TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1053287

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

10.02 AM, TUESDAY, 12 APRIL 2016

Continued from 11/04/2016

PN26714

JUSTICE ROSS: Mr Stanton?

PN26715

MR STANTON: May it please, I just raise to deal with a matter that arose from a question from his Honour, the Vice President, yesterday afternoon. It was in respect to the association's proposed penalty rates for public holidays, that is the eight national days and the additional public holidays and perhaps I can deal with this very succinctly. As I understand, the question really goes to whether there's a fixed ration or the proportion that exists between these various rates and the answer really is there isn't a deliberate fixed ration between these rates, they are set with regard to the considerations which we've set out and assist - I don't take the Full Bench to the submissions now, but they are set out in the submissions.

PN26716

JUSTICE ROSS: What was the reason for the difference?

PN26717

MR STANTON: I beg your pardon?

PN26718

JUSTICE ROSS: What's the reason for the difference in rations?

PN26719

MR STANTON: The reason?

PN26720

JUSTICE ROSS: Yes.

PN26721

MR STANTON: In terms of the additional day casuals we propose at 125 per cent and that recognises the fact that, in contrast with permanents, casual employees are not entitled to the guaranteed day, the guaranteed payment of wages if they don't work. It's a reasoning that's not dissimilar, I think, to the position that's advanced by Mr Izzo's clients in the proceedings. That then informs the permanent rate on the additional day, which is 200 per cent, which recognises that the permanent employee is entitled, if they didn't work, to the day's pay. In addition to that, we propose that they receive a loading.

PN26722

JUSTICE ROSS: I'm not sure I follow any of that, but if that's your submission that's your submission.

PN26723

MR STANTON: It's set out in the written submissions.

PN26724

JUSTICE ROSS: No it's not, not in relation to the explanation for the difference in the ration.

PN26725

MR STANTON: There's not a deliberate ration, your Honour, we've sought to establish rates which are fair and reasonable.

PN26726

JUSTICE ROSS: No, but the point is - all right.

PN26727

MR STANTON: If it pleases.

PN26728

MR WARREN: Your Honours, I was not here yesterday, I'm here today and I am here to represent Clubs Australia Industrial. We have filed submissions in this matter. They were filed in October last year. We do not repeat those submissions. We rely upon them. We wish to in essence deal with four matters today. We wish to take the Commission to our claim, we wish to take the Commission to the background paper briefly, we wish to take the Commission briefly to the Productivity Commission report, and we wish to take the Commission to the union's submissions and make comment with respect to that.

PN26729

It is almost a race in these proceedings for various employer parties to say we're different, and you've heard that and you will hear it again. The club industry as described by Mr Tate is a different industry from any other industry that is before the Commission in this 4 year modern award review. It is described by Mr Tate in paragraph 5 of his affidavit, which is exhibit CAI1. It is clear that the club industry is a not-for-profit community based industry. The vast majority of clubs are either small or of medium size. It is not an industry - or clubs are not entities which pursue profit for the purposes of profit. If they have a surplus, that is by their very nature and design returned either to the members, either by way of direct facilities or by way of services, for those services also affect the community within which that club exists. And we'll take the Commission briefly to some of the evidence brought on behalf of Clubs Australia that indicate that if there is any reduction which is pressed with respect to certain penalty rates, then that reduction will firstly lead most probably to an increase in employment, and secondly, because of that increase in employment, it will lead to an increase in services available to the members of the club and of the community as a whole.

PN26730

Can I take the Commission briefly please to the background paper prepared by the department. It's the background paper: 4 Yearly Review of Modern Awards Penalty Rates dated Melbourne, 4 April 2016.

PN26731

JUSTICE ROSS: Yes, okay.

PN26732

MR WARREN: I think it's the background paper your Honour referred to when indicating - - -

PN26733

JUSTICE ROSS: It's not been prepared by the department.

PN26734

MR WARREN: I'm sorry, your Honour.

PN26735

JUSTICE ROSS: It was prepared within the Commission registry.

PN26736

MR WARREN: I'm sorry, your Honour - yes, by the Commission. It traces the payment of penalty rates for weekends. We note that at page 5 of 45 in paragraph numbered 10, it there cites the weekend penalty rates case of approximately 70 years ago where Saturday was described as the day upon which competitive sports and various forms of organised social activities occur, and then further in paragraph 11, Sunday being a day of religious celebration and recognition as well as a day of community recreation and pleasure. The shift from that to where the society is now falls at one of the essences of Clubs Australia's application. There has been a paradigm shift in societal expectations and recognitions of the weekend and the way it is both recognised and celebrated. It's only clear to see the amount of sporting activities, for example, that occur on days other than Saturdays to see that Saturdays is not now the only day when sport is recognised and sport is celebrated and when persons attend sporting functions. And the essence of Sunday, while still recognised and celebrated as a religious day, is not seen by a large number of persons - and this is referred to in the Productivity Commission report - as being necessarily a special day upon which no work should be performed. Sunday rates, it appears, from the background paper - and we don't demur from that at all - Sunday rates were set as much to discourage the employment of persons on Sundays as anything else.

PN26737

We then note in the background paper in paragraph 29, it refers to the Hotels case, which was heard by Commissioner Gaye over 20 years ago, and the reduction there for the Saturday penalty from 150 per cent to 125 per cent. We further note the reference in the background paper to the Restaurant Industry Award appeal decision and the Majority is there referred to in paragraph 82, which led to a reduction for certain levels of persons of casual employees on Sundays. We note the reference in the background paper at page 29 of 45 to the Registered and Licensed Clubs Award and the claims. There appears probably to be a typographical error in that document where shown the casual rate currently at 150 per cent for Saturday, and there is nothing there in the claim for Clubs Australia for casuals. That may mean that there is no change in the claim, but it should read 150. And there is the Clubs Australia Industrial claim for casuals, is that there would be no change to casual rates on a Saturday, just in case there's any confusion with respect to that, and indeed the time off in lieu in certainly the first part of it is a consequential change to reflect 200 per cent for a public holiday as opposed to 250 per cent.

PN26738

JUSTICE ROSS: While we're dealing with the claim - - -

PN26739

MR WARREN: Yes, certainly.

PN26740

JUSTICE ROSS: If the award was varied consistent with what you're seeking, there would be a differential for full-time and part-time employees between the penalty payable of Saturday and the penalty payable on Sunday?

PN26741

MR WARREN: Yes, there would be.

PN26742

JUSTICE ROSS: Does it follow from that that it's your submission that the, for want of a better expression, the disabilities suffered associated with working on Sunday are greater than those suffered when working on a Saturday, or the inconvenience is greater and hence a higher penalty is warranted?

PN26743

MR WARREN: We recognise that that is an issue with the claim, your Honour.

PN26744

JUSTICE ROSS: What is an issue with the claim?

PN26745

MR WARREN: That there is a differential between the Saturday and Sunday rate for full-time and part-time employees, yet no - - -

PN26746

JUSTICE ROSS: I'm not sure it's an issue with the claim. It is the claim.

PN26747

MR WARREN: And your Honour is highlighting that.

PN26748

JUSTICE ROSS: Mm.

PN26749

MR WARREN: And that indeed the claim is for there to be no differential in the Saturday and Sunday rates for a casual employee.

PN26750

JUSTICE ROSS: Yes.

PN26751

MR WARREN: And there is evidence that goes to that with respect to Mr Della speaks of the difficulty that he has with his casual employees on a Sunday where it is a quieter day in the Hawthorn Club and he largely employs university students, and there is a conflict in their mind as to whether there should be greater rates of pay for Sunday than Saturday and yet they're working in less difficult circumstances.

PN26752

We recognise that what is being put by clubs here is to an extent in conflict with the Productivity Commission report that says there is really no difference between a Saturday and a Sunday, and we recognise that is a conundrum in the claim. It is

indeed - probably would have been more logical for clubs to say let's reduce it all to 125 per cent, but the clubs are not in that position of trying to dramatically reduce in one fell swoop the rates of pay payable to a person who is a full-time employee on a Sunday with reflection to the casual rate. There is a large number of persons who are employed as casuals and they are employed on the weekends in the main, and so it's the desire of Clubs Australia to maintain the same rate of pay for casuals on Saturday and Sunday but to reduce by 25 per cent but to reduce by 25 per cent the rate of pay for full-time and part-time persons on the Sunday. We recognise, your Honour, that that is in some way in conflict with the Productivity Commission report which I'm about to take you to, which says there's really no difference between a person working on a Saturday or Sunday. It may well be reflective of a need to not bring rates down so dramatically, so quickly.

PN26753

It is not part of Clubs Australia that there should be no penalty for working on the weekends. Clubs Australia recognises that there is a need for appropriate penalties to be on the weekends, and the reduction on the Sunday for full-time persons and reflecting a different position between that and casuals, is merely reflective of that position the very different nature of a full-time person and a casual person.

PN26754

JUSTICE ROSS: I'm not sure any of that answers my question which is why is it proposed there be - what's the basis for the differential, not between full-timers and casuals but between the Saturday and Sunday rates paid to full-time and part-time employees in your claim? I'm just trying to understand why that is so. I mean the hospitality employers have a similar position and they provided an explanation for the differential, and other employer organisations in respect of the awards that they have an interest in have sought - the essence of the argument is there's very little, if any, difference in the inconvenience or disability associated with working on a Sunday as opposed to a Saturday. I'm trying to understand what the basis is for Clubs Australia's position in relation to the differential between Saturday and Sunday for full-time and part-time employees.

PN26755

MR WARREN: Your Honour, it is - if one looks at it, the claim is for a reduction of 25 percentage points on both Saturday and Sunday and on public - and 50 per cent on public holidays. If one refers to, for example, an industry such as the hotel industry, it's been 25 per cent on Saturday for a very, very long time and that is perhaps a fundamental reason why Clubs say it should be 25 per cent on Saturday, not 50 per cent on Saturday.

PN26756

One only goes to say that to align both Saturday and Sunday rates at 125 per cent, in Clubs Australia's view that would be too large a drop for Sunday rates in one hit, and it really is as logical as that, your Honour. There is no necessary science in it and it is not - it certainly would recognise that there be a higher rate of pay for employees working on a Sunday.

PN26757

JUSTICE ROSS: Is it implicit in that, that you say a higher rate of pay for employees; full-time and part-time employees in this industry is warranted for working on a Sunday, as opposed to working on a Saturday?

PN26758

MR WARREN: There is no evidence or there is little evidence to say that the persons who work on a Sunday should receive a greater reduction than 25 per cent from the current rate of pay. There is a - indeed, Ms Quirk, who was the union's only full-time employee giving evidence, she's worked Sundays for the last 20 years and indeed is the only full-time employee at the Coledale.

PN26759

Your Honour, there is no mathematical recognition within the Clubs Australia's position that says the Sunday rate should necessarily be an additional 25 per cent on top of the Saturday rate. It is simply because Clubs Australia does not wish to put to this Commission that there should be a reduction from 175 per cent to 125 per cent for Sunday. If that is reflective and the Commission comes to the view that that reflects that there should be a higher rate of pay on a Sunday than a Saturday then that's the view the Commission may well come to, but we do note of course the conflict between the Productivity Commission's findings and indeed other evidence, that says there's little difference between a Saturday and a Sunday rate. I can put it no further than that, your Honour.

PN26760

JUSTICE ROSS: Right.

PN26761

MR WARREN: Thank you. If I can now take the Commission please to the submissions of the union. In paragraph number 16 of the union's outline of closing submissions, in 16(b) it is put and I quote:

PN26762

It is inaccurate to describe employees as making a free and unfettered choice to work on weekends. Rather many employees work on weekends because that is when they are available to work.

PN26763

Indeed, we acknowledge and indeed to an extent adopt that submission because that is clearly where the evidence sits. That is not a reason for a high penalty rate on a weekend, to have a high penalty rate merely because that is the only time when an employee is available to work. If one looks at the evidence I've already referred to, Mr Della, in paragraph 12 of his affidavit, he refers to his employees being largely university students on the weekends that is, and that they're casual employees and that they aren't available to work during the week. So clearly they would work on the weekends simply because there is a need for them to obtain some employment.

PN26764

If there is a reduction in penalty rates on the weekends that will encourage, and this is clearly the evidence of Mr Della and Mr Casu at least, that if you reduce the penalty rates on the weekends that will lead to greater employment opportunities

on the weekend. It is clear that if penalty rates are reduced, employment opportunities will arise and increased employment opportunities will arise. That being the case, the fact that people can only work on weekends, it will provide them with greater opportunities and that is indeed reflective of one of the objects for the modern awards.

PN26765

The submissions continue, still in paragraph 16(b). It says:

PN26766

Moreover, it is reasonable to assume that the choice to work on weekends is at least in part shaped by the financial incentive of penalty rates.

PN26767

There is simply no evidence of that whatsoever. The evidence in the clubs is that - well, the people who work on weekends work on weekends either, and this is the case with respect to the union's evidence of Mr Jones and Mr Cooper, that they work on weekends and they accept that's just part of - that's just the cut of the green. That's what you do when you're working in the club industry.

PN26768

It is no part of the union's evidence that they work on the weekends to obtain higher penalty rates. Clearly, the higher penalty rates are appreciated by the employees but it forms no part of the union's evidence that the reason why they work on weekends is to receive a higher penalty rate.

PN26769

Further in paragraph 16(d) it is put:

PN26770

Working on the weekend is not the norm.

PN26771

Well, it is the norm in the club industry. To suggest that working on the weekends is not the norm is contrary to the evidence of the three union witnesses called, and is contrary to all of the evidence called by the employers. There's simply no evidence to support that working on the weekend is other than the norm in the club industry.

PN26772

It is then further put in (e) that there was no probative evidence before the Commission of industry wide adjustments to trade and service on Sundays and public holidays. We aren't here to put industry wide adjustments, industry wide evidence. The evidence that's been put by the clubs is that there is clear evidence that if the clubs have a more - have more capacity to pay people to work on the weekends that more people will be working on the weekends. Mr Della and Mr Cassou were pursued quite in some detail, in cross-examination, with respect to whether they would or would not be employing more persons and they would at least be employing more persons within their casual pool. Indeed, Mr Cassou gave clear evidence, by calculation of the number of additional hours he would be able to keep his clubs open on the weekends, if there was a reduction in pay for

those certain employees. So it would lead to more employment, it would lead to greater services provided to the club and its members and to the community at large. That evidence is clear and that evidence is emphasised in the written submissions put in by Clubs Australia.

PN26773

In paragraph 18 it speaks of the necessity of any variation to the hospitality awards that is necessary to achieve the modern award objectives. We note the submissions put to the Commission by Australian Business Industrial yesterday and we support those submissions, with respect to the structure and construction of the Act. But, indeed, Clubs Australia says that the objects of the Act are met, in large measure, by the evidence and by the application brought before this Commission in this case.

PN26774

One looks to paragraph 24 of the outline of submissions of Clubs Australia and it clearly ticks most of the core objectives contained in section 134 of the Act, the claim by clubs:

PN26775

The promotion of social inclusions will increase workforce participation.

PN26776

Clear evidence of that.

PN26777

The need to promote flexible, modern work practices and the efficient production and performance of work.

PN26778

Clearly it will be more efficient and productive if the claim by Clubs Australia is acceded to.

PN26779

Provides additional remuneration when employees worked on weekends.

PN26780

Clubs Australia recognises that there should be penalties for working on the weekends and it does so provide. It clearly deals with the issue of equal remuneration, there is no issue of non-equal remuneration between the genders in the club industry.

PN26781

The impact of any exercise of modern award powers in the club industry and its productivity and employment costs.

PN26782

Clearly, that object is met by the application.

PN26783

A simple and easy to understand modern award.

PN26784

One just merely has to look at the evening out of rates of pay for casual employees, for example. Casuals who are working on Saturdays and Sundays, if the clubs application is acceded to, would receive the same rate of pay.

PN26785

Then:

PN26786

The likely impact will be significant and positive on employment growth and sustainability in the licenced club industry.

PN26787

We say, quite clearly, that the application by Clubs Australia meets a large proportion of objects of the Act and thus satisfies the provision of section 134.

PN26788

I now return to the submissions of the union. In paragraph 23 the union refers to the National Retailer Association and Fair Work Commission and highlights, in paragraph 85, and I quote:

PN26789

The purpose of the requirement to review the modern award in its own right is to ensure that the review is conducted by reference to particular terms and particular operations of each particular award.

PN26790

That is precisely what we're putting here. The particular award, being the Club Industry Award or the Licensed Club Industry Award and we say, quite clearly, that the Commission is empowered and should, in the exercise of its functions under the Act, look to the particular industry and the particular operation of this particular award and not be influenced by other factors outside, necessarily outside, the club industry that do not pertain to the club industry.

PN26791

Then, in paragraph 29, it is put:

PN26792

Consistent with that matters set out in paragraphs above, must establish there is some material change in circumstances from the making of the modern award.

PN26793

Well, that's simply not the situation. We do not have to show that there's been a change in the circumstances. What the club industry needs to do is to show that the application that is put is reflective of the objects of the Act and would positively aid the employment of persons in the industry, would positively aid the flexibility of the employment of persons in the industry and would be of benefit to both employees and employers and we say, quite clearly, the evidence is compelling in that regard. We do not have to show that there's been a change in

circumstances since 2010, as is expressed in paragraph 34. We need to meet the test of the modern award's objectives and we say, quite clearly, that is done.

PN26794

In paragraph 51 the Commission, by the union's submission, are taken to the judicial issues decision that is referred to therein and we say that we meet that test. It is clear that this submission is put, in our submission, of a general nature. It is not put necessarily and directly reflective of the position in the club industry. The clubs, by their evidence before this Commission, has clearly met that test and we say that it is reflective and clearly reflective of the evidence that has been put.

PN26795

If I can just take the Commission briefly to some of the evidence that is found within the material? Mr Della, who is the club manager at Club Hawthorn, I hasten to add, indeed, that Club Hawthorn is not the AFL Club, it's a club that largely exists for the purpose of providing and snooker facilities for its members. He noes, in paragraph 6, that:

PN26796

On public holidays we are generally closed because it is uneconomic to open due to the excessive wage rates on those days.

PN26797

He expresses the low patronage of the club on Sundays. He expresses that Sundays are their slowest days of trade, yet it is one of the higher rates of pay payable for his employees.

PN26798

He clearly expresses the view that if there was a reduction in the rate of pay payable to casual employees on the Sunday that they would trade for longer hours and they would be open for trade, indeed, on most public holidays, should the public holiday rate be reduced, as claimed. I refer there, particularly to paragraphs 15 and 16.

PN26799

You will recall that he was pressed, in some detail, with respect to that part of his evidence in cross-examination, and he was unmoved and, indeed, expanded upon his evidence that it would greatly enhance the potential for employment and it would enhance the facilities available and the use of those facilities available for members of the club.

PN26800

This same theme was found within the affidavit of Mr Cassou. Mr Cassou being the general manager of the Narooma Sporting and Services Club, that's exhibit CAI7 in these proceedings. He speaks of the immediate provision of the club's sporting facilities. They're there as a bowls, croquet club and, indeed, the vast majority of their income comes from poker machine revenue.

PN26801

He noted, in paragraph 7 of his affidavit, that the average daily club revenue is $50,000 from Monday through Saturday but on Sundays there's a significant drop

to $20,000. This is a common theme in both of these witnesses that Sunday is a low trade day, yet it's a high cost day, and if they could reduce the costs on the Sunday they could significantly increase and improve the services to the members which would lead of course by that very action to increased employment on the Sundays for - the availability of employment on the Sundays for those persons seeking employment on Sundays.

PN26802

Mr Casu also in paragraph 11 made the observation that Monday is their lowest trade day, yet just through dint of the way public holidays fall, a large number of public holidays occur on the Monday, and yet there is no extra trade is generated by this but the wages were two and a half times greater than certainly on the normal Monday. If there was a reduction in the rate of pay payable for employees on a public holiday, he gave clear evidence that he would be in a position to provide greater table service, he would open up a bistro on the Sunday and it would mean of course creating additional shifts for employees. That being a fundamental tenant of one of the objects of the Act.

PN26803

I note his words in paragraph 14;

PN26804

If there was a reduction in penalty rates the club would not change current trading hours, be unlikely to increase the levels of revenue on those days but the club would increase service during the trading hours. An increase in the provision of member service would mean we would increase our staff numbers and increase the hours available to existing staff.

PN26805

There's two things there of course. It doesn't necessarily mean that there would be more people employed but it certainly means that the people who in the casual pool, for example, would get more work, or get the potential or the offer of more work.

PN26806

Commissioners, the position of Clubs Australia is this, that the claim we say is modest in its terms, inasmuch as what it is seeking to do is to in essence reduce some penalty rates, the majority of penalty rates indeed by some 25 per cent or on public holidays by 50 per cent. We note indeed, your Honour, the President's question of me with respect to whether there is a recognition that the Sunday rate should be higher. I refer to my earlier answer to that and that's where Clubs Australia is sitting. It is the position of Clubs Australia that it is not pursuing a one big bite in one action. It is taking a small nibble at the penalty rates to better reflect the needs of the club industry and to thus provide better services to the membership of the clubs, and thus provide by mere effect greater employment opportunities for employees to provide those greater services.

PN26807

The reduction in full-time and part-time to 125 per cent for Saturday has been a - well 125 per cent has been a rate that has been paid in the hotel industry for well over 20 years, and Clubs Australia says there is no fundamental reason why the

hotels industry should have that benefit that the clubs does not. Particularly bearing in mind the very nature of the club industry, the very nature of the club industry being to provide services to its members and services and facilities for the community at large.

PN26808

With respect to casual employees, there is no reason why a casual employee who works on a Saturday or on a Sunday indeed should receive a higher rate of pay than a casual employee who works on a Saturday. Yet it's still recognising by there being a higher rate of pay for a casual employee on a Saturday from that of a full-time employee that there are some disadvantages quite clearly in being a casual employee in the industry, and the need to not take a large chunk out of the current rates of pay that are paid to casual employees.

PN26809

Casual employees are a necessary and essential part of the club industry and it's recognised as such, but the club industry says that a 50 per cent loading for both Saturday and Sunday is more appropriate, and the evidence clearly shows that if such is granted there would be an increase in services provided and an increase thus in the need for employment. That being so, it clearly meets the vast majority of the objects of the Act. Unless there's any further questions, those are the submissions of Clubs Australia.

PN26810

COMMISSIONER LEE: If I could ask - - -

PN26811

MR WARREN: Yes, Commissioner.

PN26812

COMMISSIONER LEE: You've put that, well as I understood what you're saying, you were agreeing with the union's position that each particular award should be looked at in isolation if you like and in terms of its particular industry, and there shouldn't be an influence of factors outside of that.

PN26813

MR WARREN: We say that Clubs is demonstrably different.

PN26814

COMMISSIONER LEE: So focusing on the employment effects that your submission say would flow from a change to the penalty rate regime that you seek, for us to be satisfied that those employment effects - that there will be beneficial employment effects, there will be greater employment, we are to rely on the evidence of Mr Della, Mr Cox and Mr Casu.

PN26815

MR WARREN: And the evidence of Mr Tait of course, speaking generally.

PN26816

COMMISSIONER LEE: That's the basis upon which we can be satisfied that there would be some improvement in employment.

PN26817

MR WARREN: Yes, Commissioner. That's the evidence and indeed if that evidence had been destroyed or in some way moved in the cross-examination or in the case put by the unions, one could say that that is not reflective of the industry. But we say it is clearly reflective of the industry and that - and indeed I think Mr Tait put there is a reluctance on the part of many employers to as it were - my words now, put their head above the trenches and give evidence in these type of proceedings. But that evidence that has been given we say is very strong evidence and it is very persuasive evidence, and you could be satisfied that certainly when one even goes to the Productivity Commission report, and I note just even in the - what I could call the executive summary or the overview, the Productivity Commission goes to the extent of - and I'm reading from page 27;

PN26818

Some of the broader arguments that might conceivably justified a higher regulated penalty rates for Sundays in the hospitality and entertainment industry are also not compelling. There was little evidence that in contemporary Australia social impacts of work on Sundays are disproportionately higher than Saturdays or other times deemed to be unsociable, despite this being the strongest rationale for a higher rate of the day. Most people working on weekends, Saturdays or Sundays, do no claim any major impact on their lives; for example 75 to 77 per cent people working on Saturdays, Sundays and evenings respectfully said their working pattern's only infrequently affected at the time when they've had the family and friends -

PN26819

And it goes onto speak of the difference between working on Saturdays or Sundays on subjective wellbeing.

PN26820

We say, Commissioner, that the evidence that has been put by Clubs Australia has not been moved by the union evidence at all. The union evidence shows that there is clearly a need to work on Saturdays and Sundays and the Clubs Australia position is that there should be a recognition of penalty for the weekend, but it is too high.

PN26821

COMMISSIONER LEE: I understand all that. I'm just getting - it was a straight forward question, which is just what do you say your evidence shows we should be satisfied of in terms of the employment effects. That's what's - - -

PN26822

MR WARREN: We say the evidence clearly shows that.

PN26823

COMMISSIONER LEE: Show's what?

PN26824

MR WARREN: Shows that if there was a reduction in rates, there would be greater employment, there would be greater services provided, and there should be available, indeed for those very people - the sort of people that work on weekends,

in the majority, casual persons, and there would be greater opportunities for employment on those days. And that was unshaken in cross-examination, and we say that's clearly indicative of what you will find in the club industry, and what is in the club industry, and therefore the Commission could be well satisfied that that evidence demonstrates the need to reduce rates on the weekends to allow those circumstances to prevail.

PN26825

COMMISSIONER LEE: Okay.

PN26826

MR WARREN: As the Commission pleases.

PN26827

MR RAUF: Your Honours, President, Vice President, Deputy President and Commissioners, I'll be making some brief submissions on behalf of Restaurant & Catering Industrial. I propose to address four matters this morning in order. Firstly, to clarify the claims of Restaurant & Catering Industrial; secondly, to make some remarks about the nature of the review and, in a practical sense, the questions which arise for the Commission and which, of course, was the subject of some exchange yesterday; thirdly, highlight some key propositions as they relate to the restaurant and catering industry which, in my submission, given the element of uniqueness as compared to other sectors within the hospitality industry, and that's something which becomes relevant when the Commission considers the factors in section 134 as to the question about whether the award meets the modern awards objective. And, finally, I wish to make some concluding remarks regarding the underlining reasons for the claims put forward by the Restaurant & Catering Industrial and why, in our submission, they will assist in the relevant awards meeting the modern awards objective.

PN26828

Just before I do clarify, if I can make some preparatory remarks. Firstly, we do rely on our written outline of submissions dated 3 February and the submissions in reply dated 4 February. I don't propose to traverse those in any detail. And I should note that there have also been a number of other matters which other employer representatives have covered which I have intended to go to but I won't, given the time constraints. And finally, there's that – I'm at some disadvantage in that my involvement was following the conclusion of the evidentiary case, so this is really the first opportunity that I've had to address the Bench, orally at least, and I want to take that opportunity coming to the first matter to initially clarify the claims of Restaurant & Catering Industrial in light of the evidence that has fallen, but also my instructions. And I propose to do so with reference to the summary set out in the background paper and, if it's of convenience, I've got extracts of the Restaurant Industry Award and the Fast Food Industry Award, which I can hand up. So these are tables at 1.2 of Appendix A and table 2.3 which I've extracted.

PN26829

So just turning to the Restaurant Industry Award initially, if I may, in respect of the penalty rates for Sunday, so for full-time and part-time the summary is correct; that it's a 20 per cent reduction which amounts to 125 per cent. No change in respect of casuals, and 150 for casuals at levels 3 to 6. Now, in terms of the

public holidays it's the claims of Restaurant & Catering Industrial for public holidays, the figures represented there are as contained in the original application, and the draft determination. I can simply note this: that although the rates, which RCI claims, or submits are appropriate, are 150, it's not necessarily wedded to 150 for casuals and we would be open to a casual loading, although it's pitched at 150 for historical reasons and given that that's currently, indeed currently, the same rate that has been applied for both casuals and full-time and part-time employees working on public holidays.

PN26830

Now, I'm instructed that, to the extent that there are the time off in lieu provisions and what is sought there, the Restaurant & Catering Industrial in light of really the evidence as its fallen does not press those. And so I don't propose to say anything more about those.

PN26831

JUSTICE ROSS: Can you provide that in writing?

PN26832

MR RAUF: Yes.

PN26833

JUSTICE ROSS: Which claim you're not pressing?

PN26834

MR RAUF: Yes.

PN26835

JUSTICE ROSS: Jus so we're clear and submit a revised variation determination.

PN26836

MR RAUF: Yes. We'll undertake to that, your Honour.

PN26837

JUSTICE ROSS: I haven't taken you to be saying that there's any change in your public holiday claim.

PN26838

MR RAUF: No, there isn't. There isn't.

PN26839

JUSTICE ROSS: All right.

PN26840

MR RAUF: So that the change in this respect is really that the time off in lieu proposed provisions are not pressed and that's something that we will confirm in writing.

PN26841

JUSTICE ROSS: Can I just go back to the change in relation to casuals.

PN26842

MR RAUF: Yes.

PN26843

JUSTICE ROSS: So, in effect, this is in relation to the Sunday rate, what you're seeking to do is to extend the decision that was earlier made in the transitional review to reduce the Sunday loading for casuals in levels 1 and 2.

PN26844

MR RAUF: Yes.

PN26845

JUSTICE ROSS: You're seeking to extend that to all casuals, so now one grades those in 3 through to 6.

PN26846

MR RAUF: That's correct, your Honour. Yes.

PN26847

JUSTICE ROSS: And do you have any information about the numbers of casuals employed in those two categories? At levels 1 and 2 verses 3 to 6?

PN26848

MR RAUF: Yes, 3 to 6.

PN26849

JUSTICE ROSS: That might have been canvassed in the earlier restaurant case, but I'm not sure.

PN26850

MR RAUF: I don't immediately but perhaps if I can take that on note.

PN26851

JUSTICE ROSS: Certainly.

PN26852

MR RAUF: And come back to your Honour as to whether there is information available on the evidence before the Commission.

PN26853

JUSTICE ROSS: I might put Mr Dixon on notice that I've got a similar question in relation to Fast Food, but - - -

PN26854

MR RAUF: Yes.

PN26855

JUSTICE ROSS: - - -it's just to try and get some feel, or if you can me take to where in the material I'd find information about the number of employees at the different levels.

PN26856

MR RAUF: Shift loading is as represented, so that's a correct summary there. If I can then briefly turn to the Fast Food Industry Award, the proposed variation to – just initially looking at the Monday to Friday penalty rates, the summary there is correct, and that's as it stands. Now, there's just a correction, if I may, at the Monday to Friday after midnight. For casual it's represented to be shift loading at 105 per cent but, of course, Restaurant & Catering Industrial accept that there's the 25 per cent casual loading so that ought to be to reflect that loading, 130 per cent, so it becomes then 105 for full time and part time, 105 per cent, and then for casuals 130 per cent. And that differential is consistent in terms of the rates that apply for Sunday, for instance, where there's that 25 points differential.

PN26857

Now, public holiday is the same as is proposed by the Restaurant & Catering Industrial that again if I can note here that the Restaurant & Catering Industrial again are amenable to the casual penalty rate being 175 per cent to reflect the continuing differential of 25 points, and that's something that we will confirm in writing as well. And I'll come a little bit later on to explain the underlying reasons for the proposed variation, but I just wanted to take this opportunity, if I could, to clarify what is being sought and to the extent that there's been some refinement of that.

PN26858

Can I then come to the statutory framework and the questions which really arise for this Full Bench, and in particular to make clear the position of Restaurant & Catering Industrial. Firstly, I note that there is a positive obligation on the Commission to review all awards, as reflected in section 156 subsection (2)(a). Section 134 informs the nature of the obligation to ensure that modern awards, together with NES, provide a fair and relevant minimum safety net of terms and conditions, and that a number of factors are required to be considered in forming a view about or ensuring that the objective is met; and those factors are broad and in effect require a balancing exercise as they relate to a particular award operating in an industry.

PN26859

So in practical terms, what are the questions which arise? They are, in our submission, threefold. To the extent that there are these threefold questions, we agree with the submissions in reply of the Ai Group and support that approach. The threefold questions are these - that is a relevant award meeting the modern award objective, firstly; secondly, do the current terms provide more than is necessary to achieve that objective, and then, thirdly, to the extent that certain proposed variations have been put forward, are they to an extent necessary to achieve the modern awards objective? And it may be that the Full Bench on forming a view that the relevant award is not meeting a modern award objective instead takes the course that, well, there may be other variations or other changes that ought to be made to ensure that the modern awards objective is met to the extent necessary - and I'll come back to this, but our submission is that to the extent that RCI has put forward proposed variation with the concessions and the refinements adverted to earlier, in our submission, they go to the extent necessary to assist in or ensure that the relevant award meet the modern awards objective.

PN26860

For the reasons that we've set out in our submissions in reply at paragraphs 3 to 10, we submit that there's no basis to import other requirements or threshold tests which must be met and/or which favour the retention of status quo. Further, we submit that it is inappropriate to call for adverse inferences and, with respect, to the extent that the unions call for such an inference it reflects a misunderstanding on their part as to the nature of this review.

PN26861

Finally, if I can say this in relation to the task before the Commission, as to any assumption that the modern awards either did or continue to meet the modern awards objective, this is something that the Full Bench must determine now, not necessarily with reference to whether it did or didn't in the past. And relevant to that, if I can say this, that to the extent or in relation to the process which was adopted in the making of modern awards, it was an exercise in some respects akin to a rationalisation of many awards, and that's something that's been noted previously by this Bench, and indeed, as to penalty rates in the background paper at paragraph 58, a characterisation similar to that is provided. And helpfully in the observations of Vice President Watson and Commissioner Roberts at 160 in the Penalty Rates appeal decision, there is again a description really of process that was followed and that's something that we have - the relevant paragraph we've extracted in our submissions at paragraph 26, and I must just very briefly advert to that.

PN26862

At paragraph 46 of our submissions-in-chief, we set out the relevant extract or the observation of Vice President Watson and Commissioner Roberts. In particular, the award modernisation process essentially involved the determination of the critical mass of award positions that were replaced by the modern award, and those substantive considerations of the rationale and level of Sunday penalty rate payments in this instance occurred beyond the process of rationalising et cetera; I don't go on. Indeed, for a number of industries where key stakeholders and participants, we were able to reach some level of agreement. Ultimately that was submitted to the AIRC and, subject to former requirements, generally adopted. So in that sense, there wasn't necessarily a process of expressly considering and analysing draft provisions in terms of underlying reasons and rationale, and expressly whether or not they met the modern awards objective. We say that that's significant for this reason, that this is really the first opportunity that the Full Bench has to consider the rationale, consider in a detailed manner whether the relevant awards meet the modern awards objective, and so that makes this task significant, and certainly it's been acknowledged by the Full Bench that, to the extent that there was the 2 yearly review, that was a more confined exercise.

PN26863

If I can then come to the Restaurant Industry Award and the circumstances of that industry in particular, continuing somewhat the theme of Mr Warren that as to the uniqueness of different industries, but we certainly submit as much in respect of the restaurant industry and that's something which we deal with at paragraphs 21 to 29 of our submissions-in-chief. But importantly, as the Full Bench is well aware, there was the process that arose as a result of the ministerial request dated 28 May 2009, and we say that, in our submission, that ministerial request

recognised the different circumstances of the restaurant industry, in particular its labour-intensive nature and the core trading times, and that for the task of formulating a modern award to apply to that industry, it warranted special consideration or attention, not as one aspect of a broader hospitality sector.

PN26864

We summarise at paragraphs 31 to 40 what we say are some of the characteristics and views expressed relating to the accommodation and food services industry generally and specifically the restaurant and catering industry, but if I can simply note this, the general tenor of those characteristics which we say at a fundamental level don't appear to be in dispute and are also consistent with the findings expressed in the Penalty Rates appeal decision at paragraphs 95 and then 278, but also the observations reflected in the Industry Profile Report dated December 2015, which we advert to in our submissions at paragraphs 35 to 38. Then there is also the expert evidence of Professor Lewis which is based on the data obtained from the Australian Bureau of Statistics, which we summarise at paragraph 41 of our submissions.

PN26865

But importantly, if I can just note these, that the industry's comprised of a large proportion of small businesses and single establishments, labour cost is comparatively high compared to other industries, it has a low operating profit margin, core trading hours are highly responsive to consumer demand rather than determined in some arbitrary fashion or in isolation, and that's something which we say is an inherent aspect of the services industry, and also that on the evidence before the Commission, including the anecdotal and survey evidence which I'll come to shortly, employers have utilised methods to manage the way it is billed for weekends and public holidays, and that has included for instance owners performing more work or calling upon family members, reducing the number of staff engaged, utilising younger workers and also in some instances decreasing offerings or services. So we say that those factors become relevant when this Full Bench turns to the question posed in section 134 as it relates to the Restaurant Industry Award and striving to achieve or ensuring that the award provides a fair and relevant minimum safety net and includes terms only to the extent that they are necessary to achieve that objective.

PN26866

We have summarised the evidence, which is relied upon by Restaurant and Catering Industrial in our submissions at paragraphs 48 and 49, so I don't propose to do that again. But if I can just note these observations, which we say emerge from that evidence, and that is that small businesses have felt the impact of penalty rates on weekends and public holidays and, as I indicated earlier, that they have utilised measures to try and reduce or mitigate the effects of these.

PN26867

Thirdly, there has been indications given by relevant operators that they would look to increase activity or utilise staff for longer hours, for instance, or increase offerings of services, if there was a reduction in penalty rates, which assisted in managing the wages bill for those days.

PN26868

Now, the union submissions, to the extent that they say, "Well, any savings will go to profits" misunderstands, in our submission, the nature of the restaurant and catering industry. It fails to acknowledge the highly competitive nature of that industry and that it is comprised, predominantly, of smaller operators for whom it is important to maintain a competitive advantage to survive.

PN26869

It is in this context that we make the submission that having regard to the evidence the current levels of penalty rates contained in the Restaurant Award and, indeed, the Fast Food Industry Award are acting to inhibit activities and also objects or aspirations, such as promotion social inclusion through an increased workforce participation.

PN26870

Now, the challenge which is mounted is that well, there's no attempt at quantifying or calculating any relevant impact of penalty rates, or there's no definite evidence given that certain things will happen. In our submission, such criticisms fail to appreciate the concerns which have been raised and that there is a real relationship between penalty rates, particularly in light of the core trading hours and labour intensive nature of the industry, as recognised in the ministerial request at the outset leading to the making of the award, and also the levels of activity and services offered.

PN26871

Indeed, in arguing, in effect, against the existence of any such correlation and relationship, we say that the union's submission adopt a position which is also contrary to now the various other observations and views expressed in other reports, which are before the Commission, such as the Productivity Commission Report, the Visitor Economy Task Force, which was prepared for the New South Wales government, and it also - that view put forward by the unions also disregards the context, as to the making of particularly the Restaurant Industry Award and the fact that it was carved out for very specific reasons and so that it may be given special attention.

PN26872

We have made submissions as to the survey evidence and, again, we say that that survey evidence must be considered in the context of the general concerns which have been highlighted. The survey does not, whether it be the Jetty Research or the RCI survey, they don't seek to provide quantification of precise measurements as to any impact or experiences of operators. Rather, what they do do is engage with participants in the industry and indicate a general trend and views. To the extent that they do, that's consistent with views and observations, for instance, of the Productivity Commission, of the views expressed in the Visitor Economy Taskforce Report and that's more than can be said of the observations and opinions expressed, for instance, by experts such as Professor Muurlink, whose opinion is relied upon by the unions and who extrapolates from information which has no relevance to the industries under review.

PN26873

If I can turn then to the application of the Restaurant and Catering Industry and make the following observations? Consistent with the submission that was made

yesterday, on behalf of the ACCI, the Restaurant and Catering Industrial immediately recognise that there is a level of inconvenience, of disruption, as a result of performing work on weekends or public holidays. We don't say that there isn't any such disruption. Rather, the question which Restaurant and Catering Industrial raise is that, well, what is a penalty rate which is proportionate to that disruption and, to an extent, necessary, having regard to all of the factors, not just one of the factors in 134, but all of the factors, what's the rate which goes towards ensuring that the modern awards objective is met?

PN26874

Flowing from that, Restaurant and Catering Industrial raise the concern and make the submission that the existing penalty rates do not reflect, firstly, the level of disruption and are also predicated on what are outdated historical justifications or rationale and that having regard to now the evidence which is before the Commission, the (indistinct) have shifted, that there's been a change in the underlying reasons and the level of disruption.

PN26875

By way of example, that, in our submission, there is no real or practical difference in the level of disruption between work on a Saturday and work on a Sunday, and that's something I'll go to, with reference to the Productivity Commission Report. Therefore, it makes little sense, in that context, to have a penalty rate for Sundays which is significantly more than the penalty rate which applies for Saturday. And to the extent that it does, in our submission, going to the earlier questions which I outlined for this Full Bench, in our submission the answer is, well, to the extent that the Sunday rate is more than the Saturday rate it is beyond the extent necessary to ensure that the modern award meets the modern awards objective. So, accordingly, the Restaurant and Catering Industrial seek variations to those penalty rates to achieve a level of equality and also to reflect, more consistently, the tends and underlying circumstances and the operating circumstances which apply within the restaurant and catering industry and the fast food industry as well.

PN26876

If I can then, just briefly, go to the Productivity Commission Report? So on the basis of its extensive survey and submissions and review, I refer to, initially, the key points outlined at page 436 of the report. The Commission states that:

PN26877

There are no systematic differences between asocial impacts of working on Saturdays and Sundays. There is no impact on self-reported wellbeing of working on either day. Comparatively evening work seems to have more impacts on various measures of work life balance and wellbeing. Further, there is no persuasive evidence that working on Sundays has adverse health effects, unlike the evidence about long hours and night work, and, importantly, Sunday is not special anymore.

PN26878

So those are the key points outlined at page 436, in chapter 12. Then chapter 13, which is entitled The Level of Weekend Penalty Rates, again the key points which summarise the observations of the Commission, the last point:

PN26879

There are other indications that current Sunday penalty rates are out of line with Saturday rates.

PN26880

Then it repeats some of the points I mentioned earlier.

PN26881

But in addition:

PN26882

The return to working on a Sunday far exceeds the return to the acquisition of skills associated with tertiary training and there is evidence that there is an excess demand for jobs on Sundays.

PN26883

Chapter 14, of course, talks about the impacts of changing weekend penalty rates. I don't read that but again I refer to the key points at page 461 and say that those observations, to the extent that they talk about providing benefits for consumers and increasing the level of activity is consistent with firstly the evidence given by operators on behalf of Restaurant and Catering Industrial, albeit that there wasn't any precise or calculated measure. But that's not the point.

PN26884

The point was to provide direct evidence as to the experiences of those operators and then the way in which they might respond if there were some assistance in managing the wages bill for those particular days. All of that, in my submission, is consistent with the survey reports and with other materials, including the Productivity Commission report, which ought not be readily or easily dismissed.

PN26885

The submission that the penalty rates for Saturday and Sunday ought to be at the same level is adopted, then there is the consequential amendment which is reflected in the application by the Restaurant and Catering Industrial relating to clause 34.1(a) which follows, we say, as a matter of porosity, and that's the distinction between the different rates which currently apply for casuals.

PN26886

If I can just say this, coming back to your Honour's question about that, the attempt to make consistent the different rates. In our submission, given the nature of the work that is performed there isn't necessarily much differentiation in terms of the skills required and the outputs and therefore, in our submission, there isn't a proper basis to conclude that there ought to be differing penalty rates for casuals.

PN26887

JUSTICE ROSS: What's the basis for the proposition that there's no difference in the skills required, because the higher levels are supervisory, the trade level et cetera. Doesn't it sort of follow from the classification structure that different skills are required?

PN26888

MR RAUF: Yes. Well if I can just address that, your Honour, with reference to that table again. So for full-time and part-time the relevant rate is 125 per cent - sorry, it's currently 150. What is sought is 125. In respect of casuals level 1 and 2, so level 1 and 2 currently is the same as full-time and part-time, casuals level 3 and 6 are above that. But in our submission, there isn't - for the same reason that full-time and part-time are pegged currently at 150, in our submission, there doesn't appear to be any basis to differentiate between them, for instance, so a full-time person who happens to be working on a Sunday, potentially undertaking similar duties and a casual employee at a level 3 to 6.

PN26889

So it's really attempted to streamline and make consistent, not just amongst the casuals but with reference to full-time and part-time, and the penalty rates which apply to them as well, albeit that there's - sorry, withdraw that. So that's the - really the basis for that claim. But as to - - -

PN26890

JUSTICE ROSS: In the Full Bench decision in the transitional review, they decided on that differentiation in relation to casuals, are you suggesting that they were wrong to do that, and if so, what about their reasoning was wrong?

PN26891

MR RAUF: I'm not suggesting that the Full Bench was wrong. What I do note though is that the consideration by the Full Bench was in a more confined sense in the context of the two yearly award. But going to the underlying rationale for the penalty rate, and that is to reflect some level of disability to disruption, in our submission as a matter of logic there isn't any differentiation in terms of what the disruption is for a casual at levels 1 to 2, and a casual at 3 to 6, or for that matter a part-time or full-time person who comes in on a Sunday, if one has regard to that rationale for the setting of the penalty rate.

PN26892

JUSTICE ROSS: But as I understood one of the rationales for the difference in the earlier case went to the characteristics of the employees who occupied the different levels.

PN26893

MR RAUF: That's so and as an aspect of that, generally speaking I think one of the observations made was casuals 1 to 2 may come and go or maybe more fluid.

PN26894

JUSTICE ROSS: Yes, transient.

PN26895

MR RAUF: Transient, whereas levels 3 to 6 may not be. Well to the extent that they are not that's no different to employees who are full-time and part-time who otherwise get the same rate as casuals at levels 1 and 2.

PN26896

JUSTICE ROSS: Was that an argument put by the association at the earlier proceedings?

PN26897

MR RAUF: I don't believe that it was. I'm not entirely - I'm not certain of that but I don't - on a review of the decision at least, I don't believe that - I couldn't see that that argument - - -

PN26898

JUSTICE ROSS: I'm not sure the decision would necessarily tell you whether you put it or not.

PN26899

MR RAUF: No, quite. Quite, and I'm not in a position, your Honour, to - - -

PN26900

JUSTICE ROSS: Perhaps you might check that and advise us about that as well.

PN26901

MR RAUF: Yes, I'll do that.

PN26902

JUSTICE ROSS: But you're not, I take it, contesting the observations that there were distinguishing characteristics between casuals of 1 to 2 and those of 3 to 6, or are you, that were made in the previous decision.

PN26903

MR RAUF: We're not contesting that but simply say that those observations are made with reference to the classifications and the duties and descriptions attaching. But for the purposes of the review before the Full Bench now, we are approaching that somewhat differently and saying that at a practical level, in terms of what's occurring, the level of disruption that's caused or inconvenience is no different. It's the same for all of those employees, generally speaking of course, and so that doesn't provide a basis - - -

PN26904

JUSTICE ROSS: No, I understand that. It's really whether you're challenging the basis for the distinction that led the previous Full Bench to its decision. I don't recall it saying there were differential inconveniences, if you like.

PN26905

MR RAUF: No.

PN26906

JUSTICE ROSS: But it was more the characteristics of the employees that were at those levels - - -

PN26907

MR RAUF: Yes.

PN26908

JUSTICE ROSS: - - - and seeking to distinguish between those employees who, if I can put it this way, might be more transient in their nature in this industry and others who were more likely to see this industry in a career sense.

PN26909

MR RAUF: Yes. Just in responding to that question, your Honour, can I just briefly confirm one point with my instructor.

PN26910

JUSTICE ROSS: Sure, and look I appreciate also that you've come into the matter late and if you need an opportunity to reflect - - -

PN26911

MR RAUF: Yes.

PN26912

JUSTICE ROSS: - - - bearing in mind it will be a quick opportunity.

PN26913

MR RAUF: Yes, indeed, indeed.

PN26914

JUSTICE ROSS: Then by all means.

PN26915

MR RAUF: Yes. I might take that opportunity, your Honour, and revert once I've clarified the instructions.

PN26916

JUSTICE ROSS: Yes. So that the union has an opportunity to respond to whatever you say, if you can over the luncheon adjournment give some thought to when you'll be coming back and how we might deal with that.

PN26917

MR RAUF: Yes. I'm most mindful of the evidence and whether the evidence provides the basis for that, and if it does, it does, if it doesn't, it doesn't. So it might be a quick discussion but that's what I need to check.

PN26918

JUSTICE ROSS: Yes.

PN26919

MR RAUF: We say generally speaking there isn't a differentiation in respect of full-time, part-time and casual employees in light of the historical trend, and that the same penalty rate has been applied for employees for public holiday work as well, so in the claim of RCI. Sorry, so I've moved to the public holidays.

PN26920

JUSTICE ROSS: Yes.

PN26921

MR RAUF: Where what is sought is a rate equal to 150 per cent for all employees, which brings it to the same level as penalty rates for Saturday and Sunday work, albeit that result is a slightly higher amount for full-time and part-time employees who would, on the proposal, get 125 per cent. And the change which is sought in respect of – if I can just very briefly comment on the evening

hours on week days, the change which is sought there, at the heart or at the core of that is really to streamline and create administrative ease, if you like, in the application of the rates.

PN26922

So while the figure of 5 per cent is put forward, the Restaurant & Catering Industrial isn't necessarily wedded to that number, but what, in its proposal, it is seeking to do is to try and streamline the rate that applies to that so a small operator or a business owner doesn't have to worry about factoring different rates at different hours for different employees, and relevant to that context if I can just note the observations of the Fair Work Ombudsman report dated June 2015 which, again, we do refer to our submissions, but very quickly if I can just go to page 7 of that, which captures an observation made by the Ombudsman, and namely that after sending out the overall statistics based on its audit it says that the most commonly identified errors were employers providing flat rates of pay for all hours worked with many employers advising that they had adopted this practice to simplify their payroll process. In many cases the hourly rate paid was not enough to cover hours attracting penalties, loadings or overtime, and then in respect of pay slips and record keeping the most common errors related to insufficient information being recorded on pay slips, et cetera. But what we say this observation reflects is that - - -

PN26923

JUSTICE ROSS: What's the reference to the - - -

PN26924

MR RAUF: Sorry. It's page 7, your Honour.

PN26925

JUSTICE ROSS: Page?

PN26926

MR RAUF: Page 7 of - - -

PN26927

JUSTICE ROSS: Thank you.

PN26928

MR RAUF: - - -of the report by the Ombudsman dated June 2015. But we say that that reflects, at a general level, the difficulty which smaller operators have, particularly in this industry, in terms of computing and working with differing rates at differing times, and so in looking – when one turns to the various considerations for factors in section 134 one of those is, of course, the consequence flowing from the modern awards powers and the administrative burden or otherwise of relevant provisions, and we say that in terms of streamlining the evening penalty rates that goes directly to the concern or the object of trying to achieve administrative ease, having regard to the circumstances of the industry.

PN26929

JUSTICE ROSS: Yes. Well, you can achieve administrative ease in a whole – you could level up or level down and it would still be administratively easier.

PN26930

MR RAUF: Yes. Well, one can, that's right. But the case which is advanced that - - -

PN26931

JUSTICE ROSS: It might be the case of being careful what you wish for.

PN26932

MR RAUF: Yes. No, I accept that, your Honour, and indeed the question, of course, remains as to the extent necessary in providing a safety minimum net. So one can meet the objective by moving it up, but the question arises is that to the extent necessary.

PN26933

Just, finally, if I can conclude with these comments. We say, in our submission, that there is a proper basis to find that the existing levels of penalty rates for weekend and public holiday work are to an extent which is more than what is necessary to provide the minimum safety net and in turn meet the modern awards objective. To this extent – sorry, I withdraw that. But there is also the further question as to whether the penalty rates properly reflect the underlying reasons and rationale and, in light of some of the materials I've taken the Bench to, and the other evidence which is before the Commission, and, in particular to the extent that there has been discussion of penalty rates and the setting of it in historical context doesn't appear, certainly in relation to modern awards, that there's been any recent or in-depth consideration of what the appropriate level ought to be. And so RCI really joins with ACCI in inviting the Bench to consider the underpinning rationale in light of the evidence which is now before it but in the circumstances of the restaurant industry.

PN26934

And we say, in summary, that the existing levels are inhibiting training activities and also acting as a deterrent for predominantly small business operators in the relevant industries, and to the extent that there are differing penalty rates, for instance, during the evenings, it does create a level of administrative burden. And therefore on balancing the various factors outlined in section 134, and without simply focusing on any one factor, we submit that there is a proper basis on which this Commission can find that there is a need to vary the restaurant and fast food awards to ensure that they meet the modern awards objective to the extent necessary and only to that extent, and we say that the proposals of Restaurant & Catering Industrial, subject to the earlier concessions and refinements, which we will confirm in writing, go towards ensuring that that objective is met, and, in a way which appropriately balances, in our submission, the various factors which the Commission must take into account under section 134.

PN26935

They were my submissions, unless there are any questions arising?

PN26936

JUSTICE ROSS: Thank you.

PN26937

MR RAUF: Thank you.

PN26938

JUSTICE ROSS: We might just stand down for five minutes.

SHORT ADJOURNMENT [11.31 AM]

RESUMED [11.47 AM]

PN26939

MR WHEELAHAN: If your Honour please, I think the next applicant is in Melbourne.

PN26940

MR BREHAS: Thank you, your Honour.

PN26941

JUSTICE ROSS: Perhaps if you remain seated, because it'll be easier to hear you.

PN26942

MR BREHAS: Thank you. I take it you can hear me clearly enough, your Honours?

PN26943

JUSTICE ROSS: Okay, so much for the theory that remaining seated would make it easier to hear you. No, well certainly I'm having a bit of trouble hearing you. Just bear with us for a moment.

PN26944

MR BREHAS: Okay, thank you.

PN26945

JUSTICE ROSS: All right.

PN26946

MR BREHAS: Should I try again? Can you hear me clearly?

PN26947

JUSTICE ROSS: No, that's fine.

PN26948

MR BREHAS: Thank you. The NRA has acted as an interested party in these proceedings given its interest in the Fast Food Industry Award. This is separate to the joint claims that it has made together with other retail associations in relation to the General Retail Industry Award which Mr Wheelahan will be addressing the Bench on. The NRA supports the claims by the Ai Group in these proceedings and the restaurant and catering industry regarding claims to reduce Sunday penalty rates in the Fast Food Industry Award in relation to full-time and

part-time employees from time-and-a-half to time-and-a-quarter, and in relation to casual employees from time-and-three-quarters to time-and-a-half.

PN26949

Given that other employer parties have already address the Bench in relation to the legislative framework and the modern awards objective, I do not propose to repeat those issues for the sake of brevity but rather will just briefly focus on two main issues, being the historical considerations and the other issue which I describe as the evidentiary issues in these proceedings. As set out in our submissions in these proceedings dated 8 February 2016, the primary reason why we consider that Sunday penalty rates should be reduced to Saturday penalty rates in relation to the Fast Food Industry Award is because we submit that there is no longer any real difference between Saturdays and Sundays in today's modern Australia. In this regard, we submit that the historical justification for higher penalty rates on Sundays no longer exists. The historical background regarding Sunday penalty rates has already been canvassed by other employer parties, both yesterday and this morning and in the Fair Work Commission's background paper dated 4 April 2016, and as such we will not be repeating those issues but agree with the historical background relating to those aspects.

PN26950

In our submission, except for the issue of religious observance, which I will be addressing shortly, there is no longer any distinction in today's modern society in Australia between the purpose of Saturdays and the purpose of Sundays. If this was not the case, we submit then that it be very simple for any real differences between the two days to be clearly articulated. However, this is not possible because there is no longer any discernible difference relating to the purpose between each of those days. Therefore, the only real difference, we submit, between the purpose of Saturdays and Sundays relates to Australia having primarily a Christian population from a historical perspective, hence the observations in the Weekend Penalty Rates case in 1947 about the reasons why Sunday had particular significance.

PN26951

For those people of a Christian faith, Sundays do hold a level of significance because it is a day of religious worship. However, we submit that in today's modern and multicultural Australia, the significance of Sundays as a day of religious worship has declined. In this regard we refer to the submissions of Mr Izzo yesterday about at most the religious observance on Sunday impacting approximately 17 per cent of the Australian population.

PN26952

In the SDA's submissions dated 21 March 2016 at page 216, paragraph 694 - and I'm not sure whether you have that before you, your Honours, but I'll read from it - it is stated:

PN26953

The existing penalty rates in the Fast Food Award are an essential element of a fair and relevant safety net because of the destructive and harmful effects of working at the times at which those penalties currently apply. As detailed in section (e) of chapter 2 of the submissions, the evidence establishes that

working on weekends and public holidays has a negative effect on the physical and psychological health and on the social life of workers and their families.

PN26954

Weekends, particularly Sundays, and public holidays are important and valuable. The current penalty rates appropriately recognise the value that workers and the community, including employers, place on weekends and public holidays.

PN26955

It therefore appears that the SDA's focus on why Sunday penalty rates should be retained at existing levels are because of the alleged disruptive and harmful effects of working times which those penalties apply. Therefore the SDA appears to be relying on a new reason as to why penalties should be imposed on weekend work, which does not appear to be consistent with the historical justification for those penalties. Even if we were to accept the SDA's arguments about the alleged negative effects that work on weekends may have on physical and psychological health and on the social life of workers, which we do not, there does not appear to us to be any reason why these effects should be worse on Sundays compared to Saturdays.

PN26956

The SDA does not also advance any explanation as to why Sundays are more important and valuable to workers than Saturdays. We submit that the reasons for this difficulty are simple and namely that, with the exception of a relatively small percentage of the population for whom Sundays are significant for the purposes of religious worship, there is no real distinction between Saturdays and Sundays. Sundays are significant for the purposes of religious worship. There is no real distinction between Saturdays and Sundays any longer.

PN26957

The NRA accepts that there is still a distinction between weekends and weekdays, particularly given that there's a large percentage of the population that works predominantly on weekdays, and that for this reason it may become difficult for those workers who work on the weekends to coordinate times to participate in social activities and family reunion, with those who work on weekdays.

PN26958

For this reason, we submit that a penalty rate for work on weekends should still apply but at this rate should be at the current Saturday penalty rate levels in the Fast Food Industry Award. Because of the nature of the fast food industry which generally operates or is expected by consumer demand to operate seven days a week, workers who enter this industry are expected to work on weekends. Given that in our submissions that we have made there is no real distinction between work on a Saturday and work on a Sunday, under the existing penalty rates arrangements workers who work on a Sunday effectively receive a windfall in the form of increased penalty rates.

PN26959

For employers in the fast food industry, the requirement to pay this increased penalty rate for Sunday work is, in our submission, not fair or reasonable, given

that the inconvenience for work on a Saturday is not any different to the inconvenience for work on a Sunday. We therefore submit that in today's modern Australia, in the fast food industry in particular which operates seven days a week, that there is no longer any justification for penalty rates for work on a Sunday to be higher than those on a Saturday.

PN26960

I'll now turn to the issue of the evidentiary matters that I raised at the outset. We support the common evidence that's been presented to the Bench in these proceedings by Ai Group and other employer parties in support of the employer claims for the reduction of Sunday penalty rates to Saturday levels. Insofar as the SDA and other union parties contend that the Fast Food Industry Award has achieved the modern award's objective at the time that it was made in relation to the present claim, we do not agree with that view. Rather we agree with the position advanced by ABI and the New South Wales Business Chamber as set out in Mr Izzo's closing submissions yesterday, as to why this is not the case, which again for the sake of brevity I will not be repeating.

PN26961

In the submissions that we have filed we have expressed a view that in considering the evidence of the employer parties in these proceedings that the Bench should adopt a practical and common sense approach, and that the evidence should not be considered in an overly technical or formalistic manner. Ultimately, there may be a degree of deficiency in the evidence presented by both the employers and the union parties and challenges can be mounted by both opposing groups as to the degree to which, for example, survey evidence is representative of a particular group, or the methodology of an expert's evidence.

PN26962

However, provided that the evidence that is presented is legitimate, in the sense that it's been presented in good faith, we submit that this evidence is useful to the Bench as a compass to steer it in the correct direction in arriving at a decision. In this regard we note that there's been a multitude of additional evidence that's been presented in the form of statements from the lay public. In that regard, we submit that the Fair Work Commission should approach that evidence with caution as it appears that in many instances there has been confusion by those parties as to what these proceedings entail. For example, although I have not been in a position to review all of the material, in various instances it's evident that some parties believe that the employers' claims in these proceedings are to cut Sunday penalty rates altogether.

PN26963

Insofar as the Bench propose to take a more formalistic and technical approach to the evidence that's presented in this matter, we have identified in our submissions deficiencies in the evidence of Professor Altman and Dr O'Brien, which we have set out in pages 20 to 22 of our submissions, and we do not propose to repeat today for the sake of brevity.

PN26964

However, one important matter arising out of the evidence of Professor Altman is that his evidence appears to be limited to a consideration of the effects of a

reduction in Sunday penalty rates of existing employees only, and that's set out in transcript PN19695 to 19697 and 19736 to 19737, transcript date 26 October 2015.

PN26965

We submit that in considering the employers' claims relating to the reduction of Sunday penalty rates, that the Commission should take into account the impact that this is likely to have, not only on existing employees and employers but those who are unemployed and those who are proposing to establish businesses in the fast food industry. We submit that this is a very important group which needs to be taken into account and who in effect have a very small or potentially no voice in the present proceedings.

PN26966

Although evidence as to the impact that a reduction on Sunday penalty rates will have on this group is hard to come by, we submit that adopting a common sense approach it's likely that this will have the effect of increasing employment opportunities for those who are currently unemployed, and encouraging both existing and new businesses to trade on Sundays and to employ more staff on those days.

PN26967

In conclusion, your Honours and Commissioners, we submit that a reduction in Sunday penalty rates in the Fast Food Industry Award to Saturday rate levels are necessary in order to achieve the modern award's objective, and that it will ensure that employees in that industry still receive a fair and relevant penalty rate for work on those days. Unless there are any questions, those are our submissions.

PN26968

JUSTICE ROSS: Thank you.

PN26969

MR WHEELAHAN: If the Commission pleases, I rely on the primary written submissions dated 12 February 2016, the reply submissions dated 1 April 2016, and the joint employer submissions regarding the public submissions.

PN26970

At paragraph 12 of the SDA's primary submissions they put forward the following formulation of the test, and they say as follows;

PN26971

That in order to enliven the jurisdiction to vary a modern award in the review, the Fair Work Commission must first be satisfied that since the making of the modern award there has been a material change in circumstances, relating to the operational effect of the modern award in the period since it was made, with the consequence that it no longer meets the modern award objective.

PN26972

I reject that formulation. The jurisdiction of the Commission is of course enlivened by the statute, section 156. Upon the enlivening of the jurisdiction the Commission in making a determination in this proceeding must of course make a

value judgment as to what terms in the award are necessary to achieve the modern award's objective, based on an assessment for the considerations in section 134(1)(a) to (h).

PN26973

So much was said in the preliminary jurisdictional decision at paragraph 36. The value judgment to be made by the Commission is necessarily a temporal one. Accordingly, in my submission, that review brings a fresh re-assessment by the Commission in this particular case as to the appropriate Sunday penalty rate that is necessary to meet the modern award's objective. That which is necessary as opposed to one which is desirable, in my submission, is a rate approximately twice that of the Saturday penalty rate, and not four times as it is for permanent employees presently. It is not a matter, as the SDA submits, of first finding that the modern award does not meet the modern award's objective.

PN26974

In making such a value judgment it goes without saying that reasonable minds may differ as to what terms in an award are necessary in order to achieve the modern award's objective at a different point in time, based either upon the same or different material before the Commission. Again, so much is evident at paragraph 38 of the preliminary jurisdictional decision wherein reference is made to the decision of the Federal Court Tracey J in Shop Distributive and Allied Employees Association v The National Retail Association Number 2.

PN26975

In that case, Watson VP on the first occasion was met with an application to amend the award with respect to the number of hours for the minimum hour engagement for casual employees, on the first occasion he rejected the application, and on the second occasion, with conditions, he granted the application. That is an illustration of the temporal nature of the current review.

PN26976

Further, different value judgments are evident in previous arbitrated decisions and I refer the Commission to the background paper dated 4 April 2016 that's been prepared by the Commission research area. Relevantly, at paragraphs 60 to 61, therein it sets out that the consideration by the Australian Industrial Relations Commission in 2010 and the determination to retain a 200 per cent penalty rate was on the basis of a critical mass argument across awards in Australia and the quote therein, which your Honour took my learned friend, Mr Izzo, to where it said where there is significant disparity in those terms and conditions we've attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit.

PN26977

Those arbitrated decisions and the different value judgments made by other industrial Tribunals are evident and illustrated, for example, at paragraphs 37 to 38 of the background paper. Relevantly in New South Wales it is there and stated that the penalty rate was 150 per cent, and where there was an application by union parties to increase it to 200 per cent, at paragraph 38 it's noted that that claim was rejected and that the New South Wales Industrial Relations Court found

a conclusion to reject that as irresistible. I put that again as an illustration that, in a temporal way, reasonable minds may differ as to the appropriate penalty rates.

PN26978

As to the fixing of the 200 per cent rate in the award simplification process the background paper, if I can take you to paragraphs 41 to 42 in 1999, and therein the quotation from Commissioner Hingley, and what I draw your attention to is at that time as a basis, in Victoria at least, for retaining a 200 per cent penalty rate, he took into account the need for protection from the requirement to work extreme or unsociable hours notwithstanding the penalty rates entitlement. In my submission, the modern purpose of the Sunday penalty rate is not to deter the employment of persons or to protect employees from working on a Sunday. In that regard I note the submissions of the SDA at paragraph 40 are consistent with that proposition.

PN26979

As your Honour noted with Mr Izzo, in this case, the employers have put forward merit arguments to support their position as to what is necessary with respect to a Sunday penalty rate to be in the award, and there are three main positions put: the first one is about proportionality and, that is, that the current proportionality of a Sunday rate being multiple times that of Sunday is not necessary in the modern award. The second main support for that submission as well is the limited difference between Saturdays and Sunday. Now, we've addressed that in detail in the written submissions. There are parts S, part P of the primary submissions, and Mr Izzo's submissions, and Mr Rauf's oral submissions I adopt as well in support of that. The third reason put by me is the reduction in penalty rates, as I said, is likely to lead to an increase of employment hours and persons in the retail industry and the evidentiary support for that proposition is in the primary submissions at part K paragraphs 87 onwards. And an analysis of that evidence by the SDA has further been - as an annexure, and I won't go through the detail, but annexure A to the reply submissions.

PN26980

Your Honour, I'm content to rely on the written submissions in support of the merit arguments and note that our case is aligned with Mr Izzo's oral submissions. As the Commission pleases.

PN26981

JUSTICE ROSS: Can I just take you to, in your reply submission, paragraphs 10 and following. This is your response to the SDA's proposition that work be voluntary.

PN26982

MR WHEELAHAN: Yes.

PN26983

JUSTICE ROSS: I note your submission, in your initial submission, at paragraph 106, that you say that retail employees will continue to work on Sundays if the penalty rate is reduced in a way that's consistent with your submission. And it seems to be inherent in your argument that there's no real difference, employees don't mind, and I'm doing this as a broad sweep, perhaps, don't take offence there.

PN26984

MR WHEELAHAN: Yes.

PN26985

JUSTICE ROSS: That the employees don't have a marked preference; the reliance on Rose; the reliance on some of the employee direct evidence, et cetera.

PN26986

MR WHEELAHAN: And Dr McDonald herself.

PN26987

JUSTICE ROSS: Indeed.

PN26988

MR WHEELAHAN: In the survey evidence.

PN26989

JUSTICE ROSS: Yes. Yes.

PN26990

MR WHEELAHAN: Yes.

PN26991

JUSTICE ROSS: And understand the particular history of the retail awards and where the voluntary idea came from, but in your submissions, and in those of ABI, you take up the point, I think, from the Sands report, that you advance or acknowledge the force of the proposition that the inconvenience or however one phrases it as inconvenience or disability associated, there is one associated with working on weekend work, but that's not necessarily the case that it's higher on Sunday for all employees.

PN26992

MR WHEELAHAN: Yes.

PN26993

JUSTICE ROSS: There's an acceptance that it may be higher for some employees but not for all.

PN26994

MR WHEELAHAN: Yes.

PN26995

JUSTICE ROSS: And it's the "some employees" I want to go to for the moment, and if you deal with this issues of – and I suppose I'm linking different concepts here. In ABI's submission, one of the points they advance in support of a reduction in public holiday penalty rates is the shift in the Fair Work Act, namely the provision in section 114 that an employee may refuse, on reasonable grounds, to work on a public holiday. I'm para-phrasing the provision, but that's the essence of it. And you may want to give this some thought, and Mr Izzo may want to as well, and it might be something that the employers generally might wish to discuss over the adjournment as to how they – and if you seek more time to respond, that's entirely fine, but there may be a midway between what the SDA

is putting, and in making this observation I don't want you to make any assumptions about likely outcomes.

PN26996

MR WHEELAHAN: Right.

PN26997

JUSTICE ROSS: But a midway point may be perhaps not the prescription of voluntariness in the terms that it was original described in the, I think it was the, interim retail award, but rather there would be a right to refuse to work on a Sunday on a similar basis to that articulated in section 114, which is a more confined proposition than saying it's voluntary. I invite you to think about and also think about how you might respond to it, whether it's in writing subsequently, what period you would need et cetera. Because I had some difficulty - I understood the reaction to the voluntariness proposal but the 114 proposal is differently cast, if I can put it that way, and also it does seem to accord with the other submissions you advance in support of the various propositions.

PN26998

That is you say relying on the experimental evidence that while employees would accept work at this level, that is the reduced level, this is - I'm leaving aside from this the hospitality award matters because they have more clearly articulated that for them it's an attraction rate, if I can put it that way. But that's not the case advanced by the other employers. It's rather put well employees don't mind largely and it may suit some of them, and we won't have any trouble getting people to work at that rate.

PN26999

Now if one accepts all that, and you also accept the proposition which each of you seems to accept, that working on a Sunday may provide particular inconvenience or disability for a relatively small group of employees, an issue that might arise is how does one deal with that relatively small group of employees. Now SDA's put to you that whilst maintaining their position in relation to no reduction, they're putting the voluntary proposition and in raising the 114 I simply didn't want the debate to be confined to some binary position; you're either voluntary or you're not type of thing.

PN27000

Can you give that some thought, Mr Wheelahan, and see where we - - -

PN27001

MR WHEELAHAN: Yes, your Honour, I can say that of course I took you to the example of Watson VP declining a claim at first instance and at second instance he granted it with conditions. Essentially what you've put to me is to consider well, if we were to grant your claim with conditions, on my feet what you've put is quite a significant matter. I think for my clients they would certainly want some time to put something in writing.

PN27002

JUSTICE ROSS: No, no, no, that's fine and I entirely understand that and your colleagues are probably in much the same position.

PN27003

MR WHEELAHAN: Yes.

PN27004

JUSTICE ROSS: Speaking for myself, it would certainly assist me if you were able to confer and perhaps come with one - well at least one document, if not one view, because it might be - and look, there might be differences between the different sectors, I don't know. But it seems that the point's only raised in retail in this sort of stark way, and I raise it because it - as you say, in other cases propositions have been modified or been granted on a particular, perhaps more confined basis or with conditions, and I didn't want us to be endlessly coming back, I suppose, there's that consideration.

PN27005

MR WHEELAHAN: Yes. Well given that new matter that's been put to us, I think I'd like to take it on notice and reply in writing.

PN27006

JUSTICE ROSS: No, no, certainly. Well perhaps if you can discuss with the others and see what time period you need, and talk to the union parties. Bearing in mind we've got the other issue of the joint employer response to the public material, that might be - see if you can come up with a timetable that embraces all of it really.

PN27007

MR WHEELAHAN: I will, your Honour.

PN27008

JUSTICE ROSS: Thank you. Mr Dixon, do you have an idea as to how long you might take? I'm not - I don't raise that - - -

PN27009

MR DIXON: No, no.

PN27010

JUSTICE ROSS: I'm just wondering whether it's envisaged that the unions would go on immediately or would start on the Wednesday, or if there had been any discussion at all between the parties about that.

PN27011

MR DIXON: My learned friend has asked me what my present estimate is, your Honour, and I thought probably one and a half to two hours.

PN27012

JUSTICE ROSS: Right.

PN27013

MR DIXON: Subject to clarification of any matters that arise. But I would have thought that our learned friends would have ample time given that I'm last in this group.

PN27014

JUSTICE ROSS: No, no, certainly. It was more if you were going to be 20 minutes, I was wondering whether it was envisaged the unions would start after lunch, or whether we're sticking to the original program. But that doesn't seem like that's going to be a problem.

PN27015

MR MOORE: I think, your Honour, Mr Dowling and I had a conversation about that in the event that we found ourselves completed early to mid-afternoon with the employers. We would seek the opportunity to break and then resume tomorrow. There's a fair bit to consider.

PN27016

JUSTICE ROSS: That might also provide the employer parties with an opportunity to consider the matter I've just raised and appropriate timelines and those sorts of issues. We've asked for some information from the Restaurant and Catering Association as well. Let's see how we go. Sorry, Mr Dixon.

PN27017

MR DIXON: May it please the Commission. Ai Group in respect of the Fast Food Industry Award relies on the written submissions dated 5 February 2016 and their reply submissions dated 1 April 2014. We intend if the Commission has those submissions available, not to repeat the submissions orally but simply during the course of our submissions to take you to some aspects of those submissions, because in doing so it will, in our respect submission, capture the essential issues that are at issue between the unions and Ai Group.

PN27018

We have also provided a folder of documents of extracts and material which facilitate the submissions that we make, and copies have been provided to our learned friends. May we draw attention as a start to the first of the documents, which is a matter which was dealt with yesterday and the Commission will see behind tab 1 there is exhibit SDA56. The significance of this aide memoire is that it contains some agreed facts. May I just mention on page 2 of the aide memoire that the document described as item 3 is now AIG26 and number 4, Australia's Welfare is AIG27. We will be dealing with those in due course.

PN27019

But it's the agreed position on page 3 of that aide memoire that is the starting point really from a statistical point of view as to what we deal with, and the Commission will see in paragraph 3(b) that the fast food industry is estimated to comprise 24,564 fast food enterprises, and that the fast food industry is estimated to employ 214,265 persons.

PN27020

JUSTICE ROSS: What's the definition of enterprise for that purpose? For example, is each separate McDonald's outlet an enterprise?

PN27021

MR DIXON: Yes, that's our understanding. The Commission would then appreciate that the changes sought on the part of the Ai Group is firstly that the

starting time for evening work penalty move from 9 pm to 10 pm, and this is set out in summary form in paragraph 5 of our submissions.

PN27022

JUSTICE ROSS: Sorry to interrupt, Mr Dixon, but can I take you back to SDA56. I'm not sure where we left the last item, the letter from the Chamber of Commerce & Industry, Queensland, because it's more - that seems to be more putting the proposition - I don't know - - -

PN27023

MR DIXON: This was a joint submission but I'm not sure what our learned friends - - -

PN27024

JUSTICE ROSS: So the letter from CCIQ of 29 June2015 is not objected to being received, but on the basis that it be regarded as a submission only. Do I take it there's no opposition to that course from anyone?

PN27025

MR DIXON: No.

PN27026

JUSTICE ROSS: All right, thank you.

PN27027

MR DIXON: Can I then just turn to the nature of the changes, sir? Firstly, starting time for evening work penalty move from 9 pm to 10 pm - - -

PN27028

MR BREHAS: Excuse me, your Honours, apologies for interrupting. Sorry, I've lost sound again in Melbourne.

PN27029

JUSTICE ROSS: All right. We might stand down for five minutes. I'm sorry, Mr Dixon.

SHORT ADJOURNMENT **[12.26 PM]**

RESUMED **[12.32 PM]**

PN27030

MR DIXON: If the Commission pleases. I was just outlining the changes sought. Starting time for penalties in the evenings, the first one; secondly, to reduce the level of Sunday work penalty from 50 per cent to 25 per cent for full-time and part-time employees, and thirdly, to reduce the level of a Sunday work penalty from 75 per cent to 50 per cent for casual employees inclusive of the casual loading. The Commission will appreciate that the Ai Group is seeking to equate the level of Sunday work penalty to the level of Saturday work penalty.

PN27031

There are essentially two areas of contest between the Ai Group and the unions in the written submissions that directly relate to the fast food industry. The first is

that - and you've heard submissions about this - there must be material change, and the second issue is that the Ai Group's evidence is deficient in that it is limited to McDonald's and Hungry Jacks employees and therefore is not representative of employees in the fast food industry. I'll come to deal with those in a moment, but we may we simply by reference to our written submissions point out what Ai Group says in relation to the nature of the review.

PN27032

We've dealt with that in our prime submissions at paragraphs 27 to 35, but it's the reply submissions which perhaps are more pertinent and that is at paragraphs 3 to 4 and may we ask the Commission to turn to those submissions where we only want to emphasise one aspect. The Commission will see in paragraph 3 we've dealt with the nature of a review, and it is our respectful submission, contrary to what is put against us, that in carrying out the review it is incumbent on the Commission to examine whether: (a) the fast food award, in its current terms, is achieving the modern award objective; and, secondly, and this is an important element, whether the fast food award, in its current terms, provides more than necessary, to achieve the modern award objective.

PN27033

In our respectful submission, the review can readily, on the present case put forward by the Ai Group, come to the conclusion that in relation to the matters which we identify the terms are more than necessary to achieve the modern award objective. The Commission then also, of course, has the power to vary the fast food award if it is not meeting the modern award objective in either of the ways that are set out in subparagraph (a) and (b), and then it needs to assess whether the proposed variation meets the modern award objective.

PN27034

Now, on the question of material change, we've dealt with that in our primary submissions in paragraphs 16 to 26, and in our reply submissions at paragraphs 6 and 7. May we just very briefly encapsulate what we've said there. In our respectful submission, the suggested requirement of material change or significant change in circumstances since the making of the modern award is the wrong test. It does not reflect the language of the Act, does not reflect the scheme of the Act, and introduces words of limitation into section 156, and we say is contrary to logic, and we've dealt with that in our submissions at paragraph 17(b) and 20, and in our reply submissions at paragraph 6.

PN27035

We note, for the Commission's record, that retail employers, the Australian Retailers' Association and Master Grocers of Australia and the Retail Council, and the National Retail Association join in that submission. It's the retailers' submission, paragraph 7, and the retailers' submissions in reply at paragraphs 2 and 4. We also note that the accommodation employers, the Australian Hotel Association and Accommodation Association join in the submission. That's in paragraph 12 of their submissions, and, finally, that the Restaurant & Catering Industry join in the submission. In our respectful submission, the union submission is inconsistent with the approach of the Commission in the preliminary jurisdiction decision, in the penalty rates decision, and in the RACV decision.

PN27036

Now, there has been, in that regard, some emphasis placed on, by the retail employers, the fact that there had not been a contested issue in prior proceedings in relation to other awards but we note that and submit that there has not been a contested issue in prior proceedings related to the fast food award for Sunday versus Saturday rates. And in reality the earlier contested issues relating to the fast food award was the abolition of weekend penalty rates. To our knowledge, if the Commission pleases, there has never been a case where the Commission or a previous Tribunal has been presented with evidence of the modern day profile characteristics and working conditions of the workforce in the fast food industry and certainly not at the level which we endeavour to present to the Commission in Ai Group's evidence.

PN27037

The second issue which is the contest about the profile and characteristics of the workforce really relates to the contrast which Ai Group seeks to present to the Commission and the differences between the profile and characteristics of the workforce, the subject of early Tribunal decisions, such as 1919 and following and working conditions and the modern day profile and characteristics of the working conditions of the fast food industry and we respectfully submit that the contrast and differences are fundamental.

PN27038

In order for the Commission to follow that submission, it may be if I simply just take you to our original primary submissions and the Commission will see that at about paragraph 42 we set out, in summary form, the requirement to pay a penalty reflected the typical employee at the time; married male with family working initially 48 hours and then later 44 hours and later 40 hours Monday to Friday. And we note the reduction in hours effected by those orders. And we also note the significant reduction in the number of employees working typical hours Monday to Friday has reduced.

PN27039

And then what we have set out to do, and the Commission will see that, starting in the section headed (H) Employees in Australia in Current Times, we have set out the evidence available about employees generally and then employees aged 15 to 24 years, and then, under H(iii) employees in the accommodation and food services industries, and in the heading (I) Employees in the Fast Food Industry.

PN27040

I don't, at this stage, propose of course reading the submission and statements of the evidence in paragraphs 60 and following, but we'll deal with that in evidence in a moment, but what it leads to, as the Commission will see, is based on what is set out in paragraphs 60 through to paragraph 83 and then 84 and 85, one arrives at the position that is set out at paragraph 86.

PN27041

And at paragraph 86 is a statement of the characteristics of the typical employee in the fast food industry, and, in our respectful submission, based on the evidence that is summarised in the earlier paragraphs, the characteristics set out in paragraph 86 are the characteristics representative of 86 per cent, and I'll be

coming to deal with that proposition in a moment, of the fast food industry as a whole. And, secondly, we submit, as you'll see in paragraph 87, that based on the McDonald's and Hungry Jack's data 78 per cent of employees working for McDonald's and Hungry Jack's on a Saturday work between one and six hours. And the typical crew member of McDonald's in a corporate store working an average of 5.3 hours on a Saturday, and then you'll see 80 per cent in relation to a Sunday.

PN27042

Now, the contest really is that it is suggested that because the survey, which I'm coming to, only concerned McDonald's and Hungry Jack's the Commission cannot regard the typical employee in the fast food industry in the manner in which we have set out in relation to those characteristics.

PN27043

In that regard we wish to take the Full Bench to the evidence supporting the profile and identify characteristics of the fast food employee. In the first instance we find the evidence of Ms Deasy, which is behind tab 2 of the bundle, and that is exhibit Ai Group 11, and the Commission will recall that Ms Deasy was responsible for analysing the data of the survey carried out of McDonald's employees and the Hungry Jacks' employees. In her report which is - and I'm going straight to page 18.

PN27044

JUSTICE ROSS: Large 18 or the - - -

PN27045

MR DIXON: I'm just checking that if I may. Yes, your Honour, at the bottom, under "Key findings". The Commission will forgive us if we don't take you to all of the material because every proposition, I think, is - we rely upon and I just want to highlight some and also illustrate the extent to which she went through and the conclusions that she drew.

PN27046

So you will see under "Demographics" starting at paragraph 6 that most commonly employees are aged 15 years old, while 54 per cent - sorry, 24 per cent - while 54 per cent are 16 years or younger and 81 per cent are younger than 20 years. You'll see in relation to the position of those who are married, those who - yes, across the page at paragraph 8, and then those who live with one or both parents, paragraph 9. We've obviously summarised all of this in our written submission.

PN27047

She then deals with students and that you will see is a very high percentage of students who are full-time students and that's in paragraph 12 and following. The working arrangements are clearly relevant and you will see from paragraph 17 that two thirds of employees are employed casually, while only 4.7 per cent are employed as permanent full-time employees, and 20 per cent are employed as permanent part-time. You will see that commonly employees work one to 10 hours per week, 49 per cent. 82 per cent work 20 hours or less per week and 7.1

per cent work 31 or more hours per week. 95 per cent of those who are employed as permanent full-time work 31 or more hours per week.

PN27048

Under "Work day preferences" which start from paragraph 26 and following, I just wanted to highlight a few matters. You will note in paragraph 31 that for those who indicated a preference to work weekends, either as a mix with weekdays or weekends only, most prefer to work both Saturdays and Sundays. That was 44.7 per cent. While 28.6 per cent prefer Saturdays only and 26.7 prefer Sunday only. As to whether they would prefer to work more hours, that's dealt with in paragraph 32. Then there's a breakdown in some of those statistics.

PN27049

In paragraph 33, she deals with the correlation between the interest in working on Saturdays if offered and she says it's highly correlated. Younger employees are more interested than older employees, 79.1 per cent of those aged 14 years and younger are interested in more Saturday hours, while 50 per cent are interested in more Saturday hours. Students of any type, this is paragraph 34, are more interested in more Saturday hours around 74 per cent, and if the Commission just compares that with Sundays, which is in paragraph 37, the Commission will see students of any type are more interested in more Sunday work hours, around 73 per cent.

PN27050

If one looks at - going back to paragraph 34, that was - 74 per cent was for full-time and part-timers and then in relation to casuals, this is paragraph 35, are more interested in more Saturday hours, 74.8 per cent, compared with permanent full-time and if you compare that with Sundays, paragraph 38, you'll see that's 73.5 per cent. So there is a very significant correlation and minor differences in relation to those preferences or interests in working on more Saturday and more Sunday hours.

PN27051

In relation to those who indicated a preference to work Saturday, you will see from paragraph 39 at the bottom of page 20, and then across the page to the top of page 21, the most common reasons, more than 30 per cent choosing a reason for choosing Saturday over Sunday where the employees prefer to spend time with their family on Sundays, 48.2 per cent and because of study commitments on Sunday, 40.7 per cent.

PN27052

If you look then at - sorry, that was for a Saturday. Paragraph 39 deals with Saturday and paragraph 40 deals with Sunday, and again the Commission will see from what is at the end of paragraph 40, more friends are available to socialise with Saturday rather than Sunday, that's 50.4 per cent. Sporting commitments, et cetera.

PN27053

Then the report deals with working on a Saturday and this section deals with commonly worked hours, whether there is any impact from working on a Saturday. You'll see that's at paragraph 42, and 43, the degrees of impact vary

minimally across the age ranges, except for those aged 14 or younger. Paragraph 44, vary minimally across all living arrangements, then in paragraph 46, in terms of the working hours on a Saturday, 67.1 per cent of those working one to three hours report no positive impact while 53.4 per cent working four to six hours report no positive impact. Conversely, 58.1 per cent of those working seven to nine hours report some or a lot of negative impact and 74.4 per cent of those working more than nine hours report some or a lot of negative impact.

PN27054

You will note also at 48, for example, that a high percentage, 75.9 per cent of those working on a Saturday work a similar shift some, most or all of the time. Then that analysis is repeated in respect of a Sunday, and I don't want to go through every one of the paragraphs, other than to try and assist the Commission by looking at the comparison between the Saturday and Sunday.

PN27055

In paragraph 56 on page 22 which deals with working on a Sunday, if one looks, that is being compared to Saturday so that in terms of working hours on a Sunday 68.9 per cent, that compares to 67.1 per cent for a Saturday, report no or positive impact. The 55.8 per cent on a Sunday is compared with 53.4 per cent for a Saturday. That in the second sentence, conversely the 59.8 per cent working the seven to nine hours as compared to 58.1 per cent on a Saturday and the impact for those working more than nine hours the 66.4 per cent, the impact on a Saturday is 70.4 per cent. So it's clear that either there's very little change, and for those working longer hours the impact from working on a Saturday was actually greater than working on a Sunday.

PN27056

And if one looks then at paragraph 59, which deals with those working regular shifts some or all the times on a Sunday start their shifts before midday, that's 57.6 per cent compared to a Saturday which is 56.6 per cent. 51.5 per cent start between 6 am and 11 am. That's compared to 51.3 per cent on a Saturday and only 8.6 start the Sunday shifts between 6 pm and 11 pm and that's compared to 10 per cent for a Saturday. So from the working hours and impact the Commission will see from that analysis that there is very little difference. If anything Saturday has a gradual impact in some respects than Sundays.

PN27057

The report then deals with work day/evening work. That's at paragraph 64 and following. And I'll leave that to the Commission to consider at a later stage. The other information deals with matters such as spending time with friends, spending time with family, computer games, et cetera, which is dealt with at paragraphs 68 and following. And the Commission will see this also deals with transport. There's no issue really that there's no transport differences available. It's interesting on the screen time, in paragraph 71, when analysed by age rate the amount of screen time per week increases steadily until 21 years. It peaks at 21 years with 27.5 per cent having 15 hours per week after which it declines. And in relation to religious service that's dealt with at 73, and 74 deals with those thinking that they may have a career, 16.2 per cent in the fast food industry.

PN27058

Is that a convenient time, if the Commission pleases?

PN27059

JUSTICE ROSS: It might also be convenient just to raise a couple of short questions. I'd hate Mr Gotting to be idle during the lunch break. The first, you said paragraph 94 of your initial submission, that reference to the Limbrey first affidavit, you might check that because that didn't seem – I might just have been misreading it but I wasn't sure that that supported the proposition. And also I'm not sure what the relevance was of at paras 154 to 155. There's a characterisation there that in 1919 the typical Australian employee was male whereas currently at 50 per cent of female and I wasn't sure what the relevance of that proposition was. There are a couple of others, but I might take you to those when you come to them in your submissions.

PN27060

MR DIXON: If the Commission pleases.

PN27061

JUSTICE ROSS: I note that in the fast food award there are three levels. You'll recall the question I asked about - - -

PN27062

MR DIXON: Yes, I'm going to deal with that.

PN27063

JUSTICE ROSS: Yes. And I'm not sure what you would submit is the appropriate correlation between those levels in the other award but - - -

PN27064

MR DIXON: We've got that and we have some statistics which I'll come to in the statement.

PN27065

JUSTICE ROSS: That's fine.

PN27066

MR DIXON: The next one which I'm going to deal with.

PN27067

JUSTICE ROSS: All right. Thank you.

PN27068

MR DIXON: As the Commission pleases.

PN27069

JUSTICE ROSS: 2.15?

LUNCHEON ADJOURNMENT **[1.00 PM]**

RESUMED **[2.17 PM]**

PN27070

JUSTICE ROSS: Yes.

PN27071

MR RAUF: Your Honour, I'd undertaken earlier to come back on a couple of questions that I was asked during my oral submissions. The first of those was whether there was anything indicating the proportion of employees who work within casuals level 1 and 2 and then 3 and 6. Now it appears that there's no information in the evidence which is before the Commission, I'm instructed that Restaurant and Catering Industrial may be able to obtain data if that's of assistance which we can provide if that - but there doesn't appear to be anything presently before the Commission, as to that level of detail.

PN27072

JUSTICE ROSS: Right.

PN27073

MR RAUF: The second question related to the Full Bench appeal decision and I'm instructed that to the extent that the majority in that decision arrived at this two tier approach, that wasn't the subject of any argument or submission, and it appears was also not foreshadowed, but something which the majority arrived at in its distillation. That's reflected in paragraph 138 of the majority decision.

PN27074

The position that was pursued was a general reduction across employees and that's reflected, for instance, in the separate minority judgment of Watson VP and Roberts C where they give an indication of the position pursued at paragraph 239 and then at 312 arrive at a position where there is a general reduction applied across the stream. So there's no discussion in their judgment, for instance, of any different and it doesn't appear that there was any submissions or arguments as to whether such an approach was, in the view of the parties, warranted or justified.

PN27075

JUSTICE ROSS: That answers that, thank you. Mr Dixon.

PN27076

MR RAUF: May I also be excused from this afternoon?

PN27077

JUSTICE ROSS: Certainly.

PN27078

MR RAUF: Thank you.

PN27079

MR WARREN: Similarly, your Honour, I note the matter is being streamed and I'll keep an eye out if we need to come back.

PN27080

JUSTICE ROSS: Certainly.

PN27081

MR WARREN: Thank you.

PN27082

JUSTICE ROSS: We can catch you on your phone, Mr Warren, if you - Mr Dixon.

PN27083

MR DIXON: May it please the Commission, just before we turn to the next witness, may I just draw your attention to some questions and answers of Ms Deasy, which you'll find behind tab 13 of the bundle which we handed over this morning. It's an extract of the evidence and there are just a handful of paragraphs to which we wish to draw your attention.

PN27084

The first one is PN19323, which appears on the first page about the fifth item down. That's in relation to whether there was bias. Then on the next page in re-examination, starting at paragraph number 19330, the first question to Ms Deasy was in relation to what she'd been asked about pooling her analysis, a reference to combining the McDonald's employees' responses with the Hungry Jacks' employees' responses. She's asked to explain her response in paragraph 19331, and the Commission will see that she gave evidence there that she carried out a statistical analysis using some software. You will note her evidence towards the end of that paragraph, that she was actually stunned as to how similar they were and she says;

PN27085

It was like I'd done the survey the same, used the same people to answer both of them for nearly all the questions.

PN27086

That of course is an important bit of evidence when you consider the representativeness of this evidence to the industry. If one separate company's employees in the large group responded in that way and then - - -

PN27087

JUSTICE ROSS: I'm not sure I follow how you can extend the argument in that way. It certainly shows a similarity in relation to the employees of Hungry Jacks and the employees of McDonald's. How do you extrapolate the point more broadly, to the industry generally?

PN27088

MR DIXON: Well, if the Commission accepts Dr Pratley's evidence that the survey was in relation to characteristics, representative of 86 per cent of the population, a point which I'll come to, then in my respectful submission that can be reinforced by the two - - -

PN27089

JUSTICE ROSS: I follow that argument. I'm not sure that Ms Deasy's evidence takes you that distance, that's all.

PN27090

MR DIXON: No, no, I'm not - I'm saying it reinforces Dr Pratley's evidence and it reinforces other evidence, which I'll come to in a moment, about similar

behaviours and - sorry, similar characteristics of employees wider. But may I come back to that, if your Honour pleases.

PN27091

JUSTICE ROSS: Certainly.

PN27092

MR DIXON: Your Honour will see at PN1933 she recognises the similarities in response to behaviours and opinions, namely screen time and religious activity. One almost had exactly the same percentage results. Two separate companies, two separate groups of employees and if you then look at, as we come to now when we eventually come to Dr Pratley's evidence where he's identifying the larger groups and he talks about the representativeness of this group more generally, I would ask you to bear that in mind.

PN27093

The evidence then of Ms Limbrey, which is behind tab 3, exhibit AIG3, she really deals with the nature of the McDonald's operations; employees, franchisees and the like, and you will note that her evidence about the types of restaurants and the like start at paragraph 6 of her statement; freestanding, café court, in store restaurants and also then you will see earlier that, paragraph 4, as at 19 May there were – this is 19 May 2015, there were 943 McDonald's restaurants in operation. Of that number 165 were McOpCo restaurants and 778 were operated by franchisees so that's the distinction.

PN27094

And, again, I don't want to be taking up too much time but I do just want to highlight some aspects, or indicate to the Commission how her evidence is all put together. Hours of operation starts at paragraph 8 and it deals both with the McDonald's restaurants and it deals with the franchisees later. When you go to sales, the average sales starting at paragraph 10, and come to paragraph 11(c), which is one of the paragraphs I think your Honour asked us about before lunch. That paragraph goes to the fact that the gross sales for the period Friday to Sunday inclusive is higher than the rest of the week, and, of course, the higher demand from customers for services over that period. That's what was intended by that submission.

PN27095

You will recall the evidence about the Metime system, where the employees have the option of putting in their preferences and availability and one then comes to the characteristics of people employed by McDonald's Australia Limited and its franchisees starting at paragraph 23 on page 6. And the Commission will see that in a combined way the McDonald's restaurants and its franchisees, in combination, employ as at 19 May 2015, 98,911 employees, and bear in mind, as a percentage total of the entire workforce, which is identified in the aid memoire, that is a substantial proportion of the overall workforce.

PN27096

What flows from paragraph 24 and following touches, your Honour, the presiding Members, on the question that you asked us earlier. The evidence about numbers on classifications is confined to McDonald's but it does give the Commission an

indication by reference to the McDonald's enterprise agreement of 2013. In paragraph 24 the Commission will see there's a reference to agreement levels to agreement level 3 and agreement level 4. When one looks at those it's our respectful submission that they reflect - level 2 in the agreement reflects level 1 in the award. Level 3 represents level 2 in the award and level 4 level 3, and just for convenience for the Members of the Bench, we have the schedules to the two instruments if I may hand up. Thank you.

PN27097

JUSTICE ROSS: Is there a McDonald's employee level 1 classification?

PN27098

MR DIXON: Not in the agreement. But if one comes back then to paragraph 25 of Ms Limbrey, the Commission will see that, by reference to the award, accepting that analysis that we put forward.

PN27099

JUSTICE ROSS: Yes. No, I follow that.

PN27100

MR DIXON: That 91,000 employees are employed within the level 2 classification, and although it's confined to McDonald's, it would represent 42.5 per cent of the total number of employees in the industry being 214,265. And the percentages at level 2 and level 3 are very small in comparison. And then there's a breakdown of employees employed directly by McDonald's in the next paragraphs. The Commission will then see, in the following paragraphs, there's a breakdown of whether employees are male or female. Employees directly employed by McDonald's, females are 51.23 per cent, higher than the males obviously, and for franchisees, paragraph 29 on page 7, to the same effect. And then - - -

PN27101

JUSTICE ROSS: So 26 and 27 are just the split of numbers in paragraph 25 by those employed directly and those by franchisees?

PN27102

MR DIXON: Yes. And those numbers add up.

PN27103

JUSTICE ROSS: Yes.

PN27104

MR DIXON: Yes. And then paragraph 30, the Commission will see the number of employees of McDonald's that are employed directly, who are casual and part time and then, in 31, the McDonald's franchisees employed on a casual, part-time and full-time basis are 59,995. And in each case the combination, of course, is a substantial portion of the overall McDonald's number which are a substantial portion of the industry.

PN27105

Her statement then deals with the age breakup of the relevant employees. I don't want to take your time, other than to show the Commission that the employees, this is at 35, at 19 May 2015, the ages of employees of McDonald's franchisees are set out in that table, and in paragraph 41 and following, by reference to the same split, directly employed and then franchisee employed, you will see a breakdown of the length of service of casual employees or part-time employees, and the formula is repeated. Then at 43 there is a breakdown from the payroll department of the number of hours worked per week for all full-time, part-time and casual employees employed directly. That's on page 12.

PN27106

JUSTICE ROSS: Yes.

PN27107

MR DIXON: And the Commission will see that the statistics demonstrate that the hours worked are relatively short periods over a period of any week. She then deals with the way in which the number of employees have increased over time, and in paragraph 54 and following, under the heading: First Way, and there is a description of the recruiting process and the employees making themselves available, giving them a preference as to when they work at paragraph 64 and following.

PN27108

The Commission will then see - starting at paragraph 73, there is a breakdown of work preferences of 14-year-old employees, and that is then repeated for every year by casual employees and then later part-time employees, leading to the situation where Ms Limbrey says at paragraph 164 on page 40, she provides a summary of that analysis and that appears at the top of page 41, the availability by age, weekdays and weekends, and then availability for casual employees, part-time employees and full-time employees.

PN27109

The statement then, at page 42, under the heading: Weekdays after 8 pm, I just want to draw attention to availability after 9 pm in subparagraph (l) on that page the Commission will see the availability dropping slightly of employees from what is set out in (j), but between 9 and 10 there is still substantial availability of the employees by reference to age to work between 9 and 10 on those days. The balance of her evidence deals with the absence of health and any issues and a breakdown of employees who might be described as career or non-career employees. That's dealt with at 180 and following.

PN27110

Can I then ask the Commission to turn to the evidence of Dr Pratley, and that appears behind tab 5? And you will recall that Dr Pratley gave two reports; the first one was responded to by Ms Bartley, and then he provided a separate report on 3 November 2015 which responds to the Bartley report and deals with some of the issues that he had dealt with previously but in a modified way. The Commission will see there's an executive summary at page 40 of 60 of that report, and it is that he says, having looked at the survey sample, and at paragraph 6 at the bottom of the page, it says: "My opinion is that the sample is representative to the major chains" - which he deals with later - "greater than 50 stores that operate

24/7 in the fast food industry", and he sets out his other opinions in summary about the reasonableness of the representative nature of the sample "to major chains that do not operate 24/7;" he says that it is representative. In (h) it's his opinion that the sample only has "limited representatives to the minor chains", and "9) it's my opinion that the sample would have very limited representation of independence in the food industry."

PN27111

And then in relation to the manner in which he arrives at those conclusions, the Commission will see at section 4.2 he looks at the suitability of data collection, he deals later with the concept of convenience sampling, and he disagrees at 81 in relation to the survey response or non-response rate with Ms Bartley and that there was any issue about that, and he goes on to deal with that at 4.5.2. He says at 101 on page 50 that:

PN27112

In the Bartley report no evidence is presented of a specific reason for bias. The low response rate is discussed extensively. There is no causal link between the response rate and one or more factors that would cause bias mentioned in any of those paragraphs.

PN27113

He looks then at 4.5.3 at assessing the bias in the sample, and he looked at the two places, the age of the employees and the location of the employees, 111, and he says that there was some adjustment required but he rejects the concept that there was bias within that sample representation. He rejects the idea that it was necessary for weighting, and then at 4.10 he comes to deal with his conclusions of representativeness of the sample to the sampling frame and he says there's no evidence of bias in the sample, and he draws those conclusions, the reasons for that, at 152.

PN27114

He then goes at 4.11 to look at the population as a whole and the Commission will see there he's relying on the figures that are in the aide memoire, the 214,265, and that the combined employment within McDonald's and Hungry Jacks being 114,765. He looked then at material from the Food Industry Foresight Fast Food in Australia report and identifies three main types of stores, major chains greater than 50 stores, minor chains less than 50 stores but great than 15 stores, and independents, and he then goes on to consider - he says he has given, based on that report and his knowledge of the industry, he breaks them down into the four categories in 159.

PN27115

That breakdown appears on page - the details of those major chains of more than 50 outlets appeared on a confidential table and that confidential table identified the names of those major players and their employee numbers, but you can gather from paragraph 167 that a range of the other chains, that he had under consideration, and then sets out a table on page 58, which demonstrates that those employers in those chains had converted the analysis of 184,315 employees, and so that Dr Pratley then, at paragraph 171, says that nine companies represent approximately 86 per cent of all employees in the fast food industry.

PN27116

And he goes on to say that given that there was no bias it's his opinion, in 172, that the results of the survey would be representative of all other employees in organisations in the major chains that operate some stores 24-7. And he then goes, breaks down, and does the same analysis in respect of those that do not trade 24-7 and you'll see at 174 he says that it is representative in that category in relation to the minor chains, at 175, he says only limited representativeness, but the minor chains, of course, fall within the difference between 214 and 184. And he says very limited representativeness of independence which leads him to his conclusions set out at 178 and 186.

PN27117

Dr Pratley was cross-examined and it's behind tab 16 of the bundle that we handed up this morning; an extract of his cross-examination. On the second page at PN21604 he's asked about paragraph 175 of his statement, to which I've just taken you to, and I just draw attention to what he said in relation to that paragraph and the four paragraphs that follow. And then at PN21619 he's asked a question about the – he poses the question back:

PN27118

Is your question you're asking is given those two companies that were selected, how were they similar and how were they different to other companies that are included in the fast food industry?

PN27119

We draw attention to what Dr Pratley said at PN21620 and PN21660, and also at PN21660 and PN21661 on the last page of that extract. And just to conclude in that respect may we draw attention to what we say in our reply submissions at paragraph 15 on page 8 of 16 where we emphasise that contrary to what is put against us it is permissible, on the evidence, for the Commission to find that representativeness of the data as to the characteristics of the employees more generally and that the Commission should reject the proposition that our description of a typical employee in the fast foods industry cannot be sustained.

PN27120

In relation to the survey, the Commission would no doubt have observed or will observe that there's no criticism of the Ai Group survey in the union's written submissions of the kind levelled at some of the other surveys, allegations of response bias or allegations of outside influence. Now, that's not the only evidence, of course, before the Commission of the characteristics of which you are entitled to take into account. The evidence of the Ai Group survey or derived from the survey finds support from other sources and there are a range of other sources. Firstly, data from other published material, and, secondly, from some of the experts called in these proceedings. The first is the document behind tab 7, the State of Australia's Young People, a publication of the Australian Government Office of Youth, and it's a publication in October 2009. It's a report on the social economic health and family lives of young people. The Commission will see on page 196 the research centre team is set out there and the authors. And this publication, which is based in part of ABS data and deals with young people and the number of young people, particularly between the age of 12 and 24, you'll note at figure 4.2 on page, in the bottom right-hand corner, page 26 of the report that it

looks at the number of young people by State or Territory. And of those young people are most likely to live in New South Wales, Victoria and Queensland. Who do the young people live with? Again, under 4.3, about 28 per cent of all households live with their parents, but living arrangements differ dramatically.

PN27121

Then at the very bottom of page 218, you'll see that two in three 12 to 19 year olds live at home with two parents and a further 20 per cent live with one parent; contrast to a much lower proportion of young people aged 20 to 24 live at home with two parents; a further 10 per cent living with the lone parent. And in relation to the conclusions at page 224, paragraph 32 of the report, there are key points which I just invite the Commission to have regard for. You'll see, for example, some of the points I've already touched on, but at about half-way down almost 79 per cent of young people remain in the parental home at least until they are 24 years of age.

PN27122

So that was a position summarised. Then that report also looked at working hours at 235, page 43 of the report. And I just invite the Commission to pay regard for what is said at the top of that page and then the second paragraph. And in relation to casual work, on page 236, page 44 of the report, you will note the observation under the heading, Casual Work:

PN27123

Surprisingly considering high levels of casual employment young people rate their job security very highly but expressed a lower level of satisfaction with their pay.

PN27124

And under Activities, 264 you will see, towards the bottom of that page, page 72 of the report, how young people spend their time.

PN27125

In relation to religious affiliation that's dealt with at page 280. And this is consistent with the other evidence which the Commission has seen about a decline in religious affiliation or religious attention because the importance of religion is set out in the table based on HILDA source at figure 10.2 on page 281.

PN27126

Further support can be found in a separate publication, which is behind tab 8, and that's exhibit AIG27. Yes. And the Commission will find in the first part of the bundle the facts upon which Ai Group stated it intended to rely which come from that report and, again, they provide further support for the conclusions that one can draw from the survey conducted by Ai Group in the McDonald's and Hungry Jack's employment group. The report, as you will see, is one prepared by the Australian Institute of Health and Welfare. It is a report presented to the Minister for Health, Minister for Sport, the Honourable Susan Ley, on 22 July 2015. The Commission will see from the early part of the report, page IX that there were expert referees on page 9 and 10 who refereed the publication, an extensive group of people.

PN27127

There was also, as you will see from the top of page 11, introductory 11, the following government departments and agencies were involved and there's a quality assurance. The analysis about part-time work you'll find on page 24 of the report, which deals with the first two of the items that were sought to be relied upon. Under The Changing Labour Force on page 42, the introduction, there's the data in relation to three of the items that we sought to rely upon. Again, that's ABS data, and then Living Arrangements at page 136 of the report you will see there is in that analysis that most young Australians aged 18 to 24 live with their parents and the proportion has increased over time in line with social and economic trends, 50 per cent in '97, 60 per cent in 2012 and 13. At the top of page 138 there is data in respect of the marital status of young people in the age of 20 to 24, and at 143 in the third paragraph, for the first time in 2013 youth part-time employment rate, 44 per cent, exceeded the youth full-time rate.

PN27128

The Commission will see the thrust of our argument that there is broader support for the conclusions about the characteristics of the workforce, that the nature of work part-time and age, religion, dependency and the like. There's also some support for this from the union witnesses. The first is from the cross-examination of Ms Yu, and that is you will see behind tab 17 of the bundle, and it's in relation to an article that she authored in 2015 for the Journal of Industrial Relations, and the Commission will please note what she says at paragraph number 22755 through to 22764 about the nature of part-time work, et cetera. Dr O'Brien in his evidence, which is extracted at tab 18 at paragraph 23455, halfway down that paragraph, said - - -

PN27129

JUSTICE ROSS: Sorry, what was the paragraph number?

PN27130

MR DIXON: It's behind tab 18.

PN27131

JUSTICE ROSS: Yes, and the paragraph number?

PN27132

MR DIXON: 23455, the middle paragraph on that page, your Honour.

PN27133

JUSTICE ROSS: Yes.

PN27134

MR DIXON: He talks about the take away food services which we know that there's a much higher proportion of younger and particularly teenage people work in the take away food services versus food and beverages services more generally. Can I just also remind the Commission, if I may, about the various divisions and how the experts dealt with the fast food industry classifications under the Australian and New Zealand Standard Industrial Classifications? You will recall that there was division H which dealt with accommodation and food services, and then subdivision 45 separately dealt with food and beverage

services, and then you've got the three digit group, café, restaurants and take away food services, and class 4512 for take away food services. National division G dealt with retail.

PN27135

And when the Commission comes to look at the evidence of the experts, can we just highlight that, in relation to the evidence, which reports dealt with which division? Professor Markey's report was concerned with division G and not with division H; Drs Peetz and Watson's report of 2 September was concerned with division G, and the report that Dr Watson tendered on 2 September, SDA36, was concerned with division G, retail and - no, more - when Dr O'Brien gave evidence on 15 September concerning what he had to say about the four-digit take away food services, he included in the classifications there persons who were included in other sections, other than the fast food services, including persons in - trades assistants and pastry cooks who would be employed in other industries as well, so that one got to take care in his evidence.

PN27136

The Commission will appreciate that the SDA has sought to apply the evidence of Professor Charlesworth based on O'Reilly survey to the fast food industry, and there are a number of observations which we wish to make about that. Firstly, it was uncontested that no employee under the age of 18 years participated in the O'Reilly survey yet 66 per cent of employees in the fast food industry are under the age of 18 years, and so the results of O'Reilly do not apply to the fast food industry. Secondly, the O'Reilly survey was not intended to be used at an industry level and does not include data focussing upon the fast food industry, yet the SDA endeavours to apply a broad Australia-wide conclusion based on it which, in our respectful submission, is not permissible. Thirdly, the O'Reilly survey does not focus upon the distinction between full-time and part-time employees and its impact on work/life interference. You'll see SDA submissions at paragraph 290 and especially footnote 573, even though part-time workers have less work/life interference than full-time workers, and so the generalised results of O'Reilly do not examine the issue of crucial to work/life interference.

PN27137

Additionally there are a range of characteristics of those surveys in the O'Reilly survey that are unrepresentative of the fast food industry. We identify those characteristics at paragraph 258(5) of our submissions. Further, it was not possible to rate data as apparently might be suggested by our learned friends in O'Reilly. As the under-18s were not in the sample and could not be weighted, the O'Reilly survey does not say anything about the population under-18, a matter accepted by Professor Charlesworth at PN23626.

PN27138

Can we just say something briefly about the evidence of Dr McDonald based on her 25 qualitative interviews in relation to the fast food industry, and this is dealt with in the SDA's submissions at page 108 and 111 and also paragraph 718.

PN27139

The Commission would appreciate that none of the 25 respondents were from the fast food industry and it's not been shown that their views are representative of the

fast food industry. Any conclusions about them are not applicable to the fast food industry and in any event the SDA ignores the general finding in that report, that the majority of employees in the retail industry are satisfied with their work/life balance, a matter which we refer to in paragraph 258, 13(d) of our submissions, page 61.

PN27140

The unions have also sought to emphasis at first work/life outcomes associated with Sunday work, by reference to the evidence of Professor Charlesworth and Dr McDonald, exhibit SDA43. As we've already indicated AWALI is not representative and is not applicable to the fast food industry but as this matter is put against us, we need to highlight a few matters for the Commission.

PN27141

Firstly, the unions ignore the conclusions relating to the data. Firstly that the majority of workers report being satisfied with their work/life balance, a matter to which I will come to in a moment. Secondly, the unions ignore that part-time workers consistently report better work/life outcomes than full-timers. That appears in AWALI 2014 at page 21, and thirdly the unions ignore that long work hours are consistently associated with work/life outcomes. That's in AWALI at page 23, and the unions ignore that a preference to reduce work hours but an inability to do so is associated with work/life outcomes, page 26 of AWALI.

PN27142

The unions ignore that caring responsibilities are associated with work/life outcomes and that's AWALI section 5. The unions also ignore in their submissions, in our respectful submission, that work/life outcomes are associated with evening work, as opposed to weekend work.

PN27143

Can I take the Commission then to the report - an extract of the report at exhibit SDA43, which is behind tab 10 of the tender bundle, and this is the report which Professor Charlesworth spoke to in examination and cross-examination. Behind tab 10, your Honour. We want to emphasise one particular matter and you will see on page 5 of the report, which will be the first page in the bundle, she in paragraph 2, towards the end of the introductions, says;

PN27144

In some AWALI measures perceptions of work/life interference along five dimensions, focusing on -

PN27145

PN27146

Then there are a range, one of them being "satisfaction with overall work/life balance".

PN27147

Now when it came to addressing that issue, "satisfaction with overall work/life balance, Professor Charlesworth in the body of her report simply ignored the level

of satisfaction and only indicated the level of dissatisfaction. If one goes to the table which is the second last document in the bundle, page 33 of her report, she set out there in the annexures to the report table 13, and the question was:

PN27148

The extent to which you are satisfied with your work/life balance, Saturday work -

PN27149

and that refers to all employees. The Commission will see that for all employees the figure of "very, somewhat satisfied" is 64.5 per cent. Then for Sundays all employees in table 14, it's 61 per cent.

PN27150

When she came to deal with retail, similar questions are asked and put in tabular form at firstly, this is page 38 of the report, and it's table 23 and you'll see this deals with retail. In respect of retail, the "very, somewhat satisfied" level is 69.9 per cent. In fact more satisfied than all employees, but when one comes to retail Sundays, table 24, you will see that the "very, somewhat satisfied" is 67.6 per cent.

PN27151

Professor Charlesworth was cross-examined about this, the cross-examination is at tab 19. I don't wish to take you to it now, other than to say that her explanation for not including the relevant material in the body of her report, but simply in those tables referring to the level of dissatisfaction, clearly put her evidence under the microscope that there was a tendency, a strong tendency to overstate the negative and not give proper effect to the positive.

PN27152

My learned friend Mr Wheelahan in cross-examination asked her at PN23906 to accept that the AWALI survey reveals that a common pattern is that retail employees are very or somewhat satisfied with a work/life balance working Saturday and Sunday, and she said yes, she did.

PN27153

The next the Commission - - -

PN27154

JUSTICE ROSS: Sorry, what was that paragraph reference?

PN27155

MR DIXON: It's PN23906, I'm just checking whether it's in the bundle.

PN27156

JUSTICE ROSS: No, it's not.

PN27157

MR DIXON: Yes, it's behind tab 19.

PN27158

JUSTICE ROSS: Mine must be missing a page.

PN27159

MR GOTTING: Your Honour, it might be the fourth leaf in. I don't think it's in chronological order.

PN27160

MR DIXON: I apologise.

PN27161

JUSTICE ROSS: Yes, I've got it. Just to check we were paying attention, Mr Dixon.

PN27162

MR DIXON: The next issue relates to the unions' attempts to emphasis what is described as the disutility associated with Sunday work. Can we make some brief observations about that. Firstly, it's clear that the disutility that is relied upon is not across the board and is individually focused. The unions seem to accept that disutility is not across the board and is individual focused. The SDA's submissions at 313 and United Voice submissions at 299, and one also finds support for that at the Productivity Commission Final Report, chapter 12, especially at page 437.

PN27163

One can illustrate this, for example, by AWALI analysis which recognises that the length of working hours is a critical issue, and obviously necessary to examine the individual working hours. We of course submit that the AWALI data is not representative to the fast food industry but to the extent that it does recognise that the length of hours worked and the flip between actual and preferred hours is relevant, one can apply it to the fast food industry. Secondly, we say there's greater disutility for older workers than younger workers and that is in the Productivity Commission final report at page 440. And, thirdly, there is greater disutility for workers with caring responsibilities than workers without such responsibilities. And that again is O'Reilly exhibit SDA45 at page 3, and the Productivity Commission final report at page 440.

PN27164

Fourthly, this disutility, in our respectful submission, has changed significantly over time. There's greater disutility, if there's significant church attendance and less if not. Greater non-Christian religious observance in Australia over time, as we demonstrated in the earlier exhibit, and less hours worked overall in Australia per annum with the Productivity Commission final report. And there's been greater Sunday work over time.

PN27165

Additionally, we respectfully submit that some recovery is possible and in that regard we wish to just touch on the article of Craig and Brown which should be behind tab 12 of the Commission's tender bundle. It's exhibit ABI13, and I'll deal with this fairly briefly. The Commission will see in the summary on the left-hand column, about three-quarters down that italicised comment:

PN27166

Some weekend workers, example, part-time employees men recouped some shared leisure time notably with friends over the following week but most did not.

PN27167

And then at page 723 the authors speak about, in the first left-hand column, first paragraph:

PN27168

The positive association between Sunday work and parents' weekday leisure time with friends was however negated by individuals who worked long hours. The suggested long hours have the same outcomes regardless of which parent works –

PN27169

Et cetera. And then towards the end of that paragraph:

PN27170

Logically, part-time work offers more flexibility to reschedule than full-time does and persons who work long hours would have the least opportunity to coordinate their leisure time with others, both length of work week –

PN27171

Et cetera. Now, if the Commission just bears in mind those general observations by reference to the data that was presented by the Ai Group it's my respectful submission that it underpins factors which go to the characteristics of the workforce which strengthens the argument that the data presented is representative of a large part of the fast food industry workforce.

PN27172

May I then come to deal with a unrelated topic at this point, and that is the economic evidence and the issue of the effect of penalty rates and the reduction of penalty rates, if that were to occur. And as an introduction, can we indicate to the Commission that you would have appreciated that the Ai Group case is not founded upon or dependent upon a positive finding by the Commission that a reduction in the penalty rates will necessarily increase employment. Our case can succeed, in our respectful submission, because of the nature of the workforce; the characteristics, the absence of disutility, the absence of any distinction between Saturdays and Sundays.

PN27173

We have addressed the economic evidence for two purposes: firstly, because the Commission is clearly required to pay attention to that, firstly, under section 134(1)(a), and we've addressed that in paragraphs 176 of our submissions. So in 176 we deal with the effect for the purposes of section 134(1)(a), and at 185 to 186 we deal with that evidence for the purposes of section 134(1)(c), social inclusion through increased workforce.

PN27174

Having done that, in our submission, in schedule D at page 67 of 81, in our first submission, we have attempted to assist the Commission in an analysis of the

expert evidence. But you see what one might draw from that evidence in an overall sense, and we really make two observations, in summary, about that material. I should say three observations. Firstly, the overall effect of the evidence, in our respectful submission, is that there would be some benefit from employment purposes, but it is difficult to quantify. Secondly, the level of that benefit, on the union's case, was directed primarily at attacking Professor Lewis' attempts to actually quantify the amount. None of the expert witnesses called by the unions made any attempt to assist the Commission by reference to what their quantification would be. And Professor Borland, of course, frankly acknowledged that there has not been, and he spoke, we think, on behalf of economists, there has not been a sufficient attempt to quantify the benefits, although it is recognised that there would be some benefits. And, thirdly, if you look at what we've set out in paragraph 264, there is, in our respectful submission, a fair summary about the overall impact of that evidence.

PN27175

I just want to add, as a third point, that in paragraph 264 subparagraph (i) when we make reference to the common ground that scale effect is likely to be higher in an industry with greater competition, even if there is not perfect competition, we're relying on Professor Borland's cross-examination, one must bear in mind what is an agreed fact here in the aid memoire that it is a competitive industry. I'm sorry, that the industry has high competition among the businesses which participate in it offering a wide range of different fast food options, paragraph 3 of the aid memoire, which is behind tab 1 of the document, the tender bundle.

PN27176

And, in our respectful submission, when the Commission is considering section 134, the various provisions, one can accept that if an employer is able to reduce its costs as a result of the reduction in penalties, it can have a beneficial impact on employment, and that that is capable of achieving a positive impact on employment without the necessity for cutting or reducing prices of the product that is supplied.

PN27177

Commissioner, can I then deal with the contributions that have been received by the Commission and all the parties are of course, given the nature of the proceedings, not aware of precisely to what extent the Commission will rely on contributions from other parties who have not presented the evidence to be tested. But can we deal with the - make some general observations about them. First, the contributions are general submissions only. They do not constitute evidence, are not supported by evidence and in some cases are quite emotive rather than considered.

PN27178

When one looks at the contribution from the 5800 plus that the Commission was referred to yesterday, one would note that most of those contributions are from persons who do not specify the industry in which they work, that's over 60 per cent do not specify their industry. In that respect we note that the SDA has suggested that no reliance be placed on material in the weekend worker survey conducted by Ms Pezzullo as the Commission had "no idea of the industry of 64

per cent of the participants", and that's SDA's submission at paragraph 210 and 214.

PN27179

Thirdly, most of the contributions are from persons who do not work in the retail or hospitality industry. Approximately 80 per cent do not relate to the retail and hospitality industries. I am leaving out at the moment the 70 that the Commission said may be coming.

PN27180

We were content to deal with what we know about the fast food industry and these contributions orally, because I think it will save time. So far out of the 5000 - just in round figures 5800 or thereabouts, only seven contributions are from persons who work in the fast food industry; contribution 20, 1233, 1466, 1706, 2879, 5474 and 5690. Of those one of those persons is a person working nightshift, that's contribution 5474.

PN27181

Secondly, one does not receive penalty - weekend penalty rates, so the contribution is no direct impact on that person. Thirdly, one of the fast food contributions is from a person who no longer works in the fast food industry and therefore has no direct impact on that person. One of the fast food contributions was prepared on the basis of removing penalty rates rather than a reduction, that's contributor 1466. Lastly, and crucially the fast food industry contributions do not address the issue of Sunday work versus Saturday work.

PN27182

May we just say something in relation to the absence of evidence concerning any concerns from employees in the fast food industry. The Commission would appreciate that the SDA called not one witness from the fast food industry to give any evidence about the disutility or any other impact of working on Saturdays or working on Sundays. Secondly, out of 5800 approximately contributions you have less than a dozen of contributors in relation to the fast food industry and there is a complete absence of dissatisfaction revealed from that material.

PN27183

If one looks at survey evidence that is presented, it talks about levels of satisfaction being pretty equal for Saturdays and Sundays and you have no contrary evidence, or no indication of an absence of satisfaction from this vast source of material, subject to its probative value. The absence of that material against us is consistent with broad satisfaction within the industry.

PN27184

If the Commission pleases, what we've done in relation to the impact is we've prepared an aide memoire which is behind tab 20 of the bundle and what we have sought to do here is not to make new submissions that have not been made before. The purpose of this document is three fold. Firstly, it avoids us making some of these submissions orally. Secondly, the bring together the submissions from the other employer parties who have made submissions, and thirdly, we've grouped the materials in what we respectfully submit is a useful manner for the Commission to deal with them. For example, under A we deal with the impact of

rest and amenity and we make reference to submissions from various parties, and also the Productivity Commission and reference where their submissions are to be found.

PN27185

We've done the same in respect of the impact on family and social reunion. Under the headings A, B, C, D, E, we've got - and F, submissions concerning bringing together the factors which are said to be such that would drive the Commission to consider whether there should be a distinction between Saturdays and Sundays, and the conclusions that we invite to draw from our evidence and from the other submissions, that in relation to the Fast Food Industry Award and in relation each of the changes we seek, the proposed amendments would allow the Commission to readily conclude that they provide no more than necessary to achieve the modern objective, which is one of the requirements.

PN27186

I then need to just touch on some of the other submissions that have been sent to the Commission. We appreciate that the Commission has of course gathered as much information as reasonably possible for this review and it's not possible for us to know at this stage precisely which documents will be relied upon, and to what extent but can we just make an observation about some.

PN27187

The Commission has published the background paper on 4 April 2016, relating to the full year review. Can we just make some very brief observations about that? First, the background paper at paragraph 4 identifies two purposes of penalty rates and it does not refer to a third purpose, which is identified in some of the earlier cases, an incentive for employees to work at the time. We identified that third purpose in our submissions. Can we ever say this about incentive - as the Commission will see from paragraphs 108 and 110 of our submissions that there is no need in the fast food industry for the Commission to be concerned with any element of incentive.

PN27188

In paragraph 108 we refer to, at a general level, the factors outlined that support the proposition that there is less need for employees in the fast food industry to offer an incentive, and we do so particularly if one combines what we said in those paragraphs with what is at 110, because at paragraph 110 the Commission will see that as things presently stand there are a range of enterprise agreements, including McDonald's and its franchisees, that do not pay its employees an incentive to work in stores on Sundays, bearing in mind that they pay their employees a flat noted rate for each day of the week.

PN27189

And so if one looks at the survey of the McDonald's and Hungry Jacks, those answers and willingness and satisfaction come not from the fact that those employees are being paid a premium for working on the weekends, and it is an important consideration in our respectful submission to demonstrate that a) there is a level of satisfaction without a higher penalty being paid for the particular days, and secondly, it demonstrates clearly that there is no incentive required on the part of the employers in the fast food industry to have employees work more

hours when there is, on the basis of what we have demonstrated in our submissions and also this afternoon, broad support in the materials to the effect that employees in that industry wish to work more hours.

PN27190

Secondly, the background paper at paragraph 11 notes that the original cases on weekend penalty rates observed that Sunday was a day apart and different from Saturday. We respectfully submit that on the evidence that is no longer the case and when one considers the fast food industry the employees in the fast food industry no longer consider that to be of any major importance.

PN27191

The Commission has also received a submission from the Australian Labour Party described as the Federal Opposition. It's not clear to us, of course, the extent to which the Commission will put any reliance upon that submission, and I don't wish to unnecessarily take up the Commission's time, but could we - with the qualification that we don't know precisely what part or what weight the Commission will give to such part - make a few brief observations? Firstly, their submission does not address the issue of Sunday work versus Saturday work or the relative social disutility of Sunday work. Secondly, as the Commission will see, the submission makes a number of assertions without evidence or reference to supporting material. Thirdly, the submission suggests that a reduction in penalty rates will widen the gender gap in Australia, when even though the number of females in the retail and hospitality industries is marginally greater than the number of males and there is no support for the submission. And in addition, the Commission has in its annual wage decisions recognised that the movement and minimum wages has only a slight effect on the gender gap. Fourthly, the submission asserts on some unstated basis that a reduction in penalty rates will have a flow-on effect to enterprise agreements, yet there is no logical reason for such assertion. Fifthly, the submission suggests that it will result in reduced remuneration and will lead to a reduced consumption and harm to the aggregate economy. Again, there's no basis on the evidence for such a conclusion. Sixthly, it relies on a report referred to as the McKell Institute report. It is a report which Professor Markey in cross-examination on 28 October 2015 at PN20082 to PN20088 discounted as having significant flaws. And seventhly, the submission assumes at one point a removal as opposed to a reduction in penalty rates or so proceeds on an inaccurate, factual basis. And it relies on - or purports to rely on - research material which is not in the submission and is not before the Commission. It also makes some references and places reliance on the general material before the Treasury Estimates Committee as opposed to any detailed or specific later in time Productivity Commission findings.

PN27192

The last thing I think and perhaps that I need to deal with is your Honour the Presiding Member's question to us before the luncheon adjournment, in the quest of paragraph 154 and 155 in our submissions, which is a reference to the changes in characteristics of employment - well that's the broad heading. The purpose of that submission, of course, we started with indicating what the typical workforce and work patterns were in 1919, a brief summary of which is in 154 referring back to paragraph 42, and paragraph 155 contrasts the makeup of that workforce and

conditions. It's not intended to be of any greater indication, other than that all the changes in relation to the composition and characteristics have produced an entirely different mix and entirely different factors, which demonstrate that the position as we have concluded at the end of our submissions have been made good.

PN27193

There is one last point which I wish to make and that is at paragraph 174. We just raise some caution that there is a distinction to be drawn that the rate of penalty rates is not to be determined by reference to the rate that the low-paid people are paid under the relevant instruments. Unless there's anything else, those are our submissions, if the Commission please.

PN27194

JUSTICE ROSS: Thank you, Mr Dixon. Anything further from the employer parties?

PN27195

MR IZZO: Your Honour - - -

PN27196

JUSTICE ROSS: Mr Izzo?

PN27197

MR IZZO: With the Commission's leave, I wanted to clarify a response that I gave to Lee C yesterday in relation to a query he had on behalf of the New South Wales Business Chamber, Australian Chamber and ABI. It will literally take one minute.

PN27198

JUSTICE ROSS: Sure.

PN27199

MR IZZO: With leave. I was asked by Lee C about the extent of knowledge respondents to the Professor Rose survey had about their existing rate of pay, and I drew the Commissioner's attention to the various elements of the transcript. What I omitted to do was also draw the Bench's attention to the fact that in the Professor Rose report itself, ABI1 we see that the survey participants were asked to enter their rate of pay into the actual survey. They did so and their rate of pay is reported. The relevant pages are pages 19, 20 and 49 of ABI1. So that is an additional piece of evidence which indicates their level of awareness about their existing rates of pay. I just want to draw the Bench's attention to that fact.

PN27200

JUSTICE ROSS: Thank you.

PN27201

MR MOORE: Thank you, your Honour. Mr Dowling and I were hoping that we might commence tomorrow.

PN27202

JUSTICE ROSS: No, that's fine.

PN27203

MR MOORE: We have a level of confidence we'll finish tomorrow between us.

PN27204

JUSTICE ROSS: Who is likely to go first?

PN27205

MR MOORE: I am.

PN27206

JUSTICE ROSS: Right. 10 o'clock. Thank you, we will adjourn.

ADJOURNED UNTIL WEDNESDAY, 13 APRIL 2016 [3.50 PM]