



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER CIRKOVIC**

**s.155A - Terms dealing with superannuation**

**Four yearly review of modern awards  
(AM2014/266)  
Educational Services (Teachers) Award 2010**

**Melbourne**

**10.21 AM, MONDAY, 30 JANUARY 2017**

PN1

THE COMMISSIONER: Good morning, everyone. This is a conference that's recorded that is following on from a hearing before the Full Bench in Sydney on 6 December, if I recall correctly. I'll take appearances first from the parties that are in Melbourne and then I understand we have parties in Sydney via video link. So, I'll start with Melbourne.

PN2

MR A ODGERS: If the Commission pleases, my name is Odgers, initial A, and I appear on behalf of the IEU, together with Ms Wischer, initial K.

PN3

THE COMMISSIONER: Thank you, Mr Odgers.

PN4

MS K KNOPE: If the Commission pleases, Knope, initial K. Appearing with me is Ms Gilmore, initial L. We are appearing for six associations of independent schools, those of Victoria, New South Wales, Queensland, South Australia, Tasmania and Western Australia; if the Commission pleases.

PN5

THE COMMISSIONER: Thank you, Ms Knope. In Sydney?

PN6

MR M ROBSON: Robson, initial M, for United Voice.

PN7

THE COMMISSIONER: Thank you, Mr Robson.

PN8

MR J ARNDT: Arndt, initial J, seeking permission to appear for the Australian Childcare Alliance, New South Wales Business Chamber and Australian Business Industrial.

PN9

THE COMMISSIONER: Seeking permission, Mr Arndt, are you, as solicitor?

PN10

MR ARNDT: That's right.

PN11

THE COMMISSIONER: Thank you.

PN12

MS J ZADEL: If the Commission pleases, Zadel, initial J, on behalf of the Australian Federation of Employers and Industries and I have with me assisting today, Mr Miljak, initial J.

PN13

THE COMMISSIONER: Thank you, Ms Zadel. And?

PN14

MR J GUNN: If the Commission pleases, Gunn, initial J, for CCSA.

PN15

THE COMMISSIONER: Thank you, Mr Gunn. I can't see you. Thank you. All right, thank you, Mr Gunn. We'll deal first with permission, Mr Arndt. Is this the first time you've participated in this process?

PN16

MR ARNDT: In the wider process, not by any means, but in this particular award, yes, I've been heavily involved.

PN17

THE COMMISSIONER: By that, I'm asking have you been granted permission or is this a - - -

PN18

MR ARNDT: In this specific award, no.

PN19

THE COMMISSIONER: Yes, just in previous - in other - - -

PN20

MR ARNDT: In many, many previous award review proceedings.

PN21

THE COMMISSIONER: Thank you. We'll hear you first then.

PN22

MR ARNDT: Having regard to the complexity of the process and having regard to the efficiency that I can bring to the process, it's my submission that the Commission and the parties would be assisted through my participation today.

PN23

THE COMMISSIONER: We will benefit from your participation, is that the essence?

PN24

MR ARNDT: Hopefully, Commissioner.

PN25

THE COMMISSIONER: Thank you. Does anyone have an objection?

PN26

MR ODGERS: Irrespective of the grounds cited, we have no objection to leave being granted.

PN27

THE COMMISSIONER: Thank you. Anyone in Melbourne have anything?

PN28

MS KNOPE: No objection.

PN29

THE COMMISSIONER: Thank you, Mr Arndt, permission is granted.

PN30

MR ARNDT: Thank you, Commissioner.

PN31

THE COMMISSIONER: As I said, this is a matter flowing from the last hearing before the Bench on 6 December. Since that time, there has been an exposure draft published and there have been a number of submissions that have been received by the Commission. Before I hear from each of the parties in relation to specific items, what I'd like to do is confirm what's been put to me as matters that have changed since the 6 December hearing and since the earlier published draft. I'm going to be using the table that is the table that was published on the website by the (indistinct) team and on my copy it says updated as of 24 February 2016, but that's not obviously the case. It was published post the hearing in December 16. What I'd like to do is confirm first that item 1, relating to clause 20, has been withdrawn by United Voice; is that correct?

PN32

MR ROBSON: Yes, that's correct.

PN33

THE COMMISSIONER: Item 7 related to clause 4. Mr Gunn, I believe that's been withdrawn?

PN34

MR GUNN: That's correct, Commissioner.

PN35

THE COMMISSIONER: As has item 8 related to clauses 10(1)(d) and (10)(c)(vi)?

PN36

MR GUNN: Yes, Commissioner.

PN37

MR ARNDT: Apologies, Commissioner. I think the parties in Sydney are having some difficulty ascertaining which document we're dealing with at the moment. Is this the revised summary of submissions, technical and drafting?

PN38

SPEAKER: These are the substantive.

PN39

MR ARNDT: These are the substantive.

PN40

THE COMMISSIONER: Just one moment and I'll get the actual heading. It's published on the website on 6 January 2017. It is headed: "Summary of proposed substantive variations."

PN41

MR ARNDT: Thank you, Commissioner.

PN42

THE COMMISSIONER: Is that the document? Do you have that document?

PN43

MR ARNDT: I think everyone has now found that, thank you, Commissioner.

PN44

THE COMMISSIONER: Thank you. Would you like me to repeat? It's clear there, though, that item 1, the United Voice submissions being withdrawn? Is that  
- - -

PN45

MR ARNDT: No - - -

PN46

THE COMMISSIONER: You're clear?

PN47

MR ROBSON: Excuse me. Excuse me, Commissioner, could I take a second?

PN48

THE COMMISSIONER: Yes, certainly. I'll give you a moment to have a look at that document.

