



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/244)
Silviculture Award 2010
and Others**

Melbourne

10.17 AM, MONDAY, 8 AUGUST 2016

PN1

THE DEPUTY PRESIDENT: Good morning. I take it we've just got Mr Crawford and Ms Pearsall. Is that right? In Sydney?

PN2

MR CRAWFORD: Yes.

PN3

MS PEARSALL: Yes, your Honour.

PN4

THE DEPUTY PRESIDENT: Thank you. All right. This is the first real opportunity to look at the Silviculture Award. So I'm not sure whether or not you've both had some discussions together about this but I've noted the summary, and I thought we may as well just work through the summary.

PN5

MR CRAWFORD: Yes, that sounds fine.

PN6

MS PEARSALL: Yes. I should just note, your Honour, too, Ms McKinnon will be joining us shortly. She just had another matter to attend to first.

PN7

THE DEPUTY PRESIDENT: That's fine. No worries. Okay. All right. So shall we just work through – I'm going to work off the summary revised up until 5 pm on 21 July. And with that, we will just work through the items now. The first item 1 is an NFF suggestion to delete the words "as varied" from clause 1.2. Any comments about that, Mr Crawford?

PN8

MR CRAWFORD: We don't have a problem with it, your Honour. I assume the Commission will ultimately use the same wording across all awards.

PN9

THE DEPUTY PRESIDENT: Yes, I think there's a desire for a standard form of wording, so this will fall in with whatever else is decided, I would say. All right. Item 2, the NFF. There was a suggestion there for some proposed wordings in one of your submissions, Ms Pearsall.

PN10

MS PEARSALL: Yes, that's right. This is something that has come up in the other awards as well and we have reached agreement on that. But that's to accommodate circumstances where people – where employers are operating out of, say, a ute or something like that.

PN11

THE DEPUTY PRESIDENT: Yes. Yes.

PN12

MS PEARSALL: Where there's not a clear notice board.

PN13

THE DEPUTY PRESIDENT: All right. So is that agreed, Mr Crawford?

PN14

MR CRAWFORD: Yes, it is, your Honour. Largely because I guess we have accepted that wording in other agricultural awards. During a hearing – it was a little while ago now, but his Honour Ross J didn't seem overly thrilled maybe about departing from the standard wording.

PN15

THE DEPUTY PRESIDENT: Yes.

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MR CRAWFORD: But in any event, our position is we're not opposed to that amendment.

PN17

THE DEPUTY PRESIDENT: All right. I think again it's probably one of those categories where the Full Bench will have regard to the proposal, the view of the AWU. And then if it's to the satisfaction of the Full Bench, that wording will be adopted but it's not guaranteed until the Full Bench considers it. All right.

PN18

If we go to item 3 and this is in relation to the coverage clause 3.2, is this – this is the same sort of issue that has arisen with some of these other awards, just to have the definition of Silviculture and afforestation just once in the award, and the preference being for this clause 3.2. Is that the position?

PN19

MS PEARSALL: Yes, that's correct. Yes.

PN20

MR CRAWFORD: Yes, we agree with that.

PN21

THE DEPUTY PRESIDENT: Okay. Thank you. Now, item 4 deals with both clauses 3.4 and 3.3 just deleting those words "set out in clauses 3.1 and 3.2." So is there any disagreement there?

PN22

MR CRAWFORD: No.

PN23

THE DEPUTY PRESIDENT: Thank you. All right. Well, then we will move to item 5. Now, this relates to the clause 5.2 and the draft – the facilitative provisions. The proposal seemed to be for – the AWU's proposal was to include clause 11.4 roman numeral (i). The suggestions come from the – well, the questions come from the NFF, whether you meant clause 11.6 roman numeral (i). Anything further on that or are there two clauses that should be included?

PN24

MR CRAWFORD: Perhaps. I think 11.6 roman numeral (i) – it's 11.6 "i".

PN25

THE DEPUTY PRESIDENT: I beg your pardon, it's "i", yes.

PN26

MR CRAWFORD: So that, to me, is a facilitative provision and that could go in. We agree with that.

PN27

THE DEPUTY PRESIDENT: Yes. Let's got back to 11.4(i).

PN28

MR CRAWFORD: Yes. Roman numeral (ii) is perhaps what we had in mind because it does seem to contemplate an agreement for the employee to use their own vehicle.

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THE DEPUTY PRESIDENT: I see. Yes.

PN30

MR CRAWFORD: But whether that just operates as a normal, I guess, award term, or whether it's a facilitative provision, I'm not sure. We don't have a strong view either way.

PN31

THE DEPUTY PRESIDENT: Okay. Ms Pearsall, have you any comments regarding that?

PN32

MS PEARSALL: No, nothing beyond what we've set out in the submission really. It's – yes, we don't consider that it is very clear that it is a facilitative provision. It could be just a standard award term.

PN33

THE DEPUTY PRESIDENT: All right. So how would you be – Mr Crawford, how would you be comfortable with this being characterized for the purposes of the summary going forward?

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MR CRAWFORD: We're happy to kill it, your Honour.

PN35

THE DEPUTY PRESIDENT: Okay.

PN36

MR CRAWFORD: Just to withdraw it.

PN37

THE DEPUTY PRESIDENT: All right. Do we want to add or suggest that 11.6(i) be inserted into the facilitative provisions clause?

PN38

MR CRAWFORD: Yes, I think so.

PN39

THE DEPUTY PRESIDENT: Thank you. I will just make that note. Thank you. All right. If we move then to item 6 which refers to clause 6.3, this is a proposal of the AWU to insert the word "ordinary" after 38. So it will be 38 ordinary hours per week. And this has been opposed by the NFF. So what do we want to do with this one?

PN40

MR CRAWFORD: We would press this point, your Honour. We do think that the reference is intended to be to the amount of ordinary hours per week, and we don't really agree with the submissions of the NFF and how they characterise the issue. And we also note that the Act does require an award to prescribe ordinary hours of work for all classes of employee. And, in our view, that is the intent of clause 6.3. So we say that's another reason why the word "ordinary" should be in there. We say a full-time employee is guaranteed 38 ordinary hours of work per week, and then of course they may work overtime in addition to that.

PN41

THE DEPUTY PRESIDENT: I see. Yes. Thank you. Ms Pearsall.

PN42

MS PEARSALL: Yes. So we don't consider that this clause deals with rates of pay, so it's not necessary here to have "ordinary" in there because this clause is just defining a full-time employee rather than rates of pay and hours of work.

PN43

THE DEPUTY PRESIDENT: Yes. All right. Well, I will note that that's not agreed at this point. All right, then. Item 7, 6.4(a)(i), is that the same sort of – are we in the same sort of discussion about that one, do you think?

PN44

MS PEARSALL: I think that's just - - -

PN45

MR CRAWFORD: I think 7 and 8 overlap.

PN46

THE DEPUTY PRESIDENT: Yes. Yes.

PN47

MR CRAWFORD: So we agree with the NFF that hours at the very least should go in there, but again we would say that there should be a reference to ordinary in there as well.

PN48

THE DEPUTY PRESIDENT: Yes. Okay. Yes. So 7 is agreed but 8 is the same argument as 6 really.

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MR CRAWFORD: Correct.

PN50

MS PEARSALL: That's right.

PN51

THE DEPUTY PRESIDENT: Yes. Okay. Then it appears there's agreement with item 9 to delete the last sentence of 6.4(b).

PN52

MS PEARSALL: Yes, that's correct.

PN53

THE DEPUTY PRESIDENT: Yes. Thank you. All right. If we move to item 10, please, this also appears to be agreed, taking ordinary out of clause 6.5(b) in the first part of it, so it reads "For each hour work a casual employee must be paid." Is that correct?

PN54

MS PEARSALL: Yes, that's right.

PN55

THE DEPUTY PRESIDENT: Thank you. We turn then to item 11, dealing with clause 8.2. Now, the – as I understand it, the wording proposed by the AWU would be:

PN56

Ordinary hours of work must not exceed an average of 38 per week over a work cycle agreed in accordance with clause 8.3.

PN57

Is that correct?

PN58

MR CRAWFORD: That's correct.

PN59

THE DEPUTY PRESIDENT: And the NFF's position is that this agrees on the basis that it submits the current wording is sufficiently clear.

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MS PEARSALL: Yes, that's correct.

PN61

THE DEPUTY PRESIDENT: Okay. So is there any way of working this one through or should I just note that's the respective positions? So, Ms Pearsall, from your perspective, do you have any objections as such to the substance of the wording proposed by the AWU?

PN62

MS PEARSALL: Sir, I'm afraid I don't have any instructions on that one so we might – is it okay if we park that one and maybe come back to that later on when Ms McKinnon is here?

PN63

THE DEPUTY PRESIDENT: Yes. Yes. All right. You will just need to remind me of that.

PN64

MS PEARSALL: Yes, I will. Yes.

PN65

THE DEPUTY PRESIDENT: All right. Thank you. We will go to item 12 then which is dealing with clause 9.2. This seems to be a debate between the parties where the AWU position is 200 per cent of the applicable rate of pay, whereas the NFF is that it should be 100 per cent of the ordinary hourly rate. Is that how it's characterised?

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MS PEARSALL: Yes, that's correct.

PN67

THE DEPUTY PRESIDENT: That seems to be a disagreement of some substance. So what has been the position to date?

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MR CRAWFORD: Do you mean in the current award?

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THE DEPUTY PRESIDENT: Yes. I assume it's as currently - - -

PN70

MR CRAWFORD: Yes. It basically just refers to the break – the delay break being paid at a rate of 200 per cent in addition.

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THE DEPUTY PRESIDENT: Are there any arguments in the field, so to speak, about what that 200 per cent in addition means?

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MR CRAWFORD: Not that I'm aware of, no.

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MS PEARSALL: No.

PN74

THE DEPUTY PRESIDENT: Well, do we have a feel for how it's applied at the moment?

PN75

MR CRAWFORD: Not really, your Honour. Our experience with this industry has been some of it is still in the State public sector because it's done by the Forestry division of government or whatever. In New South Wales I know that it was – a forestry corporation was set up so they are in the federal system in New South Wales, but they have an enterprise agreement.

PN76

MS PEARSALL: And, sir, we've put some suggested wording in there in our submission for this one as well.

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THE DEPUTY PRESIDENT: Yes. And that's your submission of 9 June, yes?

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MS PEARSALL: That's correct.

PN79

THE DEPUTY PRESIDENT: I might just have a look at that. Is that beeping at your end?

PN80

MS PEARSALL: I think it's coming over the microphone here.

PN81

THE DEPUTY PRESIDENT: Yes. Okay.

PN82

MS PEARSALL: At your end, yes.

PN83

THE DEPUTY PRESIDENT: It sounds like a truck is backing up.

PN84

MR CRAWFORD: Yes. I was going to say.

PN85

THE DEPUTY PRESIDENT: All right. Okay. I'm just looking at the NFF suggested wording here for clause 9.2. And which is:

PN86

An employee who is required to defer a meal break prescribed by clause 9.1 must be paid an allowance of 100 per cent of the ordinary hourly rate until their meal break is taken.

PN87

The current wording is not very satisfactory, is it?

PN88

MR CRAWFORD: No.

PN89

THE DEPUTY PRESIDENT: In addition to what? 200 per cent in addition. So the effect of the NFF clause would be it would be, in effect, 200 per cent of the – well, 200 per cent. Whereas if it was the applicable rate of pay it would depend on what the applicable rate was and then you're multiplying it by 200 per cent or so. Is that in essence the difference here?

PN90

MR CRAWFORD: Yes, I think that's right and a compromise option that we would certainly consider is confirming that the employee would keep getting the rate applying to their ordinary hours of work on that – at that particular time, which might include a shift loading, a weekend penalty rate or whatever. And then saying in addition to that they would get an amount of 100 per cent of the ordinary hourly rate.

PN91

THE DEPUTY PRESIDENT: Yes. Ms Pearsall, does that – how does that sit with you?

PN92

MS PEARSALL: I'm just – can you just explain that again, sorry?

