TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1053286

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

AM2014/305

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/305)

Sydney

10.12 AM, MONDAY, 11 APRIL 2016

Continued from 7/04/2016

PN26066

JUSTICE ROSS: Can I have the appearances, please, in Sydney?

PN26067

MR L IZZO: Izzo, initial L, appearing on behalf of the Australian Chamber of Commerce and Industry, the New South Wales Business Chamber, and Australian Business Industrial.

PN26068

MR M SECK: Seck, initial M, with Ms Wellard, initial S, for the Pharmacy Guild of Australia.

PN26069

MR DIXON: May it please the Commission, I appear with my learned friend, Mr Gotting, on behalf of the Ai Group in respect of the Fast Food Award.

PN26070

JUSTICE ROSS: Thank you.

PN26071

MR J STANTON: May it please the Commission, Stanton, initial J. I appear for the Australian Hotels Association, and with the Accommodation Association of Australia, instructed by Ms Wellard.

PN26072

MR P WHEELAHAN: If the Commission pleases, Wheelahan, initial P. I appear on behalf of the Australian Retailers Association, Master Grocers Association and the Retail Council and National Retail Association.

PN26073

MR B RAUF: If it please the Commission, Rauf, R-a-u-f, initial B. I appear for the Restaurant and Catering Industrial, instructed by Mr R Clarke.

PN26074

MR S MOORE: If the Commission pleases, Moore, initial S. I appear for the SDA, together with Ms Forsythe, initial A and Mr Borgeest, initial T.

PN26075

MR C DOWLING: Good morning, members of the Commission. If the Commission pleases, Mr Dowling, initial C. I appear with Ms Burke, initial K, on behalf of United Voice.

PN26076

JUSTICE ROSS: Thank you. Anyone else in Sydney? I think we have links to other states, but I think at this stage there's only someone in Melbourne. Did you want to announce your appearance?

PN26077

MR C BREHAS: That's correct, your Honours. If the Commission pleases, Brehas, initial C, for the National Retail Association in relation to the Fast Food Industry Award.

PN26078

JUSTICE ROSS: Thank you. Is there anyone else? No? Okay. There were some minor matters to deal with first regarding some exhibits that have been tendered, Ai Group requested in correspondence dated 1 February that two further documents be marked in the proceedings. Do you want to say something about that either Mr Dowling, or - - -

PN26079

MR BREHAS: Not particularly, just that we wanted to make sure that we relied on the material and if appropriate, be assigned an exhibit number.

PN26080

JUSTICE ROSS: Is there any objection to that?

PN26081

MR DOWLING: No, your Honour.

PN26082

JUSTICE ROSS: Bear with me for a sec while I - just one moment. So the first of those documents is ABS Catalogue 4102 Losing My Religion and secondly a report by the Australian Institute of Health and Welfare titled Australia's Welfare 2015 dated 22 July 2015. I'll mark the ABS catalogue report as exhibit Ai Group 26 and the welfare report as Ai Group 27.

EXHIBIT #Ai GROUP 26 ABS CATALOGUE 4102 LOSING MY RELIGION

EXHIBIT #Ai GROUP 27 REPORT BY THE AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE TITLED AUSTRALIA'S WELFARE 2015 DATED 22 JULY 2015

PN26083

JUSTICE ROSS: The second issue is an SDA request for MFI2 to be amended. That's identified in the exhibit as an aide memoire with respect to documents filed by employer organisations. What did you want to do with that?

PN26084

MR MOORE: Can I just have a moment, your Honour?

PN26085

JUSTICE ROSS: Yes, sure. Mr Moore, we can come back to this after lunch if you want to have an opportunity to look at it.

PN26086

MR MOORE: I'd be grateful for that.

PN26087

JUSTICE ROSS: No, that's no problem. Did the SDA and Ai Group confirm that exhibit AiG 16 will no longer be relied on? Is that correct?

PN26088

MR GOTTING: That is so. That's consistent with the aide memoire document that we're coming back to after lunch.

PN26089

JUSTICE ROSS: Okay, well perhaps at that time - because it also referred to some other material that wasn't being relied on. If we can just clarify if any of them have been marked as exhibits, which ones they are. It doesn't just affect Ai Group, I don't think. I think there was some ARA material in that aide memoire as well.

PN26090

MR GOTTING: That is so. Could we come back to that at 2pm?

PN26091

JUSTICE ROSS: No, no, that's fine. The other matter was - I'm assuming well Mr Izzo that we've been advised that you'll go first then the Pharmacy Guild and then AHA, although that might shift. Do you want to deal with the joint employer review document? Because I have some answers in relation to the matters that you raise in paragraph 4 of that.

PN26092

MR IZZO: Could you just bear with me, one moment?

PN26093

JUSTICE ROSS: It might be convenient to deal with that at the outset before you get to your submission, just so we can - - - Did you want to tender it?

PN26094

MR IZZO: Yes, your Honour, so we seek to rely on it and tender it and what we have proposed to the union parties, is that they be provided with a period to respond to the document. We don't expect them to respond to it in the hearing this week. They could have an additional period of time, say seven days after the conclusion of this hearing, to put any response in writing to the document.

PN26095

JUSTICE ROSS: All right, well we might - any objection to the tender on that basis?

PN26096

MR MOORE: Your Honour, the document came to us over the weekend. So we've only reviewed it very generally.

PN26097

JUSTICE ROSS: Me too.

PN26098

MR MOORE: Yes, and the unions will look at it as a priority. We're not sure as to - we understand it's character really to be the nature of a submission. I'm not sure whether it's necessary to be tendered, if that is so.

PN26099

JUSTICE ROSS: What it does do is characterise the submissions that have been filed in a particular way. Well whether it's a submission or an exhibit, it doesn't really make any difference in that sense, you'd still get an opportunity to respond.

PN26100

MR MOORE: Yes, well from our perspective, it's just a question of we need to consider our position as to how long we're going to need to respond to that.

PN26101

JUSTICE ROSS: No, sure. I mean, I don't particularly want to get into a long debate about whether it's an exhibit or not. I mean it could be put into an exhibit form and one of the people who was involved in it can swear up to it, but I don't know that it's going to change the weight to be given to it. It is what it is and it puts in the limitations that it was operating under.

PN26102

MR MOORE: I acknowledge that, your Honour.

PN26103

JUSTICE ROSS: Okay, we'll hear from you about that, and we'll probably - you can refer to it in your submissions, but we'll deal with the formal tender issue later.

PN26104

Can I go to paragraph 4 of the document and just - in relation to point A that link was unresponsive. It it's been fixed, but the consequence of that is that there are 48 submissions which you've not seen. I'll come back to how we deal with that in a moment.

PN26105

As to paragraph B, that's correct. They're not missing, they were incorrectly skipped, so there aren't any missing there. Paragraph C, yes that's right. They were blank or for whatever reason. As to paragraph D, there have been 22 submissions which have been uploaded on the site since 1 April.

PN26106

That brings in total 70, which you haven't seen. Which no parties have seen. Let me deal with the 25 - I'll come back to C in a moment.

PN26107

As to E, all of that's correct. Some people filed two submissions. Just because they hit the button twice. Or they wanted to give twice as much weight to what they were saying, but either way, they're the same submission.

PN26108

As to the 25 contributions that were withheld, I've asked the registry to write - or to email, each of those parties indicating that we would propose to provide access to their submission to the interested parties in the proceedings so they can comment on it. They're then asked whether or not they wish to object to that course. We're going to give them until 4pm on Monday. It will be made clear to

them that if they do object and they don't want it published, then we wouldn't be relying on it. We wouldn't be reading the material.

PN26109

The upshot of all of that is, and indeed, it's not just 25, there are some 50 that have not been published because the submitter asked for that. So there are at least 70 you haven't seen and possibly more that will be available. What I was going to suggest is that all of those ones that nobody's seen, be provided to all parties by close of business on Wednesday 20 April and you'd have an opportunity to say what you wish to say about them by close of business on Friday 29 April.

PN26110

Can I ask you to give some thought to those timings. Have a discussion amongst yourselves. That discussion might also embrace the time issue around when the unions might respond to the other material, and let's see if you can line something up and if you come up with something that suits you. It's an indication of when we'd be able to give you those materials, because we'll get confirmation from the 50 or so who filed the material asking for it to be repelled by close of business Monday. So we'd be able to get you submissions you haven't seen by Wednesday of next week. It's then a question of what process you will adopt to say whatever you wish to say about those. I imagine that largely they fall into the category of the submissions that have already been received and so I'd anticipate that you'll be saying much of the same thing that you've been saying about the submissions that have already been received, but I don't know that because I don't know what's in them. Okay?

PN26111

MR IZZO: I'm comfortable with that approach, your Honour.

PN26112

JUSTICE ROSS: So are you content to proceed on the basis you can refer to the document? We'll leave the formal tender until later in the week until the unions have had an opportunity to have a look at it and until you've given some thought to just how the timings might work, okay?

PN26113

MR IZZO: Yes.

PN26114

JUSTICE ROSS: This is unlikely to be a problem - it's going to strike us as we go through it - but I've just been advised that those sitting at the second - the Bar table behind the first Bar table, the transcriber can't hear you because there are no microphones there, so when it becomes your turn if you wish to say something if you just indicate and then come forward and we'll deal with it then.

PN26115

MR IZZO: Your Honour, the NSW Business Chamber and ABI have filed claims in these proceedings seeking, firstly, to reduce the penalty rate applicable for all Sunday work under the Retail Award from 200 per cent to 150 per cent; secondly, to reduce the penalty rate payable on public holidays, for permanent workers from 250 per cent to 200 per cent under both the Retail and Restaurant Awards; thirdly,

for the filed claim seeking a lower rate to be paid to casual workers on public holidays under both the Retail and Restaurant Awards, and that's a matter I'd intend to address in more detail separately in due course. And finally, we've sought a variation to the way in which employees can take time off in lieu for public holiday work under the Restaurant Award. This is somewhat of a discrete matter which is consequential to our other claims, and again, I'll deal with that in due course.

PN26116

JUSTICE ROSS: So it's consequential to the claim to reduce the public holiday penalty rate for full-time and part-time employees under the Restaurant Award from 250 to 200?

PN26117

MR IZZO: It is, your Honour.

PN26118

JUSTICE ROSS: Yes, I follow.

PN26119

MR IZZO: The Australian Chamber supports all of these claims, as well as the claims of its affiliates: the Pharmacy Guild of Australia, the Australian Hotels Association, Restaurant and Catering Industrial, ARA, NRA, and also supports the claims of Ai Group and Clubs Industrial in these proceedings.

PN26120

Your Honours, if I could make this point at the outset, it's very important I think for us to make this acknowledgement. We agree that for many workers there is a disability associated with working on Saturdays, Sundays and public holidays. Given the social and family activities conducted at these times, employees can miss out, for want of a better phrase, because of work. We do not contest this fact. What we say, however, is that the historic assessment of the level of disability associated with Sunday work specifically and public holiday work is now out of sync with the experience of real workers in 2016, and what that has led to is a regime of penalty rates that are disproportionate. They are disproportionate when compared to the disabilities actually experienced by restaurant and retail employees working on Sundays and public holidays, and they are disproportionate when assessed against the modern awards objective.

PN26121

We intend to make good these propositions by addressing the following six matters. Firstly, I'll address the statutory framework applicable to this review. Secondly, I'll explore the disability associated with Sunday and public holiday work. Thirdly, I will demonstrate that penalty rates do have a disemployment effect. Fourthly, I'll identify the historic approach to setting Sunday and public holiday penalty rates, and demonstrate why this historic approach is now out of sync with the evidence presented in this case. Fifthly, I'll look at the legislative changes pertaining to public holidays which now warrant a review of public holiday penalty rates. And lastly, I'll address the casual claim regarding public holidays, as well as the claim relating to time off in lieu. I'll finally conclude by demonstrating how the modern awards objectives are furthered and satisfied by

the granting of the claims sought by ABI and NSW Business Chamber in these proceedings.

PN26122

If I could start then, your Honour, with the statutory framework applicable to the review. Before I do, I've got some folders, one folder for each member, which essentially just has extracts of the exhibits/cases that I wish to refer to so that members aren't put to the task of having to identify each of the relevant exhibits. Copies of these folders have been provided to the other parties. The statutory framework applicable to this review is a matter that should be uncontentious, particular given that Full Bench proceedings were held at the commencement of the 4 yearly review in 2014 to address this very issue. But it now seems necessary to address this matter given two contentions that have been raised by the union parties.

PN26123

The first contention is that the proposed variation sought by employers must be necessary to meet the modern awards objective, and the second is the contention that the Commission must be satisfied that there has been a material change in circumstances relating to the relevant modern award in order to grant a variation. If I could - just to exemplify the nature of the argument made by the unions - if I could just turn to United Voice submissions? At paragraph 31 of the United Voice submissions, and when I refer to those submissions I'm referring to the submissions filed in reply to the employer parties' submissions - - -

PN26124

JUSTICE ROSS: Sorry, what paragraph was that?

PN26125

MR IZZO: Paragraph 31.

PN26126

JUSTICE ROSS: Mm-hm.

PN26127

MR IZZO: United Voice state as follows:

PN26128

In the 4 yearly review of the Stevedoring Industry Award, the Full Bench stated that the award achieved the modern awards objective at the time it was made and the applicants have not established that the award no longer meets that objective.

PN26129

The United Voice go on to say:

PN26130

Such an approach is consistent with the provisions of Part 2-3 of the Fair Work Act. It should be accepted that the modern awards met the modern awards objective when made and have since only been varied if necessary to achieve that objective.

PN26131

JUSTICE ROSS: So the contention is that that construction's to be preferred to the one in the preliminary jurisdictions' decision, which spoke about it being - I think it was prima facie - it's to be assumed that it was meeting the objective?

PN26132

MR IZZO: In addition to that, your Honour, it seems to say that you can only vary a modern award if necessary to achieve the modern awards objective. That takes the matter further than what had been expressed in the preliminary issues decision, and, respectfully, if that is the ratio of the Stevedoring Industry Award, then we respectfully submit that the decision has been wrongly decided, because we say that quite clearly there is no obligation under the Fair Work Act for proposed variations to be necessary to meet the modern awards objective in order for them to be made, and this is for three reasons.

PN26133

Firstly, there is no qualification on the Fair Work Commission's power when varying awards as part of the 4 yearly review under section 156. The discretion in section 156 is unfettered. This language about a term being necessary - that the United Voice and the SDA submissions echo the United Voice position - this language about a variation being necessary appears to come from section 138 of the Fair Work Act, and although the Commission's well aware of the provisions of section 138, I'll just take you to it now. It says that:

PN26134

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

PN26135

What section 138 is saying, in our submission, is that once terms are included in an award, they are only to be included to the extent necessary to achieve the modern awards objective. That is, once you've included certain terms and you've achieved the fair and relevant minimum safety net, you go no further.

PN26136

So for instance, if we're including a penalty rate in a modern award, we include that penalty rate, ensure it meets the objective, but go no further. What the union parties are contending takes section 138 further than is expressed in the Acts, because they are saying, "No, no, the test is whenever you vary, you look at the variation of the award in isolation and see if that's necessary to achieve the modern awards objective." That's not what section 138 says.

PN26137

JUSTICE ROSS: You say it's whether the award as varied meets the modern award?

PN26138

MR IZZO: One looks at the terms as varied of the award and sees if the terms included have gone no further than necessary to achieve the objective. And that's

what we say a proper construction of 138 requires. Thirdly, and I think this might be where the union position - why perhaps the position is being advanced, the union position seems to be predicated on an assumption that there is only one possible compilation of award terms and conditions that can meet the modern awards objective.

PN26139

It seems to be for this reason that one might argue that you need to know a modern award is not meeting the objective before varying it, but there is nothing in section 134 to suggest that only one combination of terms will achieve the modern awards objective. The way we say 134 operates is that it is effectively the lens of 134, for want of a better term, are a series of levers that can be pulled and pushed in different directions to come up with a compilation of terms to include in a modern award.

PN26140

There is no specific set of criteria as to how those levers are to be pulled and pushed and it may be the case that if you include certain terms in one area, you remove them from elsewhere, there's a whole different array of permutations and combinations you might have. This is in fact acknowledged in the preliminary issues decision and if I could take your Honours to the reply submissions filed by ABI and New South Wales Business Chamber. At page 6 of those submissions, we quote the relevant paragraph of the preliminary issues decision. Paragraph 34, it states:

PN26141

Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account, there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

PN26142

We endorse that finding and that, we say, leads to a conclusion that there is nothing in the Fair Work Act that requires one permutation to be preferred over another and therefore it's odd that the union position, in light of that matter, it would be odd to say, well, you need to show something is meeting the objective before you change it because there could be any series of formulations in the award that meet the objective.

PN26143

The fourth matter, and I think this is certainly the most telling that militates against the union position is comparing the language used in section 156 with the language used in section 157. If one looks at the language of section 156 of the Fair Work Act, which deals with the 4-yearly review of modern awards, one will see that subsection (1) says the Commission is to conduct a 4-yearly review, which as we all know is presently ongoing. Subsection (2) says:

PN26144

In the 4-yearly review, the Fair Work Commission must review all modern awards and may make -

PN26145

And that's where the Commission's discretion is enlivened:

PN26146

- one or more determinations varying modern awards, one or more modern awards and one or more determinations revoking modern awards.

PN26147

There is no fetter on that discretion. It just says that the Commission may make determinations varying modern awards. If we then move forward to 157, 157 talks about variations to modern awards outside the system of 4-yearly reviews. The language is different. This says, 157(1):

PN26148

The Fair Work Commission may make a determination varying a modern award otherwise than dealing with minimum wages -

PN26149

And it goes on to say:

PN26150

- if the Fair Work Commission is satisfied the making of the determination of a modern award outside the system of 4-yearly reviews is necessary to achieve the modern awards objective.

PN26151

That language, that's the language of the unions' submissions which is you can only make a change if it's necessary to achieve the modern awards objective. That language is missing from section 156. We say that is the most compelling argument which disproves the position being advanced by the union parties in these proceedings.

PN26152

JUSTICE ROSS: You say that the power in 156 is - well, the discretion is not fettered, but I'm not sure that's right in as much as doesn't the modern award objective apply to any variation that the Commission makes in the context of a review? The argument being that 156 is in part (2)(iii) and section 134(2) talks about:

PN26153

The modern awards objective applies to the performance or exercise of the FWC's modern award powers -

PN26154

Which include the power under 156. But subject to that, you say it's not constrained - is the real point, as I understand it, is that it's not constrained by the fetter, well, by the limitation in 157(1).

PN26155

MR IZZO: That's right, your Honour. It is fettered and I think you more precisely put the position I advance because it is fettered by 134 and it is fettered by 138, any variation made under 156, because that's part of the exercise of modern award powers, but it is not fettered by the condition, if you like, the additional condition, that's identified in 157. So we rely on all those arguments to say that the first contention the unions put, that the variation must be necessary to achieve a modern awards objective is not sustainable.

PN26156

The second position is that one needs to identify a material change in circumstances.

PN26157

JUSTICE ROSS: Just before we leave the first one, I just want to make sure I'm understanding what's put about that. Is it put on this basis, that we're in a review, the Commission is empowered by 156 to make variation determinations to awards and it has a statutory imperative to review each award. It can do it in groups, but each award is to be reviewed; that in performing that function or exercise any powers to vary, the modern award objective applies, and the modern award objective is that the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

PN26158

So the task, then, in the review is to examine the award and to ascertain whether or not it provides a fair and relevant safety net of minimum terms and conditions, and in this case, you're arguing that it doesn't. Essentially, fairness involves a consideration of both impact on employees and employers and relevance is the various points you've made about the relevance of the current penalty rates. Is that the essence of - - -

PN26159

MR IZZO: That is our argument, that the current awards subject to the claims are not currently providing a fair and relevant minimum safety net, but that's not the test and this is an additional consideration the Commission needs to take into account.

PN26160

JUSTICE ROSS: What's the test, then?

PN26161

MR IZZO: It could, the Commission could, vary a modern award to some other formulation provided the new formulation meets the modern awards objective and the basis for doing so would be a merit-based case that convinced the Commission of that matter.

PN26162

JUSTICE ROSS: Yes. No, no, I'm merely putting to you that is the test that the Commission must - well, at the conclusion of the review, having made whatever variation determinations it thinks is appropriate, must be satisfied that the modern award provides a fair and relevant minimum safety net.

PN26163

MR IZZO: That is the task of the Commission at the end of the review, yes.

PN26164

JUSTICE ROSS: Yes.

PN26165

MR IZZO: But it may be moved by a merit-based case to end up with a different formulation and at that point, it needs to assess whether that meets the modern awards objective. In most cases, it is likely that the Commission will probably vary a modern award if it's moved to think well, it's meeting the modern award's objective because of a particular problem, we'll vary it to fix that, but that's not the only circumstance necessarily, that's what I'm saying.

