



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER HUNT**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2016/15)  
Plain Language re-drafting**

**Sydney**

**10.17 AM, WEDNESDAY, 23 NOVEMBER 2016**

PN1

THE COMMISSIONER: Good morning. I will take the appearances in Sydney first, thank you. You can remain seated, we're in conference.

PN2

MR M NGUYEN: Commissioner, Nguyen, initial M. I appear for the Australian Manufacturing Workers Union.

PN3

THE COMMISSIONER: Thanks, Mr Nguyen.

PN4

MR B FERGUSON: If the Commission pleases, Ferguson, initial B, for the Australian Industry Group. With me in the room is Ms Mandell, initial J, and Ms Barton, initial J.

PN5

THE COMMISSIONER: Thank you.

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MS S MCKINNON: May it please the Commission, McKinnon, initial S, for the National Farmers Federation and with me Ms Pearsall, initial K.

PN7

THE COMMISSIONER: Thank you.

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MS M ADLER: If it pleases Adler, initial M, for the Housing Industry Association.

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THE COMMISSIONER: Thanks, Ms Adler.

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MS K THOMSON: If it pleases the Commission, Thomson, initial K, seeking permission to appear on behalf of ABI New South Wales Business Chamber.

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THE COMMISSIONER: Thank you. That's all in Sydney. We'll go to Melbourne then, thank you.

PN12

MS K BIDDLESTONE: Biddlestone, initial K, appearing on behalf of the SDA.

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THE COMMISSIONER: Thanks, Ms Biddlestone.

PN14

MS L SVENDSEN: Svendsen, initial L, appearing on behalf of Health Services Union.

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MR J FLEMING: May it please the Commission, Fleming, initial J, on behalf of the ACTU.

PN16

MS R LIEBHABER: Liebhaber, initial R, appearing on behalf of the Health Services Union.

PN17

MR J COONEY: Justin Cooney, for the Australian Services Union.

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THE COMMISSIONER: Right, thank you, that's Melbourne. We'll go to Brisbane now, thank you.

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MS J MINCHINTON: Good morning, Commissioner, Minchinton, initial J, appearing on behalf of the Australian Hotels Association, and with me is (indistinct).

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THE COMMISSIONER: Thank you. Canberra?

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MS Z BLANDFORT: Blandfort, initial Z, (indistinct) The Pharmacy Guild.

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THE COMMISSIONER: Thank you. Then Adelaide?

PN23

MS K VAN GORP: Van Gorp, initial K, and with me Klepper, initial C, for Business SA.

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THE COMMISSIONER: Thank you. Ms Thomson, there's no issue with leave. Look, the matter is being recorded. I think that's for the benefit of all those parties who can't be here today and also for the (indistinct) team who have quite an interest in this matter.

PN25

So as far as I understand, given that there are quite a few matters dealing with the plain English issue, I think we're here today to look at the draft guidelines and to also look at the proposed draft standard clauses and as far as I understand we're limited to that, we're not going to be discussing the proposed draft pharmacy. Is that agreed between the parties or understood?

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SPEAKER: Yes.

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SPEAKER: Yes.

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THE COMMISSIONER: Yes, excellent.

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SPEAKER: Yes.

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MS SVENDSEN: Can I just interrupt slightly. It's Leigh Svendsen from the HSU. We understand we're not discussing the Pharmacy Industry Award, however we will tend to refer to our experiences in that award and I hope that's taken amiss.

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THE COMMISSIONER: That's fine there, thanks, Ms Svendsen, but you've seen the direction there from the President that the matter is before the Full Bench in December, so of course there'll be some things that overlap but we won't deal with the clauses that crop up.

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MS SVENDSEN: Thank you.

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THE COMMISSIONER: Well, then it appears to me that the draft guidelines might be the easiest document to tackle. I understand that the summarised positions have been put, they're available on the relevant page on the Commission's website. Does everybody have that before them?

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SPEAKER: Yes, Commissioner.

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THE COMMISSIONER: Yes, right. Well, it only goes to about five pages, so we might have you there Ms Biddlestone speak to that first, given that I think the SDA has put the most submissions on with respect to the draft guidelines. But can I say from the outset though that it's been made clear what the guidelines are intended to do. They are, and I'll just for the benefit of the parties, the statement issued on 15 July by Ross J at paragraph 37 says that:

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*The guidelines will be a reference for further plain language re-drafting untaken as part of the review. The guidelines will be expanded and refined as more awards and provisions are redrafted and feedback is received from a broader range of award users and interested persons.*

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So it's my understanding that the guidelines will eventually be made. The input of course of all the parties is sought but they will be made at some point in the near future. They will not have the effect of an award but they are there to assist all of the parties including the Full Bench in determining what plain language clauses will look like. So we might hear from you first there Ms Biddlestone.

PN38

MS BIDDLESTON: Thank you, Commissioner. You will note from paragraph 3 from our submission that we haven't made submissions in relation to the guidelines themselves because on their face we don't believe that there's any controversy about the guidelines that have been established. The submissions that we've made really go more to how the guidelines are actually applied and the fact that the guidelines won't necessarily be a one size

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fits all approach (indistinct). Our comments have come from the experience that we've had in the (indistinct) guidelines to the Pharmacy Industry Award. So we're coming at this from the point of view of seeing how (indistinct) have been applied to awards, and also the process that has been undertaken to work through the issues that the interested parties to the award have provided. So our submission isn't just in relation to the guidelines themselves but how they're applied and the process is undertaken in the drafting of the award.

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So we through our experience have just had some issues. I think it's been a much different process to the exposure draft which other awards have gone through in that because the plain language drafting process has involved an external third party, our ability to I suppose inform or put our point of view in terms of how we viewed the plain language draft has been different, and the approach taken by the drafter is an external party has also been different. So that sort of explains a little bit about the concerns that we have in relation to the plain language drafting process. That's particularly in relation to that we've seen a change to the legal effect within the Pharmacy Industry Award and also the issues we've identified in the standalone clauses has been then re-drafted as well.

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THE COMMISSIONER: I think there's some commonality between a number of the parties that there is concern that the guidelines may not give enough emphasis on the fact that the guidelines should not change the legal effect. Some parties have put a proposal that it should perhaps be a standalone clause within the guideline. Is that your view there, Ms Svendsen?

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MS BIDDLESTONE: I think - sorry, it's Ms Biddlestone from SDA.

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THE COMMISSIONER: Sorry, Ms Biddlestone, sorry.

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MS BIDDLESTONE: That's okay. I think that will be useful. I suppose the only concern with that is that the guidelines aren't an enforceable document, as far as I'm aware. So while it would be good if it actually spells it out within the guidelines themselves, that may not necessarily resolve the issue. The other point I might just mention too is that the plain language process for the Pharmacy Industry Award has involved a great deal of cooperation and consultation between the parties who had an interest in that award, and we on the direction of President Ross have spent a lot of time in coming to agreement about the changed legal

effect in the award, and also working on an alternative which resolves those issues in terms of wording. So one issue that we would have is the process going forward on how consent positions may be viewed in the plain language drafting process because that has been different because of the use of the external party to the process that's been undertaken in relation to consent positions within the exposure drafts.

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THE COMMISSIONER: Well, not everybody here has been party I expect to the pharmacy conferences that have been convened by the President but I've had the benefit of reading the transcript and I think he's been quite clear that whilst he encourages consent positions on the re-drafting for plain language. Ultimately it's going to be a matter for the Full Bench. So it is encouraged and relevant weight will be given to that but he hasn't determined that that would be accepted.

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He's certainly not in a position to as a - in a conference and as a single member when the matter is before a three person Full Bench. So I think that that is clear for all the parties that we do encourage the parties to put a consensus position as much as is possible but ultimately it will be determined by the Bench after a hearing. So is that your understanding there, Ms Biddlestone?

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MS SVENDSEN: Commissioner, it's Leigh Svendsen.

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THE COMMISSIONER: Sorry.

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MS SVENDSEN: Sorry, we've just switched over now, it's my fault, my apologies. Yes, it is. The problem for us is this; it's been an incredibly different process to the exposure draft so all of us are familiar with what's happened with their drafting process, where the parties have provided submissions to the Bench and a revised exposure draft has come out. There may or may not be another round of submissions and then the matter's been decided. However there's been an additional layer in the plain language, even where - and I would say that most people I think, but certainly the people that I know who would agree that third parties have agreed on a re-drafting clause without changing legal effect in the exposure draft. That's generally been accepted by the Bench.

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What's actually happened in the plain language process is that following an acceptance that the legal effects changed and the proposed wording's been put up, it's then been sent to another party who has decided that they like the language of their previous clause because that was what they wrote, and seem to have ignored that the parties have all agreed that the legal effect has changed. I mean that in the context of sometimes quite simple wording, in terms of the removal of the word "only" can actually have quite an effect on the meaning of the clause.

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While we have not had any difficulty in consulting in detail in relation to this award, that's not necessarily going to be the case when we're talking about standard clauses that (indistinct) for 122 modern awards and have an impact that is more broad. We therefore think that there needs to be a very clear process about how that kind of interacts and we've not got one. Well, we actually don't - we actually aren't clear about what's happening in relation to that stuff. There's a third party that's been involved in the drafting process, not the Commission, and we don't know why those decisions are being made in terms of what's then put back. So it's all - the legal effect is not taking precedence and at the end of the day that's a significant concern for all of us.

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THE COMMISSIONER: Well, you say that, Ms Svendsen, in subsequent drafts that are then issued by the Commission. Ultimately, you won't know whether that's the case until the matter is determined at hearing but I hear what you say. You say that even when consent positions are put that when it's re-issued then you say you haven't been listened to. Is that your position?

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MS SVENDSEN: I'm saying that definitively and I think the PGA would agree.

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THE COMMISSIONER: Well, do you propose - I mean it's very clear in the last statement what the direction was, that where you say the legal effect has been changed you should say so. Have you covered that off sufficiently in your latest submissions in those areas, both with the pharmacy and also with the standard clauses?

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MS SVENDSEN: I think we have, Commissioner, and in fact the last sort of detailed - the next but last set of detailed one, I think the sixth iteration of the Pharmacy Industry Award and we now have a seventh, were joint submissions and they dealt with how the legal effect had been changed in detail, and that - and nothing's happened in relation to those issues in the seventh iteration of the Pharmacy Industry Award.

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THE COMMISSIONER: So when you say they were joint submissions, joint submissions of whom?

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MS SVENDSEN: The three unions involved and the Pharmacy Guild - Business SA, sorry.

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MS THOMSON: And ABI as well. So it was all of them.

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THE COMMISSIONER: So a number of unions and employers.

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MS THOMSON: That's correct, Commissioner.

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THE COMMISSIONER: Right. So when was that?

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MS SVENDSEN: That submission was filed on 18 October.

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THE COMMISSIONER: Has there been a draft - a revised draft from the Commission subsequent to that?

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MS SVENDSEN: Yes, there has. Yes, on the - I think 9 November, and submissions in relation to that were filed by the parties on Monday just gone.

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THE COMMISSIONER: Yes, and then that is then set for 15 December for hearing.

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MS SVENDSEN: That's correct.

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THE COMMISSIONER: So at that hearing you'll be able to all speak to those concerns that you have, which are common, and you'll be able to tell the Full Bench of which I'm a member and say that you haven't been listened to, and that preference should be given to your consent clauses and we shouldn't have regard to what's been put by the outside expert. Is that what you will eventually say to us?

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MS SVENDSEN: That's correct, Commissioner. I suppose that the issues that we're raising today go to more the process that might be established in relation to the standard clauses and the common clauses which will come later. What we are trying to do is avoid the same issues that we've had throughout the Pharmacy Industry Award, so that it's a more efficient process for the parties to be able to work through.

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THE COMMISSIONER: Yes.

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MS SVENDSEN: So that's why we're highlighting issues, not because we're seeking a change to the process that's happened within the Pharmacy Industry Award but so that there can be some lessons learnt in the experience that we've had with the Pharmacy Industry Award.

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THE COMMISSIONER: Thank you. I understand your concerns there. It's not clear where we go to from today after this conference on the guidelines and the draft standard clauses. I imagine that we'll - the Bench will convene and discuss



what you've put today but there is nothing set as far as I'm aware in terms of next steps. I might just hear from anybody else who wishes to speak to that point and otherwise we'll then move onto getting into the nitty gritty of the guidelines. Is there anyone else who wishes to speak? Yes.

PN72

MS THOMSON: If I may, Commissioner. I'd just like to reiterate what Ms Svendsen and Ms Biddlestone said in that really the Pharmacy Industry Award proceedings have only proceeded as they have cooperatively and collaboratively because of the cooperation and the good working relationships of the parties. I think we would all share the concern that that's probably not likely to occur in terms of the standard clauses which have, you know, a far broader range of parties with, you know, very different views and very different approaches to dealing with these matters. So I just wanted to indicate that we do share that concern as well. I just don't really know how it's going to work if you didn't have a group of parties that were able to work in the way that we have in relation to award.

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THE COMMISSIONER: So you have a larger number of parties who are going to cover a more broad range of issues, is that what you're saying?

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MS THOMSON: Yes, and probably don't - you know, there was a certain intimacy in those proceedings as well, so there's only a limited number of parties which allows for a - you know, an easier time of things. But then there's also I think the possibility or the likelihood that when you've got a far broader range of interests as well, that the conflict which might result is going to make the process fairly unworkable if it's going to proceed in the way that we did in the Pharmacy Award.

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THE COMMISSIONER: Right. Well, in the Pharmacy Award can - the parties are saying are they that they've met - well, sorry, the statement issued on 17 August by the Bench at paragraph 4, says that it's very clear that you need to in your submissions state the legal effect of the clause, the legal effect of the clause in the plain language re-draft and how if there was a change to the legal effect, how they would differ. Have the parties met that obligation in relation to the standard clauses? In recent submissions? Yes?

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MR FERGUSON: Yes.

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MS THOMSON: Yes.

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THE COMMISSIONER: Right.

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MS SVENDSEN: Yes.

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THE COMMISSIONER: But in relation to the standard clauses, you haven't reached that intimacy of combined, everybody's still putting their own submissions at this point in time. But perhaps if you - you've all put reply, well some of you have put reply on. Are the parties at a stage where they might be able to between themselves come to some understanding?

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MR FERGUSON: That may be so, we've all had - - -

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THE COMMISSIONER: You've got to speak up there.

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MR FERGUSON: That may be so, we've all had the benefit of each other's submissions and perhaps through this process we can narrow the differences. In any event, I don't know how far we'll get just in one instance. It may be that there's a bit of a process that needs to unfold but I suppose we'll see how we go today.

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THE COMMISSIONER: Yes, so if there's dissatisfaction as to what is occurring with what's being put collectively for the pharmacy, if you have concerns that that will arise again out of the standard clauses, do you see some benefit in putting a collective as much as possible submission to the Commission that would defeat some of what is being put by the expert?

PN85

MR FERGUSON: It seems that we're already there to a degree. I think we suggested this process of exchange of submissions and from a cursory glance, or reasonably detailed glance at the summary, it seems that there are some obvious trends of a level of agreement arising. So it may be that this process itself can identify clauses that are not - or common concerns that, you know, then presumably the Bench will have regard to the weight of the consensus in deciding what course of action it takes.

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Now I might say this, the Ai Group has been generally supportive of the principles in the sense that we think it's a document that is of some assistance to the parties. But we've advanced that position on the view that we understand those guidelines to be intended to be of assistance to the Commission but particularly the Commission staff that are doing this drafting process, not that they're necessarily elevated to the level of holy writ where there is no capacity for the Full Bench to depart from them if a salient issue is identified.

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So what we had envisaged is that through this process of submissions and any ultimate hearing that is undertaken it will be open to the parties to argue that a particular approach be taken in the award, which may be subtly different from what the guidelines say. We've emphasised in our submissions some points about caution departing from test case standards and so forth. The only reason I raise

those issues is we hadn't envisaged that these guidelines would elevate to the point they were absolutely binding on the Commission, certainly not on the Full Bench itself. That's what we thought would be the benefit of this process going forward.

