



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER TRAN**

AM2023/21

**s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards
objective**

**Application by
(AM2023/21)**

Melbourne

10.05 AM, THURSDAY, 14 MARCH 2024

Continued from 04/03/2024

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes. Good morning. Are there any changes or additions to the appearances since the last occasion?

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MR WARD: (Audio malfunction.)

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DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you, Mr Ward.

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MR J CULLINAN: (Audio malfunction.)

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DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you, Mr Cullinan. Any others? No? Very good. Commissioner Tran?

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COMMISSIONER TRAN: Can I just confirm whether Mr Nguyen of the Flight Attendants Association of Australia is present via Teams? We received correspondence from Mr Nguyen, so we'll see if he joins us later. Following on from our last consultation in Sydney we are still to hear from you, Mr Morrish, in relation to the question of (indistinct). Thank you.

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MR J MORRISH: Thank you. You will (indistinct) some questions on some (indistinct). Again, the entitlements in question should not be exempt from (indistinct). We believe doing so (indistinct). In our submission, through the survey results which we commissioned, we questioned employers about the (audio malfunction) at each session and we discovered that 88.16 of (indistinct) employers, it would negatively impact their business if they were required to pay additional entitlements for their full-time or part-time employees in addition to their casual loading.

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81.58 per cent of casual employment responders said they would not continue the engagement of casuals. Our views, of course, would mean that the extension of such entitlements (indistinct) the choice of flexible work (indistinct). Additionally, I would also seek to finalise the legitimacy of casual employment as a form of employment (indistinct) form of work, to (indistinct) of part-time work.

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We are concerned by the push to (audio malfunction) casual work provides, though it's still (indistinct) for full-time and part-time work. That is not a huge difference and therefore functions differently. Casual employment suits the lifestyle of those workers who choose to be casually employed, who may (indistinct) work, and remains the preference for the majority of workers (indistinct).

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I would also address briefly concerns that we had with the union submissions (audio malfunction). But we believe the case has not been made to extend NES entitlements such as personal leave (indistinct). We are concerned by what we conceive to be a lack of proper justification and explanation of (indistinct) cost implications, the impact on the business or the potential for (indistinct). So, it is (indistinct) position that the union proposal should not be accepted. Thanks.

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COMMISSIONER TRAN: Thank you, Mr Morrish. Were there any other employer groups or organisations who have not yet had an opportunity to make submissions on questions 4 and 5 that we missed, either in the room, not in the room or on Teams? I will take that as a no. Mr Clarke, would you like to make a reply there? I'd also ask if you have had an opportunity to look at our correspondence yesterday afternoon about the need for the further consultation date on (audio malfunction) to provide that (indistinct).

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MR T CLARKE: Maybe coming to the second issue first, I have two things today. Selfish point of view, I need to leave the room at 2 o'clock. But that doesn't determine what everybody else does, obviously, but let's just put that there for a moment.

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COMMISSIONER TRAN: Was that 2 o'clock?

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MR CLARKE: Yes. It might have been possible to get through everything we need to get through today, but really I think that depends on the collective view of how everybody wants to kind of deal with it (indistinct) at 10.30 last night in terms of (indistinct) the category of employment and there might be a range of views about that.

PN15

I can provide a little of a response in generality of that and have prepared to do so on the basis of the general sketch of the type of thing we were talking about that was provided on the last occasion. But there may be others who want to say more about it at a further consultation session, or if that's awfully difficult, in writing. So, that's all I can add to that issue.

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COMMISSIONER TRAN: Yes. We'll come back to you on the issue about the proposal with the flexible (audio malfunction) sent in last night.

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MR CLARKE: Yes.

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COMMISSIONER TRAN: We'll go on with replying in relation to questions 4 and 5 and if you wish to start in relation to the subject areas on 1, 2 and 3, as well, that would be helpful.

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MR CLARKE: Yes, sure. Sure.

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MR MORRISH: Commissioner - - -

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COMMISSIONER TRAN: Yes, Mr Morrish.

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MR MORRISH: (Audio malfunction) but are really questions that no response (audio malfunction).

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COMMISSIONER TRAN: Sure.

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MR CLARKE: Do you wish to hear from me first?

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COMMISSIONER TRAN: I'm happy to hear from Mr Cullinan first.

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MR CLARKE: Yes.

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COMMISSIONER TRAN: And then that way, Mr Clarke, you can be on your feet for one block of time and then be free to go as you need. Thank you, Mr Cullinan.

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MR CULLINAN: I'll start with (indistinct) around here. Commissioner - - -

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DEPUTY PRESIDENT GOSTENCNIK: I'm sorry, Mr Cullinan. Before you go on, I asked my associate to make contact with the FAAA's lawyers to see whether they would be joining us today. We were advised that the FAAA will not be able to make its presentations at today's consultation and wants to make its presentation on 18 March, which answers the question, I suspect.

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MR CULLINAN: Yes, your Honour. I understand that's (audio malfunction).

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DEPUTY PRESIDENT GOSTENCNIK: Very good. Yes. But the later correspondence indicated that they might join us today, but they haven't. So, that's fine. We'll have to proceed with the 18th.

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COMMISSIONER TRAN: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Sorry, Mr Cullinan.

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MR CULLINAN: No. Thank you, Deputy President. I noticed on the Teams that there was some complaint about the microphones, so I've come over here. But that might just be noted for others that need to speak.

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So, RAFFWU wanted to make some very short submissions on the issues of questions 4 and 5. We submit that there is now a long history of leave applying to casual workers in Australia. Notably, throughout Australia long service leave has now applied to casual workers for many, many years. More recently, paid domestic violence leave has applied to casual workers.

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And then we have the ground-breaking program in Victoria of the sick pay guarantee for casual workers, as well. We say that all of those arrangements are in place for good public policy reasons, and also reasons of equity and justice. We say leave should apply to casual workers, in the very least, personal and compassionate paid leave. We say this at paragraph 17 of our submissions in reply.

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However, we do reject the proposals of the employers that would suggest that the casual loading in itself should be reduced, or the part-time work should be casualised. And we've seen the application overnight, or the proposal overnight for part-time work to be casualised, which we submit is merely a program in disguise to reduce the casual loading.

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We are currently dealing with this at one of the largest employees in Australia of Kmart, that are proposing a similar, or the same program as part of enterprise bargaining. And I think we just wanted to conclude that we say there are also good public policy reasons for leave to be available to the child labourers in retail and fast food.

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They're in the early stages of their employment and learning about how paid leave works and how it is accessed in circumstances where their employers don't permit them to have any other employment other than casual work is a good foundation as they start their working lives, not least of which because paid personal leave and compassionate leave will be of significant value to them. They are our submissions.

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COMMISSIONER TRAN: Thank you, Mr Cullinan.

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MR CLARKE: Thank you. To the extent that anything substantive was said in relation to question 4 and 5 on the last session other than no, we had a proposal run up the mast for a form of flexible, part-time employment in that session, as an

answer to some proposed difficulties arising from the changes to casual employment.

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Our real concern with the suggestion of tinkering with part-time employment and/or creating a third category a third category of employment is that you end up depriving part-time workers of some of the security and predictability in the hours that they presently have, and that is, you end up making part-time work less secure rather than providing casuals with the choice to engage in secure work. Or indeed, the choice you want for them tomorrow provides less security than the choice that might be already up to them.

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The United Workers' submission touches on the effect of introducing more flexibility to part-time work in the restaurants and hospitality awards. The flexibilities were introduced into those awards, among other things, in the August 2017 decision in the Casual & Part-time Employment 2014 Review matter.

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And it was introduced, among other things, to increase the likelihood that part-time employment would actually be utilised, rather than being a bit of a dead letter. But on the UWU's account and it's in their submissions, it hasn't in fact made much of a difference to the share of casual employment to the industries.

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One of the drivers of these desires for flexible part-time employment seems to be to solve the problem of what to do with casuals, given that the changes to the definition of 'casual' and to cater to the needs of casuals who don't want to be, and I think the word that was used last time, the expression of, 'locked in,' to regular work.

PN46

To deal with the second issue it's absolutely clear that no casuals are going to be locked into regular work because of the new definition of, 'casual' or the associated provisions that hang off it. The way the new section 15A works, or will work from late August does not involve the change in status of any existing employee independently of their choice.

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Nor does it involve the change in status of any new casual employee independently of their choice. Furthermore, provided the initial classification of the employee is casual, as casual is correct at the point of engagement. No issue of contravention arises if the employee might later more appropriately not be so described. And that's clear from subsection 15 of the new section 15A which provides:

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A person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a casual employee of the employer until their status is changed to full-time or part-time under division 4A, or is changed by an order of the Fair Work Commission, or is changed under the

terms of the Fair Work instrument or they accept an offer of alternative employment.

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MR CLARKE: Nobody is locked in. As to the other definitional problems, we'd say we need to entertain the possibility that some of the supposed difficulties of integrating the new definition of casual employment might be more imagined than real.

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Certainly at the award level any provisions in modern awards that purported to actually define casual employment were removed as part of the review of awards required by the transitional provisions and legislation that introduced the existing section 15A, back in 2021. So, no collision between award and statutory definitions of casual employment arises.

