRAWFORD: Correct.

PN296

THE DEPUTY PRESIDENT: Yes.

PN297

MR CRAWFORD: And in this award there aren't actually any night shifts but there is that clause to do with water restrictions, so basically allows ordinary hours to be worked at any time of the day, Monday to Friday.

PN298

THE DEPUTY PRESIDENT: Yes. I guess my question to the AFEI and Business SA is, when you say it's not necessary, is your position that there won't

be a scenario where someone might finish one shift and commence a shift on the same day with a 10-hour break?

PN299

MR JACK: I'm not aware, Deputy President, of whether that does occur, but our view is that in the wording in the current award and what's in the exposure drafts, that 10-hour break provision would not apply in that situation.

PN300

THE DEPUTY PRESIDENT: What would apply? I mean, the question going through my mind is, one, are there situations arising where it's unclear where people might conclude and commence a shift on the same day what the length of the break is, or what - I mean, Mr Crawford's position seems to be one that would seek to confirm that it's got to be 10 hours' break between two periods of work, regardless of whether it's on successive days. Do any other practical implications flow from that, Mr Crawford, in terms of the pay rate that would apply when the next period of work commences?

PN301

MR CRAWFORD: No, not as we understand it. I mean, this wasn't intended to be a substantive change at all. It was just some suggested wording to make the clause clearer, because perhaps the situation of overtime finishing and then ordinary hours resuming on the same calendar day wasn't contemplated when the provision was drafted, that's all it was.

PN302

THE DEPUTY PRESIDENT: Yes.

PN303

MR KLEPPER: Excuse me, would that be clarified in the exposure draft 13.3(c), so where subclause (a) just raises the reasonably practical goal, the actual entitlement arises under (c), which doesn't make mention that I can see about successive days? That just arises from having less than 10 hours break between consecutive hours?

PN304

THE DEPUTY PRESIDENT: It certainly spells out the implications of not having 10 consecutive hours off. The question is, given that (c) is there, what's the harm in (a) having the wording that would be proposed by the AWU?

PN305

MR CRAWFORD: There is a separate entitlement in (b) which entitles an employee to be paid for ordinary hours that fall during the 10 hours off duty, and then (c) contains the penalty rate if you resume work without that break.

PN306

THE DEPUTY PRESIDENT: Yes.

PN307

MR CRAWFORD: And we do agree with Business SA in terms of their initial position anyway that subclause (b) should be amended as well.

PN308

MR KLEPPER: I think Business SA's position would be that's not something we're going to, you know, go into bat for our lives over. It's just something that we'd say it may not be necessary but it's not something we'd really stick up against if push came to shove.

PN309

THE DEPUTY PRESIDENT: Yes.

PN310

MR KLEPPER: Simply given the intended operation of 13.3(a).

PN311

THE DEPUTY PRESIDENT: Well if the parties want to maintain their positions I'll note that in the report. I'm not sure how long the argument would go for if it ends up being something that is sought to be argued before a Full Bench though. Maybe you just encourage the parties to think about it a bit more and if there can be some sort of a consent position agreed encourage them to do that rather than leaving it in dispute.

PN312

The last one I had was item 23. Just to confirm, if we have a look now at schedule B.3, this was an AWU claim where this table for casual adult employees should include a table for overtime rates. Was that the position, Mr Crawford?

PN313

MR CRAWFORD: Yes, your Honour.

PN314

THE DEPUTY PRESIDENT: Have you circulated anything for the other parties to consider?

PN315

MR CRAWFORD: I'm not sure that I have, your Honour, but I mean, it's something that I can do quite quickly.

PN316

THE DEPUTY PRESIDENT: I'm just having a look at the transcript. I know having such a table there's been debate that in some other awards, and then it was something about no, it's been discussed what the heading should say and whether the table expands the entitlements. Taking it back a step, with this award is there a dispute as to whether casual employees are entitled to overtime rates?

PN317

MR CRAWFORD: No, not as we understand it.

PN318

THE DEPUTY PRESIDENT: Mr Jack or Mr Klepper?

PN319

MR JACK: Yes, I don't believe there is a dispute about that.

PN320

THE DEPUTY PRESIDENT: All right. Well the second question then is, is there an agreed position on what those rates are?

PN321

MR CRAWFORD: Our understanding, your Honour, would be the rates in schedule B.2.2, which are the overtime rates for full-time and part-time employees, would be the same except there would be a 25 per cent casual loading added.

PN322

THE DEPUTY PRESIDENT: Yes. So if we look at the table then in B.3 - it's slightly different considerations but it's got rates for casual employees outside of the Monday to Friday span of hours and before 6 am on a Saturday - I guess the position would be whether you propose, Mr Crawford, another table there that has the columns for first two hours and after two hours. Presumably you'd be saying that the first two hours is 175 per cent and the after two hours is 225 or thereabouts?

PN323

MR CRAWFORD: Correct.

PN324

THE DEPUTY PRESIDENT: All right. Well that's something that perhaps Mr Klepper and Mr Jack would have to have a think about. I'm just noticing from the transcript from the matter before the Commission on 6 June, Mr Crawford, you said:

PN325

Our initial point was to do with again a rates table for casuals in terms of overtime. It made sense to us there should be a table inserted.

PN326

And then a broader debate arose about the terminology in schedule B.

PN327

Although AIG aren't in this award I think it's a debate they -

PN328

Yes, I know, but I think it affects your argument in another award. It's just about the terms, minimum hourly rate and ordinary hourly rate, and I think we did actually submit additional material on this issue, which was published onto the website.