PN26166

JUSTICE ROSS: No, I see, yes. So you're not saying it would be incorrect to adopt that approach, that is, you look at an award, you see a provision, you don't think that provisions based on a merit argument appropriate and that in order for that award to provide a fair and relevant minimum safety net, that provision ought to be varied.

PN26167

MR IZZO: I think that approach is fine. I just think the problem would be saying we need to be satisfied that the modern award is currently not meeting the modern award's objective for doing anything. I think that would put an additional bar not in the legislation.

PN26168

JUSTICE ROSS: I follow that, I'm just trying to piece through what the consequence of - what difference would it make in either event, given that ultimately, whether it's after any variation, you have to be satisfied that the award as varied, meets the objective.

PN26169

Why do you think the pathways create different issues?

PN26170

MR IZZO: I think it's quite a small point, but to give you a very simple example.

PN26171

JUSTICE ROSS: You say it's a small point, it certainly generated a lot of debate, but I'm just trying to tease out what, in a practical sense, given the - you accept that our task is to review the award. In doing that, the modern award objective applies. Therefore we have to be satisfied that the award provides a fair and relevant safety net of terms and conditions. Well, in looking at the award in this particular phase, we're looking particularly at the penalty rate provisions and we have to be satisfied that there is a fair and relevant minimum safety net. So whether the unions contend they are and you contend they're not.

PN26172

MR IZZO: In this particular case, your Honour, if our contention is correct, that they're not providing a fair and relevant safety net, yes, the Commission would be moved to change it. If the union contention is correct that they are, providing a currently fair and relevant safety net, it would probably follow that then the employer position couldn't also be providing a fair and relevant safety net, because we're arguing for two different penalty rates. So in this case, yes. I think ultimately the Commission needs to be satisfied that the penalty rates are providing that safety net.

PN26173

JUSTICE ROSS: I gather that your concern is that by saying it's necessary and that there's some onus issue imported into that, well, given that it's a review and it's not either party's proceedings, other than the proposition that unless a party wants to argue that that was wrong, the proposition in the preliminary jurisdiction issues decision that prima facie, modern awards meet the objective, well that's by way of indicating that it's not enough just to come along and say you want to change, you have to advance something in support of it. But you've done that. Whether we're persuaded as a matter of merit, is a different thing.

PN26174

I mean a lot of energy is being caught up in this point and I'm just speaking for myself, struggling a bit to understand why. It's not as if you've simply come along and said these things have to change and you haven't advanced an evidentiary based case. Whatever might be said about the evidentiary based case, and you accept that if you don't persuade us that it's the awards as currently framed do not provide a fair and relevant minimum safety net, then it seems to follow that we wouldn't vary.

PN26175

MR IZZO: I think that's right in this particular case, your Honour, because there's a penalty rate. We're saying it should be lower. The union is saying it should stay where it is. Only one party can be right. So, one provides a fair and relevant safety net, the other doesn't. And I agree, and the position of my client has always been that if you're going to advance a substantive change, you should have a merit based argument supported by probity of evidence and we entirely agree with that proposition, so we agree with all of that.

PN26176

JUSTICE ROSS: We did, I think Ai Group went beyond you in the preliminary jurisdiction case and wanted to added the gloss that there had to be cogent reasons as well. ACCI and others oppose that point and I think we found in favour of - we rejected Ai Group's formulation in that decision.

PN26177

MR IZZO: We stand by the finding of the preliminary issued decision on that point.

PN26178

JUSTICE ROSS: No doubt it won't be the last we hear of what the test is. But if I can ask the others to bear in mind the exchange we've just had. I'm interested as a practical matter what difference flows from the formulations that are proposed.

PN26179

MR IZZO: To answer that, your Honour, it's not actually relevant to this particular case, but in our position, if you had an award, to reduce it quite basic oppositions - you had an award that provides a trade rate of $22 an hour and four weeks' annual leave. That might meet the modern award's objective. Then you have a union party come along and say look, you should lower the trade rate from $22 to $20 an hour, but give the employees six weeks' annual leave instead.

PN26180

Both formulations might meet the modern award's objective. The union would not be required to establish that the first formulation doesn't meet the objective to satisfy change. It would simply need to advance a merit based case to move to the challenge.

PN26181

JUSTICE ROSS: No, I follow that. In this case, to bring it back to here, you could have a different formulation. For example, the loaded rate formulation in the fast food agreements. If that had been proposed here, in lieu of effectively, weekend penalties - I'm not suggesting we embark on a new case, but if that was the case, that's your proposition, isn't it, that well, it's a change, but no particular balance between those range of considerations or range of terms - there's not one way of meeting the objective and you might have a loaded rate and a reduction in penalties, that would be a way, etcetera.

PN26182

MR IZZO: And I agree that's not available here because we're simply arguing about the figure.

PN26183

JUSTICE ROSS: I suppose it's available, but I don't think anyone's agitating it and I don't think we're about to. It was really an example of - yes, okay.

PN26184

COMMISSIONER HAMPTON: Mr Izzo, is the practical difference in your proposition that if the Commission considers that a variation means that the award would better achieve the modern award's objective, then on a merit basis as part of the four yearly review, the Commission should adopt it or at least consider it?

PN26185

MR IZZO: Well, Commissioner, that's an interesting proposition when one considers how it interrelates with section 13A because the job of the Commission is to achieve the modern award's objective and go no further. But given there can be different formulations, there must be some merit basis upon which the Commission favours a particular reason and it might be yes, it is more relevant one particular reason to workers, or some other reason.

PN26186

You still couldn't be going too far so as to put in terms that go further than is necessary, but there might be one formulation, I think for want of a better phrase, that's more relevant or that for some merit basis the Commission prefers and so may go down that path.

PN26187

JUSTICE ROSS: So at the end, 13A comes in when you've finished the process and you've looked at the award as varied. You have to be satisfied that it meets the modern award objective and no more. That is, only to the extent necessary to achieve the modern award objective, because that's the jurisdictional limit of 13A.

PN26188

MR IZZO: Yes, your Honour. So it sets a minimum for the modern award's objective. From a union claim perspective the floor should not go further than is necessary to achieve that minimum floor, but from an employer claim perspective it should also not pursue the interests of business to such a point that it goes beneath what is a fair and relevant minimum floor.

PN26189

The second contention of the unions, and it really feeds on from this discussion, is that there needs to be a material change in circumstances. We actually addressed this particular position at paragraph 6.3 of our own reply submissions.

PN26190

JUSTICE ROSS: Is this also caught up in the debate between the various parties about the nature of the award modernisation process and whether there was or was not an examination of these penalty provisions at that time?

PN26191

MR IZZO: I think that is a relevant matter here because if at the time the award was created certain penalty regimes weren't particularly looked into in a substantive sense, then there's not a lot of basis to say well you need to look for a significant change in circumstance, if the argument's been run but perhaps had not been ventilated in the context of the modern awards objective. But again, we say the union position imposes a fetter not imposed by section 156, and that's for two reasons I've already advanced. The first is assessing the language of 156 against 157. The other reason that I've already advanced relates to the fact that you can have different permutations of combinations of terms that meet the objective, so there's not necessarily a bar on the Commission moving to a different formulation.

PN26192

The third reason, but we urge against this approach, is because it's an approach that's already been found to have been or have led the Commission into error in the Restaurant and Catering Award review decision in 2014. If I can refer your Honours to that decision, it's behind tab 1 of the bundle that I've handed up. What I've done with these bundles, rather than extract an entire document because we have a lot of volume, is just to extract the relevant sections. I'm conscious of the Tribunal's receival of folders in these proceedings. If I can just draw your Honours' attention to paragraph 91, this is from the Majority decision. The Majority say that in her decision, the Deputy President - - -

PN26193

JUSTICE ROSS: Anyone else left their phone on?

PN26194

MR IZZO: - - - in her decision of first instance not to vary the Restaurant Award, the Deputy President concluded that:

PN26195

Cogent reasons had not been established because the grounds on which they seek the variations do not identify significant change in circumstance. Rather they are largely merits considerations which existed at the time the award was made.

PN26196

The Majority go on to say:

PN26197

That conclusion, with respect, appears to have established a criterion for the determination of penalty rates case, namely a significant change in circumstance which was not derived from the relevant sections of the transitional Act.

PN26198

JUSTICE ROSS: And you argue, I think, that well if that was the case in the transitional review, all the more so in the current review because its scope's broader.

PN26199

MR IZZO: Precisely, your Honour, and the Majority goes on to hammer the point home at the end of paragraph 92. The Majority says - this is about halfway through paragraph 92:

PN26200

Although the Deputy President made some findings about these aspects of the applicant's case, her adoption of a significant change in circumstances, the apparent criterion for variation going forward, meant that the alternative case was not considered in accordance with the requirements of the relevant provisions of the transitional Act and that the exercise of the discretion was artificially confined and thereby miscarried.

PN26201

And we rely upon that decision to say that if the Commission does seek to impose the kind of fetters on its discretion that the union urges, then the Commission could be led into error. That's essentially all we wanted to say on the statutory framework, unless there's any further questions about that matter.

PN26202

If I can now turn your Honours to the merit basis for the variations, the first merit question we wish to address is the level of disability associated with Sunday work, and to attempt to determine what that is by reference to the evidence. If I could draw your Honours to the second tab in the folder that I have provided, you will see an extract from the expert report of Professor Rose regarding the value of time, and this is exhibit ABI1. The first page of this extract is page 6 of exhibit ABI1, and what is extracted there is a screenshot of the survey that employees participated in, and what you'll see is that they were asked to enter what activities

they do on particular days and then they were asked to rank the importance of those activities from critical to very low, where critical is an event they could never miss down to very low, something they could easily reschedule and change or miss. They entered that survey and the outcomes of those findings contained overleaf - the analysis starts at page 21 but page 22's the more relevant consideration that I wish to draw you to.

PN26203

At page 22 at the top, Professor Rose finds that there was not a huge deal of variation between the importance associated with activities from day-to-day. Rather the variation in terms of importance of activities really occurred within each day, depending on the particular time, and if we look at the table that Professor Rose has extracted you'll there's an average down the bottom, and if one looks at Saturday, the average importance of the activities is 2.849, whereas the figure for Sunday is 2.871. The lower figure for Saturday indicates that the activities on Saturday were less able to be moved, were more critical than the activities on Sunday albeit only by a slight margin. So the lower figure indicates activities that they couldn't move and they considered more important. I must point out that our submissions actually at page 41 in-chief had that formulation the other way around, but it is actually the lower figure that represents the less able to moved events. So what we say that Professor Rose's assessment of value of time identifies is broadly consistent level of disability across Saturday and Sunday, indeed perhaps more on Saturday than Sunday when it comes to ability to move particular events.

PN26204

JUSTICE ROSS: So is the way you read it that Tuesday has the - or, sorry, Thursday - - -

PN26205

MR IZZO: In terms of the activities that people perform - - -

PN26206

JUSTICE ROSS: - - - is more important because of lowest number?

PN26207

MR IZZO: It would certainly suggest that the ability to reschedule those activities is less than that on the weekend.

PN26208

JUSTICE ROSS: And is the inference that people value - or the respondents value the time on that day more highly than on other days? Is that what you're - - -

PN26209

MR IZZO: Well, on average, in relation to the way that the survey participants entered things that were critical, that's certainly an inference that's available. I understand that that's something that might strike some as surprising because people consider Saturday and Sunday to be more important days in terms of their social and family activities, but the reality is that they were also looking at things

that they could or couldn't reschedule, and it may be that there are things fixed on a Thursday for these employees that they find difficulty moving.

PN26210

JUSTICE ROSS: You mentioned earlier that - and I might have misunderstood you - but there wasn't much variation across days, it was more times that were critical? Where does he say that?

PN26211

MR IZZO: At the very top he says - of page 22 - he says:

PN26212

Very little variation exists between days of the week with average rating ranging from 2.72 to 2.9 for Fridays. More variation exists within each day with an average importance rating of 2.66, the hours between 6 am and midnight.

PN26213

JUSTICE ROSS: Yes.

PN26214

MR IZZO: Professor Rose also addresses the wage rates that employees sought to be paid on these days. I'd like to come back to that later on, but for now we simply rely upon the assessment of value of time. The next piece of expert evidence upon which we'd like to rely to address, that is, the Sunday work, is actually the union expert evidence of Professor Markey. Whilst it was filed by the union parties, we actually think that a thorough analysis of Prof Markey's report actually supports in large respects the position of the employer parties. If I could take your Honours to tab 3 of the bundle that I have provided you, there's an extract from Prof Markey's report, ACTU2. Now, this first page is an extract of the executive summary. At paragraph 12 of the executive summary, Prof Markey says:

PN26215

Sundays continue to be more important than Saturdays, in spite of claims to the contrary. Workers place a significant wage premium on Sunday work and are more likely to take issue with Sunday than Saturday work. Sundays are also more associated with work/life interference than Saturdays.

PN26216

So that's his thesis about Sundays being more important. If we then turn overleaf, I've extracted the actual, the detail of the report, if you like, and where Prof Markey derives these views. At paragraph 28 he starts talking about time missed on weekends when one works and he cites two authorities. One is Bittman and one is Craig and Brown. He says:

PN26217

Unsurprisingly, Bittman found working on Sundays resulted in substantially less time spent on a range of activities on that day.

PN26218

Further on he says:

PN26219

He [referring to Bittman] found that Sunday was the most important day of the week for families spending time together, with an average of in excess of 300 minutes spent.

PN26220

Overleaf, Prof Markey refers to Craig and Brown, and then if I take your Honours much further forward to page 17 of ACTU2, you will see there's a section headed, "The Importance of Sundays", and Prof Markey cites two more authorities. Well, I should say, expert opinions, in support of his position. One is the actual report conducted by Rose, towards the end of the first paragraph, and the other is the AWALI study conducted by Skinner and Pocock. That is the basis upon which Prof Markey expresses his view, and I'd like to deal with each of those - - -

PN26221

JUSTICE ROSS: Just bear with me for a moment. Just in Melbourne, we seem to be getting some feedback. You must be bumping a microphone or something. Can you just be a bit careful with your paper shuffling?

PN26222

MR BREHAS: Yes. Apologies.

PN26223

JUSTICE ROSS: Yes. Okay.

PN26224

MR IZZO: I'd like to address each of these pieces of literature that he's reviewed because we say they don't stand for what Prof Markey says they stand for. The first is the Bittman Report, and if I can ask your Honours to turn to tab 4 of the bundle in front of you? Bittman looked at the time that all persons in the community spend or allocate to activities on the weekend, and there are two key figures that he extrapolates. Figure 6 relates to time allocated to various activities and figure 7, I believe, talks about social contact with family, friends, colleagues and neighbours.

PN26225

The way I'd like to characterise the Bittman findings is that they effectively represent, if you like, U-graphs or little N-graphs in the sense that they form the shape of a U generally, which show that most time is spent at the extremities of each week, the extremes being Saturday and Sunday, less time spent in the middle. The same applies - sorry?

PN26226

JUSTICE ROSS: On these particular activities.

PN26227

MR IZZO: On these particular activities, yes, and the same - - -

PN26228

JUSTICE ROSS: There's sort of an inverse for employment-related activities.

PN26229

MR IZZO: And that's the end, because people are performing less employment-related activities on Saturday and Sunday. Now, I asked Prof Markey about these particular graphs and what we could discern from them, and if I can ask your Honours to turn to paragraph 20.14 of our submissions in-chief which - - -

PN26230

JUSTICE ROSS: Is that under tab 5? You've got the - - -

PN26231

MR IZZO: No, it's our actual submissions in-chief, your Honour, at page 43. The matters in our two submissions, I haven't put in the tabs.

PN26232

JUSTICE ROSS: No, no, I just thought your cross-examination of Prof Markey was under tab 5.

PN26233

MR IZZO: I'm planning on coming to that next.

PN26234

JUSTICE ROSS: 20.14, yes?

PN26235

MR IZZO: 20.14. So the effect of the cross-examination, Prof Markey agreed with each of the propositions put in that table and we footnoted the relevant transcript reference. What you will see is that for a number of activities, the time spent was broadly equivalent between Saturday and Sunday. For one, that is leisure with friends, colleagues and neighbours, time spent was actually greater on Saturday than Sunday, although only slightly, and then there's a few where, yes, more time was spent on Sunday, but it was only slightly higher.

PN26236

What we say is what the Bittman report shows is that there's actually a very slight, you might even say negligible, difference in many of the activities in terms of time spent on them on Saturdays versus Sundays. If I can then ask you to turn to tab 5 of your bundle and the cross-examination of Prof Markey, halfway through that transcript, you'll see at PN2411 I asked Prof Markey, "Do you agree in relation to both figures", and at this point we're talking about recreation, leisure and personal care activities:

PN26237

Do you agree that where there is a difference between Saturday and Sunday, the difference is slight and is markedly different to the difference between the time spent on the weekends as compared to the week day?

PN26238

He responds, "Yes." Further on, at PN2415, I then quote his report to him which says:

PN26239

Unsurprisingly, Bittman found the working on Sundays resulted in substantially less time than on a range of other activities on that day including, amongst other things, substantial drops in time spent on social and community interaction, recreation, leisure activities and domestic activities.

PN26240

I then take him, if we go overleaf, to the key finding where Prof Markey says he found that Sunday was the most important day of the week for family spending time together. I then asked Prof Markey:

PN26241

Do you agree that what one could add to those comments is that in relation to all of these activities, an equivalent amount of leisure time was associated with Saturdays, or if not an equivalent amount, then a slightly lesser amount?

PN26242

Prof Markey said:

PN26243

I would agree that a slightly lesser amount, yes.

PN26244

But not necessarily for all activities. For some, you would agree it's equivalent?---Yes.

PN26245

So what we say really comes out of the Bittman report is that the time spent on these types of activities, leisure activities, engaging with family and friends, et cetera, is broadly equivalent between Saturday and Sunday. There are some activities where it is, yes, slightly higher on Sunday, but only slight, and it is markedly different to the time spent on leisure activities during the week. That's what we say Bittman says, and we say for reasons that I'll come to later on, that that supports our claim.

PN26246

The next piece of evidence is the literature from Craig and Brown. That's attached behind tab 6. Craig and Brown analysed three different family types. They looked at couples without children, couples with children and singles without children, and if I ask your Honours to move to page 717 of the Craig and Brown report, the second column at page 717 sets out the relationship between weekend work and the loss of shared leisure activities. In that second column, halfway through the first paragraph, the authors state:

PN26247

For respondents in couples without children, every hour of work on a weekend day was associated with 18 fewer minutes per day with their spouse while doing leisure activities, amounting to 1.8 hours for the average weekend work time of six hours a day.

PN26248

If I go a little bit further, they say:

PN26249

There were no significant interactions between paid work on Sunday for any form of shared leisure time for this group, suggesting that both weekend days displaced their shared leisure time to a similar extent.

PN26250

So for the first group, no noticeable difference between Saturday and Sunday. The second group was respondents in the couples with children. If I go down a bit, they say - - -

PN26251

JUSTICE ROSS: Just bear with me for a moment.

PN26252

MR IZZO: Certainly.

PN26253

JUSTICE ROSS: Yes.

PN26254

MR IZZO: They say:

PN26255

For each hour of the weekend work, predicted less leisure time with one's spouse, 14 minutes per day, children, 15 minutes per day, and friends, six minutes per day.

PN26256

Again, they use an average six-hour working day on the weekend and say it amounts to 1.4, 1.5 and 0.6 hours per day. Now, I've added those figures up, your Honours, and whilst not a maths whizz, I can confirm that's 3.5 hours total displaced if one adds 1.4, 1.5 and 0.6, you get to a figure of 3.5 hours displaced for these couples with children.

PN26257

For this group, interaction terms were significant, such that for them Sunday work as associated with more displaced leisure time with spouse and children, a further five minutes per hour, so per day per hour worked. So if we multiply that by the average six-hour day that the authors have been using as their measure, you end up with an extra 30 minutes displaced on Sunday for this particular subgroup. Now, an extra 30 minutes on top of three and a half hours is about an extra 15 per cent.

PN26258

Then the third subgroup was singles without children and they say weekend work, irrespective of day, was associated with less leisure time. So we have three subgroups studied; of those three subgroups there was no difference in terms of displace leisure time for two of the subgroups and for one, yes, Sunday displaced leisure time more, but only by 15 per cent more.

PN26259

Again, we say that supports our position that the disability associated with Sunday work is broadly equivalent to that of Saturday, although you might argue slightly higher for some subgroups. The next material relied upon is the AWALI data from Skinner and Pocock. Now the Skinner and Pocock literature wasn't put forward as part of an expert report in these proceedings, but we have the benefit of Prof Charlesworth talking about the same data.