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But there's many more reasons why I shouldn't assume that the new definition of 'casual employment' in the legislation has the effect that existing casuals are going to be made unemployed en masse because there's nowhere to put them unless part-time employment was radically changed across the award system.

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In terms of the definitional question and I'll touch on conversion in a moment, stripping back to its most fundamental elements, until late August we will continue to have a definition in the statute that requires in order to be defined as a casual employee, no firm advanced commitment to continuing and indefinite work according to an agreed pattern of work. And that's assessed at the time of entering into the contract.

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The new definition requires assessment of the employment relationship rather than merely a contract. But the key in that assessment is the absence of the 'firm, advanced commitment to continuing and indefinite work.' The new definition also requires the entitlement to a specific rate or loading for casuals in order to be defined as a casual. I'll park that forward as to how the hand grenade dropped last night would actually work.

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Now, I can't imagine at the award level this second element, as of the requirement for a loading to be paid, is a change to the status quo because all modern awards already require the payment of a casual loading for casuals. So, let's focus for a moment on the commitment, the commitment to continuing in indefinite work, and trying to construct something of a sort of a (indistinct) Venn diagrams.

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So, first off, the issue as to the agreement about a pattern of work just referred to in the existing definition which was disposed of pretty quickly, where an agreement about a pattern of work exists in isolation, that is, without a commitment as to continuing in indefinite work, it really makes no difference as

to how the employee replaced either under the new definition or the old definition if that's the only commitment that you have got for casual.

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If an employee to whom a modern award applies is given a commitment to continuing indefinite work, they cannot be a casual under the new definition. Under the existing definition an employee, given that commitment, would not be defined as a casual provided that the commitment to continuing and ongoing work did not carry with it an agreement as to the pattern of work.

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So, the risk identified by the employees is effectively, and I think this was articulated by Ms Bhatt on the last occasion, effectively there's a category of workers who are defined as casual, who might be smaller after the amendments take effect than it is today, for the reason that there may be some casual employees who have been given a commitment to continue in ongoing work but without any agreement as to an agreed pattern of work.

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It's that supposed shrinking of the casual category and the consequence of that which is identified as a problem that needs to be fixed by way of this flexible part-time employment.

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In our view it ought to be immediately apparent that if what the employers say about the inflexibilities of part-time employment under the award system is correct, the chances that there are many employees on award conditions that have been given a firm advance commitment to continuing in indefinite work without any agreement as to the pattern of hours, is very small.

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This is because when, as an employer you go to print in an offer of employment that you will provide continuing ongoing work, the offer being what the current definition focuses on. It's difficult to conceive of you doing that without also offering part-time work if you're committing to permanency in the offer. And if you do offer part-time work, then according to the employers the terms of these terrible awards force you to agree on hours anyway. And the result of that added agreement, of course, is that the employee is not a casual under the existing definition.

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So, that suggests that this mismatch is a bit of an unlikely prospect to begin with. But wait, there's more. There's more. Here's the steak knives. Let's assume – let's assume that some employees have fallen through the cracks and are correctly designated as casual under the existing provisions because they have no agreement as to a regular pattern of hours, but they do have an agreement to continuing in indefinite work.

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Now for one, as I mentioned before, the status of those existing employees will not change automatically. That's because of the operation of sub-item 3 of item

102 in part 18 of the recent Act which now appears at part 16 of schedule 1 to the Fair Work Act. It's a transitional provision. Employees won't change their status automatically.

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Employees will continue to be considered casual employees unless or until they exercise their right to choose, and then of course their mileage may vary. Should they wish to exercise that right, the fact that their employer did make a firm advanced commitment to ongoing employment in their initial offer isn't actually going to be of any assistance to them.

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This again arises because of some transitional provisions, and that's at paragraph (a) of sub-item 2 of item 102, which concerns how you apply section 15A and the manner in which the choice provisions in section 66A(AB) relies upon that section. So, whether the employer rechooses to make that commitment or create an expectation of it is a matter for them.

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Now, it should be noted also that if an employee in that category does exercise their new right to give notice the employer has an explicit right to refuse conversion as set out in 66(AC)4B and 5C which contemplate the employer not being able to accommodate the employee within the relevant full-time or part-time provisions of the award. Hence the expression is used, 'without a substantial change of terms and conditions which would result in – not apply to the Fair Work instrument.'

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So, if the employer can't fit them in they don't have to convert them. The consequence of such a refusal is not that the employee needs to leave and find a job somewhere else. It's just that they continue to retain the same casual status which they already hold as a consequence of the terms. No change in status.

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If you look at what the employers wanted to do in broad terms as is articulated in the last session, in terms of having core hours which are flexed up and flexed down based on availability, they can do that right now for existing casual employees and they can do it for new casual employees after August provided they don't do it at the point of engagement.

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The difference is that under the existing terms of award they'd be paying \$25 for the privilege, rather than the preferred 10 per cent of a modest loading. There is a risk for employers that if they choose to provide that partial stability in hours for casual employees who want it, that they will face a request to convert.

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But as I've just taken you to, if there's too much of a gap between the residual flexibility in that arrangement and the requirements of the award for part-time work, the employer says no, the Commission agrees and the employee continues

as a casual with some regular hours, some flexible hours, as long as they remain employed.

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It's really quite, in our submission, a perverse pivoting of this process for the employers to say, on one hand, any expansion of employee rights including, you know, our rather modest suggestions, needs to be held off until we have this award by award review of casual employment terms, while at the same time they urge you to embrace the wholesale transformation of part-time secure work into something radically different without examining the need for that in even the brief level of detail I've provided today

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Now, our proposals for casuals are pretty simple. You know, to put them in the first person workplace context. 'I know I've said I'd come in tomorrow but my dad died, can I take bereavement leave?' 'I know I said I'd come in tomorrow but I'm really sick. Please don't offer me any work. Please don't stop offering me work just because of that.' 'Can you let me know if there are any more hours available?' Is that really so complicated?

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There is absolutely no reason in our submission why our modest proposals need to be put off to the Never-Never while we pontificate about potentially each case in respect of which there's a distinct power to bearing in item 101 of the transition provisions, in any event, as they arise. So, we would invite you to engage with our proposals on their merits in the reports rather than as a contingency eras as some kind of enforced concessional bargaining.

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Now, we'd otherwise observe the proposals advanced in respect of flexible part-time such as they are, and not particularly to questions 4 and 5 in any event. To the extent that they're advanced as responses to questions

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1 to 3, you need to kind of question the need for all this. The need is said to be that, well, it's all too restrictive. It's all too much of a burden.

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Just, if you have a quick look, and everyone's got access to this as it's on the internet, the Fair Work Commission statistical report for the annual wage review. If it's just too hard to employ part-time employees how come

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part-time employment has grown five and a half per cent over the last twelve months relative to a five year average of 1.9 per cent? How come it's outpaced full-time employment growth which is only 1.3 per cent?

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How come the share of casual employees in the workforce has remained relatively stable, if not actually declined? There's no exodus from part-time employment because it's all hard. It's just not happening. And if you want to have a little bit of

a think about complexity, you know, we often hear that proposals are all too difficult.

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If you have a look at the proposal that was sort of dropped on us at 10.30 last night, in terms of how it deals with ordinary hours, they're either the average hours worked on a particular day of the week over the previous four weeks, or the hours that have been rostered on a relevant day. So, a different number of ordinary hours on each day, they could be different depending on what happened, yet we're still going to provide a leave entitlement which we're going to make by force of law, responsive to the rules in Mondelez(?) that say a day doesn't mean a day, it's a proportion of ordinary hours.

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How are you going to run up leave accruals and leave acquittals on the basis of that without actually conceding it's pretty complex? Is it any more complex than answering the questions that I proposed on behalf of the hypothetical employee, a moment ago? That's a lot more complex in our submission.

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And other than that, by way of overview in terms of the brief amount of time I've had, all I can say is that we heard from ACCI this morning. They had an opportunity to say that they supported this, and they didn't.

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COMMISSIONER TRAN: Thank you, Mr Clarke. Are there any of the employee organisations who wish to make a reply to the questions 4 or 5 submissions, in addition to Mr Clarke's submissions? I'll take that as a no. I suggest we proceed on then to submissions in relation to questions 1, 2 and 3. Would you like to start that, Mr Clarke?

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MR CLARKE: We didn't make any specific submissions in relation to questions 1 to 3. But we just took them as more specific concerns.

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COMMISSIONER TRAN: Ms Wischer, would you like to make any submissions in relation to questions 1, 2 and 3? Your written submissions did address that.

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MS K. WISCHER: Thank you, Commissioner, Deputy President. Yes, the ANMF has approached this review very much from, I suppose, the industry specific and our submission relates to the Nurses Award. I understand that for the purposes of this consultation we are looking at it in a broader sense, and particularly in relation to the seven awards identified in the discussion paper.

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So, I will try to refer to those but bring attention to the matters that we consider fall within this review in respect to the Nurses Award and would start really with our proposals in relation to part-time work. It obviously leads very much into the discussion just been held about the categories of employment. We would not in

any way want to see an expansion of flexibility with respect to part-time work. And in fact our submissions really go towards creating greater certainty for people in part-time work which we would say do promote access to secure work.