PN93

MR CRAWFORD: Well, I think it's largely what the NFF are putting on the table. So you would keep getting, you know, the rate that you were on for working ordinary hours, which might include an afternoon shift allowance or a weekend penalty rate. But then if your break is delayed you get an additional amount of 100 per cent of the ordinary hourly rate. So if you were on afternoon shift and your rate was \$30 you would keep getting that \$30, and then there would be an additional allowance of 100 per cent of the ordinary hourly rate.

PN94

MS PEARSALL: Okay. We can take that and consider that, your Honour.

PN95

THE DEPUTY PRESIDENT: yes.

PN96

MS PEARSALL: But I would have to take that back and seek further instructions.

PN97

THE DEPUTY PRESIDENT: Okay. Thank you. I'm looking also at the note that I think the Commission's award modernisation team has put about the pre-reformed award, which provided for single time in addition to the appropriate rate, which seems to be perhaps close to what Mr Crawford was just outlining. But I note the NFF will take instructions.

PN98

MS PEARSALL: Yes. Thank you, your Honour.

PN99

THE DEPUTY PRESIDENT: All right. Thank you. We will go to item 13, which is relating to clause 9.3(b). So there's a proposal by the AWU to replace the last three words "ordinary hourly rate" with "applicable rate of pay", and the NFF has proposed time worked during ordinary hours. So I guess my question is from both of your perspectives is there any difference in terms of the effect of the two sets of wordings that have been proposed? It seems as though there might be.

PN100

MR CRAWFORD: Yes. Our concern would be the addition of "the crib break will be treated as time worked during ordinary hours" because that would mean, for example, the 20 minutes would be taken off the employee's entitlement to, for example, 38 ordinary hours of work for that week.

PN101

THE DEPUTY PRESIDENT: Yes.

PN102

MR CRAWFORD: So in our view, the rate that again is intended to apply would just be the rate the employee was receiving for ordinary hours of work probably immediately prior to the break.

PN103

THE DEPUTY PRESIDENT: Yes. Ms Pearsall.

PN104

MS PEARSALL: Yes. So can I just clarify, Mr Crawford, that you concern there is that the crib break wouldn't be treated as time worked during ordinary hours or -
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PN105

MR CRAWFORD: It would be paid but it wouldn't be counted in the ordinary hours of work for the week.

PN106

MS PEARSALL: Okay. So I'm just looking here. We've proposed to add at the end of that clause the sentence, "The crib break will be treated as time worked during ordinary hours." So that wouldn't address your concern?

PN107

MR CRAWFORD: Well, that is exactly what our concern is.

PN108

MS PEARSALL: Yes. Just clarifying that.

PN109

THE DEPUTY PRESIDENT: Okay. So we've got a difference of substance.

PN110

MS PEARSALL: Correct. Yes.

PN111

THE DEPUTY PRESIDENT: Okay.

PN112

MR CRAWFORD: Well, perhaps – I'm just wondering whether we are actually in dispute that the effect of the provision is that the break is between the ending of ordinary hours and the commencement of overtime.

PN113

THE DEPUTY PRESIDENT: Yes.

PN114

MR CRAWFORD: So the clause is saying you don't get the overtime rate. It would be at the rate for ordinary hours.

PN115

THE DEPUTY PRESIDENT: Yes.

PN116

MR CRAWFORD: So the point we're making is that that logically should include shift loadings, weekend penalties, if those are applicable for ordinary hours of work. And I'm not sure whether that is actually disputed.

PN117

MS PEARSALL: No, I don't think that is disputed.

PN118

THE DEPUTY PRESIDENT: All right. Well, look, I will note it as not agreed. If you want to put it in one of those – in the category, Ms Pearsall, of those ones you might revisit - - -

PN119

MS PEARSALL: Yes. Yes.

PN120

THE DEPUTY PRESIDENT: - - - I'm happy to come back to it.

PN121

MS PEARSALL: Okay. That would be good. Thank you.

PN122

THE DEPUTY PRESIDENT: All right. Morning, Ms McKinnon.

PN123

MS McKINNON: Good morning, Deputy President. I apologise for the delay.

PN124

THE DEPUTY PRESIDENT: That's all right. Thanks for being present. We're just at item 14. We've parked two items at this stage but I won't put you on the spot right away; we might return to them at the end. We may return to item – at this stage – 11 and 13, but we will do that when you and Ms Pearsall have a chance to confer.

PN125

MS McKINNON: Thank you.

PN126

THE DEPUTY PRESIDENT: So we might now move to item 14, please, which is at clause 10.2. And it is a proposal of the NFF – no, sorry, I beg your pardon. 10.2. A proposal of the AWU to insert the word "minimum", so it reads:

PN127

The minimum hourly rate can be calculated by dividing the applicable and –

PN128

again –

PN129

minimum weekly wage above by 38.

PN130

Is there any comment from the NFF on that?

PN131

MS McKINNON: Your Honour, this is probably a peculiarity to this award where it has its own concept of an actual weekly rate. And so it has sort of done the job that we're trying to get to in other awards, where we're moving away from the concept of minimum rate to ordinary rate. In this award there is an actual rate, and there's a formula that you use to get there. So we think, you know, for the purposes of this award we just need to think through which concepts we are going to have. And we're not fixed on a particular approach but it's probably – it's not just the traditional minimum versus ordinary dispute that we've got in other awards and other parts, because this award has its own rule and formula. But happy to have the discussion.

PN132

THE DEPUTY PRESIDENT: All right. So I will note that one as perhaps further discussion unless, Mr Crawford, you've got any comments in regards to that, just off the back of that.

PN133

MR CRAWFORD: Yes, I mean the only purpose of our submission was to point out that mathematically the hourly rate in that table is 1/38th of the minimum weekly wage rate, as opposed to 1/38th of the actual weekly rate. So we were just wanting to make that clear.

PN134

THE DEPUTY PRESIDENT: I see. But really, 10.2 is like a statement of fact.

PN135

MR CRAWFORD: Yes, I was just thinking whether it actually needs to be in there.

PN136

THE DEPUTY PRESIDENT: Ms McKinnon, do you think it has got any work to do, clause 10.2?

PN137

MS McKINNON: Sorry, your Honour, I'll just find it. No, I don't. I mean I think that's a product of probably an industrial dispute at some point in the past, but I think these days, once you look at minimum wages and you look at ordinary

hours, you put the two together and you can get to that result. So I'm not opposed to taking it out altogether.

PN138

THE DEPUTY PRESIDENT: The one that probably would spark people's curiosity is the actual weekly rate.

PN139

MS McKINNON: And it seems to me that the reason that 10.2 is there is because there's two different rates. There's the minimum rate, which is just the ordinary 38 hour divisor, but then there's the rate that you actually get paid. And there's a bit more science to that figure.

PN140

THE DEPUTY PRESIDENT: Which is dealt with in 10.3.

PN141

MS McKINNON: Yes, that's right.

PN142

THE DEPUTY PRESIDENT: All right. Well, I'll perhaps make the observation that the parties query whether 10.2 is needed.

PN143

MS McKINNON: Yes and we're happy to have further discussions with the AWU about an approach to resolve this issue. Because I don't think it's a matter of substance so much as form.

PN144

THE DEPUTY PRESIDENT: Okay, thank you. If we move to item 15 then, again dealing with minimum wages. I note you've dealt with this in your most recent submissions, Ms McKinnon.

PN145

MS McKINNON: I think they're the same as 14, so perhaps if we resolve the issues in 14 and 15 together, that might be the best.

PN146

THE DEPUTY PRESIDENT: I'll note that as further discussions. Thank you. We'll move then to item 16, which is clause 10.4(a). There has been some suggestion for wording proposed by the AWU, which is opposed by the NFF. So Mr Crawford, maybe if you address it first.

PN147

MR CRAWFORD: I think the point we were making was that there's no reference to the piecework agreement being in writing, and that the clause is also lacking other content which is pretty standard in other words that have piecework conditions. Hence I think we've proposed some wording to address that in our submission.

PN148

THE DEPUTY PRESIDENT: Thank you. Ms McKinnon?

PN149

MS McKINNON: We resist the inclusion of the words "in writing" because we don't think that that's a current requirement. Not having the arrangement in writing would then mean that somebody who was paid as a pieceworker couldn't be a pieceworker. So we think that's a substantive change. But we agree that there is a need to explain how the rules for pieceworkers work better. So I think that we can reach an agreement on the wording. Am I right, Steven, that it's the "in writing" issue that's probably the sticking point.

PN150

MR CRAWFORD: Yes.

PN151

THE DEPUTY PRESIDENT: Where would the "in writing" go?

PN152

MR CRAWFORD: I think the provision redrafted would go at the start of the clause, in 10.4(a). I mean there is already a requirement to terminate the piecework agreement in writing under 10.4(c). So it seems a little odd that you would have to terminate in writing, but not agree in writing.

PN153

THE DEPUTY PRESIDENT: In writing. Yes. That begs the question, doesn't it?

PN154

MS McKINNON: I suppose it does, but I think that the consequences of the two are different. So if a pieceworker can only be engaged if it's in writing on a piecework basis, then not having it in writing means there can be no pieceworker. Just terminating in writing, what that job is doing is putting the employer on notice that they need to change their payroll system. It doesn't change their actual employment as a pieceworker. Having said that, to be honest I'm not sure that the piecework provisions are all that beneficial, given you still have to be paid at least the ordinary hourly rate. But that's another matter.

PN155

THE DEPUTY PRESIDENT: Okay. Well, look, you've both put up proposed wording. Is it perhaps worth noting that this one you'll discuss further?

PN156

MS McKINNON: Yes, happy to discuss it, your Honour.

PN157

THE DEPUTY PRESIDENT: All right, item 17. Again, dealing with pieceworkers. So what's the situation with this one? I note that the NFF has some proposed wording. So perhaps, Ms McKinnon, you can address what your intentions are here.

PN158

MS McKINNON: Yes, sure. The problem with the current arrangement is that there's a circular definition. Because the award had to have a "how you calculate

NES entitlements for pieceworkers" rule in it, we put one in, or somebody put one in, in 2010, but it's circular, because it refers back to the Act and the Act refers to the award. So there's not actually been any rule about how you work out pieceworker leave entitlements.

PN159

So we've tried to develop a formula, taking in to account I think what the union has put forward, but trying to sort of explain how you might calculate the rates of pay. Our proposal would be that their full rate is you get the total amount they earn for the year, and divide it by the hours that they've worked in the period, and that's your full rate of pay for the purposes of leave entitlements.

PN160

For base rate of pay, it's the same approach, but you take off the over-award payments that can't be included in base rate of pay for pieceworkers, under the Act.

PN161

THE DEPUTY PRESIDENT: Yes. Have you had an opportunity to review that proposal, Mr Crawford?

PN162

MR CRAWFORD: Yes, I have, your Honour. I think the concern we have is that the Fair Work regulations currently in regulation 1.09 prescribe a definition for the base rate of pay for pieceworkers, who are award and agreement free. Our concern is the proposal from the NFF appears to use the definition of base rate of pay from the regulations as the definition of the full rate of pay in the award, and then to apply a lower amount for base rate of pay in the award. So we would be saying that whatever is put in there should not go below what is in the regulations for award and agreement free workers.

PN163

THE DEPUTY PRESIDENT: Yes, okay.

PN164

MR CRAWFORD: So we also have put forward some wording, your Honour, in our submission.

PN165

THE DEPUTY PRESIDENT: Yes.

PN166

MS McKINNON: It might be one that we also have to discuss, I think, your Honour. Again, I don't think it's a - there's not strong feelings on either side, but we do have to come up with some wording that works.

PN167

THE DEPUTY PRESIDENT: All right, I'll note that is one you'll discuss further. With all these ones for further discussion, it's really an exercise in seeing whether matters as to form can be agreed. If there are substantial differences that go down to matters of substance, that's a different thing, obviously. So we'll go then to

item 18., 10.5(c). This seems to be relatively uncontroversial. It's just to insert the words "of termination" after "notice" in 10.5(c)(i). Is that agreed?

PN168

MR CRAWFORD: Yes, it is.

PN169

THE DEPUTY PRESIDENT: Thank you. Item 19 relates to clause 11.3(b). So with discussing the leading hand allowance. So, Mr Crawford, your concern is that only the normal rate would be paid if someone was acting as a leading hand. Is that the concern you've got?