PN26260

They conclude, Skinner and Pocock, that's who Prof Markey is referring to - they conclude that there is greater interference on Sunday than Saturday caused by work, but there's a few things we would like to point out about that. The evidence demonstrates - and this is the AWALI data - that there is a greater interference on both weekend days as compared to weekdays. So the difference is marked between weekend and weekdays, and just to give you a reference for that, your Honours, we address how that's - where you can find the evidence for that at paragraph 20.49 of our primary submissions.

PN26261

So the first thing is even though the AWALI data shows there is more interference on Sunday, the biggest difference is between weekends and weekdays. The AWALI data provides no indication of the quantum of time interfered with. The AWALI data provides no indication of what the non-work activities are that are being interfered with. Is it domestic chores? Something that might be able to be substituted, or is it family gatherings that might be less able to be substituted. We don't know.

PN26262

Lastly, in relation to the retail industry, the difference of interference between Saturday and Sunday was not statistically different, it was not statistically significant and that was conceded by Prof Charlesworth under cross-examination. She noted that was due to the small cell size of data for retail and the transcript reference is PN 23953.

PN26263

So again, we say that broadly that position supports or that data does support the general submissions that we will be making about the disability associated Sunday and then finally, the only other matter relied upon by Prof Markey is the Rose Report. I've already talked about the value of time and the inferences we should draw from that assessment.

PN26264

The only other thing that Prof Markey could be referring to is the premium that employees indicated that they would want to be paid for working on Sundays and he assumes that then demonstrates that there is a greater disability associated with Sunday work.

PN26265

Well, we say that one needs to take into account the whole context in which the survey was performed. Prof Rose gave evidence that the employees knew their rates of pay when they did the survey; they knew that they got higher penalty rates

on Sundays and as a result of that, it could well be that the phenomenon of loss aversion is at play, something that Prof Altman talked about at length and that is that knowing that they currently get a higher amount on Sundays, they felt that that is something they want to retain, not necessarily that the disability associated with Sunday is greater.

PN26266

So that's how we address the Rose report. So on balance, when we take into account all of that material and then go back to what Prof Markey says, it doesn't show that Sunday is this enormously important day compared to Saturday; this day that has much, much greater level of social and family interaction, or that there is a huge level of interference on Sunday compared with Saturday. We say that it shows that the two days are broadly equivalent in terms of the activities performed and broadly equivalent when it comes to the level of interference caused by work.

PN26267

If anything, I think I have to acknowledge it might be that Sunday slightly does have certain leisure activities slightly higher than Saturdays; I think the materials bear that out, but only to a very minor level. That's what we say about the Prof Markey report.

PN26268

If I could next draw your attention to the Productivity Commission which conducted its own analysis of times spent on weekend and weekdays, and that's behind tab 7 of the bundle put before you, your Honours will see at page 437 of the final Productivity Commission Report that on - if we look at figure 12.1 and the key activities performed on weekend, there's a much larger amount of time spent on Saturday with friends than on Sunday. There is a slightly greater amount of time spent on Sunday with family than on Saturday, both family living elsewhere and family in the household.

PN26269

If we then go down to figure 12.2, we will see that there is a greater period of time spent on social and community interaction on Saturdays compared to Sunday, same with voluntary work and care, same with purchasing goods and services. Domestic activities are broadly similar and personal care - well, it looks like almost double there, but there is a higher amount of personal care on Sunday than on Saturday.

PN26270

Personal care, we would submit, is something that is one of the most likely matters to be able to be substituted across the other days in any event, but what the Commission concludes from all of this, and we say quite rightly, is that there is relatively little difference in the degree to which people engage in social activities between Saturdays and Sundays, compared with weekdays. There is some difference in types of engagements. The largest deviation in social activities is between weekends and weekdays; social and community interaction is actually higher on Saturdays.

PN26271

In the pages that follow, the Productivity Commission then goes on to look at the AWALI data as well and if I take your Honour to the very end of that bundle of pages, to page 443, the Productivity Commission concludes the overall evidence points to adverse social impacts of frequent weekend and evening work, compared with weekdays. So they acknowledge this disability that we've acknowledged at the beginning of our submissions.

PN26272

However, the various strands of evidence do not sustain a rigorous argument that regular Sunday work has especially adverse social impacts compared with other periods of working at asocial times or that these impacts are notably worse for women than men.

PN26273

So that's what the Productivity Commission's finding were based on the evidence it reviewed. The next matter I would like to draw your attention to, your Honours, is the individual employee witnesses in the retail and restaurant industries. If I could ask you to go to page 46 of our submissions, there were four witnesses put forward by the union parties in relation to the Retail Award, four employee witnesses who talked about the disability associated with weekend work. Of those four witnesses, they were all cross-examined about whether the level of work/life interference was greater on Saturday or Sunday. Three of them indicated that the level of work/life interference was greater on Saturday, one indicated it was greater on Sunday. That's identified in all the transcript references at page 46.

PN26274

Overleaf, on page 47, we talk about the retail employees and there were six witnesses who gave evidence in relation to a disability associated with weekend work. Three gave evidence that the disability associated with weekend work was equivalent between Saturday and Sunday, and then one said it was Sunday and two we didn't cross-examine because it was evidence from their witness statement effectively that they thought there was a greater disability on Sunday.

PN26275

So even if we take is as a given that those two that weren't cross-examined had a greater level of interference on Sunday, we're left with three and three. Three say it's broadly equivalent, three say it's Sunday. Again, we say this is broadly equivalent with our arguments regarding the level of difference between disability Saturday versus Sunday.

PN26276

If you look at the individual employee witness, obviously it's only a handful of witnesses, it's anecdotal at best, that's the highest we can put it, but it does point towards a similarity of interference as opposed to sizeable difference.

PN26277

The next matter, when it comes to disability associated with Sunday work relates to religious observance. The incidence of religious observance on Sundays has dramatically reduced. The Prof Lewis evidence in relation to this was uncontested. We say it speaks for itself. What we are looking at in terms of an

impact on the population is, at most, an impact on 17 per cent of the population, if not less in terms of people who have religious observance on Sundays, and we must also bear in mind that church activities only - - -

PN26278

JUSTICE ROSS: That's 17 per cent numbers from people who attend once a month at least.

PN26279

MR IZZO: Once a month, that's right. So if we're looking at weekly, it will be even less, that's right.

PN26280

JUSTICE ROSS: All right.

PN26281

MR IZZO: Then one also needs to bear in mind church activities don't take up the whole day. They would only take up, one would imagine, one or two hours. There could be exceptions to that, but that's probably the majority experience. There's only two other key elements of evidence that I want to briefly address about the disability on Sundays and they are the two union witnesses, Dr McDonald and Dr Muurlink. Dr McDonald performs a qualitative analysis of respondents who participated in the AWALI survey.

PN26282

If I can take your Honours to section 8 of the bundle of materials in front of you, at paragraph 4 of this excerpt from SDA43, you'll see that Dr McDonald says, at paragraph 4, the second line:

PN26283

The view that Sunday is different and not a regular workday was held by almost all the retail employees interviewed.

PN26284

So Dr McDonald forms this view. Then overleaf at page 15, at paragraph 18 she refers to her research findings and says:

PN26285

In presenting these findings, we have focused on these common themes while also providing many examples of individual stories to illustrate the underlying diversity.

PN26286

She talks about identifying common themes.

PN26287

JUSTICE ROSS: I'm sorry, what paragraph was that?

PN26288

MR IZZO: That is paragraph 18 on page 15.

PN26289

JUSTICE ROSS: Yes. Thank you.

PN26290

MR IZZO: Then the report goes on to talk a lot about disabilities associated with Sundays. The difficulty we have with the McDonald report is that if one actually goes through the interviews that were conducted and looks at the types of things that were said, it becomes readily apparent that a large number of employees gave evidence about the fact that Sunday wasn't too different to Saturday and we have outlined at schedule 1 of our primary submissions more than - I think it's six pages of interview transcript from a variety of different interviews where they talk about the fact that they'd prefer to work Saturday or that Sunday is not different to other days or it doesn't bother them to work Sunday as opposed to certain other days or opposed to Saturday. Lots of different comments.

PN26291

Saturday is obviously probably a little bit worse because it's hard being at work there - there's no need to go through all of schedule 1, but when the Commission does so in its own time, you will see that there is a common theme that has not been referred to and that is a common theme of Sunday being broadly equivalent to Saturday. That doesn't rate a mention at all in the Dr McDonald report. On one view, it's surprising that there was such a large number of comments about the equivalence when one sees the way in which the questions were asked.

PN26292

If we go to page 50 of the Dr McDonald report, which is just a few pages over from where you are now, tab 8, the questioning that was directed at employees is outlined. There's a large number of questions about Sunday work. The questioning starts with Sunday. People were asked how often they work on Sundays before being asked, later on down the page, "Do they prefer working on Sundays or would they prefer to be working some other time? Are there things you don't like about working on Sundays?" Overleaf, they're asked, "Does working on a Sunday feel any different to working on other days?"

PN26293

I think probably the worst question is the next one because it says, "Does working on Sunday interfere with your responsibilities or activities outside work at all?" It then says, "Reframe and prompt", depending on the answer you get, "When you weren't working on Sundays, what were the responsibilities that you were more engaged with or had more time for than you do while working on Sundays?" It assumes Sunday to be a day which is interfering most with social activities, and then it goes on to say, "Does working on Sundays affect your involvement" and it lists a number of activities that might be interfered with.

PN26294

It's a very leading course of questioning and that causes a lot of difficulty. We then turn to Saturdays down the bottom of the page. There's only three questions about Saturday and they're nowhere near as leading as the questions that were asked in relation to Sunday. So what we say about Dr McDonald's report is that it's lacking a common theme that was clearly evident from the interviews and that's outlined at schedule 1. It also appears that Dr McDonald's approach,

predetermined views she held about Sunday, appear to have clouded the process and so we've ended up with a report that we say is unreliable.

PN26295

Just briefly to conclude with Dr Muurlink, the SDA rely upon Dr Muurlink's report in relation to the fact that Sunday work is inherently more unsafe. We've pointed out a number of deficiencies with the Muurlink report and they're outlined at paragraphs 18.4 to 18.8 of our primary submissions, and I won't repeat those deficiencies. But what I do want to emphasise is that what needs to be understood is Dr Muurlink's thesis. It's not that Sunday work creates adverse health consequences.

PN26296

His thesis is that consecutivity overload, uncontrollability, unpredictability, asynchronisti and arrhythmia cause adverse health consequences and he says that you're more likely to find people on a Sunday that might have those patterns in their life because you're more likely to have shift workers, you're more likely to have people working overtime and things of that nature. If I can draw your attention to page 36 of our submissions in-chief, the submissions quote transcript where I put these matters to Dr Muurlink. We talked about the fact that irregularity of rostering contributes to adverse health consequences, rostering overtime on weekends, where people are shift workers or were workers who worked on six or seven consecutively.

PN26297

If we then turn overleaf in the submissions, Dr Muurlink summarises his position and this is our 18.11. He says:

PN26298

Yes, to be quite clear, weekends and public holidays do not magically cause negative effects. The body does not somehow sniff that it's a Saturday. These things are empirically associated with but not Saturday doesn't have to be associated with anything. It just is associated with these things. Public holidays tend to be staffed by people who have unpredictable schedules, et cetera, et cetera, so it's a correlation not a causation, not a necessary causation.

PN26299

The reality is that it's things like shift work, overtime, et cetera, that are causing adverse health consequences, is Dr Muurlink's thesis. Now, if these matters are generally of concern to the Commission and the Commission were to accept his evidence, then one should be looking at shift penalties, overtime penalties, casual loadings. One should not be using the Sunday penalty as a blunt and very indirect instrument to redress issues associated with shift work and casual work and other types of irregular work patterns.

PN26300

So that's why we say this evidence is not relevant. I would add that if the Commission does impose penalty rates in response to these matters, it would be a significant departure from the basis that has previously been outlined for imposing weekend penalty rates in the past. To conclude, then, about the disability

associated with Sunday work, essentially our position is this. It's a threefold position and it is as follows: firstly, the disability associated with working on a Saturday is generally equivalent to the disability associated with working on a Sunday.

PN26301

Secondly, it is only sometimes and for some employees that the disability associated with working on a Sunday is greater than the disability associated with working on a Saturday. Thirdly, even where the disability associated with working on a Sunday is greater than that associated with Saturday, the difference between the two days is very slight. In light of that, we say that the current Sunday penalty is disproportionate to the disability associated with Sunday work and this is indeed corroborated by the work of Professor Rose, because notwithstanding that employees had in their mind set that they get higher rates of pay on Sunday. Even when they entered the amounts that they would require to work, they did enter amounts that were much less than the penalties imposed by the existing award regime. They didn't seek loadings of 200 per cent. On average employees sought 157 per cent in the retail industry and 146 per cent in the restaurant industry. That is what we have to say about the disability associated with Sunday work.

PN26302

In relation to public holiday work, the key evidence relates to Professor Rose and if I can take you back to the bundle. At tab 9 of the bundle, there should be two pages extracted. If I take you firstly to the second page, page 25, you will see that there's a table outlining the public holidays that employees recall existing, and you'll see certain public holidays had a high level of recall, such as Australia Day, Anzac Day, Christmas and Easter. Other days had lower levels of recall.

PN26303

If I can then draw your attention to our submissions at page 61, our primary submissions, that is. We have outlined the value that employees attributed to each of the relevant public holidays. Because Professor Rose outlined the values in each state, for each public holiday, what we've done in the submissions is average out the value for each holiday across the states and that's why I'm drawing your atteniton to the table in page 61 of our submissions.

PN26304

What becomes apparent, is that there's really two categories of days. There's the days that are considered important and they appear to be Christmas Day, New Year's Day, Boxing Day, Australia Day, Anzac Day, Good Friday. Then there is a separate grouping of days that were given very low value ratings by the employees. This is an interesting development, because it means that whilst the awards presently treat all public holidays the same, they're not in terms of the disability associated with them. It suggests that perhaps the assessment of the disabilities associated with public holidays might need to be reconsidered in light of this evidence.

PN26305

When employees were asked what they wished to be paid, again, Professor Rose's evidence demonstrates that their assessment of the disability associated with work

might not equate to the current award assessment. Because if we go to page (vii) which is the first page of tab 9 of the bundle in front of you. In the restaurant industry, employees sought wages between 124 per cent and 150 per cent to work on a public holiday in the exercise that they conducted. In the retail industry it was a little higher 165 per cent for week days and Saturdays and then there's a higher number for Sundays, 224. And again, this likely arises from the perception that employees are currently paid higher amounts on Sundays. They're paid higher amounts on public holidays and for that reason we're seeing a higher figure for the Sunday public holiday.

PN26306

We say both of these matters that Professor Rose outlines demonstrate that the disability associated with public holiday work is not at the level currently assessed in relation to the awards that are the subject of the claim.

PN26307

Your Honours, I will come back to disability when addressing the historic regulation of penalty rate, but the next theme I would like to address is the disemployment effect of penalty rates.

PN26308

JUSTICE ROSS: We might take a five minute break.

SHORT ADJOURNMENT **[11.38 AM]**

RESUMED **[11.47 AM]**

PN26309

COMMISSIONER LEE: Mr Izzo, just before you continue, I just wanted to ask you a question about a couple of times now you've made reference to respondents to the Rose survey, reflecting that they put a price premium, if you like, on working on weekends and you've said a couple of times that, if I put it to you this way, reframing what you said, that's not surprising because they are aware of what their rates of pay were and so they were reflecting that back.

PN26310

But I'm just not sure, thinking back to the evidence at the time, that that was entirely clear for a couple of reasons. One, I think there was some controversy about whether they were aware of what their rates were, and I think just generally I'm still not sure if the proposition that you make out - where's the basis for that as opposed to they simply reflected the fact that irrespective of awareness of their rate, they think that that's what they should be paid.

PN26311

MR IZZO: Thanks, Commissioner. In relation to the first element, whether they were aware or weren't aware, if you just bear with me one moment and I'll just find the reference. There was evidence given - so if I can draw your attention to page 12 of the reply submissions filed by my clients in this matter, there's a transcript reference there from Prof Rose. What Prof Rose effectively said, as far as I can recall, was that in the pilot study that they conducted, he had noticed that

employees were aware of their rates of pay and I believe he included in that a reference to penalty rates, and I'll just pull the transcript reference for you.

PN26312

I'll just read it out, that's probably easiest. At PN9518, he's asked:

PN26313

They wouldn't necessarily know what their ordinary hourly rate is, would you agree with that, with or without penalties?---I can't answer for every respondent. In the pilot study, the majority of the respondents in the focus groups were aware of what their award entitlements were.

PN26314

That was the evidence given by Prof Rose. Now, what we would say - sorry, and then his Honour, Ross J said at PN9520:

PN26315

Professor, when you say that, do you mean that they were aware of what they were actually paid?---They were aware of what they should have been paid and what they were actually being paid; the majority, not all. I'm not taking claims that the entire population were aware, but in the actual pilot the respondents that were present, the majority in my understanding was they did know what their entitlements were.

PN26316

We say that's not unsurprising because most people generally know what they get paid. It's a matter of importance to a lot of people. It's how you live on a daily basis. So I don't think that's a surprising conclusion, and indeed, Prof Altman accepted under cross-examination that the employees would have known their own rates of pay and would have known if they ordinarily received penalty rates or not and he conceded that at transcript, 27 October 2015, PN19494.

PN26317

Now, obviously Prof Altman wasn't there when they did the survey but he obviously accepts the proposition that I am putting, which is that most people know what they get paid, they know if they get more on Sunday and they know if they get more on a Saturday because it's of such importance. So that's what we would say about that, Commissioner. That's what we would say about it in response to your question. I'm not sure if there was a second element, perhaps?

PN26318

COMMISSIONER LEE: The second element - you've explained the first - is what's the basis for suggesting, then, if they were aware of what their rates are, that it follows that that's the reason that they would reflect that in terms of what they say they should be paid, in terms of the survey, as opposed to, getting back to the discrete choice nature of what that work was about, that's simply what their according - as to work rate is.

PN26319

MR IZZO: What we would say about that, I don't think there's direct evidence on that point. What we have is evidence from both Prof Rose and Prof Altman

would say that context is important to employees when they conduct a survey like this because context will influence the outcome and what Prof Rose said under cross-examination, and I don't have the exact reference with me now, is that he said part of their context is that they knew what they were being paid, so that was his opinion and we stand by that which is that when someone goes to think about, "Well, what would I want to work a particular day", well, they think about, "How much do I usually earn? What do I do on that day", all those kinds of things, "What would I spend my money on", and all of those kinds of things will form part of the context.

PN26320

In fact, in the cross-examination of Prof Altman, I put a number of those things to him. I put to him, for instance, that people would think about what their financial commitments were, what their mortgage repayments were, all those kinds of things would feed in to whether you work or not. We say it's all part of the context and context always will influence a survey result and that was the evidence of both Rose and Altman.

PN26321

COMMISSIONER LEE: Thank you.

PN26322

MR IZZO: Is there are no further questions on that, I'll now turn to the disemployment effect of penalty rates. The first piece of evidence we rely on in this regard is the expert report of Prof Lewis which is exhibit ABI3. There's been a lot of criticisms made by the union parties of the Lewis report, and there's been criticisms made of the Lewis report by Professors Borland and Quiggin. All of the union and expert criticism has been addressed, whether it be at section 27 of our primary submissions or section 9 of our submissions in reply. There is not, unfortunately, sufficient time to go through each criticism and each response today. The written submissions on these matters have been extensive. Therefore I really want to focus on three key points that I would like to identify.

PN26323

The first is that much has been made of the fact that Professor Lewis's estimates of the elasticities of demand are at the higher end of the scale, if you like, of other academic literature. And if I could draw the Bench's attention to tab 10 of the bundle in front of you, which is an excerpt from ABI3 - halfway down, this is where the professor expresses his view about the assumptions of the elasticities at play. He says: "On the basis of the above studies" - and there have been a number of studies in the pages proceeding -

PN26324

On the basis of the above studies, we can reasonably assume that sigma, the elasticity of substitution for hired labour, is between 1 and 3.

PN26325

That number of three - sorry, then he goes on to say:

PN26326

However, for completeness, an elasticity of 0.5 is included in the analysis to account for the possibility that there is a lesser degree of substitution in that suggested by the above statements.

PN26327

He then goes on to say that:

PN26328

n) the price of elasticity of demand for relevant industries is between -0.1 and -3.