PN86

Again, with reference to the Nurses Award what we have observed as an issue of concern about flexibility and about security is that because of the definition of part-time work, it provides really only for reasonably predictable hours and minimum hours, that that encourages employers to really use part-time work as a form of quasi casual work because of the ability to move those hours up and down, and that does create a range of disadvantages for part-time workers in our situation with predominantly women, in terms of arranging care, in terms of income security, predictability.

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So, what we would seek and when we look at what's in the discussion paper and those seven awards, is a stronger definition of 'part-time work' where the number of hours to be worked are to be agreed on engagement, the days of the week and the start and the finishing times, to allow those part-time workers to know what their engagement looks like, and that that be bolstered in a range of ways, which I'm happy to touch on.

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We think that then creates certainty and security for those workers. And that that then, going through some of the other matters then would be that if you are, for example, engaged to work on your roster with your agreed hours, day for a six hour day but you're asked to stay for longer, a provision that says, well, those additional hours are by agreement, yes, they may be in theory.

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But in practice, when you're in a health setting or aged care where there are people who are needing care, and it's almost impossible to walk away from that situation, that agreement is given but it's not in terms, I think that, are equal balanced.

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We would submit that those additional hours then not be paid as overtime to recognise the disutility of that and to encourage that the initial engagement be one that actually reflects the work to be done. And to disincentivise a low hours contract that creates that flexing up and down, we see that to be made more difficult rather than easier to access.

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We then think that that would also be bolstered, and going back to the suggested changes around the definition that is supported and a number of the seven awards do have that descriptions around when those days will be worked, the number of hours, the days of the week.

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We would also strongly support consideration of a clause that provides for review of part-time hours, so that after a period, whether it's six months, where you look at the work that has actually been performed over a period of time and if that isn't

reflected in your contract and that initial contract was for a lower number of hours whereas you've consistently done a greater number, that there is an option to them amend that contract so that that becomes your permanent part-time position, obviously with the employee having a choice around that with the guaranteed hours. But we certainly see that as a bolstering and as a measure to ensure that work done is the work that you're contracted to do.

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We have made some submissions that I think are additional to some of the matters that have been discussed in the paper. If we look, for example, at part-time progression. I'm happy to elaborate on that now but also - - -

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DEPUTY PRESIDENT GOSTENCNIK: In relation to progression as between classifications, or within classifications?

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MS WISCHER: Within classifications. So, for example, in the Nurses Award, a part-time - - -

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DEPUTY PRESIDENT GOSTENCNIK: How many hours count as a period of service for - - -

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MS WISCHER: Yes, towards progressing, say, from an RN level 1, to an RN level 1.8, they have to perform the equivalent of 47 weeks of work, which is really the full-time equivalent less annual leave. We would say again

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that that discriminates against women accumulating the benefit of progression in terms of income, in terms of retirement income, and it doesn't recognise at its best that a level of part-time experience is not significantly different to, or in any way different to the equivalent of a full-time form of progression.

PN99

The other matter there is that there is an issue that's not clear around when, if you start with a new employer, the extent to which your prior service is recognised in progression, so where you start. That certainly might be just a matter of clarification but we would certainly support that being looked at.

PN100

We also have spent a bit of time in our submissions, which I won't go through all of the detail. On a review of allowances in terms of how they might – for any improved condition and the tension, again, very important issues for both ensuring that health and aged care are adequately staffed with people with appropriate skills and experience. We would certainly see a place for looking at how to encourage that through allowances which have been, I think, you know, certainly adopted in private sector, public sector, through enterprise bargaining but are not reflected in the award.

PN101

That would be particularly around the introduction of the qualifications around – we also put forward, and again we would happily take this up in more detail at a later time, recognition that particularly at the higher end for registered nurses levels 4 and 5, they're excluded, for example, from allowances, overtime and shiftwork on the basis that their classification level compensates for that. We say that that probably has fallen away over time, if in fact it ever adequately compensated for those loss of additional entitlements.

PN102

And again, it raises some gender based issues when you look at some other words for it. Words for example, the Medical Practitioners Award at the higher end a doctor has a – described as a managerial or senior allowance that compensates for additional work.

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It recognises that that management role that you take on when you build up that classification structure, does attract additional work, but maybe not sort of down to the variations of a shift penalty. So, we certainly would like that to be considered at the appropriate place.

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COMMISSIONER TRAN: You say that that, in particular, would have allowances for the higher classification annexed with secure work (audio malfunction)?

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MS WISCHER: Look, it takes a broad view of it. But it is about retaining people and encouraging people with qualifications and skills to stay in the health and aged care sector and creates, I suppose, a sense of value for the work that's done.

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I would accept that that crosses broadly into gender valuation and under-valuation, as well. But in terms of if you're viewing it across the economy making sectors that must be staffed and must be well staffed with the right people, then recognising that in the award, as it is in many instances in the agreement-based public sector that that promotes access to the security around the nature of your job and your contract.

PN107

We also make some quite detailed submissions about overtime rates and shift penalties. Where there's a particular issue there is that in some instances the overtime rate is equivalent to – well, there's no benefit in a shift penalty. So, that if you are part-time or even full-time and you're doing additional hours, the overtime rate in some ways a cheaper option for the employer because you pay an overtime rate but you don't then also have to offer a shift penalty which attracts other accrual of your longer term annual leave and so on, entitlements, and superannuation is not paid on overtime.

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So, it incentivises again, in security because it's the less costly to the employer but also less work for the employee. So, there are a range of those matters. I won't take you through all of those but they are in the submission. The other matter that again does get raised in the discussion paper is the question of minimum engagement. And the reviewed awards, certainly the majority of awards do put forward a minimum engagement for casuals and part-time.

PN109

We see the Nurses Award as deficient in that sense, in that there is no minimum engagement for a part-time employee, and only two hours for a casual employee. So, we would certainly be very open to a recommendation that there be a minimum engagement for part-time employees, and all employees in that situation, an increase to four hours as a minimum engagement.

PN110

Again, we have made some submissions about shift workers and it crosses across disutility of nature of shift work. But in terms of one of the issues that does arise under the Nurses Award is there are effectively three definitions of a shift worker. One is just in the definitions, one relates to hours worked, but the one that causes the most difficulty for us is the one that's connected to whether you have access to the six week of annual leave, noting that five weeks is the standard in the Nurses Award.

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It is the definition that says you work across seven days whereas, for example, under the Aged Care Award the definition for a shift worker with access to the additional week of annual leave is simply that they work outside of ordinary hours. We would say that particularly in the health and aged care sectors where there are 24/7 services, those services must be levered that someone must work at night time, must work on the weekends.

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But those workers who are shift workers in that sense which fits within the primary definition of the award, ought all be able to access the additional week of leave that again crosses perhaps more into the work in care but also recognition of disutility; of the disruption of the health impact of night work, in particular; having time to recover; having time to spend with family are very much – again, I accept that that's probably more in the broad definition of security but I do advance it in this circumstance and we take the opportunity to be able to advance that, as well.

PN113

Just a couple of other matters. Frequency of payment of wages. The Nurses Award makes provision for fortnightly payment or monthly by agreement. We would certainly be supportive of a move to have seven days as the cycle of payment. Again, that matter is referred to in the reviewed seven awards where the majority do have a seven day payment cycle. We see that that gives, again, people greater security of that income and a better ability to manage the cost of their own financial security.

PN114

Matters of roster, certainly I know they have been discussed in previous sessions. We would support a range of changes there about notification of roster. In our submission we put a notification of 14 days. We would like to amend that to 28 days for the purpose of this. We also would strongly support a longer roster cycle and greater notice of change.

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Again, this is very important to people who do work shift work, predominantly, as just said about 24/7 nature of that work, the shift cycle, your roster that is the way that you then structure the rest of your life and security around knowing that in advance, with the opportunity to have input into how that's going to look. We would certainly support improvements around roster change.

PN116

Again, a bit similar in my submission about overtime rates and shift – and it is the nightshift penalty is low in the Nurses Award compared to some others. It is set at 15 per cent which we would say doesn't recognise the cost there, particularly of the sector gender. And I believe my friend last week has made some submissions about causal loading, so I won't revisit that. Thank you, Commissioner.

PN117

COMMISSIONER TRAN: Thank you, Ms Wischer. I don't have any questions. Thank you. Ms Wiles, you're at the Bar table. Did you also wish to speak to your submissions?

PN118

MS WILES: Thank you. The CFMEU manufacturing division filed a submission on 5 February 2024. And in that submission it's fairly confined, confined to three awards in which our union has an interest, the Dry Cleaning and Laundry Industry Award; the Textile, Clothing, Footwear and Associated Industries Award; and the (audio malfunction).

PN119

By way of observation the Dry Cleaning and Laundry Award and the Textile & Clothing Award are highly award dependent and also have a high percentage of women working in those workplaces. We have included a number of variation proposals in relation to those awards and they essentially seemed to ride on a number of job security themes, including part-time employment, generally.

PN120

And that includes minimum engagement hours for part-time employees and causals and rostering arrangements. And also we have included what we would say are sort of ancillary variation proposals that really strengthen notification and recording requirements around employment status presentations and part-time and causal employment. And I don't go through them in detail. In terms of the Dry Cleaning Award, our submissions and proposals begin at paragraph 16 of our submission.