PN170

MR CRAWFORD: Yes, that is, your Honour. Our view is the intent of the provision is that you get the specified allowance in addition to either your own rates, or the rate of the highest classification of the employees that you are supervising. Whichever is higher.

PN171

THE DEPUTY PRESIDENT: Yes.

PN172

MR CRAWFORD: There appears to be a substantive dispute, because the NFF are saying, as I understand it, that there can be no additional payment if the employee's own rate is higher than the amount calculated with the other method.

PN173

THE DEPUTY PRESIDENT: Yes, I see.

PN174

MS McKINNON: Yes and we say that's a plain reading of the current award term, and hasn't been changed in the exposure draft to any significant degree. So our view is that is intended to reflect the fact that some people are employed at a rate of pay which factors for their managerial or supervisory status. If that rate of pay is higher than what they'd ordinarily get for the wage plus leading hand allowance, that's just what they get.

PN175

THE DEPUTY PRESIDENT: Yes, I understand. All right, well that's a difference of substance. So I note that that's not agreed.

PN176

MS McKINNON: Yes.

PN177

THE DEPUTY PRESIDENT: Item 20 relates to clause 11.4(b). Again, it's an NFF proposal which would add in "away from and" after "on work". So is that in the second line there, Ms McKinnon?

PN178

MS McKINNON: Yes. Sorry, your Honour, I'm just trying to figure out myself. I think it is, it's employed on work, away from, and located within 30 kilometres

of the place where - it's just picking up the words currently in the award, as I understand it.

PN179

THE DEPUTY PRESIDENT: Does 11.6(a) shed any light on it? The wording there? It doesn't seem to.

PN180

MS McKINNON: It's quite complicated, all these allowances, but I think that there's an either/or scenario. I don't think 11.6 applies if 11.4 applies, necessarily.

PN181

THE DEPUTY PRESIDENT: I'm just not sure what your words are designed to do.

PN182

MS McKINNON: Well, predominantly reflect the provisions in the current award, but also to - if they're accommodated at the same place as the work, then this allowance doesn't apply. But that's not necessarily clear without the words "away from".

PN183

THE DEPUTY PRESIDENT: So if they're on a distant job, and then they're staying somewhere within 30 kilometres of that distant job, they get this. Is that the - - -

PN184

MS McKINNON: That's right. But the way that the current provision is worded, it talks about the allowance must be paid when the work is carried out away from the place where the employee is accommodated, for a distant job. And then it goes on to say, "when employed on work located within 30 kilometres from the place." So there's just those two elements. It's "away from" and then "within" 30 kilometres.

PN185

THE DEPUTY PRESIDENT: Mr Crawford, have you got any comments?

PN186

MR CRAWFORD: The reference to "away from" is in the current award, so we wouldn't oppose it going in.

PN187

THE DEPUTY PRESIDENT: All right. Thank you. I'll go to item 21, which relates to clause 11.4(c). Another form of wording proposed by the NFF. So which parts are we talking about in (c)?

PN188

MS McKINNON: It's just in that first line, your Honour. It's "an employee who is engaged at a business", and it's the "at" that we are asking for it to revert to the words in the current award, which is "on work for". Because "at" is sort of talking

about that it's physically at that place, whereas "on work for" is, you know, in the conduct of work for that - - -

PN189

THE DEPUTY PRESIDENT: Is the concern there that you have an argument about where the business is located?

PN190

MS McKINNON: Or where the work is being done, yes. So if you're out doing the work there, you get it, but if you're doing the work over there, for the same person, you don't get it.

PN191

THE DEPUTY PRESIDENT: All right. Mr Crawford, any comments?

PN192

MR CRAWFORD: It's not opposed, your Honour.

PN193

THE DEPUTY PRESIDENT: Thank you. Item 22 relates to clause 11.4(d)(1). It seems to me that that one is agreed?

PN194

MR CRAWFORD: Yes, it's just a typo.

PN195

THE DEPUTY PRESIDENT: Thank you. Item 23, 11.4(f)(i) and (iv). This is one going to the cross-references. Let's have a look. So, Ms McKinnon, what do you base that on?

PN196

MS McKINNON: The cross-reference?

PN197

THE DEPUTY PRESIDENT: Yes.

PN198

MS McKINNON: We just compared what's in the current award with what's there, and it seemed to be incorrect.

PN199

THE DEPUTY PRESIDENT: Okay. Mr Crawford, do you have a view?

PN200

MR CRAWFORD: I'm just wondering whether (f)(iii) is relevant. I think (f)(i) is generally removing allowances if you're provided with travel free of charge, but then (f)(iii) is saying that if you're required to drive it you wouldn't lose the allowance entitlement.

PN201

THE DEPUTY PRESIDENT: Yes.

PN202

MR CRAWFORD: It's a relatively painful set of provisions, your Honour, but if we're having - we've obviously got a lot of other further discussions to have, and we should be able to sort out this one, I think. We're just trying to preserve the status quo, presumably.

PN203

MS McKINNON: Yes, exactly.

PN204

THE DEPUTY PRESIDENT: All right, I'll make a note to that effect. Thank you. I'll go then to item 11.4(f)(iv). Expense related allowances, fares, and travelling time. This is an AWU one, the last sentence should refer to clauses 13.6 and 11.6(d), and the position of the NFF is that 11.6(d) doesn't appear to relate to travel entitlement. So what shall we do with this one?

PN205

MS McKINNON: We can certainly have discussions, because I think that they're linked to the earlier one. It's just, again, preserving the status quo.

PN206

THE DEPUTY PRESIDENT: Okay. Thank you. Are items 25 and 26 sort of the same - well, I've got a few, actually. There's items down to about - no, they're moving - well, item 25 might be part of that same discussion, is that - - -

PN207

MS McKINNON: Yes, I think so.

PN208

THE DEPUTY PRESIDENT: Then item 26 to item 30 start dealing with clause 11.6(a) through to 11.6(e). Well, we can start working through those.

PN209

MS McKINNON: Subject to what the AWU thinks, I'm happy to just take all the expense related allowance provisions away and have that discussion, because it's a really difficult provision to navigate.

PN210

THE DEPUTY PRESIDENT: Yes.

PN211

MS McKINNON: If we all agree that what we're trying to do is preserve the status quo then we should be able to get there.

PN212

THE DEPUTY PRESIDENT: All right. So I'll treat items 26 to 30 in that way.

PN213

MS McKINNON: Yes.

PN214

THE DEPUTY PRESIDENT: Further discussions, aimed to preserve status quo. All right. Then we'll move to item 31, which deals with clause 13.3(a). This is some wording proposed by the AWU, not agreed by the NFF. Mr Crawford, do you want to just outline your rationale for this one?

PN215

MR CRAWFORD: Yes, it was very much just a technical amendment that we were proposing, to deal particularly with a situation whereby an employee on night shift might finish their ordinary hours at, say, 3 or 4 am, and then they may recommence work again on the same calendar day. So that leads to concern that the work of successive days could become problematic, if successive days is understood as a reference to successive calendar days. Our amendment, in our view, just reflects the intent that you get - it's a 10 hour break after the overtime finishes.

PN216

THE DEPUTY PRESIDENT: Yes. Thank you. Ms McKinnon?

PN217

MS McKINNON: Our approach was simply to retain the current wording. I'm happy to have that discussion, though, if we can make it clearer.

PN218

THE DEPUTY PRESIDENT: It seems the principle is that there's at least a ten hour break between shifts, if you like.

PN219

MS McKINNON: That's usually the way these things work. So just because this award is not an easy one, we just want to make sure that there's no unintended consequences from using a different form of words, like "shift" for example.

PN220

THE DEPUTY PRESIDENT: Okay. Thank you. Item 32, proposal by the NFF. 13.5(a)(ii). So, Mr Crawford, is this designed to pick up the changes that have been made under some State's public holidays legislation to declare Easter Saturday a public holiday? Is that - - -

PN221

MR CRAWFORD: Perhaps, your Honour. I'm not sure but I can indicate that - sorry, are you making the point that in not every State or Territory that day might actually be called Easter Saturday?

PN222

THE DEPUTY PRESIDENT: Yes. I'm not sure. I'm not sure. I wonder why the - I mean, I'm guessing that the clause originally was at a time where Easter Saturday wasn't treated as a public holiday, and that the award wanted to pick up what was a public holiday rate for that Saturday. I don't know why it just wouldn't be called Easter Saturday now, which is what you're suggesting.

PN223

MR CRAWFORD: Yes. I mean, we're not opposed to Easter Saturday going in, and we suspect everybody will understand what it means.

PN224

THE DEPUTY PRESIDENT: Yes. Again, it's one of these ones if there's a change in substance I guess you want to be across that but, Ms McKinnon, what was the basis of this one?

PN225

MS McKINNON: Just common parlance, your Honour. No science more than that. I think we all sort of talk about Easter Saturday and, yes, it's just to simplify the provision but nothing more than that.

PN226

THE DEPUTY PRESIDENT: All right. That looks like it's capable of being marked as agreed, I think. So that's what I might do.

PN227

MR CRAWFORD: Yes.

PN228

THE DEPUTY PRESIDENT: Thank you. All right. Item 33 which relates to clause 13.6(a)(i) and (ii). So this is in response to a letter of the Commission.

PN229

MR CRAWFORD: Yes. We seem to be in agreement about how the provision - -
-

PN230

THE DEPUTY PRESIDENT: How it's supposed to work. Okay. So we will just note the parties' comment and note they're agreed. Thank you. We will go to item 34 which is clause 14.11. And that seems to have been an agreed item. Is that right?

PN231

MS McKINNON: Yes, your Honour.

PN232

THE DEPUTY PRESIDENT: Thank you. All right. Item 35, clause 15.7, the bushfire fighting.

PN233

MS McKINNON: Yes. We've taken the view, your Honour, that bushfire provisions are stand-alone in the award, and not cumulative on other entitlements. So we think that that interpretation makes sense in the context of the award and for that reason we don't support extending the shiftwork provisions to the bushfire context.

PN234

THE DEPUTY PRESIDENT: All right. Mr Crawford.

PN235

MR CRAWFORD: Yes, your Honour. So the concern we have here – I mean, 15.7 only applies Monday to Friday work, so weekend penalty rates don't appear relevant. But the concern is someone could be working afternoon or night shift from Monday to Friday, and then they are required to commence firefighting work. And then applying 15.7(a)(i) seemingly because of the definition of ordinary hourly rate, they would lose their shift loadings and actually drop onto a lower rate.

PN236

THE DEPUTY PRESIDENT: Yes.

PN237

MR CRAWFORD: For the first eight hours of work. Which I don't think is fair and I don't think that's the intent of the provision. I might just need to get the current award out but I just wonder if that's a difficulty created by the ordinary hourly rate concept being introduced and defined.

PN238

THE DEPUTY PRESIDENT: Yes. Okay. That would be interesting to know what the current award says.

PN239

MS McKINNON: At 27.7 - - -

PN240

MR CRAWFORD: Just ordinary time.

PN241

MS McKINNON: It's all time worked Monday to Friday, including time worked prior to firefighting work, must be paid for at the rate of ordinary time.

PN242

THE DEPUTY PRESIDENT: What clause is that, sorry? 27.7?

PN243

MS McKINNON: 27.7.

PN244

THE DEPUTY PRESIDENT: Yes. Okay. So your submission is there would be a change, Ms McKinnon?

PN245

MS McKINNON: Yes. Because of the particular circumstances that arise in the bushfire context.

PN246

THE DEPUTY PRESIDENT: All right. Well, look, I will mark that as not agreed at this stage, but that you will have further discussions.

PN247

MS McKINNON: Yes.

PN248

THE DEPUTY PRESIDENT: Is that all right, Mr Crawford?

PN249

MR CRAWFORD: Yes, that's all right, your Honour. But if I can just indicate, I don't think we would agree to wording that would allow people to fall onto a lower rate when they're fighting fires.

PN250

THE DEPUTY PRESIDENT: Yes. No. I understand. I understand. So that might – ultimately it might fall for a determination given the basis of both parties' positions. Thank you. Clause 15.11. So just where do you want to put "despite clause 15.11(e)", Ms McKinnon?