PN26329

That -3 was something that's received some criticism, not just by Professor Quiggin and Professor Borland, but it's been criticised as unrealistic in the Productivity Commission report. But what we need to realise is that these are outer extremities of his estimates. They're not what he used in his model. In his modelling he's already told us his estimate for substitution elasticities are between 1 and 3 but for completeness he's halved his estimate to 0.5, and he conducts a similar approach with the elasticity of demand, so if we turn the page, when you actually look at what was inputted into the model, he's got values of 0.5 - this is for the elasticity of substitution and one, and he's got values of -0.1, 0.5 for (n) in terms of the elasticity of demand, so if we were to take even his lower end, more conservative estimates, take sigma of 0.5 and the other (n) figure at -0.1, we still arrive at a conclusion that the modelling demonstrated shows a substantive impact on employment. So I think we acknowledge, yes, some of the academic literature he relies on - some of it's his own previous work - is towards the higher end, but he doesn't use that; he uses the lower estimates, so that's a very important matter to bear in mind.

PN26330

The next thing in relation to this matter is that the Commission has before it now a report tabled by an independent Commonwealth agency with specialist economic expertise, and that is the Productivity Commission, and they have conducted their own modelling and that's contained overleaf in tab 11 of the bundle in front of you. The Productivity Commission commence by saying that the broad empirical evidence suggests that, with exception of youth wages, a 10 per cent decrease in wage rates could increase the economy-wide demand for labour, both a head count and the hours basis, by around 5 per cent. They go on to qualify that. They say:

PN26331

However, these are commonly-wide estimates, may not be a good guide to labour demand responses for Sunday.

PN26332

So then what follows is discussion about what to do with Sunday, and, overleaf, the Productivity Commission at page 479 refers to its own analysis, and it talks about: "If a labour demand elasticity for Sunday of -0.6, a hypothetical but probably conservative estimate" - and note that -0.6 is slightly higher than what Professor Lewis used; he uses -0.5 in his model - they say:

PN26333

If a labour demand elasticity for Sunday of -0.6, a hypothetical but probably conservative estimate, using 0.6, if that were to apply, the anticipated increase in hours from say a 33 per cent reduction in wage rates will be around 27 per cent.

PN26334

They then go on to talk about, in the next paragraph, a view expressed by the majority Full Bench in the Restaurants decision of 2014 where the Full Bench talked about: "The fact that uncertainty over labour demand elasticities and a view that minimum wage decisions had obvious employment effects" - they referred to those comments from the decision and they disagreed that those contentions were correct in relation to penalty rates because those contentions relate to small movements in wages, whereas a penalty rate - I think one is to assume they are saying - is a much larger change in the wage movement. And so ultimately they conclude that there are highly probable, economy-wide, employment increases to be generated from a reduction in Sunday penalty rates, and that conclusion is at page 480 in the second paragraph.

PN26335

So not only do we have Professor Lewis, we also have the Productivity Commission's own modelling pointing to a substantive decrease. But then we further have the evidence of Professor Quiggin. If I can take you to page 18 of our reply submissions where we extract the relevant section of Professor Quiggin's evidence, he accepts that penalty rates on Sunday have a disemployment effect. He says:

PN26336

We'll certainly see substantial lower employment on Sundays, which is indeed the intention of penalty rates to set aside Sunday, in particular, more than Saturday, is a day when people aren't expected to work, but nearly all of that employment loss would be made up by increased employment on other days of the week.

PN26337

And that's extracted at paragraph 9.16 of our reply submissions. So what he's saying is, yes, the penalty rates do have a disemployment effect on Sunday - we would expect that - but his view is that it will be made up on other days. But that assumption, we say, is not sound, because for that labour to move to other days, that means the demand for the services need to move to the other days; the demand that hasn't been serviced on the Sunday needs to shift to the week. In the restaurant industry, Professor Quiggin gave evidence about the fact that restaurants are shut on Monday and this is at a time when penalty rates don't apply, and what that demonstrates is that there's other factors relevant to demand. Restaurants appear to be shut on Monday not because of wage costs. It's likely that the demand just simply isn't there on a Monday compared to what it might be on a weekend, so we cannot assume in the restaurant industry that if we disincentivise employment on Sunday it'll just be made up on a Monday or a Tuesday. And a simple example would be something like a Sunday lunch. I mean, most people don't - we accept that the large proportion of Australian workers still work the Monday to Friday, 9 to 5, working week. I think the United

Voice quote a figure of 70 per cent in their submissions. These people are going to find it far more easy to have a restaurant meal on a Sunday at lunch than during the week when they're working. We say the same applies to retail but perhaps to a slightly lesser extent. So this assumption that all the demand will just shift to the week, we don't think that's sound, which means that if that's the case there won't be a demand for labour during the week either.

PN26338

Moving on from that expert evidence, the next evidence that we have is Dr Yu's evidence.

PN26339

JUSTICE ROSS: Just before you leave Professor Lewis, can I take you to paragraph 11193 of his evidence? Do you have - - -

PN26340

MR IZZO: Yes. So his evidence, you're referring to the transcript, are you, on it?

PN26341

JUSTICE ROSS: Yes.

PN26342

MR IZZO: I'll just read it now. Yes, your Honour.

PN26343

JUSTICE ROSS: So there I've been trying to understand Prof Lewis' modelling. I've asked the question: so does it work this way, that a reduction in penalty rates would lower labour costs, those savings would be passed on to consumers in the form of lower prices and the lower prices would increase demand and then it's through the increased demand you get an increase in employment, and he accepts that's the proposition that he's putting. That's why, on his analysis, a reduction in penalty rates would give rise to an increase in employment. That's the chain of reasoning.

PN26344

It seems at odds, though, with the employer lay evidence in these proceedings. Not one of the employer lay witnesses suggest that they were going to drop their prices. There's no suggestion in fast food that Hungry Jacks or McDonalds will drop their prices in the evidence that there's a reduction in penalty rates. Yet, in fast food they rely on Prof Lewis's analysis. The employer lay witnesses predominantly speak of we might employ some more people, improve our service delivery, offer services, bring back the Sunday roast area, that sort of evidence, but no one is suggesting a reduction in prices.

PN26345

So it's the disconnect between, on the one hand, the expert evidence of Prof Lewis in this instance, and on the other hand, the lay evidence which is where employers are asked directly, "Well, what would you do if there was a reduction in penalty rates?" None of them are proposing to do what Prof Lewis says. So how do we deal with that apparent conflict?

PN26346

MR IZZO: Your Honour, Prof Lewis, from what I gather from his evidence, his conclusions about the way they would act is based on this understanding that the relevant industries are highly competitive and that's why I think he forms a view.

PN26347

JUSTICE ROSS: That's true.

PN26348

MR IZZO: It may well be that Prof Lewis is taking an aggregate view about the fact that there is this highly competitive industry, once a change gets put into place, everyone is going to act in a particular way and then that's going to drive a chain reaction. Now, the individual operators may not have that at the forefront of their minds because they're not necessarily thinking about what others would do, they're not thinking about the flow-on effect to the entire industry; they're just talking about their own circumstance.

PN26349

But once everyone else starts to react to the reduction, it may be that as a collective, and given it's a competitive industry, we end up with some of the types of effects that Prof Lewis is talking about.

PN26350

JUSTICE ROSS: Aren't you more likely to end up with some of the types of effects that the employer lay witnesses are talking about? That is, if their competitors offer a range of different services on a Sunday, they might offer it, but not one of them talks about reducing prices.

PN26351

MR IZZO: It's possible that some of those outcomes that are suggested by the lay witnesses will happen. I mean, one of the problems with the lay witness evidence is that it's a small number of people we've talked about in terms of how representative it is - - -

PN26352

JUSTICE ROSS: But it's your case. I mean, you've called them and they've given evidence about what the effect would be and what they would do. Are you saying we should disregard that evidence?

PN26353

MR IZZO: I'm not saying we should disregard it, your Honour. What I'm saying is that that is one of the outcomes, is what the lay witnesses have said, but when we look at an aggregate economy-wide effect, it's probably the assessment of Prof Lewis based on assumptions he makes about it being a highly competitive industry, et cetera, probably gives us a more reliable view of an aggregate effect, although just like any qualitative research conducted by any expert, the individual witness evidence is certainly giving us an idea of the types of thing that might happen.

PN26354

It is odd that none have mentioned this outcome, I think that's right, but I don't think that necessarily means that won't be an outcome that takes place. I am conscious, particularly in the restaurant industry, I think two of the operators didn't even know that there had been a rate reduction. One thought prices had gone up, and so there may well have been, in terms of what can be understood from those witnesses, they didn't really have the price reduction that has taken place in that industry at the top of their mind.

PN26355

JUSTICE ROSS: Or the wage reduction.

PN26356

MR IZZO: Sorry, yes. Dr Yu is put forward as contradictory evidence to that of Prof Lewis, and the Productivity Commission, in effect. Dr Yu, as the Commission would be aware, compares employment in Victoria to employment in New South Wales in the period preceding 2010 and then looks at what impact the increase in penalty rates had in New South Wales, on New South Wales' employment, after 2010. The Dr Yu evidence has been addressed in detail in our written submissions, and that's at paragraph 27(27) of our primary submissions and section 12 of our reply submissions.

PN26357

It's also been dealt with in detail by the ARA, not to mention some of the other organisations, but certainly the ARA submissions. I accordingly don't intend to repeat all these criticisms, of which there certainly were many. We say the criticisms invalidate the whole report. What I do wish to do, though, is make one final point regarding the Yu report, and to do that, I would ask if the Commission could please turn to tab 12 of the bundle in front of you. There's three relevant figures in the excerpt from SDA39 that I've provided.

PN26358

Figure 2 shows total retail employment in New South Wales and Victoria, then figure 3 goes to full-time hours and figure 4 goes to part-time hours. If we look at figure 2, you will see that there is a trend of employment in New South Wales from about 2008 onwards where employment is decreasing. At the same period of time, we see a trend in Victoria where employment is flat initially from 2008, but then increases. What we see here is a divergence between the two populations and that's a matter that Dr Yu was taken to in cross-examination.

PN26359

Just briefly before I make my submissions about this, I'll show you the divergence in the other graphs. Figure 3, we'll see that immediately prior to 2010, New South Wales employment is dropping whilst in Victoria it's increasing, and figure 4, the trend was broadly equivalent, but then immediately prior to 2010, New South Wales employment is increasing while Victorian employment is decreasing. Dr Yu says that to look at these small periods, if you like, is what she called cherry-picking, and that it does not invalidate that there is a common trend before 2010 and that New South Wales and Victoria are appropriate comparison groups.

PN26360

Now, I don't accept that proposition, but even if I did, even if we accept that she is right and that on aggregate the two employment groups are appropriate groups to compare, it still does not change the fact that at the very period we are trying to assess, namely post-2010, the groups are divergent. Dr Yu is telling us, well, they're appropriate groups to measure against each other so that divergence will end at some point, because on aggregate over a long period of time, they're consistent, but there is no evidence before this Commission about how quickly this divergence will rectify itself.

PN26361

It might be after six months, it might be after three years. We don't know, and Dr Yu didn't and couldn't tell us how long it would take before the divergence rectified itself. Indeed, if we look at the divergence in figure 2, it's actually been going for - I mean, it's hard to tell, but it looks like it's been going for two to three years. So we simply don't know how long this divergence will last and that is a critical problem because we are looking at what happens in 2010 when the awards rates are implemented, but we know at this very specific period the two groups are not aligned. We say that's a fatal flaw in relation to her evidence.

PN26362

If I can then move on from Dr Yu. The next evidence the Commission has before it is the witness statement of Ms Baxter, the final witness statement that was tendered in the proceedings. Ms Baxter's witness statement talks about a survey that was conducted of the retail population. I think I have to acknowledge at the outset that this survey is not a comprehensive survey of the population because it does not survey all employers in the retail industry, it surveys employers who are members of the relevant organisations who conducted the survey.

PN26363

I also need to acknowledge that it's not possible to tell how representative the survey is of the membership, because we don't have the number of employers who responded from each organisation. But nevertheless, it stands as a survey of 690 employers of the retail employer population, 485 of whom are covered by the Retail Award.

PN26364

If I draw your Honours' attention to page 75 of the submissions-in-chief, filed by ACCI, ABI and NSW Business Chamber, we set out a geographic spread of the participants in the survey and we'll see that the geographic spread is broadly equivalent, although there's a slight blip in relation to Victoria and Queensland. I think Queensland has a slightly higher response rate than Victoria, just a little bit. But other than that, it's broadly representative of the number of employers in each jurisdiction.

PN26365

MR BREHAS: Excuse me, your Honours, sorry to interrupt. We've lost Simon Ralbyn. Can you hear me?

PN26366

JUSTICE ROSS: Yes, we can hear you. What's the problem?

PN26367

MR BREHAS: Sorry, I can't hear anyone.

PN26368

MR IZZO: He can't hear us I think.

PN26369

JUSTICE ROSS: When did this - I suppose you don't know.

PN26370

All right, we'll stand down for five minutes until we sort the problem out.

SHORT ADJOURNMENT **[12.16 PM]**

RESUMED **[12.20 PM]**

PN26371

MR IZZO: Your Honours, so I was saying that the survey attached to the Baxter statement does have a broadly representative geographic spread, and so we would say that some weight can be given to it in terms of it being a representative survey of the population.

PN26372

JUSTICE ROSS: Aren't they two different things? I mean, I understand the proposition that some weight can be given to it because it represents responses from a significant number of operators, but are you putting that the results are representative and can be extrapolated to the whole population?

PN26373

MR IZZO: We are putting that that exercise could be conducted for the reasons that I've indicated about it being broadly representative geographically and I've also talked about the fact that we say there's a relatively significant number of employers.

PN26374

I accept that from a purist perspective, to extrapolate it statistically, it would need to be of the whole population and not the membership and I have to accept that and I note the previous decisions of the Commission that have - - -

PN26375

JUSTICE ROSS: I suppose on behalf of the purists, we've got 485 employers who are covered by the Retail Award and the survey identifies what their views are in relation to a range of questions. Given that they were self-selecting, they responded to the survey, so it's not unlike perhaps an ABS survey where it's a random weighted sample. Let's not put that this is how that was done.

PN26376

It would seem to be a bit of a heroic assumption to say that 485 out of 135,000 - when we don't know what the characteristics of the 485 are. We know broadly which state they come from, but that's about it. I'm just not sure on what basis it could be said that we can extrapolate and therefore it represents the whole.

PN26377

I understand what you say about it representing the views of a significant number of employers and on that basis, it may be the best evidence we have available on that issue. But I'm struggling to understand how it can be said that it's representative in the way that expression is understood in the survey literature.

PN26378

MR IZZO: I think that they are criticisms that are valid. That is a difficulty in terms of extrapolation and that's a challenge we have to accept in terms of extrapolating it. What we do so that, as your Honour said, there's 485 individual employers. It's quite a loud voice and it exceeds the number of individual witnesses we've had in the proceedings, so just like we've heard from individual witnesses, we have a large number of employers telling us things and certainly it's indicative of the types of issues being faced in the industry and weight should at least be given to it on that basis.

PN26379

If I can turn your Honours to the submissions in-chief that we've made at page 76 in reliance of what these employers have told us, at paragraph 27.53 we outline - and this has all been taken from the Baxter statement naturally, and you can find the references in the footnotes. But we're told that of the 470 respondents who actually provided week day trading hours, 88 per cent of them had trading hours on Sunday that were lower than week days and 89 per cent of them rostered fewer employees on a Sunday than on a week day.

PN26380

Interestingly, when they were asked why their trading hours differed, 55 per cent of this group of 470 employers cited wage costs as the reason, and importantly, in the way the survey was asked, it's important to note there were no leading questions, they were asked, "What are your week day trading hours?" They were asked, "What are your Sunday trading hours", and then they were asked, "If these hours differ, tell us why", and it was just free text and what Ms Baxter was go through that free text and categorise it. So this is compelling evidence, 55 per cent of these 470 were influenced by wage rates when setting lower trading hours and employment hours for Sundays.

PN26381

For public holidays, there was a similar disincentive effect for some holidays but not for all, and I'd like to come back to that later. So there was a disincentive effect for public holidays, but it depended on the holiday and that's something I want to address in due course. The last thing I'd like to address, just when we come to the disemployment effect of penalty rates is the qualitative research conducted by Dr Sands. Behind tab 13 of your materials in the bundle is an excerpt from Retail2. I accept that the research conducted in this regard is qualitative, it means we don't know the extent of the issues that Dr Sands identified, but what it does confirm is the existence of a particular phenomenon.

PN26382

What this evidence extracted at tab 13 of the bundle shows is that the vast majority - sorry, I withdraw that. What it shows is that there was a prevalent theme of employers reacting to wage rates by reducing labour or addressing

labour in some way. We hear about rostering on casual, younger and therefore cheaper employees on the weekend. We hear about few permanent and permanent part-time hours being available, younger staff being contracted, reduced Sunday labour budgets. Overleaf, we're told Sunday is dedicated to service delivery as opposed to other stock or store activities.

PN26383

Lower on the page we see less meal breaks, we see retail business owners working on the shop floor themselves to keep labour costs down, so on and so forth. So we have this qualitative evidence that tell us there is this phenomenon that's going on. That's what we say about the disemployment effect of penalty rates. We say it is a real phenomenon and is one to which the Commission should have regard.

PN26384

I'd next like to address the traditional approach to Sunday penalties that's been adopted by this Commission and its predecessors, and considered in light of the evidence in these proceedings. To do this, I'd like to draw your attention to the background paper published by the Fair Work Commission, and that's located behind tab 14 of the bundle in front of you. Naturally, there's not the time nor perhaps the inclination to go through all the cases that relate to penalty rates, but what I would like to identify is a key theme that runs through some of the cases.

PN26385

If I take you to page 5 of the background paper, the first case reference - sorry, the first case I wish to least reference - is the Gas Employees case at paragraph 9 of the background paper and it talks about Sunday being the day for family, social and religious reunions, the day on which one's friends are free, the day that is most valuable, most valuable for rest and amenity under our social habits. We then move on to the next case on that page. There's a reference to the Weekend Penalty Rates case and there's an excerpt there. Saturday, it is said, is the great day of recreation, while Sunday is the day of religious observance and family reunion.

PN26386

Saturday is the day on which competitive sports and various forms of organisation, social activities and public entertainment are held. What's not in the background paper is a paragraph that appears just below that one in the case, and that paragraph I can read out to you. It states as follows, and it appears just below this one in the case:

PN26387

Before us, advocates for the unions have very properly and with great earnestness laid stress upon the very special position of Sunday in relation to religious and family life in our society.

PN26388

That's excerpted as our primary submissions at page 8. The reason I draw attention to that is because it again emphasises the distinct importance of Sunday vis-à-vis Saturday.

PN26389

JUSTICE ROSS: It's reflecting what the submissions were of the party, rather than what the Commission is saying, isn't it?

PN26390

MR IZZO: Well, your Honour, I'm not too sure about that proposition because they say, "Before us, advocates for the unions have very properly and with great earnestness laid stress upon the very special" - - -

PN26391

JUSTICE ROSS: I see. So it's the acceptance of the proposition? Yes, I see. I follow, yes.

PN26392

MR IZZO: So I believe they're endorsing - that's right. The next case is at page 12 of the background paper and this is the decision by Gay C to reduce the Saturday penalty rate from 1.50 to 1.25 in 1993, and that's at page 12 as I mentioned. The last passage of that, the last paragraph excerpted, says:

PN26393

The Sunday ordinary time rate should be less than the overtime rate and yet appreciably more than the Saturday rate.

PN26394

There's that phrase, "appreciably more". It is similar and builds on this common theme about Sunday being appreciably more important, much more valuable, et cetera, than Saturday. Essentially, these cases all assume, for want of a better phrase, a big difference between Saturday and Sunday. When it came to the award modernisation process, rather than reassessing some of these assumptions, if we go to page 21 of the background paper, we are told - and we accept this is quite an accurate representation of what happened in the case - that submissions were considered by the Australian Industrial Relations Commission regarding the penalty. There was a divergence of views as to whether it should be 150 or 200 per cent.

PN26395

The Commission expressly said in its judgment that:

PN26396

Where there is significant disparity in those terms and conditions, we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit.

PN26397

They then went on to say that the critical mass lay with the Victorian/ACT/Queensland rates and accordingly adopted the critical mass position. They didn't reassess the difference between Saturday and Sunday, they just said most of what's gone on in the other jurisdictions is 200 per cent, there's industrial merit for that because there had been arbitrated cases, "We'll adopt that."

PN26398

JUSTICE ROSS: If I take you to paragraph 60 and the quote, it's probably the emphasis - you lay the emphasis on the critical mass positions, as do other employer parties. The unions lay evidence on the second bit, for lay purposes, and terms which are clearly supported by arbitrated decisions and industrial merit. But is that suggestive of some qualitative assessment or what is it suggesting?

PN26399

MR IZZO: My assessment, your Honour, is that - - -

PN26400

JUSTICE ROSS: I'm sorry, I understand the first bit, the critical mass. You look at the range of them, where they are, and you make a decision to adopt, that one. I'm not sure what's meant by the second part of that expression.