PN121

We seek proposals in relation to clause 8. We want to strengthen it to the types of employment clause and we set out the reasons for that. And part of that is really

strengthening the employer obligations around confirming changes in employment status during an employment period. We also raise an issue around agreed regular patterns of work, or guaranteed hours for part-time employees.

PN122

In the Dry Cleaning and Laundry Award there is a minimum engagement of three hours per start but there's no minimum number of hours for part-time employees on a weekly basis. So, potentially part-time employees could effectively have a maximum of three hours part-time work a week. And we observe in our submissions that in previous pre-simplified awards, minimum number of hours per week for part-time employees were a common feature of those awards.

PN123

For example, I think in one of the previous DCF Awards it was a minimum guaranteed 19 hours per week. And we say that in terms of enhancing job security and income security that consideration should be given to this critical issue. The other thing I think that's worth noting is that in the laundry industry, in particular, it's quite common for business models to operate almost entirely on a basis of a very large part-time workforce.

PN124

So, that might be anything from ten hours up to 37, and often despite the safeguards in the award around part-time agreements and any variation to part-time agreements we do find instances where effectively, employees' hours have been ramped up and down without the payment of applicable overtime rates. And that is the cause of some disputation, not only with our union but also other unions that have an interest in the laundry industry.

PN125

As I said, some of the proposals that we're suggesting, go to recording employees' time on wages records, and also to employ (indistinct) express obligation on employers to provide a copy of part-time agreements or any variations to part-time agreements to employees in a timely way, both at the time of engagement and also if those part-time arrangements change during the period of employment.

PN126

In the Dry Cleaning Award we also raise an issue around casual employees and also, currently there's only a minimum engagement period of three per start and we say generally, again that's not really consistent with the amended objects of the Act in terms of enhancing job security or income security.

PN127

We have referred to a decision of the Full Bench in the four-yearly review of casuals and part-time employment which really goes to the heart of this issue about employees having sufficient work and income, and that I guess the cost benefit of, in particular, casual employees being required to attend their workplace for very low hour engagements.

PN128

So, I guess in summary we say that as a general principle that minimum engagement periods and awards for both casual and part-time employment do

require a reconsideration in light of the problem of low hours engagement generally and in the context of any objects of the Act.

PN129

We also raise an issue about notice to employees around their classification. Again, this sounds like a sort of small issue but that's actually an issue in terms of potential disputes, actual disputes and compliance in relation to the minimum rates of pay. And so at clause 46 and 49 we will make some submissions and a proposal about that too. We also raised an issue about rostering arrangements in the Dry Cleaning Award and that's set out, as well.

PN130

In relation to the Textile & Clothing Award, again we raised similar issues and our proposals there kind of reflect what I have already discussed, particularly around guaranteed hours, part-time employees and the minimum number of hours per week.

PN131

Similarly, with the Timber Industry Award, I guess, similar issues. We note at paragraph 78 that currently under the Timber Award there's no obligation on the employer to provide any written confirmation to an employee regarding their type of employment either at the time of engagement or when the type of employment changes. And we say that that should be addressed.

PN132

We also raise issues, again about the minimum number of guaranteed hours for part-time employees, currently three, three per start, and also the issue around the ancillary proposals around classifications. So, I guess in closing we say that a number of these proposals, we say are pretty modest and we think they're sensible. We think that they strengthen the current provisions in a way that we wouldn't think would be too controversial with employer organisations.

PN133

We appreciate that our proposals seeking a reconsideration for what is an acceptable minimum hours engagement, a part-time engagement of employees both on a daily and on a weekly level with which we would press that serious consideration be given to that as a general principle, not only for our awards but we think that's an issue for all awards.

PN134

And lastly, just on the proposal by Business New South Wales which was filed last night, we would seek some further time to respond to that in detail, whether that's with a consultation on Monday or in writing. Thank you.

PN135

COMMISSIONER TRAN: I think that's (audio malfunction).

PN136

MS WILES: I'll probably need to appear from here, but yes.

PN137

COMMISSIONER TRAN: Ms Burnley.

PN138

MS BURNLEY: Thank you, Commissioner. The SDA just has a few short comments because we did file a submission which covered our responses to questions 1 to 3. The SDA would say that we support the analysis that the ACTU provided this morning regarding the Fair Work Act construction of the casual provisions that now apply, or will apply from August this year.

PN139

Just briefly, on the theme of job security in response to the questions 1 to 3, there was a couple of themes that we've had which was about rosters and weekly part-time hours providing certainty to employees, and also the issue about pay as providing certainty and security to employees. On the last issue regarding pays except for the issue of pay averaging for full-timers, which we noted that that should be a provision that could be included into the ground(?) of the Fast Foot Award.

PN140

We do believe that the current provisions that it's either weekly or fortnightly pay for these workers is appropriate, and that that shouldn't be extended to monthly or four-weekly given that this cohort of workers is low paid, predominantly women, and also predominantly young. It would seem to be rather absurd if you were a casual in this industry, which is quite common, and you were only working three hours every two weeks that you have to wait four weeks to get six hours' worth of pay.

PN141

The other issues that we highlighted in our submission was regarding the roster generation program which now exist for generating rosters for people. We noted that there are issues in those programs at times because it depends on one of the variables which sets the parameters of how those rosters generation programs work.

PN142

It's very obscure as to what it is actually doing, whether there are considerations such as, you know, do they put in somebody's work in care responsibilities, do they know what the previous roster was or do they just start from a blank sheet each time the roster comes up? Because it is done by computer, not by a human and there's very little human intervention in those programs. And then if an employee has a problem they then have to dispute it.

PN143

Just on that one, we did note for roster changes - we did put in our submission an issue that arbitration would be good. We don't propose to canvas that issue again because we did speak on arbitration last time. But the other part we had in there was whether there would be a status quo provision regarding a dispute about the roster change so that there is a bit more time given to the employee to dispute a roster change if they can't do it or would like to have further consultation.

PN144

Currently that sits at 14 days, so that is the change. If they disputed it, initially they get seven days' notice. But then if they dispute they get 14 days. We think that is insufficient time in being able to negotiate through what may or may not be workable.

PN145

The other point that we would raise which goes to the issue of certainty of pays, security of pays, is just the issue of the penalties being paid on personal leave which we noted in our submissions that that was something that we believed would provide greater security for workers in both the Fast Food and the Retail Award, given that these industries are not operating 24/7 days a week and there is a large proportion of them now operating seven days, 24 hours a week.

PN146

And if you are working those unsociable hours and you rely upon on your income and your penalty over that time, when you do need to take personal leave you shouldn't take the double whammy of missing out on your penalty rate at those times that you normally relied upon. That's all that we need to put before the Commission today unless there's any questions.

PN147

COMMISSIONER TRAN: I don't have any really. Thank you. Is there anyone else in the room who wishes to make submissions?

PN148

MS J WELLS: Good morning, Commissioner and Deputy President, Jeane Wells for the National Tertiary Education Union, and thanking you, the opportunity to speak to questions 3 and 2 in the discussion paper and obviously identifying an industry-specific matter today, as well.

PN149

So, briefly, we'll address you on relying upon submissions made, primarily focussing on question 3 and the Higher Education Contract of Employment Awards, the drafting of section 33(e) and (s) in the legislation, the solution that we propose for that drafting matter, and also noting in our submissions, a response to question 2 and an example of further opportunities for casual work, and other and minor amendments in respect of the Higher Education Awards and meeting a modern award objective.

PN150

So, specifically, the NTEU relies upon our submissions of 5 February, the correspondence that we addressed to the Commission on 7 February regarding the scope of the review, our submissions in reply on 21 February. In terms of question 3, 'Are there specific award provisions that are not consistent with the modern awards objective,' the NTEU submits, yes.

PN151

In respect of the Higher Education Awards, the Academic Award and the General Staff Award identified in our submissions, specifically 11.2(b)(2) and (5) of the Academic Award, and 11.3(b) and (d) of the General Staff Award are award provisions that require amendment in order to provide higher education workers

who are covered by these two awards, the benefits of the limitations in section 333(e) – section 333.

PN152

The NTEU notes the increase in insecure work identified in the discussion paper for this award review stream, and of course in the work in care award review stream, and the literature review published on International Women's Day, and note the strong nature of gendered experiences of insecure work generally and in the higher education sector. We have noted in our submission that in 2018, just over one in three workers have continuing employment.

PN153

Casual work is at 43 per cent and fixed term employment is at 22 per cent in our sector. So, clearly we are all here in recognition of the need to ensure employees access to secure work is improved in our sector and in general. The 65 per cent of workers are in insecure working at 2018, and 22 per cent of those are fixed term employees. The 22 per cent figure is probably, we would suggest, a result of the Higher Education Contract of Employment Award working against the tide of increases in secure work that have been identified by the Commission's own review and the legislature review for award review streams.

PN154

The HECI(?) Award's impact has been identified in the statistics from 2003 and I was lucky enough to meet many of the workers who benefited from the restraints or the restriction, or the regulation of fixed term work in our sector. And I'd like to thank the unionists that worked very hard to give their time to make that award come into effect in 1998.