PN251

MS McKINNON: Your Honour, at the beginning of 15.11(f).

PN252

THE DEPUTY PRESIDENT: I see. Okay. Okay. So that should be inserted at the start of (f).

PN253

MS McKINNON: Yes, and it just reflects the words in the current award which say "provided that". So it's just an interaction rule.

PN254

THE DEPUTY PRESIDENT: All right. Any objections to that, Mr Crawford?

PN255

MR CRAWFORD: No. That seems to reflect the current award, your Honour.

PN256

THE DEPUTY PRESIDENT: Thank you. All right. If we move to item 37 which is clause 15.14(a), the change proposed by the NFF to reflect current award wording – any comments, Mr Crawford?

PN257

MR CRAWFORD: That seems okay, your Honour.

PN258

THE DEPUTY PRESIDENT: Okay. Thank you. Item 38, clause 16.4. So the submission of both parties is just to note that this clause might be required to be amended having regard to the annual leave decision. Is that right?

PN259

MS McKINNON: Yes. It's being dealt with separately, I think, in proceedings dealing with this later requirement to take leave.

PN260

THE DEPUTY PRESIDENT: Yes.

PN261

MS McKINNON: So it will just reflect whatever falls out of that process.

PN262

THE DEPUTY PRESIDENT: Right. Thank you. In clause 16.5(b) which is item 39 – so, Mr Crawford, your proposal is to add some words after – at the end of that sentence "per hour of leave taken". Yes?

PN263

MR CRAWFORD: Correct.

PN264

THE DEPUTY PRESIDENT: And, Ms McKinnon, do you have a view on that? You've got a different sort of a comment for this clause.

PN265

MS McKINNON: I think this is one that we need to include in that discussion about the actual weekly rate versus ordinary versus minimum, because depending on where we get to with how we should use those terms in the award this one might resolve itself. So can I suggest that it be one for further discussion.

PN266

THE DEPUTY PRESIDENT: Yes. I'll note that. Thank you. If we move then to item 40 and we're into the schedules now. This should be relating to schedule 8.1.

PN267

MR CRAWFORD: Yes. It's just a typo this one, your Honour.

PN268

THE DEPUTY PRESIDENT: Thank you. I think that can be agreed. Thank you. 41, schedule 8.2.3. All right. So this is one where the AWU position is that firefighting rates should be included in the table. The NFF position is if they're to be included, they're to be as a separate table or the – what would be a – or the status quo. Is that sort of where it's at?

PN269

MS McKINNON: Yes. I think it's linked to item 35. We're not opposed to having a table, if we need it, but the question is, well, can we resolve, you know, whether the bushfire fighting provisions are stand alone.

PN270

THE DEPUTY PRESIDENT: Okay. Well, I guess if item 35 is ultimately resolved by a determination of the Commission, then item 41 simply becomes a matter of form, does it not?

PN271

MS McKINNON: Yes, it does.

PN272

THE DEPUTY PRESIDENT: Okay.

PN273

MR CRAWFORD: Well, I think that might be right but our point was – and I guess that's why Ms McKinnon is querying whether firefighting is a distinct set of conditions, but our point was the bushfire fighting rates are included in schedule A 2.1 for day workers. So if they're included there, there's no limitation on shift workers performing firefighting duties. So we were just saying they should also be in A 2.3.

PN274

THE DEPUTY PRESIDENT: Yes. I see what – yes. But the question is what rate of pay they get. That's not agreed. Is that - - -

PN275

MR CRAWFORD: Correct. Yes.

PN276

THE DEPUTY PRESIDENT: Yes. Okay. All right. I'll mark that one – that item 41 is likely to be resolved pending the resolution of, or will require, the resolution of item 35.

PN277

MS McKINNON: Yes. Thank you.

PN278

THE DEPUTY PRESIDENT: All right. Now, item 42 seems to be agreed?

PN279

MS McKINNON: Yes.

PN280

MR CRAWFORD: Yes.

PN281

THE DEPUTY PRESIDENT: Item 43. So item 43 relating to schedule A.2.3, the AWU is suggesting this separate column for Sundays. Now, Ms McKinnon, your position is that there's no Sunday loading for shift workers?

PN282

MS McKINNON: In the current award, yes.

PN283

THE DEPUTY PRESIDENT: Yes. So is it the position, or your position, that there's no Sunday rate?

PN284

MS McKINNON: That seems to be the case, yes.

PN285

THE DEPUTY PRESIDENT: Yes.

PN286

MS McKINNON: And so in the interests of preserving the status quo we think it shouldn't be changed.

PN287

THE DEPUTY PRESIDENT: So what do people get on Sundays?

PN288

MS McKINNON: Well, they may not work it. I don't know, your Honour.

PN289

THE DEPUTY PRESIDENT: Yes. Okay. Do you know, Mr Crawford?

PN290

MR CRAWFORD: We certainly understand that it's 200 per cent. And clause 26.4(b) of the current award does state:

PN291

All time worked on a Sunday must be paid for at 200 per cent of the appropriate minimum wage.

PN292

And we found it's not uncommon for awards to rely upon a general provision like that as prescribing the Sunday rate for ordinary hours and overtime in an award.

PN293

THE DEPUTY PRESIDENT: I'll just have a look at the current award. Is it 26.4(b), is it?

PN294

MR CRAWFORD: Correct.

PN295

THE DEPUTY PRESIDENT: Well, the question here is that whether or not there are shift workers on Sundays. Well, that's the debate, is it?

PN296

MR CRAWFORD: Well, the debate is, yes, what is the rate for ordinary hours by shift workers on a Sunday, yes.

PN297

THE DEPUTY PRESIDENT: Yes.

PN298

MS McKINNON: Yes. And it comes up in the context of express words in the pre-reform award that the Sunday rate doesn't apply to shift workers, so it seems to me there is some history here, but we might need to have a further discussion about it, I think.

PN299

MR CRAWFORD: Yes, because clause 28.11 specifies a Saturday shift work rate. And then 28.12 talks about Sundays and public holidays, and it's reasonably clear from reading 28.12 that there is intended to be a higher Sunday rate.

PN300

MS McKINNON: Certainly a Sunday rate. As to whether it's higher I'm not sure that's indicated.

PN301

THE DEPUTY PRESIDENT: All right.

PN302

MS McKINNON: But I'm happy to explore that.

PN303

THE DEPUTY PRESIDENT: Well, look, why don't you see if you can work through and see if there's some sort of common understanding there.

PN304

MS McKINNON: Yes. We will do that.

PN305

THE DEPUTY PRESIDENT: Okay. All right. Then if I move to item 44, please. The suggestion from the AWU is to have a table for overtime rate for casuals. It seems as though, Mr Crawford, the NFF is inviting you to put forward a table and they'll comment on it.

PN306

MR CRAWFORD: Okay. Well, that can be done.

PN307

THE DEPUTY PRESIDENT: All right. So put that for further discussions. And I note that with this award that, you know, this is really the first time it's been really dealt with in this way as opposed to all the other awards that I have before me. Item 45 is relating to schedule A.3.1.

PN308

MS McKINNON: And we think this is again a (indistinct).

PN309

THE DEPUTY PRESIDENT: So what's the point here, Ms McKinnon?

PN310

MS McKINNON: I think it goes back to item 35. If it's bushfire provisions that stand alone then the penalties aren't cumulative.

PN311

MR CRAWFORD: She's saying they wouldn't get the casual loading.

PN312

THE DEPUTY PRESIDENT: Yes.

PN313

MS McKINNON: Maybe not, yes. So we'd need to resolve. You know, fundamentally we need to resolve how the bushfire provisions operate and then clauses that hinge on them will follow.

PN314

THE DEPUTY PRESIDENT: All right. Thank you. Can we then move to item 46, schedule A.4.2 for casual shift workers. So this is an AWU proposal for a Sunday rate. It looks like it might be related insofar as it deals with bushfire fighting rates with the discussion around clause 35; is that how you'd see it?

PN315

MR CRAWFORD: Well, it's also related to the Sunday penalty rate for shift workers.

PN316

THE DEPUTY PRESIDENT: Yes. So there's no column for that at the moment.

PN317

MR CRAWFORD: No, and it sounds like we're in dispute about what the rate is.

PN318

THE DEPUTY PRESIDENT: Shall I mark it for further discussion but note that it may be a dispute of substance?

PN319

MR CRAWFORD: Yes.

PN320

MS McKINNON: Yes, linked to item 43 as well.

PN321

THE DEPUTY PRESIDENT: Yes. Okay. I'll move to item 47, or 47 to 49. Now, Ms McKinnon, the NFF has updated wording for these items, I think, with other awards. Is this proposal for the Silviculture Award reflecting that same wording?

PN322

MS McKINNON: Yes, it's the same, your Honour. And I think there's now separate proceeding dealing with an update of the national training wage schedule.

PN323

THE DEPUTY PRESIDENT: Okay.

PN324

MS McKINNON: So that I think we can leave it alone. It'll be dealt with in another contest.

PN325

THE DEPUTY PRESIDENT: And is separate to the proceeding for all awards?

PN326

MS McKINNON: Yes, it is.

PN327

THE DEPUTY PRESIDENT: Thank you. All right. Well, we'll take it down then to item 50, which is a part-day public holiday, which the suggestion of the

NFF is that it may be being dealt with in the public holidays common issues proceeding. So I'll just note that, I think. And then the final one goes back to a – this is item 51, which goes back to, I think, an earlier item where we have discussed duplicating the definition of Silviculture and afforestations and the position seems to be that the parties agree that it should just be defined once and that should be defined in clause 3.2; is that right?

PN328

MR CRAWFORD: Yes, correct.

PN329

MS McKINNON: That's right.

PN330

MR CRAWFORD: That's item 3.

PN331

THE DEPUTY PRESIDENT: Yes. Yes. All right. Look, thank you. Unless there's any other items, or we could return to those two ones at 11 and 13. I can stand this down for 10 minutes for you to have that discussion, and just see whether you've got a position on that. Do you want to do that?

PN332

MS McKINNON: I think that's a useful approach because we have, I think, made some progress in other context which might apply, but who knows. We'll have a go.

PN333

THE DEPUTY PRESIDENT: All right. Well, just maybe, Ms McKinnon, if you just touch base with Ms Pearsall on that. I'll resume at 10 to 12 and we'll just get some comments on items 11 and 13 and then more broadly that it's the case that there's a few items that you and Mr Crawford will need to take up a bit further in discussions. So I'll adjourn until 11.50 am.

SHORT ADJOURNMENT

[11.41 AM]

RESUMED

[11.58 AM]

PN334

THE DEPUTY PRESIDENT: Thank you. So just in terms of items 11 and 13 first off, was any progress made there, or a status that I can note?

PN335

MS McKINNON: Yes, your Honour. We've reached agreement I think on item 11. So what we propose to do is modify it slightly so it would read:

PN336

Ordinary hours of work –

PN337

This is clause 8.2 of the exposure draft.

PN338

THE DEPUTY PRESIDENT: Yes.

PN339

MS McKINNON: Would read:

PN340

Ordinary hours of work must not exceed an average of 38 per week over an agreed and specified work cycle.

PN341

So it's just adding in the words "per week".

PN342

THE DEPUTY PRESIDENT: Yes. Okay.

PN343

MS McKINNON: And I think on that basis item 11 is resolved.

PN344

THE DEPUTY PRESIDENT: Sorry, I'll just note the clause. So it's simply adding the words "per week" into the clause 8.2 in the exposure draft?

PN345

MS McKINNON: Yes, after the number 38.

PN346

THE DEPUTY PRESIDENT: Yes. Okay. Thank you.

PN347

MS McKINNON: And on item 13 this matter does require further discussion but we think it's likely to be agreed. It's really – we agree in principle that the issue is just making sure that the pre-overtime crib break is not paid at the overtime rate, but I think that that other question about how you transpose the words "ordinary rate" into the exposure draft is part of that discussion about actual hourly rate and ordinary hourly rate and minimum hourly rate.

PN348

THE DEPUTY PRESIDENT: Yes.

PN349

MS McKINNON: Which we need to have. So we'll work that through, but I think as a matter of principle we agree on where we want to get to.

PN350

THE DEPUTY PRESIDENT: All right. Well, thank you, I've noted that. Are there any other final comments before we conclude this award today?

PN351

MS McKINNON: Not from me.

PN352

MR CRAWFORD: No, thank you, your Honour.

PN353

THE DEPUTY PRESIDENT: All right. Well, thank you for your assistance on this award. I note there's a number of items that you've undertaken to have further discussions on. As the timetable for these stage 3 awards becomes clearer that will obviously dictate the timing of your discussions, but if you can progress those sooner rather than later that would assist everybody. So thank you for this, and I'll adjourn this matter now, and we'll resume at half past 12.

PN354

MS McKINNON: Thank you.

SHORT ADJOURNMENT [12.01 PM]

RESUMED [12.43 PM]

PN355

THE DEPUTY PRESIDENT: Thank you, I'll start with appearances in Sydney, please.

PN356

MR K JACK: Jack, initial K, appearing for the Australian Federation of Employers and Industries.

PN357

THE DEPUTY PRESIDENT: Thank you, Mr Jack.

PN358

MR S CRAWFORD: Crawford, initial S, from the AWU, your Honour.

PN359

THE DEPUTY PRESIDENT: Thank you, Mr Crawford. Yes.

PN360

MS R BHATT: If it pleases, Bhatt, initial R, appearing for the Australian Industry Group.

PN361

THE DEPUTY PRESIDENT: Thank you, Ms Bhatt. Yes.

PN362

MS S McKINNON: May it please the Commission, McKinnon, initial S, appearing with Ms Pearsall, initial K, for the National Farmers' Federation.

PN363

THE DEPUTY PRESIDENT: Thank you, Ms McKinnon. Yes, and then in Adelaide, please?

PN364

MR H WALLGREEN: Wallgreen, initial H, for the South Australian Wine Industry Association.

PN365

THE DEPUTY PRESIDENT: Thank you, Mr Wallgreen.

PN366

MR S BLEWETT: Blewett, initial S, for United Voice.

PN367

THE DEPUTY PRESIDENT: Thank you, Mr Blewett. All right, thank you, everyone. As I understand it, where things have been left, there are about 12 or so items to work through. What I was going to do was just work through them in order, having regard to the latest summary prepared by the Commission, if that is agreeable to everyone. I'll take that as a yes, so the first one I have is item 25, which was relating to clauses 8.1 to 8.4, dealing with ordinary hours of work and rostering. Now, as I understand it, we had a - there was a proposal from the AWU that was going to be considered further by Business SA, the South Australian Wine Industry Association and the NFF.

PN368

It was a proposal that was not opposed by ADI and New South Wales Business Chamber, United Voice or AFEI. So who would like to address me on that aspect, please?

PN369

MS McKINNON: For the NFF, we are not opposed to the change.

PN370

THE DEPUTY PRESIDENT: Thank you.

PN371

MS BHATT: Deputy President, it's Ms Bhatt for Ai Group.

PN372

THE DEPUTY PRESIDENT: Yes.

PN373

MS BHATT: It's perhaps not reflected in the summary that Ai Group doesn't have any difficulty with the amendment proposed.

PN374

THE DEPUTY PRESIDENT: Yes, thank you, that's recorded in the summary. Just hold on. Thank you.

PN375

MR WALLGREEN: And on behalf of the Wine Industry Association, we don't oppose the proposed amendment.

PN376

THE DEPUTY PRESIDENT: Thank you, Mr Wallgreen. So can I take it then that the AWU proposal for item 25 is now agreed?

PN377

MR WALLGREEN: Yes.

PN378

MS McKINNON: Yes.

PN379

THE DEPUTY PRESIDENT: Thank you. The next one I had was items 30 to 32.

PN380

MS BHATT: Deputy President, Ms Bhatt here for Ai Group.

PN381

THE DEPUTY PRESIDENT: Yes.

PN382

MS BHATT: All three of those issues were raised by Ai Group. The matter that we've just discussed resolves all three of those issues.

PN383

THE DEPUTY PRESIDENT: All right, so - I'm sorry, I didn't catch that last bit, Ms Bhatt.

PN384

MS BHATT: I'm sorry: the amendment that's been proposed by the AWU, which is now agreed, will resolve those three issues.

PN385

THE DEPUTY PRESIDENT: Thank you. So the AWU amendment is agreed. Thank you. The next one I have is item 35 and it's only (indistinct) item 35 relating to clause 9.4, if I'm correct. Is that right?

PN386

MR WALLGREEN: Yes, yes.

PN387

MR BLEWETT: Yes, that's right, sir, it's Blewett from United Voice.

PN388

THE DEPUTY PRESIDENT: Okay, so where does this one now sit?

PN389

MR BLEWETT: I don't know if we've progressed anything since the last conference, sir. We and I understand the AWU believe that what's in the exposure draft is a change and a reduction to that which is currently contained in the award. It provides for an additional loading of 50 per cent of the minimum hourly rate, where someone is not provided for a meal. We believe it should be an additional loading of 50 per cent on the rate then applying to the employee, or some similar phrase. But I understand the employer groups don't necessarily agree with that.

PN390

THE DEPUTY PRESIDENT: Thank you. Anyone want to respond on behalf of the various employer groups, please?

PN391

MR WALLGREEN: Your Honour, Wallgreen for the Wine Industry Association: we support what's in the exposure draft in 9.4.

PN392

THE DEPUTY PRESIDENT: Yes.

PN393

MR WALLGREEN: I wouldn't want that wording to be changed.

PN394

THE DEPUTY PRESIDENT: Thank you. Anyone else?

PN395

MS BHATT: Deputy President, Ai Group's position is the same. I think the issue here is one of the appropriate rate upon which the 50 per cent loading is to be applied. There is some assertion from at least the AWU initially that that loading should compound that already includes some other penalties or loadings and to that we are opposed.

PN396

THE DEPUTY PRESIDENT: Yes, all right. Thank you, Ms Bhatt. Ms McKinnon?

PN397

MS MCKINNON: Your Honour, I'm not sure that the position is clear in the current award. We certainly don't consider that it's a cumulative loading. It's a separately calculable entitlement. But I don't know that we've achieved a final view on what the loading should be calculated on.

PN398

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN399

MR JACK: Yes, we would be in the same position as the NFF.

PN400

THE DEPUTY PRESIDENT: All right, so do we think we're at the stage where this one will need to be resolved by the Full Bench? That's my question.

PN401

MR CRAWFORD: Yes, that's - - -

PN402

THE DEPUTY PRESIDENT: Sorry.

PN403

MR CRAWFORD: That's the AWU's view, your Honour.

PN404

THE DEPUTY PRESIDENT: All right, I'll note that for the moment, then we'll see how many of those we have at the end of the list. Thank you. The next one I had was - for further discussion - item 49. It's relating to clause 16.2(d).

PN405

MR BLEWETT: Your Honour, it's Blewett from United Voice. This is a very similar point. It's a question of upon what the loading should be applied and it's our view that again, it should be 50 per cent on the rate then applying to the employee or some similar phrase.

PN406

THE DEPUTY PRESIDENT: Thank you.

PN407

MR BLEWETT: Perhaps I should point out, though, sir, that I'm not presently aware how extensive in fact this work is. It's cleaning boilers and flues and I don't know if the employer bodies have a - some better handle on how extensive this is. But, you know, I'm not sure we'd be wanting to make a big issue if it's affecting very few employees.

PN408

MR WALLGREEN: Sorry, I might be able to respond to Mr Blewett on that.

PN409

THE DEPUTY PRESIDENT: Yes.

PN410

MR WALLGREEN: We've consulted with our membership, which includes some of the country's largest wine producers, as well as smaller, boutique wineries. None of our members are currently engaged in this work. According to our members this is work that used to be done when wineries primarily were producing fortified wines and they were distilling their own grape alcohol, which hardly is being done these days. If fortified wine is produced grape alcohol is produced by external providers and provided to the winery. So in their view this allowance is quite redundant, therefore we don't have a strong view on this allowance, because in our view this is hardly payable to anyone in the industry.

PN411

THE DEPUTY PRESIDENT: Thank you, Mr Wallgreen. Any views from the employer groups in Sydney, please?

PN412

MS BHATT: Deputy President, I think it's worth noting - it's Ms Bhatt from Ai Group - that the provision in the exposure draft has been put in issue by the unions. It's they that have concern with the way it's been drafted so it might be appropriate to hear from Mr Crawford or Mr Blewett as to whether they continue to press for a variation to that clause in the exposure draft.

PN413

THE DEPUTY PRESIDENT: Well, I think Mr Blewett has put his position. Mr Crawford?

PN414

MR CRAWFORD: Well, very much so - we press that issue. We think it should be - the loading of 50 per cent should be on whatever rate the employees otherwise receive.

PN415

THE DEPUTY PRESIDENT: Yes. All right. I take it, Ms Bhatt, you oppose?

PN416

MS BHATT: We do.

PN417

THE DEPUTY PRESIDENT: Thank you. Ms McKinnon?

PN418

MS MCKINNON: For us the issue is the same as the last issue. It's unfortunately not clear in the current award so we don't have a definitive view and it's not a matter we feel strongly about.

PN419

THE DEPUTY PRESIDENT: Okay, Mr Jack, your view, please?

PN420

MR JACK: Yes - we would oppose that - our view is the loading should be on the
- - -

PN421

THE DEPUTY PRESIDENT: Sorry, I missed that last bit.

PN422

MR JACK: The loading should be applied on the minimum hourly rate.

PN423

THE DEPUTY PRESIDENT: Thank you. All right, thank you. I'll note that that is similar to the position that's held with respect to item 35, then. Now, the next item I have is item 53 and I note that this one is not agreed as it's considered a substantive change or would constitute a substantive change and it is also the observation that it may be dealt with after the casual and part-time employment Full Bench is finished dealing with its matters. So is there any - have I understood that correctly?

PN424

MR CRAWFORD: Yes, that's the AWU's understanding, your Honour.

PN425

THE DEPUTY PRESIDENT: Thank you.

PN426

MS MCKINNON: Yes, sir.

PN427

THE DEPUTY PRESIDENT: Thank you. I'll take it back - the current position won't change. The position remains as per the summary. Okay, the next one is item 62, which was a matter that was going to be the subject of further discussions. Item 62 relates to clause 24.3(a)(i).

PN428

MR BLEWETT: Your Honour, it's Blewett here from United Voice. This is a relatively similar issue to those two issues that we've already discussed about the relevant rate upon which a loading should be applied. We maintain essentially the same position except that I note that the AIG had indicated it wouldn't oppose using the term, "ordinary time rate", rather than minimum rate of pay, and if that was in fact its position that might be something that we could accommodate.

PN429

THE DEPUTY PRESIDENT: Yes. Ms Bhatt.

PN430

MS BHATT: Deputy President, this is an issue which is evolving by virtue of the fact that this provision also appears in the manufacturing award.

PN431

THE DEPUTY PRESIDENT: Right.

PN432

MS BHATT: There are ongoing discussions between the parties that have an interest in that award and I think that for the moment we would be seeking to have this matter parked, effectively, in this award because I think any resolution would be coloured by the progress of discussions.

PN433

THE DEPUTY PRESIDENT: Right, thank you, Ms Bhatt. Any other comments, please?

PN434

MR JACK: AFEI would support both findings as well until the manufacturing award issue is resolved.

PN435

MS McKINNON: NFF is happy with that approach, your Honour.

PN436

THE DEPUTY PRESIDENT: Thank you. Mr Wallgreen?

PN437

MR WALLGREEN: Yes, we're happy with that too.

PN438

THE DEPUTY PRESIDENT: Thank you. Mr Crawford, I assume your position is similar to United Voice?

PN439

MR CRAWFORD: Correct.

PN440

THE DEPUTY PRESIDENT: Thank you. All right, then, if we could move then to the next one, which is items 71 and 72, which were previously not agreed. Now, I was just - my question on this one - let's deal with 71 first. It may be the same for both. Was it the case out of the recent conference before the President that what was sought was perhaps the table of rates being formulated and circulated for comment?

PN441

MS BHATT: It's our understanding, Deputy President.