PN26401

MR IZZO: I think one could validly contend and accept that what the Bench was directing its attention to was if there were terms that, having been included as a result of arbitrated substantive decisions, for want of a better word, then they would accept that those terms therefore had some level of merit to them because they had substantial consideration in the past as a result of Commission decisions. That doesn't necessarily mean that the bench turned its mind to re-evaluating the merit of what had happened before.

PN26402

JUSTICE ROSS: And it might have been drawing a distinction between those as a result of arbitrated decisions as opposed to consent decisions.

PN26403

MR IZZO: Yes. They're advancing a proposition which I think is quite appropriate, which is if there has been a big dispute about a particular term in the past and it has had thorough consideration, well, we will assume that that term is quite valid in the way it currently operates because it had such thorough consideration. That doesn't mean they reconsidered what was considered in the earlier decisions.

PN26404

JUSTICE ROSS: So you're suggesting to the extent they had to do that, they delegated it in a way that, "Well, if the previous bench has looked at it, we're not going to look at it again."

PN26405

MR IZZO: In a sense. We have to accept that what was conducted during the award modernisation process was an enormous task of bringing together a large, large number of awards. That was a very, I think, efficient means of dealing with it, but what it doesn't mean is that the difference of Saturday as opposed to Sunday was the subject of any substantial consideration in 2010.

PN26406

DEPUTY PRESIDENT ASBURY: And those arbitrated decisions could have been decided sometime previously.

PN26407

MR IZZO: That's right. That's our position, yes. Indeed, if we talk about the Retail Award as an example, the last time it was really properly looked at was the $2 and under case. That was - - -

PN26408

JUSTICE ROSS: 2003.

PN26409

MR IZZO: - - - in 2003, and that was a two/one decision.

PN26410

JUSTICE ROSS: I'm not sure we're going to be adding up the numbers in that way.

PN26411

MR IZZO: No, your Honour, but what is interesting from that decision is in the dissenting judgment by Giudice J. The Justice did actually say - and I'll just get the reference. It's actually in the next tab of your materials at page 4. Naturally he dissented. He's in the minority, I accept that, but he made the point that:

PN26412

The penalty for ordinary hours on Sunday should bear a proper relationship to the Saturday penalty.

PN26413

He says that in paragraph 17. That's a matter that we do endorse.

PN26414

JUSTICE ROSS: I don't think anyone would disagree with that. It's how you apply it.

PN26415

MR IZZO: That's right. That's where they came to disagreement. Where we now arrive though is that we've had a history of cases that assume this big difference between Saturday and Sunday, but we say for all the reasons I've already advanced today, that difference is markedly reduced. It's either they're broadly equivalent in terms of disability or Sunday is slightly higher. It certainly doesn't justify a penalty rate that is - well, the loading itself is four times that of the Saturday loading.

PN26416

We accordingly submit that this warrants then - having regard to the evidence that has been filed, having regard to the history of the cases and the weight that they've placed on the difference between Saturday and Sunday as the key matter really supporting a higher Sunday, it really does warrant a re-visitation of this Sunday rate both in the restaurant and retail industries.

PN26417

If I could next turn to the case law pertaining to public holidays. We have traced in section 8 of our submissions-in-chief the history of public holiday regulation. I

won't take you through the specifics, but the history was that it was actually bank holidays legislation that regulated for public holidays and the awards would usually provide for no loss of pay if you took the day off in accordance with the bank holidays' legislation, or penalty rates if you had to work and that penalty rate operated as a deterrent.

PN26418

Just on the point of deterrent, if I could take you to paragraph 10.1 of our submissions. That is, our primary submissions. We quote the Tanning Industry case in 1944 where his Honour Piper CJ held:

PN26419

This court does not create such holidays as King's birthday and the like; they exist either by statute or general custom.

PN26420

He goes on to say:

PN26421

What the court does is to select a certain number of already existing and recognised holidays and on the assumption that, generally speaking, such holidays would be observed as such, apply to them the principle of no loss of pay because of absence if no work were required and, in addition, in order to protect the employee from any improper loss of the benefit of such holidays, prescribe a deterrent by providing penalty rates for work on such days.

PN26422

If I can take you a couple of pages over in our submissions, to page 19, this notion of the public holiday penalty being a deterrent is reinforced by the New South Wales Industrial Relations Commission. There is a decision there at paragraph 11.6 of our submissions referring to a decision of Harrison DP who says:

PN26423

Employees should ordinarily expect to have a day off on a public holiday unless there are business needs which require them to work. Public holiday penalties are not an opportunity for employees to increase their earnings, but a disincentive to employers to require employees to work on a public holiday.

PN26424

MR IZZO: That was the traditional approach. We should also be cognisant that at the time a lot of these public holidays were implemented, employees had much less annual leave allocated to them. They in some case would only have two weeks' annual leave when some of these cases were determined. That has now doubled to four weeks. The number of public holidays has also increased. We had the example in these proceedings only last year, Grand Final eve - arose last year which I think intervened in these proceedings in Victoria.

PN26425

It wasn't until 2006 that an express entitlement to a day off was actually prescribed by employment legislation. That came with the Work Choices amendments to the Workplace Relations Act. Employees for the first time

conferred a right to refuse work. That has been mirrored in the Fair Work legislation. We have a system which historically did not have substantial quantums of leave. Now, that has changed over time. We have a system that developed penalty rates as a deterrent to engage workers.

PN26426

We now have a system that has a codified right to 10 public holidays in employment legislation and it's combined with a right to refuse work. The need for a substantial deterrent has accordingly dissipated somewhat, because indeed an employee can only be required to work on a public holiday if the requirement is reasonable in the circumstances. This is a matter that the Commission will need to take into account.

PN26427

On top of this history of legislative change, we have unique new evidence in these proceedings. In these proceedings - and I'd like to draw your attention to page 79 of our submissions-in-chief - we outline the differing impact of differing public holidays. Now, to the best of our knowledge this is not something that has been delved into in any substantive level of detail in any of the other previous public holiday test cases, for want of a better word.

PN26428

What this table shows on page 79 is two things: it shows there are a category of public holidays which employees value as having a high importance. Those are Christmas Day, Good Friday, New Year's Day, Boxing Day and Anzac Day. You can see the employee importance ratings in the right column. It also happens that on those days, according to the Baxter evidence of those 470 employers, wages are not a huge influence on whether the business operates or not. It can only be, we say, because it is the nature of the day itself that is operating as somewhat of a deterrent.

PN26429

Just to give one example - and I know it's an isolated example, but one of the free text responses when they asked, "Why do the hours differ on Christmas Day?" said, "It's Christmas Day." What that shows is that these holidays have a more sacrosanct character to them or a more sacred character than some of the others.

PN26430

JUSTICE ROSS: And probably that that reflects the lower demand for the services that the employers offer on those days.

PN26431

MR IZZO: Indeed. It could well be that for some of those employers they simply don't - for the small operators, they don't want to operate because they themselves want that day off.

PN26432

JUSTICE ROSS: I'm not sure how that proposition on that material that some employees value some public holidays greater than others - how does that lead you to support a general proposition to reduce the penalty rate on all public holidays?

PN26433

MR IZZO: If I can come to that in one moment, your Honour, because the second point on that is there is the second category of public holidays that have the low importance rating from employees, but a high wage influence, and that's the second category identify on page 79. To address your Honour's question, we say there's really only two responses the Commission should have when presented with this evidence. The first response is to set two different categories of public holidays, to set a category that had a higher penalty rate that reflects the higher value associated with that date, and a category that has a lower penalty rate that reflects the lower value associated with those other dates.

PN26434

Now, that is an approach that we say is not ideal because it involves setting two different sets of penalties. It's not a simple or straightforward approach. So we would argue against adopting that response to this evidence. So the next response is to set a public holiday penalty rate for all public holidays, not just by reference to the important ones, but to set a rate that evenly balances the differences in disability across all of the public holidays. In addition to that, when adopting that approach, we say the Commission should take into account that employees now have a codified right to have public holidays off and they can only be required to attend work if it's reasonable in the circumstances.

PN26435

So one should adopt as the starting point that they will only be there if it's reasonable in the circumstances to be there.

PN26436

JUSTICE ROSS: So you say that the qualified right not to work takes account of, if you like, the differential value because if they value them more highly, then they'll have a reasonable reason to not - - -

PN26437

MR IZZO: And to take an example, Christmas Day is a good example. When assessing whether it's reasonable in the circumstances, you might be looking at someone's family responsibilities, there's a whole arise of matters, and all of that will be a matter that's relevant. They will only be there on that day if it's reasonable and that is a matter that should be taken into account when we set the penalty rate, otherwise we'll be setting a penalty rate by reference to a state of affairs that's not contemplated by the Act.

PN26438

We say this latter approach is the better one because it's more simple and straightforward and if you adopt this latter approach, you end up at a figure of 200 per cent. One of the reasons we're attracted to the 200 per cent is, well, is that it actually has the effect of equalising, if you like, the pay to both those who attend for work and those who don't on the day. So if you don't attend for work on the day, you receive a full day's pay, that's 100 per cent. If you do attend for work on the day, you get the full day's pay that you worked, plus what the people got who got paid who didn't come to work, which is the extra 100 per cent.

PN26439

So you have a neat symmetry there with the payment being made to employees who work reflects the amount that others are being paid to not attend work. That is the course of action that we urge the Commission to take. If I could then address the consequential amendment regarding time off in lieu.

PN26440

JUSTICE ROSS: Just before you go on, can I take you, and this is more out of interest than anything that's central, but paragraph 9.15 of your submission, from page 16. I perhaps should have asked Commissioner Hampton this before we came in, but the South Australian Act identifies Sundays as nominal public holidays; how does that work? I hesitate to raise it, given there are some odd arrangements in South Australia, but - - -

PN26441

MR IZZO: Your Honour, I was equally perplexed by that. My understanding, and I'm happy to be corrected by Commissioner Hampton if I'm wrong, is that Sundays remain a public holiday and are treated as such in that jurisdiction, but that by way of practice, it's largely being ignored. I think that's my understanding, but it is still codified as public holiday in South Australia. That's my understanding of the position.

PN26442

JUSTICE ROSS: Okay.

PN26443

COMMISSIONER HAMPTON: From my part, I'm not sure I'd describe Sundays as being ignored, but they're treated as Sundays, not public holidays for the purposes of local instruments, at least. It's an interesting area, largely untested, I think.

PN26444

MR IZZO: Yes. When we did - my understanding was they're still in there, in the statute recognised that way, but obviously for all intents and purposes, a different approach has been taken in practice. The consequential amendment, just briefly, is this; if I can just take your Honours to the last tab in your bundle. This is an excerpt of the penalty rates clause in the Restaurant Award. It's headed, "34 penalty rates". If you turn the page to clause 34.4, you will see that at 34.4(c), employees who work on a prescribed holiday may, by agreement, perform such work at a rate of 150 per cent of the relevant minimum wage rather than the penalty rate prescribed, and then take a day off in lieu.

PN26445

So currently they get paid 250 per cent, they can get paid 150 per cent and then have a day off in lieu, which would represent the remaining 100 per cent. If the Commission was to reduce the penalty rate to 200 per cent, we say if they work the day, they should be 100 per cent and then they can take a day in lieu. So it would be to change 150 to 100, assuming that our primary claim succeeds. The next matter I'd like to address relates to the casual rate for public holidays. The applications seek to cut the casual rate of pay from an existing rate of 250 to 125 per cent.

PN26446

Now, I acknowledge that this means that there is no additional remuneration for working the public holiday in the sense contemplated by section 134(1)(d)(a).

PN26447

JUSTICE ROSS: Not only that, but you started your submission saying you recognise there are disabilities associated with working on weekends and public holidays.

PN26448

MR IZZO: Indeed, your Honour, that's right, and I do maintain that we recognise that disability. So I'll explain the basis of the claim. The basis of the claim is that casuals not only have the right to refuse, but in any event, because of the nature of their engagements, they can't be compelled to work in the sense that if a casual is not available - the ad hoc nature of the engagement, if they're not available one day, they don't have to come in, and so in the purest sense, and it really is the purest sense, I accept that casuals will only end up working on a public holiday if they choose to and that in that sense, the work on that day is very much as a result of a voluntary decision.

PN26449

I have to say, this represents the outcome of the employer arguments in their purest form. I accept that there may be other considerations that might still motivate the Commission - - -

PN26450

JUSTICE ROSS: But if we accepted that, then casuals wouldn't get any other loading benefit in the awards, other than the 25 per cent loading. Because you're working on the assumption, well, they can not come, they can refuse to work, so - - -

PN26451

MR IZZO: But I think the difference in penalty rates, your Honour, is that penalty rates are particularly referable to disabilities as well which the other provisions might not be in the sense that it's a - - -

PN26452

JUSTICE ROSS: Okay, but then they wouldn't be entitled to any penalty rates.

PN26453

MR IZZO: On that basis, yes.

PN26454

JUSTICE ROSS: Yes.

PN26455

MR IZZO: And for that reason, it may well be the case that the Commission forms a view that they should be awarded a penalty. The Commission may form a view that - we would say in light of the argument, it's a penalty that shouldn't be a size of the permanent workforce, but if the Commission was to impose a penalty for casuals that was somewhere less than the permanent rate, this is still an

available outcome for the Commission. I'll just very briefly touch on the public submissions before taking you to the modern awards objective. We will finalise that document that we discussed at the beginning of these submissions, your Honour.

PN26456

Our position is a simple one; we say the public submissions should not be given any weight because they include evidence, a large number of them that hasn't been tested. There's no indication as to the extent of the public's submission authors' understanding of the relevant claims, and indeed, if one actually does the analysis to look at whether the people who have written these submissions are covered by the relevant awards, have worked in those industries, the document that we will ultimately file will show that it's only a very small proportion that actually relate to the industries that are applicable to these claims.

PN26457

That's why we say that no weight should be given, or if weight is given, a very low amount.

PN26458

JUSTICE ROSS: Does it follow as a consequence of that, if we accept that proposition, then there were some other submissions filed by various employer parties in the proceedings that also seek to make assertions as to facts.

PN26459

MR IZZO: There are. There's a slight difference in that at least some of the employer party submissions that I have reviewed have demonstrated an understanding of the relevant claims.

PN26460

JUSTICE ROSS: No, no, no, I accept that that's the difference, but where they then make an assertion as to a fact or when it's not sworn, hasn't been tested - - -

PN26461

MR IZZO: Then it would suffer from the same difficulty, yes. I think they have to be treated equally. Your Honour, before I conclude, to address the modern awards objective - - -

PN26462

JUSTICE ROSS: That might be a convenient time, or have you - - -

PN26463

MR IZZO: I'm intending on concluding within four or five minutes.

PN26464

JUSTICE ROSS: I was just wondering whether you've done a deal with your colleagues and you probably have, to wrap up before lunchtime, so I don't want to interrupt that.

PN26465

MR IZZO: I'm in the process of wrapping up, your Honour.

PN26466

JUSTICE ROSS: That's fine, yes.

PN26467

MR IZZO: In relation to the modern awards objective, we say that the Commission's function here is to set a fair and relevant minimum safety net. It's not an aggregate safety net, but a minimum floor to create the safety net for workers. There's a lot of criteria to be balanced. We have set out in our reply submissions at schedule 1, I believe, of the reply submissions, a list of the key findings that we seek the Commission to make. We say that those key findings demonstrate that the current penalty regime over-estimates the disability associated with Sunday and public holiday work.

PN26468

This is in conflict with section 134(1)(da) because section 134(1)(da) talks about taking into account the need for additional remuneration. When one considers 134(1)(da) in the context of section 138, what the Commission is to do is to provide a penalty that compensates for the need for additional remuneration, but to go no further. What we say is the current rate goes beyond what is needed and that's somewhat borne out by the Prof Rose analysis. It goes beyond that and provides an additional amount that is not necessary both by reference to how employees have assessed what they need to work on those days, and by reference to the disability associated with work on those days.

PN26469

The disemployment effect that we have spoken about demonstrates that penalty rates do impact business adversely, they impact employment adversely and they impact workforce participation adversely, contrary to sections 134(1)(c), (f) and (h). I'll simply note that at section 31 of our primary submissions, we align each of the components we seek against the modern awards objective and show how our claims further the modern awards objective and satisfy once - the award, once varied, satisfies the objective.

PN26470

Your Honours, in short, our position is simply this; it's time, it's time to revisit the way in which Sunday is reviewed. The 4-yearly review is the right time to move away from including penalties that achieve the critical mass of what has gone before. Instead, we should include provisions and awards that are truly relevant to the modern workforce. The same applies to public holiday penalties. These had their genesis from different eras which had different quantums of leave and holidays available at the time. We need to ensure that the right balance is struck between a 24/7 economy and the deterrence that exists for public holiday trade.

PN26471

It's time to make modern awards in the service industry modern. Let's make them reflect society's culture and experience, from 2016 to 2020, not just take as a given principles first adopted when these penalties were previously imposed.

PN26472

Unless there's any further questions, your Honour, they are the submissions.

PN26473

JUSTICE ROSS: Thank you, Mr Izzo. We'll adjourn until 2.15.

LUNCHEON ADJOURNMENT [12.58 PM]

RESUMED [2.16 PM]

PN26474

MR MOORE: If the Commission pleases, might I just deal with one housekeeping matter from this morning.

PN26475

JUSTICE ROSS: Yes.

PN26476

MR MOORE: There was a question arising in relation to what was referred to as MFI 2.

PN26477

JUSTICE ROSS: Yes.

PN26478

MR MOORE: I note for the record that MFI 2 is actually referred to in the transcript at para 24534 as MFI 1, just to complicate things. I have spoken to Mr Gotting about this and there is no uncertainty. It's agreed between us that MFI 2, as it's listed in the list of exhibits or as it's identified in the list of exhibits, should be received as an exhibit and AIG16 withdrawn.

PN26479

JUSTICE ROSS: Received as an exhibit from the SDA or - - -

PN26480

MR MOORE: It records an agreed position reached between the parties.

PN26481

JUSTICE ROSS: Joint exhibit 1? It might be the start of a trend.

PN26482

MR MOORE: I'm in your Honour's hands.

PN26483

JUSTICE ROSS: Well, this looks ominous.

PN26484

MR MOORE: Your Honour, we are quite content for the document to be marked as SDA and the next exhibit number, if that makes any - - -

PN26485

JUSTICE ROSS: Sure. Okay.

PN26486

MR MOORE: I know it is difficult.

PN26487

JUSTICE ROSS: We'll mark what was MFI 2 as exhibit SDA56.

EXHIBIT #SDA56 FORMERLY MFI 2 - AIDE-MEMOIRE

PN26488

JUSTICE ROSS: Thanks, Mr Seck.

PN26489

MR SECK: Thank you, your Honour. The Pharmacy Guild have filed two submissions in this matter. I should just note some aspects of it. There is an annexure A to the principal submissions. The guild has filed an amended annexure A. It doesn't change the evidence substantively. It sets it out slightly more clearly by grouping together the evidence of witnesses both in their statements and by reference to evidence given in transcript.

PN26490

JUSTICE ROSS: When did you file that?

PN26491

MR SECK: We filed that and hopefully that amended annexure has reached the bench.

PN26492

JUSTICE ROSS: Not this side of the bench. When did you file it?

PN26493

MR SECK: In the context of this four-yearly award review in relation to penalty rates - - -

PN26494

JUSTICE ROSS: No, I wanted to know when you filed it.

PN26495

MR SECK: When did we file it? Last Monday.

PN26496

JUSTICE ROSS: Last Monday?

PN26497

MR SECK: Last Monday.

PN26498

JUSTICE ROSS: All right.

PN26499

MR SECK: It should be headed at the top "Amended annexure A".

PN26500

JUSTICE ROSS: Yes, it is.

PN26501

MR SECK: There were no substantive changes other than just to clarify the grouping of the evidence and attributing some of the transcript evidence to specific witnesses. I'll start again. In the context of the four-yearly review in relation to penalty rates, there are significant and fundamental differences between the community pharmacy industry and the applicable award, the Pharmacy Industry Award, with the other employer groups in this review.

PN26502

Of course the guild relies upon the common evidence and the submissions which have been made by the other employer groups in relation to those common evidence. However, there are significant differences in relation to the history of the award, the characteristics of the community pharmacy industry - in particular the high level of regulation that applies in relation to ownership, location, remuneration from the services, sale of medicines and professional standard - the commercial position of the community pharmacy industry, the trading hours of the community pharmacy industry and its workforce characteristics. I want to emphasise some of those differences during the course of today's oral submissions.

PN26503

I might start with the question of the award review which is addressed in the background paper. The bench can conveniently find the background paper in the bundle of documents handed up by Mr Izzo, under tab 14. The guild's position is that in the preliminary jurisdiction decision, the full bench said that the position taken by the Commission in the 2010 award modernisation establishes really a prima facie position as to whether or not the minimum safety net of conditions were fair and relevant, and were necessary to the meet the award objective. That prima facie or presumptive position can be tested and rebutted by reference to evidence.