PN49

MR ROBSON: Yes, that's correct. That's been withdrawn.

PN50

THE COMMISSIONER: Thank you. Item 7 and 8 have been withdrawn and Mr Gunn has confirmed that. Is everyone clear on that in Sydney?

PN51

MR ARNDT: Yes, Commissioner.

PN52

THE COMMISSIONER: Are the Melbourne parties following the same course?

PN53

MS WISCHER: Our understanding was that we were working with the technical and drafting, but we are starting with the substantive.

PN54

THE COMMISSIONER: I'm just wishing to confirm before we do that that these things have been withdrawn since the last. Is that correct? If you could just follow that one for the moment.

PN55

MS WISCHER: Yes, certainly.

PN56

THE COMMISSIONER: Item 10, Mr Gunn, has been - - -

PN57

MR GUNN: Commissioner, yes, if it assists the Commission, all those items that are shown against CCSA on this table have been withdrawn.

PN58

THE COMMISSIONER: That's item 10, item 11 and item 12?

PN59

MR GUNN: Correct, Commissioner.

PN60

THE COMMISSIONER: We then have item 16, item 17, item 20, and that's the end of that document and all parties have that in front of them then and can record that when the updated drafts are forwarded in the summaries, they will record that those matters have been withdrawn. Turn next to the revised summary of submissions, technical and drafting. Item 1, and I'll start with United Voice there.

PN61

MR ROBSON: This item has been withdrawn, Commissioner.

PN62

THE COMMISSIONER: Thank you. Item 2.

PN63

MR ROBSON: Yes, Commissioner, in the current award, this deals with clause 3.3 of the exposure draft which I believe is also clause 5 of the current award. There's been some redrafting to this clause. The current award clause reads:

PN64

*The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means whichever makes them more accessible.*

PN65

The exposure draft currently reads:

PN66

*The employer must ensure that copies of the award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through accessible electronic means -*

PN67

Leaving out the words: "Whichever makes them more accessible". We say that the words, "Which makes them more accessible", should remain in the exposure draft because it does direct an employer to make these documents available. I suppose it seems a little self-evident to use that it should be the one that most

assists employees to have access to the document and be able to read them and consider them when they're making decisions about their rights.

PN68

THE COMMISSIONER: That will remain and can be subject to further discussion at a later conference. I'll hear from the other parties on these aspects. Is there someone that wishes to make a submission now?

PN69

MS WISCHER: We'd have no objection to that proposed amendment.

PN70

MS ZADEL: Commissioner, AFEI in Sydney. I just wanted to comment that my understanding is this clause was subject to an earlier decision by the Fair Work Commission Full Bench in 2015 where the Full Bench found that those words, "Whichever makes them more accessible", placed an obligation on employers that was actually difficult to meet in practice and I understand that as a result of that decision, that standard wording was then placed into all of the awards and so we'd be pressing that, like the other awards, this should have that termage removed, "Whichever makes them more accessible."

PN71

THE COMMISSIONER: That then is something that will remain as a matter we will hear further submission on and determined at a later date. Anyone else? If we can then turn to item 4. United Voice, I take it there is no item 5, item 6. Mr Robson, you're next. You don't oppose item 7?

PN72

MR ROBSON: No.

PN73

THE COMMISSIONER: Item 11, Mr Robson?

PN74

MR ROBSON: Yes.

PN75

THE COMMISSIONER: I'm sorry, I wasn't clear, perhaps. I will dealing with you first.

PN76

MR ROBSON: No, that's all right. Sorry, I'm just a little caught out. I mean, most of us are mostly responding to other people's submissions. But I think our view when we were looking at the classifications and progression was that "service" was defined later on in the clause 14.2(b), (c), (d), and we weren't sure if there could be a definition or progression that could be inserted that didn't conflict with that.

PN77

THE COMMISSIONER: Thank you. Who would care to go next?

PN78

MS WISCHER: The parties at the table would have to take the next. Would you like me to work just through the items from the IEU?

PN79

THE COMMISSIONER: Yes, please. Please.

PN80

MS WISCHER: For item 3, that is with respect to the list of matters that can be dealt with in an individual arrangement or flexibility. It's our submission and if the Commission pleases, we are speaking on behalf of - making these submissions on behalf of the AIES as well today, having put in joint submissions with respect to these matters.

PN81

THE COMMISSIONER: Yes.

PN82

MS WISCHER: The list includes matters that can be the subject of an individual arrangement and items (b) and (c) of that list are for overtime and penalty rates. It's our submission that that is not relevant for teachers under the award save for those potentially under schedule A and so that those items should be confined only to schedule A employees.

PN83

THE COMMISSIONER: That's a matter that you'd put as one that requires further submission or further conference on or - - -

PN84

MS WISCHER: Yes.

PN85

THE COMMISSIONER: Yes.

PN86

MS WISCHER: Yes, Commissioner.

PN87

THE COMMISSIONER: Thank you. Yes, go on.

PN88

MS WISCHER: With item 4 with respect to the facility provisions, those matters were agreed prior to the making of the award and modern award so they were a consent position. We'd object to the proposal that that list be extended, so it would be a matter for further submissions. Item 5, the exposure draft has defined for the definition of part time employment that the 90 per cent value is calculated with reference to a 38-hour week and has expressed that 90 per cent as more than 34 hours and 12 minutes per week. It is the parties' submission that that should be deleted because a part-time teacher's hours are calculated with reference to face to face teaching hours and it would be misleading and in many cases irrelevant to use a portion of the 38-hour week because of the way that teacher's hours are averaged over the 12-month period.



PN89

THE COMMISSIONER: That's an amendment that would fix that.