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THE COMMISSIONER: Well, as far as I understand they are just guidelines.

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MR FERGUSON: Yes.

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THE COMMISSIONER: It's been made clear and are the parties looking for something to be inserted in the guidelines that says something to that effect?

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MR FERGUSON: I think that would be of assistance but also we've in particular, and I think other parties have raised this, emphasised the concern about making it clear in the guidelines that there isn't a change in legal effect that is to flow from this process. I think everyone, all meeting parties have raised that issue. If that was made clear I think there'd be a lot less nerves about some of the re-drafting and also it would enable to us to tackle it in a more productive way, because we would be certain about whether we had to engage with the merits of the change based on the substantive effect, or just from looking at it from a drafting perspective. So I think we - - -

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THE COMMISSIONER: Well, it does say so in 1.4 but I take it from the parties' submissions that 1.4 isn't satisfactory to many parties. Is it that the parties want to standalone clause that - - -

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MS SVENDSEN: Great idea.

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MR FERGUSON: I think the word "aim" might give rise to some nerves. It's good to have intention but if we had certainty that this wasn't going to - and if there was to be a legal effect, a change to legal effect, that there be another process set up to enable parties to address the Commission on that.

PN95

THE COMMISSIONER: Well, there is isn't there, in that the hearings will be - I mean the Full Bench is not going to just publish ultimate awards. It's going to, as you can see in the pharmacy matter, seek submissions, hold conferences and then ultimately decide. But the drafts that have been prepared by the Commission are a starting point. You say that - well, I've heard Ms Svendsen you say that when even common submissions are put there, they may not be ignored but they may not then be included in the subsequent re-draft. So there is - if it is put that there is a change to the legal effect in what is put as the latest draft by the Commission, that's something that can be determined at hearing but is it that you don't want it to be left to the hearing for those matters to be addressed by the Commission?

PN96

MR FERGUSON: I think if we knew that this process was - and a hearing directed at resolving differences between the parties or concerns the Full Bench may have about drafting that would be fine, but we wouldn't want that process to also involve a consideration of whether there should be a substantive - a change made that would have a substantive legal effect. We would prefer this process to be confined to a re-drafting exercise if you will, because obviously if there was going to be a change that might have a substantive legal effect, then there might be a need for a proper case to be run; evidence and so forth, and that would be a much bigger task. So I thought that, and I think the guidelines are clear that the aim of this process is a re-drafting exercise, and we think that can be done through the hearing, Commissioner, that you've envisaged. If there was just a little bit more certainty around that, I'm sure everyone could be very productive.

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THE COMMISSIONER: Well, does anybody have an example - - -

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MS SVENDSEN: Commissioner, just to - sorry, Commissioner, just to kind of follow up on what Mr Ferguson was just saying, it's Leigh Svendsen. That's actually why we kind of referenced back to the exposure draft process. I think all of us are very clear that when we do the ED technical drafting hearings that's exactly what we're doing, just matters of checking on the drafting review and if there - and no substantive matters are being dealt with at those hearings. So we're clear that that's the process. I think we in the PIA thought that would be the process but we're not so clear that it or has been, and we did not want that to be repeated in the process that goes forward from here, in relation to standard clauses.

PN99

THE COMMISSIONER: Can I ask, do any parties have on hand an example of where in submissions relating to the standard clauses, paragraph 4 of the directions of 17 August, the parties have said that they do consider the draft to alter the legal effect and how they say that happens and how they can explain how they differ. Not in respect of the pharmacy because I'm not across the pharmacy submissions as much as I am these standard clause submissions, but do you have an example?

PN100

MR NGUYEN: Commissioner, just before you move onto this next issue, can I just make comment about the issues that Leigh Svendsen was speaking about before? Just as an outsider, I haven't been involved in the Pharmacy Award but this idea that there is a third party issuing documents or drafts on behalf of the Commission that have not - the drafts have not addressed the submissions of the parties, is quite concerning to me. That somebody who is not accountable in the way that a Full Bench is for drafts that come out in addressing party submissions is concerning.

PN101

I think that that might be something that could be looked at in terms of the guidelines and ensuring that any input from this third party, which I assume is

acting like a counsellor assisting the Full Bench, is transparent and accountable in the decisions that they make, so that the parties know that the contest - what the contest is between them and between the draft before the Full Bench. That sounds to me like something that probably needs to be clarified in the process, so that people don't feel like the Commission has made any decisions or implicit decisions through that sort of shadowy third party, which we don't - like I don't know who that is.

PN102

THE COMMISSIONER: Well, who that is, is a senior counsel. But can I give some comfort to the parties that the expert assistance that is being given is not completely independent of the Full Bench. We are reviewing what is being put out as pre-drafts. It's not just left to this gentleman only. I have reviewed relevant clauses and given - and made some changes to them. So it's not independent of the Full Bench. Perhaps early on yes, but most recently, no. So if there's criticism - - -

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MS SVENDSEN: We were about to say - - -

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THE COMMISSIONER: Sorry?

PN105

MS SVENDSEN: Sorry, Commissioner, we were about to say that actually wasn't what we've been advised. We've been advised it was independent of the (indistinct).

PN106

THE COMMISSIONER: I personally have reviewed some clauses in respect of - I'm trying to remember if it was the standard clauses. I can't recall with any certainty but I know that I have played with some words and ultimately it is something that is distributed by the Bench or the President, so there is some - there has been some regard to what has been put. So I can't say it's been comprehensive but that is my anecdotal information for you. So ultimately the Bench will be responsible for making the revisions to the awards. Your concern there, Mr Nguyen, is that there's not enough or any regard and it's simply being done by a third party. I hear what you have to say. We'll make sure that if there any concern there that the Bench is giving due consideration to any re-drafting that goes out and turns its mind to what's being put and it's not left solely to that third party.

PN107

MR NGUYEN: I think that would be helpful, just if there are changes that are made as a result, like going from draft to draft or changes that are not made as a result of parties' submissions. That there should be an accompanying statement so that people have some comfort that yes, that issue has been heard or that party's submissions or consent positions have been heard, and a decision in relation to the next draft has been made about it. Rather than - it sounds like from Leigh's example that a consent has been put and the re-draft has just come back and nothing is said about it and there's been no change, which can be alarming I think

to people if there's no - you know, if there's no sort of statement or reasons accompanying why things have happened from draft to draft.

PN108

THE COMMISSIONER: I hear what you're all saying but ultimately these are matters that will not be determined until a hearing, so whilst revisions are put, the Bench can certainly be influenced at hearing as to why submissions made four months ago still have relevance today. So I think we would be in a difficult position in saying that we've heard submissions put it, for example, October and we dismissed them when we don't hear them at hearing. So these re-drafts are point in time ideas of the Commission, they're not set in stone and they are subject to movement. But I do hear what you're saying in that you're putting positions forward, you don't think enough regard is had for them and another re-draft comes out and you wonder why there hasn't been sudden movement to them.

PN109

MS SVENDSEN: Yes.

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THE COMMISSIONER: Am I on the right track there? Right.

PN111

MS BIDDLESTONE: Commissioner, can I just maybe make a couple of points just in relation to this most recent discussion. Firstly, just in relation to your comments about the fact that standard clause drafting has obviously gone to members of the Full Bench and you've had an opportunity to have a look at those and then that might be the re-drafting going forward. As far as we're aware that hasn't happened in the Pharmacy Industry Award process, but we would welcome that happening in the standard clause process, and it would be great if that comment could be reflected in the next statement that's issued from the Commission in relation to the process going forward. I think that would be really useful.

PN112

The other point I wanted to make too was just in relation to Mr Ferguson's comments and particularly in relation to the nature of submissions that may be required to be provided to the plain language drafting process. We found that the requirement around submissions has been different with the plain language drafting process. In the exposure drafts, parties have made submissions and where there is joint consent they haven't been, as far as I'm aware, required to show where the legal - what the legal effect of the current clause is and how the re-drafting clause has changed the legal effect. However, this is a requirement of the plain language drafting process, so it would be good to get some further clarity around the nature of the submissions going forward and what kind of evidence will be required in those.

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THE COMMISSIONER: Sorry, are you saying in relation to pharmacy or standard clauses?

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MS BIDDLESTONE: Standard clauses.

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THE COMMISSIONER: So standard clauses, the parties have been directed to do that.

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MS BIDDLESTONE: Yes, my point goes more to where there has been consent positions around the change to legal effect and proposed alternative wording.

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THE COMMISSIONER: But there haven't been consent provisions put there in relation to standard clauses because the submissions - - -

PN118

MS BIDDLESTONE: No, I'm talking about - no, my point goes to establishing a process to deal with these things, so the parties know from the outset what the requirements are going to be in the process.

PN119

THE COMMISSIONER: Right. So perhaps moving forward, as I had earlier indicated, if the parties are in a position to engage with each other and come to some common position as to why the proposed wording by the drafter does alter it, then you are encouraged to do so. That's been made clear as early as August. If you do it in joint submissions well it will carry even greater weight than if they were made separately.

PN120

The submissions are only very fresh, so following today that might be one course of action that can be taken where if you're all aghast at what is being put, then perhaps collectively or at least some of you can collectively put what you think the clause should look like and if you're all going to hold onto the past and say well, don't change it then you might not get very far, but if you're going to work with what has been drafted collectively, then as the President has earlier indicated it's going to carry some weight. It's not going to be accepted blindly but it's going to carry some weight. But look, what I was earlier suggesting is do we have any examples in the most recent submissions on standard clauses where a party has nominated?

PN121

MR FERGUSON: I think when we work through those you'll probably find that our submissions are going to be littered with examples where there's been changes. But just to take one for example, in relation to the transfer to lower paid duties provisions, there's been a re-drafting of those provisions. It now includes an entirely new obligation to provide written notice of such a transfer. Never been an obligation in the past but it's just been dropped in.

PN122

Now we'd say that is entirely inappropriate. It's a significant change in our view and it's the sort of thing that might be overlooked but once it's identified it's a change that shouldn't be embedded through this process. Because we're not

advancing substantive cases about the merits or the risks or the detriments of those sorts of changes. So that's the sort of thing that we think that we could just go through, identify and where possible that could be admitted for further re-drafting. We wouldn't envisage that this sort of process could result in that kind of change.

PN123

THE COMMISSIONER: Right. Look, there's obviously going to be some parties here who have more experience having worked in re-drafting the pharmacy awards, they'll have a few more months on everybody else. How do you propose that you might put some heads together to work on some collective concerns that you have and how long do you think you'll need? Would you then distribute it to parties who aren't so familiar or experienced and see broadly, for example, to the AMWU and other parties who might not have been involved in the pharmacy matter. Might it be that you have a small working group or do you wish to expand it to a larger working group? What are your proposals there?

PN124

MS THOMSON: I think we've had the benefit of the Pharmacy Guild taking the lead in relation to that so I think certainly if an organisation can sort of take a coordinator or lead of a couple of organisations at the very least, because otherwise I just think the process becomes unworkable, so that would be my suggestion; I'm not volunteering.

PN125

MR FERGUSON: What I was - I haven't been involved - - -

PN126

THE COMMISSIONER: Yes.

PN127

MS BIDDLESTONE: Sorry, sorry, Commissioner. It's Katie Biddlestone, sorry I can't even remember my name anymore. Look, our recommendations will be that conference is facilitated by a member of the Commission. Given the size of the group involved, you know, Pharmacy was quite a small group as Mr Thomson has explained. I don't think that it's going to be workable for any of the parties - interested parties to take the lead role in coordinating this. I think that given the parties involved and the complexity of the matters, potential changes to the legal effect, it would be more appropriate if a member of the Commission was to facilitate conferencing. That way proper transcript can be taken, it can be a record of the conferences and it can be done in a much more orderly way.

PN128

MS SVENDSEN: Commissioner, could I just also add to that. I have concerns looking at the people who have attended today and the - the reality about what previously happened in group one exposure drafts. So it seems to me that principally the people who are here are those who have got involved in the identified plain language awards, not the formal gamut of people who will be interested in the impact of changes to the standard clauses.

PN129



That's not principally your problem or anyone else's problem here, but that suggests that further down the track there may be more contention about the issues if we don't actually attempt to have - if we don't actually have these discussions facilitated by the Commission.

PN130

MR FERGUSON: I was just going to say, from there covering some of the points of the others, I just think given the number of parties, at least at the outset the best course of action might be to try and get into the nitty gritty of the standard clauses, and see whether we can identify at least some areas of commonality and so for working through that and making some progress. It maybe that in doing that you know, there are individual matters where only one or two parties are having an argument and that they can have separate discussions to try and narrow those differences. But I'm just anxious about how far we would get in the process entirely outside of the auspices of the Commission. Because it would be very difficult to coordinate this many people. It is a difficult task, I know. but I wonder whether we're best just trying to break it down clause by clause and work through it to see whether we can at least narrow the issues.

PN131

In some of the exposure draft processes and I wasn't in the planning of this drafting, when we had a summary document like this we were able to sort of go through, identify areas where issues seemed to have been resolved between the parties or that parties may - instances where parties may resile from their original position in light of the reply submissions, and that sort of narrowed the matters. It just seems that doing that in front of the Commission, at least to start with, is probably the most efficient way.

PN132

THE COMMISSIONER: We have five clauses, don't we?

PN133

MR FERGUSON: Yes.

PN134

THE COMMISSIONER: You're all pretty comfortable with the index, so that's a good start but could the parties be put to some work if your proposed course of action is approved by the Commission, to at least put something together where there might be some common agreement in respect of each of the five clauses, with at least the leading players and then everybody else can see what they think of that? Otherwise we could spend each conference on each of the five clauses, couldn't we, we'd need at least five - perhaps five days set aside to deal with each of the clauses, and you might still be very far apart.

PN135

MS SVENDSEN: Commissioner, I think most of us who have been involved in the ED process and found even with 25 pages of this stuff that we've gone through it in half a day in most cases. Half a day to a day at the most. That it's pretty clear before we get to lunchtime that - where the differences are going to continue.

PN136

MR FERGUSON: What a process has often looked like there is going through this sort of summary, admittedly usually with a few less players. Trying in principle to tick off areas where there's agreement. Where there's obvious disagreement just exploring that between the parties and also to help the Commission to try and overcome the disagreement. Then at the end of that process an updated document is often prepared which there identifies the matters that the Commission believes are agreed are all resolved or are no longer pressed by the parties. Everyone gets a short period to - or a period to check whether that's correct and then sometimes we've had a further conference.

PN137

It might be useful to try that and if it seems that there are lots of issues that we can all agree in principle seem to be resolved of shared concern, at least from the parties' perspective, then we can at least narrow the list. Then it may be that the Commission has some capacity to assist in the preparation of another document. We're not opposed to assisting as well, given that we probably raised a lot of these issues, but there are some time constraints, just in terms of how much we could do.

PN138

THE COMMISSIONER: So that's a matter that we'll have to take into consideration too. Is that the wishes of all of the parties?

PN139

MS SVENDSEN: Yes, Commissioner.

PN140

MR FLEMING: Yes, Commissioner.

PN141

THE COMMISSIONER: How many days do you foresee that it will take to go through these five standard clauses, even if they were half days?

PN142

MS SVENDSEN: One.

PN143

THE COMMISSIONER: Do you think we could do all five clauses in one day?

PN144

MS SVENDSEN: I think that we would in one day know whether there was going to be any need for further conferencing, and unless we were actually making a decision at those conferences, which isn't going to happen, then I would think that one day would be sufficient. Because we'd then be writing submissions - substantive submissions about the matters we're in disagreement before the Commission making a decision on it.

PN145

THE COMMISSIONER: Do the parties have the ability to start with at least one of these clauses today?

PN146

MR FERGUSON: Yes.

PN147

MS THOMSON: Yes.

PN148

THE COMMISSIONER: Yes? Yes, from Sydney?

PN149

MS SVENDSEN: Yes.