PN26504

The second position the guild takes is that in the four-yearly review, the Commission's role is to determine whether or not the award as it currently stands is fair and relevant in establishing minimum safety net conditions of employment having regard to the requirements of the modern award objective. Clearly in the context of these proceedings there has been a much deeper look into the issue of penalty rates by reference to more detailed expert survey and lay evidence. Even if the Commission was satisfied at the time in 2010 that it satisfied the modern award objective, it doesn't preclude, in my submission, the Commission coming to a different view in 2016.

PN26505

The starting point of the 2010 review is what occurred and the background paper usefully sets out the process that was undertaken by the Australian Industrial Relations Commission during that period. Paragraph 58 - starting at page 20 - onwards sets out in the guild's submission an accurate analysis of the Commission's approach to penalty rates during the 2010 award modernisation process. The guild sets out a more detailed account of the award history in paragraph 21 to 23 of its principal submissions and paragraph 6 of its reply submissions, and none of that award history has been expressly refuted by the SDA in these proceedings. Might I just ask the Bench to note one point? In

paragraph 29 of the principal submissions, there's a reference to a decision of Commissioner Larken. I've omitted to insert the print reference there. If the Bench can note this is print, N8528. What is apparent from and when one looks at the award history, and particularly the award modernisation process of the awards in the community pharmacy industry, is that there was no detailed consideration of the issue of penalty rates. Indeed, what appears to have happened is set out in paragraph 6 of our reply submissions, that is, it was merely a standardisation or a blending of the various State and Territory and Federal award prescriptions based on what appeared to be the highest amount.

PN26506

Can I take the Commission to the quote which is set out in paragraph 60 of the background paper, which refers to the Commission's approach in relation to the General Retail Industry Award, to attach a weight to the critical mass of provisions, which are clearly supported by arbitrated decision in industrial merit? I want to unpack that proposition as it applies to the community pharmacy industry awards and the best way of doing that is to go to Annexure D of table 2.4 to the background paper, which is set out at page 44 and 45, and it usefully summarises the position in relation to Sunday and public holiday penalty rates prior to the making of the Pharmacy Industry Award 2010. If one is to analyse whether or not a critical mass of provision supported the current rate of 200 per cent for Sundays, which is set out on the third line of the Pharmacy Industry Award 2010 - 200 per cent, one would need to count up the number of awards which are prescribed a rate of 200 per cent for Sundays. On my account, if one takes the Victoria-South Australian position of 200 for the Community Pharmacy Award 1998, the ACT position and then the position under the Chemists ACT Award 2000 between 6 am to 8.30 am and 6 pm to midnight, the Victorian award and then the Queensland award and the South Australian award, there are six provisions which support a rate of 200 per cent. However, if one contrasts that with the position for 150 per cent, for the Federal award one has four States - New South Wales, Queensland, Tasmania and Western Australia; and then in the ACT there's 150 per cent between 8.30 am and 6 pm, and then count up the numbers for the following awards, there are eight awards - or eight provisions which apply for 150 per cent. One can see from that there wasn't necessarily a critical mass to support the insertion of a Sunday rate of 200 per cent at the time of award modernisation. If one just looked, it's six provisions against eight provisions.

PN26507

JUSTICE ROSS: But we're not setting those an Appeal Bench - - -

PN26508

MR SECK: We aren't.

PN26509

JUSTICE ROSS: - - - from the Award Modernisation decision?

PN26510

MR SECK: I'm merely undertaking this process to highlight to the Bench that at the time of award modernisation, the approach of looking at a critical mass of provisions wasn't necessarily reflected in the community pharmacy industry.

PN26511

JUSTICE ROSS: What was the approach?

PN26512

MR SECK: The approach appears to have been taken to - it's hard to know because the decision of the Full Bench didn't fully articulate the reasons, but one way of looking at it is that the highest amount was taken and applied, because 200 is clearly the highest for this amongst the various Federal and State awards at the time, and that was adopted rather than looking at the critical mass of provisions, which using purely a numerical method was 150 per cent on Sundays. A similar approach is taken for casuals, and I won't go through that. It's clear that there is no amount with the prescribed 225 per cent. There are a few which provided the 220 per cent. There are probably equal number that had 170 per cent. And for public holidays I accept that 250 was the critical mass.

PN26513

The point I wish to come to is this is that if one looks at what occurred during award modernisation, it wasn't necessarily based on a proper assessment of what was a fair and relevant minimum safety net. It didn't even comply with the approach which was adopted in relation to the General Retail Industry Award. It appears what has been done is that the highest amount has been taken in relation to what's been prescribed in the various State, Territory and Federal awards and that's been used as the benchmark for the Pharmacy Industry Award 2010. Even if one looked at this as a matter of industrial merit and considered the arbitrated decisions in the Community Pharmacy Award, the approach isn't necessarily supported.

PN26514

Might I hand up to the Bench a copy of the decision - and this is the only decision we've been able to find - of Commissioner O'Shea in relation to the 1996 award. As far as the Guild has been able to ascertain, the decision which I've just handed up of Commissioner O'Shea in relation to the making of the Community Pharmacy Victorian Interim Award 1995 is the only arbitrated decision in relation to penalty rates that exists. There are a number of other decisions where the award was updated at various times but this appears to be the only decision where proper industrial merits were considered. Might I take the Bench to the section marked Conclusions - regrettably it's not paginated. On my copy it starts at page 4 of 11. There's an analysis of the approach taken by the Commission in relation to the making of the award, and the key part I wish to emphasise is on page 8 of 11. It sets out the various rates for the categories and then in the second paragraph after the classifications and rates are set out it says this:

PN26515

The PGA says salaries and penalty rates should be considered and determined together, i.e. in an integrated way. The SPA accepts that penalty rates -

PN26516

The SPA is the Salaried Pharmacists' Association; he's a predecessor to APESMA -

PN26517

- in the classification structure are inextricably linked.

PN26518

Then it goes on to say:

PN26519

The PGA refers to the parties' agreement regarding hours of work

PN26520

et cetera.

PN26521

The PGA argues for a reduced regime of penalty rates and takes the Commission to interstate comparisons.

PN26522

Then turning over the page, the Commission then establishes the penalty rates in the third paragraph:

PN26523

Having regard to the nature of the industry and bearing in mind the agreement of the parties as to ordinary hours, it is reasonable to set a penalty rate of 25 per cent from 6 pm to 9 pm, Monday to Friday, and 50 per cent for 9 pm to midnight, Monday to Friday.

PN26524

Then there are the rates for Saturdays, and then the conclusion the Commission reaches is this:

PN26525

These rates, in the Commission's view, represent a fair and reasonable compensation for salaried pharmacists, given the material before the Commission as to the changes in trading hours and community expectations of availability of services. Looking at other workers under Federal Awards who are required to work their ordinary hours outside of 9 to 5, a 5-day pattern, they seek to strike the right balance between costs to employers and the industry, of meeting the public's demand for services with rights of employees to reasonable compensation for the additional demands of late evening, weekend work. These rates represent a pronounced reduction in penalty rates by way of realignment of salaries and penalty rates which translate across interim awards -

PN26526

Et cetera:

PN26527

To ensure their combined effects, the wage increase and the penalty rate adjustments determined did not combine anonymously -

PN26528

And then there's a process set out. The point I wish to derive from that analysis of the case is that the Commission in that case looked at wages and penalty rates in a

greater way. It wasn't analysed as a separate issue, it was analysed as an overall question. That is the only arbitrated decision as far as we can find in relation to penalty rates, and in my submission, because it was treated as an integrated position, one cannot rely upon this decision as necessarily supporting the position that was taken in relation to penalty rates in the Pharmacy Industry Award.

PN26529

It is a position that was subsequently replicated for pharmacy assistants in subsequent awards made at a Federal and State level. The next point I wanted to focus upon are the differences in relation to the regulation of the pharmacy industry. One core difference that exists between the pharmacy industry and other industries is that there is, in effect, a grand bargain that exists between the Pharmacy Guild of Australia and the Commonwealth government for the regulation of pharmacy remuneration. In particular, the linkage of that regulation and access to funding, to greater access to the community pharmacy industry, to increased opening hours.

PN26530

The document which embodies that is the Sixth Community Pharmacy Agreement. It's exhibit SDA8 in these proceedings. I have a copy for the Full Bench so it's easier to follow. I just wish to highlight some aspects of the Sixth Community Pharmacy Agreement. The Bench can see from page 3 there is a set of recitals to the agreement which places and identifies the Community Pharmacy Agreement as having a central role in the Australian healthcare system. I won't read all those particular provisions out.

PN26531

Under the agreement itself, it establishes the rate of remuneration for pharmacists with a dispensation of pharmaceuticals on behalf of the Commonwealth government and the funding of particular community pharmacy programs as part of the arrangements. Clause 6.1 on page 15 of the agreement deals directly with the issue with community pharmacy programs. The Bench will see at clause 6.1.1 that the Commonwealth will make available up to 1.26 billion in funding for the provision of those programs by community pharmacies, and if one goes through the particular provisions, they're designed to improve clinical outcomes for consumers and place at the forefront the role of pharmacists in the delivery of primary healthcare services.

PN26532

The most important provision is set out on page 16, clause 6.1.9, where there is an acknowledgment made by the Guild that as a condition for receiving the funding, the Australian government requires the achievement of real improvement in patient access to community pharmacies including for increased opening hours under community pharmacy programs, and (b):

PN26533

Funding for existing and any new or expanded community pharmacy programs under this agreement will be contingent on the Guild and the approved pharmacists actively working with the Department over the first financial year of the term and then on ongoing basis to achieve such improvement.

PN26534

That places front and centre the question of increased access outside standard hours as a condition for funding from the Commonwealth government. Much of the submissions by both parties, by both the Pharmacy Guild and the SDA, have focused on the importance of the Sixth Community Pharmacy Agreement. It is true that there is significant funding under the Sixth Community Pharmacy Agreement that's forthcoming, however, that is very much contingent on the industry being able to demonstrate real improvement in patient access through increased opening hours.

PN26535

In our submission that is a very important difference that exists in the community pharmacy industry to the other industries. It is a matter of government policy that community pharmacies are to open for longer hours and that's embodied in clause 6.1.9 of the agreement. Another difference is, when one looks at the opening hours of community pharmacies, there are significant numbers of pharmacies which do not open outside standard hours on Monday to Friday. That is in contrast to others in the hospitality and retail industries.

PN26536

Might I invite the Bench to go to the Guild submissions in reply on this issue, annexure C. This is an analysis of the lay evidence in relation to the hours of work. The Bench will recall that there 23 pharmacy proprietors who gave lay evidence in these proceedings, and each of them in their statements set out the opening hours for their pharmacies. On my count, going through this table, 13 out of the 23 pharmacy proprietors closed earlier than 5 pm on a Saturday; 16 out of the 23 pharmacy proprietors either did not open on a Sunday or opened for less than the full hours up to 5 pm.

PN26537

Whilst this merely represents the evidence of the lay witnesses, in my submission it demonstrates that there is significant scope for increased trading hours during weekends and public holidays. That is supported by the survey evidence in the Deloitte Pharmacy Award Report, to which I'll come shortly. The importance of opening hours and increased accessibility to community pharmacies is fourfold. Firstly, in the case of sickness or medical misadventure, patients need pharmacies at odd times. If a parent has a sick baby and needs access to medication, that doesn't occur during ordinary hours on a Monday to Friday, it can - - -

PN26538

JUSTICE ROSS: That's just the Canberra link that's been dropped out. Nobody is there and apparently the livestream is insufficient for whoever was going to watch it from there, and another member of the Commission needs that link, so - - -

PN26539

MR SECK: Patients do not have control over when they need the services of a community pharmacy, it happens in circumstances often of an emergency and increased accessibility to community pharmacies outside standard hours can assist in overcoming or addressing those particular circumstances. It also allows for the triaging of medical problems at an early stage, and there is significant evidence of

those issues. It avoids patients having to go off in all circumstances to a very busy and over-crowded hospital emergency department where some situations might be addressed by merely visiting a community pharmacist located locally.

PN26540

Thirdly, there is a central role given to community pharmacies under the National Medicines Policy, and fourthly, if there is improved healthcare overall of the Australian community, that will improve healthcare outcomes, lower healthcare costs and have economic benefits which flow on to the rest of the economy in terms of lower healthcare spending, potentially less taxation and therefore higher economic growth.

PN26541

I now want to focus on the specific report that was prepared by Deloittes in relation to the Pharmacy Industry Award and its impact. That is exhibit PG35. I don't propose taking the Bench to that particular report. The conclusions that the Guild wishes to draw from that report are set out in paragraph 98 of its principal submissions. It was a report undertaken of Guild members. There were 302 respondents to the survey. That led to a 94.4 per cent of statistical confidence in relation to its results.

PN26542

Some criticism has been made by the SDA that it did not reach the original target of 95 per cent. In my submission, whilst that may be so, it doesn't necessarily invalidate the statistical reliability of the conclusions that one may reach from that particular survey. The evidence suggests that 94.4 per cent is still a sufficient level to enable reliable conclusions to be drawn. The conduct of the survey sought to address and control for other compounding factors and it is representative by reference to a range of criteria, including location on a State-by-State basis, by reference to urban and remote areas, by reference to sale revenue and employee size.

PN26543

The key conclusions that the Guild wishes to rely upon out of the Deloitte Pharmacy Award Report is that 93.59 per cent of pharmacies operate unprofitability on public holidays; 88.89 per cent of pharmacies who participated in the survey operate unprofitability on Sundays; and just over 50 per cent operate unprofitably outside normal hours on Saturdays and on weekdays. This has led to a decrease in trading hours during those particular times. Deloitte has sought to control for the various factors which might explain why those outcomes have been reached, and the factors they've looked at include price disclosure, increased competiveness in the marketplace, lower sales and lower prescription levels.

PN26544

No other compounding factors have been identified by anyone. As a result of a regression analysis which has been undertaken by Deloittes, it was found that the Pharmacy Industry Award resulted in a contraction in the number of working hours by 123.38 hours per week; three trading hours - that's employment hours per week, I should say; a contraction in three trading hours per week and lower staffing and increase in the wages bill by $60,462 on average. There was indeed some criticism made of the approach taken in the regression analysis by Deloittes

in the SDA evidence, in particular from Dr Martin O'Brien. Those criticisms have been addressed in our submissions.

PN26545

Can I then deal with the common themes that emerged out of the lay evidence. The common themes are set out in paragraph 101 of the Guild's principal submissions. By and large, the SDA does not take issue with the common themes which emerge in paragraph 101 except for, as I understand it, three points. The first point is set out in paragraph 101(d) of the principal submissions. That is, the impact of price disclosure and whether or not there was cross-subsidisation by pharmacies of unprofitable aspects of their business.

PN26546

Secondly, in paragraph 101(i), in relation to the impact of penalty rates on the profitability of pharmacies and their ability to trade outside standard hours, and thirdly, paragraph 101(m) in relation to the future intentions of pharmacy proprietors in the event that the Guild proposal was granted.

PN26547

JUSTICE ROSS: Are you saying that (j) is not challenged?

PN26548

MR SECK: Pardon me, I think (i) and (j) should go together. You're right, your Honour. Other than those propositions, as I understand it, the SDA does not contest the common themes that have been outlined by the Guild in paragraph 101 of the principal submissions. We've sought to address each of the disputed areas in our reply submissions. I won't repeat them but the issue of the impact of price disclosure and cross-subsidisation is addressed in paragraphs 55-57 of our reply submissions. The issue of future intentions is addressed in paragraph 61 and the issue of profitability is addressed in paragraphs 63 and 64.

PN26549

Can I now deal with the question of the workforce characteristics of the pharmacy industry, working in the pharmacy industry. This material is taken out of the Commission's paper in relation to retail trade. Might I - I don't know if the Bench has access to that document? The Commission's report is entitled, "Industry Profile Retail Trade, March 2016" sets out relevantly the composition of employed persons by industry at table 5.1 on page 37. There are a number of characteristics I just want to highlight as they apply to the community pharmacy industry.

PN26550

The segment which is identified is pharmaceutical and other store based retailing. I think the other store based retailing includes cosmetics and toiletries, amongst other industries. They're clearly not covered by the community pharmacy industry, but it's probably as accurate as we can get in terms of figures.

PN26551

The bench will see that the number of part-time employees who work in the industry is much higher than other retail segments. In particular, 44.8 per cent of females work on a part-time basis and 77.1 per cent of the composition of the

workforce in the community pharmacy industry are females. That is the second highest amongst all retail segments to the clothing, footwear and personal accessory retailing industries. The fact that the pharmacy industry has a high number of part-time female employees, in my submission, is relevant in undertaking a subgroup analysis of the relevant survey evidence and determining the level of work-life interference that may exist for those particular employees who work in the community pharmacy industry.

PN26552

Might I just highlight one other factor which influenced the nature of part-time work in the community pharmacy industry. It arises under the award. I'll hand up a copy of the award to the bench. The award has a slightly unusual definition of part-time and casual work, which means that a high number of employees are classified as part-time and casual. Might I take the bench to clause 12 initially. That sets out the definition of "part-time employees". The bench will see that part-time employees must have reasonably predictable hours of work and that must be determined at the time of engagement in accordance with their regular pattern of work. If the bench then turns over to clause 12.6, it says:

PN26553

An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee.

PN26554

The definition of "casual employee" is like a residual category if you don't fall into full-time or part-time. Then there is a conversion clause set out in 12.10. Importantly, in clause 12.11, where a part-time employee works additional hours which are not designated, they are treated as a casual employee for the purposes of rates. The way it operates is that part-time employees can be given a roster which is agreed at the time of the engagement and if there are additional hours which are not reasonably predictable, then those employees will be paid the casual rate but they'll still be classified as part-time employees.

PN26555

Clause 13 sets out the definition of "casual employment". It isn't the standard definition which provides that casual employees would be those who are paid and engaged as such. It's defined in the negative sense. That is, in effect, those people who are not full-time and part-time employees. The reason why I've drawn the Commission's attention to that is there was some suggestion in the SDA's submission that the pharmacy industry doesn't have a high casualised workforce similar to other parts of the retail industry.

PN26556

There is an explanation for it, given the particular provisions that are contained in the Pharmacy Industry Award 2010, because there's a bias - not a bias, but there are provisions that apply to part-time employees which would also seem to potentially capture casual hours of work. The definition of casuals is a residual category, which bias is in favour of part-time employees. In any case, much of the data doesn't report casual employment as it applies to the community pharmacy industry.

PN26557

If one then undertakes a subgroup analysis of those particular employees who work in the community pharmacy industry - that is, part-time employees who are women and one would assume there are at least some women who have carer responsibilities and work part-time to participate in their carer responsibilities - then one can see that there is, in my submission, based on the survey evidence, a high number of employees who work in the community pharmacy industry who prefer to work on weekends because it suits their particular commitments.

PN26558

Conversely, the level of interference or displacement of activities for those categories of workers are lower. The selection of working on weekends really depends on the individual characteristics and personal circumstances of those employees. To make good that proposition, one has to look at the particular survey evidence in this area. The Deloitte weekend report, or the Pezzullo report as it's referred to in other places, sets out the findings or the survey results of 1000 weekend workers. It's true the 1000 weekend workers who were surveyed, as the SDA points out, were not all retail workers. However, one can see from the report that a significant number are retail workers and we've set out those numbers in our submissions.

PN26559

The conclusions one can draw from the Deloitte weekend work report are set out in paragraph 111 of our principal submissions. The major conclusion is that a majority of weekend workers report either no problem or only minor problems with working on weekends. When one undertakes a subgroup analysis of those employees who are likely to work on weekends - and we'll make this proposition good shortly - that is part-time and casual workers, the number of weekend workers not troubled by working on weekends is much higher than for full-time workers.

PN26560

The majority of people view Sunday and Saturday as equally important, and less than a third view Sunday as more important than Saturday. In the case of younger workers under the age of 35, that's even more pronounced. In the case of part-time and casual employees, 53 per cent of part-time employees and 57 per cent of casual employees viewed Saturday and Sunday of equal importance.

PN26561

The conclusions that one can draw from the Deloitte weekend report, in my submission, are these: that the differences in the time use between weekend and non-weekend workers are complicated and they differ from category to category of worker. For those employees who are young part-time or casual workers, it shows that their activities on weekends are different from people who do not work on weekends.

PN26562

This difference in time use between weekend and non-weekend workers suggests that employees work on weekends for a range of reasons which are highly individual based on different demographic characteristics, family structures, arrangements, different lifestyle and preferences from the population as a whole.