PN90

MS WISCHER: Yes, yes.

PN91

THE COMMISSIONER: All right.

PN92

MS WISCHER: Item 6 would also be an amendment that's with the mechanism of when a part-time employee's hours might be considered to be full time and the exposure draft refers to a full-time employee requesting to be considered for more than 90 per cent. So, again, I think a drafting amendment.

PN93

THE COMMISSIONER: It's a fairly straight forward drafting issue.

PN94

MS WISCHER: Yes, yes. Item 7 is again a drafting amendment to make it clearer, the issue being the division of that clause into part A and part B. It's our submission that it is clearer to be a single clause.

PN95

THE COMMISSIONER: Instead of being separated into two parts, to make - - -

PN96

MS WISCHER: Yes, to revert it back to being one clause.

PN97

THE COMMISSIONER: Thank you. Yes.

PN98

MS WISCHER: Item 8 is again a drafting issue to maintain the current award at 10.4(d)(ii). Again, the current award is the clearer expression.

PN99

THE COMMISSIONER: Thank you.

PN100

MS WISCHER: Similarly, with item 9 with respect to fixed-term employment and the definition in the current award being the clearer than the draft. Item 10 is with respect to recognition of previous service. The definition is about recognition with respect to how a person is placed on the scale and the title includes the word "previous". It's our submission that that is potentially misleading in the current award and in the - - -

PN101

THE COMMISSIONER: What does it currently say?

PN102

MS WISCHER: The current also uses the word "previous".

PN103

THE COMMISSIONER: "Previously".

PN104

MS WISCHER: We consider that both ought be amended because it should also include your service with your current employer as well as your previous service. It would be - - -

PN105

THE COMMISSIONER: To reflect service in its entirety rather than some - - -

PN106

MS WISCHER: Rather than solely previous service.

PN107

THE COMMISSIONER: Previous service.

PN108

MS WISCHER: Yes.

PN109

THE COMMISSIONER: Again, we'll hear from others on that, but it might just be a drafting issue.

PN110

MS WISCHER: Yes, yes, I think. Item 11 is in response to the question in the draft raised by Commission as to whether the parties seek a definition of "years of service". It's the parties' submission that the use of the expression "normal years of service" is sufficiently clear and a definition isn't required.

PN111

THE COMMISSIONER: Yes.

PN112

MS WISCHER: Item 12, the exposure draft has four teachers included for rates of pay and hourly rate column. It's the parties' submission that that is not necessary as teachers are not paid on an hourly basis, but rather with respect to their face to face teaching load and that we would also link back with previous comments.

PN113

THE COMMISSIONER: Your previous submission in relation to this.

PN114

MS WISCHER: Previous submissions, yes. It's our request that that column be removed. There would be some utility to a weekly rate, but that, in fact, it is potentially misleading to use an hourly rate when considered how a teacher's salary is calculated.

PN115

THE COMMISSIONER: All right.

PN116

MS WISCHER: Item 13 is with respect to part-time employees. It's been removed on the basis that that matter has been dealt with earlier. It's the parties' submission that it would be clearer because it's an entitlement with respect to how wages are paid, not simply as to the pro rata accrual of other entitlements. That would be reinstating the previous - - -

PN117

THE COMMISSIONER: How would it be reflected?

PN118

MS WISCHER: The current award has clause 17.4, so it would be a reinstatement of that and then there would be a consequent renumbering, but I think that would be the extent of it.

PN119

THE COMMISSIONER: Which would flow on.

PN120

MS WISCHER: Yes.

PN121

THE COMMISSIONER: Yes.

PN122

MS WISCHER: Item 14. Commissioner, would you like me to address the matters where we're responding to other matters or solely the ones that our submissions? So, item 14 - - -

PN123

THE COMMISSIONER: The response ones, are they?

PN124

MS WISCHER: No, no, item 14 is a response. After that, item 15. The Commission in the draft raised the question as to whether the parties would seek a definition with respect to leadership allowances for levels 2 and 3. The parties' view on that is that it would not be appropriate at this time because it would be a substantial question which would need - - -

PN125

THE COMMISSIONER: Which will need a further Full Bench hearing or something.

PN126

MS WISCHER: Yes, we would prefer to not have a definition at this time and to have that perhaps as the subject of a future review, but not as a part of this review, Commissioner.

PN127

THE COMMISSIONER: Is it something that would fall in the current Full Bench reviews that might fall within the broader reviews that are undertaken? Do you have any - - -

PN128

MS WISCHER: No, no.

PN129

THE COMMISSIONER: No. Thank you, Ms Wischer.

PN130

MS WISCHER: Item 16 is with respect to superannuation funds that are listed in the clause. There are, as listed, three funds that have been incorrectly named, so it's simply a matter of substituting the correct names for those funds and also there is a, I suppose, typographical error probably at Q: "A superannuation scheme of which the employee is a defined benefit member." I think there is the addition of the word "of".

PN131

THE COMMISSIONER: They're just typos and corrections.

PN132

MS WISCHER: That's right, yes, and corrections, yes.

PN133

THE COMMISSIONER: That can be easily rectified.

PN134

MS WISCHER: Yes. Item 17 is a pro rata payment of salary inclusive of annual leave. That would be essentially changing the structure to make it clearer. So, for 21(2) and 21(3) to become separate clauses. Or 21(2) rather than being divided up, I think in (a) and (b) as it is now for that to become a single clause and then - -  
-

PN135

THE COMMISSIONER: 21(3)?

PN136

MS WISCHER: Yes, 21(2) to be not divided into (a) and (b), but to make them two succinct clauses because the second part then relates to the definitions that are used for the remainder of the clause.

PN137

THE COMMISSIONER: That was 17.

PN138

MS WISCHER: Seventeen.

PN139

THE COMMISSIONER: Nineteen is - - -

PN140

MS WISCHER: Nineteen is a submission to retain the wording of the current award for employees for the calculation of salary. There's really two distinct situations. It's where someone works within a year and you calculate their salary pro rata if they don't work the entire year and then a second situation where if

someone works that straddles two school years. It's our submission that the current award expresses that distinction more clearly. Sorry, I jumped. Sorry, no. So, that was actually - - -

PN141

THE COMMISSIONER: That was - - -

PN142

MS WISCHER: Sorry, that was item 20. Item 19 - - -

PN143

THE COMMISSIONER: Did you have anything to say about item 18?

PN144

MS WISCHER: Item 18 - - -

PN145

THE COMMISSIONER: Was in response to reply.

PN146

MS WISCHER: Yes, a response. We have no objection to that.

PN147

THE COMMISSIONER: Sure.

PN148

MS WISCHER: Sorry, item 19 is really just to retain the wording of the current award on the basis that it is clearer and the construction is not broken up. The words: "Provided that - ensure that the entitlement is linked to the period of employment." Item 20, I have dealt with.

PN149

THE COMMISSIONER: Dealt with.

PN150

MS WISCHER: Item 21 was, I think, a matter that was raised, I understand, from the previous - from this document that there was an error that has been addressed.

PN151

THE COMMISSIONER: That's item 21.

PN152

MS WISCHER: It was a referencing matter.

PN153

THE COMMISSIONER: That's no longer an issue.

PN154

MS WISCHER: No, the exposure draft is correct.

PN155

THE COMMISSIONER: Correct.

PN156

MS WISCHER: Yes. Item 22 is really only a minor matter that the expression "this clause" within the clause is sufficient without the need to add this clause 31. Item 23 relates to a question imposed by the Commission in the exposure draft as to whether there should be an inclusion in the body of the award with respect to provision of rostered days off. It's our submission that that is not relevant for teachers and it belongs only in schedule A. We don't seek that.

PN157

THE COMMISSIONER: All right.

PN158

MS WISCHER: Yes, so essentially that it belongs only in schedule A, not in the body of the award.

PN159

THE COMMISSIONER: Schedule A.

PN160

MS WISCHER: Item 24 with meal breaks is both a drafting matter and subject to a substantive application by the AIS and IEU and has also been the subject of a further submission lodged on 25 January because we identified at the last conference that the substantive application to change the wording of the timing and taking of the meal break in the body of the award was also picked up in the language of schedule A and so we, for consistency, now make the same application to amend that wording, although there is some differences in terms of whether the break is paid or unpaid. But we, yes, certainly seek to make some - - -

PN161

THE COMMISSIONER: Further submissions on that.

PN162

MS WISCHER: - - - further submissions about the rationale behind the expression as proposed in our substantive applications.

PN163

THE COMMISSIONER: Okay.

PN164

MS WISCHER: Item 25 is similar to the previous question about inclusion of hourly rates for teachers. We don't seek that.

PN165

THE COMMISSIONER: You may support weekly comparative, but not the hourly.

PN166

MS WISCHER: Yes.

PN167

THE COMMISSIONER: It's a similar type of proposal.

PN168

MS WISCHER: Similar, yes. The issue being breaking things down into a 38-hour week and that that is not how - - -

PN169

THE COMMISSIONER: How it works.

PN170

MS WISCHER: - - - how it works in practice, yes. Item 26, calculation of casual rates of pay is done with a reference to a full day and a half-day for teachers in schools. Teachers in early childhood services can be engaged for a quarter day and we seek a note to be added to make that clear that there is an applicable quarter-day rate for those employees.

PN171

THE COMMISSIONER: That was something that was a submission was made at the last hearing; is that right? Was that an amended submission or an amended - - -

PN172

MS WISCHER: No, no, Commissioner.

PN173

THE COMMISSIONER: No.

PN174

MS WISCHER: That was in our original submission of 30 June.

PN175

THE COMMISSIONER: All right. So, that again is - - -

PN176

MS WISCHER: Yes, I think there is maybe an error. Sorry, Commissioner, yes, there was an error I think in wording raised as well, and you're correct on that, in the conference on 6 December.

PN177

THE COMMISSIONER: But that's not being raised as a substantive issue in any way or is it?

PN178

MS WISCHER: No, no.

PN179

THE COMMISSIONER: No, it's a - - -

PN180

MS WISCHER: Again, it's drafting.

PN181

THE COMMISSIONER: Drafting.

PN182

MS WISCHER: The final item 27, there's no objection to the proposal to clarify the capping of a travel vehicle allowance at 400 kilometres per week.

PN183

THE COMMISSIONER: That's another straight forward - - -

PN184

MS WISCHER: Yes, straight forward. A matter of consistency.

PN185

THE COMMISSIONER: Yes. That can be dealt with in the further exposure draft and should resolve any issue between the parties.

PN186

MS WISCHER: I think so, yes.

PN187

THE COMMISSIONER: That's that then in terms of your submission.

PN188

MS WISCHER: Is there anything else?

PN189

THE COMMISSIONER: Anyone else in Melbourne need to - - -

PN190

MS KNOPE: That's fine. We support the comments that have been made, thank you.

PN191

THE COMMISSIONER: Hopefully then a lot of those matters can be addressed in the further exposure drafts following this conference. My intention is once I hear from all the parties in Sydney, I anticipate another conference, perhaps, and then there might only then be a couple of matters that are in the substantive matter basket that will be dealt with in due course.

PN192

MS KNOPE: Yes, I imagine so, Commissioner, yes.

PN193

THE COMMISSIONER: Yes, all right. Who wishes to go first in Sydney?

PN194

MS ZADEL: Commissioner, Ms Zadel, for AFEI.

PN195

THE COMMISSIONER: Yes.

PN196

MS ZADEL: Our submissions are all made in reply to those put forward by other parties. I'm not sure if you do want us to go through and comment. There's



simply opposition or agreeing to the positions that have already been put forward by other parties.

PN197

THE COMMISSIONER: I think given that we're here, my preference is that we just do that briefly.

PN198

MS ZADEL: Okay.

PN199

THE COMMISSIONER: It might trigger some response from the other parties that we don't know about, if that's okay.

PN200

MS ZADEL: Item 3 on award flexibility.

PN201

THE COMMISSIONER: I couldn't hear that, I'm sorry.

PN202

MS ZADEL: Sorry, item 3.

PN203

THE COMMISSIONER: Thank you.

PN204

MS ZADEL: This is on award flexibility.

PN205

THE COMMISSIONER: Yes.

PN206

MS ZADEL: AFEI has submitted that the variation would be inconsistent with the current award. This is just generally a point that the amendment is not necessary. The award flexibility term is a standard clause, so we'd oppose any change to that clause. Item 4, AFEI agrees with the ABI's submission on the list of facilitative provisions, to include 12.2, A.2, A.3.1 and A.4.2. At item 6, AFEI is not opposed to the position put forward by the IEU on the definition of the part-timer. Sorry, it's about making requests to work above 90 per cent. So, it's towards the definition of the part-timer, but it's introduced something not in the current award.

PN207

THE COMMISSIONER: The position? What is the position of the AFEI on that?

PN208

MS ZADEL: Sorry, we are not opposed to the removal of the reference to the full-time employees. So, we're not opposed to IEU's position.

PN209

THE COMMISSIONER: Thank you. That was item 6, did you say?

PN210

MS ZADEL: That's correct.

PN211

THE COMMISSIONER: Item 5?

PN212

MS ZADEL: Item 5.

PN213

THE COMMISSIONER: Do you have a - - -

PN214

MS ZADEL: We would not be opposed to the IEU's position on item 5 either.

PN215

THE COMMISSIONER: Thank you.

PN216

MS ZADEL: On item 7, we consider the exposure draft is consistent with the current award, but we don't oppose the position of the IEU. I just want to raise a point, however, and this is something I might raise a couple of times. Redrafting this exposure draft in the terms set out by the modern award may get picked up again further in the future in plain language drafting.

PN217

THE COMMISSIONER: Yes.

PN218

MS ZADEL: There are a number of clauses in the current award that are actually quite lengthy and not consistent with the guidelines in plain language drafting and I imagine this will be one of the. But we - - -

PN219

THE COMMISSIONER: That might just be something that will take place in the ordinary course of the way in which the process works.

PN220

MS ZADEL: Yes. So, we don't oppose the position. We don't think it's necessary and just making the comment that it could be picked up again in plain language drafting.

PN221

THE COMMISSIONER: Yes, yes.

PN222

MR ODGERS: Commissioner, just at the risk of interrupting, just in - - -

PN223

THE COMMISSIONER: Who is that? I'm sorry. I can't see.

PN224

MR ODGERS: Odgers in Melbourne, Commissioner.

PN225

THE COMMISSIONER: I'm sorry. Thank you, Mr Odgers.

PN226

MR ODGERS: Just in relation to - - -

PN227

THE COMMISSIONER: I'm looking at Sydney.

PN228

MR ODGERS: In relation to your earlier comments about matters that are brought forward as a result of this conference and possibly reaching a better understanding.

PN229

THE COMMISSIONER: Yes.

PN230

MR ODGERS: We understand that the plain language drafting exercise runs parallel to this.

PN231

THE COMMISSIONER: Yes.

PN232

MR ODGERS: But the majority of the objections that the union representing the majority of employees covered by this award and the employer representing almost all employers and schools, that is the AIS in respect of this award have to the exposure draft are that it's a lack of understanding about how the award works that has led to about 90 per cent of our objections. So, simply seeking particularly in relation to the part-time proposals, part-time provisions, to insert standard provisions from other awards will not work in this industry context. I limit my remarks to that. We need to be very careful.

PN233

THE COMMISSIONER: Mr Odgers, I have noted very clearly that quite a substantial amount of issues that have been raised relate to what you're putting as issues that the words and the practice don't necessarily meet and that you're attempting to ensure that the practice and the words are closely aligned to the greatest extent possible.

PN234

MR ODGERS: Yes, Commissioner, indeed.

PN235

THE COMMISSIONER: I've followed that submission and I don't think anything has been put as yet and I'm happy to hear from the other parties that holistically objects to that proposal. If I've understood Ms Zadel there it's simply that she's noting that the other Benches that are sitting parallel to this might impact and if

they do, my intention is to allow the parties every opportunity to come back and raise whatever concerns they may have with how that process is interacting. It's certainly not my intention or anyone else's in this part of this process to cut off short any submissions you may have. So, if as a result of any other parallel process you feel that in this particular case the practice and words are not satisfactorily aligned then you can always come back and you'll be heard and the other parties will be given an opportunity to make submissions. So, I'm not sure if that assists, but that's as far as I can go for today.

PN236

MR ODGERS: Thank you, Commissioner.

PN237

THE COMMISSIONER: But certainly your concerns are recorded and as are my comments.

PN238

MR ODGERS: Thanks, Commissioner.

PN239

THE COMMISSIONER: All right, thank you.

PN240

MS ZADEL: Thank you, Commissioner, and that is consistent with our view just with the plain language drafting issues. We're just pointing out a concern. We're not opposing the position in most circumstances of the IEU.

PN241

THE COMMISSIONER: Thank you.

PN242

MS ZADEL: So, is it item 8?

PN243

THE COMMISSIONER: Yes, yes.

PN244

MS ZADEL: Again, a similar issue. We don't oppose the position of the IEU on item 8.

PN245

THE COMMISSIONER: Thank you.

PN246

MS ZADEL: Similar for item 9.

PN247

THE COMMISSIONER: Thank you.

PN248

MS ZADEL: On item 10, AFEI does oppose the submissions of the IEU and we consider the variation unnecessary. That is the deletion of the word "previous".

This is a clause that's about classification on appointment and the service would then appear to be any prior service to that appointment. It doesn't appear to require it to be with any particular employer, so we don't consider that the variation is necessary.

PN249

THE COMMISSIONER: Are you saying, just so I'm clear, are you saying that you don't disagree with the intent of how - it's been put as to the operation of the clause, you don't disagree with that. You agree that the operation is it's service regardless of who that service may be with. It's just that you're saying that that word doesn't actually prohibit that intent from taking place.

PN250

MS ZADEL: That's right, Commissioner.

PN251

THE COMMISSIONER: Is that - - -

PN252

MS ZADEL: That's right.

PN253

THE COMMISSIONER: I'm sorry, I haven't perhaps articulated that clearly.

PN254

MS ZADEL: It would be previous service with their current employer or previous service with another employer.

PN255

THE COMMISSIONER: Yes, that's what I understood to be the position of Ms Wischer when that submission was raised, that it's service with an employer.

PN256

MS WISCHER: Yes, Commissioner, and for example, it also talks about for a part-time teacher and accrual of service as a part-time teacher at B. So, it is broader than simply the on-appointment - the operation of that clause. That's probably a matter for substantive - - -

PN257

THE COMMISSIONER: It might well be, yes.

PN258

MS WISCHER: Yes.

PN259

MS KNOPE: Commissioner, if I can add one further thing in relation to this.

PN260

THE COMMISSIONER: Yes.

PN261

MS KNOPE: When we looked at it and we've been using this award obviously for a very long time and it flows over from a 1998 award and so on, we never really thought about the use of the word "previous" in the title. But this is the clause that we use to work out how a person will progress once they're employed in a particular school in addition to the service that they had in their previous school because without this applying, we have no other means of determining their progression through the salary clause or through the classification clause. There is clause 14.4 in the exposure draft which is the same as the clause in the current award, but it just talks about when they commence and they progress according to normal years of service and so on, but that's about all that it does. Whereas this one helps employers to actually understand how they're actually going to deal with someone who is employed at 90 per cent, not in their past employment but in their current employment. So, if we have the word "previous", we'll probably still interpret it in exactly the same way as we have over all these years, but in our view, it's just not accurate and we never picked it up before. Another option might be to draft two different clauses, one for recognition of previous service and one for service with the current employer, but we think that removing the word "previous" would resolve the issue.

PN262

THE COMMISSIONER: I'm just not sure that option - that sounds to me like it's not part of a process that's attempting to simplify and reduce things.

PN263

MS KNOPE: To draft two clauses.

PN264

THE COMMISSIONER: To draft two clauses.

PN265

MS KNOPE: No, well, we think employers and employees in the sector can actually use the clause and no one has really thought about whether the word "previous" in the title in fact is limiting.

PN266

THE COMMISSIONER: Perhaps that's something that's going to have to require further discussion and/or submission from the parties.

PN267

MS KNOPE: Yes.

PN268

THE COMMISSIONER: We'll have to park that one for the time being. All right.

PN269

MS ZADEL: Item 11.

PN270

THE COMMISSIONER: Yes, yes.

PN271

MS ZADEL: AFEI agrees with the submissions of the other parties, IEU, the United Voice and ABI, that a definition of years of service is not required and we don't support the inclusion of a definition. Item 12 - sorry, Commissioner.

PN272

THE COMMISSIONER: Yes.

PN273

MS ZADEL: Item 12, AFEI agrees with the IEU's submission in terms of the concept of the one-38th of the weekly rate of pay not being something that really happens in practice. Item 14, at item 14, I'd just like to revise AFEI's position on this in as far as it appears that we are opposing ABI's proposal. We would withdraw that opposition. So, we don't oppose the submission to the references of levels being reinserted into the allowances clause.

PN274

THE COMMISSIONER: Yes, that will be noted. What was item 13? Did I miss that?

PN275

MS ZADEL: AFEI didn't make a submission on item 13.

PN276

THE COMMISSIONER: All right, thank you. Thank you.

PN277

MS ZADEL: At item 15, as with the AEI, AFEI does not support the inclusion of further definitions in the leadership allowance. AFEI did not make a submission on item 16.

PN278

THE COMMISSIONER: Item 16, yes.

PN279

MS ZADEL: At item 17, AFEI opposes the position of the IEU and we consider the exposure draft is sufficiently clear on the pro rata payment of salary inclusive of annual leave.

PN280

THE COMMISSIONER: Thank you.

PN281

MS ZADEL: At item 18, AFEI does not oppose the submission of ABI and the New South Wales Business Chamber.

PN282

THE COMMISSIONER: Yes.

PN283

MS ZADEL: At item 19, again, AFEI does not oppose the position of the IEU, but this may be something that does come up in plain language drafting. It is quite a lengthy provision at present.

PN284

THE COMMISSIONER: Again, you raise that, I take it, as something that should just be noted as part of it.

PN285

MS ZADEL: That's right, just as a comment.

PN286

THE COMMISSIONER: As a comment, thank you.

PN287

MS ZADEL: At item 20, AFEI is not opposed to the submissions of the IEU.

PN288

THE COMMISSIONER: Yes.

PN289

MS ZADEL: AFEI does not have submissions on item 21, but I understand that's something that has been corrected in the current exposure draft.

PN290

THE COMMISSIONER: If not, it will be. It will be in the next one.

PN291

MS ZADEL: All right.

PN292

THE COMMISSIONER: Thank you, go on.

PN293

MS ZADEL: At item 22, AFEI does not oppose the position of the IEU. AFEI has not made a submission on item 23 or item 24.

PN294

THE COMMISSIONER: All right, thank you.

PN295

MS ZADEL: AFEI at item 25 agrees with the IEU and it's the same issue that was raised, I think, in item 12. AFEI has not made a submission at item 26 and at item 27, AFEI agrees with ABI to insert a note to clarify the payment of the vehicle allowances capped at 400 kilometres per week.

PN296

THE COMMISSIONER: You agree with IEU. No objection to that one. That might soon be off the table then. Thank you. All right, are there any other comments from you, Ms Zadel?

PN297



MS ZADEL: No further comments, thank you.

PN298

THE COMMISSIONER: Thank you. Who would care to - again, I'd like to, given that we're here, go through this process in this way so that we're all clear on and to give the parties an opportunity to hear any other party.

PN299

MR ARNDT: Commissioner, Arndt from ABI and New South Wales Business Chamber.

PN300

THE COMMISSIONER: Thank you.

PN301

MR ARNDT: I think I can get through mine relatively quickly and I'll only address the matters which ABI and the chamber have made a submission on.

PN302

THE COMMISSIONER: Do I take it the other matters then you don't oppose if you're silent on them? Are you going that far or - - -

PN303

MR ARNDT: That's correct. If no submission has been made, I guess there's no submission that's been made. In terms of item 4, I hear the submissions that have been made previously this morning about the agreement of what would be a facilitative provision and what wouldn't be when the award was created. From our perspective, it seems like a clause is either a facilitative provision or it's not and we've listed four provisions which we say seem to be able to be varied by agreement and therefore we would press that submission that really all 7.2 does it list the facilitative provisions and it seems like it may have missed a few provisions which would be described as facilitative provisions.

PN304

THE COMMISSIONER: So the clauses that are referred to by you, you're saying should be listed as facilitative.

PN305

MR ARNDT: That's right, in clause 7.2. We're not arguing that any variation to the award needs to be made or that somehow clauses should be turned into facilitative provisions.

PN306

THE COMMISSIONER: You're saying they already are, I take it.

PN307

MR ARNDT: That's right and that 7.2 is merely a list of those provisions. I'm not sure whether the parties opposing that change are suggesting that those clauses aren't facilitative provisions or whether the opposition is just to the change in clause 7.2. But we say that if those clauses are facilitative provisions, which we say they are, they should be listed there.

PN308

THE COMMISSIONER: I'm not sure whether the other parties are in a position to respond to that or wish to at this stage, but it's certainly something that will require either a submission or consideration at the next conference. So, I'm in your hands.

PN309

MS WISCHER: Yes, we'll put it for a matter for submissions at the next conference.

PN310

THE COMMISSIONER: All right, thank you, but you understand now precisely what's been put if you haven't already.

PN311

MS WISCHER: Yes.

PN312

THE COMMISSIONER: Thank you.

PN313

MS WISCHER: If the Commission please. The next issue which ABI has made comment on is item 7. It seems for this item, ABI has noted some difficulty with the exposure draft provision and made a suggestion as to how it might be remedied. We don't press the suggestion given that some of the other parties haven't been minded to accept it, but we would maintain the submission as the other parties have that the splitting up of this clause into two parts isn't ideal.

PN314

THE COMMISSIONER: By saying you'd press it, are you going as far as saying you agree or - - -

PN315

MR ARNDT: Essentially, we had proposed an alternative clause. We don't press that alternative clause. We don't. We don't oppose the alternative formulation proposed by the IEU.

PN316

THE COMMISSIONER: All right.

PN317

MR ARNDT: Issue 11, like the other parties, we say that a separate definition isn't necessary and we're assisted by the helpful comments from Melbourne this morning about how that clause works. So, it was useful in that respect. In issue 14, or item 14, we say that references to levels should be inserted or re-inserted into 18.2. There doesn't seem to be any opposition to that course. Issue 18, we basically are seeking to retain the existing form of the award clause by inserting the word "or" into that clause. Again, there doesn't seem to be any opposition.

PN318

THE COMMISSIONER: Seem to be any objection.

PN319

MR ARNDT: No.

PN320

THE COMMISSIONER: No.

PN321

MR ARNDT: Issue 21, as has been said, appears to be resolved and arose out of a typographical error, it seems.

PN322

THE COMMISSIONER: All right.

PN323

MR ARNDT: Issue 23, this is in relation to the question of RDOs and whether the clause that's in schedule A should be picked up by the wider award. Certainly, we're in agreement that it shouldn't be picked up by the wider award. I think the word used in our original submission was that this clause is odd. The reason why we say that, and I guess this is more of a comment, is that the clause that's in schedule A is a schedule that applies to childhood services operating for at least 48 weeks per year, but the specific clause relates to where a service operates for less than 48 weeks per year.

PN324

We understood the reason why a question was asked in the exposure draft as to how that clause fitted in with that schedule. We're not sure, to be perfectly frank, and we would just comment and possibly invite the parties to consider whether an explanation of that - whether the clause applies to less than 48 weeks per year to a schedule that seems to apply to operations that go for more than 48 weeks per year and how that works because it did seem odd to us.

PN325

THE COMMISSIONER: But in terms of the specific, are you suggesting that there be further discussion about that clause even though you're not specifically saying that you object to it being retained? Is that in, in essence?

PN326

MR ARNDT: Yes, simply, yes, yes. In essence, we don't oppose the retention of that clause. If this process is to shed light on how awards work, we think that that clause is problematic because it does appear on its face to be confusing. There may be an excellent reason why that clause is there and there may be a very simple explanation, but we don't have.

PN327

THE COMMISSIONER: Perhaps then if we can note that as something that the parties can consider before the next conference and it might be something that can be resolved at that time.

PN328

MR ARNDT: The last issue is item 27 and we submitted that a note should be inserted into schedule C(2) placing a limitation on the vehicle allowance. Again, there doesn't seem to be any objection to that course.

PN329

THE COMMISSIONER: No, there doesn't. All right, thank you for that, Mr Arndt.

PN330

MR ARNDT: Thank you, Commissioner.

PN331

THE COMMISSIONER: All right, who else?

PN332

MR GUNN: Commissioner, Gunn, for CCSA.

PN333

THE COMMISSIONER: Yes.

PN334

MR GUNN: We have made a formal response to the exposure draft, but if the Commission pleases, if I could raise two issues in response to some comments that were made earlier. It comes to Mr Odgers' point that we need to look at practice and there are a group of teachers who are covered by this who are in fact outside of the school system. I'm referring to early childhood teachers in early childhood education and care services. That's the reason that we have now schedule A in the exposure draft because there is a subgroup of those in long day care who have a different approach.

PN335

Broadly, since the award was first created back in 2009 and 2010, the education and care services national law has come into effect and the most significant impact of that is that the protection that's provided to all other teachers under clause 15.4 of the exposure draft which broadly says that at those times when not required, a teacher is able to be absent, isn't available to early childhood teachers in a pre-school or in a long day care centre because they're required to remain on premises even though they're not involved in face to face teaching activities. For that reason, I think - - -

PN336

THE COMMISSIONER: Mr Gunn, sorry, just so I'm clear, I thought I sort of detected an element of a coverage type issue there, is that - - -

PN337

MR GUNN: We've had discussions with other parties, Commissioner. We think that the coverage issue is still best addressed by keeping teachers in this award and the two points I was going to raise were around the award flexibility and the hourly rates wherein early childhood those are actually the norm to look at hourly rates, for example, because there is a different method of employment. However, the majority of what a teacher is, you know, a teacher is a teacher is a fair point.

This is still the appropriate award, but there are a subgroup of teachers for whom things such as expressing an hourly rate when you're talking about very small employers employing one or two teachers are a benefit to both the teacher and to their employer and, so, retaining it for that subgroup is important, whilst I accept the point that it doesn't fit in necessarily to the way teachers are employed in schools.

PN338

THE COMMISSIONER: In terms of this aspect of this award, technical and drafting, what precisely are you putting there? I'm just wondering whether this is something that's - - -

PN339

MR GUNN: Commissioner, I would be saying that in regards to the IEU's position at items 3, 12 and 25, that we would oppose those, but only in the instance of early childhood teachers employed in an early childhood education and care service outside of the school system.

PN340

THE COMMISSIONER: So, that's the essence of the submission.

PN341

MR GUNN: Yes, Commissioner.

PN342

THE COMMISSIONER: It relates to items 3, 12 and 25.

PN343

MR GUNN: Correct, Commissioner.

PN344

THE COMMISSIONER: Thank you. That will be noted. All right. Is there anyone else that I haven't dealt with? Mr Robson, did you want to say anything else given that I did start with you? Having heard everyone else, is there something else you would like to - - -

PN345

MR ROBSON: No, thank you, Commissioner.

PN346

THE COMMISSIONER: Are there any other matters that any of the parties wish to cover at this stage? No. My intention is to take what the parties have submitted today, make sure that what has been put is reflected in the summary of submission tables and the exposure drafts, have them recirculated again and then make sure that that's available to all parties prior to the next conference and at that point, we'll hopefully be able to narrow before then quite a few of these issues and we'll end up with a position where there'll be some substantive position I presume that are off the table from my perspective in this proceeding and we go from there. Does that suit the parties?

PN347

MR ODGERS: We have no objection to that course.

PN348

MS WISCHER: No objection.

PN349

THE COMMISSIONER: Sydney?

PN350

MR ARNDT: Thank you, Commissioner, that's fine.

PN351

THE COMMISSIONER: In terms of another date and a venue, is Melbourne still the preferred venue? Everyone happy with that? Sydney?

PN352

MR ARNDT: Subject to there being video conference facilities, absolutely.

PN353

THE COMMISSIONER: Of course. That goes without saying.

PN354

MR ARNDT: Yes.

PN355

THE COMMISSIONER: Yes.

PN356

MR ARNDT: Thank you, Commissioner.

PN357

THE COMMISSIONER: In terms of timing, I was thinking perhaps early March. Is that suitable to all? How is Tuesday, 7 March, at 10 am?

PN358

MR ODGERS: No problem in Melbourne.

PN359

THE COMMISSIONER: Sydney?

PN360

MS ZADEL: 7 March is suitable for AFEI.

PN361

THE COMMISSIONER: Thank you.

PN362

MR ARNDT: It seems everyone else is fine with that, Commissioner.

PN363

THE COMMISSIONER: I will adjourn the matter now and relist for 10 am, Tuesday 7 March. Thank you.

**ADJOURNED UNTIL TUESDAY, 07 MARCH 2017**

**[11.32 AM]**