PN150

MR FLEMING: Yes, Commissioner.

PN151

THE COMMISSIONER: Well, then do we want to deal firstly with the guidelines or shall we just simply take all of the submissions on board, and you'll note that the guidelines will eventually be published. Or do you wish to further explore your written submissions with respect to the guidelines?

PN152

MR FERGUSON: The Ai Group's content to rely on the submissions.

PN153

MS THOMSON: Yes, thank you.

PN154

MR FLEMING: Likewise Commissioner, the ACTU's content to rely on the written submissions.

PN155

THE COMMISSIONER: Are there any parties at all that wish to further explore their submissions with respect to the guidelines today? No. Well - - -

PN156

MS VAN GORP: Yes, sorry, Commissioner.

PN157

THE COMMISSIONER: Yes.

PN158

MS VAN GORP: There were a couple of points in the summary of the guidelines that the Business SA would like to address. One was and I'll hand that over to Chris.

PN159

MR KLEPPER: There was just one point which wasn't actually clarified. It's in table 2 in regards to points 3.14 and 3.15. The position summarised by the Commission doesn't accurately reflect Business SA's position and so the statement provided in the table says:

PN160

*In relation to guideline 3.14 and 3.15 Business SA's notes and guides are better placed in annotated versions of the award.*

PN161

Business SA has no opposition to notes appearing in the award. So we'd just like to flag that for other parties and possibly for a revised summary. It was just the guides for the guidelines which Business SA's taken a look at.

PN162

THE COMMISSIONER: But no objection there to notes being included in the award proper?

PN163

MR KLEPPER: No.

PN164

MS VAN GORP: That's correct.

PN165

THE COMMISSIONER: Thank you.

PN166

MS WILES: Commissioner, it's Vivienne Wiles here from the TCFUA and I apologise for my late appearance. One of the issues, and I know that the various parties have made submissions around consent submissions, particularly in relation to the Pharmacy Award, but there is also the preliminary issue of consent positions that were reached in relation to matters from group one awards, which are subject to previous Full Bench decisions. I think there's also another layer of complexity as to how this process interacts with the exposure draft process.

PN167

For example, in relation to the Textile Clothing & Footwear Award we were in group one, there's been a Full Bench decision in May last year that dealt with a range of consent positions, both around substantive issues but also around the technical drafting issues. So for example in relation to that award the last submissions that were made generally around the exposure draft were filed in December last year, and essentially nothing's happened since. So it's not just recent submissions, for example, in the Pharmacy Award. It's around consent positions that were put to the Full Bench for a particular award and accepted by the Full Bench and the decision on foot current about those. I just raise that as another level of complexity.

PN168

THE COMMISSIONER: I think some parties have raised that in the recent submissions that I've read as well, so I note that it is a widely held concern.

PN169

MS WILES: Yes, thank you.

PN170

THE COMMISSIONER: From what you have to say the guidelines will then be further reviewed, taking into consideration the submissions of the parties, and I don't know at this stage whether or not they'll be finally released. That will be a matter for our consideration. But you're all content to have your written submissions considered and there's nothing else that you wish to say today with respect to those?

PN171

Moving onto the standard clauses, I have a document that includes the in reply, so I think that that's published on the website. The submissions are in blue identifying the parties with the comments in black, and then in reply in red. Does everybody have a copy of that?

PN172

MR FERGUSON: Yes.

PN173

MS THOMSON: Yes, thank you.

PN174

THE COMMISSIONER: That's a yes to Sydney? We're all working off the correct document then. So to tackle the easy one, table of contents there's agreement that the table of contents should look as per the plain language re-draft and it's breaking up older clauses into more specific clauses. So do I take it that there's - - -

PN175

MR FLEMING: Sorry, Commissioner, I'm not sure if we're looking at the correct document here in Melbourne.

PN176

MR NGUYEN: It's the 7 November date on the bottom.

PN177

MS SVENDSEN: That's why I'm confused. Yes, I think it's 7 November.

PN178

THE COMMISSIONER: Yes, thank you. It's on the left-hand side as a footnote. So the table of contents, is that a generally accepted practice there that you're comfortable with?

PN179

MS McKINNON: Commissioner, at the risk of being - - -

PN180

MS SVENDSEN: We have no objection.

PN181

MS McKINNON: At the risk of being contrary, the only comment I'd make just having regard to the guidelines is that table of contents, item 6, talks about award flexibility for individual arrangements, and the Act talks about flexibility terms and individual flexibility arrangements. So it just might be a matter to be aware

of that the clause is dealing with how you make IFAs under the Act. So maybe it should be called IFAs, or individual flexibility arrangements.

PN182

THE COMMISSIONER: So it's the heading?

PN183

MS McKINNON: Just the heading in the table of contents.

PN184

THE COMMISSIONER: That eventually is A in item 4, Award Flexibility.

PN185

MS McKINNON: Yes.

PN186

THE COMMISSIONER: So you have concerns with the heading.

PN187

MS McKINNON: Only just - if the guidelines are looking for greater consistency between the phrasing in the Act and the awards, it would seem to make sense.

PN188

THE COMMISSIONER: Thank you.

PN189

MR FERGUSON: What phrasing should be used?

PN190

MS McKINNON: Individual flexibility arrangements.

PN191

MS THOMSON: Which is what they're called generally.

PN192

MS McKINNON: Which is what everybody talks about, that's the common parlance.

PN193

THE COMMISSIONER: Thank you. So then moving onto that exact clause, it's currently called award flexibility in most awards. You can see the word that's been done there. Now if we go down to - it goes to A.15, the current sample clause goes to 4.10. You might need to walk me through, I haven't dealt in detail with each of the concerns. Who wishes to address this issue first?

PN194

MR FERGUSON: I'm happy to press some of the issues we've raised and see how we go.

PN195

THE COMMISSIONER: Thank you, Mr Ferguson.

PN196

MR FERGUSON: We've set this out in full in our written submissions. Page 6 of those submissions we address the first issue which arises in A.1. There's been a change in terminology so that the clause now provides that parties may agree in writing with the employer to vary how the terms of the award relating to any one or more of the following things applies to them. There's a concern from our perspective that that wording doesn't pick up the fact that the agreement can actually provide that those terms do not apply. Not just dealing with how they apply but that they actually don't have application to the employees. We say that's a matter that can be agreed, and I think for that reason we propose either an amendment or revision to the previous wording.

PN197

At paragraph 18 actually we've proposed an amendment that would fix this. So paragraph 18 of our written submissions, a minor amendment which would - - -

PN198

THE COMMISSIONER: So if we're not going to flick back to your submissions then at A.1, how would you have that read?

PN199

MR FERGUSON: "Despite anything else in this award, an employee who has started employment may agree in writing with the employer to vary" - strike out the word "how" and insert the - "the application of terms of this award, relating to any one or more of the following." Then strike out the words "applies to them".

PN200

THE COMMISSIONER: I see.

PN201

MR FERGUSON: Now it is put to a degree out of an abundance of caution because we just think at the very least the new terminology suggests (indistinct) varying how they apply, not whether they do in fact apply.

PN202

THE COMMISSIONER: Yes, they may not apply to all.

PN203

MR FERGUSON: Yes.

PN204

THE COMMISSIONER: Because you're paying over award payments et cetera.

PN205

MR FERGUSON: That's right.

PN206

THE COMMISSIONER: Right. Anybody who wishes to speak against that? Do I take it that there is some comfort if those changes were made, that that would give effect to what is currently understood can happen with respect to those five items?

PN207

MS McKINNON: It does appear that that's an agreed outcome, at least between a number of the parties. It's certainly - we have provided different wording but we are quite comfortable with the Ai Group's wording and it achieves the outcome that we seek.

PN208

MR FLEMING: Commissioner, we submitted also a proposal, Fleming from the ACTU, but we've just discussed - I've just discussed that with the unions amongst ourselves and we're happy to go with what - happy with the wording the Ai Group has suggested.

PN209

THE COMMISSIONER: Thanks, Mr Fleming.

PN210

MR FERGUSON: The next issue we identify relates to the use of the hyperlinks within the clause. Obviously intended to be helpful but the difficulty, if I can just deal with it, is this. The clauses that might fall within those various headings; say allowances, penalty rates et cetera, might actually - well there might be multiple clauses that fit within those headings.

PN211

So dealing with allowances, for example, that link might take you to the allowances clause but there may be other shift allowances and so forth dealt with elsewhere. The hyperlink might mislead people into thinking that well, you can only deal with those matters that are in the linked clause. So it's nice to embrace technology but I think in this instance it's probably not helpful and the hyperlinks should be removed. There is a bit of complexity around it because the terminology used to describe some of these things like shift allowances, loadings and so forth might change through the exposure draft process but the short point is on balance they hyperlinks probably should be removed.

PN212

THE COMMISSIONER: Because it might lead parties into error.

PN213

MR FERGUSON: Yes, it's not going to actually pick up every one of those clauses, I'd suggest to you. It's not essential obviously anyway that there be a hyperlink.

PN214

THE COMMISSIONER: Anyone in Sydney wish to speak to that?

PN215

MR NGUYEN: It's probably going to be a matter for the re-drafting process of that particular award, like I mean I would assume that for the plain language award all of the allowances should be referenced in there if there are particular, more descriptive aspects which help the interpretation of an allowance in like another clause, there should be a note.



PN216

So I mean that concern that Mr Ferguson has probably can be addressed in the re-drafting process of the award to ensure that where these headings refer to certain locations, that there's a note to make sure that everything that party says should be captured is in there. Which makes sense for a reader as well. Like, if you're looking for allowances you want to go to the allowances section, you don't want to be advised by someone else about obscure allowances that are also in other parts of the award.

PN217

THE COMMISSIONER: But the effects that the Act allows is that it can and if these re-draftings are done bite by bite and we're only dealing with the first five clauses, I'm not sure what we're doing with that, whether or not we're going to then make those five clauses across the relevant awards and then deal with other clauses later. The Act does allow you to make in awards these agreements to cover off over-award payments to cover off the non-payment of allowances, and if the link is only to one part then, you know, is there a further link, is there further notes. It just makes it very confusing, I accept, but - - -

PN218

MR FERGUSON: I think the other difficulty is if we're having standard clauses, if were to take that approach they're not going to be standard because all awards take different approach - well not all awards but there are - there is a diversity of approaches adopted in terms of where some of these or how some of these matters are dealt with in the body of the instrument.

PN219

You're going to have to list in each award where every payment or provision dealing with one of these things could be found and include links to all of them, and I just - our point is it isn't to change a substantive effect of anything, it's just to remove the hyperlinks. Because it's going to be difficult to include a hyperlink to everything that falls into each of those categories, for every single award, given that this is a standard clause. So we're not trying to take anything away from anyone or anything like that, we're just sort of thought on balance littering the award with every possible link might be more confusing than just letting parties read the award.

PN220

THE COMMISSIONER: Thank you. Anything else from Sydney here?

PN221

MS ADLER: Only by way of example, particularly difficult for the Building Award with over 100 allowances. So if you have a hyperlink, where are you linking it to in the award and as I said you wouldn't want to exclude things which would otherwise have been included despite the fact that there's a hyperlink that's been included.

PN222

THE COMMISSIONER: So the employers here say there's no benefit in hyperlinks. From Melbourne, any comments?

PN223

MR FLEMING: We agree, Commissioner.

PN224

THE COMMISSIONER: Anywhere else, any comments with respect to the hyperlinks? No?

PN225

MR FERGUSON: We just say that the same issue arises in relation to hyperlinks in the note.

PN226

THE COMMISSIONER: In the note, yes.

PN227

MS ADLER: We raised a concern with that note in our written submissions at paragraph 2.3.1 and basically the view is that - - -

PN228

MS SVENDSEN: Can you speak into the microphone?

PN229

MS ADLER: Apologies, sorry. So just a concern with that note that's included at A.1, which specifically lists out examples of what arrangements for when work is performed would include and our written submissions go to it in detail, around what was said in the award flexibility decision. While we would say it's guidance, we don't see that it's appropriate to include it in the award platform. It's more appropriate that such guidance can be provided by the ombudsman or other industrial parties and it doesn't actually add anything to specifically list examples which may not include some things which could potentially be examples of arrangements for when work is performed. So our position is that it should be removed.

PN230

MS THOMSON: I think, if I can just sort of give a bit of context as to why I think that's there. The plain language draft doesn't like terms which are essentially legal terms or terms - which I think is what they've regarded as arrangements for when work is performed as being. So I think we're going to have a bit of difficulty with getting rid of the note in its entirety. We might want to think about other ways that we can express that clause or those words to give explanation and context, because the response I think is likely to be well if I'm picking up the award I have no idea what that means. So I think if we can perhaps approach with that kind of frame of view, that might assist in not having the plain language draft to come back to us and just ignore what we're saying in that regard.

PN231

THE COMMISSIONER: Have these words in the note been used elsewhere? They look familiar to me.

PN232

MS ADLER: They were in the award flexibility decision.

PN233

THE COMMISSIONER: Yes.

PN234

MS ADLER: So by way of guidance the decision suggests that they are examples of arrangements for when work's performed, but the decision also went onto say that if parties involved in specific awards wanted to provide industry specific examples that would fall into that category, that they could apply to do so and our understanding is that no party did.

PN235

THE COMMISSIONER: And it's not within the Act?

PN236

MS ADLER: So while it may be ambiguous - no, it's not.

PN237

THE COMMISSIONER: So these words are brand new, are they, in current awards?

PN238

MS ADLER: It was part of the term as it was originally inserted into the modern awards, and is the model flexibility term in the Act. But - - -

PN239

MR FERGUSON: The words in the note aren't though.

PN240

MS ADLER: The words in the note, no, sorry.

PN241

THE COMMISSIONER: So this note is brand new in re-drafting?

PN242

MS ADLER: Yes, of course.

PN243

THE COMMISSIONER: But it looks familiar to me.

PN244

MR FERGUSON: So your submission is that that sort of terminology was ventilated or contemplated in the award flexibility decision.

PN245

MS ADLER: Yes, his Honour gave examples of what arrangements when work is performed could be enlisted of those three things but then also indicated that parties to individual awards should apply to I guess scope out what that means for that particular award, and no party did make an application as far as we understand. So it's paragraphs 108, 109, 111, 117 of that award flexibility decision.

PN246

THE COMMISSIONER: So currently now and at 4.1(a), a lay person picks that up and says "arrangements for when work is performed", and they don't know what that means. So it's been suggested to add in, it might include hours of work, rostering arrangements and breaks. What is your specific objection to that?

PN247

MS ADLER: That there may be things that falls outside of those three things that could be considered arrangements for when work is performed, depending on a particular award. That that information can be found through the Fair Work ombudsman, there's guidance about these things, associations and unions I'm sure provide guidance about these things. So - - -

PN248

THE COMMISSIONER: Are you concerned that "includes such matters" is too limiting or it's not broad enough? I think there's a movement away from limited - "including but not limited to".

PN249

MS ADLER: I think, like I said, the principal concern is that it is guidance information, it was referenced in the decision of the Full Bench but is it appropriate that in that form it be included in the award when there are other ways to get that sort of guidance, that may not have an unintended consequence.

PN250

THE COMMISSIONER: But you say the other ways to get that guidance is to speak to parties who are knowledgeable. What does a lay person do when they pick it up and say what is "arrangements for when work is performed? This is giving examples of it.

PN251

MS ADLER: I guess in our experience most of our members who want to enter into these agreements need assistance to do it, notwithstanding that it's supposed to be something that too many individuals just agree to themselves. So - now, I'm not - I guess I'm not trying to be difficult, I'm just - we're just concerned about a lay person picking it up and thinking oh well that's exactly what it means and so that's what I do and that's what I follow.

PN252

MR FERGUSON: I think we've raised a similar - - -

PN253

MR FLEMING: Can I just - I'm sorry, continue Mr Ferguson.

PN254

THE COMMISSIONER: We'll go to Mr Ferguson, and then I'll cross to you there Mr Fleming.

PN255

MR FERGUSON: We've raised a similar concern, I don't think we can put it much higher than that, in that we say that really identification of all the award provisions that could fall within the ambit of those words in A.1(a) is something

that needs to be undertaken on an award by award basis. There could be variations. We've said accordingly we'd simply be concerned if the note had the effect or could any way narrow the scope of matters in a particular award that could fall within that category of words.

PN256

I don't think we have a difficulty with the deletion of the provision, I've never called for it but our concerns are the same. If you look at it on an award by award basis there might be many other things that are in there too. We wouldn't want someone to read that clause or those words in the note as in some way limiting the scope of matters that could be subject to an individual flexibility agreement.

PN257

MS ADLER: I mean I guess by way of example in that award flexibility decision which obviously dealt with time off in lieu of overtime.

PN258

MR FERGUSON: Yes.

PN259

MS ADLER: I think the Bench - the decision indicated that toil arrangements could form part of an IFA, notwithstanding that a specific provision was not provided in the award. So a note like that doesn't kind of contemplate that sort of situation.

PN260

THE COMMISSIONER: At 6.3.3 of the guidelines it recommends to use the words, "without limiting", might be helpful to include those words in the note to something like:

PN261

*Without limiting any other provisions in the award it may include items such as hours of work, rostering arrangements and break.*

PN262

I mean if you've got somebody who picks up an award and they're going I don't know what arrangements for when work is performed and they're then given an example and they know it's not limited to these, then is that of some assistance?

PN263

MS ADLER: Potentially.

PN264

THE COMMISSIONER: In Melbourne, do you have any views on that?

PN265

MS SVENDSEN: (Indistinct) should be included - - -

PN266

THE COMMISSIONER: I'm sorry, I'll get you to start, there's some paper rustling going on.

PN267

MS SVENDSEN: Everybody's starting to look at the guidelines again. Commissioner, the general position here is that we support the position of the employers that it shouldn't be included and I just was - I was just looking for the "without limiting" given that that just sounds so jargonistic that it seems to be quite a big opposition to the concepts of plain language drafting. So I think we're just looking for the guidelines to find it again.

PN268

THE COMMISSIONER: I found it at 6.3.3 on the hop.

PN269

MS SVENDSEN: Thank you.

PN270

THE COMMISSIONER: I mean it's pretty clear that I'm a bit attracted to including some sort of example there. So look, you might just want to give some thought to that. You don't need to have positions today, we're simply fleshing it out but perhaps that might be a - - -

PN271

MS BIDDLESTONE: Commissioner.

PN272

THE COMMISSIONER: Yes.

PN273

MS BIDDLESTONE: Sorry, it's Katie Biddlestone. I just wanted to clarify, is it still the intention of the Commission to produce an award and then an annotated version of the award which would include examples and notes?

PN274

THE COMMISSIONER: I don't have the answer to that I'm afraid.

PN275

MS BIDDLESTONE: Because there was a decision earlier in the process which went to that issue and I don't have it with me but that might be where we can get clarity around - if the intention is to provide an annotated version of an award then it might be better placed in that version rather than the award itself.

PN276

THE COMMISSIONER: Yes, that's a good point there. Look we'll get some clarity around that but if there were not an annotated version, could the parties live with something as I've suggested there?

PN277

MR FERGUSON: I think that goes part of the way to addressing the issues and I'm just thinking through as well. Another issue that just springs to mind as I look here and think about it is rostering arrangements aren't even contained in all awards, so I wonder, and I'm developing this a little bit on the fly, I wonder how helpful it is for example to include rostering arrangements as a specifically

referenced type of example, when it's probably going to vary from award to award to the extent which they can deal with those sorts of things.

PN278

THE COMMISSIONER: Sorry, are you saying rostering arrangements are not contained in awards?

PN279

MR FERGUSON: I'm not sure that every award has a provision about the issuing of rosters and so forth. They might have provisions around the arrangement of ordinary hours of work.

PN280

THE COMMISSIONER: Yes.

PN281

MR FERGUSON: But some awards do have specific rostering requirements, some do not.

PN282

THE COMMISSIONER: If there is no hyperlink then simply the expression rostering arrangements - - -

PN283

MR FERGUSON: Yes. No, no, what I was thinking, picking up on your suggestion, Commissioner, I thought there was merit in saying that it's inclusive and then identifying those clauses that were perhaps in awards, and always would fall within that scope. Then I just was thinking about it, thinking well rostering arrangement isn't even in some awards.

PN284

THE COMMISSIONER: That some exclude - right.

PN285

MR FERGUSON: So it's a bit misleading to suggest that one of the things you can agree about is rostering arrangements when there might not be such arrangements. But, you know, we're not - - -

PN286

THE COMMISSIONER: Thanks Mr Ferguson.

PN287

MR FLEMING: Commissioner, it's Fleming from ACTU. What about inserting the words "some examples of" at the beginning of that note and then taking on board Mr Ferguson's comments, inserting the word "may" after "performed", unless at a later stage we could be satisfied that certain examples are then applicable to all awards.

PN288

THE COMMISSIONER: So I have the "some examples", so for when - what, for when "may" - - -

PN289

MR FLEMING: "Some examples" - - -

PN290

THE COMMISSIONER: Can you please read that out then?

PN291

MR FLEMING: "Some examples of arrangements for when work is performed may include", and then you could delete "such matters", "hours of work, rostering arrangements and breaks".

PN292

THE COMMISSIONER: Is that perhaps a little exhaustive, "may include". It might suggest that it can't include other things.

PN293

MR FLEMING: But does "some examples" not clarify that?

PN294

THE COMMISSIONER: It's helpful, it's helpful at the beginning but I have a concern that "may include" suggests to a lay person that it can't include other things.

PN295

MR FLEMING: I see your point.

PN296

MS VAN GORP: Commissioner, can I make that clear as well. This is Business SA in Adelaide.

PN297

THE COMMISSIONER: Yes, thank you, Ms Klepper.

PN298

MS VAN GORP: Thank you.

PN299

THE COMMISSIONER: I'm sorry, it's Ms Van Gorp, isn't it, yes.

PN300

MS VAN GORP: Van Gorp, thank you. With regard to this, so the response to this was that the notes would help a lay person without them having to refer to (indistinct) by creating the need for employers and employees to seek advice from paid advocates, or their union representative or their employer organisation as such. But if you're going to put a note in or if we're going to put a note in that is so vague then would they not have to go and get advice anyway, because there are other clauses in the award that are not listed in that note? It's not actually assisting those people in identifying all the different things that they could address under arrangements for when work is performed.

PN301

THE COMMISSIONER: Do you have other examples there?



PN302

MS VAN GORP: Not offhand but I do note that the decision itself mentioned notice periods for example. That was the award flexibility decision, and that isn't listed in this particular list. Shift work.

PN303

MS McKINNON: Commissioner, can I make a suggestion. I mean I think this is the kind of issue where parties might need some time to have a think about it and maybe put forward some proposal alternative wording that could accommodate the concerns. That might speed up the process.

PN304

THE COMMISSIONER: Yes, I think that might move it on but look, I have some concerns about leaving (a) standalone as arrangements for when work is performed. I just don't think that the common man will really understand what that means and if the parties can assist with how that might be further explained, whether it's via a note or whether it even is a note to the decision.

PN305

MR FERGUSON: Yes, that's the issue - - -

PN306

THE COMMISSIONER: I will leave it to you suggest something there. You're welcome to put that (a) doesn't need any further explanation but if you are minded that it does then perhaps the parties can put something that they can live with, and if you can put a common position, even better. If we hear from three or four of you that you're all comfortable with particular wording, that's going to give us some comfort there.

PN307

MS SVENDSEN: Commissioner, I'll just make a note that the decision from the Bench way back when in relation to group one said that notes included where legally enforceable and I think we need to take that into account as well.

PN308

THE COMMISSIONER: Yes, thank you.

PN309

MS SVENDSEN: Because it's in a legally enforceable instrument.

PN310

THE COMMISSIONER: Yes.

PN311

MR FERGUSON: That's our overarching concern is that you include some, it may affect interpretation in terms of narrowing those words, but we'll have a think about it as well. Probably can't take it any further today.

PN312

THE COMMISSIONER: All right then. I think we've made some movement there.

PN313

MR FERGUSON: The next issue we identify just as a catalyst for talking about things is A.5.

PN314

THE COMMISSIONER: Well, do we want to go in order, A.2? I mean that's - - -

PN315

MR FERGUSON: I'm happy to, I was just doing it because it was - - -

PN316

THE COMMISSIONER: I think we should. That will just - - -

PN317

MS SVENDSEN: Sorry, we've got an issue regarding A.1.

PN318

THE COMMISSIONER: We haven't finished with A.1 then, right.

PN319

MS BIDDLESTONE: Sorry, Commissioner, (indistinct) go over again. I think the issue that we had which were included in the ACTU's submissions and also the AMWU was in relation to - that any agreement cannot be made until after the employees (indistinct). So clause 4.2, the current provision says "an agreement", the second sentence says:

PN320

*An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.*

PN321

That doesn't seem to be reflected as clearly in the re-draft.

PN322

THE COMMISSIONER: So you say where it says;

PN323

*An employee who has started employment may agree in writing -*

PN324

You don't think that that comprehensively covers as well as it did in 4.2?

PN325

MS BIDDLESTONE: No, it's not written explicitly as it is in the current version, so I think because it's just written into the opening, that the effect of (indistinct) in the re-drafting of this clause. Because obviously that's a pivotal protection for employees that any agreement around the flexibility arrangement shouldn't occur upon engagement, because obviously the nature of the relationship is different at that time to once someone has actually commenced employment. We want to say that any clause that's provided in the plain language draft ensures that that protection is still as strong for our employees.

PN326

THE COMMISSIONER: Is there anybody who disagrees with that position?

PN327

MR FERGUSON: We think the wording that you would have identified, Commissioner, does actually deal with the issue.

PN328

THE COMMISSIONER: Sorry, you think the wording in A.1 is adequate?

PN329

MR FERGUSON: Well, it's clear the employee has to have started for them to be able to utilise this clause. I'm not sure we're necessarily vehemently opposed to an alternative approach being taken, but I think Commissioner, the words you identified probably does get the job done.

PN330

THE COMMISSIONER: Well, 4.2 says that you can't do it and A.1 says that when you've started employment you can do it.

PN331

MR FERGUSON: But it doesn't allow you to do it unless you've started.

PN332

THE COMMISSIONER: Yes, but is that clear to a lay person?

PN333

MS BIDDLESTONE: It doesn't say that.

PN334

MR FERGUSON: I think so but we're not - sorry, I'm not trying to put this too highly.

PN335

THE COMMISSIONER: We all know that it's hidden as a note in the Act, it's not even a provision. It's just a note in the Act.

PN336

MR FERGUSON: We're not overly concerned.

PN337

THE COMMISSIONER: Sorry, you're not overly - - -

PN338

MR FERGUSON: We're not overly concerned if it went back in.

PN339

THE COMMISSIONER: Right.

PN340

MS THOMSON: I agree, I think it's dealt with but again not going to cause a huge drama if there's particularly strong feelings.

PN341

THE COMMISSIONER: But you feel strongly there, Ms Biddlestone, that it should make it clear that you cannot do this until the employment has commenced.

PN342

MS BIDDLESTONE: Yes, we believe that it's a pivotal aspect (indistinct) contained in the re-draft.

PN343

THE COMMISSIONER: Is that supported by all of the employee representatives?

PN344

MR NGUYEN: Yes, Commissioner. This clause was very - that particular sentence was actually added by the Commission after its own review of the use of individual flexibility arrangements, which found that a very large number of IFAs were made at the point of employment.

PN345

THE COMMISSIONER: So you say there's some historical context for the insertion of that - - -

PN346

MR NGUYEN: Of that sentence, yes.

PN347

THE COMMISSIONER: - - - sentence in 4.2. All right then. I think AIG had concerns with started employment versus commenced employment.

PN348

MS THOMSON: That was us.

PN349

THE COMMISSIONER: That was you?

PN350

MS THOMSON: Yes, I don't like started but again.

PN351

THE COMMISSIONER: So that's the HSU is it? Sorry - - -

PN352

MS THOMSON: ABI.

PN353

THE COMMISSIONER: ABI, yes. ABI doesn't like "started employment".

PN354

MS THOMSON: Dealing with the big issues.

PN355

THE COMMISSIONER: Well, I'm with you on that one. Are there any other matters in A.1 that any of the parties here wish to address?

PN356

MS BIDDLESTONE: I think the next issue is if you go down to - sorry, next to ACTU where it says Attachment A, page 1, and then SDA paragraph 25-27. It's in relation to the re-drafting of the requirement in 4.4(a) that it be in writing, and that it's just written in as a qualification in clause A.1. So 4.4(a) is explicitly written that it be in writing, name the parties to the agreement, signed by the employer and individual employee and so on. So our submission is that this should still be a separate subclause, rather than just written into A.1.

PN357

THE COMMISSIONER: But isn't it then provided for in A.7, that it must be signed if a person's under 18 by the parent or guardian, so doesn't - - -

PN358

MS BIDDLESTONE: Yes, it's - - -

PN359

THE COMMISSIONER: Yes.

PN360

MS BIDDLESTONE: It's more in relation to that it be in writing.

PN361

MS SVENDSEN: Commissioner, it might be able to be dealt with at A.6 that an agreement must do each of the following. Well, an agreement must in writing and do each of the following, might cover it.

PN362

THE COMMISSIONER: So you don't think that A.1 in writing and A.7, it must be signed, is clear enough to a lay person that it needs to be in writing? How else would it be signed.

PN363

MS THOMSON: And then there's A.9 which says everyone has to keep a copy and a copy to the employee.

PN364

MS SVENDSEN: I understand that, that's why I've just suggested that if you put in A.6 it must be in writing and do the following it just spells it out very clearly, then it's signed by everybody and actually stipulates all of those things. It's not - yes, lots of those clauses would imply all of those things but one would just put what you need.

PN365

THE COMMISSIONER: We will have to have regard to whether or not that's necessary. Does anybody have anything else to say in relation to that?

PN366

MS McKINNON: Commissioner, I just wonder if that would be supported by the drafters because A.6 is about what an agreement must do, rather than what an agreement is. So an agreement obviously can't do - becoming itself in writing, I just don't think it will fit in A.6, even though I have some sympathy for the suggestion.

PN367

MS SVENDSEN: It'll be before the "do" though.

PN368

MR FERGUSON: So you say the agreement must be - - -

PN369

MR FLEMING: Commissioner, this issue - - -

PN370

MR FERGUSON: Sorry, go ahead.

PN371

MR FLEMING: Apologies. This issue comes up a little bit I've noticed throughout the standard clauses and it seems to be attention between simplicity, the brevity and being easy to understand. In my submission, precedence should be given to being easier to understand. This creates the impression by collapsing, by giving as a qualified right rather than a right and then in a separate section the limitations on that right. The reader might be drawn to overlook the qualification on the right, because you look to the first section A.1 that gives the right and then the reader says okay so we can make an agreement. Then when we look to find what are the requirements for that agreement we are drawn to a different section. That's where that requirement about the in writing should be. So it's true that if you read it very carefully, you know, the two have been collapsed in A.1 but it could be overlooked by then, not being in the other section where the limitations are.

PN372

THE COMMISSIONER: Could it be addressed - - -

PN373

MR FLEMING: That's the structure that's followed in 4, sorry.

PN374

THE COMMISSIONER: Could it be addressed in A.7 for extra clarity:

PN375

*An agreement must in writing and signed by the employer and employee.*

PN376

MR FLEMING: Yes, Commissioner, that would be (indistinct).

PN377

THE COMMISSIONER: Anything else in A.1 ? That's a no from Sydney. Are we comfortable doing in A.2 downwards or do we wish to address any major

parties' concern, talk through their issues because they do seem to cut across each of the relevant provisions. How do you want to deal with this?

PN378

MS McKINNON: I think in order is easier to follow.

PN379

THE COMMISSIONER: In order, thank you. A.2:

PN380

*An agreement may only be made in order to meet the genuine needs of the employer and the employee.*

PN381

Does anybody have any issue with that?

PN382

MR FERGUSON: No.

PN383

THE COMMISSIONER: No issues here in Sydney. All right then. A.3:

PN384

*Either the employer or the employee may initiate the making of an agreement.*

PN385

No concerns?

PN386

MR FERGUSON: Is ACCI here?

PN387

MS THOMSON: No.

PN388

MR FERGUSON: I'm not advocating for them but I'm just - - -

PN389

THE COMMISSIONER: What do they say?

PN390

MR FERGUSON: - - - looking at my replies, not theirs, and they appear to propose the deletion of clauses A.3 and A.4.

PN391

MS THOMSON: I think they have a re-draft.

PN392

MR FERGUSON: Do they? I don't know if we want to put that aside until an occasion when they might - - -

PN393

THE COMMISSIONER: Well, no, let's have a look at it now.

PN394

MS THOMSON: I think they proposed - A.2 they want the deletion of the word "only".

PN395

MR FERGUSON: Yes, sorry, they do.

PN396

THE COMMISSIONER: Sorry, they want the insertion of only do they?

PN397

MS THOMSON: Deletion of the word "only".

PN398

THE COMMISSIONER: I see, yes. Well, what does 144 say? "In order to meet the genuine needs". Is there any objection to A.2 having the word "only" removed?

PN399

MR FERGUSON: No.

PN400

MR NGUYEN: Yes.

PN401

MS BIDDLESTONE: No.

PN402

MR FERGUSON: Really?

PN403

THE COMMISSIONER: We have a no and a yes. Mr Nguyen?

PN404

MR NGUYEN: Yes. It should be "only to meet the genuine needs", well I don't understand why that's a concern for the employers? Do they not make agreements that don't meet the genuine needs of - - -

PN405

MR FERGUSON: I don't know, it's not my proposal.

PN406

MS THOMSON: Consistency with the Act is what I think the thrust of the argument is.

PN407

THE COMMISSIONER: Yes, so ACCI is saying it should reflect what the Act says and the Act doesn't include the word "only". Do you have something to say there in Melbourne about that? Well go ahead. Sorry, if somebody in Melbourne has an objection to the word "only" being removed you should say so and why?



PN408

MS SVENDSEN: We've all said so, we're just still looking at it more closely.

PN409

MS WILES: Commissioner, it's Ms Wiles from the TCFUA. I mean one possible reading if you remove "only" is that there may be other circumstances in which an agreement may be made.

PN410

THE COMMISSIONER: Well, the Act says that there must be the term that allows for the varying of the effect of the award, in order to meet the genuine needs of the employee and the employer. Why should that not be reflected?

PN411

MR NGUYEN: Commissioner, sorry I took some time to pull up the section in the Act but I think that's correct, your assessment that it should be reflected in the plain language version of the award. If the Commission wants to make a term that provides for other circumstances then that's a substantive issue.

PN412

THE COMMISSIONER: But it's not - what ACCI is proposing is that the word "only" be removed so that it directly reflects the Act. So it would read:

PN413

*An agreement may be made in order to meet the genuine needs of the employer and the employee.*

PN414

MS SVENDSEN: But the Act doesn't provide for any other reason for this to be used, so it is only. It doesn't use the word "only" but it only provides for it to be used for those reasons.

PN415

THE COMMISSIONER: So then why would the award go beyond what the Act says is what ACCI is putting.

PN416

MS SVENDSEN: But I don't think it is going beyond what the Act says.

PN417

MS LIEBHABER: Commissioner, the Act does use the word "must" which I think is - implies that - well that means that it can be used in that way, that's where the "only" term can come from.

PN418

MS WILES: Commissioner, it's Ms Wiles here again from the TCFUA. From memory the 2012 Full Bench that looked at the IFA issue, looked at a range of research around the IFAs, and it did become pretty apparent then there was widespread noncompliance in relation to the use of IFAs (indistinct). So I think in terms of a compliance objective, it would be helpful I think that it's very explicit that it can only be used for that circumstance.

PN419

THE COMMISSIONER: I can see both sides of the argument there. I guess you'll have to figure out what you want to put in your next submissions as to whether or not "only" should be included or not. Is there anything else that ACCI wishes to address in A.3?

PN420

MR FERGUSON: I think they proposed the deletion of A.3.

PN421

MS THOMSON: A.3 and A.4, is that right?

PN422

MR FERGUSON: In their entirety.

PN423

MS THOMSON: Yes.

PN424

THE COMMISSIONER: Where do they say that?

PN425

MR FERGUSON: Unnumbered, I think.

PN426

THE COMMISSIONER: They say that just following A.2.

PN427

MS THOMSON: It's on the second page of the table.

PN428

MR FERGUSON: Yes. Second box.

PN429

THE COMMISSIONER: So they say:

PN430

*An agreement by its nature involves a process of parties arriving at a consensual arrangement.*

PN431

They consider the inclusion of description around the agreement making process unnecessary and it's not a legislative requirement for the term and A.3 and A.4 should be deleted.

PN432

MS SVENDSEN: Excuse me, Commissioner, I'm just heading out for another hearing.

PN433

THE COMMISSIONER: Yes, thank you. Thanks, Ms Svendsen. So with A.3 they say that it shouldn't be included because it doesn't really matter who's initiating the making of an agreement. Is that right?

PN434

MR FERGUSON: I think that's what they're asserting. It doesn't do anything.

PN435

THE COMMISSIONER: What do the parties here say about that?

PN436

MS McKINNON: A question has been raised by the drafter as to whether that is the rule in the current term, and I suppose, you know, without wanting to put words in ACCI's mouth, what they are saying is well we neither confirm or deny but we don't want to change the rule if that is not clear in the current term.

PN437

MR FERGUSON: Is it in the current term?

PN438

MS McKINNON: No, there's no rule about who - - -

PN439

MS THOMSON: Who makes it or who - - -

PN440

MS McKINNON: - - - makes the proposal. It's one interpretation, I think.

PN441

MR FERGUSON: We wouldn't oppose it coming out.

PN442

MS BIDDLESTONE: I think - Commissioner, sorry, it's Katie Biddlestone from the SDA. I think that that is actually a new term. There's no sort of comparative wording in the current provision.

PN443

THE COMMISSIONER: Yes, so is it to assist lay people with who might be able to initiate this?

PN444

MS McKINNON: It seems to be the intention of that drafter.

PN445

MS THOMSON: Yes, the drafter's made a number of comments about it seems unclear what the requirements are for employees to request or propose an individual agreement and refers to a decision of the AIRC Full Bench.

PN446

THE COMMISSIONER: Well, are the parties ambivalent as to whether it's included or not or do you think that it's helpful, do you think it's unhelpful?

PN447

MR NGUYEN: The employer being required to provide a proposal inviting to the employee is helpful.

PN448

THE COMMISSIONER: We're talking about A.3.

PN449

MR NGUYEN: In terms of A.3, it's - I mean that's my understanding of the current clause, that either party may initiate the making of the agreement - - -

PN450

MR FERGUSON: I think everyone thinks that either party can initiate.

PN451

THE COMMISSIONER: So are you ambivalent - - -

PN452

MS McKINNON: Yes.

PN453

THE COMMISSIONER: - - - or do you object or do you - - -

PN454

MR NGUYEN: To A.3. I'm ambivalent to A.3 yes but not A.4.

PN455

THE COMMISSIONER: Yes, we're only talking A.3.

PN456

MR FERGUSON: We don't oppose a solution but ambivalence is probably - - -

PN457

THE COMMISSIONER: Right, and in Melbourne there?

PN458

MR FLEMING: Ambivalent about 3, and opposed solution for 4.

PN459

THE COMMISSIONER: I'm only up to 3. Anywhere else around the country, anyone have any concerns about A.3, whether it's in or not?

PN460

MS VAN GORP: Business SA doesn't oppose ACCI's suggestion.

PN461

THE COMMISSIONER: In Brisbane and Canberra?

PN462

MS MINCHINTON: No views either way, Commissioner.

PN463

THE COMMISSIONER: Right, thank you. A.4, I don't have my head around that just yet so what are we talking about here? So this - are you saying - is ACCI saying that this is new? It doesn't reflect the legislative regime and also is it taking additional steps in including the issuing of translation. Is that - - -

PN464

MS McKINNON: I think it picks out 4.7 in the current term, so it's not a new provision.

PN465

THE COMMISSIONER: I see, yes.

PN466

MS McKINNON: But it may be related to the concern about who has to do what, so yes, it might just be about trying to keep it as consistent with what's there as possible, without adding new provisions.

PN467

THE COMMISSIONER: Well, how far different is it from 4.7? It's only where the employer wishes to initiate the making and isn't that reflected at 4.7 in the first sentence?

PN468

MS McKINNON: Yes.

PN469

THE COMMISSIONER: They must give a written proposal, that's covered again in the first sentence and if they have limited English by the translation. So isn't it just breaking up 4.7?

PN470

MS McKINNON: It seems to be.

PN471

THE COMMISSIONER: I mean it's almost identical to 4.7 isn't it, just breaking it up? So how do the parties feel about A.4?

PN472

MR FERGUSON: I think we initially said we support - - -

PN473

MS BIDDLESTONE: It needs to be retained would be our submission because it's contained in the current award. So removing it would be a substantive change to the award.

PN474

THE COMMISSIONER: Thank you.

PN475

MR FERGUSON: I think we initially said that we support the deletion but we'll have some further consideration of that.

PN476

THE COMMISSIONER: So we forge through as much as we can or do the parties require a convenience break?

PN477

MR FLEMING: That would assist, Commissioner.

PN478

THE COMMISSIONER: Right, we'll reconvene at 12.15 Sydney time then, thank you. Parties just be aware that the recording is still on.

**SHORT ADJOURNMENT**

**[12.03 PM]**

**RESUMED**

**[12.21 PM]**

PN479

THE COMMISSIONER: Thanks, parties. I should inquire as to availability for today. Are there restrictions on parties? How long are we going to go for?

PN480

MS McKINNON: We're able to say, Commissioner.

PN481

MR FERGUSON: We're able to stay.

PN482

THE COMMISSIONER: Able to stay. In Melbourne, thank you. I know you might not want to but - with that pained - - -

PN483

MS BIDDLESTONE: Yes, I think a couple of us might have other commitments this afternoon, so maybe potentially till about 1.30. I don't know about the others, if that's okay.

PN484

THE COMMISSIONER: I think we should just press till 1.30 and then we'll call it a day and we'll see where we go after that. Very well. We've finished with A.4 with parties most likely considering that it probably should be kept because it looks like 4.7. So A.5.

PN485

MR FERGUSON: So we've raised issue and I think others have raised the issue in that the clause talked about the better off overall assessment being made at the time the agreement is made previously. That wording has evolved so that the better off overall test is made on its making, it uses the words "on its making" rather than expressly stating at the time of its making. Now we have a concern that this is less clear in terms of making it apparent that the assessment is made when you actually make the agreement, and it's also less clear in terms of clarifying that there's no ongoing assessment. In our submissions we've suggested a simple amendment which we think would provide the previous clarity.

PN486

THE COMMISSIONER: What is the previous clause?

PN487

MR FERGUSON: So - - -

PN488

MR NGUYEN: 4.3(b).

PN489

MR FERGUSON: 4.3(b), I'll just find it.

PN490

THE COMMISSIONER: So result in the employee being better off at the time the agreement's made - - -

PN491

MR FERGUSON: Yes.

PN492

THE COMMISSIONER: - - - than if no agreement had been entered into. A.5 it:

PN493

*Must result in the employee being better off overall on its making -*

PN494

MR FERGUSON: So the issues there we say it's not as clear at the time of the assessment is when you first make it, and it's not as apparent that there's no ongoing assessment required. Now I think this is agreed by various parties but at paragraph 18 of our submissions which I'll read, we've suggested an amendment to A.5. Paragraph 32, I apologise. Which would say A.5 would be amended to say:

PN495

*An agreement must result in the employee being better off overall at the time the agreement is made -*

PN496

and then strike out the words "on its making" and then:

PN497

*than if the agreement had not been made.*

PN498

So we're just putting it back to very clear saying that the better off overall test is at the time the agreement is made.

PN499

THE COMMISSIONER: Yes.

PN500

MR FLEMING: We all agree here in Melbourne with Mr Ferguson's characterisation of the problem. Could Mr Ferguson please just repeat that rephrased wording?

PN501

MR FERGUSON: Yes, sorry, and just for clarity it's at paragraph 32 of our first submissions. The wording would be:

PN502

*An agreement must result in the employee being better off overall at the time the agreement is made -*

PN503

Strike out the words "on its making" and then insert:

PN504

*than if the agreement had not been made.*

PN505

MR FLEMING: Yes, we all agree with that proposal.

PN506

THE COMMISSIONER: Thank you. And from around the country, any objection to what AIG are putting?

PN507

MS VAN GORP: No objection.

PN508

SPEAKER: No, Commissioner.

PN509

THE COMMISSIONER: Right, thank you. Do we know what ACCI says about that? Do they - - -

PN510

MS THOMSON: They're talking to consolidating A.5 to A.7 into one subclause and using a paragraph format because it would more easily translate into a checklist, and they propose some wording.

PN511

THE COMMISSIONER: I'll have a look at that separately. I won't ask the parties to address that.

PN512

MR FERGUSON: Just jumping forward because it's the same issue. Clause A.6(d) - - -

PN513

THE COMMISSIONER: Sorry. Is that Canberra? Sorry, Ms Blandfort? She seems to have gone. No, returning. Ms Blandfort or is there somebody in



Canberra there? Perhaps we can assume that there's nobody in Canberra appearing.

PN514

MR FERGUSON: Yes.

PN515

THE COMMISSIONER: We might then - can we cease the feed to Canberra? So where do you wish to go?

PN516

MR FERGUSON: A.6(d), the same kind of issue arises where the wording "at the time the agreement is made" has been substituted for "on its making".

PN517

THE COMMISSIONER: "On its making", yes.

PN518

MR FERGUSON: So we say a similar amendment should be made. Our proposal is set out at paragraph 34 and it would be, it would say:

PN519

*Show how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made.*

PN520

So we strike out the words "on its making".

PN521

THE COMMISSIONER: Thank you. Is that a consensus position here in Sydney?

PN522

MS McKINNON: Yes.

PN523

MS THOMSON: Yes.

PN524

THE COMMISSIONER: Mr Nguyen?

PN525

MR NGUYEN: Yes.

PN526

THE COMMISSIONER: Thank you. In Melbourne?

PN527

MR FLEMING: Yes, Commissioner. We have a further concern with A.6(d) when we get to it but yes.

PN528

THE COMMISSIONER: But to give the same effect to A.5 you're comfortable that it should say that?

PN529

MR FLEMING: Yes, Commissioner.

PN530

THE COMMISSIONER: Any other objections around the country?

PN531

MS VAN GORP: No, Commissioner.

PN532

SPEAKER: No, Commissioner.

PN533

THE COMMISSIONER: Thank you. We're at A.6 at the commencement of it. Anything there?

PN534

MR FERGUSON: We have raised one other issue in our submissions but I might just pause and think about that further before I raise it now.

PN535

THE COMMISSIONER: Does somebody else wish to speak to A.6?

PN536

MS McKINNON: Well, if I could maybe just prompt the discussion by saying that I think that there's an issue here about replacing the word "detail" with the word "show" in A.6(d), and the general consensus I think there is, is that "detail" and "show" both have different meanings. One is set out in a prescriptive way and the other one is demonstrate/prove, you know that's the kind nuance meaning. So there seems to be a consensus that keeping the existing phrasing is preferable and I have other issues with this clause, but I'll leave that one for now.

PN537

MR FERGUSON: No, I think that's right. I just wasn't sure whether the answer was to put "set out" in both clauses or insert "detail".

PN538

MS McKINNON: Yes, well either way from my point of view.

PN539

MR FERGUSON: Yes, perhaps just using the word "set out".

PN540

MS McKINNON: "Set out" is used in (c) above.

PN541

MR FERGUSON: Consistently in both - yes, so it's both 6(d) and 6(c).

PN542

THE COMMISSIONER: I see, so the current 4.4(c) and (d) is "detail how" but given that A.6(c) says "set out", is it your view that it should - (d) should say "set out"?

PN543

MR FERGUSON: Yes.

PN544

MS McKINNON: Yes, that would achieve the outcome that we're seeking.

PN545

THE COMMISSIONER: Does anybody have an opposing view to that? I'll take that's a no. What do the parties think about A.6 in itself?

PN546

MS ADLER: One that maybe more a matter of consistency - - -

PN547

THE COMMISSIONER: Into the microphone please.

PN548

MS ADLER: Sorry. More a matter of consistency perhaps is between A.6(b) and (c). One talks about identifying award term or terms and the next one sets out how the award term or each term is varied. I think the way A.6(c) is written is more confusing and having it similarly to the way (b) is drafted might be a better outcome.

PN549

THE COMMISSIONER: So how would you have (c) read?

PN550

MS ADLER: Even if it just said, "set out how the award term is varied". So you'd remove all "each term".

PN551

THE COMMISSIONER: Or would you say, "set out how the award term or terms are varied"?

PN552

MS ADLER: Yes, for consistency it would be.

PN553

MS WILES: Commissioner, it's Ms Wiles here from the TCFUA. Our preference would be to retain the word "each". We think in terms of compliance it emphasises to the parties to the agreement that there is an obligation to set out how each term is - or the effect of that - so we would prefer the word "each term" to be retained.

PN554

THE COMMISSIONER: Would you then have that in (b) "identify each award term or terms to be varied", and then (c) - - -

PN555

MS WILES: Well, we would comfortable with that.

PN556

THE COMMISSIONER: Then perhaps (c) similarly would be set out "how each award term or terms is varied". So you're getting each in both (b) and (c).

PN557

MS WILES: Yes, we're comfortable with that, yes, we support that.

PN558

MS BIDDLESTONE: That's also more consistent with the current wording in the award as well.

PN559

THE COMMISSIONER: Any objection to that?

PN560

MS VAN GORP: No objection, Commissioner.

PN561

THE COMMISSIONER: So does A.6 do what it needs to do with those proposed changes?

PN562

MS McKINNON: There's an issue of - so the drafter has raised the question about whether a note should be inserted under A.6(d) to provide guidance on the better off overall test and what that means in the context of an IFA. I anticipate that there won't be much scope for agreement on that issue because it's a hotly contested issue as to whether non-monetary benefits can be included. So our other concern about the note that's put forward is that it sort of suggests that it's the employer's responsibility to ensure that employees are better off overall but actually in our view that's a joint responsibility because only the employee can determine what genuine needs it has that are accommodated by the agreement. So those are the NFF's two contributions to the note.

PN563

MR FERGUSON: The Ai Group's - - -

PN564

MR FLEMING: Commissioner - - -

PN565

MR FERGUSON: No.

PN566

THE COMMISSIONER: I'll hear from you, Mr Ferguson.

PN567

MR FLEMING: Go ahead, Mr Ferguson.

PN568

MR FERGUSON: Ai Group's simply opposed to the note. We've set out detailed reasoning, part of it being that the question of how the test is to be applied needs to be determined in the context of each particular case and it's probably not helpful to try and provide some sort of abstract guidance around that. That's an observation made by the Full Bench in the context of a two year review. I think Ms McKinnon's right, it's probably unlikely to be agreement between all parties unless the unions are altering their position.

PN569

THE COMMISSIONER: So the FWO has proposed some draft wording there, the employers are not comfortable with that?

PN570

MS McKINNON: No, because then it raises the question about why non-financial benefits have to be significant to the employee and what significant means. It's just - I think there's more to go in clarifying the law about the application of this test in the IFA context. I'm not sure that the note would accommodate all concerns at this stage.

PN571

MR FLEMING: We agree with those comments here in Melbourne.

PN572

MR NGUYEN: Sorry, the AMWU doesn't agree that non-financial - non-monetary benefits can be part of the consideration for the better off overall test for the award individual flexibility agreement.

PN573

MR FERGUSON: Can we all agree that perhaps given the divergent views we shouldn't have the note?

PN574

THE COMMISSIONER: Well, that's your position.

PN575

MR FERGUSON: No, no, but there's divergent views - - -

PN576

THE COMMISSIONER: Yes.

PN577

MR FERGUSON: - - - and I get we're not going to agree on the views but I'm just trying to work out whether - - -

PN578

THE COMMISSIONER: Well, it's the parties collective view isn't it that the note should not be there.

PN579

MR FERGUSON: That's what I'm just trying to clarify, yes.

PN580

THE COMMISSIONER: But it's the drafter's preference or view that - - -

PN581

MR FERGUSON: Suggestion.

PN582

THE COMMISSIONER: Or suggestion that it could be there.

PN583

MR FERGUSON: Yes, I'm just trying to get if everyone thinks that, from the parties' perspective, that it's unhelp to have the note.

PN584

THE COMMISSIONER: So what does a - - -

PN585

MR FLEMING: Melbourne, yes.

PN586

THE COMMISSIONER: Yes, I hear that you all don't want it, it doesn't mean that it won't be there but your views are quite strong on it and what does a lay person do when they look at A.6?

PN587

MR FERGUSON: Make an assessment in the context of their particular case, which is what the Full Bench has said is required.

PN588

THE COMMISSIONER: They may not know what the better off overall test is.

PN589

MS McKINNON: They may not know that there is even a better off overall test, but what they will know is that if they make the agreement it has to leave them better than overall, just using the plain meaning of the words, and that because of other parts of the term it has to meet their genuine needs. I think that's probably enough.

PN590

THE COMMISSIONER: So is it your view that they would perhaps go and look at the Fair Work site and explore, if they weren't members of - - -

PN591

MS McKINNON: If they were concerned, there is guidance provided by the ombudsman and others.

PN592

THE COMMISSIONER: What does it currently - what does the clause currently say? There's no guidance given there?

PN593

MS McKINNON: No, no guidance.

PN594

THE COMMISSIONER: So it the parties' position, collective position, that there's no guidance in the current clause so why provide it in the plain language clause?

PN595

MS McKINNON: That and we're just concerned that inserting the note would create more disputation than the benefit it will bring. I think the drafter acknowledges that and they have suggested that the note would be beneficial if it could be agreed, but it's really got to be a note that reflects a common statement of intent.

PN596

MR FERGUSON: But even if we all agreed on it, it might be that in individual cases there are different applications of the test. So I'm just not sure that it's even going to be - it's certainly not going to be easy to come up with a form of words that captures all of that.

PN597

THE COMMISSIONER: But the words are - - -

PN598

MR FLEMING: The ACTU - - -

PN599

THE COMMISSIONER: Sorry, yes, go on.

PN600

MR FLEMING: The ACTU has concerns that the FWO's guidance is wrong and doesn't reflect the state of the law. So it's - that was all.

PN601

THE COMMISSIONER: Right. Nobody wants a note. I'm satisfied that the same language is used in terms of better off overall, so I don't know that we need to explore that any further.

PN602

MR FLEMING: Commissioner, if I could add in relation to that clause on a different point, the qualification in relation to the individual employee's terms and conditions of employment has been lost from 4.4(d) when translating it to A.6(d), so we say that there was some - in the existing wording there is some limitation of the kinds of things that can be taken into account. Those words suggest a focus remain on terms and conditions of employment which would speak against too broad a consideration of non-financial benefits. So the legal effect has changed in the re-draft.

PN603

THE COMMISSIONER: Well, did 4.4(d) only deal with the explanation and the detail of how that person - but did it affect the individual's legal rights or just how it was explained?

PN604

MR FLEMING: Well, we'd say 4.3(b) and (d) together would have that effect of characterising the right, and that they would be linked together.

PN605

THE COMMISSIONER: Well, 4.3(b) would be reflected in - - -

PN606

MR FLEMING: A.5. So strictly speaking - - -

PN607

THE COMMISSIONER: Yes.

PN608

MR NGUYEN: 4.4(d) - I think he's referring to 4.4(d).

PN609

THE COMMISSIONER: Yes, but he also referred to 4.3(b), and 4.3(b) is covered you say in A.5, but then 4.4(d) goes to the explanation and the demonstration of how those employees' individual circumstances are - and they were - they're better off. But that - 4.4(d) wouldn't have affected the right under 4.3(b), is that right?

PN610

MR FLEMING: Well, we say it would if the two of them were read together.

PN611

THE COMMISSIONER: But doesn't 4.4(b) go further than 4.3(b)?

PN612

MR NGUYEN: Commissioner, it does and if we listen to the explanation of the employer advocates today it would indicate that there is a right there that needs to be expressed.

PN613

THE COMMISSIONER: I see that you don't want to lose what's in 4.4(d), but I don't think it on face value goes so far as to preventing - I don't think it's as strongly as you put there, Mr Fleming, that it would affect the right to make it with the individual, taking into consideration their individual circumstances, because I don't think that's what 4.3(b) does. But it might do so without express - it might do so by effect.

PN614

MR FLEMING: Yes.

PN615

THE COMMISSIONER: So how do you want the reference to individual employees' terms and conditions covered off?

PN616

MR FLEMING: Well, I'd suggest taking - the least controversial way would be to tack it onto the end of A.6(d).



PN617

MS BIDDLESTONE: As it is in 4.4(d).

PN618

MR FLEMING: Yes.

PN619

MS McKINNON: That might be inconsistent with the guidelines because it would be crunching concepts together.

PN620

THE COMMISSIONER: Well, doesn't 4.4(d) and A.6(d) do the same thing as what is being sought?

PN621

MR FERGUSON: We would oppose it.

PN622

MS McKINNON: What would you oppose?

PN623

MR FERGUSON: So we oppose - the same reasons, Commissioner, that you've identified. We say that (d) really goes to the form of the agreement, that the test is in 4.3(b) if you will, in terms of whether they're better off overall. It doesn't - the clause that's seeking to be replicated doesn't actually create a new legal right as you've put. In fact replicating those words now may just perpetuate an ambiguity if people are going to try and latch onto that and suggest that that has some additional test, means some additional test is being applied. Surely this process is designed to remove those sorts of ambiguities, not perpetuate them just because the words were there in the past.

PN624

THE COMMISSIONER: Yes, but you can see the contention is that it would be a loss.

PN625

MR FERGUSON: That's their intention but we say that's wrong, that it's not a loss, that there isn't - that there's a loss of words of course but that we don't see that as being a further - sorry, I'm cutting my friend off. We don't see that clause as being a further limitation on whether one of these agreements can be put in place. We just say that as a matter of form you have to set out those sorts of matters.

PN626

THE COMMISSIONER: What do you say, Mr Fleming?

PN627

MR FLEMING: I hear what my friend is saying and ideally we would resolve ambiguities but this is a contentious issue so we'll be resolving ambiguity in favour of the employers. We could equally say how about we just put the - let's

resolve the ambiguity of the employee and put that limitation tacked onto the end of A.5. So it's clear that it's qualifies the right but at the very least we say - - -

PN628

MR FERGUSON: Well, you're right, if - - -

PN629

MR FLEMING: - - - we reserve that. And we simply say it's not a process - this isn't the process for resolving a substantive issue with a legal effects change - - -

PN630

MR FERGUSON: No, I maybe putting it too - sorry. I maybe putting it too high to say it's an ambiguity. Our position is actually that the clause doesn't have the effect that you say it does and that certainly replicating those words is going to make it less simple and easy to understand. But I think that it doesn't sound like we're going to agree.

PN631

THE COMMISSIONER: No.

PN632

MR FERGUSON: So obviously the Full Bench will just have to decide what the current effect is.

PN633

THE COMMISSIONER: Yes. So I hear what you have to say there, Mr Fleming, thank you. That 4.4(d) you press for the inclusion of those words. You say they're best served in A.6(d) and that's not - it's not a consent position.

PN634

MR FLEMING: That's correct. Thank you.

PN635

THE COMMISSIONER: Thank you. Are we ready to move to A.7?

PN636

MS McKINNON: Yes, thank you, Commissioner.

PN637

THE COMMISSIONER: Have we suggested perhaps that A.7 might be assisted by saying that a written agreement must be signed?

PN638

MS McKINNON: Yes, I think the suggestion might have been to move the "in writing" requirement from A.1 to A.7.

PN639

THE COMMISSIONER: Well, was it to move it or to in addition?

PN640

MS McKINNON: Well, up to the Commission, depending on the guidelines.

PN641

THE COMMISSIONER: I think it was suggested in addition. I think I'd earlier suggested - yes.

PN642

MS BIDDLESTONE: Yes, the suggestion was that it be in addition to A.1.

PN643

THE COMMISSIONER: So A.7 might look like, "A written agreement must be signed".

PN644

MS BIDDLESTONE: No, "Must be in writing and signed" - - -

PN645

THE COMMISSIONER: Sorry.

PN646

MS BIDDLESTONE: - - - is the proposal by - - -

PN647

THE COMMISSIONER: Sorry, an agreement - and I think, "An agreement must be in writing".

PN648

MR FLEMING: Yes, and signed.

PN649

THE COMMISSIONER: Then otherwise is the rest of that clause contentious?

PN650

MS McKINNON: Not from our perspective.

PN651

MR FLEMING: No.

PN652

MR FERGUSON: Not A.7.

PN653

THE COMMISSIONER: So everybody's otherwise comfortable with that?

PN654

MR NGUYEN: Yes, Commissioner. We had a submission about - - -

PN655

MR FLEMING: Yes, Commissioner.

PN656

MR NGUYEN: - - - the inclusion of the second sentence from clause 4.2, but we had discussed this issue earlier today as a group. So I don't know if maybe that

issue is maybe still alive and we have to make further submissions about whether the second sentence in 4.2 needs to be - - -

PN657

THE COMMISSIONER: I think that we've addressed that elsewhere haven't we? It doesn't really sit under A.7 does it?

PN658

MR NGUYEN: No, I mean I just note that we had raised that issue in the context of A.6 and A.7 but we did discuss it elsewhere today.

PN659

THE COMMISSIONER: Right, well the transcript will reflect that. A.8, not including third parties. Is that contentious at all?

PN660

MR FLEMING: No, Commissioner.

PN661

MS McKINNON: Not for us.

PN662

THE COMMISSIONER: A.8, no issue. A.9.

PN663

MS McKINNON: There are some issues here, Commissioner. The current provision is that the employer must keep the agreement itself as a time and wages record and give a copy to the employee, whereas it's not clear what happens with the original in this term because the employer has to keep a copy of the agreement and give another copy to the employee. So it's just really a question of - I think the current rule is that the employer keep the original agreement and the copy be provided to the employee.

PN664

THE COMMISSIONER: So 4.5 the employer keeps the agreement and gives a copy to the employee.

PN665

MS McKINNON: Yes.

PN666

THE COMMISSIONER: So you say that's changed by the employer keeping a copy and giving another copy.

PN667

MS McKINNON: Yes, yes.

PN668

THE COMMISSIONER: In the original - - -

PN669

MS McKINNON: So I mean it's a big issue but it's just the actual agreement itself I think is what needs to be kept as the time and wages record.

PN670

THE COMMISSIONER: Well, is there some explanation from the drafter as to why the employer keeps a copy? Are they going to keep in trouble for having kept a copy only and not the original?

PN671

MS McKINNON: Who knows, Commissioner.

PN672

THE COMMISSIONER: Well, the days of scanning and keeping only an electronic version of it, might that be what the drafter is trying to do?

PN673

MS McKINNON: Could be. I mean there will have to be an original copy because it has to be signed.

PN674

THE COMMISSIONER: Yes, but if it's an electronic version it's not really an original is it?

PN675

MS McKINNON: Depends, yes. I mean I don't know. There is a difference in the language, that's all.

PN676

THE COMMISSIONER: So are we assisted by the drafter?

PN677

MS McKINNON: No. 4.5 in the current original.

PN678

THE COMMISSIONER: So the issue is what the employer needs to do. Do you have any concern about them giving a copy to the employee as opposed to an original, there being two originals.

PN679

MS McKINNON: I think a copy would be better because, you know, if you have to have two copies then you do have to - - -

PN680

THE COMMISSIONER: Sign two.

PN681

MS McKINNON: Do a bit more of a formal process.

PN682

THE COMMISSIONER: Right. So then the employer must keep a copy of the agreement. That probably allows more scope doesn't it for the employer?

PN683

MS McKINNON: Yes, and again it's not a big issue but just noting the difference.

PN684

THE COMMISSIONER: Yes, well what do you say there in Melbourne?

PN685

MS WILES: Commissioner, it's Ms Wiles from the TCFUA, we would support the NFF's original point that there should be an obligation on the employer to keep the original. We think that's more consistent with the current legal effect of the current clause.

PN686

THE COMMISSIONER: The current clause says that the employer must keep the agreement as a time and wages record. It's not explicit as to whether it's an original or a copy.

PN687

MS WILES: It is kind of implied though that the agreement would be the original agreement. I take your point that it's not explicit but again in terms of compliance we think it's appropriate that there is an obligation on the employer to keep the original.

PN688

THE COMMISSIONER: So there are concerns that the NFF has and you have there, Ms Wiles. Are those concerns shared or there's ambivalence?

PN689

MS BIDDLESTONE: We're happy to support the TCFUA and the comments that Ms Wiles just made.

PN690

MR FLEMING: Likewise, your Honour.

PN691

THE COMMISSIONER: Then for the employers, your views? You're the ones who are mostly impacted.

PN692

SPEAKER: Happy to support the comments of the NFF.

PN693

THE COMMISSIONER: So you want the employers to keep an original? You don't, Mr Ferguson?

PN694

MR FERGUSON: I'm not sure. I'm thinking through the points, Commissioner, you've raised. I'm not sure it's explicitly clear that it's an original that has to be kept as you look at it.

PN695

THE COMMISSIONER: Yes.

PN696

MR FERGUSON: It seems sensible, they're not trying to change the legal effect of it, for there to be an outcome where a copy has to be kept. I'm just not clear that that's not sufficient already.

PN697

THE COMMISSIONER: Does A.9 do the work of 4.5 if it says, "The employer must keep the agreement as a time and wages record"?

PN698

MS BIDDLESTONE: And give a copy, not another.

PN699

THE COMMISSIONER: Yes.

PN700

MS BIDDLESTONE: Just a copy.

PN701

THE COMMISSIONER: We get there, don't we?

PN702

MS BIDDLESTONE: Yes.

PN703

THE COMMISSIONER: We get there with the same effect?

PN704

MS BIDDLESTONE: Yes.

PN705

THE COMMISSIONER: Excellent.

PN706

MR FLEMING: Yes, Commissioner.

PN707

MS BIDDLESTONE: The reality is someone has to keep the original I would have thought.

PN708

THE COMMISSIONER: Well, not necessarily in this day and age. So "The employer must keep the agreement as a time and wages record and give a copy to the employee". Very good. A.10.

PN709

MR FERGUSON: We've raised a minor issue with the inclusion of the words "of any kind". In essence we'd say the words "of any kind" are superfluous and should simply be deleted. They're unnecessarily in the clause.

PN710

THE COMMISSIONER: Where is the original clause?

PN711

SPEAKER: 4.2.

PN712

THE COMMISSIONER: They "must have genuinely made the agreement without coercion of duress". This reads that they "without duress of coercion of any kind", and is it your only - - -

PN713

MR FERGUSON: They weren't there before, there's no need for them now.

PN714

THE COMMISSIONER: "Only of any kind" is - - -

PN715

MR FERGUSON: Just take out "of any kind".

PN716

THE COMMISSIONER: Interestingly the words have been swapped, "coercion or duress" is now "duress or coercion".

PN717

MS McKINNON: It's not a big issue but in the Act I think it's the other way around.

PN718

THE COMMISSIONER: Do you think it's as it is now, it is "coercion or duress"?

PN719

MS McKINNON: I believe so, in the general protections and that's where it came from because originally you didn't need that provision because it's already prohibited in the Act but just to make it clear.

PN720

THE COMMISSIONER: So AIG would like to see a removal of the words "of any kind". Is there anybody who says that that should be retained in the draft?

PN721

MR NGUYEN: It seems to make it clearer from the a plain language perspective.

PN722

THE COMMISSIONER: How does it do that?

PN723

MR FLEMING: Commissioner, I suspect the reason why - even though "of any kind" seems to add some great emphasis, I suspect the reason it was put in by the drafter was to make it clear that the second aspect of that sentence was also an obligation. So it's a clause about the fact you have to - the parties have to genuinely agree and then to make it clear that the without duress or coercion is



also a further obligation. So my only reservation about removing it is that we just lose that message that there's two obligations if there's another way of achieving that we wouldn't oppose it.

PN724

THE COMMISSIONER: But does it take it a step too far, Mr Fleming, in the example of well, I'm not going to agree but if the employer then says well, look, I'll increase your rate by 50 cents an hour. Isn't that coercion of any kind which is to the benefit of the employee?

PN725

MR FLEMING: Yes, I agree, Commissioner, it does - it does seem to make the obligation higher. All I'm seeking to preserve is the idea that there are two clear obligations in the clause, if we can find a way to - - -

PN726

MR FERGUSON: Sorry, Mr Fleming, you're raising an issue that we hadn't perhaps thought of. You're saying that clause 10 now not only requires that the agreement be a product of agreement without coercion or duress but it's now creating an obligation to not submit the employee to duress or coercion or vice versa.

PN727

MR FLEMING: No, what I meant to express was that it's requiring that they agree and that's requiring the agreement be without duress or coercion. Which is very clear in the original version but has lapsed in the - it's a very subtle point but (indistinct).

PN728

MR FERGUSON: As a secondary - - -

PN729

MS THOMSON: I don't agree that it's necessarily clear that there's two obligations there because if you look the 4.2 as it stands, "genuinely made the agreement without coercion or duress". So isn't the coercion or duress going to supplant the genuine agreement? They're linked in that way.

PN730

THE COMMISSIONER: Well, 4.2 is in past tense, "they must have made the agreement without coercion or duress" and A.10 is that they "must genuinely agree without duress or coercion".

PN731

MR FLEMING: Maybe I wonder if we insert the word "and" before "without duress or coercion" and then get rid of "of any kind", if that helps.

PN732

THE COMMISSIONER: How do you say that would read? It wouldn't make sense, would it?

PN733

MR FLEMING: That makes it clear that there's two obligations.

PN734

THE COMMISSIONER: What do you say are the two obligations Mr Fleming?

PN735

MR FLEMING: Just that the parties agreed and that the agreement be without duress or coercion.

PN736

MR FERGUSON: So you would say - - -

PN737

THE COMMISSIONER: How do you say that that is done in 4.2? 4.2 flows doesn't it that looking backwards they must have agreed without coercion or duress but it's not a two-step process.

PN738

MR FLEMING: True. The emphasis in that though seems to be on the coercion and duress.

PN739

THE COMMISSIONER: I think the comma might need to go mightn't it? "The employer and employee must genuinely agree without duress or coercion", the comma needs to go.

PN740

MR FERGUSON: I think that's - - -

PN741

MR FLEMING: Yes.

PN742

MR FERGUSON: - - - that's right, Commissioner. Because if you just strike out the without - yes.

PN743

THE COMMISSIONER: See if the comma goes after "agree" we're still left with your concern there, Mr Ferguson of "of any kind".

PN744

MR FERGUSON: That's right. So we think - and I'm not sure whether anyone has any objection to the "of any kind" being removed.

PN745

MR FLEMING: I think that's the answer, if you remove the comma and "of any kind" we might all be in agreement.

PN746

THE COMMISSIONER: Excellent.

PN747

MR FERGUSON: I think we are. I don't wish to make an issue of it now, we will just give further thought to the changing nature of the whole sentence.

PN748

THE COMMISSIONER: Yes. So remove the comma after "agree".

PN749

MR NGUYEN: Commissioner, I just note that you had put forward the proposition that a type of coercion would be allowed, such as an employer providing in a meeting that there would be an additional remuneration per hour, for example. Like I don't - with respect, don't agree that that is a type of activity that could be possible in the making of this type of agreement. The employer has to put the agreement in writing, the proposed agreement in writing to the employee to consider, not in the meeting but in their own time.

PN750

THE COMMISSIONER: Yes, it was just a suggestion there of what is coercion.

PN751

MR NGUYEN: But in light of your comment it does reflect that the words "of any kind" do have meaning and purpose that some people may take it that a type of coercion may be allowed.

PN752

MS McKINNON: Well, coercion is a term in the Act and clearly sets out what is coercion and it involves threatening behaviour. So I think if you - - -

PN753

THE COMMISSIONER: For example, I used wouldn't constitute coercion.

PN754

MS McKINNON: Wouldn't be coercion under the Act, it would be a positive. It's a bit like affirmative action. It's discriminatory but that's okay.

PN755

THE COMMISSIONER: Right well in that situation there then I imagine the employer would pull up a second agreement and the second agreement with more money is unlikely to be coercion. So you'll give some thought there, Mr Ferguson, to "of any kind" and the parties will respond if the AIG presses - - -

PN756

MR FERGUSON: Yes, we think that fixes the issue we've raised and it's just whether out of my exchange with Mr Fleming there's any other issue that we might want to raise. They won't necessarily be one.

PN757

THE COMMISSIONER: The pesky comma.

PN758

MR FERGUSON: Yes. Well, do we need to remove both commas?

PN759

THE COMMISSIONER: Yes, you would remove I think the second comma, I think it's necessary.

PN760

MR FLEMING: Yes.

PN761

THE COMMISSIONER: A.11.

PN762

MR FERGUSON: No, there's another - - -

PN763

MR FLEMING: If I can speak to that Commissioner.

PN764

MR FERGUSON: There's another A.10, I apologise. In some detail page 14 of our submissions. If I can come to the heart of it, we think that A.10 requires that there be genuine agreement to the concept of there being an agreement, not just to each of the term or terms that are being varied. I'm explaining this probably poorly but in essence, we are proposing a fairly simple variation to make the clause a bit simpler. What we would say is, putting aside this "of any kind" issue. What the clause should say ultimately is:

PN765

*The employer and the employee must genuinely agree, without duress or coercion to any agreement made.*

PN766

So they must not only agree to each of the variations to the terms but they must genuinely agree to enter into one of these arrangements. This is set out at paragraphs 43 to 46 of our submissions. At paragraph 46 we have the words that we propose.

PN767

MR FLEMING: Could you please read those words?

PN768

MR FERGUSON: The words are:

PN769

*The employer and the employee must genuinely agree, without duress or coercion to any agreement made.*

PN770

Maybe we don't need the comma.

PN771

MR FLEMING: I'm not sure the layperson's going to understand the agreement to agree phrasing.

PN772

THE COMMISSIONER: Well, if you have a look at what I said earlier about 4.2.

PN773

MR FLEMING: I'm a bit confused - - -

PN774

THE COMMISSIONER: 4.2 is a past tense and it says that they must have genuinely made the agreement. So it's making of the agreement not the variation of each respective term.

PN775

MR FERGUSON: That's what we're trying to bring back.

PN776

MS McKINNON: There is a point in time test there, because you can't have coercion or duress at the time that the agreement's made. They must have made the agreement without coercion or duress because there may be a time when once the agreement is made, circumstances change and then the employee or the employer no longer genuinely agree, but that's not what current 4.2 contemplates.

PN777

MR FERGUSON: Yes, you don't want to get into a fight about the level of genuine agreement about the variation. Rather just the fact that they have genuinely entered into the arrangement.

PN778

MS McKINNON: Yes.

PN779

MS THOMSON: Would it be better to say the employer and the employee must genuinely agree without duress or coercion to make any agreement?

PN780

MS McKINNON: Well, it seems there's lots of ideas for wording. Maybe we could come back on this issue and make some suggestions.

PN781

MR FERGUSON: Yes, we're not weathered to our wording.

PN782

SPEAKER: That is shocking wording.

PN783

THE COMMISSIONER: Well, do the parties - - -

PN784

SPEAKER: We're not weathered to them if you've got a better idea.

PN785

THE COMMISSIONER: How do the parties feel about 4.2 - - -

PN786

MS SVENDSEN: How do you feel about the employer and the individual employee must have genuinely made the agreement without coercion or duress?

PN787

MR FERGUSON: It certainly has an appeal doesn't it?

PN788

THE COMMISSIONER: Well, that's what I was suggesting there at 4.2 but I think there's a preference to - I'm not sure if I'm right on this but move away from the past tense, but could perhaps - you like - - -

PN789

SPEAKER: (Indistinct) why don't we use it?

PN790

MR FLEMING: Use the existing wording.

PN791

THE COMMISSIONER: Yes, but you like what 4.2 says and how - the effect of it and how narrow it is but you think A.10 is clumsy.

PN792

MR FERGUSON: Yes.

PN793

MS McKINNON: Yes.

PN794

MR FERGUSON: The genuine agreement needs to be - for what it's worth, the wording that we did develop is set out at 46 if anyone wants to have a think about it. But - - -

PN795

MR FLEMING: We'd support going back to the original wording. Is that open for discussion?

PN796

MR FERGUSON: Yes.

PN797

MS SVENDSEN: I think the current wording is actually pretty simple and clear and if we separate it in two, like if you do not want the second half of the paragraph in there which this wouldn't have, then I don't see that the - or in fact I'm pretty sure given the discussions we're having that A.10 is not as clear as 4.2 is if you just use the first paragraph - sorry, first sentence.

PN798

MR FERGUSON: So the unions want the second sentence in anyway.

PN799

MR NGUYEN: Yes, put the whole thing in.

PN800

MS SVENDSEN: Yes.

PN801

THE COMMISSIONER: Look I hear what you're saying.

PN802

MS BIDDLESTONE: The whole 4.2 should be retained as it is.

PN803

THE COMMISSIONER: Thank you. A.11.

PN804

MR FLEMING: Commissioner, if I could speak to 11 and 12. So clause - the existing clause 4.8 makes it clear that the agreement can be either terminated by agreement or unilaterally by either party. I don't think that's less clear in A.11 and 12 because on one reading of what's there it says in A.11 the two can agree at any time and then A.12 could be read as describing how the notice works and how it moves from one party to the other, rather than specifying independently that a party could unilaterally end the agreement.

PN805

THE COMMISSIONER: Yes, you really need to read A.12 to understand the effect of A.11. To understand that A.11 requires agreement.

PN806

MS THOMSON: ACCI have proposed collapsing A.11 and A.12. I think the clause makes sense the way they've proposed some wording which is, you know an either/or situation but I think that's not in keeping with the guidelines, which is why they've moved away from that form of drafting.

PN807

MS SVENDSEN: The trouble with the concept of drafting that moves away from making it clear that either/or applies is that when either/or does apply then it's very hard to make it clear.

PN808

MR FERGUSON: Isn't the problem compounded as you move through the clause because then there's a scenario where you use a different period of notice in the event that there's noncompliance with the requirements or the clause or the Act? So actually all of these clauses are linked and alternate arrangements but there is a risk that a lay person - - -

PN809

MS SVENDSEN: Yes, I think the issue - - -

PN810

MR FERGUSON: Sorry. There's a risk that a lay person just reads one clause, gets what they need and then stops reading.

PN811

MR FLEMING: That's right.

PN812

MS SVENDSEN: Absolutely.

PN813

MS BIDDLESTONE: I think there's actually a problem with A.11 right through to A.14. So the re-drafting of I think A.9 is now A.11, A.12, A.13 and A.14 and they don't - I think there are some issues with whether they actually reflect what's in - well it's definitely less clear.

PN814

MR FERGUSON: We have problems with some of the later clauses in terms of their substance and I don't have a view, I'm just thinking about it now, is whether a subheading to flag that those clauses are somehow linked would assist.

PN815

MS ADLER: Or that they relate to termination.

PN816

MR FERGUSON: That's what I was getting at too.

PN817

THE COMMISSIONER: So A.11 to A.14 does the work of what 4.8 and 4.9 did but none of you like it.

PN818

MR FLEMING: That's right.

PN819

THE COMMISSIONER: What do ACCI, how helpful are they?

PN820

MS THOMSON: So they've collapsed A.11 and A.12 to say:

PN821

*An agreement may be determined: a) by written agreement at any time, or b) by the employer or employee giving; (i) 13 weeks, or (ii) four weeks.*

PN822

I'm just looking at the guidelines. That does make a lot more sense but that doesn't deal with the other clauses as the other parties raised after - - -

PN823

MR FERGUSON: So A.14 is overlooked. I mean it could just be dropped in as (iii) until the guidelines - - -

PN824

MS THOMSON: Yes, there's ways of working but that would solve the problem I think.

PN825

THE COMMISSIONER: Yes, so that's a more attractive clause is it, the ACCI one?



PN826

MR FERGUSON: With amendment.

PN827

THE COMMISSIONER: What amendment do you say is required?

PN828

MR FERGUSON: I think it would need to embrace A.14 as well. So just looking at it on the run, there's 13 weeks or four weeks if it's agreed is it? Sorry four weeks if it's - - -

PN829

THE COMMISSIONER: No, four weeks if before the relevant change to the Act was made.

PN830

MR FERGUSON: Yes, so 14 deals with the situation where either party can vary it, "28 days if an agreement made under this clause does not meet a requirement set out in section 144(4)" or the clause itself. So maybe that's just a separate - it just needs to be a separate clause.

PN831

THE COMMISSIONER: Well, they're only proposing to collapse 11 and 12 so they've done that job well haven't they?

PN832

MR FERGUSON: Yes.

PN833

MS McKINNON: As long as it can be done under the guidelines with the sub, sub, sub.

PN834

THE COMMISSIONER: Yes.

PN835

MR FERGUSON: Sorry, no, I withdraw what - - -

PN836

THE COMMISSIONER: So are the parties comfortable with what ACCI's put broadly, with respect to 11 and 12?

PN837

MS McKINNON: Yes.

PN838

MR FLEMING: I'm just looking for that construction but in that kind of grammatical construction, yes, is what we prefer. So broadly we're agreeable. I don't seem to have a copy of that exact wording in front of me.

PN839

THE COMMISSIONER: Well, I'll read it out.

PN840

MR NGUYEN: It's on page - - -

PN841

THE COMMISSIONER: So it says:

PN842

*An agreement may be terminated; a) at any time by written agreement between the employer and employee; or by the employer or employee giving; (i) 13 weeks written notice to the party; or (ii) four weeks written notice to the party if the agreement was entered into before the first full pay period starting on or after 4 December 2013.*

PN843

MR FLEMING: Yes, that looks good.

PN844

THE COMMISSIONER: So then it's - what's to be done about 13 and 14? That simply ceases to have effect once that time has expired.

PN845

MS THOMSON: They need to reverse the order, so have the exception to the new A.11 if agreement - there should be a new A.11, immediately followed by what is now A.14 and then have A.13 as the new A - I'm getting confused with my numbers. But just because I think it doesn't make sense to talk about having the agreement ceased to then talk about an exception.

PN846

THE COMMISSIONER: Where does A.14 come from?

PN847

MR FERGUSON: So A.14 arises from a note that's in 4.8 and it's a problem because it introduces new provisions. So the note references facts that if there's a failure to comply with the requirements set out in section 144(4) the agreement can be terminated with 28 days' notice. The new drafting says that that can arise - you can terminate with 28 days' notice if there's a failure to comply with section 144(4), or clause (a). The difficulty is that this clause, as I understand it, includes additional requirements that are not - that don't arise directly from that section so it now gives a greater right to either party to terminate with only 28 days' notice. Which is a substantive change.

PN848

THE COMMISSIONER: What are the additional provisions that aren't already in 144(4).

PN849

SPEAKER: I don't think that's correct.

PN850

THE COMMISSIONER: I mean you're not agreeing to terms that are greater than the Act, are you?

PN851

MR FERGUSON: Well, 54 we set out, and I'll have to rely on my submissions, but we've set out a raft of requirements which we say are not caught by that section.

PN852

THE COMMISSIONER: Your paragraph 54?

PN853

MR FERGUSON: Paragraph 54. Double checking the Act now to make sure we were right. Includes:

PN854

*The written agreement must state the names of the employer and employee -*

PN855

which I don't think is in section 144(4) and the parties can read it, but:

PN856

*requires that the written agreement must identify the award terms or terms to be varied.*

PN857

Under their clause:

PN858

*The written agreement must set out how the award term or each term is varied and the written agreement must state the date on which the agreement is to start.*

PN859

Now look it may be that some of these are fairly minor issues but it would be somewhat inappropriate if, you know, noncompliance informed with one of these minor issues suddenly enabled a party to terminate one of these agreements in a much shorter period of time.

PN860

THE COMMISSIONER: So you say it should be limited to only the 144(4).

PN861

MR FERGUSON: That's right, you take out the noncompliance with the requirements of the award clause. That's just an issue for compliance.

PN862

THE COMMISSIONER: It's a step gone too far.

PN863

MR FERGUSON: Yes.

PN864

MS McKINNON: Yes.

PN865

MR NGUYEN: Commissioner, I don't agree with that assessment. The Full Bench has determined the terms of the award flexibility term as it presently exists as being necessary to comply with the terms of the Act, and so the extrapolation by the Full Bench of these requirements means that the Bench considers that these are requirements of the Act. So it's not - it's not right to say that it should only strictly be the words in the Act as people may or may not, you know, determine that to mean.

PN866

MR FERGUSON: Well, the Full Bench hasn't determined and what they've determined is that a note is appropriate, and that the note not have this new obligation which the drafter has dreamt up.

PN867

MR NGUYEN: Well, they have because the note says "which are reflected in the requirements of this clause".

PN868

MR FERGUSON: That's the second thing we're going to say, is that we think it may be better to leave A.14 as a note rather than an award derived obligation. A new award derived obligation. Why don't we just keep it as a note which references the Act, the Act does it's work and then we can't get into any trouble.

PN869

THE COMMISSIONER: The existing note says:

PN870

*If any requirements of section 144(4) which are reflected -*

PN871

So isn't that limited, it doesn't include everything within the current clause. It's only those that are in both 144(4) and the clause?

PN872

MS McKINNON: Yes, and that's what the note does but A.14 doesn't do that, so what A.14 - - -

PN873

THE COMMISSIONER: It goes beyond.

PN874

MS McKINNON: - - - says, it must mean any requirement in the Act or this clause.

PN875

THE COMMISSIONER: Well, doesn't it say as set out both in section 144 and in clause (a), so doesn't that do the same?

PN876

MS McKINNON: Well - - -

PN877

MR FLEMING: Yes, it does.

PN878

THE COMMISSIONER: The word "both" there does exactly what - "which are reflected", so that they need to be common to both the existing clause and 144 and the word "both" there I think - it's a bit confusing though. I mean you're all confused here. What's a lay person going to see?

PN879

MR FERGUSON: Well, what about if we - that's right, but you're going to have to actually cross reference the Act to the award and play spot the difference, which we've helpfully done in the submission. But you're going to have to work out which category it falls in to make sure it's triggered by both. Can we just make it a note and make it in the same terms, because then we're not creating any new obligation or right if you will.

PN880

THE COMMISSIONER: I don't know that we need to make it a note. If it can be a clause, it can be a clause but look, it does appear to be a little confusing. Perhaps the parties can have a look at that and hone some better words. Try and make it a clause if you can. Fall-back position a note.

PN881

MR FERGUSON: Yes. Partly we're suggesting the note because it fixed our structuring issue as well.

PN882

MS McKINNON: I mean the justification for it being a note is that really what it's - the note is doing is pointing to a current rule in the Act so you don't need to replicate the rule in the award but we - - -

PN883

MR NGUYEN: I don't think that's right, because you can't make an agreement under section 144, you make an agreement under this term, under the term of the award.

PN884

MS McKINNON: Yes, but the Act deals with the period of notice.

PN885

MR NGUYEN: The Act deals with what's required in the term in the award, not with the requirements of the agreement.

PN886

MS McKINNON: No, no, the Act is dealing with the different period of notice to the expanded period of notice that now operates. So all the note is doing is pointing you to there's a different rule in the Act, in certain circumstances.

PN887

MR FERGUSON: If you're going to drill down, how can it be necessary to have an award clause that gives effect to something the legislation already delivers, because that's not what the awards do at the moment.

PN888

THE COMMISSIONER: Well, give some thought parties to whether or not ACCI's proposed words might include (iii). You may not agree with that but would a (iii) assist with explaining the other time when 28 days is imposed?

PN889

MS McKINNON: I think it's a good idea for us to have a think about how best to resolve this and come back.

PN890

THE COMMISSIONER: A.15. I don't know that the comma is necessary after effects. I do like a comma but I don't know that it's necessary there. No, but there's no objection from Melbourne, is that right?

PN891

MR FLEMING: That's correct.

PN892

THE COMMISSIONER: To A.15.

PN893

MS WILES: Sorry, Commissioner, it's Ms Wiles from TCFUA. I have just identified in 4.10 in the second last sentence, it does make explicit that it's any other agreement between an individual employee and an employer, and the wording "individual" has been lost in A.15. This is actually quite an important point because there are in many awards facility provisions that deal with majority agreement.

PN894

THE COMMISSIONER: Yes.

PN895

MS WILES: So potentially there is - well potentially there could be an anomaly or an ambiguity in terms of how that operates. So my preference would be for the word "individual" to be retained in A.15.

PN896

THE COMMISSIONER: Is the drafter perhaps saying that it's unnecessary because an employee - - -

PN897

MS SVENDSEN: The drafter actually doesn't understand - this is always about the rest of the award and I would think that that's one of the issues that we've not been able to resolve in some of the PIA stuff, so it may well be relevant. We don't have these conversations with the drafter so you can't actually tell. So, you know, we might be wrong in that but it seems to us more broadly that sometimes there's conflict between clauses like this for those sorts of reasons that is just raised and

that actually doesn't seem to have made sense because the drafter's not had that general understanding.

PN898

THE COMMISSIONER: Yes, but - - -

PN899

MS VAN GORP: Commissioner, back to your question. An employee can be part of a majority making a decision and that is a different context than an agreement between the individual employee alone and an employer.

PN900

THE COMMISSIONER: But does, "that provides for an agreement between an employer and an employee" do the necessary work without any verbose?

PN901

MR FERGUSON: I think when you read it - reading that paragraph in isolation it probably does get the job done but I understand the issue that might arise, given that there are collective agreements that are entered into in the context of awards. When you don't specify individual people might think it captures both. We haven't thought through it because it's being raised now but as I sit here I think perhaps there is some merit in specifying individual.

PN902

THE COMMISSIONER: But it's not necessary to include the extra words such as "contained in any other term of this award". It's simply the insertion of "individual", is that right Ms Wiles?

PN903

MS WILES: I'll just have a quick think. Well, I think it's probably covered off in the second line:

PN904

*Any other term of this award that provides for an agreement between an employer and an individual employee.*

PN905

Yes, I think you're right.

PN906

THE COMMISSIONER: So you're only looking for the insertion of the word "individual"?

PN907

MS WILES: At this stage, yes.

PN908

THE COMMISSIONER: And on face value the employers don't seem to have any objection to that.

PN909

MS McKINNON: Ambivalent for me. That's how I would read it.

PN910

THE COMMISSIONER: I think we've done very well. Now to consultation - no, I'm only joking there, we're not going to move onto that. Looks, thanks parties. Is there anything else that you wish to say today in relation to that entire clause?

PN911

MR NGUYEN: Thank you, Commissioner. In terms of the process now, is there going to be another draft issued or an indication of which matters are still to be resolved or - - -

PN912

THE COMMISSIONER: I don't know. I'll discuss that with the President and we'll see where we go. I think we've made some very good progress today.

PN913

MR FERGUSON: I appreciate you may not have a view on this, Commissioner, but should we consider what process we're going to now undertake for the rest of this - these clauses?

PN914

THE COMMISSIONER: What would the parties like? You've seen what we can do in a couple of hours. Is it your preference that we convene again and get through the rest of it in the same fashion that we've done today?

PN915

MR FERGUSON: If we're going to do it I would like one big block.

PN916

MR FLEMING: Yes, Commissioner.

PN917

MR FERGUSON: Just try and get through it as best we can.

PN918

THE COMMISSIONER: So set aside a full day?

PN919

MR FERGUSON: One full day.

PN920

THE COMMISSIONER: Yes. When would you propose that happen?

PN921

MR FERGUSON: Not in the next two weeks. It's difficult without the diary about all of the award review proceedings.

PN922

THE COMMISSIONER: Yes.

PN923

MR FERGUSON: So if we could just ensure it happens on a day that doesn't clash with any other award review proceedings.



PN924

MS McKINNON: Are there any such days, Commissioner.

PN925

MR FERGUSON: They're becoming few and far between before Christmas and not in the next two weeks.

PN926

THE COMMISSIONER: Look, I don't think that we can necessarily say today when that will be. We'll hold some discussions, we'll propose some dates and see what the parties say.

PN927

MR FERGUSON: Thank you, Commissioner.

PN928

MR FLEMING: Commissioner, we would request if possible that the Commission release an updated version draft to assist us.

PN929

THE COMMISSIONER: Dealing with - - -

PN930

MR FLEMING: An updated version of the summary.

PN931

THE COMMISSIONER: Dealing with?

PN932

MR FLEMING: The summary, sorry.

PN933

THE COMMISSIONER: An updated version of the summary with the submissions are you saying? No?

PN934

MR FLEMING: Yes, Commissioner.

PN935

THE COMMISSIONER: Are you looking for an updated of this clause?

PN936

MR FLEMING: Well, if the intention - I take it we wouldn't be revisiting what we've covered today, so maybe that's not necessary. Just the submissions.

PN937

THE COMMISSIONER: I don't know. I'll discuss with the other members of the Full Bench. It may be that we take into consideration what you've said today and we are ready to move on that clause. Or we deal with the remaining four clauses and - - -

PN938

MR FERGUSON: Without in any way pre-empting what the Commission might be able to do, in the exposure draft process we would have one of these conferences, sometimes a revised summary has been prepared which just reflects the Commission's best efforts at showing the matters that we have resolved or not resolved.

PN939

THE COMMISSIONER: Yes.

PN940

MR FERGUSON: Then the next time that might be the template for bedding it down to make sure that's done.

PN941

THE COMMISSIONER: Yes. So that doesn't sound to - you know, there's not too many outstanding issues between the parties. It'd be good for you to all walk away in the coming weeks with what that is.

PN942

MR FERGUSON: Think about it and make sure that's right.

PN943

THE COMMISSIONER: Rather than having to read through the transcript. But look I'm in the President's hands, we'll see where we go. It's my first time doing plain language.

PN944

MS SVENDSEN: Welcome, it's a wonderful process.

PN945

THE COMMISSIONER: Will you have me back is the question?

PN946

MS McKINNON: With pleasure.

PN947

THE COMMISSIONER: You'll have me back. We will just communicate in the normal process as to what the next steps are.

PN948

MS McKINNON: Thank you very much.

PN949

MS THOMSON: Thank you.

PN950

THE COMMISSIONER: Thanks for your participation today in all the other states.

PN951

MS SVENDSEN: Thank you.

PN952

MR FLEMING: Thank you.

PN953

THE COMMISSIONER: We are adjourned.

**ADJOURNED INDEFINITELY**

**[1.34 PM]**