In particular, it seems that casual workers and part-time workers are more likely to devote time to education than non-weekend workers. That evidence is supported in the AWALI survey. The AWALI data has a number of deficiencies and I've set out those particular deficiencies in paragraphs 120-134 of the Guild's principal submissions. However, if one were to draw conclusions using the AWALI data and undertook a subgroup analysis of the workers who are more likely to work on weekends in the retail industry, that is female workers, younger workers, part-time and casual workers, single workers, it demonstrates that the level of work/life interference is not much different to the average weekday worker and they are much more willing to work during those hours without the benefit of penalty rates.

PN26563

Might I take the Commission to a report by Tony Daly, which is exhibit PG33 in these proceedings. I can hand up a copy for the Bench. The Bench will recall that the 2014 survey which was undertaken by Skinner and Pocock, led to some other studies which were focused upon working unsocial hours and penalty rates. One of those reports was the Charlesworth report which is a more specific one, or another one which was undertaken by Mr Tony Daly. It's a useful study because it identifies those workers who are likely to be working on weekends and their willingness to work on weekends without being paid penalty rates.

PN26564

Can I take the Bench just quickly to the key tables. If one goes to page 9, table 3 sets it out by age. One can see that those employees who are willing to work who are 18 to 24, were willing to work unsocial hours, is much higher for 18 to 24 hours than 25 to 34-year olds in other categories, other than the oldest categories. One can then go to the household composition. The ones who were much more willing - who were likely to be working weekends are single people with no children. Then going over the page, those people who are most likely to be working on weekends are those who earn between - less than $30,000, or 30 to $59,000.

PN26565

Turning over the page again to table 7, the workers who are likely to be working weekends more than others are sales workers, which is 16.1 per cent working on weekends and 36.5 per cent on weekends only. Then going to the type of employment, it's casual employees who are likely to be working on weekends only. Then looking at it by industry, it's retail trade and doesn't - it unfortunately doesn't actually identify the community pharmacy industry separately, but it's amongst the highest, over terms of the percentage of employees who work unsocial hours.

PN26566

When one undertakes that subgroup analysis, one can see that it's not all employees who are likely to be working on weekends and one has to focus on those employees who are in fact working on weekends or who are likely to be working on weekends. In my submission, when one undertakes that analysis, then one can see from the following tables in the Daly report that those employees are much more willing to work without penalty rates than other classes of employees.

If the Bench can go to page 14, Mr Daly here sets out the employees who receive and rely upon penalty rates and would be continue to work without penalty rates.

PN26567

One can see that's broken down; table 9 sets out the total amounts, so for people who work - the average amount for those who work on weekends is 39.7 in terms of continuing to work without penalty rates, then one goes down to table 10, for young workers, it's 52.8 per cent which is significantly higher than the norm. Then turning over the page, for single workers, it's 39.2 per cent. For those earning less than $30,000 per annum, it's 48 per cent. Then going to table 13, those classes of employees who are willing to work without penalties - for sales workers, it's 48.9 per cent, as opposed relevantly for the pharmacy industry professionals, it's 47.2 per cent and for casuals, for the type of employment in table 13, it's 54.8 per cent.

PN26568

Pardon me, I should go over the page to table 14. It's also higher for the retail industry, which is 52 per cent. The evidence also demonstrates for those classes of employees, there were lower levels of work/life interference on weekends. That evidence is set out in the Skinner and Pocock report which is exhibit SDA47. I won't take the Bench through that, however, I set out the evidence to support it in paragraph 136 of my submissions. In particular, the details are set out in footnote 234.

PN26569

Can I then take the Bench to the analysis of the AWALI data in relation to these issues undertaken by the Productivity Commission Final Report. Conveniently, ABI has extracted the relevant parts under tab 7 of its bundle of documents. Can I take the Bench to tab 7. I want to emphasise something slightly different to what Mr Izza has identified in his submissions, and that is at page 440, box 12.2. The Bench will see there, under the heading, "What Holds For Many Does Not Hold For All", an analysis which has been undertaken by the Productivity Commission of the dis-amenity or disability associated with working on weekends for particular classes of employees.

PN26570

I won't read that out but there's a reference to Daly in the second paragraph, and then at the end of that paragraph it says:

PN26571

The fact that most people take account of their own personal circumstances when choosing a job should reduce the social impacts of asocial working hours, in that those who find it the most problematic would be less likely to seek weekend jobs.

PN26572

The Guild adopts that proposition in the Productivity Commission report. Box 12.2 then goes on to talk about the positive aspects of working on weekends which are not captured in the AWALI data. Then what the Productivity Commission does is to look at the adverse outcomes of working on weekends relative to those who do not work on weekends, and that's set out in that table

there. The Commission will see that those who do not regularly work on weekends and evenings experience a higher level of adverse outcomes, that as a higher will never rarely, only sometimes, experience an adverse outcome, which is only just slightly higher than Saturdays and slightly higher than Sundays. The difference between Saturdays and Sundays, whilst there is a difference, is not that significant. The Bench will see that the analysis of that data is based on the O'Reilly database, even the source.

PN26573

In the Guild's submission, the most accurate way of gauging the level of disamenity that exists for employees within the specific groups of employees who work or are likely to work on weekends is to look at their willingness to work without penalty rates at all. Those conclusions are also supported in the Rose report, and I won't go to the Rose report.

PN26574

The propositions I've just advanced are also confirmed when one looks at the academic studies which analyse the ABS time use survey, for both the 2006 survey and the predecessor survey, which I think is the 1995 survey. The SDA has criticised the use of this survey on the basis that it doesn't highlight differences between what existed in 2010 and 2016, and it hasn't been the subject of any detailed evidence in these particular proceedings. It's clear that it has been the subject of evidence in these proceedings because it forms the foundation for the conclusions which have been reached, in particular by Craig and Brown, and Bittman. They rely on the time use survey to reach their conclusions. When one looks at the academic studies which are conducted in relation to the ABS time use survey in 2006, one can accept as a general proposition that there is a degree of work/life interference that exists on weekends. But it also demonstrates that it's not the case for all employees and there's a slightly more nuanced picture which emerges when one looks at it on a sub-route basis.

PN26575

I set this out in paragraph 145 of my principal submissions, and it's apparent that the level of disability is not the case to be as high as other workers as for students who undertake weekend work, because there is evidence to suggest that they schedule their weekend work around their education. For women who have carers' responsibilities, the evidence demonstrate that men spend significantly more time alone with children if their spouse works non-standard hours including weekends, which suggests that women arrange their working hours around their partners' schedules. For couples with or without children, it's been shown that there is more leisure time with friends during weekdays, demonstrating or suggesting that couples who work on weekends have friends who are couples who also work on weekends. Part-time workers, amongst others.

PN26576

Can I then just conclude by dealing with the modern award objective? In terms of the needs of the low paid, under section 134(1)(a), in my submission, when one looks at the evidence in the Daly report, it is apparent that the classes of workers who do not rely on penalty rates is much greater, in particular for young people, single people and those working as sales workers in the retail industry. Secondly, the Pharmacy Industry Award does contain wages rates which are higher than the

other retail and hospitality awards, in particular for pharmacists, and for those who are pharmacy assistants because their pay rates are based on competencies that must be acquired during their employment.

PN26577

In terms of the economic benefits, I already referred to them - rely upon the Deloitte Pharmacy Industry Award report to demonstrate the adverse impact to the Pharmacy Industry Award in relation to hours of work, employment and wages. If the key difference between what existed prior to the commencement of the Pharmacy Industry Award and what exists now in relation to those key issues is the increase in penalty rates, one can infer from that that if penalty rates are reduced in accordance with the Guild's proposal, there's likely to be a restoration of the previous position with an increase in trading hours and increasing employment.

PN26578

The SDA have referred in their submissions to the evidence of Professor Borland and Professor Quiggin at paragraph 634. It's not an issue I've specifically addressed in our written submissions in reply, so I just wish to spend some time on this. The evidence of Professor Borland, exhibit UV25, is limited to cafes and restaurants, and I cross-examined Professor Borland on this issue, and it's apparent when during the cross-examination that he specifically relied on data for the hospitality and restaurant industry. That's at PN11784. He agreed that the example used in the hospitality and restaurant industry differed from instances that would arise in the community pharmacy industry. That's set out in paragraph numbers 11785 to 11801. He also agreed that the level of competition that existed in the restaurant and hospitality industry is likely to be different in the community pharmacy industry, including because of the impact of the DBS arrangements. That's stated at paragraph number 11812 to 11819.

PN26579

In relation to the evidence of Professor Quiggin, Professor Quiggin also agreed that there were differences between his area of focus and his expert report in the restaurant industry and the community pharmacy industry. One of the key aspects of Professor Quiggin's evidence was shifting demand from weekend to another weekday. I put to him in cross-examination at PN11470 that that's not necessarily the case, because in the case of medical misadventure when people need pharmacies in times of emergency, there isn't the ability to go off to the pharmacy on a different day because you need the services of the pharmacy on that particular day. So the proposition that the use of pharmacy services can be shifted from one day to another is less applicable here than it might be in other industries. The other point which Professor Quiggin acknowledged was that there is no ability to - he wasn't aware of any circumstances where community pharmacies impose a surcharge, which is PN11478 to PN11480. Clearly, that's a fortiori in circumstances where the community pharmacy industry is governed by the PBS scheme and there are fixed rates of remuneration.

PN26580

In conclusion, the Guild submits that the current penalty rates are not fair and relevant and are not necessary to meet the award objective, and submits that its proposal does meet those requirements. May it please the Commission.

PN26581

JUSTICE ROSS: Thank you, Mr Seck. Mr Stanton?

PN26582

MR STANTON: Your Honour. May it please the Full Bench, and I don't think my appearance earlier this morning was picked up by the transcript, so for that purpose it's Stanton for the Australian Hotels Association and the Accommodation Association of Australia. Your Honours, could I just deal with some points of clarification and correction. It was raised in the submissions of United Voice at page 135 - I don't take the Full Bench to that - but there's a reference there to schedule 8 of the schedule of variations sought by the associations in these proceedings. Schedule 8 deals with a part-day additional holiday - - -

PN26583

JUSTICE ROSS: Yes, I'm sorry, what was the paragraph in the United Voice submission?

PN26584

MR STANTON: It was page 135, and I don't think I gave the paragraph number. It was paragraph numbers 430 and 431. Indeed, at paragraph 342, it said that no evidence was called about this variation, I'm quoting, and no submission made. That's the case, that particular variation is not pressed in these proceedings, in these particular proceedings. That is, the proceedings before the Full Bench. It's pressed elsewhere. I just clarify that. Might I also just indicate, in relation to my reply submissions at page 8, at paragraph 26 of those reply submissions, there is an extract from the decision, important decision, the 1993 decision of Gay C in relation to the former award and about halfway through that extract, it reads:

PN26585

The onus considerations probably raised by the respondent -

PN26586

It should read "properly" raised by the respondent. I thought I'd take the opportunity to correct that. Further, at page 58 of the primary submission, at paragraph 256 of that submission, the second sentence should read, and I quote:

PN26587

Thus, even if the impacts of the variations on those matters -

PN26588

- "on those matters" is missing, and by that, I refer to the matters dealt with in Dr Muurlink's report which are the physical, psychological or social effects of persons who work on Saturdays, Sundays or public holidays. Thus, even if the impacts of the variations, that is, the Associations' variations, on those matters were matters that could assist in the consideration of the Associations' variations, that report would be inadequate for that task. With those clarifications, if I could just indicate the nature of the variations proposed by the Associations in these proceedings.

PN26589

Firstly, it is proposed that in relation to Sunday, that the current penalty rate, the 175 per cent, or the current rate of 175 per cent, be replaced with a rate of 150 per cent. That is set out in the primary submissions at page 3 and which we have included in that table at paragraph 7, a comparison between what is currently in the award against what is proposed. That rate in relation to Sunday would apply to both casuals and permanent employees and that really is the result of continuing the equality of loading that exists under the current award.

PN26590

As the Full Bench will see, the current situation is that in relation to Sundays, both full-time, part-time and casual employees are paid at the 175 per cent rate. The position in relation to public holidays is, to an extent, twofold. Firstly, in relation to full-time employees, it is proposed that the 250 per cent loading being replaced with a loading of 225 per cent for the eight national public holidays, that is, the public holidays that appear in the National Employment Standards, and that a rate of 200 per cent apply in relation to the additional holidays, that is, the holidays that are from time to time declared by State and Federal governments. Those days don't appear expressly in the National Employment Standard.

PN26591

In relation to casuals on public holidays, the current position is a rate of 275 per cent and the Associations' proposal is that it would be replaced at the rate of 175. In relation to the additional holidays, the casual loading of 275 would be replaced with a loading of 125 per cent. As we are contemplating what exists and what is proposed, it is appropriate for me at this point to say something about the nature of these penalties in the current award. This is addressed in the submissions, but it is a critical point. That is, even on a superficial analysis, there is an extraordinary range of penalty rate in this award that applies to effectively the same thing.

PN26592

That is, the disability associated with time. That is, the disability associated with the time which work is performed, Monday to Friday after 7 o'clock and before 7 am; Saturday, Sunday and on public holidays. Now, that is dealt with in the primary submissions. It is also dealt with in the reply submissions where I have indicated - I don't have to take the Bench to that now - or we have calculated what these variations mean in percentage terms. But there is an extraordinary range of penalty rate compensating essentially for the disability of work which is performed on weekends and at times that would be considered unsocial.

PN26593

So the award provides an after 7 pm loading of 10 per cent for - well, any work performed after 7 pm Monday to Friday. That is 10 per cent on the standard rate in the award which is at the level 3 rate; 10 per cent of that rate for work performed after 7 pm and until midnight and then from midnight till 7 am, Monday to Friday, a rate of 15 per cent. Saturdays, of course, 25 per cent. Sundays, 75 per cent, and in the case of public holidays, an additional 150 per cent for part-time permanent, and 275 - or an additional 150 per cent for casual employees.

PN26594

There would appear to be, in my submission, no coherent reason for such a range. Effectively, the Sunday rate at 75 per cent is five times the rate which applies midnight till 7 am. Now, in these proceedings, the Full Bench has heard evidence - - -

PN26595

JUSTICE ROSS: How have you worked out it's five times the rate?

PN26596

MR STANTON: Well, 15 per cent - - -

PN26597

JUSTICE ROSS: The penalty is?

PN26598

MR STANTON: Yes, yes.

PN26599

JUSTICE ROSS: But not the - otherwise there would be a 500 per cent penalty.

PN26600

MR STANTON: Indeed, no. That would make it extraordinary. We probably would have brought this application earlier. No, it's 15 per cent if the penalty is just isolated. That is, five times 15 on my maths was 75. Of course, it's greater in the case of the after 7 pm allowance which is 10 per cent. So that is 7.5 times that rate. Now, in these proceedings, evidence has been heard, or opinion evidence and I note Dr Charlesworth, he is probably the notable expert who was brought in relation to matters that were addressed by both unions - Prof Charlesworth, I beg your pardon. Prof Charlesworth relied upon and referred to the AWALI reports of both 2008 and 2014. In both cases the results from those reports reveal that workers indicate a higher level of work/life interference with night work than with weekend work.

PN26601

The point is raised in our submissions, particularly at paragraph 266 of the primary submission, to 268, page 60. I note there that in the cross-examination of Prof Charlesworth, I asked her to confirm this and she indicated that both of those surveys indicated a greater level of interference. Against that, we have a rate for Sundays which is substantially greater than that provided for the night and evening work during the week. Even on a superficial analysis, there are justified concerns about the penalty rate structure in this award.

PN26602

The principal position of the Associations really can be succinctly stated as this: the Sunday rate and the public holiday rate deter employers; perhaps an unintended consequence, but it is the case that those rates deter the employment. The consequence is, and this is shown by the volume of evidence, the 41 lay witnesses called by the Associations, almost uniformly gave evidence about what it is that they each do to address the penalty rates. There was evidence, substantial evidence, from particularly small business that shows that there is a displacement

effect. That is, owners working during these times in preference to providing that work to those who are covered by the award.

PN26603

But that was not the end of it. There was also substantial evidence as to the services, the service responses that are a consequence of these penalty rates, which are done, informed by these penalty rates. They include reduction in trading hours, they include the closure of bars, they include the imposition of surcharges. Those consequences were seen in relation to Sunday and are set out comprehensively in the primary submissions, the supporting evidence for that. They were also seen in relation to public holidays, and perhaps because of the much greater penalty rate on public holidays, those consequences are felt more dramatically on those days than on public holidays.

PN26604

Might I, just as an example, refer the Bench to what Mr Ryan, a Victorian hotelier, had to say about the Grand Final eve public holiday and the consequences for him. That is set out, and there's an extract in my primary submission at page 44. I believe it will be more convenient to go to that, than to anything else. Page 44, paragraph 194 of the submission. I refer there to the response that Mr Ryan gave in response to a question from his Honour, the Vice President, and which appears at the transcript at 7384. I just take you through that transcript. His Honour asks:

PN26605

Have you made a decision about any upcoming public holiday in the light of that change?---Yes. The upcoming holiday on Friday, Grand Final Friday, the bistro will be closed. There will be restricted hours in the bar and full-timers will be doing the bottle shop and that we clean the hotel ourselves, my wife and myself, and the casual staff on that Friday will miss out on 52 hours' casual pay due to my closing the bistro, restricted hours -

PN26606

Et cetera, et cetera. I finish the quote there, I don't go on with the remainder. This is not an isolated example of the consequential effect of the public holiday rate. It is not an isolated example. The evidence was replete with references to what hoteliers, what business operators do, in order to manage the public holiday penalty. Further evidence was given by Mr Cronin, a hotelier from Ballarat. His evidence is summarised in the primary submission at page 42, paragraph 182 of the primary submission. I have set out there Mr Cronin's response to a question from his Honour, the President, at 7308 about public holidays on which the hotel was closed in 2014. Mr Cronin said:

PN26607

We were closed on Good Friday 2015. We were closed Good Friday and Easter Monday.

PN26608

This in a period where additional public holidays were declared in Victoria over the Easter period with the effect that four days were experienced by hoteliers as public holidays. That is, four consecutive days, four consecutive days in which,

had they traded, they would have been exposed to the penalty rates to which I have referred. Just for completeness, I note in re-examination as to the reason for the closure on that Easter Monday, Mr Cronin's evidence was that:

PN26609

The closure was because of the additional public holiday on the Sunday as opposed to a normal - well, what has traditionally been Sunday rates for Easter Sunday.

PN26610

I finish the quote there. The additional day for, as it's described, Grand Final eve public holiday, is an instance in which a State government has declared an additional day and which has the consequence that it is to be recognised by hoteliers operating under this award as a day on which staff who work are paid at what is described as a penalty rate, and it truly does have the effect that is implied in the title, it penalises. Also for completeness, Mr Gibson, a hotelier from Queensland whose evidence is summarised at page 42, at the top of page 42 - I beg your pardon. Mr Gibson is a Queensland hotelier. He's not affected by that additional day, but was affected by - he does give evidence about the effect of the public holidays on trading hours in the bottle shop and the kitchen.

PN26611

In any event, I have set out quite substantially in the written submissions the evidence which we say shows the deterrent effect. Can I say this, that these proceedings are less about trying to establish what is the precise disability and what is the accurate quantum that can express that disability. It is more about achieving a fair and reasonable result. In our case, in the Association's case, we do not say in relation to Sunday that there should be no compensation. We accept that there is disability associated with work on Sundays.

PN26612

JUSTICE ROSS: Indeed, you accept that the disability with working on Sunday is greater than the disabilities associated with working on Saturday?

PN26613

MR STANTON: Yes.

PN26614

JUSTICE ROSS: So to that extent, your position is different to that of the other employer organisations?

PN26615

MR STANTON: Yes.

PN26616

JUSTICE ROSS: Why do you say the level of disability is greater on a Sunday?

PN26617

MR STANTON: It flows from this, your Honour. We recognise the need to compensate the employees for disabilities associated with weekend work. We also note that it's not the end of the story. It's also necessary for the associations

to be able to attract employees to work and it's critical. It's critical, because what we are proposing is a rate of 150 per cent. The current rate is 175. I've set out in the reply submissions what that means, a per cent. I say that that is a 14.3 per cent reduction, not a 25 per cent reduction. A 25 per cent reduction is, to be fair, is to misstate it. It is a 14.3 per cent if it is to be ascribed as a reduction. It is a 14.3 per cent reduction, but we still need to attract labour.

PN26618

JUSTICE ROSS: It's difficult to describe it as anything but a reduction, isn't it?

PN26619

MR STANTON: Well, fine, but - - -

PN26620

JUSTICE ROSS: So is it put then that in the circumstances of the employers covered by this award that it's necessary to have a differential between Saturday and Sunday in terms of the penalty rate in order to attract sufficient employees to undertake that work?