PN442

THE DEPUTY PRESIDENT: Yes, all right. Can I take it that that's a position shared by everyone?

PN443

MS McKINNON: Yes, your Honour.

PN444

THE DEPUTY PRESIDENT: Thank you. So we'll await the table of rates and - -
-

PN445

MR BLEWETT: Your Honour - - -

PN446

THE DEPUTY PRESIDENT: Yes?

PN447

MR BLEWETT: I apologise, your Honour. Blewett from United Voice. It appears to me that the latest version of the exposure draft has included the table at B2(iii) on page 57.

PN448

THE DEPUTY PRESIDENT: Right.

PN449

MR BLEWETT: I can indicate that United Voice is happy with that table but I don't know if other parties have had the opportunity to review it.

PN450

THE DEPUTY PRESIDENT: Okay, thank you, Mr Blewett. Well, other parties, is this the case, that you've got to work through that table first?

PN451

MS McKINNON: Yes, your Honour: we'd be happy to report back within a period as to whether we've got any concerns with the table.

PN452

THE DEPUTY PRESIDENT: Thank you, Ms McKinnon. Ms Bhatt?

PN453

MS BHATT: We're content with the same approach, thank you.

PN454

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN455

MR JACK: Yes, we'd also be happy with that.

PN456

THE DEPUTY PRESIDENT: All right, and Mr Wallgreen?

PN457

MR WALLGREEN: Yes, I agree.

PN458

THE DEPUTY PRESIDENT: All right. I'll be guided by the parties: what sort of a timeframe do you think you'd need?

PN459

MS McKINNON: Seven days if all the NFF needs.

PN460

MR WALLGREEN: Yes, yes.

PN461

THE DEPUTY PRESIDENT: All right, I'll note that the parties will report back with comments on table B2(iii) on page 57 of the exposure draft by close of business Monday, 15 August. Thank you. Now, that is 71 and 72. The next one I had was just to comment on this - items 74 and 75. This one I think, Ms McKinnon, going on from the Silviculture award this morning, these two items may form part of that matter before a new Full Bench: is that your understanding?

PN462

MS McKINNON: That's right, your Honour. I think there's a separate proceeding now to review the national training wage schedule and they are proposing to do it once and then apply the same approach across all.

PN463

THE DEPUTY PRESIDENT: Thank you. All right, well, we'll treat that this way at this stage. The last one I had was item 77. This is a question going to there being a consistent definition of wine industry across the various awards that make reference to the wine industry. Is that correct?

PN464

MS McKINNON: That's correct.

PN465

THE DEPUTY PRESIDENT: All right. Now, was there any discussion about how that might be undertaken or was that going to be something done by the award modernisation team first?

PN466

MS McKINNON: I think that's right, yes, to make sure that there wasn't any unintended consequences flowing.

PN467

MR CRAWFORD: I think if it's - - -

PN468

THE DEPUTY PRESIDENT: Yes?

PN469

MR CRAWFORD: - - sorry, your Honour - I mean, I assume that all parties agree that the definition of the wine industry, the wine award will be the primary reference point. But there are other awards that also refer to the wine industry definition or something similar. So it might be more of an issue that arises in other awards, not this one. I think the issue we were initially raising is you don't need to repeat the definition in the schedule and the coverage clause.

PN470

THE DEPUTY PRESIDENT: Yes.

PN471

MR CRAWFORD: That has now been addressed in the latest version of the exposure draft.

PN472

THE DEPUTY PRESIDENT: So the comment you're making, Mr Crawford, is that it may be agreed that wine industry - the definition of wine industry should be as per the wine industry award but there may be implications in other awards from that definition being adopted?

PN473

MR CRAWFORD: I guess the point I'm making is that there may be issues that arise in relation to other awards about how they cross-reference the wine industry or the wine award but I'm not sure that those are matters we have to deal with in relation to this particular award.

PN474

THE DEPUTY PRESIDENT: Yes. All right, Ms McKinnon or Ms Bhatt: are you aware of how many other awards reference or have reference to the wine industry?

PN475

MS McKINNON: Certainly the horticulture award and the pastoral award both do and potentially the (indistinct).

PN476

THE DEPUTY PRESIDENT: I beg your pardon?

PN477

MS McKINNON: Potentially the sugar award as well.

PN478

THE DEPUTY PRESIDENT: Sorry, yes. Okay, we'll have a look at those three awards and any others here at the Commission and see what that uncovers. That is the end of the list that I have. Were there any other items that needed to be addressed, following on from the earlier conferences, the statement of 3 June and then the conferences held on 6 or 7 June?

PN479

MS McKINNON: Your Honour, for the NFF items 15 and 16 - - -

PN480

THE DEPUTY PRESIDENT: Yes.

PN481

MS McKINNON: - - I think we had agreed to some minor change to the provisions defining casual employee that don't seem to have been picked up in the exposure draft - that's 6.5A and B.

PN482

THE DEPUTY PRESIDENT: Right, thank you. I'll just have a look there. Now, I'm looking at - I've got a copy of the exposure draft which was republished on 29 July. 6.5A reads:

PN483

A casual employee is an employee who is engaged and paid by the hour as a casual employee.

PN484

MS McKINNON: That's what we have, yes.

PN485

THE DEPUTY PRESIDENT: Right - is that what was discussed?

PN486

MS McKINNON: I thought we had agreed to take out the words, "by the hour", because casuals can also be (indistinct).

PN487

THE DEPUTY PRESIDENT: Right. Okay. Right. Okay, well, look, I'll make a note of that and - so that was the NFF amendment and the summary at least indicates that there was no opposition from the AWU, AFEI or the AIG. So if that's still the position I'll cross-reference the other documents and suggest that's the position of the parties.

PN488

MS McKINNON: Thank you, your Honour. There is also at the beginning of 6.5B, we have I think agreed to add in the words, "Except in the case of piece workers."

PN489

THE DEPUTY PRESIDENT: So that would be, what - before each ordinary hour of work?

PN490

MS McKINNON: Yes.

PN491

THE DEPUTY PRESIDENT: Yes. Mr Crawford, what was your view on that?

PN492

MR CRAWFORD: Your Honour, I don't see that we'd have a massive problem with either of those changes.

PN493

THE DEPUTY PRESIDENT: Thank you. Mr Blewett, any comment?

PN494

MR BLEWETT: Certainly not with respect to the second of those, sir. I just wanted to - I thought that that which had been set out in the exposure draft was what we agreed last time. If I could have the opportunity to check and perhaps respond within seven days as to whether or not I maintain that position - I'm just a little concerned that the definition becomes circular if it's simply, "A casual employee is an employee who is engaged and paid as a casual employee."

PN495

THE DEPUTY PRESIDENT: Yes, all right. Okay, so I'll note that you'll provide a response on the proposed item 15 change of the NFF.

PN496

MR BLEWETT: Thank you, sir.

PN497

THE DEPUTY PRESIDENT: All right, anything further?

PN498

MS McKINNON: Not from the NFF, your Honour.

PN499

THE DEPUTY PRESIDENT: Thank you. Any other party with any further matters?

PN500

MR WALLGREEN: No.

PN501

THE DEPUTY PRESIDENT: Thank you, Mr Wallgreen. Mr Blewett?

PN502

MR BLEWETT: Not from me, sir, no.

PN503

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN504

MR JACK: No.

PN505

THE DEPUTY PRESIDENT: Thank you. Mr Crawford?

PN506

MR CRAWFORD: No, your Honour.

PN507

THE DEPUTY PRESIDENT: Ms Bhatt? Ms Bhatt, have you any further - - -

PN508

MS BHATT: No, thank you, your Honour.

PN509

THE DEPUTY PRESIDENT: Thank you. All right, thank you everybody. I'll update and do a further report on this matter. It seems to me that of the matters that perhaps there could be further discussion, it might be just item 62 that - but that is pending the manufacturing award position being finalised. Also if the parties will report back on those new tables and United Voice on item 15. I'll issue a statement hopefully very shortly and we'll take it from there. So thank you to everyone for your attendance and assistance today.

SHORT ADJOURNMENT

[1.14 PM]

RESUMED

[2.08 PM]

PN510

THE DEPUTY PRESIDENT: Thank you. Can I just confirm appearances in Sydney please. Mr Jack?

PN511

MR JACK: Yes.

PN512

THE DEPUTY PRESIDENT: Thank you. Mr Crawford?

PN513

MR CRAWFORD: Yes, your Honour.

PN514

THE DEPUTY PRESIDENT: For the AWU, yes. Ms Bhatt, I understand you're for Ai Group and Voice of Horticulture?

PN515

MR BHATT: Yes, Deputy President.

PN516

THE DEPUTY PRESIDENT: Thank you, and Ms McKinnon, you're there with Ms Pearsall for the National Farmers' Federation?

PN517

MS PEARSALL: Yes, sir, Ms McKinnon has just stepped out of the room but she'll join us in a moment, and I'm - Ms Pearsall is here.

PN518

THE DEPUTY PRESIDENT: Thank you, Ms Pearsall. And Mr Jack, you're for the AFEI?

PN519

MR JACK: Yes.

PN520

THE DEPUTY PRESIDENT: Thank you. All right. I thought what we'd do is similar to the wine industry, and that is to work through the summary as it currently stands, having had the hearing on the 6 June before the president, and having regard to any further discussions that have been had between the parties. I've made a note of items that I'll work through in numerical order and if I miss any along the way, please advise. The first one that I have - - -

PN521

MR BHATT: Deputy President - - -

PN522

THE DEPUTY PRESIDENT: Yes?

PN523

MR BHATT: I'm sorry, it's Ms Bhatt for Ai Group. There's one procedural issue that I sought to address you on before we proceed. I wonder if you'd be minded to going off the record just for a brief interval so that I might address you on this one issue, unless there's any objection to that?

PN524

THE DEPUTY PRESIDENT: No. All right, we'll go off the record. We are off the record now.

OFF THE RECORD

[2.11 PM]

ON THE RECORD

[2.13 PM]

PN525

THE DEPUTY PRESIDENT: We're now recording again. So the first item I had was just a question I had around item 9. It was whether it was withdrawn or there were further discussions occurring and I note that it may have also been addressed in the National Farmers' Federation submission on 16 June. So I was just wondering whether we could just confirm the status of it because it's bouncing around a bit.

PN526

So Ms Pearsall, your submission on 16 June, and I'll just – so this is in relation to clause 5, yes.

PN527

MS PEARSALL: Yes. So, yes, I note that in the summary of submissions there is reference to us, the NFF, withdrawing part of that. So we withdrew the first couple of parts of our submission on this clause but what we have here is a proposal for the content of the facility provision table.

PN528

THE DEPUTY PRESIDENT: Yes.

PN529

MS PEARSALL: And we have circulated this to the parties but I don't think that this has been agreed to yet. So it's just to add a couple of facility provisions into the table.

PN530

THE DEPUTY PRESIDENT: Okay. Is that your email of Friday 5 August at 3.47 pm? Is that the one you're referring to?

PN531

MS PEARSALL: No, there's our email of 16 June.

PN532

THE DEPUTY PRESIDENT: Okay.

PN533

MS PEARSALL: This is in about item 9, is that – yes.

PN534

THE DEPUTY PRESIDENT: Yes. Yes, I've got it here. Okay. So it is proposing to add in a couple of additional clauses, is that right?

PN535

MS PEARSALL: Yes, that's correct. So it's clause 15.2(b)(1) and 16.7.

PN536

THE DEPUTY PRESIDENT: I think 16.7 is already there. It might be 17.7, you are also seeking.

PN537

MS PEARSALL: Yes, that's right.

PN538

THE DEPUTY PRESIDENT: Okay. All right, well any comments on that proposal of the NFF please?

PN539

MR CRAWFORD: Your Honour, from the AWU's perspective we just – I'm not sure if a reference to the time off in lieu of overtime provisions should go into the facility of provision table. I'm just not sure that that approach has been adopted across all the other exposure drafts.

PN540

THE DEPUTY PRESIDENT: Yes.

PN541

MR CRAWFORD: But that would be our only point and there might be a need for consistency across the exposure drafts, but we don't have a strong view on this issue, really.

PN542

THE DEPUTY PRESIDENT: Thank you. So 17.7 is not a problem, you've just got a question about 15.2(b)(1).

PN543

MR CRAWFORD: I'm just not sure about 17.7. In my exposure draft clause 17 is personal carers.

PN544

MS PEARSALL: Yes, so that must have changed.

PN545

THE DEPUTY PRESIDENT: 17.7?

PN546

MR CRAWFORD: I thought it was 16.7.

PN547

THE DEPUTY PRESIDENT: Yes, I'm not sure if the – the email of 16 June is 17.7 but 16.7 – yes, all right.

PN548

MS PEARSALL: Yes, I think that my be a mistake.

PN549

THE DEPUTY PRESIDENT: 17.7?

PN550

MS PEARSALL: Yes, looking at it now.

PN551

THE DEPUTY PRESIDENT: Okay.

PN552

MS PEARSALL: Yes, so I think it's just 16.7 which is already in there, which means that the only one we are seeking to add in is 15.2(b)(1).

PN553

THE DEPUTY PRESIDENT: Okay, thank you. All right. Thank you, Mr Crawford, I've noted your comments. Any comment from you, Mr Jack?

PN554

MR JACK: AFEI does not particularly have a strong view but we wouldn't be opposed to inserting 15.2(b)(i) into the table.

PN555

THE DEPUTY PRESIDENT: Thank you. And Ms Bhatt?

PN556

MR BHATT: Ai Group does not oppose the NFF's proposal.

PN557

THE DEPUTY PRESIDENT: Okay, so look the note I might need to make is, subject to a consistent approach across awards in relation to the treatment of time off in lieu of payment for overtime there's no opposition for the inclusion of 15.2(b)(1) to the facilitative provisions. So that's the note I'll make. All right, thank you. The next one I had was just around item 12. There's a note that might be an update to the proceeding on 6 June which in the summary says that this issue has been determined in a recent decision of the Full Bench. So I was just going to satisfy myself on that but if any party has got any comments on that I'd welcome them now.

PN558

MR BHATT: Deputy President, if I may, it's Ms Bhatt from Ai Group. We've reviewed the decision and we're not sure that the decision resolves this particular issue.

PN559

THE DEPUTY PRESIDENT: Yes.

PN560

MR BHATT: I wonder if I can just speak to – briefly to explore why it's controversial. 6.4(b) simply says that a part-time employee is to be paid the ordinary hourly rate in clause 10. We've simply observed that clause 10 doesn't identify the ordinary hourly rate payable. It only prescribes the minimum hourly rate.

PN561

THE DEPUTY PRESIDENT: Yes.

PN562

MR BHATT: And so the reference to the ordinary hourly rate in 6.4(b), we say is confusing given the cross reference.

PN563

THE DEPUTY PRESIDENT: Right.

PN564

MR BHATT: It's on that basis that we've suggested that the words, "minimum hourly rate" should be inserted in 6.4(b) instead.

PN565

THE DEPUTY PRESIDENT: Yes. Yes. So where's the – I see it in 6.4(b). Where's the reference? In 10, is it?

PN566

MR BHATT: 24(?) (e) refers to clause 10. And then when we turn to clause 10.1, it only sets out the minimum hourly rate, not the ordinary hourly rate.

PN567

THE DEPUTY PRESIDENT: But then at the end of 6.4(b) it sort of describes "clause 10 – minimum wages." Does that perhaps clarify it a bit?

PN568

MR BHATT: I don't think it does, Deputy President, because none of the remaining subclauses in clause 10 will deal with all purpose allowances or the ordinary hourly rate.

PN569

THE DEPUTY PRESIDENT: So your proposal is for in 6.4(b), take out the word, "ordinary" and insert, "minimum"?

PN570

MR BHATT: Yes, Deputy President.

PN571

THE DEPUTY PRESIDENT: Yes. Okay. So Mr Crawford, do you have a view on this?

PN572

MR CRAWFORD: Yes. No, we're opposed to any change, your Honour. In the exposure drafts there has been a consistent approach, consistent with the identified Full Bench decision whereby if there are all purpose allowances in the award the term, "ordinary hourly rate" is used and if there aren't any all purpose allowances, the term, "minimum hourly rate" is used, and that is all that is occurring in the exposure draft is the application of that decision. And in terms of inconsistency, in our view all clause 6.4(b) is doing, with the reference to clause 10, is informing people that that's where you find the relevant classification for the employee. So the reference to clause 10 is just where you work out the classification and then you would work out their ordinary hourly rate in accordance with the definition in the award. So we don't see any problem at all with that approach.

PN573

THE DEPUTY PRESIDENT: Right, thank you. Ms McKinnon?

PN574

MS MCKINNON: Your Honour, I see the points that are being made by both the parties. I think either way 6.4(b) needs to be consistent with clause 10. So, you know, clause 10 doesn't deal with ordinary rates of pay, it deals with minimum rates of pay. I mean, the alternative is, of course, to just remove the cross reference but the reason we've originally taken the approach that we have and preferred the use of the word, "minimum", is because that's what's currently in the award and to reduce the opportunity of a disputation we thought we'd retain the status quo.

PN575

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN576

MR JACK: Yes, Deputy President, we don't have a particularly strong view either way but we would not oppose the changes suggested by AIG.

PN577

THE DEPUTY PRESIDENT: Thank you. All right, well, that one seems to still be live so I'll note the views in the summary, I think, of where that stands. Thank

you. The next one perhaps is a related sort of an issue but it's item 13, and references to clauses 6.5(c) and 6.5(c)(1). And I'm noting that there's no agreement reached regarding the insertion of "minimum hourly rate" to replace "ordinary hourly rate." Now the summary notes that that may have been resolved by the same Full Bench decision. I've noted already the Ai Group's questioning of whether that is in fact the case. Are there any additional comments that anyone would like to make in relation to item 13?

PN578

MR CRAWFORD: No, Deputy President.

PN579

MR BHATT: Not from the Ai Group, Deputy President.

PN580

THE DEPUTY PRESIDENT: All right, thank you. The next one is item 14 and the question of casual loading, and the same sort of issue again, I think.

PN581

MR BHATT: I think it might be precisely the same issue.

PN582

THE DEPUTY PRESIDENT: Righto. All right, thank you. I just have a quick question around item 15. Can that one be regarded now as agreed?

PN583

MS McKINNON: No, your Honour, I don't think so. I think that we do have an issue now around casuals and whether they can be shift workers under this award. And accordingly we'd be concerned about a table in the award reflecting that position.

PN584

THE DEPUTY PRESIDENT: Okay. So the NFF position is that you query whether there are casual shift workers working under this award?

PN585

MS McKINNON: Yes.

PN586

THE DEPUTY PRESIDENT: Are there any other views, please?

PN587

MR JACK: AFEI is of the same view as the NFF.

PN588

THE DEPUTY PRESIDENT: Thank you. Yes, Ms Bhatt?

PN589

MR BHATT: I'm not sure if our organisation has a concluded view, your Honour.

PN590

THE DEPUTY PRESIDENT: Okay, thank you. And Mr Crawford?

PN591

MR CRAWFORD: Your Honour, we are very clear that casual employees can be engaged as shift workers under the current award and that should remain the case in the exposure draft, and we press the point that a rates table for casual shift workers should be included which would have the standard shift work rates plus the 25 per cent casual loading.

PN592

THE DEPUTY PRESIDENT: Yes, thank you. All right, thank you. I'll note those comments. The next one I have is item 19 and there was some mixed views around the proposed wording of the AWU. So I'm just noting the previously held positions of the AFEI and NFF was to oppose the AWU proposal. The AiG was not to oppose and the parties previously there, a Voice of Horticulture had objected, ABI New South Wales and Business SA had also disagreed, so the transcript maybe will indicate something different, I don't know.

PN593

MS McKINNON: I think NFF had a look at this this morning and we are happy to no longer oppose the addition of the words "or outside". I think that's reflected in the transcript.

PN594

THE DEPUTY PRESIDENT: Okay. Well, I think you said, my understanding of where we've reached was, we'd retain the current wording.

PN595

MS McKINNON: That was our initial understanding.

PN596

THE DEPUTY PRESIDENT: But this morning might have changed. Okay.

PN597

MS McKINNON: So anyway, the NFF is happy to accept those additional words.

PN598

THE DEPUTY PRESIDENT: Okay. Of the AWU?

PN599

MS McKINNON: Yes. So that it would read:

PN600

All the time worked by full-time and part-time employees in excess or outside of the ordinary hours will be deemed overtime.

PN601

THE DEPUTY PRESIDENT: So, yes, the sentence would end after "overtime"?

PN602

MS McKINNON: Yes. That's right.

PN603

THE DEPUTY PRESIDENT: Yes. Yes. All right. Well, of the other parties present Mr Jack?

PN604

MR JACK: Yes, Deputy President, our preference would be to retain the wording that's in the revised exposure draft, but we wouldn't oppose the change suggested by the AWU.

PN605

THE DEPUTY PRESIDENT: Yes. Thank you. And, Ms Bhatt, is this one of these ones you'll need to get some clarification?

PN606

MS BHATT: No, Deputy President, I can indicate that Ai Group doesn't oppose the AWU's proposal.

PN607

THE DEPUTY PRESIDENT: All right. And what about Voice of Horticulture?

PN608

MS BHATT: I don't have instructions from Voice of Horticulture on this specific issue.

PN609

THE DEPUTY PRESIDENT: Do you want to get some?

PN610

MS BHATT: May I have a period of seven days?

PN611

THE DEPUTY PRESIDENT: Yes. Close of business on the 15th.

PN612

MS BHATT: If the Commission pleases.

PN613

THE DEPUTY PRESIDENT: All right. The next one was items 23 to 25 inclusive. And I'm just wondering whether there's any movement. So if we look at 23 first. So meal breaks 9.1(c). The submission put by the AiG was that ordinary hourly rate was a substantive change and should instead read "minimum hourly rate". And that was adopted by Business SA and Voice of Horticulture. The NFF had a comment on that. Has that position changed, Ms McKinnon?

PN614

MS MCKINNON: It's the same as with all of these issues around, you know, whether you would use the ordinary rate or the minimum rate reference. The current award deals with minimum rate, and our preference is to avoid the dispute by retaining the status quo, because otherwise it is an increase.

PN615

THE DEPUTY PRESIDENT: Thank you. All right. Now, Mr Crawford, I suspect you support what is in the exposure draft?

PN616

MR CRAWFORD: Yes. Yes, we do, your Honour.

PN617

THE DEPUTY PRESIDENT: Yes.

PN618

MR CRAWFORD: And we don't agree that there is any substantive change with that reference.

PN619

THE DEPUTY PRESIDENT: Yes.

PN620

MR CRAWFORD: Yes, the current award, at clause 23.1(b) refers to 200 per cent of the appropriate minimum wage, and we would say that term would include any all-purpose allowances anyway.

PN621

THE DEPUTY PRESIDENT: Yes. All right. I'll note that. Okay, item 24 deals with clause 9.2. It was to respond to a Fair Work Commission query whether employees working afternoon or a night shift are entitled to a paid rest break. Now, that was noted as not being agreed between the parties. Could I get an update on everybody's views, please, on item 24?

PN622

MS McKINNON: NFF's view was that we were comfortable to amend it from "each morning" to "each shift", I think, was the proposed wording, or day, but we're happy for it not to be limited just to the morning break.

PN623

THE DEPUTY PRESIDENT: Thank you.

PN624

MS BHATT: Deputy President, my instructions are that Ai Group's position remains as is summarised in this document, that the entitlement to the break arises only during the morning, and that an employee working an afternoon/night shift will not be entitled to the break.

PN625

THE DEPUTY PRESIDENT: Okay. So you're morning only. Yes?

PN626

MR JACK: AFEI is still of the same view as the NFF. We would not oppose a change.

PN627

THE DEPUTY PRESIDENT: Thank you. And, Mr Crawford?

PN628

MR CRAWFORD: Yes, the AWU's view remains that the reference should be amended to each day or shift, and that would appropriately capture all the situations.

PN629

THE DEPUTY PRESIDENT: Thank you. All right. Let's move then to item 25 which is 9.3(a). This, correct me if I'm wrong, may be that issue of whether there just needs to be a nine hour break between two periods of work; is that right?

PN630

MR CRAWFORD: Well, in 10 hours, yes, your Honour.

PN631

THE DEPUTY PRESIDENT: Yes, sorry, 10 hour break. Now, the only objection I can see from last time was – well, the view of the Ai Group was that they were unaware of any practical problems arising from the current wording. AWU proposal should not be made. Is there any update on that position, to your knowledge, Ms Bhatt?

PN632

MS BHATT: Deputy President, the position remains as is.

PN633

THE DEPUTY PRESIDENT: All right. Thank you. So the question really is whether or not, or more particularly with 24 and 25, whether we can regard the position now as one that has to be determined by the Full Bench. It would seem that that may be so, unless anyone is going to suggest that there might be room for the parties to negotiate an agreed position.

PN634

MR CRAWFORD: Yes. It doesn't really seem so, your Honour. If AiG are not prepared to agree, it appears there would have to be a decision.

PN635

THE DEPUTY PRESIDENT: Okay. Thank you. All right. Now, we'll move to item 27. That's the next one on mine, and this is one that the NFF has circulated a proposal. I was notified of this on Friday by an email at 3.47 pm, but the advice in that email was that the proposal has been circulated amongst the parties. So perhaps Ms McKinnon, you could indicate whether there's been any feedback from the parties to your proposal?

PN636

MS MCKINNON: Not from outside our membership, your Honour. So we've consulted within our membership and there's a level of comfort, and the idea is that the definition would be workable in situations where you don't record hours of work because it's a piece work arrangement. But we haven't had feedback from the other parties involved in these proceedings.

PN637

THE DEPUTY PRESIDENT: Right. All right. Well, from the other parties, is anyone in a position to give feedback now or is it still under consideration?

PN638

MR CRAWFORD: Your Honour, the AWU is opposed to the NFF's proposal. Effectively it uses the definition from the Fair Work Regulations for base rate of pay as the definition of full rate of pay and then adopts a lower entitlement for base rate of pay in the award, so we don't see that whatever goes in the award should be lower than the safety net for award and agreement free workers.

PN639

THE DEPUTY PRESIDENT: All right. Thank you. All right. Any other feedback at this stage?

PN640

MR JACK: AFEI is still in the process of consulting with our members.

PN641

MS BHATT: As is Ai Group.

PN642

THE DEPUTY PRESIDENT: Thank you. All right. Well, what timeframe do you think those consultations would be completed within?

PN643

MS BHATT: We'd seek a period of at least two weeks, Deputy President.

PN644

THE DEPUTY PRESIDENT: All right. And, Mr Jack?

PN645

MR JACK: Yes, I think we could agree with that.

PN646

THE DEPUTY PRESIDENT: All right. Well, if you could both notify the Commission by close of business on Monday, 22 August, please.

PN647

MS BHATT: If the Commission pleases.

PN648

THE DEPUTY PRESIDENT: And you might also advise the AWU and the NFF too.

PN649

MS BHATT: Of course.

PN650

THE DEPUTY PRESIDENT: All right. I have then a question around item 36. There seems to be perhaps a bigger deletion agreed to than what was recorded in the summary. So this is to clause 14.1(h). I just wanted to confirm everybody's understanding that there is agreement that 14.1(h) of the exposure draft read:

PN651

All time worked in excess of the ordinary hours will be deemed overtime.

PN652

Is that the agreed position?

PN653

MS BHATT: That's Ai Group's understanding.

PN654

THE DEPUTY PRESIDENT: Thank you.

PN655

MS McKINNON: Yes, that NNF's understanding, it reflects the current board.

PN656

MR JACK: Yes, AEFI too.

PN657

THE DEPUTY PRESIDENT: Mr Crawford, have you got a view on this?

PN658

MR CRAWFORD: Yes, that's agreed, your Honour.

PN659

THE DEPUTY PRESIDENT: Thank you. I'll update the summary to reflect that, or provide that feedback for the position of the parties.

PN660

All right, now, the next note I had was item 38 which had previously had been - I think the position had been that this was not agreed. Was it the understanding of the parties that this issue might be one resolved by the casual and part time Full Bench?

PN661

MS McKINNON: Yes.

PN662

THE DEPUTY PRESIDENT: Thank you. Any other comments on that please?

PN663

MR CRAWFORD: The AWU agrees. I think it's fair to say, it will certainly be impacted upon by whatever decision comes from the casual Full Bench. So it would probably be premature to finalise the wording at this stage.

PN664

THE DEPUTY PRESIDENT: Thank you. Ms Bhatt?

PN665

MS BHATT: We agree with that.

PN666

THE DEPUTY PRESIDENT: And Mr Jack?

PN667

MR JACK: The AFEI agrees as well.

PN668

THE DEPUTY PRESIDENT: Thank you. The next one I have is item 45 and it seems to me that this is the same sort of argument that's been had with some other items around the wording 'ordinary hourly rate' or 'minimum hourly rate'. That seems to be one that will require determination. Is that sort of a shared view?

PN669

MS BHATT: I think that's right, Deputy President. Can I just identify this though, when we appeared before Justice Ross on 6 June in respect of all group 3 awards, including the Horticultural Award, we were directed by the President to identify all awards in respect of which this issue arises.

PN670

THE DEPUTY PRESIDENT: Yes.

PN671

MS BHATT: Ai Group will be filing a submission in compliance with that direction, we anticipate within the next fortnight. I just wanted to note that this is an issue that appears to rise across the board, from my perspective.

PN672

THE DEPUTY PRESIDENT: Thank you. All right, thank you.

PN673

Item 47, so what's the position with this one now? Casual adult employees in schedule B.3?

PN674

MS McKINNON: The position from the NFF's perspective is that the matter is not agreed. When we had discussions about it in previous conferences, we hadn't fully understood the effect of putting in a clarification to the effect that casuals have shift work loadings and when we looked back at the award, what became apparent was that the shift work provisions don't apply to casual employees and that's important, because if you change the award to create a category of shift worker who is a casual, then by default, what you do is, you deliver overtime entitlements to casual employees, where there have not been any before.

PN675

So, that's a live issue in this award. In the casual and part time common issue proceedings and we don't agree to any changes that would deliver overtime for casuals to an alternative mechanism.

PN676

THE DEPUTY PRESIDENT: Thank you, I understand. Is there any other view on item 47 please?

PN677

MR CRAWFORD: Your Honour, it looks like the parties are now in dispute about whether casuals can receive overtime rates and that's being dealt with by the

casuals Full Bench. There's dispute about whether casuals can receive shift work rates and that will have to be dealt with somewhere else, because the casual Full Bench isn't, as I understand it, dealing with it. Then there's that additional issue about whether the rates tables have a percentage of the ordinary hourly rate or the minimum hourly rate. We say it should just remain ordinary hourly rate and that sounds like it's an ongoing broader issue that the AiG will put in a submission about shortly.

PN678

THE DEPUTY PRESIDENT: Thank you. Has Ms Bhatt any comments?

PN679

MS BHATT: Nothing in addition to what's already been put to you Deputy President.

PN680

THE DEPUTY PRESIDENT: Thank you. Mr Jack?

PN681

MR JACK: No, Deputy President.

PN682

THE DEPUTY PRESIDENT: Thank you. All right, the next one I had was item 48. Now the only note I had here was that perhaps there was a response from the Ai Group pending on the NFF's position. Is there anything you could advise on that today Ms Bhatt?

PN683

MS McKINNON: Perhaps I could just interrupt, your Honour.

PN684

THE DEPUTY PRESIDENT: Yes.

PN685

MS McKINNON: I think this issue, item 48 and 49 now will be considered by a separate Full Bench dealing with updated the National Training Wage Schedules. So events have overtaken us in relation to this issue.

PN686

THE DEPUTY PRESIDENT: All right, well that was my note for 49, so I'll just not the same for 48. Thank you.

PN687

The next one I had was items 53 and 54. Now this is going to the definitions of one industry across a number of awards. Now the note in the summary is that the Ai Group was considering its position regarding change. In fact items 53 and 54 seem to have been merged now.

PN688

Is there any update from the Ai Group, or is this one you'll need to take instructions on, Ms Bhatt?

PN689

MS BHATT: The latter Deputy President. I don't have instructions today on this.

PN690

THE DEPUTY PRESIDENT: All right, is that something you could advise on by close of business on the 15th?

PN691

MS BHATT: We'll endeavour to do so.

PN692

THE DEPUTY PRESIDENT: Thank you. All right, now, with item 56, which relates to schedule B, there's a note that the parties were going to have further discussion regarding the definition of horticultural crops. Has that happened?

PN693

MS McKINNON: Your Honour, I don't know that we've had further discussions except to the extent that there is a claim or a foreshadowed claim in the award stage of the Horticultural Award to deal with the coverage clause in the Horticultural Award. That claim - there are no directions at this stage to articulate that claim, but I think that that's coming up soon. So assuming there remains to be an award stage for the Horticultural Award, it will be dealt with in that process.

PN694

THE DEPUTY PRESIDENT: Thank you. All right, now - - -

PN695

MR CRAWFORD: Sorry, your Honour, could I just comment on that?

PN696

THE DEPUTY PRESIDENT: Yes.

PN697

MR CRAWFORD: Our understanding is there are at least two distinct issues in terms of coverage. One is a substantive claim to vary the coverage of the Horticultural Award that I understand some employer groups are pursuing. Then there is a second sort of separate issue about the interaction between the Pastoral Award and the Horticultural Award, particularly arising from recent changes that were made to the Pastoral Award.

PN698

So I just wanted to highlight those are two sort of distinct issues and that it would be a lot more - probably be a lot better prospects of maybe reaching an agreed position on the second issue of the interaction between the Pastoral and the Horticultural Awards.

PN699

THE DEPUTY PRESIDENT: Yes. That's the impression you get from your description of the two matters. All right.

PN700

The last ones were item 57, I seem to recall was just having one definition of horticultural industry in the Horticultural Award, i.e. not in the schedule and earlier in the award. I think that's the position. Was it agreed that it would be at the front end of the award in clauses 3.2 and 3.3?

PN701

MS McKINNON: I think that's right. I think my understanding is all definitions schedules have been abandoned and then definitions now appear in the body of the award.

PN702

THE DEPUTY PRESIDENT: Yes, all right, thank you. Then the last one, just a confirmation that item 58 is with the plain language Full Bench.

PN703

MS McKINNON: Yes, and it's that same comment around dealing with it in the body of the award.

PN704

THE DEPUTY PRESIDENT: Yes. All right, that was the list I had. Is there any other matters that the parties want to raise at this point?

PN705

MS McKINNON: Your Honour, for the NFF, I think item 21.

PN706

THE DEPUTY PRESIDENT: Item 21.

PN707

MS McKINNON: 9.1(a).

PN708

THE DEPUTY PRESIDENT: Yes.

PN709

MS McKINNON: There's just a drafting issue I think. We've now got a duplication of words. So in 9.1(a) we have two sentences and then 9.1(b) is the same as the second half of 9.1(a). I think we had agreed to delete (b) perhaps and just have it all in (a).

PN710

THE DEPUTY PRESIDENT: Right. Any other comments on that?

PN711

MR CRAWFORD: We're not opposed to deleting one of the references, and we don't really care whether it's the second sentence in (a) or otherwise (b).

PN712

THE DEPUTY PRESIDENT: Thank you. We'll just make a note to avoid the duplication there. Any other items?

PN713

MS McKINNON: Not for NFF thank you.

PN714

THE DEPUTY PRESIDENT: Thank you, Ms McKinnon. Any other comments please?

PN715

MR JACK: No, Deputy President.

PN716

MR CRAWFORD: No.

PN717

MS BHATT: No, Deputy President.

PN718

THE DEPUTY PRESIDENT: All right, so thank you. So there are a couple of matters for report back from the Ai Group by close of business next week and then a further report back on item 27 from Ai Group and AFEI by close of business of 27 August. We will update a further report arising out of this conference shortly. But perhaps we'll wait at least until the 15th before doing so, to get that further feedback in.

PN719

All right, if there are no further matters, I'll adjourn the matter.

ADJOURNED INDEFINITELY

[3.00 PM]