PN329

Mr Ferguson said:

PN330

I think it does arise in other awards. It's about the way the table is displayed.

PN331

I think the best thing to do here, Mr Crawford, is to perhaps just circulate a table that you'd see inserted in B.3 to at least - - -

PN332

MR CRAWFORD: If it assists, your Honour, you may recall from some matters yesterday and previously that there's been dispute about whether the rates tables should refer to a percentage of the ordinary hourly rate or a percentage of the minimum hourly rate.

PN333

THE DEPUTY PRESIDENT: Yes.

PN334

MR CRAWFORD: And we've been saying ordinary hourly rate, and in this award we did put in an additional or short submission in support of our proposition and Business SA then did put in a response dated 3 June, so that issue in itself is not directly related to whether a table for casual overtime rates should be inserted or not.

PN335

THE DEPUTY PRESIDENT: Yes.

PN336

MR CRAWFORD: But in any event, if it would assist, I'm happy to provide a proposed rates table with overtime rates for casuals, again by the end of today.

PN337

THE DEPUTY PRESIDENT: Yes. So is the position that that debate about ordinary hourly rate and minimum hourly rate doesn't arise in the context of this award, is that what you're saying?

PN338

MR CRAWFORD: No, it does arise.

PN339

THE DEPUTY PRESIDENT: It does arise?

PN340

MR CRAWFORD: Yes.

PN341

THE DEPUTY PRESIDENT: And that feeds into the broader debate about those concepts? I note the President said to the Ai Group, he asked the Ai Group to write to him setting out where it arises and what the issue is.

PN342

MR CRAWFORD: Yes, and they did indicate at the conference yesterday that they would be doing that over the next two week I thought.

PN343

THE DEPUTY PRESIDENT: Well why don't, as a preliminary point, you circulate the rates table that you would like inserted in this award so that that

material is before the interested parties and then it'll link back into the Ai Group's position on the broader issue. So we'll leave it on that basis, okay? They were the only matters that I had arising out of the Gardening and Landscaping Services Award, unless there's any further questions or comments.

PN344

MR CRAWFORD: Not from me, your Honour.

PN345

MR KLEPPER: None from Business SA, your Honour.

PN346

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN347

MR JACK: No, none from AFEI, thank you.

PN348

THE DEPUTY PRESIDENT: Thank you. And Mr Crawford?

PN349

MR CRAWFORD: No, your Honour.

PN350

THE DEPUTY PRESIDENT: Thank you. Well, let's move then to the Nursery Award. Now, I'll just get the Nursery Award out. Okay. Fairly brief here but just confirming with the Nursery Award item 9, this one was to be revisited after the casual and part-time Full Bench. Is that still the position? Or is it part of that broader debate about ordinary minimum hours of work?

PN351

MR CRAWFORD: No, it's not related to the issue of ordinary hourly rate verse minimum hourly rate. I think it was just a proposal to clarify the weekly ordinary hours of work for a casual employee.

PN352

THE DEPUTY PRESIDENT: Yes. I'm just having a look at the transcript now. I'm just looking at the transcript from the conference before the President on 6 June. The discussion seemed to move from clause 6.5(f) to clause 16.1 and overtime. The position that was being put by ABI and New South Wales Business Chamber was that – yes, I'm not sure if there's a difference of opinion. It's a difference of substance, that's all. I mean, I'm happy to leave it as a matter to be revisited after the part-time and casual Full Bench. I could also seek clarification from ABI and New South Wales Business Chamber on what their position is. Any thoughts?

PN353

MR CRAWFORD: Maybe, your Honour, is it possible to get an indication from the other parties about whether there is any opposition to what we have proposed?

PN354

THE DEPUTY PRESIDENT: Yes. Now, I just don't have it in front of me. You proposed a new clause 6.5(f).

PN355

MR CRAWFORD: Yes. So the proposal is to insert the following:

PN356

A casual employee's ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer.

PN357

THE DEPUTY PRESIDENT: So:

PN358

A casual employee's ordinary hours of work are the lesser of 38 ... or the hours required to be worked by the employer.

PN359

MR CRAWFORD: Yes:

PN360

The lesser of 38 hours per week or the hours required to be worked by the employer.

PN361

So the effect is that the maximum ordinary hours for a casual would be 38 per week and if they're only required in a week to work, you know, 20 then their ordinary hours are 20 for that week and so forth.

PN362

THE DEPUTY PRESIDENT: All right. Mr Klepper or Mr Jack, have you got any comments on that?

PN363

MR JACK: AFEI would oppose that on the basis that it would be a substantive change where casual employees in the current award don't get overtime for working in excess of 38 hours or when required to work more than, I guess, their set hours for a week.

PN364

THE DEPUTY PRESIDENT: Yes.

PN365

MR KLEPPER: And, your Honour, Business SA would be of the same position on that matter.

PN366

THE DEPUTY PRESIDENT: Thank you. All right. Well, look, whichever way you look at it that won't be resolved by agreement, and it may need to be revisited after the casual and part-time employment Full Bench has done its work.

PN367

All right. I might turn then to item 13. Now, the reason why I raise this one is that it was perhaps one that might have benefited from further discussions, and New South Wales Business Chamber said at the conference on 6 June:

PN368

I think our position is currently that we oppose but that's a matter which will benefit from further discussions.

PN369

And it was observed at that time that Business SA agrees with the proposed change to clause 10.2(a). And this was a proposal of yours, Mr Crawford, where the words "or shift" would be added at the end of clause 10.2(a). So there was no objection from Business SA. ABI New South Wales indicated they would oppose but it would benefit from further discussions. Am I right in assuming there's been no further discussions?

PN370

MR CRAWFORD: Yes.

PN371

THE DEPUTY PRESIDENT: All right. Mr Jack, do you have a view?

PN372

MR JACK: Our view is that if the parties agree that the clause should be changed, the wording we would prefer would be "each day" rather than "each morning" or "shift".

PN373

THE DEPUTY PRESIDENT: Right. Mr Crawford, does that interest you at all?

PN374

MR CRAWFORD: Yes, I think we could live with that, your Honour.

PN375

THE DEPUTY PRESIDENT: Yes. Thank you. Mr Klepper?

PN376

MR KLEPPER: Business SA would agree with the proposed change.

PN377

THE DEPUTY PRESIDENT: All right. Well, I'm going to note that in the report that that would be one that the three of you would agree to. Thank you.

PN378

The last one I had was item 20. The same question again about overtime rates for casuals and insertion to schedule B. It looks like this one actually made it into the exposure draft. If you've got a copy there, at page 31?

PN379

MR CRAWFORD: Yes, we have that.

PN380

THE DEPUTY PRESIDENT: Yes. So the rates are in. I guess it's then a question of that broader debate about whether it's minimum hourly rate or ordinary hourly rate. I don't know. So I think it's arisen because of the broader discussion and it was said by the President we'll put it in the revised exposure draft and the parties can have a look at it. So having had a look at it, Mr Crawford, does it meet your requirements?

PN381

MR CRAWFORD: Yes, the rates look correct.

PN382

THE DEPUTY PRESIDENT: And you'd support that being inserted?

PN383

MR CRAWFORD: Absolutely.

PN384

THE DEPUTY PRESIDENT: Yes. Mr Jack?

PN385

MR JACK: Yes, we have reviewed the rates, and we don't have an issue with those. I guess, like you've highlighted, Deputy President, there is still that issue of the ordinary hourly rate versus minimum, which I don't believe that's been raised in this award, but which AFEI has supported the AiG in other awards, and I believe the view would be that probably a consistent approach would be taken across the exposure drafts.

PN386

THE DEPUTY PRESIDENT: Thank you. I'll just make a note of that. All right. And, Mr Klepper?

PN387

MR KLEPPER: We wouldn't have an issue with the rates, and we'd be of the same position regarding the title of the tables, just wishing for them to be consistent across the awards.

PN388

THE DEPUTY PRESIDENT: Thank you. All right. Are there any further comments in relation to the Nursery Award, please?

PN389

MR JACK: Not from AFEI.

PN390

MR CRAWFORD: No, thank you.

PN391

THE DEPUTY PRESIDENT: Thank you.

PN392

MR KLEPPER: No, thank you.

PN393

THE DEPUTY PRESIDENT: All right. Well, thank you for your assistance with that one. We'll now adjourn and an updated statement or report will be issued shortly. Thank you.

SHORT ADJOURNMENT

[12.30 PM]

RESUMED

[2.06 PM]

PN394

THE DEPUTY PRESIDENT: Thanks. Please be seated. Thank you. And I'll confirm appearances here in Melbourne. Mr Rizzo for the ASU.

PN395

MR M RIZZO: Yes, your Honour.

PN396

THE DEPUTY PRESIDENT: Thank you. Mr Ruskin, K&L Gates.

PN397

MR N RUSKIN: Yes, your Honour.

PN398

THE DEPUTY PRESIDENT: Thank you. In Adelaide I have Mr Klepper.

PN399

MR C KLEPPER: Yes, that's correct. From Business SA.

PN400

THE DEPUTY PRESIDENT: Thank you. And Sydney, Ms McDonald from AFEI.

PN401

MS J MCDONALD: That's correct.

PN402

THE DEPUTY PRESIDENT: Thank you. Mr Ferguson from Ai Group.

PN403

MR B FERGUSON: Yes. That's correct.

PN404

THE DEPUTY PRESIDENT: And Mr Arndt from ABI and New South Wales Business Chamber.

PN405

MR J ARNDT: Thank you, Deputy President.

PN406

THE DEPUTY PRESIDENT: Thank you. All right. Well, what I propose to do is to work from the summary that's been produced by the award modernisation team arising out of previous conferences we've had and the discussion before the

President on 6 June. So it's the summary that was published on 22 July 2016. And I'll also work on the latest exposure draft of the award. I've got a list of items from the summary that I just want to touch base on, and if there are other matters arising after that, we'll work through those.

PN407

So the first item that I wanted to touch base on was to confirm, in relation to item 2, that the proposed amendment to the definition of law graduate put up – I'm just going to call this group the law firms. That is a matter that's still not agreed and likely to progress to a hearing involving substantive issues. Is that the common understanding or have there been any discussions since the last conference?

PN408

MR RUSKIN: That's my understanding, your Honour.

PN409

THE DEPUTY PRESIDENT: It's still in dispute?

PN410

MR RUSKIN: Yes.

PN411

THE DEPUTY PRESIDENT: Yes. Is there any hint of a consent position emerging in anyone's minds?

PN412

MR RUSKIN: Well, I suppose we could identify what is in dispute with this and I think it is that the variation is proposed so that people who are lawyers in another jurisdiction aren't law graduates for the purpose of this award, only those who are law graduates and who are working through the training program fall within the definition. And I think that's our purpose, but I think the ASU would like to include law graduates as people who come from a foreign jurisdiction but haven't been admitted to practice. I think that's the area of dispute. I thought I'd just identify, if that's right.

PN413

MR RIZZO: I thought it was the reverse.

PN414

MR RUSKIN: Well, we say it shall not include a lawyer that is admitted to practice in a foreign jurisdiction. So that is someone who comes from overseas and is a lawyer overseas and practised overseas comes to Australia and decides to practise law here, those we don't regard as law graduates because. Whilst they are lawyers under the – you might say they're lawyers, they're not admitted to practice. And the current definition says this award covers lawyers who are not admitted to practice. So we were just trying delineate people who are experienced lawyers, people from overseas, and they might be law graduates and they might be lawyers within the meaning of maybe what this award currently says. It's not intended to, but it shouldn't cover them. It should only cover freshly crafted, freshly graduated lawyers who have yet to be admitted to practice at all. And that's the issue.

PN415

THE DEPUTY PRESIDENT: All right.

PN416

MR RUSKIN: So I don't know if that's a major issue or not. That's what we're trying to capture.

PN417

MR RIZZO: My understanding, your Honour, is that we're trying to protect Australian jobs in fact is our motivation. Now, I must say I'm a bit confused after Mr Ruskin's explanation. I might have to seek some further instructions on that one, your Honour.

PN418

THE DEPUTY PRESIDENT: All right. Well, would you be able to do that and update the Commission on where that gets to Mr Rizzo. Would two weeks be a sufficient period of time to do that?

PN419

MR RIZZO: Yes, your Honour.

PN420

THE DEPUTY PRESIDENT: All right. Could I suggest that by close of business on Tuesday 23 August the ASU advise the Commission of its position in relation to item 2 and that advice will be posted on the website.

PN421

MR RIZZO: Thank you.

PN422

THE DEPUTY PRESIDENT: I'll just make a note of that. Are there any comments in Sydney while we're dealing with this one?

PN423

MR FERGUSON: Mr Ferguson from Ai Group. I think, from our perspective, we don't have a difficulty with the intension of the law firms in terms of the mischief they're trying to remedy. We had some concerns perhaps that there might've been other changes to the wording that could be problematic, but perhaps that could be dealt with after we know the union's position.

PN424

THE DEPUTY PRESIDENT: Well, what are they?

PN425

MR FERGUSON: We weren't quite certain as to whether the other alterations that were made, apart from referencing the foreign jurisdictions provisions, had any effect in terms of expanding the coverage. Now, the representative for the law firms has clarified that that's not their intention. But there's some reference in there to, and I'm sorry, Deputy President, it's been some time since I've looked at the wording, but reference including, for example, whether or not the Australian lawyer has finalised the training and so forth. We just weren't sure whether any of

that wording caused some expansion of the coverage. But we're happy to have a closer look at that.

PN426

THE DEPUTY PRESIDENT: Well, that'd be good. I'm not sure, I mean, isn't this - - -

PN427

MR FERGUSON: It does a lot more than just reference the foreign jurisdiction.

PN428

THE DEPUTY PRESIDENT: Yes. But, I mean, isn't this clause just designed to capture someone in between that – I'm not sure how it could expand coverage. I don't know, Mr Ruskin?

PN429

MR RUSKIN: No, I don't know. It's trying to capture – it's limitation is it's capturing: (1) you've got to be a law graduate, that is a qualification in law.

PN430

MR RUSKIN: Secondly, you can't just be doing something else at the law firm; you've got to be undertaking a period of training with a law firm in satisfaction of requirements under relevant legislation. Whether or not such training is finalised, sometimes the training isn't finalised before the lawyer is actually admitted to practice. That's what that is trying to deal with. So it's certainly not trying to expand, as you say.

PN431

MR FERGUSON: No, no - I suspected it wasn't. I was just trying to understand what the justification for that was because we had no difficulty with the mischief you're trying to rectify, if you will.

PN432

MR RUSKIN: Okay.

PN433

MR FERGUSON: With that - is that in practise - and I may be not as familiar as you with those requirements - but that you can be admitted but still be required to be undertaking the training?

PN434

MR RUSKIN: There could be some training you're doing, yes.

PN435

MR FERGUSON: So you would still be a law graduate?

PN436

MR RUSKIN: Yes.

PN437

MR FERGUSON: Even though you were an admitted solicitor?

PN438

MR RUSKIN: Yes.

PN439

MR FERGUSON: So once you're an admitted solicitor, you're not covered by this award anymore?

PN440

MR RUSKIN: That's right.

PN441

MR FERGUSON: But you are if you're still doing the training?

PN442

MR RUSKIN: Yes - even if it's still - - -

PN443

MR FERGUSON: This definition would bring in admitted solicitors?

PN444

MR RUSKIN: No.

PN445

MR FERGUSON: It wouldn't, or would?

PN446

MR RUSKIN: I don't think so.

PN447

MR FERGUSON: Well, doesn't it appear to? I may be wrong. If you're doing the training - but your intention is not to bring anyone who's admitted into the coverage, is that right?

PN448

MR RUSKIN: Yes - you can tidy up the words but that's the intention.

PN449

MR FERGUSON: I think that's it. It's just a wording tidying-up sort of exercise, because it doesn't say - on my reading - that if you're admitted you're not covered.

PN450

MR RUSKIN: The current definition says you're undertaking training with a view to being admitted but this not intending to cover people who are admitted to practice.

PN451

MR FERGUSON: No. I'm sure it's unintentional, but just looking at it, it seems to - - -

PN452

THE DEPUTY PRESIDENT: What is the purpose of the words in the - - -

PN453

MR RUSKIN: I think the purpose is not to capture people who are admitted to practice but are still doing the training. Those such people are not being caught by it.

PN454

THE DEPUTY PRESIDENT: All right.

PN455

MR FERGUSON: That's the extent of any term that we have at the moment.

PN456

THE DEPUTY PRESIDENT: All right, well, if everyone could satisfy themselves as to the wording by close of business on 23 August? All right - - -

PN457

MR FERGUSON: Did the law firms propose to potentially change the wording?

PN458

MR RUSKIN: Yes, if it tidies up the - if that's a complication, sure.

PN459

THE DEPUTY PRESIDENT: Yes, well, if you intend to do so, could that be sent to the Commission and we'll circulate - - -

PN460

MR RUSKIN: Yes, yes.

PN461

MR FERGUSON: And that just might alleviate any concern we have at all.

PN462

MR ARNDT: Deputy President, on that point from Mr Arndt in NSW Business Chamber here: I think our concerns are related to Mr Ferguson's in that it's perhaps not clear on the basis of material that's been filed or distributed between the parties what the intent of the change is. Now, it might be the intent of the change - it's apparent that the intent of the change is not - is uncontroversial in terms of our organisations. But perhaps I could perhaps suggest if the clause and the wording is to be tidied up, some short explanation of the purpose behind the changes also be included in that correspondence?

PN463

THE DEPUTY PRESIDENT: Well, what I'm going to do is suggest that - let's move through the rest of my list and see if there's other items and we might return to this while we've got everyone on the line.

PN464

MR ARNDT: Yes.

PN465

THE DEPUTY PRESIDENT: I might step out of the room, let you guys all go for it and then we'll come back in and - - -

PN466

MR RIZZO: That might be a good idea, your Honour.

PN467

THE DEPUTY PRESIDENT: If we could thrash it out today that would probably be preferable to leaving it - - -

PN468

MR FERGUSON: Yes.

PN469

THE DEPUTY PRESIDENT: - - to be done on the papers. All right. The next note that I've made just to touch base on was item 8. There was a proposal from the Australian Industry Group in relation to clause 13.3 of the exposure draft to substitute where the word, "penalties," appears with the word, "allowances." I just want to confirm that that was one that was not meeting any opposition from any of the other parties, please?

PN470

MR RIZZO: Your Honour, the ASU - no, we still have a problem with that.

PN471

THE DEPUTY PRESIDENT: Right.

PN472

MR RIZZO: My understanding was that the Commission was trying to move to some standardised language in these issues by calling them penalties. Certainly, what I see in clause 13.3 sounds like penalty to me as opposed to an allowance. So we would call for the term, "penalty," continuing.

PN473

THE DEPUTY PRESIDENT: Yes, the - I can follow that up, Mr Rizzo. I think the - just looking at the current form of the award, where early morning, afternoon and night shifts allowances are referred to in clause 31.2, now as you say there might have been a move to change the language from allowances to penalties as part of some broader work. We can follow that up. Yes?

PN474

MR FERGUSON: If I can assist: this is an issue that is of a nature that we've raised in relation to multiple awards - - -

PN475

THE DEPUTY PRESIDENT: Yes.

PN476

MR FERGUSON: - - as a consequence of this process and in fact I think the Commission is awaiting sort of a comprehensive submission from us, where we are trying to identify this problem wherever it has arisen - - -

PN477

THE DEPUTY PRESIDENT: Right.

PN478

MR FERGUSON: - - through the drafting process. Without getting into it in detail, the concern is that by changing some of the terminology from allowances to penalties it's also changing the way the entitlement is expressed from being a discrete, additional amount that's payable on top of a rate to being just a higher rate of pay; so being changed from being a 15 per cent component to now requiring a payment of 140 per cent of a certain amount, that you give rise to all sorts of consequential difficulties. That - I don't think there is much utility going all through it now because we have raised it in many, many awards and I rather suspect the full bench is going to take a similar approach across the awards.

PN479

We haven't been trying to get any advantage or anything. In fact, it's probably to employees' benefit, often, to put it back the way it was. But it clearly was called an allowance before and, Deputy President, taking up your point; it was dealt with differently under the old award. So if the full bench makes a decision that it's going to change it across all of the awards, then I'm sure, you know - - -

PN480

THE DEPUTY PRESIDENT: So, Mr Ferguson, this submission that the Ai Group's preparing: is that in relation to stage 3 generally or is it - - -

PN481

MR FERGUSON: No, I think it's broader than that.

PN482

THE DEPUTY PRESIDENT: Yes, okay.

PN483

MR FERGUSON: At cross stages - what happened is from memory, I was - I or a colleague were on our feet in relation to the last sitting before the President and this issue came up and he was well aware that we raised it in multiple stages.

PN484

THE DEPUTY PRESIDENT: Yes.

PN485

MR FERGUSON: But the difficulty is - the problem takes on a different nature in individual awards but it's - we haven't comprehensively identified it everywhere so we're endeavouring to do that. Then hopefully the - - -

PN486

THE DEPUTY PRESIDENT: All right - I might make a note then that for the purposes of this award and a statement that the Ai Group is compiling a submission relating to awards generally and will be directing submissions to the Commission.

PN487

MR FERGUSON: That's right.

PN488

THE DEPUTY PRESIDENT: All right.

PN489

MR FERGUSON: So I think all that would need to be done is that this would be brought to the full bench's attention, that it's connected to the general issue raised by Ai Group.

PN490

THE DEPUTY PRESIDENT: All right, thank you. Now, the next one I had a note on was item 11, which relates to a question that was posed by the Commission about the interaction between clauses 13.4(c)(ii) and 13.4(c)(iii) as to whether they were inconsistent and there were some parties who thought they were inconsistent and others that they were not. I just wanted to touch base with the parties that have made comment on this and just confirm their position in relation to it. It was dealt with very briefly, as I understand it, before the President with the suggestion that it be discussed further in conference. So I've noted that views have been expressed by each of ABI NSW Business Chamber, Business SA, AFEI, the Ai Group and I think the law firms as well.

PN491

So maybe if we start here in Melbourne, please - and, Mr Rizzo, I'm happy to come to you at the end of all this. You may not have had the opportunity to consider it. You have?

PN492

MR RUSKIN: Deputy President - - -

PN493

MR RIZZO: We support the status quo (indistinct.)

PN494

MR RUSKIN: Deputy President - - -

PN495

THE DEPUTY PRESIDENT: Yes.

PN496

MR RUSKIN: I just make a suggestion, we've all put different positions but if you're comfortable with this and the other parties agree, there may be some utility in just going off record for a moment and having some frank discussions about how the parties perceive this clause to work, so we can - - -

PN497

THE DEPUTY PRESIDENT: We could put that to one side and you can do that when you're discussing item 2.

PN498

MR RUSKIN: Yes.

PN499

THE DEPUTY PRESIDENT: We'll do that. All right. The next one or the next ones, I suppose, are items 13 through to 18. Some of them involve substantive

issues. I note that item 15 would appear to have been referred to a - or issues relating to annual salaries have been referred to a newly-constituted full bench to deal with annualised salaries as a broader issue. There is also item 17 being dealt with in the award flexibility case. The others are all substantive issues that have been put up by the law firms. Now, again, if the parties want to have some discussion around those today, I'm happy for them to use the time to do that. So that would be items 13, 14, 16 and 18. We might adopt that course unless, Mr Ruskin, you can report that everyone agrees with your proposals?

PN500

MR RUSKIN: I can't report that.

PN501

THE DEPUTY PRESIDENT: You can't report that? So we'll do that. Okay, then, just to complete my list before you have those discussions, I just wanted to be clear: with item 19, just to confirm that there is no opposition to the opposed amendment with item 19. I think it refers to the reference being deleted from the exposure draft in 3.3.

PN502

MR RUSKIN: Correct, your Honour.

PN503

THE DEPUTY PRESIDENT: All right. So I think that's been dealt with and the deletions agreed. The last one I had was with the training packages that in item 20 the previous advice was that the list is complete. I just note more generally that there is some work being done on training packages and the like that may be being dealt with by a new full bench. So item 20 might be taken up in that. In any event, there doesn't seem to be anything to discuss there. So what I propose now is that I'll step out and we'll go off record. The proceeding will go off record and the parties can now have some discussion about those various items: 2, 11 and 13, 14, 18 and 16. All right, so it's half-past 2 now. How about at this stage we'll touch base with you at quarter-past 3 and see how the progress is going? All right, we'll adjourn until then.

SHORT ADJOURNMENT

[2.32 PM]

RESUMED

[3.30 PM]

PN504

THE DEPUTY PRESIDENT: Who wants to report back?

PN505

MR RUSKIN: I can do a report back, Deputy President.

PN506

THE DEPUTY PRESIDENT: Thank you, yes.

PN507

MR RUSKIN: If you go to item 2 - - -

PN508

THE DEPUTY PRESIDENT: Yes.

PN509

MR RUSKIN: - - - we have an agreement on the wording, which we'll provide.

PN510

THE DEPUTY PRESIDENT: This is the wording of "law graduate"?

PN511

MR RUSKIN: Yes, that's right.

PN512

THE DEPUTY PRESIDENT: Yes.

PN513

MR RUSKIN: The change from our draft, would that help to look at that?

PN514

THE DEPUTY PRESIDENT: Yes. I've got that, yes.

PN515

MR RUSKIN: If you cross out the words that we've put in brackets and then you, on the last line where it says "but shall not include a lawyer that is admitted to practise", add the words "as an Australian lawyer or".

PN516

THE DEPUTY PRESIDENT: "Or in a foreign jurisdiction".

PN517

MR RUSKIN: Yes.

PN518

THE DEPUTY PRESIDENT: So it will read:

PN519

Admitted to practise as an Australian lawyer, but shall not include a lawyer that is admitted to practise as an Australian lawyer or - in a foreign jurisdiction.

PN520

MR RUSKIN: Yes.

PN521

THE DEPUTY PRESIDENT: Yes. Thank you. All right.

PN522

MR RUSKIN: The next item was item number 8.

PN523

THE DEPUTY PRESIDENT: Yes.

PN524

MR RUSKIN: We have agreed that clause 13.3 will refer to allowances instead of penalties.

PN525

THE DEPUTY PRESIDENT: Yes. That's in the two spots in 13.3?

PN526

MR RUSKIN: Yes.

PN527

THE DEPUTY PRESIDENT: Yes.

PN528

MR RUSKIN: In item number 11 - this is the interaction between the two clauses.

PN529

THE DEPUTY PRESIDENT: Yes.

PN530

MR RUSKIN: What we have agreed to do is to return the language of 13.4(c)(iii) into the language which is currently in the award, so (iii) would say "where shifts fall". Instead of "where a shift falls" it would be "where shifts fall".

PN531

THE DEPUTY PRESIDENT: "Where shifts fall partly - -"

PN532

MR RUSKIN: "On a public holiday", blah blah blah.

PN533

THE DEPUTY PRESIDENT: Yes.

PN534

MR RUSKIN: We wouldn't touch it any further.

PN535

THE DEPUTY PRESIDENT: That would cure (i) and (ii), would it?

PN536

MR RUSKIN: Well, from our perspective we would not take the issue any further.

PN537

THE DEPUTY PRESIDENT: Yes.

PN538

MR RUSKIN: We are content to have our interpretations on it as we see fit, I think.

PN539

THE DEPUTY PRESIDENT: Okay.

PN540

MR RUSKIN: That's the safest thing.

PN541

MS McDONALD: Deputy President, I would just like to - - -

PN542

MR RUSKIN: Sorry, yes.

PN543

THE DEPUTY PRESIDENT: Yes.

PN544

MS McDONALD: From AFEI. I would just like to get instructions on item 11.

PN545

THE DEPUTY PRESIDENT: All right. When will you have those by?

PN546

MS McDONALD: In one week.

PN547

THE DEPUTY PRESIDENT: Yes. Thank you.

PN548

MS McDONALD: Perhaps the close of business 23 August.

PN549

MR RUSKIN: The time frame that you talked about, yes.

PN550

MS McDONALD: Yes.

PN551

THE DEPUTY PRESIDENT: All right. Thank you.

PN552

MR RUSKIN: Item 13.

PN553

THE DEPUTY PRESIDENT: Yes.

PN554

MR RUSKIN: There is no agreement on that.

PN555

THE DEPUTY PRESIDENT: Thank you.

PN556

MR RUSKIN: Item 14.

PN557

THE DEPUTY PRESIDENT: Yes.

PN558

MR RUSKIN: The parties accept the law firms say just leave things as they are and it works a certain way up or down depending on the time of year, and don't fiddle with it, so what we have said is we'll get instructions on whether we want to pursue that or not in the light of the responses to say it works, leave it. So we'll come back to you by the 23rd with our instructions whether we pursue that.

PN559

THE DEPUTY PRESIDENT: Yes.

PN560

MR RUSKIN: Item number 16, there is no agreement on that.

PN561

THE DEPUTY PRESIDENT: Yes.

PN562

MR RUSKIN: I think the last item is item number 18.

PN563

THE DEPUTY PRESIDENT: Yes.

PN564

MR RUSKIN: We had a discussion about that and the purpose for which the variation has been sought. It was suggested that we should, as applicants, provide more details - which we would have to if it was arbitrated, anyway - on the purpose for which we want to change that. The ASU is opposed to change, but says it will consider, you know, what we have to say. The other parties might be more amenable to supporting it if they have a better understanding of its purpose.

PN565

THE DEPUTY PRESIDENT: You'll provide that material to the other parties?

PN566

MR RUSKIN: Yes. I can provide it to yourself, as well, by the 23rd.

PN567

THE DEPUTY PRESIDENT: Thank you, Mr Ruskin.

PN568

MR RUSKIN: I think that's all the issues. It was quite a useful conference. Thank you, Deputy President.

PN569

THE DEPUTY PRESIDENT: Thank you, everyone, for participating in that. I can now do an updated report on the status. I'll leave it to everybody now to attend to those various tasks and report back to the Commission by close of business on the 23rd, so thank you, everyone. If there are no further matters - - -

PN570

MR RUSKIN: Just one thing, Deputy President.

PN571

THE DEPUTY PRESIDENT: Yes.

PN572

MR RUSKIN: Do you want us to provide any draft of what has been discussed and agreed here or have you captured those and don't need us to do so?

PN573

THE DEPUTY PRESIDENT: No, I've captured what you've said in relation to items 2, 13.3 and 11.

PN574

MR RUSKIN: Yes.

PN575

THE DEPUTY PRESIDENT: I think they're the only changes.

PN576

MR RUSKIN: Yes, they're the ones. Yes, that's right.

PN577

THE DEPUTY PRESIDENT: So, thank you. No, that's all good. All right. If there are no other - - -

PN578

MR FERGUSON: Sorry, Deputy President.

PN579

THE DEPUTY PRESIDENT: Yes.

PN580

MR FERGUSON: Just one issue in relation to item 8.

PN581

THE DEPUTY PRESIDENT: Yes.

PN582

MR FERGUSON: I think, in effect, there is actually broad recognition that the change in approach to the way the penalty - or the relevant amounts have been articulated in the exposure draft, is potentially a problem. It probably goes beyond just replacing the word "penalties". This is the general issue that we're proposing to raise in our submissions to the full bench, so it goes beyond just changing the words "penalty rate", for example, in the second column.

PN583

THE DEPUTY PRESIDENT: Yes.

PN584

MR FERGUSON: There would also need to be a change to the title of Penalty Rate in the third column. We've suggested at paragraph 353 of our submission

some specific wording there. That's our 14 April submissions. I'm sorry we didn't go through this in detail, but we'll also likely - or we will raise in those submissions a concern about changing the approach of the clause from being one that identified discretely identifiable loadings to a rate, if you will.

PN585

I think the parties all recognise that there has been a change and there might be consequential issues. I don't know if in your report you need to do more than mention the fact that Ai Group will raise this.

PN586

THE DEPUTY PRESIDENT: What I'll note is that the parties have agreed that the word "penalties" where it appears twice in 13.3 should revert to "allowances".

PN587

MR RUSKIN: I see there's a reference in 13.4(c).

PN588

MR FERGUSON: Yes. I think the issue is the parties recognise that there may be some complications flowing from the re-drafting of the shift provisions and we're broadly agreeable to exploring the traditional approach in the old award. That might require some re-drafting of the whole clause, but of course the view that the full bench takes about whether or not it intends to adopt a new approach across all awards probably colours whether or not that's going to happen.

PN589

What I'm getting at is even if we all agree to put the old shift provisions back, I'm not sure whether the full bench will accept that; but all the parties would be, as I understand it, probably content with that approach.

PN590

THE DEPUTY PRESIDENT: In a practical sense, what does that mean? Are you saying you should revert to which clause from the current award?

PN591

MR FERGUSON: The shift provisions - sorry, bear with me, Deputy President. Yes, I think it is. It's the provisions in 31 and certainly it would include the provisions in 31.2 where you can see there, Deputy President, if you have the award in front of you.

PN592

THE DEPUTY PRESIDENT: Yes.

PN593

MR FERGUSON: It talks about:

PN594

An employee working on afternoon or night shift, must be paid for such shift 15 per cent more than their ordinary rate.

PN595

THE DEPUTY PRESIDENT: Yes.

PN596

MR FERGUSON: We understand that to be an allowance, if you will, whereas in the new clause there is a rate, so it's 140 per cent.

PN597

THE DEPUTY PRESIDENT: Yes.

PN598

MR FERGUSON: Or 115 per cent. We will argue that you should retain that approach of having the discretely identifiable component as being the allowance. Not just changing the wording, but the structure of the clause should continue to show it's a discretely identifiable amount. There is some reasoning behind that which we articulated in various submissions, but one is so that the clause works appropriately in the context of the annual leave provisions that provides that for shift workers in certain circumstances the additional allowance is payable. I don't know how much utility there is in continuing to take you through it, Deputy President, but the point - - -

PN599

THE DEPUTY PRESIDENT: Well, it strikes me that it's tipping from an exercise in changing two references to "penalties" to "allowance" to something that's perhaps less agreed and a more substantial change.

PN600

MR FERGUSON: There may not be disagreement from the parties, but it may be a bigger issue in terms of whether the full bench wants to adopt the new approach across awards or whether it would even be prepared to have a different approach in some. That's what I was getting at. We have raised this issue as a general matter.

PN601

MR RIZZO: Your Honour, that probably complicates things in a way. I suppose the parties were thinking that there are a lot of these - there are these three terms which are used interchangeably to almost mean the same thing, as you're well aware; loadings, allowances, penalties. I am of the view that I would prefer to see a discrete reference to that allowance, penalty or loading, so if there is a dispute about that matter, it has its own discrete entity as opposed to being absorbed into some other fixture.

PN602

We would certainly support the notion that there be a discrete acknowledgment of it and therefore one could have a recognition and/or a dispute about that.

PN603

MR FERGUSON: I think people are comfortable with the traditional approach being taken to the way entitlements are articulated. The question is whether or not the full bench is.

PN604

THE DEPUTY PRESIDENT: Yes. Well, it would seem that even if you have agreed to change the words - the two references to "penalties" to "allowances" - you would still have an issue with the table because it uses the term "penalty rate".

PN605

MR FERGUSON: Yes, so you would need to vary it there. In our submissions, we have said precisely how you should do it. I think there is general agreement that there is a problem, but we haven't solved the re-drafting. I mean, I'm happy to explain to you, Deputy President, why it causes a problem in terms of its interaction with other clauses in the award if it helps, but I suspect this is going to be overtaken by what we put in as a general submission. Perhaps the parties could even think about this more clearly when they have the benefit of our submission.

PN606

THE DEPUTY PRESIDENT: I think you have got to develop your submission. You might then circulate it to the parties and the parties could confer again in relation to item 8.

PN607

MR FERGUSON: Yes.

PN608

THE DEPUTY PRESIDENT: But for the purposes of my report, I think I'll need to note something along the lines of, "The parties' preference is not to depart from current clause 31 of the award."

PN609

MR FERGUSON: Yes.

PN610

THE DEPUTY PRESIDENT: And, "They will develop their position in submissions." That's how I think I'll have to deal with that. I'm happy to note, Mr Ferguson, the Ai Group's intention to address the issue in a broader sense, as well.

PN611

MR FERGUSON: Yes, I think that would be enough to pick it up. I just don't think the parties - if it's worthwhile us all trying to re-draft the clause until the full bench has made a decision about the broader issue.

PN612

THE DEPUTY PRESIDENT: All right. The full bench will be guided by your submission at first instance, I think, to articulate what the issues are.

PN613

MR FERGUSON: Yes.

PN614

THE DEPUTY PRESIDENT: All right. Well, look, we'll leave item 8 on that basis, I think. That's a more accurate reflection of what everyone is feeling about it. Are there any other matters?

PN615

MR FERGUSON: No.

PN616

THE DEPUTY PRESIDENT: No? All right. Well, look, thank you, everybody, for your attendance and the discussions you had in conference. I will issue a report shortly and if the parties could attend to their various tasks by the 23rd. Thank you.

ADJOURNED INDEFINITELY

[3.47 PM]