PN26621

MR STANTON: Yes, the associations need to attract labour. And this underscores that the proposal brought in relation to Sundays is a moderate proposal - 150 per cent for Sundays is a rate that has some precedence. It is a rate which currently applies to certain categories of casual employee under the Restaurants Award. Importantly, it was a rate that applied in South Australia prior to 1 January of this year, and the position there - and there were many witnesses - many witnesses called by the associations from South Australia - Mr Lovell, Mr McInnes - testing my memory, without looking at my notes - but Mr Lovell and Mr McInnes were two in particular whose evidence is I wouldn't say more important than anyone else's but it's particularly telling on this point. They've given evidence that - and as a result of the establishment of the new penalty rate regime from 1 January last year, 2015, that has had quite dramatic consequences on their businesses - and they give evidence about, particularly McInnes and Mr Lovell, they've given evidence about the reduction in services. It was Mr Lovell who in these proceedings gave evidence that he would no longer be providing a dining room service in his hotel on public holidays as a consequence of the increase. Let me just pause there. That was a situation where on 31 December 2014 and up to that date, South Australian hoteliers were paying 150 per cent on Sundays, and they were paying 150 per cent on public holidays. From 1 January 2015 they are paying 175 per cent for Sundays, and they are paying the public holiday rates to which I've referred - the 250 and 275 in respect of casuals. Certainly in respect of casuals, that's an extraordinary increase.

PN26622

I say and I summarise the evidence, the relevant evidence, comprehensively in these submissions that the Bench will draw much from the experience of those hoteliers. But there's also this, there's no evidence that prior to 1 January that any of those hoteliers had difficulty attracting labour at 150 per cent loading. There's none. Mr Davis was a witness called by United Voice. Members of the Full Bench will recall that Mr Davis had something like 30 years' experience in the hospitality industry in South Australia. There's no evidence from him that he was

not attracted to work at the 150 per cent loading on a Sunday - no evidence. No evidence has been presented by United Voice about the consequences of the reduction in the Sunday loading in the Restaurant Award as a result of the variation that occurred in 2014 and which affected the first three grades for casuals in that Restaurants Award - introductory level, level 1 and level 2 - casuals within that level were the category of employee that the Full Bench in those proceedings found were overcompensated by the 175 per cent loading, and as a consequence of that decision the Sunday rate was reduced to 150.

PN26623

JUSTICE ROSS: What are you putting? That there was no evidence from United Voice about what?

PN26624

MR STANTON: No evidence that that has had any effect in dissuading employees to make themselves available for work, in fact, no evidence that it had any adverse effect.

PN26625

JUSTICE ROSS: There's no evidence that it had any effect at all, and the same point can be put against restaurant and catering; the industrial that there's no evidence about the impact of that provision.

PN26626

MR STANTON: I raise the point because - - -

PN26627

JUSTICE ROSS: But are you raising it on what basis, as a Jones and Dunkel point, or are you just making an observation?

PN26628

MR STANTON: Making that as an observation, your Honour.

PN26629

JUSTICE ROSS: All right.

PN26630

MR STANTON: A Jones and Dunkel point is made against us in their submissions.

PN26631

JUSTICE ROSS: I know.

PN26632

MR STANTON: And that is dealt with comprehensively.

PN26633

JUSTICE ROSS: Yes.

PN26634

MR STANTON: In my submission, these are proceedings where those types of inferences should be drawn, and they shouldn't be drawn against the associations

in relation to those matters. The 41 lay witnesses who attended these proceedings were all in the position to provide direct evidence about their experience operating under this award, and of course that is critical and informative evidence for the purposes of these proceedings, involving as they do a review of the current award.

PN26635

And insofar as the review of this award is concerned, it demonstrates, as I've set out in the submissions, that there are problems with the rates as they apply at the moment, and regardless of the fate of the application that we seek, regardless of the fate of the variations, I say that the evidence has established that the award does not achieve what it is intended to achieve. It does not meet either the modern award objectives, nor does it meet the overriding objective of the Act, which is to provide a fair and balanced workplace relations scheme. I've set that out in the submissions.

PN26636

In relation to the variations, there was evidence brought by experts, Dr Muurlink and Dr Oliver, which as we understand it, was evidence going to the impact of penalty rates upon workers' earnings, such like. The thing that characterises, or the evidence in relation to both those reports and further, is that in no case did any of these experts address the specific variations sought by the Associations.

PN26637

There is no evidence as to the actual impact - their opinions, I should say - on the actual impact of the change from the 175 to 150 on Sundays. There is no evidence about the impact of the variation proposed to public holiday rates, and as written in the submissions, those reports, that evidence, simply does not assist the Full Bench in assessing the merits, assessing the variations sought by the Associations. The evidence brought by United Voice from employees is summarised at pages 46 through to 57. I'm excluding Mr Harvey, he's not an employer, 57 of the primary submissions.

PN26638

I can say this, in relation to Mr Syrek whose statement - Mr Syrek is a full-time security officer at a casino in Perth employed under an enterprise agreement, I dealt with his evidence in those paragraphs, but suffice to say that he's not affected by the award, it doesn't apply to him, but most importantly, there's no basis to support an assumption that Mr Syrek would work the same pattern of hours if, in the absence of the enterprise agreement, the award applied to him. His evidence just simply does not assist the Full Bench in assessing the impact of the variations proposed by the Associations.

PN26639

Mr Petrov, a gaming supervisor employed on a permanent basis, paid an annual salary. Again, his situation does not assist in assessing the variations proposed by the Associations. In particular, there's no basis for an assumption that the variations proposed by the Associations would disturb the existing remuneration arrangements, so his statement on that is simply conjecture. Ms Gounder whose statement was entered without objection, didn't attend for cross-examination, appears to be one of the few employees that regularly works Sundays. Appears to be a standard roster.

PN26640

What I say in that, though, in the submissions, is that that current roster and the associated penalty rates are not immutable conditions of her employment, and that's so because the roster can be amended as permitted by the award on seven days' notice. It can be amended, of course, by mutual agreement, but it can be amended by the employer on seven days' notice. The penalty rate that she receives for Sunday is not an immutable condition of her employment. Ms Swartz is an apprentice and it would appear from her evidence, as we are to understand it, that she does not necessarily work every Sunday, but rather whilst she tries to work weekends, it's not the case that she works every Sunday.

PN26641

Mr Davis, whose evidence I had already addressed briefly, attended and was examined. Now, here his evidence was that he does not work necessarily every Sunday. The position appears to be consistent with the experience of the majority of weekend workers disclosed in the survey results which are referred to in the Pezzullo report which I referred to in the written submissions, in which just over 76 per cent of weekend workers work only some of their Sundays. The majority of the witnesses called by United Voice would fall into that category. That is, they only work some of their Sundays. In fact, it's only Mr Petrov and Ms Gounder that would appear to - Mr Syrek, I beg your pardon, that appear to work regularly on Sundays.

PN26642

I've set out in the submissions the evidence that Mr Davis gave and the manner in which he is supportive of various propositions which we advance in these proceedings, including that he's available and willing to work on Sundays. I've set out in the written submissions the extract from the examination of Mr Davis where he has indicated that when he applied for work, the only day that he was unavailable to work was Tuesday; he doesn't work Tuesday. His circumstances seem to be accommodated in that regard.

PN26643

Mr Sanders, whose evidence is summarised at paragraph 242, is a student working for a catering business. He was engaged on a casual basis. His evidence shows that his work on Sundays is quite infrequent. In fact, he was unable to provide any evidence as to the typicality of his Sunday roster. I say that his evidence is supportive of the propositions insofar as he's willing and available to work Sundays. Sunday work suits his circumstances and importantly, while we accept that there is disability associated with weekend work, in his case and the others, that disability essentially is one of inconvenience.

PN26644

The submission of United Voice is to the effect that the disabilities represent highly disruptive circumstances, but in our submission, that is just simply overstating the true position. This is essentially, for Sunday, an inconvenience, and I've set out in the reply submissions the essential aspects of the evidence in relation to that disability. Mr Sanders, for example, says that he can't attend parties and he can't go to the movies. Ms Gordon, whose statement was entered into the proceedings without objection, says that there are circumstances where a lunch with friends has to accommodate her weekend work.

PN26645

Mr Harvey provided some evidence in relation to research he conducted. For the reasons we've set out in the submissions, it doesn't assist particularly in relation to his evidence regarding award reliance which we say is not a material issue in these proceedings. Dr Muurlink's evidence went to physical, psychological and social wellbeing of people who work on Saturdays and Sundays. Of course, as we set out in the submission, these are not matters of health and safety. Those matters aren't matters that should inform the consideration of the appropriate compensation for the disability.

PN26646

If I the Full Bench just to the reply submission. I note the time, it was 4.30, your Honour, that you were - - -

PN26647

JUSTICE ROSS: Sure. You're planning on stretching it out until then?

PN26648

MR STANTON: What, more than I'm doing already? I have a matter before the Vice President at 4.30, so I won't be going anywhere.

PN26649

JUSTICE ROSS: I don't think you'll be late.

PN26650

MR STANTON: I draw the Full Bench's attention to the calculations which show the nature of the variations and their percentages. I don't labour on that. They have been tested. But the variations, if they're to be described as reductions are not reductions in the nature of 25 to 175 per cent. They are properly seen as variations in the range of just over 14.3 per cent and 54 per cent emerging from those calculations.

PN26651

VICE PRESIDENT CATANZARITI: Mr Stanton, when you've dealt with Sundays, you said that you've accepted there was a difference in relation to Sunday and then you also said the casual rate and the full-time and part-time rate should be equal. I have read the written submissions and I'm having difficulty understanding the flow-on, then, to public holidays and additional holidays because in relation to public holidays - and I'm looking at the mathematics of it - you have a wide gap between full-time and casual, and the additional holidays, it seems to be an ideological argument, to put it loosely perhaps, that the additional holidays which be different to the public holidays. I just don't follow that logic, from the written submissions.

PN26652

MR STANTON: The proposition, your Honour, is it - - -

PN26653

VICE PRESIDENT CATANZARITI: Yes, the proposition. On the one hand you say casuals and full-time should be treated the same for Sundays, that's the first proposition I'm putting, that's what you said earlier today. Then you say, when it

comes to public holidays, they should be treated differently and then additional holidays, you say, are different again, also in the quantums. It just doesn't follow in the written submissions how you get there. It just seems to be you want a reduction, but I don't understand how you get to the reduction in terms of the argument.

PN26654

MR STANTON: Just as well I've been given this opportunity to clarify that, your Honour. Just in relation to Sundays, the position already is that full-timers and casuals are treated the same in terms of the - - -

PN26655

VICE PRESIDENT CATANZARITI: Sundays, I understand the argument, and you want to maintain that, right? In casuals, you've gone from - if you look at your amendments, public holidays, you say 250 to 225, 275 to 175.

PN26656

MR STANTON: Yes.

PN26657

VICE PRESIDENT CATANZARITI: Significant changes similarly in relation to additional holidays. Now, what's the logic or what is the evidence that says work will be done differently in the casual space by that sort of change?

PN26658

MR STANTON: By just the additional day, your Honour?

PN26659

VICE PRESIDENT CATANZARITI: For both. Unless it impacts on the actual holidays where you're claiming a payment on the actual maths you have, but it's 150 difference, from 275 to 125.

PN26660

MR STANTON: Yes.

PN26661

VICE PRESIDENT CATANZARITI: A significant difference. Is it because there are less casuals in the industry? What is the impact of that? Or is it going to increase more casuals?

PN26662

MR STANTON: Well, all of the Associations' witnesses, the 41 lay witnesses, all considered that variation as part of their evidence and I could say this, that the public holiday penalty, if it wasn't intended on being a deterrent, it certainly acts that way and that's the weight of the evidence from the Associations.

PN26663

VICE PRESIDENT CATANZARITI: But what you're really then saying, that it's a bigger deterrent in relation to casuals' employment, your proposal for full-times and part-times. The change is 250 or 225 - - -

PN26664

MR STANTON: Yes.

PN26665

VICE PRESIDENT CATANZARITI: - - - taking the first - - -

PN26666

MR STANTON: Yes.

PN26667

VICE PRESIDENT CATANZARITI: In relation to casuals, you say you need to change from 275 to 175. I am, for my part, struggling to understand the argument that justifies that, in your submissions today. I know you may want it, but I want to understand what the argument is that gets you to that conclusion.

PN26668

MR STANTON: The argument - what gets us to this point is that the current rate is a deterrent, a substantial deterrent. At 175, we will maintain a premium over what is already a fair and reasonable rate, that is, the standard, the minimum rate, the unloaded rate. We maintain a premium, 75 per cent, it's still quite substantial and that is the - - -

PN26669

VICE PRESIDENT CATANZARITI: And if you follow through your math, so the difference between full-time and casual is only 50 on a public holiday, right? How do you then argue, in the next proposition, that the additional holiday, the difference between full-time and casual, is 75?

PN26670

MR STANTON: For additional - well, we say this; firstly, that the days are, in our submission - in the Associations' submission, these are days which have different significant. The national days have a national significance - - -

PN26671

VICE PRESIDENT CATANZARITI: I understand all of that. I'm having trouble following the mathematical logic. I'll put it more simply. The proposition says there should be a reduction, it's a deterrent, I follow that. But then when you put it in what should the reduction be, there doesn't appear to be any analysis as to why there should be significant difference.

PN26672

MR STANTON: Perhaps if might assist, if you can compare the position of casuals to permanent employees. Permanent employees will be paid if they don't work, at their normal rate for the public holiday. That's not the case with - well, it may be the case with casuals that they are actually compensated partly for those entitlements because the award actually provides, at clause 13.1, and I just quote there, that:

PN26673

The casual loading is paid as compensation for annual leave, personal carer's leave, notice of termination, redundancy benefits and the other entitlements of full or part-time employment.

PN26674

So there is, it would appear on the face of the award, already an acknowledgement of compensation for the entitlements that the casuals would not get or that full-timers get, part-timers get. Part-timers and full-timers are entitled to the public holiday without loss of pay, but more importantly, your Honour, it's the case of addressing what is a substantial problem. So it is a substantial difference, to address a substantial problem which is shown in the evidence, and importantly, a day such as Grand Final eve on which there was no ball kicked in anger and which will continue, hardly has the significance, in our submission.

PN26675

It would take a compelling case to persuade us that there is equality of disability of work on a day such as Grand Final eve, compared with a day such as Christmas Day or Anzac Day or a day of national significance. Your Honours, Commissioners, Deputy President, the Associations, as I've indicated in the reply - - -

PN26676

JUSTICE ROSS: Can I just go back to the same point, I follow the logic of what you're saying, but on your own logic, the proportion between, let's say, the full-timer rate and the casual rate, would be the same, on your claim, for public holidays, the core public holidays and the additional public holidays, but the ratio is different. For additional public holidays, casuals get a lower proportion of the rate that applies to full-timers than they get on the core days. On the core days, they get seven-ninths of a full-time rate. On the additional days, they get five-eights.

PN26677

What's the logic for the - it's not a question of whether the additional days create more disabilities or they don't. Presumably, if your argument is that they create less inconvenience, et cetera, they're not valued as much by employees, well that proposition would be the same for full-time employees and casual employees.

PN26678

MR STANTON: Yes.

PN26679

JUSTICE ROSS: Well, then, I guess we get back to the Vice President's point. Why is the ratio between those two groups different when you look at a public holiday as opposed to an additional holiday?

PN26680

MR STANTON: If I could just have a moment, your Honour?

PN26681

JUSTICE ROSS: Yes, sure. I'm content for you to come back to it in the morning, if that assists?

PN26682

MR STANTON: I might take that opportunity.

PN26683

JUSTICE ROSS: Yes, that's fine. But you understand the point that I'm putting, that if you look at your claim in paragraph 7, just look at the public holiday parts of it, and don't worry about what the existing rates are now, just what are the rates you're proposing.

PN26684

MR STANTON: Yes.

PN26685

JUSTICE ROSS: Well, let's worry about the existing rates now, I suppose. You've got - no, no, we don't need to. The bold rates for the public holiday, full-timers, let's just stick with full-timers for the moment, on your claim would get 225.

PN26686

MR STANTON: Yes.

PN26687

JUSTICE ROSS: Casuals would get 175. So that's the relationship between casuals and full-timers and what they get paid.

PN26688

MR STANTON: Yes. Yes.

PN26689

JUSTICE ROSS: So if you wanted to work out, you'd just do the difference and divide it by one of them - - -

PN26690

MR STANTON: Yes.

PN26691

JUSTICE ROSS: - - - to work out the proportion. Then you've got the additional holidays, full-timers get 200, casuals get 125. That's a different proportional relationship between full-timers and casuals.

PN26692

MR STANTON: Yes.

PN26693

JUSTICE ROSS: And why is that different? That's the question.

PN26694

MR STANTON: Yes, all right, perhaps if I take that opportunity. Yes, I'll take that opportunity to reply to that issue.

PN26695

JUSTICE ROSS: Okay.

PN26696

MR STANTON: Could I just importantly, just in the reply submissions, I've dealt with something at paragraph 5 which is quite critical to our case, and that is this that associations do not contend that the proposed rates will result in increased employment. What we say is that, rather, that the increased opportunity for employment is the likely impact, and that is consistent with the accounts that the various lay witnesses gave in these proceedings. We cannot predict the actual effects of the variation. The reality is that in some cases there are hoteliers who had indicated that were these variations to be granted, they would take certain initiatives. Particularly there was evidence that some would promote live entertainment in an attempt to generate demand, and we hope - we say that that is a circumstance that will promote employment. But the actual increase we can't predict, it's inherently difficult.

PN26697

JUSTICE ROSS: Well others I think - my recollection indicated that they would adjust their opening hours on the Sunday, which presumably would also require employees to work in those times.

PN26698

MR STANTON: Yes. Yes, there were a range of - well there were a variety of initiatives spoken of - opening up bistros, trialling various things; live entertainment was mentioned by more than one of the lay witnesses. But those initiatives, we say, will improve the situation. All of the lay witnesses spoke optimistically about the situation were the variations to be granted. The matter of the reply submissions deals - I don't take your Honours and Commissioners and Deputy President to the remainder.

PN26699

I do say this about the award modernisation proceedings which we've set out a treatment of that in reply submissions. It indicated there that these were not proceedings in which the industrial merits of the penalty rates were tested. Those penalty rates are largely drawn or correspond with the rates that applied in the previous Federal award. Commissioner Gaye's decision is important. It effectively set out the rates, it established the 75 per cent Sunday rate, the 25 per cent Saturday rate; it set the night time, early morning rates, and importantly - and it's set out in the decision - the Commissioner was concerned to ensure that those rates did not operate as a deterrent. Our submission is that the evidence shows overwhelmingly that the rates do operate as a deterrent contrary to what was intended.

PN26700

I also set out - well I don't take further issue on the Jones and Dunkel inference which was - I dealt with that adequately. And I dealt in the reply submissions as to the nature of the disability which was described by the witnesses called by United Voice, say about that is it doesn't represent high levels of disruption; it essentially is a matter of inconvenience. I set out in the submissions in reply to other submissions - the ACTU submission, the Victorian government and Federal opposition submission, and the contributions mentioned to the persons. If it pleases, we rely on all of our evidence to demonstrate what we say is shown to be a deterrent and one that can be cured in these proceedings with the Sunday variations that we seek and the public holiday variations. If it pleases, if I pause

there and perhaps address the Full Bench tomorrow morning on what has been raised this afternoon about the - - -

PN26701
JUSTICE ROSS: That question about the ratio?

PN26702
MR STANTON: About the ratio, yes, your Honour.

PN26703
JUSTICE ROSS: Other than that, have you completed your oral submissions?

PN26704
MR STANTON: They're comprehensive submissions so I'm conscious that the Full Bench wouldn't want me just to simply repeat.

PN26705
JUSTICE ROSS: It's not so much whether we would; it's whether your colleagues want you to.

PN26706
MR STANTON: Well, they are.

PN26707
JUSTICE ROSS: You'll be chewing into their time.

PN26708
MR STANTON: Yes. Well I hope I haven't chewed too far.

PN26709
JUSTICE ROSS: We'll find out. Thank you, Mr Stanton. Is there an agreement about the order to follow? Given the time, I'm not proposing you'd commence now, unless you want to.

PN26710
MR GOTTING: Your Honour, there's an agreement between the employer parties as to the order. Mr Ralph will go next from the employer parties, then Mr Brihas in Melbourne, Mr Wheelahan and Mr Dixon. I omitted Mr Warren who's coming to say something shortly on behalf of the clubs, and I understand that that will be tomorrow too.

PN26711
JUSTICE ROSS: All right. Anyone want to add anything to that? No? I take it you - well given the time, does he want to start now?

PN26712
MR GOTTING: It's not asked that the Commission sit for the next nine minutes.

PN26713
JUSTICE ROSS: We will adjourn until tomorrow morning at 10.

ADJOURNED UNTIL TUESDAY, 12 APRIL 2016 [4.21 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs