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s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/305)

Sydney

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Continued from 13/04/2016

PN27827

MR DOWLING: Thank you, your Honour. Good morning, members of the Commission.

PN27828

JUSTICE ROSS: Good morning, Mr Dowling.

PN27829

MR DOWLING: I think where I got to yesterday, we had dealt with section 138 and the issue of necessity. The next topic that I've intended to cover was that dealing with the need for a material change in circumstances. I can deal with this briefly by saying United Voice rely on their written submissions, which the Commission will find at paragraphs 29 to 34 of their submissions. They additionally adopt and rely upon the oral submissions of the SDA made yesterday, which the Commission will find from transcript PN27230, but can we add to that two additional points? In terms of the consideration of Sunday and public holiday penalty rates arising from the award modernisation process, we have set out our understanding of that history at paragraph 72 to 76. We accept what your Honour said yesterday that there's some debate, and that will be resolved - perhaps may be resolved by the additional documents, but we've set out the history at 72 to 76.

PN27830

Can we additionally direct the Commission's attention to the Restaurants Full Bench decision, that is, the [2014] FWCFB 1996 decision. In that decision at paragraph 64 through to 87, they there set out a history of the consideration of penalty rates for public holidays and Sundays with respect to that award, the Restaurant Industry Award, arising from the award modernisation process. And can we simply say one last thing, one of the matters that Mr Moore was dealing with was a submission put by his applicant employers that there was a material change in circumstances since the award modernisation process. That's not something that's put by the employer organisations with respect to the Hospitality Industry Awards. Can we then deal very briefly - - -

PN27831

JUSTICE ROSS: What was the material change in circumstance that Mr Izzo was referring to? Is that the provision in the Act?

PN27832

MR DOWLING: Yes - yes, I think that's all - - -

PN27833

JUSTICE ROSS: If it is considered to be a material change in circumstance, it applies to all awards, doesn't it?

PN27834

MR DOWLING: Yes, in respect of the structure of the Act.

PN27835

JUSTICE ROSS: Yes.

PN27836

MR DOWLING: I think what I was addressing was something a bit more particular in terms of the particular facts arising from; I think particularly fast food, Mr Moore was dealing with. There's nothing of that sort that's put against us. If it's in terms of the structure of the Act we accept what your Honour says.

PN27837

JUSTICE ROSS: Mm.

PN27838

MR DOWLING: Can I then conclude in respect of the issues covering the legislative provisions by dealing with section 134(1)(d)(a). Can we just highlight firstly what is probably obvious but 134(1)(d)(a) of course has two parts to it in respect of its obligation to take into account the need to provide additional remuneration, and that is firstly for those employees working unsocial, irregular or unpredictable hours. But then separately and secondly, for those employees working on weekends or public holidays, and they are two separate concepts and they mean, in our submission, that it's not necessary for us to establish that working on weekends and public holidays is unsocial because working on weekends and public holidays is separately dealt with by 134(1)(da)(iii).

PN27839

The only other thing we have to say about 134(1)(da)(iii) which I'll return to but just mention at this point, is with respect to those applications that seek the complete removal for at least casual employees of penalty rates. How it is that it can be said that they are addressing the need for additional remuneration for those employees working on weekends and public holidays.

PN27840

A related topic that perhaps is appropriately raised under section 134 is the submission made by the employer parties, I think universally, but certainly in respect to the hospitality awards that working on weekends and public holidays is an industry norm and for that reason it's appropriate to reduce the level of penalty rates. The argument seems to assume, as we understand it, that when assessing the need for additional remuneration working on weekends and public holidays is not unsocial because it's just expected. Of course we say it misses the point that we're looking at what's describe by Young & Lim which I'll come to is this idea of network good, and what makes it unsocial is that you can't then socialise with other friends and family and it can't of course be assumed that all of those friends and family are working in the same industry and once it's clear that they are working in other industries, as they must be, then of course unsocial cannot be answered by this idea that it is the industry norm to work on weekends and public holidays in the hospital sector.

PN27841

JUSTICE ROSS: In any event, your construction argument is you don't have to establish that it's unsociable.

PN27842

MR DOWLING: Yes, because of (da)(iii). I should just note that that interpretation, logically correct we say but is also consistent with the way the Full

Bench in the Restaurants appeal dealt with this idea of unsocial and looking at it in the context of the Australian society. The paragraph reference for that consideration is paragraph 128 of the majority decision.

PN27843

The very last thing in respect of section 134(1)(da) arises from an argument put by the AHA in respect of the Hospitality Industry General Award that complains that where we talk about health in our submission, that health is nowhere a consideration in section 134, so therefore it's not something proper to take into account. We should explain that the way we approach that is to say 134(1)(da)(iii) talks about the need to provide additional remuneration for working weekends or public holidays.

PN27844

Now when the Commission is assessing that need to provide additional remuneration, they should have regard to and be cognisant of the impact of working on those weekends and public holidays, and necessarily a consideration of that impact is going to include a consideration of the impact upon health. We don't say health is a separate consideration but we say necessarily when you're undertaking this process under 134(1)(da)(iii) it's proper to look at a consideration of health. I'll return to it when I have discussed Prof Merlon but that in summary is how we tie it in to section 134. That's all we want to say about the legislative provisions.

PN27845

I want to next deal with the matters arising from labour economists and can I frame this discussion by directing the Commission to Prof Borland's report, which is exhibit UV25, and there is one paragraph at the beginning of that report where Prof Borland summarises his main conclusions and in our submission that is a very neat framework for those matters that I want to respond to that are raised by the employer parties.

PN27846

What he says - I won't read all of it but the most salient parts. What he says is - his conclusions for his opinion, the summary of his conclusions for his opinion are as follows. Firstly;

PN27847

The previous studies of the wage elasticity of the employment review by Prof Lewis do not provide evidence that is relevant to the question of how penalty rates affect employment. In addition, there are major methodological problems with each of the studies reviewed.

PN27848

That's his first point. Secondly;

PN27849

The simulation modelling to predict the employment effects of penalty rates that is undertaken by Prof Lewis has major deficiencies and should not be regarded as informative about the likely employment effects of penalty rates. The deficiencies are; the method overstates the extent to which making

decreases to penalty rates would decrease labour cost to employers. Nextly, by using a single day model of the labour market rather than a more appropriate multiple days model, to represent the effect of penalty rates, the size of the elasticity of employment to a decrease in penalty rates is over-estimated. Nextly, by considering a scenario that assumes penalty rates are being imposed rather than reduced, the employment effects derived are an upper bound and hence over-estimate of the size of the effect of penalty rates on employment. Together those deficiencies imply that the modelling by Prof Lewis systematically over-estimate the employment effects from a decrease in penalty rates and should not be regarded as informative on that issue.

PN27850

With respect to Prof Rose he says - sorry. With respect to Prof Lewis' conclusions drawn from Prof Rose he says;

PN27851

The inference drawn by Prof Lewis regarding the findings from the study by Rose that the study establishes that penalty rates could be reduced without affecting labour supply, is based on a flawed interpretation of the relation between labour supply and wages. Prof Lewis uses data on the average amounts that workers state they need to be paid to work on weekends and public holidays in order to make his inference. But in the labour market entering any theoretical model of the labour market, it is the amount that the marginal last worker hired needs to be paid to be willing to work on weekends or public holidays that will determine the wage rate that will be paid at that time. Hence the analysis by Prof Rose and the interpretation of that analysis by Prof Lewis are not informative about the wage rate that would be needed to attract the existing workforce to supply their labour on weekends or public holidays.

PN27852

He concludes in his summary;

PN27853

Overall, the report by Prof Lewis does not provide information that is valid or valuable for assessing the employment effects of penalty rates.

PN27854

JUSTICE ROSS: Which paragraphs were you reading?

PN27855

MR DOWLING: I was reading from paragraph 7, subparagraphs (a) through to (d) of UV25.

PN27856

I'll come to each of those topics, except one that is not addressed but I want to just raise one matter, and that was that conclusion by Prof Borland where he says;

PN27857

By considering a scenario that assumes penalty rates are being imposed rather than reduced, the employment effects that are derived are an upper bound and hence over-estimate.

PN27858

Now can I just interpolate there that what Prof Lewis did was impose the penalty rate and you'll see Prof Borland explains why that's an error, Prof Lewis then in his reply report accepted that criticism and said well I should use the mid-point rather than the imposition or the subtraction in the middle is the mid-point. But of course in his cross-examination he went further than that and conceded he should have looked at it, not using the mid-point but looking at it as if penalty rates were taken away, which is the very exercise that the Commission's looking at. So the Commission should b and I'll give you before the end of today a transcript reference for that concession.

PN27859

It's one thing - he's wrong firstly, even his concession turned out to be wrong and you can consider what Prof Borland has to say about that over-estimate in the context of it being even more we say over-estimated because of the further concession.

PN27860

Can I then deal with the employer arguments in respect of their reply at least to our submissions about the employment effect. The references that I will identify for those employer arguments are largely those ones arising from the ABI submissions, Mr Izzo's submissions, but on our reckoning they seem to cover all of the arguments put.

PN27861

The first response is that dealing with the minimum and aggregate wage studies, and our submission that those studies do not assist in determining the value of elasticity of demand that was imported into Prof Lewis' model. Now what is said by ABI at paragraph 9.4 of their submissions in reply, in response to the criticism that minimum wage studies were used, is to say "Well, he didn't really use minimum wage studies. What he used in fact was aggregate wage studies". Now as the Bench will have already heard, that doesn't answer the criticism because what Prof Borland says is that either the minimum wage studies, the aggregate wage studies, or one of them which is a youth wage study, all of them are inapplicable to an examination of penalty rates.

PN27862

So it doesn't matter that you might have used aggregate instead of minimum wage studies it's equally inapplicable. The second thing that Prof Borland says about those studies is that they all have flaws in the way they were conducted and the pinpoint reference for his examination of those studies is at paragraphs 11 through to 16 of his report, but I think it's fair to summarise what he has to say by saying that they range in quality really from problematic to terrible. Lastly on this issue, what we say Prof Lewis does not do is identify in any way, despite identifying the aggregate minimum wage and youth studies and then ultimately taking from it in some his elasticities, he doesn't identify with any precision how he did that.

PN27863

What he seems to do is set out the studies, identify that they all have large elasticities and then include large elasticities in this modelling, but nowhere will you see an explanation for exactly which elasticity he has taken and relied upon and which he hasn't. Certainly in formulating his figures for Sigma and Eta you won't see that anywhere. So we've just got this loose connection, "Here's a group of studies that we say are inapplicable. They have large elasticities. I'm going to equally use large elasticities".

PN27864

Now the second thing that's said in response to our criticism about that, and the Commission will find this at least in the ABI's submission at paragraphs 9.6 to 9.12, is that there seems to be an acknowledgement that there were indeed some high level of elasticities used by Prof Lewis but the response is to say "Well, he in fact in some cases halved these elasticities so you should be more confident that they are acceptable". But what that misses is Prof Borland's response, particularly at paragraph 36 of UV25 where he says that none of the elasticities used were sensible and that relevantly, in respect of the elasticities of demand, that sensible elasticities of demand would be smaller than the smallest elasticity of demand used by Prof Lewis.

PN27865

So it's not an answer to say, "Well, some of them were halved therefore it's okay" when Prof Borland is telling you even the halved elasticities are still inappropriate. Now the other way that Mr Izzo dealt with this problem we say arising out of Prof Lewis, is to direct the Commission's attention to the modelling performed by the Productivity Commission report, and he did that at transcript PN26335 in his closing submissions on Monday. Now we say two things about that. Firstly, insofar as the modelling is relied upon as expert opinion, that that's not consistent with the Full Bench's decision in respect of the way the Productivity Commission is to be treated, because of course there was no ability to test that modelling process.

PN27866

JUSTICE ROSS: Perhaps more importantly it wasn't sought to be tendered on the basis of expert opinion.

PN27867

MR DOWLING: That's right. That's right, we certainly agree with that but then it seemed in closing submission to be relied upon as something more than that, so that's our first objection to that response. Paragraph 22 of the decision on the admissibility of the PC report is the relevant part. But secondly and perhaps just as conclusively, Prof Borland was cross-examined not about the final PC report but about the draft Productivity Commission report, and in the draft Productivity Commission report this modelling or - I can't say for certain whether it was identical but it was certainly substantially the same, what they had to say about this issue in the draft Productivity Commission report, and Prof Borland was very critical of the way the Productivity Commission report had conducted their modelling.

PN27868

The Commission will find that at PN11761, and amongst his criticisms was the fact that they had failed to take a multi-day approach, and that's something I will come to. So even if the employers were to get over their first problem in terms of the admissibility or the weight to be given to the Productivity Commission report and their modeling, it's criticised by Prof Borland. There's an argument made by the employer groups which is reflected in the ABI's submission at 9.13 to 9.15 where they there identify what they say was a concession made by Prof Quiggin and Prof Markey, a concession arising out of questions about substantial increases in the minimum wage and that that might have an employment effect.

PN27869

Now can we just say two things. Firstly we say it overstated the evidence but secondly, we say really it's of no assistance to the Commission because it is evidence about the effect of changes to the minimum wage which is - substantial changes to the minimum wage I should say was the way it was phrased. So that really can't assist in terms of dealing with the issue that's before the Commission. Can I then nextly deal with what is said in response to the submissions of United Voice particularly at paragraph 157 and onwards about the substitution effect and about Prof Lewis' failure to acknowledge the substitution effect.

PN27870

The fundamental criticism of Prof Lewis was that he had not acknowledged or taken into account the substitution effect in any way, and that what he had effectively done was treat the substitution effect as zero, as having no effect at all. The response to that seems to be to say, "Well, there's no evidence about the level of the substitution effect so therefore we can't be criticised in that way". But that doesn't properly comprehend the criticism made of Prof Lewis by Prof Borland and what that criticism is, is that Prof Lewis has failed to take into account the substitution effect at all and what he effectively says is whatever the level of the substitution effect is if it's anything other than zero that will mean Prof Lewis has overstated the consequences or the results of his modelling.

PN27871

So Prof Borland is not positively stating what the substitution effect is. He's just saying it's there, it must be there, and immediately it's recognised you have to acknowledge that you have Prof Lewis overstated the employment effect. Additionally in response to that it seems to be said by certainly ABI at 9.18(a) that there really is no substitution effect at least in respect of the hospitality industry, and they posit the example of a restaurant, that if it's closed it's closed and the person might not seek an alternative. But really what that fails to address is the patron's objective. If you're looking at a particular restaurant, there might be many circumstances in which there will be a substitution effect. For example if the patron's objective is to eat at a particular restaurant, and one of some renown and it's not open on a Sunday, then they will meet that objective by going to that restaurant on another day that it is open, and in that way there will be a substitution effect. Alternatively, if the patrons' objective is to eat out on a Sunday night and that particular restaurant is closed, they will go to another restaurant, or they might go to another industry, which is really overlapping with the concept of equilibrium which I'll come to. But it's not right to say, in our submission, that there can be no substitution, because if it's closed it's closed. It -

again overlapping with the single day/multi-day - but it views things in a single day model - here's a restaurant, closed - open - binary; if it's closed I can't go and I won't go anywhere else.

PN27872

JUSTICE ROSS: It might limit the choice though.

PN27873

MR DOWLING: Sorry?

PN27874

JUSTICE ROSS: It might limit the choice.

PN27875

MR DOWLING: It might limit the choice but that doesn't completely remove the substitution effect, and that's the point that Prof Borland was making. It doesn't put the substitution effect at zero.

PN27876

JUSTICE ROSS: I suppose the real world's just a bit more complicated though.

PN27877

MR DOWLING: Yes.

PN27878

JUSTICE ROSS: It might depend on any one of a number of different variables - the area in which you live, what the options are in that area, those sorts of issues.

PN27879

MR DOWLING: We accept that and I think, to be fair, that's what makes a detailed description of the substitution effect difficult, but as I say, Prof Borland is simply saying it's got to be taken into account in some way. It might be that Prof Lewis says, well you need to discount, you need to take account of the substitution effect; but Prof Lewis wasn't prepared to do that, and the ABI still today are not prepared to do that.

PN27880

JUSTICE ROSS: What do you say about the - well I appreciate it's not - but since you've raised it, but it's not in your direct interest - but the Pharmacy Guild's argument that when you need to fill a prescription, you need to fill a prescription. I suppose the simple point made, yes.

PN27881

MR DOWLING: Yes. I think Prof Borland's position probably applies equally. It might mean that the substitution effect is less significant, but in our submission it wouldn't lead to the position that the substitution effect is zero. I should say, our memory is that Mr Seck cross-examined Prof Borland about this very issue and he gave some answers about it.

PN27882

JUSTICE ROSS: Yes.

PN27883

MR DOWLING: I think - I hope - consistent with what I'm saying, it doesn't necessarily put the substitution effect at zero. It certainly doesn't put it at zero for the entire industry. It might depend what you're going to the pharmacy for, I suppose, but if you're not going there for a prescription medicine, really you can go somewhere else.

PN27884

JUSTICE ROSS: I suppose, even if you are going for prescription medicine it depends on whether you're seeking to fill regular medication or it's more you need to get a particular - you need to start a course of antibiotics straight away or whatever it might be.

PN27885

MR DOWLING: Or whether you can go back the next day, that's right, or go somewhere else, or go somewhere else the next day.

PN27886

JUSTICE ROSS: I suppose it illustrates the point that we may be looking at questions of degree here, depending on a range of practical, actual circumstances.

PN27887

MR DOWLING: Yes.

PN27888

JUSTICE ROSS: It's a bit like the argument put about the theoretical model that with the reduction in wages you would expect an increase in employment and that the assumption of perfect competition.

PN27889

MR DOWLING: Yes.

PN27890

JUSTICE ROSS: And levels of competition vary across industries, and at least the last time I looked an economics text on this subject, I think the only one where they were positing there was close to perfect competition were fruit and vegetable markets. I'm not entirely sure that's right now but - but even in these proceedings we've seen that range of competition issue, the concession in relation to fast food, that there's a high degree of competition in that sector, but that may not hold to the same extent at least in all of the other sectors.

PN27891

MR DOWLING: Yes, we accept that. Can I just give the Commission a reference to the cross-examination of Prof Borland in respect of the pharmacy industry? That starts at PN11816. I'm repeating myself but really, whilst we accept there's variations in the substitution effect, what we don't accept is that it can be set at zero for all of these employer groups. Can I deal with the issue of the single day and multi-day model, and this argument is responded to most particularly - sorry, can I just go back. I've made a note in respect of the substitution effect; the consideration by Prof Borland of it is at paragraphs 28 to

31 of his report, UV25. He considers it along and together with the scale effect, which he deals in the subsequent paragraphs 32 to 34.

PN27892

Sorry, I'd moved to the single day/multi-day model, and that argument is raised most squarely by ABI at paragraphs 9.17(b) and 9.18(b), and they say there is nothing wrong with the single day model that Prof Lewis has utilised. I should say the discussion by Prof Borland, which in most detail is put at paragraph 29 of his report, UV25, but what he's dealing with in terms of his discussion of the single day/multi-day model is the substitution of labour, either the substitution of labour for capital or the substitution of labour for unpaid labour.

PN27893

What both Prof Lewis and Prof Borland do is assume that firms are operating efficiently and that in those circumstances labour cannot be reduced - the economists tell us - without being replaced by something else, and Prof Borland posits that if there's a reduction in labour, it's either replaced by unpaid labour or - owner/operator labour - or capital, and he says when you're looking at both of those things, the substitution of labour for both of those things, you have to consider it across a multi-day model. If labour is replaced with capital, the capital is assessed and utilised and paid for over seven days; if labour is replaced with unpaid labour then it is reasonable to expect that unpaid labour may work less on other days and therefore it has to also be assessed across a multi-day model.

PN27894

In terms of the substitution of labour for capital, can we highlight that by giving an example, which I hope clarifies it rather than complicates it, but if - this is to demonstrate the flaw in a single day model. We posit an example where a firm employs a waiter for 10 hours a day for $10 an hour. The cost of that labour obviously is $100 on the day, $700 across the week. The firm decides to substitute some of that labour with capital. They purchase, let us say, a cash register, and in our example let us say that that capital is able to reduce labour by 10 per cent, so in those circumstances the firm will save $10 a day and will save $70 across the week by the substitution of that capital for that labour. In the same example, if we posit then that penalty rates are imposed, as Prof Lewis describes, and they are imposed at the rate of 50 per cent on a Sunday, so what that means is the same firm is paying the same waiter $15 per hour on that day and they are paying him $150 on that day. The capital equipment that we've described, that is still saving 10 per cent in terms of its substitution of labour for capital, is saving $15 on that day. So a proper multiday model would tell us that that firm has saved $75 across the week by the substitution of labour for capital. $10 on each of the six days and $15 on the seventh day, and that's the proper say to look at it. To say in terms of substitution for labour and capital, admittedly we're dealing with savings here to illustrate the point, but they have saved $75.

PN27895

Now the way Prof Lewis looks at this by using a single day model we say is to say - is to look at the single day, the Sunday, and to say look the substitution of labour for capital resulted in a saving of $15 on that day. That applies equally for every day because it's a single day model and if I were to extrapolate that and say what's my saving over a week, I would come up with a figure of $105. So an

extrapolated single day model tells you that you have saved by the substitutional of capital for labour $105 over the week, where in fact looked at properly with the imposition of penalty rates on day over a multiday model, you have saved $75. That we just use to illustrate the way that the single day model creates an over-estimate of the effect.

PN27896

Can I then deal with the notion of the general equilibrium and Prof Borland sets out this criticism of Prof Lewis at paragraphs 54 to 57 of his report. It is responded to by the ABI at least at paragraph 9.20(c) where they respond to this notion by explaining well really, that is just way too difficult. I'm paraphrasing, perhaps unfairly, to deal with the general equilibrium model but can we explain Prof Borland's criticism this way.

PN27897

Section 134(1)(h) requires the Commission to take into account in ensuring;

PN27898

That the modern awards provide a fair and relevant minimum safety net of terms and conditions...the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability performance and competiveness of the national economy.

PN27899

Now what Prof Borland says is if you are looking at the national economy you are necessarily looking at the question of the aggregate level of employment across the economy, and what you shouldn't do is just look at employment in the particular sector and say to the Commission there you are, you can be satisfied of the levels of employment in this sector, for the purposes of section 134(1)(h). You have to take into account the general equilibrium model and if there is an increase in employment over here, there will be a decrease in employment - there will be a level of decrease in employment somewhere else.

PN27900

JUSTICE ROSS: But he's not suggesting the decrease would be equal to the increase.

PN27901

MR DOWLING: No, he's not suggesting that. Again, he's saying - - -

PN27902

JUSTICE ROSS: Is this the proposition - my recollection from his evidence was that, for example, if people are eating out well they're not purchasing food.

PN27903

MR DOWLING: Yes.

PN27904

JUSTICE ROSS: Therefore in supermarkets that might have an impact - - -

PN27905

MR DOWLING: Yes, that's exactly so.

PN27906

JUSTICE ROSS: Yes.

PN27907

MR DOWLING: So again he's saying this is - if you're properly looking at the national economy and aggregate levels of employment, you can't ignore as Prof Lewis does the impact upon someone choosing to go to the supermarket or not choosing to go to the supermarket as an alternative to eating out. The criticism seems to be well, the unions have not filed evidence to suggest that there would be a marked decrease in employment in other industries.

PN27908

Now in our submission, that's not a fair way to describe what it is the unions are doing here and what is put by Prof Lewis is you can extrapolate this industry and in our submission, and in Prof Borland's submission we say, or in his report, the obligation is on Prof Lewis to say why there won't be any spill over in terms of aggregate levels of employment to other industries. He's the one positing the employment effect. He should properly as a responsible labour economist take into account the aggregate levels of employment and any spill over in other industries, and he fails to do it.

PN27909

We say the effect of all of that and the other criticisms identified by Prof Borland and indeed by Prof Quiggin is that you cannot be satisfied that Prof Lewis' evidence supports the claim that the employment effect - that there is an employment effect or that it's substantial or large, as he suggests.

PN27910

Can I conclude on the employment effect - I said partway through these submissions dealing with or I think at the commencement of these submissions, dealing with the employment effect I described the concession made by Prof Lewis about the question of the mid-point and the lower point. That's addressed in our submissions at paragraph 172 and the concession that it was wrong to impose penalty rates rather than subtract them in the modelling process was made at PN10957, which is in the transcript of 1 October 2015.

PN27911

Can I conclude on the employment effect by just referring to two aspects of the lay evidence on the employment effect and the Commission will recall that there were three witnesses that gave evidence from South Australia; Mr Bullock, Mr McCallum and Mr Lovell. We deal with their evidence at paragraphs 206-215 of our submission. Those three witnesses, the Commission will recall, had by operation of the transitional provisions in the Hospitality Industry General Award enjoyed, we say on the evidence, a wage bill reduction. Indeed, Mr Lovell's evidence was that he expected the wage bill reduction to be in the vicinity of $30,000.

PN27912

Now despite those three people, because of the transitional operations you will remember that the transitional operations meant a reduction in the weekly rate for the casuals but an increase in the weekend penalty rate, and the evidence was they were cross-examined about the aggregate effect of all of that. We say the evidence demonstrates the aggregate effect was there would be a wage bill reduction. Despite that, there was no evidence from any of them about an employment effect or relating to them about an employment effect arising from that aggregate reduction.

PN27913

The same applied in respect of the five witnesses called by the RCI, in respect of the Restaurant Industry Award because those five witnesses had enjoyed the benefit of the reduction in the rate for casuals, the intro level 1, level 2 reduction arising from the Restaurants decision appeal in the interim review, and we accept it was with respect to the intro level 1 and level 2 but can we remind the Commission that of those five witnesses, four of them exclusively employed casuals at level 1 and level 2 and the fifth employed 14 out of 16 of his casuals at level 14 - sorry, at levels 1 and level 2, and again despite enjoying the benefit of that reduction for those casuals there was no evidence about any employment effect in respect of those enterprises. The Commission will see that at paragraphs - our submissions on it at paragraphs 198 to 205. That is all we say about the employment effect.

PN27914

COMMISSIONER LEE: Just before you move on.

PN27915

MR DOWLING: Yes?

PN27916

COMMISSIONER LEE: Just back on the elasticity issue, at 136 of your submissions is where you put what Prof Lewis' range of estimates of elasticity of aggregate demand are and it's between negative point three and negative point eight. So just to sum up so I'm clear about what you say the best evidence is that we have got about what the elasticity is, you say it's less than that lower end, so it's somewhere less than negative point three but we don't know what it is.

PN27917

MR DOWLING: Yes. Can I say additionally with respect to that particular study, the Lewis and McDonald 2002 study which found the elasticity of negative point eight, Prof Borland expressly deals with that study alone separately and identifies it as right at the outer limit of anything that might be reasonable.

PN27918

COMMISSIONER LEE: Yes, I saw that. Yes.

PN27919

MR DOWLING: Thank you, Commissioner. Can I then deal with in a summary way the - so that is the end of the employment effect topic. Can I then deal with a summary of the lay evidence that we are dealing with on the impact of the variation in penalty rates and - I'm sorry, I think I said that's the end of the

employment effect. This is a separate topic dealing with the lay evidence but the first part of it at least deals with the employment effect more generally rather than those specific examples that I've taken the Commission to already.

PN27920

In respect of the AHA they called 41 lay witnesses who were cross-examined about the evidence of any employment effect and almost exclusively the answers were, the Commission will recall, that the additional hours would go to the existing casual staff and we have - the Commission will find the detail and the relevant cross-references to those witnesses at appendix 2 of the submissions of United Voice.

PN27921

COMMISSIONER LEE: What is the point about that though? That's still an increase in employment, not in persons employed but in hours worked.

PN27922

MR DOWLING: Well, it's certainly not an increase in the aggregate level of employment and insofar as additional hours, of course as we've been saying these are employees that are now working additional hours to earn the same amount. But there are two issues. One, taken at its highest it's not an increase in aggregate level employment but for reasons we'll come to we say you can't even be confident that there will be additional hours. I'll have to take the Commission back to the cross-examination that was done 49 times I think about the proper calculations that have been done, and we say you can't be confident that there's anything reliable arising from those witnesses.

PN27923

Accepting what your Honour says, the same goes in respect of the five lay witnesses that were called by the RCA. There was I think as I've already said no increase in employment arising - no employment effect arising from the transitional review and we have dealt with that at paragraphs 199 to 205. Can I then deal with the Clubs Australia witnesses. There were three of them, Mr Cox, Mr Della and Mr Casu and the Commission might recall that Commissioner Lee asked Mr Warren a question at PN26810 to the effect that, "Is it the case that for the employment effect the sum total of your evidence is what it is that Mr Casu, Mr Della and Mr Casu have said?" and he accepted that.

PN27924

He didn't have very much to say about Mr Cox, not surprisingly. The Commission might recall that Mr Cox was the person that had negotiated the enterprise agreement. He was present at the certification of it, from his evidence, and we say the sum total of that is he negotiated an enterprise agreement in the same terms as the current penalty rates and it was put to him - I think it was clause 4 of the agreement, "This is negotiated to ensure the productivity and viability" - not in those exact words - "of the business". It was put to him:

PN27925

Cognisant of the productivity and viability of your business you negotiated penalty rates at the rate at which they are set in the modern award as it currently stands?

PN27926

And he said, "Yes". As to Mr Della and Mr Cox again they made very clear that any additional hours would be allocated to existing staff, and you will find that in respect to Mr Della at PN2920 and you will find it in respect of Mr Cox at PN3124 to 3125 - Mr Casu, sorry, is the last of - he was the Narooma Sporting Club general manager. That's the PN3124 to 25 reference. Can we then deal with what was the evidence about the restrictions on services. These submissions are put for the Commission's reference by the AHA at page 28 of their submission by the RCA - sorry - yes, on page 28 of the AHA's submissions, by the RCA at page 46 and by the CAI, Clubs Australia Industrial, at paragraph 8D. ABI did not call any lay evidence so they don't make this claim.

PN27927

We say three things about this evidence about the restriction in services, and I'll deal with each one separately but in summary we cannot reliably say in terms of the reduced services on Sundays and public holidays how much of it was attributable to demand and how much of it was attributable to penalty rates. Secondly, it seemed to be accepted, certainly by Mr Warren, that the Commission should be very cautious in drawing industry-wide conclusions about the restrictions on services and thirdly, repeating what I've already said, really the sum total of the evidence was nothing more than speculation.

PN27928

In respect of the first, this idea of whether it is penalty rates or demand that was causing a restriction in services, can I direct the Commission's attention to the AHA witnesses set out in table 2 of the UV's submissions, particularly Ms Ferguson, Mr Gunn, Mr Johnston, Mr Bourke and Mr Anderson - Ms Anderson, sorry, who all gave evidence that demand was highly relevant to the considerations about services, opening hours - - -

PN27929

JUSTICE ROSS: What page is the table on?

PN27930

MR DOWLING: The table is appendix 2 and I'm sorry, the page numbers stop at the conclusion. So it's appendix 2, the table. One other factor in terms of opening hours, both Mr Hakfoort and Mr [redacted] for the RCA - and I don't think they were alone, but I raise those two as an example - said they could not extend their opening hours because they were governed by the terms of their liquor licences. So again the Commission just needs to be cautious about identifying penalty rates as the cause governing restrictions on opening hours. In respect of Clubs Australia, Mr Della who I've already identified, acknowledged in cross-examination that restricted services on Sunday were more likely a product of low demand than high wage costs, and the Commission will find that in the United Voice submissions at 402 and the relevant concession at PN2907 to 2908 and 2922. Additionally, can we direct the Commission's attention to the closing submissions of Mr Rauf on behalf of the RCA, who said at PN26865:

PN27931

The restaurant industry's core trading hours are determined by reference to consumer demand.

PN27932

And lastly, in terms of the witnesses that we faced, RCA called five witnesses, two of whom did not know the applicable award rate on Sundays - Mr [redacted] and Mr [redacted]. Of the remaining three, one was required by the terms of her lease to have her business open at set times - that was Ms [redacted]; one gave no evidence at all about trade restrictions - that was Ms [redacted]; and only one out of the five gave evidence about reduced opening hours on weekends and public holidays, and that was Mr [redacted] who we say was undermined in other ways, which meant the result of his evidence was doubtful. He was undermined in other ways, you will find, that cross-examination from PN4268. So the total of that evidence, we say, is that demand is a very important consideration to the question of any restrictions on services or hours, and it would be wrong to conclude that it is all attributable to penalty rates.

PN27933

As to the second topic that I've identified for the purposes of restrictions to services, that is the question of it being industry-wide. Mr Warren in his closing submissions on behalf of Clubs Australia at PN26772 made the submission that we are not here to put industry-wide evidence, and there seemed to be for us some doubt in respect of the AHA witnesses and the RCA witnesses, although they were slightly more numerous, whether it was put that they are properly a industry-wide reflection on those restrictions on services or restrictions on hours.

PN27934

Can we then lastly deal with whichever way you might determine that that evidence is relevant, really because of its speculative nature it can't be relied upon? As I said a moment ago, the Commission will recall the way all of these witnesses were cross-examined. They were asked whether they'd calculated what they were paying in penalty rates under the current regime, they were asked whether they had calculated what they would pay under the varied rates so that they understood the difference, and they were asked whether they had costed any changes that they were, in our submission, speculating about, and invariably they had not done any of those things.

PN27935

The result of that is that really what they were doing was speculating. Mr Gallagher, I think, described the sum total of all of that as 'pie in the sky' - they were his words. That was at PN5925. And Mr Trengove was asked directly, as others were, "You are just speculating", and his response at PN1393 was, "That would be exactly what I have been doing." Your Honour might recall Mr Trengove because I think it's Mr Trengove that prompted you on his criticism about the evidence up until that point, and we of course accept that your Honour was only making a provisional assessment as the evidence was not complete. But your Honour was highly critical of the evidence at that point about the employment effect, from PN1247 to 1252, about how it just simply hadn't satisfied you at that point on a provisional basis, but we say it never improved, and the criticisms that your Honour made at 1247 to 1252 are applicable in respect of the sum total of that evidence when it was concluded.

PN27936

Can I then leave that topic, which is the summary of the lay evidence upon the impact of the variations, and deal with the expert evidence on the impact of weekend work? The expert evidence was constituted by Dr Muurlink and Prof Charlesworth, and there were two main propositions that we say arise from that evidence. The first, that weekend work has a negative impact on the overall wellbeing of employees, and the second, that the negative impact is greater on Sundays than on Saturdays. Prof Muurlink's report was exhibit - his substantive report - there were two, but the substantive report dealing with this topic is exhibit UV26. As to Prof Charlesworth and the criticisms that were made in respect of her about her use of flawed AWALI data, we adopt the submissions made by the SDA yesterday. Their written submission, which is reflected in ours, but also the oral submissions made, that the Commission will find in the transcript from PN27395.

PN27937

So could we then leave Prof Charlesworth there and deal with Dr Muurlink? There were five criticisms of Dr Muurlink, four in respect of the notion that there's no negative impact. To summarise those, they were that the six negative factors that he identified - and they were consecutivity, overload, unpredictability, uncontrollability, asynchronicity and arrhythmia - that those six factors were really associated with casual work and not weekend work. That's the first criticism. The second was that there was really no causal connection between the six factors and weekend work. The third criticism was that he did not consider the specific industries, and the fourth criticism in relation to this negative impact was that he was unnecessarily alarmist.

PN27938

The second broad way in which he is criticised is that his evidence did not establish a differential between Saturdays and Sundays. But to deal with the four criticisms in respect of the negative impact, can we say this about the six factors? Firstly, we accept that some of the factors, certainly unpredictability and uncontrollability, do relate to casual work, but that does not mean they don't also relate to weekend work. To the extent that the union parties acknowledge that casual workers will experience a high degree of uncontrollability and unpredictability, and then permanent workers, they do not say that those workers do not also experience negative impact from that weekend work.

PN27939

Secondly, can we say that of the other factors, it seems clear from Dr Muurlink's evidence, and logically we say, that at least the factors asynchronicity and arrhythmia plainly relate to weekend work, whether the worker is employed on a permanent or casual basis. That's an important distinction, and we say it is also the focus of the evidence of Prof Charlesworth and the Skinner and Pocock study, and the Young and Lim paper. The Commission may recall the Young and Lim paper is that paper that was identified by the Commission in its research reference list of 15 January of this year. It studies unemployed workers and to examine how it is that they value the weekend even though they're unemployed on the other days.

PN27940

It does, we say, give a very good example of the concept of network good. It describes, I think, the use of telephones and says in 1910 nobody had a telephone so having a telephone was not of much utility to, and as others started to own telephones of course the utility in having one increased and continues to increase. The more people that have a telephone, the greater the utility. Perhaps they don't go this far but we do, that of course not if you don't have a telephone you're disconnected and that we say is a neat example of this idea of network good, time being a network good. The study also tells us in respect of a group of unemployed study that they enjoy the weekend, even though they're unemployed on the balance of the week because of that very thing, because time is a network good.

PN27941

Can we then deal with this issue that's raised against Dr Muurlink, this idea of causation versus correlation. Can we firstly identify the reference to his report, UV26, what he says there at paragraphs 19 and 23 where he reviews a number of studies, comprehensively we say, and he says they demonstrate an association between weekend work and negative effects. So he clearly states it is an association. He also found that the evidence from certain kinds of studies, large in cross sectional or longitudinal studies, that Saturday or Sunday workers and those around them, particularly children, are paying a significant physical and psychological and social penalty for working on the weekend, and these are costs caused by weekend work rather than merely associated with it. That's at paragraph 20 with a reference to the study by Worth at paragraph 28.

PN27942

It's important to remember that evidence. We say of course additionally in terms of this debate about correlation and causation, we say it would be wrong to requite the union parties in these circumstances to have Dr Muurlink, even though we say on a proper reading he does, it would be wrong to have them rise to the point of saying all of these things are caused by weekend work. It's proper, in our submission, in his role as an expert psychologist in the field to say there's an association and it's proper to take that into account.

PN27943

Can we then respond to the criticism about Dr Muurlink that his evidence was particular to certain industries and therefore should not be given broader weight. He was cross-examined about this and re-examined about it and ultimately the result of all of that we say can be summarised by this evidence of Dr Muurlink. He said;

PN27944

The negative characteristics are human specific, not industry specific.

PN27945

You will see that in his re-examination at PN21285. He was referred to the absence of industry specific evidence, he referred to the absence of industry specific evidence in Australia and stated;

PN27946

Some of the key characteristics are common to human, as opposed to common to industries.

PN27947

Can we then lastly say on Dr Muurlink and the criticisms that were levelled against him for overstating the real position and making sweeping conclusions, I think the criticism of making sweeping conclusions is a criticism made by the RCA and the RCA didn't cross-examine Dr Muurlink at all. They certainly didn't put to him that he was making sweeping conclusions, inappropriate for them now to make that criticism without even having put it to him.

PN27948

The same goes, in our submission, for the criticism put by the AIG in their submission that what he did was overstate the real position. We have read the transcript and we don't see them putting to him that allegation. We don't see them putting to him what the real position was and how he'd overstated it. We say it's unfair for them to now make that criticism without having put it to the witness.

PN27949

Can I then on this topic of the impact of weekend work deal with the lay evidence and two issues we want to make in oral submissions. Our evidence on this in more detail is set out in our submissions at paragraphs 337-344 but can we say just these two matters in respect in these submissions. The first is the AHA criticised this evidence and described it as nothing other than inconvenience, and you will find that criticism in the AHA reply submissions - that's paragraph 42, and the oral submissions at transcript PN26644.

PN27950

If you look at the balance of the evidence we say, which we summarise at paragraphs 337-344, it does not accord with that characterisation. It seems to us that what that employer submission is doing is suggesting that the social interaction of those without families is just inconvenience. But for those with families it might be more important and it might, it seems they concede, actually constitute a disability. But for those without families they seem to suggest the social interaction is really just inconvenience. That we say on the balance of the evidence is an inappropriate characterisation.

PN27951

The only other issue on this topic, the impact of weekend work by the lay evidence is the question of choice versus availability. I think as I said at the outset - no, I withdraw that. This question arises in the employers' submissions certainly in AHA's submissions at 201-250 and Clubs Australia at 17-18 and it seems to be suggested that because these employees choose to work on the weekend, that that is an amelioration of the impact that this weekend work has on them.

PN27952

Now the only caution that we urge upon the Commission is that one needs to be very careful in identifying whether this is the level of this choice. The AHA sought to exemplify this consideration by referring to the evidence of Mr Davis, which they have set out in their submissions at paragraph 235, but ignored even in their own extract that what it was that Mr Davis says was you don't have a choice.

That was his answer in cross-examination, in the context of the position in which he found himself. So we're not saying that there's some form of coercion in respect of this employment but we're simply saying the Commission needs to be very careful in saying well, these employees choose to work those weekends and that's an ameliorated factor. One needs to look at that question of choice in respect of all of the circumstances of those employees.

PN27953

The second issue with respect to Dr Muurlink was the difference between Saturdays and Sundays. We say that that examination by Dr Muurlink was a comprehensive review of all of the relevant literature. What the ABI have done is isolate some of the papers that are referred to, to seek to undermine that evidence and particularly the findings from Craig and Brown and Bittman, and they do that at ABI reply, so it's 15.2(a). We save the Commission's time by referring to and adopting the submissions of Mr Moore made yesterday when he addressed those two studies and how they had been put against Dr Muurlink by the ABI.

PN27954

Can I for completeness just identify at this point on the difference between Saturdays and Sundays. Prof Rose; we have dealt with this in our written submissions at paragraph 241 through to 267. Can we again to save time adopt what it is the SDA had to say yesterday in respect of the proper approach to the assessment of the data and the outcomes made by Prof Rose, and the discussion by Mr Moore about that appears in the transcript from PN27441 and of course included a discussion about even if those criticisms are not accepted, what you should do with the outcomes, and there was an exchange in response to a question from Commissioner Lee about what might be done with the table.

PN27955

Can we just say one last thing on instructions about Saturday and Sunday, and this is particularly with respect to the Restaurant Industry Award because it is the award that most directly targets the difference between Saturday and Sunday. I'm instructed that in respect of that award, of the 122 modern awards its Sunday rate is amongst the lowest nine. There are eight at 150 per cent and there is only one lower and that is 130 per cent, and that for some reason is the Fitness Award, and additionally the difference that's created by that award is 25 points.

PN27956

In respect of full and part-timers 150 on a Sunday to 125 on a Saturday, and for casuals at level 1 and 2 it is 50 on both Saturday and Sunday, but for levels 3 to 6 it is 150 on Saturday and 175. So the levels 3 to 6 and the full-timers and part-timers have a difference of 25 points. This is not a case where the Sunday rate is many times the Saturday rate. This is a case in which the Sunday rate is amongst the lowest of the modern awards and it has a modest difference between Saturday and Sunday, and what the RCA is asking the Commission to do to reduce the Sunday rate to 125 would be to set a new low of 125 amongst all of the 122 modern awards.

PN27957

Can I then deal with public holidays. Now I'm going to deal with this in three parts. First that part dealing with the claim for the reduction in public holidays.

Secondly, that part dealing with the two tier system for public holidays that's proposed and lastly, that part dealing with the complete removal of public holidays penalty rates for a number of groups of workers. In respect of the reduction in the penalty rates for public holidays that case seems to be put based on the employment effect and the restriction of services.

PN27958

We repeat what we have to say about both Prof Lewis and the lay evidence about the employment effect, and we say it's perhaps made more stark in circumstances where we're only examining 10 days or so in a year in respect of that employment effect, and in respect of the restriction on services or service offerings or the decision not to open, we repeat what we've already said about the reliability of that evidence. The only other issue we raise in respect of this claim for the reduction is the submission that was made by ABI that it is ameliorated by the operation of section 114, and we were very conscious that the section - it needs to be made clear that the section entitles an employer to request an employee to work.

PN27959

But then there's a consideration of whether the request is reasonable and the relevant considerations. I think some of these were identified by Mr Moore but for emphasis they included the nature of the employer's workplace or enterprise including its operational requirements, at 114.4A; whether the employee could reasonably expect the employer couldn't - whether the employee could reasonably expect that he or she would be required to work on a public holiday, that's 114.4C; and whether the employee is entitled to receive penalty rates, at 114.4D.

PN27960

Now it seems to us on the case put by the employer parties in respect of these industries that all of those things would apply clearly in respect of the industry. They say they want people to work on public holidays because of their operational requirements, and in the circumstances of the hospitality industry they would reasonably expect that would be so, and they are entitled to receive penalty rates. So we say it provides a very modest protection in the circumstances and is not a proper basis to offset a reduction.

PN27961

Can we then deal with the AHA claim in respect of the two tier system, what it does is create different rates, different penalty rates for the public holidays. Those that are identified by the NES get a particular rate and those additional days also identified in the NES but not named, those additional State and Territory days, they get a second rate and lower rate under their penalty rate system, and for reasons I will come to in respect of the AHA if they're casuals the penalty rate is removed completely. Now can we firstly say it's not clear to us how it can be properly said that the eight named days have a greater value than the additional days.

PN27962

Can we identify for the Commission and can I provide, perhaps in a moment of overkill, the explanatory memoranda for the Workplace Relations Amendment Work Choices Bill and the Fair Work Bill, and they are the relevant explanatory

memoranda that identify when the entitlement to the public holiday was included firstly in the Australian Fair Pay and Conditions Standard and then secondly, when it was carried in to the National Employment Standards. Now all it tells you, perhaps unsurprisingly, dealing with the Workplace Relations Amendment Work Choices Bill first, at paragraph 2 on the second page of the document provided:

PN27963

This definition would only apply to Division 1A of Part 6A, paragraph 170AA would set out certain public holidays which are common to all States and Territories.

PN27964

Now the only reason we bring that to the Commission's attention is to show the reason the eight were selected is not because they were valued more highly than the others. It's just because they were common, and for completeness the Commission will find the same comment in relatively similar terms in the Fair Work Bill explanatory memorandum at paragraph 10 where they identify the eight common days as being specifically named. So firstly we say there should be no suggestion - sorry, was your Honour looking for the same explanation in the Fair Work Bill explanatory memorandum?

PN27965

JUSTICE ROSS: Yes, it's in 10, isn't it?

PN27966

MR DOWLING: It is in 10. The first sentence of paragraph 10. So there should be no suggestion that these eight named days have some higher value than the additional days provided for by section 115(b) and then it's hard to, we say, explain why the eight days have a greater value than the additional days.

PN27967

Can we say additionally about this approach. It was an approach that was urged upon the Commission in the transitional review of this award, the relevant award for the AHA, the Hospitality Industry General Award and rejected in the decision of the Full Bench [2013] FWCFB 2168 at 107 and the Full Bench included, your Honour the President and Hampton C. Can we additionally say that the differential approach was also rejected by the Commission in the public holidays test case, and you'll see that referred to in our submissions at 71(c) and the Commission described the differential approach as something that could be the source of industrial unrest.

PN27968

All of this of course has to be weighed with the conflict that exists between the employer parties on this issue. The ABI positively assert this approach is not ideal and is not a simple or straightforward approach. So they positively reject it. You'll see Mr Izzo is saying that at PN26434 and in his reply submissions at 25.5. So lastly we say, in terms of this idea of distinguishing between holidays on the basis of importance, there's really one that involves a significant exercise of subjective value judgments and it's just one that should not be recommended.

PN27969

Can we then deal with the claim for the removal of public holidays for casual workers, and this is made by the AHA in respect of those additional days. They seek to remove penalty rates for casual employees on the - if we can call them the state public holidays. Again, it doesn't seem to be to us to be - for other reasons including 134(1)(da)(iii) that will come to but there doesn't seem to be any reason for us to say they should be - any logical reason that we can see to say that they should be removed completely on those days and not removed on the other days.

PN27970

The ABI also seek the complete removal of public holiday penalty rates applicable to casual employees, for all public holidays not just for the additional days.

PN27971

Now there's a number of problems with this submission and the first and most significant is that the employees have failed to address the intersection between that proposal to remove the public holiday penalty rates for casual workers in section 134(1)(da)(iii), which requires the Commission to take into account the need to provide additional remuneration for employees working on public holidays. There is no additional remuneration at all, and the only explanation the Commission got from Mr Izzo was that in the purest sense, I think he said, these employees are casuals and therefore don't have to work on these days anyway. Your Honour the President quite rightly, we say, responded with well on that basis you could significantly undermine the terms and conditions in respect of loading benefits in awards completely. The Commission will see that exchange at PN26448 to 26450.

PN27972

Additionally, the problems that these two employer groups face with this claim is that it can't really be made without contradicting their own evidence in submissions. Because the AHA, for example, are happy to continue to pay penalty rates to casuals on Commonwealth public holidays but not on these additional days. Now there's just no logic, and both of those organisations, the AHA and ABI are happy to continue to pay penalty rates to full-time and part-time employees on public holidays but not to casual employees. As I say the only information we got for that was this idea of the purer sense.

PN27973

All of the other employers of course maintain that penalty rates for casual workers at some level are appropriate on public holidays. The ABI of course submit that there is some disability associated with working on public holidays but despite that submission, which you will see in their submissions at 24.2(c), they choose to make no payment at all in respect of those casual employees for public holidays.

PN27974

That's as much as I will say about public holidays and that takes me to my factual category of other matters. Can I identify here at least two applications that we say have not been supported by any evidence or submissions, and in respect of Clubs, that is what we called at least the substitution clauses and the changed definition, and our explanation for that is at paragraphs 404-408 of our submissions, page

130. In respect of the AHA and the Hospitality Industry General Award, it's claim for a substitution day, and the Commission will see that at page 135, paragraphs 428-429.

PN27975

MR DIXON: Paragraph.

PN27976

MR DOWLING: Paragraph 428-429. The last claim that we say falls into this category of variations not supported by evidence or submissions, although it's perhaps fairer to describe this last one as not supported by evidence but supported by a submission, is the RCA's application to reduce nightshift penalties in the Restaurant Award. Now we were told for the first time this week that the basis for that application was to reduce the difficulty of administering this shift loading. The only material put in support of that claim was the Ombudsman report, which is an exhibit of United Voice and it's exhibit UV36. That is a report that identifies that 46 per cent of employers are not correctly paying their employees in the restaurant sector.

PN27977

It's said that that noncompliance is - appears to be the result of the decision by the restaurant sector to pay a flat rate, trying to simplify things, and a flat unlawful rate as it turns out, and Mr Rauf relied upon that. But the report also tells you that there were other reasons for the noncompliance and that is a general lack of awareness of the award provisions, and you'll find that at page 9, and the unawareness of the difference between part-time and casual. You'll find that at page 10. That the employers were not aware of the difference between classifications, and you'll find that at page 11.

PN27978

It seemed to be suggested, as we understood it, that the fact that employers were not complying with the award and wanted to pay a flat rate was evidence about the difficulty of this nightshift loading provision and therefore what was urged upon you was to simplify it in some way. But there was no evidence from any employer called on behalf of the RCA to describe how they thought this was a complex provision in any way and how it had caused them some trouble. The only material relied upon is the Ombudsman report of non-compliance. Can we say two other things about what's urged? The other awards in the hospitality sector have loadings of a similar type. There's no suggestion by any employer called amongst the 50 or so of them that there was any complexity in its administration.

PN27979

But lastly, in terms of its complexity, the Commission should understand that the clause requires the employer to pay a percentage of the base rate. It's not a varying amount. It's a flat rate based on a percentage of the base rate, so it's an insertion of an extra $2 in the pay packet for working these particular late nights. We might understand, in the absence of any evidence, some submission about complexity, if it was a varying rate and changing for varying rates, but it doesn't do that; it's pegged to the base rate and only provides a flat $2. And I think, on my instructions at least, what the current practice is in terms of the way the

Commission is dealing with this is to produce its table and say, in simple form for the employers, this payment, it operates this way and is this amount, so that there's really no confusion. But whether that approach is taken or not here, really, there's just no evidence of any complexity and that's the only basis upon which this submission is advanced.

PN27980

Can I then identify, in terms of the interested parties, we're content to address this submission in accordance with what directions might be made, or what might be agreed between the parties. I am instructed to seek the opportunity to address the section 114 style condition which your Honour raised. The voluntariness issue is not raised in our submission, but this is a slightly different proposition. We'd like the opportunity to address it.

PN27981

Can I just lastly, before I make some concluding remarks, address two issues arising from the background paper? The first is, there is a discussion of the transitional review in 2012 at Part 6 where the history is recounted and the Transitional Review Penalty Rates decision is referred to. In our submission, the transitional review of 2012 Public Holidays decision also has some relevance to us, and we've referred to it in our submissions at 78 and 79. That's the decision with the citation [2013] FWCFB 2168. And secondly, the background paper at Appendix D sets out the relevant penalty rates pre-reform instruments in the hospital industry. There are two awards identified in our historical submissions that we say appear to us to be relevant that are not included in Appendix D. The Commission will find those at paragraphs 59(b) and 59(e) of our submissions.

PN27982

JUSTICE ROSS: Sorry, what were the paragraphs again?

PN27983

MR DOWLING: 59(b) and 59(e). The last matter before the concluding remarks is a question your Honour put to my learned friend, Mr Moore, about section 134(1)(e), which is the equal remuneration consideration in the modern awards objectives, and your Honour took Mr Moore to the statistics that apply in our industry. Can we say this? It's I think in part our submission is responsive, but one of the things that's said against us in respect of the workforce profile is that there has been a significant change from weekend workers who were overwhelmingly male and permanent to weekend workers who are more likely to be female and casual. It doesn't seem to be taken, the next step, but that submission is put against us, and insofar as it's put against us we put 134(1)(e) as a responsive submission. If it's being suggested that the demographic of this group is moving to casual and female, then 134(1)(e) might be a relevant consideration for the Commission.

PN27984

Can I then conclude by just taking the Commission back to the standards that it has imposed, properly we say, in respect of an application of its type? The Preliminary Jurisdictional Issue decision at paragraph 60 tells us that:

PN27985

A party seeking to vary a modern award in the context of the review must advance a merit argument in support of the proposed variation. Where a significant change is proposed, it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

PN27986

There doesn't seem much dispute that this is a significant change. The 4 yearly review of modern awards of the Security Services Industry Award tells us that at paragraph 8 that:

PN27987

In order to found a case for an award variation, it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it, and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supported by a change.

PN27988

That's the standard, but we additionally know from previous decisions in respect of the standards imposed upon the type of evidence, we know that in the Restaurants decision, both at first instance and on appeal, the Commission said they would be assisted by evidence arising from the natural experiments, and the Commission will find that at paragraph 234 of [2013] FWCFB 1635. We got none of that. We know that the annual wage reviews told us with respect to surveys - the annual wage reviews at 2012, 2013 and 2014 - [2013] FWCFB 4000 at paragraphs 438 to 442 and [2014] FWCFB 3500 at 226 to 228 - told us of the standard necessary of surveys that would be probative and helpful in a review, and again we say the surveys provided fell short of that standard as set.

PN27989

We know in terms of economic modelling that the Restaurant appeal - the [2014] FWCFB 1996 decision at paragraph 104 - told us that it was not assisted by the type of modelling performed by Prof Lewis. But we also know from his evidence that he simply repeated, largely, the report that he provided there and provided it here. So in addition to those matters, we say all of that evidence has fallen short. In respect of the lay evidence, it's fallen short of being properly probative evidence directed to demonstrating the facts supporting the variation. It either fell short of that standard or it was unsatisfactory evidence that had previously been called and was repeated. So in respect of all three awards that United Voice is dealing with, we say the Commission does not have the evidence to support the changes sought in the applications. Unless there are any questions, they are submissions of United Voice.

PN27990

JUSTICE ROSS: Thank you, Mr Dowling. Can I just take you to paragraph 46 of your submissions. You make the point there that the Hospitality Award is unusual amongst modern awards in that it has an absence of the span of hours provision. So I think the - probably the prevailing span of hour provision might be 6 am to 6 pm with some capacity by agreement to move it by an hour at either

end. You say that the absence of that here reinforces the significance of maintaining the current weekend rates.

PN27991

MR DOWLING: Yes.

PN27992

JUSTICE ROSS: Do I understand that correctly that the weekend - you say the weekend penalty rates in that award, sort of de facto, sets the span of hours or operates in a way to regulate the span of hours by imposing a penalty for work outside. Is that the proposition or have I misunderstood that?

PN27993

MR DOWLING: No, I think it's perhaps twofold. I think that is true but additionally I might be straying into Mr Izzo's area but additionally when - - -

PN27994

JUSTICE ROSS: Yes, I did wonder about that.

PN27995

MR DOWLING: - - - if there's another protection that is present in some other awards that provide some amelioration that's not here in this award.

PN27996

JUSTICE ROSS: I see, yes. So elsewhere, it would be defined that there'd be overtime outside the spread.

PN27997

MR DOWLING: Yes, there's no overtime here, for casuals.

PN27998

JUSTICE ROSS: Right.

PN27999

MR DOWLING: Can I take you to paragraph 64.

PN28000

JUSTICE ROSS: I suppose I wasn't here while all of this was happening so when you say, "in February 2007, the Full Bench reformulated the casual employment clause" what does - I don't quite follow what that means, that second sentence, yes.

PN28001

MR DOWLING: I might clarify that issue. I'm not sure of the process - now looking at that I'm not sure of the February 2007 process that it's referring to, to answer your Honour's question.

PN28002

JUSTICE ROSS: Yes, and I'm not sure what I means as a loading in addition to the 25 per cent.

PN28003

MR DOWLING: Yes.

PN28004

JUSTICE ROSS: In the standard but look, it's - I wouldn't describe it as the essential proposition in this case, it's just that I was reading through it I didn't follow it.

PN28005

MR DOWLING: I think I can perhaps clarify that and respond very briefly whilst my friends are doing their reply.

PN28006

JUSTICE ROSS: Sure. Thank you, Mr Dowling.

PN28007

MR DOWLING: Thank you.

PN28008

JUSTICE ROSS: Mr Moore, I think you indicated yesterday you were going to have a short cameo appearance to adopt - in the event that you agreed with it - what Mr Dowling had said as to certain matters. Do you want to do that?

PN28009

MR MOORE: Yes, thank you, your Honour. Can you hear me clearly?

PN28010

JUSTICE ROSS: Yes.

PN28011

MR MOORE: Thank you, and I apologise for not indicating to the Bench yesterday that I would be migrating to Melbourne for today's hearings. Just briefly, I can indicate that the SDA adopts the following submissions made by Mr Dowling orally. We adopt his submissions in relation to public holidays insofar as they addressed matters which were not specific to the Hospitality Group Awards. We also adopt his submissions made in relation to the evidence given by Dr Muurlink. We adopt his submissions made this morning in relation to the matters arising from the evidence given by the labour economists and the employment effect of the proposed changes, and we likewise adopt his submissions this morning in respect of section 134(1)(da) of the Act.

PN28012

From yesterday, we likewise adopt Mr Dowling's submissions in relation to the question of necessity and section 138, and without wanting to reopen that debate from yesterday, can I just briefly state that the SDA's position is that the debate over the correct approach mandated under the regime in section 138 doesn't arise, in our view, on the employer cases because their argument is that the penalty rate provisions don't meet the modern award's objective, and that they advance that argument by reference to the provisions themselves and not by reference to other provisions of the awards in question.

PN28013

In our view that analysis is unaltered having regard to the question of voluntary Sunday work raised by the SDA in the alternative, and that's because a provision to that effect would be a provision dealing with the same subject matter as the penalty rates; namely, the conditions attaching to the performance of work on a Sunday. That's all I wanted to add, if the Commission pleases.

PN28014

JUSTICE ROSS: Thank you, Mr Moore. It might be convenient if we adjourn until 11.30 to allow you to get organised.

SHORT ADJOURNMENT **[11.20 AM]**

RESUMED **[11.36 AM]**

PN28015

JUSTICE ROSS: Mr Gotting.

PN28016

MR GOTTING: Members of the Full Bench, in reply I wish to deal with nine issues but I will seek an opportunity at a later stage to address in writing two issues. The first issue is that issue of voluntariness that has been raised in the last few days.

PN28017

JUSTICE ROSS: I'm sorry the - yes, yes. But I think there's going to be a general opportunity to deal with that, isn't there?

PN28018

MR GOTTING: I hope so, but I just wanted to state expressly that we wanted to avail of that opportunity.

PN28019

JUSTICE ROSS: Yes. No, no, that's fine. Yes.

PN28020

MR GOTTING: The second issue to deal with in writing is the award modernisation process. We've already said something and we won't repeat it, but if there are certain aspects that we wish to emphasise as a result of compiling a joint bundle we will seek to do so in writing.

PN28021

JUSTICE ROSS: No, that's fine. I think all of that can be accommodated in the general consent directions. It can be dealt with, with whatever opportunity to reply that is sought.

PN28022

MR GOTTING: Your Honour, the first issue that I wanted to address in reply was the submission of the SDA that the reference to prima facie in the preliminary jurisdictional issues decision related to the caution of an Appeal Court on departing from its previous decisions, and a short submission I wish to say is that's not the correct understanding of the effect of the preliminary jurisdictional issues decision, and there are two matters that I wanted to emphasise. The first was the

text and the plain meaning of the last sentence in paragraph 24. I don't intend to take the Commission to it but that last sentence reads:

PN28023

The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.

PN28024

And it is plain, in my submission, that that sentence is directed to achievement of the modern award objective rather than the caution associated with departing from previous decisions. Equally, the last sentence in paragraph 60(3) of the preliminary jurisdictional issues decision is to the same effect and ought to be afforded the same construction. The third matter that I just wanted to deal with on this issue was the observation of your Honour the presiding member on Monday about the effect of the preliminary jurisdictional issues decision.

PN28025

The relevant reference is paragraph number 26173 and your Honour effectively said that the proposition in the preliminary jurisdictional issues decision was that prima facie the modern award meets the objective, unless of course one of the parties wanted to argue that that proposition was wrong. We submit that that proposition was not wrong and that your Honour and the other members of the Full Bench ought to apply it in these proceedings. The second issue that I wanted to raise in reply were the five reasons identified by the SDA in support of its contention that there was a need for material change in order to support a variation to a modern award pursuant to the current review.

PN28026

The first reason identified by the SDA was that there was implicit acceptance by the legislature that a modernised award pursuant to the award modernisation process met the modern awards objective and that's a premise that was put by the SDA which is not accepted by the Australian Industry Group. We articulated in writing why we do not accept that premise. That writing appears in paragraph 5 of our submissions in reply and I rely upon that writing without repeating it now. The second reason identified by the SDA was that there would be an unworkable outcome with the possibility of the award moving in and out of achieving the modern awards objective.

PN28027

In my submission that's a mischaracterisation of the effect of our submission. There's no unworkable outcome and there's no suggestion of the award moving in and out of complying with the modern awards objective. The position of the Australian Industry Group is that this Commission is to consider the achievement of the modern award objective every four years as part of the review that needs to occur in accordance with section 156 of the Act and it's not unworkable, in my submission, because there's a statutory direction in section 156 for this Commission to conduct such a review every four years. It's just simply giving effect to the statutory direction.

PN28028

The third reason that was relied upon by the SDA was a suggestion that the employer parties were ignoring the datum point that had been established in the modernised awards. My submission is that the Australian Industry Group is not ignoring the datum point but is recognising the datum point as a prima facie position that the modern award objective was being met. That is that on a prima facie basis the datum point was fair and relevant, but it was open to a party such as the Australian Industry Group to establish that the prima facie position ought not apply, and obviously that's what the Australian Industry Group and the other employer parties have sought to do in these proceedings.

PN28029

The fourth reason that the SDA identified was that the employer parties were effectively ignoring the scale and the significance and the purpose of the award modernisation process that had occurred in 2008 and 2009. With respect, the Australian Industry Group is not ignoring that process. It recognises the scale and the significance and the purpose of the modern award process in the prima facie position that the award was fair and reasonable. But what it seeks to do is establish that it no longer meets the modern awards objective, and in the ways that we have articulated; and in particular that it provides in the context of the Sunday penalty rates more than is necessary to meet that modern awards objective.

PN28030

The fifth reason that was identified by the SDA was that the industrial parties may require this Commission and other parties to use their resources to participate in the four yearly reviews. The short point that I wish to make on this issue is that of course it's not an inter partes review, it's a review that the Commission must conduct itself to comply with the statutory charter. It's obviously up to the parties themselves to determine the extent of their participation, and to the extent to which they might share the burdens among similar parties to address a particular issue that needs to be agitated or to respond to a particular issue that is being agitated.

PN28031

The third issue that I wanted to deal with in reply was the effect of the Restaurants and Catering Victoria decision. The members of the Full Bench will recall that an extract of that decision appears in the ABI folder that was handed up on Monday by Mr Izzo. In particular, the extract appears behind tab 1 of that folder. The first aspect that I wanted to emphasise is the last sentence of paragraph 90, which appears in that extract and it states that;

PN28032

For the purpose of the two yearly review, if a party cogently demonstrates that for any reason an award is not achieving the modern award's objective and/or is not operating effectively without anomalies or technical problems arising from the award modernisation process, then that must be taken into account in the conduct of the review under item 6.2 of the Transitional Act.

PN28033

This is the part that I emphasise in particular;

PN28034

Regardless of whether circumstances have changed since the Full Bench decision which resulted in the making of the modern award.

PN28035

That's the end of the emphasis. That passage, in my submission, undermines any suggestion that there's a need for material change or significant change. A similar point is made in the next paragraph of the decision, and that is paragraph 91. That is of course a point made by the Full Bench when describing the error that was found by Gooley DP, and there's obviously a dispute about the extent to which the emphasis of the error was on a significant change, that's emphasised in paragraph 91 or whether it's the other matter that's addressed in paragraph 92.

PN28036

In any event, as your Honour the President observed when the Full Bench came to re-exercise the discretion, having found that there was error on the part of her Honour, the Full Bench did not apply the material change test, and that's plain from its consideration at paragraphs 138 and 139 of the decision. I don't seek to take the members of the Full Bench to those paragraphs but I rely upon them.

PN28037

Can I just make one observation about the last sentence in paragraph 90 of the RACV decision. It's true of course that that observation was made in relation to the transitional review, not a full yearly review, but in my submission those observations apply with greater force in respect to the four yearly review because of the broader nature of the four yearly review.

PN28038

The fourth matter that I wanted to raise in reply was the assertion by the SDA that it's erroneous to suggest that there's a temporal aspect to the four yearly review. My submission is that there is obviously an inherent temporal aspect in the obligation of the Commission to conduct a review every four years. That by definition introduces a temporal aspect. Each examination pursuant to that review needs to occur at the time of the review. Obviously, the obligation is on the Commission to conduct a review, not simply left to the parties to agitate issues in order for that review to occur.

PN28039

The fifth point that I wanted to raise in reply was the reliance upon by the SDA on previous decisions since 2010, which had involved the application of arbitrated decisions and industrial merits. Can I just make a number of observations. First, there has been no arbitrated decision on the issue of Saturday work versus Sunday work and certainly none has been identified by any of the unions.

PN28040

Secondly, no prior evidence in the proceedings have been directed to the Saturday work versus the Sunday work issue and any difference of lack of difference that may exist between those two days, and once again none has been identified or pointed to by the unions. The third point that I wanted to emphasise is that there has been no industrial merit consideration relating to the Saturday work versus the Sunday work and once again, such consideration has been identified by one of the unions.

PN28041

The sixth matter that I wanted to raise related to the SDA rejecting the criticism that the Australian Industry Group had made on the inadequacies of the evidence of Prof Charlesworth. The Australian Industry Group had emphasised that certain aspects of the material that are being relied upon by Prof Charlesworth had been effectively ignored by her, particularly those aspects that related to part-time employees, employees that worked long hours, employees that had caring responsibilities and employees that were struggling with the disconnect between their wish to reduce the number of hours they're working and their ability to actually reduce the number of hours.

PN28042

The response of the SDA to those criticisms was that the professor was only asked to consider employees generally and not to consider the specific criticisms that we had identified. The short submission that I wish to make is the limitation on the question that's asked by a union of the professor does not absolve the need of this Commission to consider the characteristics of the relevant employee, and the characteristics of the relevant industry when it's reviewing each of the awards as it's required to do under section 156.

PN28043

The members of the Commission will appreciate that in the Fast Food Award there is a high level of part-time and casual employment, there's little or no long hours, there's little caring responsibilities and there's no suggestion of any disconnect between an endeavour on the part of employees to reduce the number of hours they're working and some sort of preclusion by the employer from doing so. The short point that we wish to make is the circumstances where the worst work-life outcomes have been identified as applying, are circumstances that do not apply for the fast food industry because of the absence of those characteristics in the employees and in the industry specifically.

PN28044

The seventh matter that I wanted to emphasise in reply was the comments that had been made on the $2 and under case by the SDA. We address the $2 and under case in our submissions in reply at paragraph 12 and I rely upon that without repeating them. But we do join in the submission of the retail employers that the evidence in the $2 and under case was not contemporary for the reasons that they articulated in their submissions at paragraph 26, and we note that the SDA criticises an approach that involves looking in the rear view mirror and they did so yesterday at paragraph number 27631, and really the evidence in the $2 and under case is really acting contrary to that warning because it is focusing on the historical evidence that was the subject of the $2 and under case.

PN28045

The eighth matter that I wanted to emphasise in reply was the objection by the SDA to an allegation that the Australian Industry Group was translating the reasoning in the restaurant case relating to untrained restaurant employees to the fast food industry. It was suggested that employees in the fast food industry were at the same level as a level 3 classified employee under the Restaurants Award. Those submissions are based on a premise which are factually inaccurate. The

evidence that relates to training in the fast food industry is at the higher level. That is, it's relating to managers and shift managers and the like.

PN28046

That's plain from the evidence of Ms Limbrey in her affidavit which was exhibit AIG3, and it appears at tab 3 in the folder that was handed up by Mr Dixon on Tuesday, relating to the materials upon which the Australian Industry Group relied. The relevant paragraph references are paragraphs 182 and 183 but there are various references there to appropriate certificates that are the subject of training for managers and the like. Can I just make a couple of observations. As against the documents that Mr Dixon handed up which were the extracts from the classifications in the Fast Food Award, Mr Dixon handed up the document, a single page document, on Tuesday and there was a reference to the classifications in the Fast Food Award.

PN28047

The members of the Full Bench may recall that a fast food - and there were three classifications; a fast food employee level 1, a fast food employee level 2 and a fast food employee level 3. The employee level 1 dealt with preparation, food preparation, cooking, sales and matters of that kind. The employee level 2 had the major responsibility on a day to day basis for supervising the level 1 employees and/or training new employees, and the employee level 3 was appointed to be in charge of a shop, a food outlet or a delivery outlet.

PN28048

Mr Dixon also handed up a copy of an extract from the enterprise agreement relating to McDonald's and there was no level 1 in that classification system under the enterprise agreement but there was a level 2, a level 3 and a level 4. The members of the Commission will note immediately that there's a correspondence between level 1 under the award and level 2 under the enterprise agreement. The members of the Full Bench will also note that there's similar language used in level 2 under the award and level 3 under the enterprise agreement, and the members of the Full Bench will also note that the same concept of managing a store is addressed in both the employee level 3 and under the award and a level 4 under the enterprise agreement.

PN28049

Now those positions are to be contrasted by what the Full Bench said in the restaurant and catering Victoria decision, particularly at paragraph 141, and in that paragraph there was particular emphasis laid on the training requirement that occurred in the Restaurant Award and relevantly, there's references to various certificates that the higher level managers would be required to undertake pursuant to that award. The overall effect of the submissions that I've just been putting is that it's inaccurate to say that the untrained employees in the RACV case are to be accurately compared or translated across to the Fast Food Award.

PN28050

The employees in the Fast Food Award are not the same as the level 3 employees under the Restaurants Award. They're actually the same as the lower level employees under the Restaurant Award and therefore the premise for that submission falls away. The ninth and final matter that I wanted to emphasise in

reply was the emphasis by United Voice, but adopted by the SDA, on the criticisms directed to Dr Muurlink, and there was a suggestion that in effect only five criticisms had been identified. Can I just remind members of the Full Bench that at least for the part of the Australian Industry Group we identified 29 criticisms. That's in paragraph 257.1 to 257.29 of our submissions.

PN28051

There was also an endeavour to explain away one of the criticisms on the basis that it related simply to casual employees. Can I just remind members of the Full Bench of the State of Australia's Young People report that was the subject of reference by Mr Dixon on Tuesday. It appears at tab 7 of the folder that Australian Industry Group relies upon, and relevantly at page 236 of that report there's a recognition that young people, even though they are casually employed, rate their job security very highly. Therefore in my submission the concern about casual employees falls away, at least insofar as it relates to young people, and obviously as the members of the Full Bench will appreciate there's such a significant proportion of young people in the Fast Food Award.

PN28052

There was also an endeavour to suggest that the material upon which Dr Muurlink relied was really human-specific rather than industry-specific. We reject that submission. It's obviously necessary to consider whether any of these effects exist of employees working in one of the relevant industries which is the subject of this review, and the six factors which are emphasised by Dr Muurlink are not, in my submission, present in all industries in Australia and certainly are not present in the fast food industry. That's because the issue of consecutivity for example is not an issue that arises in the Fast Food Award. The issue of being on-call work does not arise in the Fast Food Award.

PN28053

The issue of precarious employment does not arise in the fast food industry. The issue of fatigue and the like which was emphasised based upon long hours of work does not arise in the fast food industry. So, with respect, it's inaccurate to try and say it's a human-specific problem. It's highly dependent upon the nature of the work that the person performs and the industry in which they're engaged. Unless there's anything further, they're the submissions that we wish to make orally in reply.

PN28054

JUSTICE ROSS: Thank you, Mr Gotting.

PN28055

MR WHEELAHAN: If the Commission pleases, I adopt the submissions of Mr Gotting, save for his eighth point where he was confined to the fast food industry. As to the SDA's stated test to enliven the jurisdiction of the Commission, firstly, that test has not been adopted by the full bench in its preliminary jurisdictional decision. In the Restaurant and Catering Association full bench appeal decision - and, as your Honour noted yesterday - paragraphs 91 and 92 of that decision are inconsistent with the test as proposed by the SDA.

PN28056

Further, in paragraph 130 of that decision, the full bench expressly stated that, "The issue of Sunday penalty rates vis-a-vis Saturday penalty rates" is one that is "more appropriately considered in the course of the broader four-yearly review." They specifically refer to the proportionality argument between Saturday and Sunday.

PN28057

Mr Moore made criticism of the terminology of describing it as a fresh reassessment. The wording for a fresh and a reassessment gains support from the same decision at paragraph 3. At paragraph 3, it refers again to the four-yearly review and that, in terms of a consideration, a fresh consideration as opposed to simply adopting previous value judgments of the Commission - for example, in the $2 and Under case - so support for that language is found there. Now, I'm not submitting, as Mr Moore suggested, that that is completely untethered to any historical context. Again, I refer to and adopt paragraph 60 of the preliminary jurisdictional decision.

PN28058

It was also said by Mr Moore that the decision of Tracey J in SDA v NRA No 2 could not be relied upon because that dealt with section 157(1) of the Act. The fact is that at paragraph 38 of the preliminary jurisdictional decision, they have quoted the decision of Tracey J and described the principles there as opposite to this review. That includes, plainly, the temporal nature of the review where different minds have different views on the same or different evidence, as is occurring in this review.

PN28059

Finally, I do agree with Mr Moore with respect to one matter and need to just amend the written reply submissions at paragraph 12(a). This was a criticism here of an incorrect description of the footnote of Ms Yu's report. I'll just read it onto the transcript. In paragraph 12(a), the first line should be amended so as to delete the words "all industries" and insert "the ANZSIC retail trade classification". In the second line, instead of the words "retail industry", insert the words "those persons covered by the General Retail Industry Award".

PN28060

That then is consistent with the references to the cross-examination, referenced in the transcript there and to the footnote of Ms Yu's report, if the Commission pleases.

PN28061

JUSTICE ROSS: Thank you. Mr Warren?

PN28062

MR WARREN: If the Commission pleases, we make two points in reply. Firstly, dealing with the employment effect that was tackled by my learned friend Mr Dowling. The clubs have brought cogent hands-on practical evidence, unmoved in cross-examination and indeed at times confirmed in cross-examination, of the positive employment effect a reduction in weekend and public holiday penalty rates would have in the club industry. This was not theoretical evidence. This was hands-on practical evidence.

PN28063

I won't read the particular parts of the transcript, but in addition to the affidavit evidence tendered, we particularly refer the Commission to - with respect to Mr Della's evidence - paragraph numbers 2858 to 2861, 2895, 2899, 2917 to 2922, 2911, 2924 and the questioning by your Honour the President and the answers therein from 2931 to 2934. With respect to Mr Casu's evidence, in addition to his affidavit, the transcript evidence at paragraph numbers 3124 to 3125, 3129 to 3131, 3153.

PN28064

We say that quite clearly my friend's attack on the use of the current casual pool to staff these additional hours is clearly an attack without merit. They are additional employment hours. We need only to refer to the modern award objectives found in section 134(1)(c) which speaks of "increased workforce participation" and in 134(1)(h), the "impact of any exercise of modern award powers on employment growth". Any increase in employment hours is employment growth. Any increase in the opportunity for persons to be employed leads to employment growth.

PN28065

The second point we make is that the question my learned friend raises with respect to the desire or otherwise to work on weekends - whether it does have any effect on penalty rates, it is clear that without weekend work, persons who can only work on weekends such as in Mr Della's Hawthorn club, university students - without the weekend work they wouldn't have work to do. They need that weekend work.

PN28066

To say that the Commission should take no notice, as I understand the submission, of whether a person desires to work on the weekend, we say that is not a relevant criticism of the employer's case and that quite clearly without weekend work and the growth in weekend work, there would be persons who need to work on weekends - who cannot work during the week - and there lies their employment opportunities. They are the two points we wish to make in reply.

PN28067

We note, incidentally, there are a small number of transcript errors that we've picked up. I don't have the document with me. Those instructing me will write to the Commission over the next few days just to highlight a few errors that we see in the transcript. We look forward to putting a written submission with respect to the section 114 issue that has been raised, if the Commission pleases.

PN28068

MR RAUF: If it please, I wish to address the members of the bench in relation to four discrete matters in reply. Can I also just adopt the submissions made by my learned friends Mr Gotting and Mr Wheelahan as to the approach to the review. Just going to the first discrete point, it was said by my learned friend Mr Dowling that no explanation had been provided by Restaurant and Catering Industrial as to the adoption of some difference in ratio of penalty rates as between Saturday and Sunday work and public holidays in relation to the full-time, part-time and then casual employees.

PN28069

With respect, that was something that I did address in my earlier submissions on Monday and seek to clarify. Just to be clear, the ratio which had been reflected in the draft determination for casual employees was - the intent there was to mirror what the existing provision was, but members of the bench may recall that I also did say that Restaurant and Catering Industrial was not wedded to that historical situation and was amenable to a reflection of a loading which applied to casual within the context of an overall reduction to the rates. I say that for clarity.

PN28070

Secondly, my learned friend, while addressing or making submissions on the employment effect, made references to evidence of some of the lay witnesses called on behalf of Restaurant and Catering Industrial. I just - so that there isn't any incomplete or misleading reliance on that - I just want to clarify some things. Firstly, it was said that to the extent that a Mr [redacted], who operated [redacted] in Victoria, gave evidence about his opening hours being dictated by a liquor licence of the terms of that, to clarify that he gave that answer as it related to evening hours, not weekend or public holidays, and that's apparent at transcript reference paragraph 3910 and 3911.

PN28071

There was the general submission made that none of the lay witnesses of Restaurant and Catering Industrial gave evidence about increasing number of workers following the reduction in the penalty rate for casuals at levels 1 and 2 from July 2014, I think it was. With respect, that does not reflect the evidence, and if I can again, without going to the transcript, but just provide some references for the assistance of the Bench. For instance, Mr [redacted] again, who generally gave evidence that he wasn't focussed on the bookkeeping and was looking at it at a more general level, he expressed the intention or the desire at paragraph reference 3958 that he wished to take on more people. There was subsequent to that an exchange about, well, have you taken on more people, and it was put to him that there were no increased number of casuals put on or that the number of casuals was constant over 2014/2015 and that that was a fair assessment, to which proposition Mr [redacted] agreed, but that does not preclude that the existing numbers may be utilised for more hours, consistent with the wish that Mr [redacted] had expressed that he hoped to utilise people during the busier times to provide increased services.

PN28072

JUSTICE ROSS: It's not inconsistent with it but did he give evidence that there had been increased hours for existing casuals?

PN28073

MR RAUF: No, he didn't, your Honour. Ms [redacted] similarly gave evidence at transcript 4217 of wanting to engage more people during busier hours. Whether that be in terms of numbers of people engaged or the hours for which the existing people are engaged, admittedly that's not something that was made clear but nonetheless to make a blanket submission that there is no evidence of any impact in an employment effect context, with respect, is not something that we say is correct.

PN28074

JUSTICE ROSS: But both of the witnesses you've referred to have said they wanted to.

PN28075

MR RAUF: Yes.

PN28076

JUSTICE ROSS: They didn't say that since the decision we have.

PN28077

MR RAUF: That they had taken on more people?

PN28078

JUSTICE ROSS: Or worked additional hours - the existing employees had worked additional hours.

PN28079

MR RAUF: Yes. They'd certainly said that they hadn't taken on more people. That's something that's apparent from the transcript. I couldn't discern that they had also given evidence that they had not required the existing numbers to work more hours.

PN28080

JUSTICE ROSS: Yes, it's putting it the other way. Did they say that since the Restaurant decision they have allocated existing employees additional hours?

PN28081

MR RAUF: Not that I could see, no, your Honour.

PN28082

JUSTICE ROSS: No.

PN28083

MR RAUF: But there's a subtle difference and I just wished to make that point. And just also in relation to that point, it was said on Mr [redacted] evidence that that was undermined and for other reasons. That's the first time I've heard of that submission, and his evidence was discussed at paragraph 204 of the United Voice submissions, and there's nothing there providing any basis or explanation for this submission that his evidence is undermined and ought not to carry weight. When one reviews the transcript, there is an exchange and discussion about a calculation which he brings forward as to the proportion of the wage costs measured against the sales, and he put that figure as 43.66 per cent. My learned friend, Ms Bourke, on her reckoning proposed that she had 35 per cent and there was an exchange about that, and then that was clarified by Mr Clarke in re-examination. There doesn't appear to be any other attack and so it was rather an extraordinary submission that it was undermined. And importantly he did give evidence, coming to the employment effect point at transcript 4449 to 4457 about there being some increase in numbers.

PN28084

Thirdly, I just want to make comment on the reliance - in dealing with the reliance of the Ai Group on the Restaurant, Catering and Full Bench decision, there was a characterisation by my learned friend, Mr Dowling, that the Full Bench decision made a distinction as to levels 1, 2 and 3 and following on the basis of the 1 and 2 not being framed. I want to refer the Full Bench to the evidence in the present matter and particular at transcript 14 September, 4366 to 4367, where again Mr [redacted] gave evidence that, on his understanding of the award provisions, the level 3 was not so much distinguished in relation to the issue of training but rather, on his understanding, it was triggered for the reason that employees at level 3 were dealing with cash and receipt of money, et cetera. And indeed, when one turns to the classification descriptions in schedule B of the Restaurant Award and, for instance, looks at the food and beverage attendant position, that appears to be an understanding which is correctly borne out, so just by way of clarification.

PN28085

Finally, the submission was made that no evidence was brought as to the claim of Restaurant and Catering Industrial about change to the penalty rate for evening work and that the only reliance placed was on the Ombudsman report. Yes, I certainly did refer to the Ombudsman report, but it's incorrect to say that there was no evidence and I refer to evidence given by again Ms [redacted] for the transcript of 14 September at paragraph 4209, where she gave clear evidence that in structuring or organising rosters, one thing that she had regard to were the hours during the evening and the morning when penalty rates kicked in. So at 4209, she, when questioned about the number of casuals and the work that they did or at what level, she said: "They're" - as in the casuals - "are sitting on level 2 so their rates stay the same. We try not to have any of our casuals working past 10 o'clock at night or starting before 7 in the morning", clearly adverting to the impact of that or the consequence of that, in terms of managing the wages bill.

PN28086

But more generally, to discuss the issue in terms of quantum or the effect of dollar terms, with respect, fundamentally misunderstands if not misconceives the concern being raised, which I again sought to clarify in my opening submission when explaining the claim of Restaurant and Catering Industrial. It's not about the monetary outcome. It's about streamlining the process and creating ease rather than burden in circumstances where a great deal of these small business operators rely on automated processes, methods of calculating wages, and it requires for there to be a two-tiered or two-stream approach. It requires one to then adjust those systems and to ensure a level of correctness in the rate which applies at certain times. And all of these add to the level of the burden on smaller businesses which predominate the restaurant and catering industry. If it please, they were the submissions I wished to make to in reply.

PN28087

MR STANTON: May it please, there are just two matters. The first, there was a submission that my friend Mr Dowling put this morning in relation to health impact. It was put that the Full Bench would be cognisant of the impact of weekend work upon employees and necessarily the health impacts, and in reply to that it's noticeable that there was no evidence regarding the health impacts of any of the lay witnesses called by United Voice, at least those witnesses that were

called with respect to the Hospitality and General Award. There were no, for example, medical opinions presented to support there being any particular health effects upon those individuals.

PN28088

The second point - and the Full Bench might be pleased to hear that there is a point of agreement between us - and it's in relation to the matter raised by United Voice at paragraphs 428 and 429 of the submissions, and it can be dealt with very quickly. This deals with clause 37(b) of the Hospitality Award, and deals with part of the determination filed by the associations on 13 February of last year. That part of the determination deals with the length of a substitution day and my friend in the submissions correctly says that there was no submission made about that. That's the case, that matter is being dealt with separately by a Full Bench that has either been convened or is to be convened to deal with public holiday issues, common issues. It's not pressed in these proceedings and no finding is required. May it please.

PN28089

JUSTICE ROSS: Mr Seck.

PN28090

MR SECK: Thank you, your Honour. The Guild wishes to address four issues in reply. Let me say at the outset that the Guild adopts and relies upon the submissions in reply of the Ai Group and the Retail Associations, concerning the nature and scope of the four yearly review.

PN28091

The first issue is in relation to the application of the $2 and under case to the community pharmacy industry. My learned friend Mr Moore addressed that issue at PN27353 to 27358. There are a number of things to note about the $2 and under decision. It relates to the retail industry and whilst the community pharmacy industry for the purposes of the four yearly modern review has been treated as part of the retail stream, that decision did not deal with the disabilities associated with working on Sundays in the community pharmacy industry.

PN28092

Indeed, when one looks at the case law on this issue as it pertains to the community pharmacy industry, in particular in relation to award simplification, the approach that's been taken by this Commission has to be to break the nexus between the retail awards and the community pharmacy industry, on the basis that the community pharmacy industry is more in the nature of providing health and wellness services. I address those issues in paragraph 28 of our principle submissions, in particular the decision of Hingley C.

PN28093

The Guild has been at pains in these submissions to emphasise the significant differences between the community pharmacy industry and the other retail industries, in particular in relation to the regulatory arrangement commercial context and the workforce characteristics. I draw the Commission's attention again to the decision of O'Shea C, which is the only decision that we're aware of dealing with an arbitrated outcome in relation to penalty rates in the community

pharmacy industry in 1996, and as it was apparent from reading O'Shea's decision, an integrated approach was taken in relation to the establishment of wages classifications and penalty rates. It is apparent when one reads the decision there was a conflation of the work value consideration, as well as other commercial and disability considerations in establishing each of those matters. Accordingly, in our submission, the $2 and under case has little if not any - little relevance to the current award.

PN28094

Can I then deal with the question of the operation of the Community Pharmacy Agreement and price disclosure. The SDA's primary criticism of the Sixth Community Pharmacy Agreement which was exhibit SDA8 is contained at PN27598, namely that the Pharmacy Guild had not produced a report using its analytical capacity in-house for forecasting the economic and commercial impact of the Sixth Community Pharmacy Agreement on the community pharmacy industry.

PN28095

Now whilst there was no reference to it, I gather from the criticism that it's a Jones v Dunkel criticism which has been made against the Guild for not eliciting that evidence. For reasons which have been articulated in other parties' submissions, the Guild submits that the Jones v Dunkel approach is not available in a review, but in any event it's, in our submission, it would be an extraordinary step to require an employer group to produce an expert report anticipating or forecasting the impact of something which has just come into effect or had yet to come into effect.

PN28096

Might I remind the Bench that the Sixth Community Pharmacy Agreement was signed on 24 May 2015. It did not come into effect until 1 July 2015. When one looks at the timetable for the filing of evidence, in particular expert evidence, which I assume was what was suggested by the SDA in terms of an econometric analysis, that was filed on 29 June 2015. In any event, the impact of the Sixth Community Pharmacy Agreement was put to a number of the Guild's witnesses, both lay witnesses and Mr Steven Armstrong, who the Bench will recall was the former chief economist of the Pharmacy Guild, and they addressed those impacts directly. The highest that the evidence went was that it simply restored the position of pharmacies prior to the introduction of price disclosure.

PN28097

Many of the pharmacists expressed the view that they did not know the impact of the Sixth Community Pharmacy Agreement because it had yet to be fully realised yet, it had only been in place for a very short period of time. In any event, the key part of the Sixth Community Pharmacy Agreement is the provision of $1.26 billion funding for the community pharmacy programs, and that is wholly dependent one reads clause 6.1.9 upon increased accessibility through increased trading hours.

PN28098

The submissions of the Guild have sought to emphasise that opening further trading hours is very much dependent on profitability during those hours and the

vast majority of the survey and lay evidence demonstrates that pharmacies have not opened during a substantial number of those hours, in particular on Sundays and public holidays, because of higher penalty rates causing unprofitability during those periods.

PN28099

Might I also note that in relation to the question of price disclosure, my learned friend Mr Moore said that the impact of price disclosure could have been - should have been addressed in the Guild Digest figures that were presented in both Mr Armstrong's statement and in the expert report product by Deloitte in relation to the impact on the community pharmacy industry. Paragraph 76 of our submissions in-chief sets out the dates and impact of price disclosure. It was introduced on 13 March 2014. The impact of it was to reduce the data collection cycles from 18 months to six months. So one wouldn't realise the impact of price disclosure until after 30 June 2014, which is where the data takes us up to when one looks at the Guild Digest statistics.

PN28100

Might I then last deal, on the question of the Sixth Community Pharmacy Agreement, Mr Moore made the submission that when one reads clause 6.1.9 the requirement for improved accessibility due to increased trading hours was uncertain and vague. Can I emphasise that the words which are used in clause 6.1.9 are mandatory in nature. It requires an achievement of real improvement in patient access. It is true for the first year both the government and the Guild would work actively to improve the increased trading hours and funding would be based on working together. But for the second and subsequent years a real improvement must be achieved. So it's expressed in mandatory form.

PN28101

That dovetails into the next point, which is the question of profitability in the community pharmacy industry. There was a dialogue between your Honour the President, Hampton C and my learned friend Mr Moore, regarding the relevance of profitability in this industry. Might I just emphasise a few things on this point. The Sixth Community Pharmacy Agreement provisions relating to increased accessibility and the dependence upon funding for the community pharmacy programs is conditional upon increasing trading hours. The evidence reveals in this case that the key driver of opening during - opening further hours is profitability. If it's not profitable the evidence of the community pharmacists is that they do not trade during those hours unless required under leases. Now there's also evidence about cross-subsidisation. Those submissions are set out in paragraphs 55 to 57 in the reply.

PN28102

Can I then last deal with the issue of the regression analysis contained in the Deloitte Pharmacy Award Report which is exhibit PG35. Mr Moore addresses this issue at transcript PN27643-27646. A number of points need to be made. Firstly, it is a completely orthodox approach in undertaking regression analysis that a dummy variably be used and that there be control for confounding factors.

PN28103

The only confounding factor which was identified by the SDA which had not been addressed in the Deloitte Pharmacy Award Report was the impact of the GFC. Ms Pezzullo deals with that in her reply evidence in exhibit PG36, pages 19-20. In summary, her evidence is that if one was to take into account the impact of the GFC it would suppress wages cost, trading hours and employment hours, and therefore if anything there would be an underestimation of the negative impact of the Pharmacy Industry Award upon those matters.

PN28104

The next point that Mr Moore was made was that the changes in the Pharmacy Industry Award weren't identified. Now if one on a fair reading of the report goes through it, it in my submission identifies penalty rates as the key issue which had resulted in a negative impact. Those matters are set out in part 3.3 of exhibit PG35, in particular table 3.12 where the proprietors 91.59 per cent of them identified penalty rates as the primary concern, arising out of the impact of the penalty award. Table 3.13 identifies a reduction in trading hours due to the Pharmacy Industry Award on Sundays and public holidays and those figures are 88.89 per cent for Sundays and 92.59 per cent for public holidays.

PN28105

Then in table 3.14 on page 49, the impact of the Pharmacy Industry Award is demonstrated on trading hours, in particular on Sundays, public holidays and Saturdays after 6 pm. In each of those circumstances nearly a majority of those proprietors identified a reduction in trading hours due to the impact of the Pharmacy Industry Award. To the extent one needs any confirmation that there had been a change in penalty rates on those particular days prior to the Pharmacy Industry Award, one merely has to go to appendix D of table 2.4 on page 44 of the background paper.

PN28106

The Bench will recall that identified that there was a critical mass or a majority of provisions in the predecessor awards which prescribe 150 per cent as opposed to 200 per cent for Sundays. In my submission, it's plain that when one looks at the differences between the awards prior to award modernisation and after award modernisation with the making of the Pharmacy Industry Award 2010, that the major difference was the introduction of the 200 per cent penalty rates for the majority of the awards. May it please the Commission.

PN28107

MR BREHAS: Your Honour, it's Brehas from National Retail Association. I think I will be the last one - - -

PN28108

JUSTICE ROSS: I'm sorry, I can't hear you.

PN28109

MR BREHAS: It's C Brehas from the National Retail Association. Can you hear me, your Honour?

PN28110

JUSTICE ROSS: Yes.

PN28111

MR BREHAS: Your Honour, we adopt and rely upon the submissions of the Ai Group and the other retail associations relating to the nature and scope of the four yearly review insofar as it relates to the Fast Food Industry Award. Other than that, we have no further submissions. Thank you.

PN28112

JUSTICE ROSS: Thank you. Mr Izzo.

PN28113

MR IZZO: Your Honour, there are eight matters that I wish to deal with in reply. The first relates to the submissions made by the SDA in relation to the need for a significant change in circumstance. To the extent that Ai Group's reply submissions dealt with that matter, we adopt what the Ai Group has stated in reply. But there is one additional matter I would like to draw the Bench's attention to in relation to that particular topic, and to do so I'd like to hand up a copy of the first instance decision of Gooley DP in the Restaurant and Catering Transitional Award Review.

PN28114

Your Honours, while you are handed that case it was put by Mr Moore yesterday that the error identified with that decision by the majority Full Bench presided over by Hatcher VP was that the Deputy President in her first instance decision identified a single criterion of a significant change in circumstances. The error was the identification of that criterion being unanchored or disconnected from any assessment about whether the award is achieving the modern award's objective. That's at PN27304 from yesterday's transcript.

PN28115

The reason I want to draw your attention to the decision is that if one looks at what actually took place in the decision you will see there is no way that the Full Bench could have arrived at the proposition that Mr Moore put, and to make that proposition good if I can just take you to paragraph - firstly to paragraph 7 of the first instance decision, which is where the Deputy President outlines the modern award's objective and states;

PN28116

It is significant within the 2012 review -

PN28117

The next paragraph which is relevant is paragraph 44, which appears - - -

PN28118

JUSTICE ROSS: I'm sorry, paragraph 7?

PN28119

MR IZZO: It's on page 5, your Honour. The top of page 5. Yes, so paragraph 7, the Deputy President talks about the modern award's objective being significant within the 2012 review and outlines it. The next paragraph which is relevant is paragraph 44, which I'm just trying to find - which is at page 17 of the decision.

PN28120

JUSTICE ROSS: Yes.

PN28121

MR IZZO: The Deputy President says;

PN28122

It was submitted the current penalty rate provisions of the order are operating in a manner which is inimical to the modern award's objective.

PN28123

The next paragraph is paragraph 241 and that's on page 41. It's this excerpt which is really critical from 241 onwards. At 241 in the third line, looking at the proposals put, the Deputy President talks about it having a significant impact on the take home pay of employees in the industry. She then moves on at 242 - sorry, and when I say take home pay, we submit that that enlivens section 134(1)(a) which talks about relative living standards and needs to low pay. At 242, the Deputy President says;

PN28124

Whilst I accept the variation proposed would reduce employment costs and reduce regulatory burden -

PN28125

PN28126

At that paragraph we say the Deputy President is addressing modern award objective 134(1)(f). At 243, the Deputy President says;

PN28127

The variations proposed would have a negative impact on relative living standards and needs of low pay.

PN28128

That again calls up 134(1)(a). 244, the Deputy President says there was no evidence that the proposed changes would encourage collective bargaining. That's another limb of the modern award's objective. Then at 245, the Deputy President concludes;

PN28129

I am not proposed to make the variations sought to remove penalties for Saturdays, Sundays and after 10 pm and replace with penalty for work on the sixth and seventh day.

PN28130

She then goes onto say she endorses a previous Full Bench decision, the AIRC, and says at the last two lines of paragraph 246 that what has been sought;

PN28131

would place the operational requirements of the restaurant and catering industry primacy over all other considerations which is the Commission is required to take into account -

PN28132

And there we say that's again talking about the modern award's objective, including the needs of the low paid and the weight of regulation. Again, that's calling up the modern award's objective. The Deputy President then goes onto say the RCA has not established cogent reasons for revisiting the penalty regime and says there critically;

PN28133

The ground on which they seek the variations do not identify a significant change in circumstance. They are largely merits considerations which existed at the time the award was made.

PN28134

It could not be said in any way, shape or form that the Deputy President's analysis was disconnected with or - I can't remember the other term - unanchored from this test about significant change. What we say has occurred is that the majority decision of the Full Bench presided over by Hatcher VP has seen in 247 of the first instance decision, that the Deputy President has added an addition fetter. One that should not have been added, and that is why they found appellable error. But at all times the Deputy President had the modern award's objective in her mind, it's quite clear, in coming to the conclusions reached. So that's what we'd like to draw the Bench's attention to in relation to that significant change of circumstance point.

PN28135

The next matter that I wanted to address briefly relates to a brief comment made by the SDA regarding the or urging the Commission to prefer the evidence of Prof Charlesworth, when it comes to disability associated with Sunday work, compared to what's contained in the Rose report. A comment was made that there's some 2200 employees surveyed by Prof Charlesworth and a mere 440 by Prof Rose.

PN28136

I just want to draw the Bench's attention to the fact that Prof Charlesworth only surveyed 223 employees in the retail industry and that can be found at page 7 of her report. Whereas Prof Rose actually surveyed 257 retail employees, and that can be found at page 18 of ABI1. He also surveyed 186 employees in the restaurant industry. So whilst the numbers are different, that's because Prof Rose's evidence is only in relation to the industries, the subject of this review. Prof Charlesworth's analysis relates to employees at large.

PN28137

There was some further discussion between Lee C and Mr Moore regarding the findings of the Rose report and what should be drawn from the percentages associated with the amounts that employees sought to be paid. Mr Moore indicated that the Commission should pay particular attention to the fact that the amounts - if one looks at the dollar that people sought, even on just a weekend, it was significantly higher than the award rate.

PN28138

Two things I'd like to say about that. One is well Mr Moore only compared it to classification 1 in the award, or grade 1, so we're not assuming here that all the respondents were engaged on grade 1. That's the natural limitation of Mr Moore's submission. But secondly, if I can draw the Bench's attention to page 19 and particularly page 20 of ABI1, in page 20 Prof Rose identifies what the average wage was of these workers. In the retail industry it was $21.92 and we say that explains quite logically why it is when they were asked for their weekday rate, that they sought a figure that was pretty much equivalent to $21.92. It was slightly higher I think.

PN28139

It's completely understandable and what we say that shows is it goes to show the effect that - sorry, I'll withdraw that. It goes to show that what they were currently paid had a significant contextual effect on their responses to the survey because it influenced their answers as to what they should get on a weekday. Equally the argument follows, as I said in my submissions earlier, that what they get paid on a weekend would have influenced what they answered when they talked about weekend rates. That's why we say that the Commission should look at the relative differences between the two rates, to get an indication of the type of disability the employees themselves assess that the weekend and public holiday shift as attracting.

PN28140

Another matter that was raised by Mr Moore, and this was raised for the first time yesterday, it's not in any of the SDA reply submissions to the best of my knowledge, was an assertion that for - initially it was put I think for a large number of the awards or for - sorry - for a large number of jurisdictions but then Mr Moore qualified it to just New South Wales and Victoria, work on a public holiday was voluntary prior to 2006. As I said, the first we heard of that was yesterday. We hurriedly overnight looked at the award provisions in place before the introduction of the modern awards and furiously prepared a table.

PN28141

I note that Mr Moore's not present in Sydney anyway so what I'd seek to do, your Honours, is perhaps in accordance with the other directions that we're going to file is perhaps if we can include in that a direction for us to file this table, which has what we say the existing award provisions were, and Mr Moore would have an opportunity to respond to that in accordance with all the other materials.

PN28142

The simple proposition we put is that based on our analysis there was only one jurisdiction where you could say that employees could elect to work or not work a public holiday, and that was Victoria. In none of the others have we identified an element of voluntariness.

PN28143

JUSTICE ROSS: Just a moment. Are you content with that process, Mr Moore?

PN28144

MR MOORE: Yes, your Honour.

PN28145

JUSTICE ROSS: Right.

PN28146

MR IZZO: I'll assume that's yes.

PN28147

MR MOORE: That was yes, sorry.

PN28148

JUSTICE ROSS: Mr Izzo always assumes that you're agreeing with him.

PN28149

MR MOORE: That would be a profound by Mr Izzo.

PN28150

MR IZZO: The only other thing I'd like to say in relation to that because the tables will likely - and Mr Moore's response will likely speak for themselves, is that Mr Moore quoted yesterday a passage from a judgment, I think from the two yearly review, and this is at PN27587 from yesterday. That over many years in New South Wales and Victoria work on public holidays was considered voluntary. As I've said, I think we may be in a position of making a concession in relation to Victoria, given the award provision. I am not sure what evidence there is or in fact there is no evidence before this Commission that generally work on a public holiday in New South Wales was considered voluntary. In relation to that decision that Mr Moore referred to, I note that at paragraph 116 it was the SDA who contended that there were well established work practice in New South Wales that meant that you only worked on a public holiday if it was voluntary. I'm not aware of what evidence, if any, was put in the proceedings about that. Certainly, there is none in these proceedings.

PN28151

A very, very minor point in relation to the Productivity Commission Report, some criticism was made of our reliance on the repot. There's a bit circular round of arguments here about this because in the United Voice and SDA submissions a point is made that the Productivity Commission criticised elasticities adopted by Prof Lew as being unrealistic. In response yesterday I indicated that if you looked at the methodology of the Productivity Commission, they had an elasticity demand of minus 0.6 which was higher than one of the categories that Prof Lewis uses in his modelling. So think we're both using it to the same extent in that sense. I was only using it to respond to what had been put by the other parties in-chief, certainly in relation to that point.

PN28152

There was asked of Mr Dowling about what one of the union experts - I think it was Prof Borland - says about the elasticities of demand that Prof Lewis concludes. Prof Lewis concludes that the elasticity of demand for employment are about minus 0.4 to minus 0.8. I think Mr Dowling said, well, that's too high, but we didn't get an alternate figure from the union experts. I just want to re-emphasise that in his report and in his modelling, although Prof Lewis talks about minus 0.3 to minus 0.8.

PN28153

When he actually does the modelling for eta - I believe I called it "n" in the oral submissions on Monday, but I've since learnt a bit more about the Greek alphabet; eta is the assumption about elasticity of demand - he has got negative 0.5 on one form of the modelling which would be in that range that Mr Dowling says is too high, but in other elements of the modelling he assumes minus 0.1. As I've said before, that lower amount is lower than the range of minus 0.3 to minus 0.8 and still shows substantial negative employment effects.

PN28154

Submissions were also made about the fact that Prof Lewis looked at the impact of the imposition of penalty rates as opposed to the reduction of penalty rates. Mr Dowling referred to a concession he made in cross-examination on that point. I think Prof Lewis's response is instructive not just in relation to this point, but in relation to other criticisms that are made by the union parties. It was put to him by Mr Dowling - and I quote from PN10957:

PN28155

I'm suggesting to you it will be more appropriate in the circumstances to do it based on the reduction in the penalty rate. Do you agree with that?

PN28156

Prof Lewis responds:

PN28157

In retrospect, I think it probably would have been, yes, but whatever the value, the effect is very high, is negative.

PN28158

What his point is there is, well, maybe that will change the degree of Prof Lewis's analysis, but that does not mean there is no negative employment effect. That is our submission in relation to that matter. In relation to Dr Muurlink, I echo the comments of Mr Gotting. Mr Dowling talked about four categories of criticisms. We have a substantial number of criticisms and they are identified at paragraphs 18.4 to 18.12 of our primary submissions. They go to more than just what Mr Dowling discussed in his submissions.

PN28159

There are just two more matters. In relation to the dis-employment effect of penalty rates in the restaurant industry, Mr Dowling made some submissions about the individual restaurant operator evidence given. Mr Rauf has already responded to that and I won't repeat what Mr Rauf has said. All I wish to say is that of the five witnesses, two were unaware that the penalty rates had increased. I'll give you the transcript references.

PN28160

JUSTICE ROSS: Decreased.

PN28161

MR IZZO: Sorry, had decreased. One transcript reference is PN3980. The other one which makes for some amusing reading is PN4137, because the witness

expressed disbelief at his Honour Justice Ross's comment that penalty rates had decreased in almost - was doubting whether his Honour was correct or not. In fact the witness then went to say, "Well, I have to have a look at that", so I think - - -

PN28162

JUSTICE ROSS: I don't think I persuaded him.

PN28163

MR IZZO: That's two of them. The third is Ms [redacted] - and I think Mr Rauf did discuss Ms [redacted] - and I think the interesting thing to point out is while Ms [redacted] didn't increase employment numbers, her evidence is quite interesting. At PN4229, she is asked:

PN28164

How does that impact your thinking with regard to the workforce?

PN28165

Ms [redacted], in part of her response, she says - she talks about labour costs being higher. She talks about costs of goods rising and says:

PN28166

It's quite difficult at the moment to be able to keep everything, just to keep it viable. It's quite a constant battle every week.

PN28167

She talks about keeping labour costs down and costs of goods at a reasonable level, as well. Now, what we submit that identifies, yes, in Ms [redacted] case, she hasn't increased employment. It could well be though that the decrease in rates has enabled her to keep operating at the level she is operating in. I think what she is saying to the Commission is she is struggling day-to-day to keep this business going. If the decrease has enabled her to keep the business going, that has a positive employment effect even if the number of staff hasn't risen.

PN28168

The final comment I wish to make - and I don't want to open a whole new can of worms from yesterday afternoon again, but I do think it was telling when your Honour President Ross asked a question - - -

PN28169

JUSTICE ROSS: You shouldn't read too much into what I say, Mr Izzo.

PN28170

MR IZZO: Not necessarily what you're thinking, your Honour, but when you referred Mr Dowling to paragraph 46 of the United Voice submissions, that is the very type of example I was talking about yesterday in terms of the application of section 138. So we do maintain our position in relation to how it works and that is an example of how our interpretation would work in practice if one was to accept the union merit arguments on that point.

PN28171

JUSTICE ROSS: Sure, but I don't think we have shifted from the position yesterday that that's your argument, but as a matter of practicality the point isn't taken here, because no employer party points to another award term.

PN28172

MR IZZO: I don't depart from that in the sense that - - -

PN28173

JUSTICE ROSS: Okay. That's all I need to know, Mr Izzo.

PN28174

MR IZZO: Those are the submissions, unless there are any further questions.

PN28175

JUSTICE ROSS: Thank you. Mr Dowling?

PN28176

MR DOWLING: Thank you, your Honour. Your Honour asked me a question about paragraph 64 of the submission.

PN28177

JUSTICE ROSS: Yes.

PN28178

MR DOWLING: Can I say what that is a reference to - your Honour may recall that the AFPCS, the Australian Fair Pay and Conditions Standards, were introduced with effect from December of 2005.

PN28179

JUSTICE ROSS: It's nice to think that I'd recall that, but - - -

PN28180

MR DOWLING: And one of the obligations that that imposed was the obligation to pay a casual loading. It identified in some limited way at least the obligation to a pay casual loading.

PN28181

JUSTICE ROSS: Yes.

PN28182

MR DOWLING: What paragraph 65 is referring to is as a result of the introduction of that obligation, the rates in the relevant awards were re-formulated so as to make clear what component of the 150 per cent, or whatever it might have been, was a penalty rate and what component was the casual loading.

PN28183

JUSTICE ROSS: I see.

PN28184

MR DOWLING: It concludes in that paragraph by saying the rates remain the same, but there was a re-formulation to make clear. Can I just mention very, very quickly one other matter. Mr Rauf criticised a submission we made about Mr

[redacted] saying that it was the first time his evidence had been criticised. His evidence is criticised at paragraph 163(b) of our submissions. He is witness 17. I think Mr Rauf understood that, because he referred to paragraph 204 which identified Mr [redacted] as witness 17, so the criticism is there in the written submissions. There is nothing further.

PN28185

JUSTICE ROSS: Thank you. We will await the consent directions in relation to the various other matters. If we have any questions regarding any of the matters that are filed, we will either put them to all the parties in writing or, if necessary, there will be a further short oral hearing in relation to those matters, but only if that is necessary on the basis of the material that is filed.

PN28186

On behalf of my colleagues, can I thank each of you for your forbearance during these proceedings and the extent of cooperation between the parties so that we have been able to deal with the matter in an efficient way, and for all of your submissions which we're all looking forward to reading again. Thank you. We will adjourn.

ADJOURNED INDEFINITELY [1.03 PM]