PN155

In the five years from '98 to 2003, continuing employment in our sector for fixed term workers improved access to secure work or continuing work increased by 30 per cent – in fact, 30.1, specifically, per cent in five years. There was a 45 per cent increase in continuing employment by women moving from fixed term employment to continuing employment by 2005. Incredibly proud of this achievement.

PN156

And the benefit of this HECI award continues today as one form of limitation against, as we've noted, the rising tide of insecure work in not just our sector but in the workforce generally. So, of course NTEU members continue to fight in this context of insecure work for improvements to accessing secure work via our enterprise agreements, NTEU members lose pay in order to achieve provisions that will move insecure workers into secure work.

PN157

However, of course we, like all workers, require a fair and relevant safety net. So, 20 years after this increase in access to secure work identified in 2003 we have another opportunity, or in fact a necessity, to ensure that the modern awards in our sector ensure that employees have improved access to secure work. And we have to ensure we take the simple step to enliven the legislation for the benefit of fixed term employees covered by the two awards in our submissions.

PN158

To briefly take the Commission to what appears to be the obvious drafting matters in respect of section 333(e), this section limits fixed term employment to two years with exceptions that comment on the exceptions generally, specifically the drafting of 333(f)(1), states that the restrictions in section 333(e)(1) do not apply to a contract of employment of an employee if a modern award applies to that employee and that modern award permits any of the circumstances in section 333(2) to (4) to occur.

PN159

So, in fact, the exception in section 333(f)(1)(h) is enlivened for all employees covered by those awards, i.e., all of those employees covered by those awards do not have the benefit of section 333(e). So, as identified in our submissions there are a number of fixed term categories which allow fixed term employment engagement to occur in the higher education sector in respect of the two awards.

PN160

And they do good work. They ensure that a fixed term employee or a worker will be insecure employment, a form of insecure employment if they are replacing a permanent employee on leave, or if they are working in a research only capacity or they are working on a specific task or project which is genuinely fixed term. And of course we all understand the disadvantages of fixed term work.

PN161

So, the life-changing restrictions in 1998 and the benefits that we saw in the first five years of the HECI Award meant that these workers could actually apply for a mortgage or planned leave, or take leave before they were waiting for the new contract to land in January. So, accessing secure work when work is not fixed term is critical.

PN162

The two areas identified by these awards that do have so much work to do in fighting against the tide of insecure employment increasing, are that if an employee chooses to take a fixed term employment contract for pre-retirement purposes they have a maximum period enabled by the award of five years. Otherwise a research-only employee could be engaged to perform research only work for a period of up to five years.

PN163

Because of these protections or limitations in the Higher Education Contract of Employment Award and the Higher Education Awards generally, currently the benefits or limitations of section 333(e) will not apply. The solution that we have proposed is simple and necessary, and specifically we address the minor amendments necessary to enable these awards to meet the secure jobs objectives, modern award objectives. And the simple solutions that would enable all of these thousands of workers to access the benefit, surely the intended benefit of the legislation is to limit fixed term work to generally short periods of fixed terms of two years.

PN164

So, we're happy to address the Commission further both in this stream and the work and care stream, and we think that these minor amendments along with a few other minor amendments we've identified in our written submissions are a necessity. Thank you for your time.

PN165

COMMISSIONER TRAN: Thank you. Anyone else present? Yes, Mr Miller. We'll turn to employer organisations (audio malfunction). I understand that Ms Pugsley may need to leave at midday, but is that (audio malfunction).

PN166

Yes. I'll see if there's anyone else from the employee organisations and then if we need to have you speak first and start on the employer organisations, we'll do that. Is there anyone else in the room from the employee organisations who wish to speak to their submissions? Mr Cullinan?

PN167

MR CULLINAN: From employee organisations?

PN168

COMMISSIONER TRAN: Yes. Thank you.

PN169

MR CULLINAN: So, Commissioner and Deputy President, we made a submission dated 20 February in response. But at that submission we considered the responses of the other parties to the discussion paper and therefore came up with the suitable alternative proposals which are laid out at paragraph 9 of our submission.

PN170

There's seven proposals there. I was going to go through those quite quickly to provide some context to each one and why on some view it may not be seen as modest, we would say that they're not immodest proposals, but maybe explain why they are there. The first is that junior rates should be abolished. And the reason why we say junior rates should be abolished is because it's now well accepted in retail and fast food that junior rates are a mechanism by which workers are eternally casual.

PN171

And that was dealt with in a Fast Wood Award attempt to casualise part-time work and it was found that that process was casualising part-time work and it was denied by the Commission. But through that case it was made clear that McDonalds had a program called churn and learn, and that meant that as you got older, if you weren't into their stream of learning which was a small proportion of their workforce, each birthday you lost hours.

PN172

And each birthday you lost hours because of the financial gain to the employer by hiring someone a year younger and paying them a lower rate. We know from the great work of the McKell Institute that that's \$8000 per year for each young

worker \$50,000 over their young working life before they turn 21. Now, the critical thing with that is that that's a financial benefit for the employer.

PN173

At the moment junior rates provide an incentive to employers to keep casual work. And we say that's why it's included in our submission that the abolition of junior rates will manifestly and measurably improve the job security of workers.

PN174

The second proposal we make is that the casual loading should be doubled. And we say that because the vast majority of casual workers are casual workers today at the direction of their employer and they do that because it's not expensive enough. We have a fantastic experience. It's not dissimilar in some ways from the award-derived experience of the HECI Award that Ms Wells already spoke to. But we had it start at 2018.

PN175

Domino's Pizza experienced the award provisions, and I've got this – decided to start applying the award provisions for the very first time following a termination of a series of agreements that applied to some of their franchise. Overnight in January 2018, 10,000 workers that were casual were converted to part-time in a single week, again at the employer's direction. Consultation didn't occur. There was a letter.

PN176

But 10,000 pizza delivery drivers converted from casual work to part-time work because for the first time ever at Domino's Pizza they were going to have to start paying the casual loading. They'd avoided a casual loading, a three hour engagement and penalty rates for those workers for well over a decade subject to the class action and we're waiting on the decision now.

PN177

But that experience was the employer could certainly do it, and as soon as they had to start paying a casual loading they moved them. And we say a higher casual loading will both disincentivise casual work, it will drive job security, it will meet that modern award objective.

PN178

The third proposal that we make is, and in some ways it was referred to by Ms Burnley and that is around the rostering arrangements for full-time workers in GRIA and in the Fast Food Award. At the moment there aren't rights for regularity for full-time workers. They get their 38 hours but their rosters are not managed in any way, in a regular way that they can rely on.

PN179

For us, it's incongruous that full-time workers in fast food that may have worked the same roster for decades could be given a simple notice, ideally following consultation but we know that hardly ever occurs, that could radically change their hours. They could have worked Monday to Friday, nine to five for a decade and then simply be given a few days' notice that they were going to work nights, Thursday to Sunday.

PN180

There's no span of hours. They could be required to work overnight, suddenly and without any protection and we say that doesn't meet this modern award objective and the Commission should look toward these two awards to make changes to provide full-time workers guaranteed rosters that only change following a process which involves agreement.

PN181

The fourth proposal of our seven is that the part-time arrangements in GRIA should be strengthened to replicate the Fast Food Award. The Fast Food Award applies at start and finish times for each day of work be agreed, and they only change following agreement. And we say that GRIA should be strengthened to provide that. It is a fundamental benefit for those workers.

PN182

Like Ms Burnley, we submit that if that's too far then binding arbitration following consultation should be a measure to protect employees from the excesses of employers. And there's been a couple of submissions already from my learned friends about increasing base hours of work. Again, we say that should be a common measure that arises out of this.

PN183

It was recently included in a form into the General Retail Award. We say it's not strong enough but it provides for outs. We think that the outs should be very limited but part-time hours should be able to be increased on the basis of the actual hours worked over a preceding period.

PN184

Our fifth proposal goes a little to the matters that were the subject of the earlier consultation discussion. But we wanted to just reiterate that the consultation machinery for major changes and roster changers are too often perfunctory in retail or fast food, or not at all. And we say a compulsory consultation process of at least six weeks post the provision of information in writing should be instituted.

PN185

There should also be clarity through the award clauses that a definite decision does not mean a decision incapable of change. And we did speak to that in the first session, as well. The sixth change is about dispute arbitration which we spoke to previously, as well. It was about those standard clauses and we have given some feedback there about how that can be properly dealt with.

PN186

Our seventh change which may be construed by my learned friends as a little modest, is that the Commission should consider the abolition of casual work. And we submit that casual work in and of its nature, we think that it was also referred to by the ABI in paragraph 219 of its submission when it said that systematic employment and termination of certain classes of employment is antithetical to secure work. We say, well, that is what casual work is.

PN187

It is the systematic employment termination of certain classes of employment, of employee. We say it's antithetical to certain types of work and that there should be some consideration given to - - -

PN188

DEPUTY PRESIDENT GOSTENCNIK: Mr Cullinan, sorry. Do you propose that the mode of employment as a casual employee be removed from the award in the sense, for example, in the Black Coal Mining Award there isn't a casual mode of employment? Or do you propose that the award ascribes or prohibits employment of casual employees? Because there is a difference.

PN189

MR CULLINAN: We would say the latter. We would say that employers that are covered by the GRIA and the Fast Food Award should have a provision which prohibits them, either through application of the award or through a better off overall test from employing casual workers. And we say that that will drive the job security that these workers deserve. And the cost borne of that would be a cost borne by the employers in those industries. A fall-back would be a provision like the Black Coal Award.

PN190

DEPUTY PRESIDENT GOSTENCNIK: Or the absence of a provision.

PN191

MR CULLINAN: They are the seven proposals that we made in response. I'm happy to answer any questions. Otherwise that's our submissions.

PN192

COMMISSIONER TRAN: Thank you, Mr Cullinan.

PN193

MR CULLINAN: Thank you.

PN194

MS GRAY-STARCEVIC: Good morning. It's my first time appearing - - -

PN195

DEPUTY PRESIDENT GOSTENCNIK: That's all right. The lectern's a popular place today.

PN196

MS GRAY-STARCEVIC: It's Ms Gray-Starcevic on behalf of the United Workers Union. We've put forward two sets of fairly brief written submissions in this modern awards stream which we generally rely upon and I don't intend to supplement the oral submissions today. Rather, the approach I want to take today is just to make some general observations about our submissions and some themes that have arisen through the consultation process this morning.

PN197

The way we approached our submissions and questions 1 to 3 in a context where we weren't putting forward specific applications to vary modern awards and in a

context where we weren't filing for evidence to refer to in our submissions, was simply to write some general examples of clauses within the modern award systems that we say tend to be compatible with the promotion of secure work, or tend to undermine it.

PN198

And in preparing those submissions and seeking those examples within our organisation it became clear that there's a significant overlap between the stream and the working care stream and that's certainly been reinforced by submissions by Ms Wells today and by ANMF, as well. Probably an unavoidable overlap between the streams just by virtue of the fact that part-time and casual work is gender work and performed largely by women who are also performing other forms of unpaid work in the home through (indistinct) care.

PN199

So, what we know is that decent part-time work conditions are essential in improving the security of work for women and also those who perform unpaid work in the home through the work of care. And these work conditions necessarily must include the availability of sufficient hours of work across a reasonable limited span of hours, rather than multiple weeks, for example. Something that has been mentioned a lot today and that we support is fair minimum engagements that clearly apply for attendance at work rather than being taken in the aggregate across a broken shift.

PN200

So, I think in our written submissions we put forward a specific timeframe that we support proposals today generally for an increase to a four hour minimum engagement across all awards for part-time and casual employees. Other relevant working conditions which overlap - - -

PN201

DEPUTY PRESIDENT GOSTENCNIK: Or as a block, you mean?

PN202

MS GRAY-STARCEVIC: As a block, yes. And most awards provide that clarification that it's per attendance at work as a block and not spread across broken shifts. I think in our written submissions we've provided some examples where it wasn't explicitly stated. We would say it probably still applies in that way but clarification would be useful in the form of some sort of standard clause across the awards.

PN203

Consistent rostering and regular predictable hours of work, and in particular with a minimum encroachment into time outside of rostered work and limitations on the incidence of casual work. And in that example we provide an example under the Children's Service Award as to the limitations on the use of casual employment to certain requirements within the industry being useful in reducing the engagement of casuals within our industry as compared to other industries, such as the hospitality industry.

PN204

Secure work in comparison to the concept of insecure work necessitates access to regular and predictable hours, the receipt of rosters in advance, having sufficient notice of roster changes and having the right to say no to roster changes about detriment. This is addressed in much more detail in our submissions in the work and care stream. We say they're relevant to this one, as well. We rely on those in relation to a right to say no to proposed changes to rosters without detriment to the employee in that circumstance.

PN205

A concern that became apparent through searching the awards, for example in relation to these discussion questions is that award-reliance sectors such as aged care, earlier childhood education, disability support and hospitality tend to provide employers with maximum flexibility which results in part-time workers being treated as de facto casuals without payment of the relevant loading.

PN206

And what this looks like is part-time workers having their hours and days of work varied, week to week in according with change of roster provisions, being pressured to take on shifts at late notice, and rarely receiving overtime payments despite working above their contracted hours. And we reiterate and support the submissions of Ms Wiles from the CFMMEU indeed in relation to low or zero hour contracts, part-time contracts in dry cleaning and laundry.

PN207

It is also relevant in other sectors such as security and cleaning for our members in those industries where despite provisions generally in most awards that provide for agreed hours of work, days of work for part-time employees, despite those provisions the experience of our members across those industries is that in fact they have low to zero hour contracts of employment which are then regularly flexed up week to week without paying the relevant overtime or loading.

PN208

Now whether those are permitted under the award or not, the fact that it occurs with such prevalence and the fact that it's a regular issue shows there's a level of ambiguity around those rights around days of work, hours of work for part-time employees. I think I've covered the main overlap between the work and care stream and the job security stream.

PN209

Other matters raised in the work and care stream which are relevant on our view to this stream, as well, we explicitly say in our written submissions as part of this stream were limitations on the use of fixed-term or maximum-term contracts, not just in terms of the time limits which we now have in the new legislation but also two specific situations where genuinely backfilling for another employee would be useful to limiting the use of those.

PN210

Those are the general observations that I intended to make today in relation to our written submissions. Other than that we rely on them and we rely on our written submissions in the work and care stream. We say the two streams are intrinsically linked. When they're talking about part-time and casual employment they're

necessarily talking about gendered work and the importance of that for workers who also provide care in terms of the regularity and predictability of hours of work is implicitly linked to this stream. Other than that I'm available to assist in relation to any questions the Commission may have in relation to our submissions.

PN211

COMMISSIONER TRAN: Thank you, Ms Gray-Starcevic. I'm fine.

PN212

MS GRAY-STARCEVIC: And on that basis, just one further note to make in relation to the proposal put forward by the ABI. We're grateful to view those submissions today on that matter. Nonetheless it came through with insufficient time for us to seek instructions. We would be grateful for an opportunity to provide a written reply if necessary at a later date.

PN213

COMMISSIONER TRAN: Thank you. We'll consider that when we issue a statement (audio malfunction), thank you.

PN214

Ms Abousleiman(?), I'll make sure we come back to you but I am aware that Mr Clarke indicated that they're not able to stay for the day, so I'll provide Mr Miller an opportunity to make those submissions now.

PN215

You may need to come to the central one, Mr Miller, as that's where the microphone is for the people on Teams.

PN216

MR MILLER: Thank you, Commissioner and Deputy President. Thank you for the opportunity to respond on behalf of AHEIA. In this matter we, in response to what the NTEU have told us this morning, we continue to rely upon our submissions and especially our reply submission sent through to this Commission. And we further respond as follows.

PN217

We note that the NTEU's submissions are entirely sector and are more specific. We understand that this is beyond the scope of this review. We also note that the Commission's correspondence on 8 February will be continuing in respect of this.

PN218

As previously submitted in these proceedings any consideration of fixed term provision in the higher education awards which are unique to these awards and our sector can only be considered, AHEIA submits, in the context of a full, holistic consideration of terms and conditions in those awards. Those terms and conditions are long-standing, as we know.

PN219

We do not accept the assessment or assertions made by the NTEU about the level of casual and fixed-term staff in the higher education sector. We believe that the

method of calculation is incorrect. We reiterate that we disagree with the NTEU's assertion that what has been sought by the NTEU is a minor change.

PN220

Any consideration of a variation to fixed term provisions in the higher education awards, as I say, we believe would need to be by way of an holistic review with the opportunity for both parties to bring and properly test evidence. Thank you, very much, Commissioner and Deputy President.

PN221

COMMISSIONER TRAN: Thank you for that, Mr Miller. Ms Sarlos?

PN222

MS E. SARLOS: Thank you, Commissioner and Deputy President. It might be actually a good run-on from my friend's submissions then because mine is in relation to an industry specific matter which in light of yesterday's statement I wanted clarification as to whether you would like any submissions on that point.

PN223

COMMISSIONER TRAN: As they relate to the questions, yes, we're happy to hear industry specific matters. What we declined to do was to convene industry specific consultation.

PN224

MS SARLOS: Okay. I'm conscious that none of the employers in our industry, being the Black Coal Mining Industry Award are here. So, I wouldn't want to, given Monday's going ahead I'm happy to make submissions then rather than now. That might be more appropriate.

PN225

COMMISSIONER TRAN: That suits, as well. That's fine. Thank you.

PN226

MS SARLOS: Thank you both.

PN227

COMMISSIONER TRAN: Thank you. Now, I will turn to you,

PN228

Ms Bhatt. I will just flag that I have a difficulty and I will need to conclude, or at least have a break at 12.30. And then in terms of that we will reconvene if we wish to reconvene today, at 3 o'clock. Alternatively, of course, we have the further consultation now on Monday to allow for the flight attendants to make their submissions to allow for further consideration of the late draft determination. But we will issue a statement about that.

PN229

In terms of the time we have left for now, we'll reconvene after 3.00 because of our difficulties. I'm in your hands and I can see that there's been an exchange there. And I'm in your hands, too as to who wishes to take this time. Thank you.

PN230

MS R. BHATT: We have had a brief exchange. I'll be very brief.

PN231

COMMISSIONER TRAN: Yes.

PN232

MS BHATT: And I anticipate that that will hopefully allow Mr Ward a sufficient opportunity to make submissions after I conclude and before 12.30 pm. If that's acceptable to the other employee representatives we can proceed on that basis.

PN233

Deputy President and Commissioner, we've obviously filed detailed of my submissions and submissions in chief dealing with questions 1 to 3 which we continue to rely on. And we don't demur from the detail of any of what's set out there, including in response to many of the specific proposals that have been advanced by some of the unions that have been again reiterated today.

PN234

Perhaps the one exception to that is some of the submissions that have been filed by RAFFWU because they were made in reply. I think our position in respect of those will be obvious. We obviously have an interest in both the Fast Food Award and the Retail Award. Each of the proposals that have been outlined today by Mr Cullinan - - -

PN235

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN236

MS BHATT: We would have serious concerns with. To a large degree they overlap with proposals that have been advanced by other parties that we have responded to in writing, and so that extent we'd rely on our written submissions. But there are two that perhaps deviate from what's been put by other parties.

PN237

One relates to the abolition of junior rates. I think all I'll say about that today is that we don't see how that would improve access to secure work. Indeed, it would very likely discourage the employment of junior employees in a sector in which many young people seek employment opportunities at an early age.

PN238

The other proposition related to removing casual employment provisions from the award or expressly prohibiting engagement on a casual basis. For various obvious reasons we would have deep concerns about any such proposal being entertained. I think the one piece of feedback that we receive routinely from employers in that sector is that the existing part-time employment provisions are not fit for purpose and that casual employment is relied upon as a necessary form of flexibility, taking into account the various operational requirements that they face.

PN239

It might be something that I seek to return to on Monday once I've had a further opportunity to consider what has been put today. Our essential thesis in response to questions 1 to 3, put simply is that in order to improve access to secure work it is necessary first and foremost to facilitate and encourage its availability. That is, to create and maintain opportunities to be employed in such work.

PN240

And in order to achieve that in the context of a modern award system it's necessary to remove barriers that prevent, preclude and/or discourage employers from engaging employees in such work. That is, create scope for employers to employ employees in permanent and ongoing work rather than other forms of engagement such as casual employment.

PN241

There are a plethora of examples of specific award terms that we would say have that effect. In the submissions that we've filed in this proceeding we've sought to focus on three categories of provisions of that nature and they're outlined at page 47 of the submission that we filed on 5 April.

PN242

The first relates to hours of work provisions generally, and I think we've made some specific mention there to provisions concerning minimum engagement and payment periods; rostering provisions, and this concerns not just the publication of rosters or the need to prepare and communicate rostering arrangements but also in respect of a number of awards that contain very complex rostering rules as to how hours of work can be arranged.

PN243

Finally and unsurprisingly, there has been significant focus in the submissions we have filed about part-time employment. We are participating in three streams in this awards review, the stream concerning making awards easier to use; this job security stream; and that concerning work and care. And part-time employment is an issue that we have raised in each of them.

PN244

It's not just a cute point or an academic point that we've sought to advance in their proceedings in response to, for example, a discussion about casual employment and its changing definition, but rather it reflects the fundamental concern that we have about the way in which part-time is regulated through the award system.

PN245

And if you take the stream concerning making awards easier to use by way of example, and I've appeared before his Honour Justice Hatcher in proceedings about a number of awards that are the focus of that part of the review over the last two days, there are awards such as the Fast Food Award and the Retail Award that not only require that an employer and an part-time employee agree upon engagement about the days upon which they're going to work and their start and finish times, they go so far as to require that agreement is reached about the timing and duration of the meal breaks that will be taken throughout the course of that employee's employment. And that can be changed only by agreement.

PN246

Another proposition that we have advanced, and it's been advanced by other parties in this part of the review and others too, is this idea that there ought to be an ability for an employer and a part-time employee to more readily agree that the employee will work additional hours where they are able and willing to do so, without the payment of a penalty.

PN247

These are issues that reflect the feedback that we have received from certain sectors, time and time again. That's the reason that we have advanced. So, it's not simply in response to sort of a theoretical argument that's been crafted in response to the legislative changes concerning casual employment.

PN248

Obviously, in this part of the review that has been part of the basis upon which those arguments have been advanced, just turning very briefly to the comments that Mr Clarke has made this morning about that, I think we have advanced our submissions in relation to this issue more tentatively and perhaps more conservatively than what has been described this morning.

PN249

We readily acknowledge that at this stage we don't know the size and scope of the problem that we have sought to identify. What we have said is that on its face there will be a category of workers who would slip through the cracks. What we don't know is the extent to which in practice employees are being engaged on that way, and indeed whether there is a greater prevalence of those sorts of arrangements in certain sectors more than others.

PN250

The other thing I would say in response to what Mr Clarke has put this morning, and I spoke to this briefly last time, we agreed with the manner in which the ACTU has described today that the way in which the employee choice provisions would operate under the new scheme, that is that ultimately if an employee seeks to convert, effectively to permanent part-time employment but their arrangement would not meet the definition of part-time employment within that award that an employer may be able to effectively refuse or decline that election.

PN251

The point we make is that surely that is an outcome that cannot be said to be consistent with the need to improve access to secure work which may well be a very sound merit reason why part-time employment provisions ought to be liberalised in the context of these awards. I won't seek to deal with the ABI proposal in any detail today.

PN252

I mean, obviously the proposal that's been advanced is potentially one way of solving that problem. But the question of whether that is the most appropriate way of doing so is something that we need to give some further consideration to. Unless there are any questions that's all I propose to put today.

PN253

COMMISSIONER TRAN: Thank you, Ms Bhatt. Mr Ward?

PN254

MR WARD: Thank you. If the Commission pleases. I'm not going to canvas what might be described as some philosophical difference between the employer and the union position. It's very clear we kind of approach job security and secure work essentially from a different position. I think they approach it from a kind of rules, restraint position, as Ms Bhatt put it, versus creating employment opportunities.

PN255

But I'm going to leave that alone. I think the Commission probably would embrace that (indistinct). Can I start – we've just been dealing with questions 1, 2 and 3. I do not want to repeat anything I've said in 1, 2 or 3. We have clearly identified quite a number of clauses which we think already go to the question of secure work in awards.

PN256

And in saying that, I want to say this. While the modern awards objective now for the first time sets out specific regard for the notion of secure work, I think it would be inappropriate to assume that this Commission and its predecessor haven't contemplated about security of work for a very long time. We've had things like minimum engagements; rules around roster changes, for decades upon decades upon decades. So, it's not a novel concept even though specific statutory regard obviously is.

PN257

I'd like to just briefly deal with this casual part-time juxtaposition and the material we filed last night. I apologise for its lateness. That was not a tactic. I think everybody is just so pressed at the moment and they're doing their best. And to the extent anybody from a natural justice perspective seeks more time, we don't cavil with that, at all.

PN258

I want to deal with that. I want to deal with the notion of facilitative provisions and I want to just deal with a couple of comments in reply to what's been said to date by some of the other parties. And I start with these propositions. It goes without saying that part-time employment is more secure work than casual employment.

PN259

We don't cavil with that. That is why casual employees historically have received a payment in part for the uncertainties of the work they're performing. The question for us, and this is a bit like Whack-a-mole in this process, the question for us is ensuring that certain parts of industry have access to the necessary flexibilities to operate effectively.

PN260

Let me explain what I mean by that. The original focus in the review was on awards, as we read it, that were service sector oriented, retail, hospitality and the like. And if one looks at those awards it's – and this was clearly the evidence in

the 2017 casual and part-time case, if one looks at those awards they are clearly demand-driven industries and that demand can fluctuate quite considerably from week to week, from day to day, and even within a day.

PN261

And a classic example of that would be an employee working in a fast food shop, the shop is particularly busy today which is unusual, and the head of the fast food shop turns around to their employee and says could you hang on for a couple of more hours because we're smashed and I need you to stay. So, this notion of the ability in those sectors to flex up hours is a practical reality.

PN262

And it's also a practical reality on occasions when it drops down. And I'm prepared to acknowledge that the Commission didn't embrace the notion of flexing down in regard to part-time employees, and so if somebody is in a situation where they have a need to flex up and flex down on a regular basis they are effectively forced to use casual employees. They're forced to.

PN263

The reason for that is, of course, that they couldn't breach a contract or they're not going to be paying overtime. I'll come back those concepts. If one looks at the awards in retail - - -

PN264

DEPUTY PRESIDENT GOSTENCNIK: They could send the part-time employee home but you'd just have to pay them.

PN265

MR WARD: Sorry, your Honour?

PN266

DEPUTY PRESIDENT GOSTENCNIK: They could send the part-time employee home and still pay that pay.

PN267

MR WARD: Yes. But I'm not entirely convinced that that's the most reasonable and balanced - - -

PN268

DEPUTY PRESIDENT GOSTENCNIK: I'm not suggesting that, at all.

PN269

MR WARD: Somebody might be able to afford to do that. I doubt many would. If one was having that conversation in the cement industry or the quarrying industry it'd be entirely irrelevant. Entirely different employment, entirely different rostering schedules. Demand is relatively understood for a very long period into the future.

PN270

So, I just wanted to start by saying that the observations, the criticality of the observations around this kind of casual, part-time nexus in our view are not at large but they are relevant to intermittently demand-changing sectors.

PN271

Now, in that context some of the awards already deal with this. So, if one was to look at – and I'll just call out three, if one was to look at the Children's Services Award it provides flexing up of part-time employment and I want to talk more about that award; if one was to look at the Retail Award it provides the flexing up for part-time employment, clause 10.5 to 10.11. Hospitality doesn't influence 10.4.

PN272

What is our concern? Our concern is this. Our concern is finding ourselves in a world where through this process part-time employment becomes entirely static in these industries and rigid where everything is set and the only way it can be changed is effectively by some written agreement to change with the employee which everybody will say, 'Oh, you can just do that.' The truth of the matter is that's harder to do than you might think, particularly on the run, if you take my example of the fast food shop.

PN273

At the same time, if we find casual employment is further constrained those sectors will find themselves between a rock and a hard place. So, if you want to make part-time employment more static, with respect, you're going to have to make sure the casual employment is more available and you almost dry casual employment up. Alternatively, if you can make part-time employment responsive but fair, I suspect then what you'll end up with in these demand-fluctuating industries, you'll end up with a greater take-up of part-time employment.

PN274

Now, you can go about what I've just said in a couple of ways. You could adopt the type of flexing up provisions that currently exist in retail, hospitality or children's services. Or if for some reason the Commission was minded to abandon those and to introduce static part-time employment in those sectors then you would have to, almost unfortunately in a way, consider our proposal.

PN275

That is, you would need to create a second category where you could have many of the benefits of part-time employment, access to sick leave, access to annual leave, you would have minimum engagements on a daily basis as we propose, you would have minimum guaranteed hours during the week but outside of that up to 38, the employer could actually dictate flexing up. And for that we would say you'd pay a premium.

PN276

If these sectors found themselves in a world where they had static part-time employment, more rigid casuals, they would actually need that escape valve to deal with their demand requirements. So, as Ms Bhatt put it, our proposition is one way to address the problem. What we're asking the Commission to do in this

process, to understand, it's a real problem in some industries in flexing up and flexing down of hours based on demand, and we need a way to respond to it.

PN277

You either respond to it through casual employment or you either respond to it through appropriately flexible part-time employment. Not cavalier, not laissez-faire, and some of the awards already do that. What we would like you to do is to maintain that in those awards rather than change it. But if there is a view that they should be abandoned then we would invite the Commission to contemplate providing the sort of alternative that we've put in our application.

PN278

So, it's not that we're critical of what's there today. We need to preserve it and if it is taken away we need something to replace it or one is forced to casualise. If you take the Children's Services Award as a good example, the Children's Services Award has some interesting balances. Now, it's an industry which by its nature attempts to promote permanent employment because Children's Services, the childcare sector operates in a regulated environment.

PN279

That is, you have to have strict ratios to children, so it tends to promote full-time employment. It is an industry though that provides for part-time employment with an ability to flex up at ordinary rates of pay, and that's in clause 10.4(f). And so, it provides the industry with the requisite level of flexibility to encourage it to employ part-time people to fill a particular need but also when required, to actually work additional hours which will happen in that sector, but not at overtime rates.

PN280

Now, they will say that's insecure work. We say the opposite. It's secure in that it's part-time. It's secure in that you get all of your part-time benefits. It's secure in that you have some minimum guarantees. And it's secure for this reason, by giving people an opportunity to access additional income which is important, and it's secure because it meets both the employees' needs and the employer's needs. And the minute you are meeting both the employer and employees' needs, by definition that work will become more secure. That job will be more secure.

PN281

So, we think that those types of clauses are essential, that that is an answer to question 1. If for some reason the Commission wants to abandon those then you would have to have a look at the sort of proposal where that could move forward. That proposition doesn't apply to every award. As we've said, we're really concerned here with what we call the services sector. And we do join with Ms Bhatt in this sense.

PN282

To the extent that awards in the service sector don't have those flexibilities, we would encourage the Commission to include them. Now, which formulation it adopts, well, that's open for further discussion. We have an affection for the retail one. It seems to cover most things in terms of how you can flex up. It has a pretty excellent conversion clause, as well.

PN283

The hospitality one is pretty good, as well. And the childcare one is probably the simplest in that it's less protective of the part-timer but that is because on the other end of the foot the provisions for casual employment in that industry are very constrained. Constrained casual employment, you create more flexible part-time employment. And that's what that industry has done and that was done by consent in that award.

PN284

So, that's the context in which we filed, I appreciate belatedly, the proposal we did. It's purely in that context. I suspect if you were to continue to adopt what's in those awards that we've discussed and to perhaps pick that up and put it in other service type awards, our proposal falls away.

PN285

If you want to throw out what's in the award then we'll have to come back and seriously talk about how our proposal might be advanced, and I appreciate given the nature of these proceedings that might have to be by way of application. That's all I want to say on that.

PN286

Can I say this in relation to facilitated provisions. We're very encouraged by facilitated provisions. Of the service sector awards the Retail Award seems to have the most. It would seem to us that where the employer and the employee, or the majority of employees and the employer have arrived at an outcome, by definition that must be more secure for both parties than if one party has dictated it.

PN287

Because both parties are comfortable with the outcome. Perhaps in a balanced way it meets mutual needs. And so, what we would suggest is, again in the context of this sort of plenary consultation process, a consideration of whether or not facilitative provisions couldn't be more widely applied across awards.

PN288

And to the extent that some don't seem to have any which seems to be very curious, and yet others have many, whether or not as a concept that could not be explored. Because by definition if facilitative provisions could be applied across more awards you would end up with, when they're used, a more secure work outcome.

PN289

I make two comments effectively in reply and then I'll finish subject to any questions I get asked. Mr Clarke made a criticism of our proposal, in how in the world would one work out the accrual of things like annual leave and sick leave which is a fair and reasonable criticism. It's not easy. The same criticism obviously can be levelled at giving casuals those benefits if they're working different hours over different weeks. So, if he wants to throw that one at me, I think it throws and lands back in his lap.

PN290

The other comment, and I just want to say in reply from what I've heard this morning, and it's always interesting when you're standing at a Tribunal and say in 37 years I haven't heard the sorts of things I heard this morning. Now, I think some of the things said this morning are extraordinary. There is an alarming, relatively with respect, glib, let's ask for something in this process. And I would respectfully ask the Commission to approach some of that with the utmost caution.

PN291

I mean, the notion that somebody stood up today and said we should abolish junior rates. The nature and level of evidentiary case that would be required to sustain such a proposition, the contemplation of the effect of that in the context of the modern award's objective and the impact on this economy would be extraordinary.

PN292

The sheer and absolute disregard for the objects placing weight on the consideration of small and medium-sized business where most of those junior employees probably do work in this country, one has to really guard with great care those types of glib claims that are put forward in this type of process that is not able to be subject to appropriate evidence and testing.

PN293

The same could be said for doubling the casual loading. The same could be said for abolishing casuals. And without wishing to in any way upset my friend from the ANMF, it also transfers down to some of those types of claims, let's move the casual engagement from two to four hours.

PN294

One has no understanding of what the consequence of that would be across the health sector in this country.

PN295

It might be benign. It might have a material economic impact on the health sector on the way the health sector works. It might have a material impact on the very engagement of casuals in various parts of that sector.

PN296

So, what I would say just in closing is, I would ask the Commission to be very cautious of glib, dramatic claims that are made, whether or not they're made by our side or theirs. And in that sense I'm a bit with Ms Bhatt.

PN297

I think we've tended to be a little bit more conservative and I think we've tried to identify what already exists in the awards which goes to the issues which have been considered here today rather than adopt a solution grab approach. A primary thesis that we have advanced today and in all of our submissions is, there are certain necessary flexibilities that certain sectors need to operate, and that rubs between the casual and part-time question.

PN298

And the other proposition we've advanced today is, we think there is ample room in various awards in this Commission to explore increasing the use of facilitative provisions to the mutual benefit of employers and employees. And other than that we would rely on our written submissions.

PN299

COMMISSIONER TRAN: Thank you, Mr Ward. Mr Morrish, would you like to make any submissions in relation to questions 1, 2 and 3?

PN300

MR MORRISH: Thank you, Commissioner. I'll make the briefest of remarks. So, ACCI is not opposed to any specific proposals or variations in respect to questions 1 to 3. I would just reiterate that we don't believe that many of the union proposals have adequately demonstrated how they would actually improve access to secure work.

PN301

We are concerned by the lack of attempt to grapple with the genuine economic consequences which might arise out of some of these proposals. I would draw attention to some of the concerns which were outlined in our survey results, particularly by employers, particularly with respect to minimum hours and rostering and how that may adversely impact on the operational requirements of business.

PN302

In response to some of the other things that were put forward today orally, it's ACCI's view that full-time and part-time employment is secure work and that it is consistent with the modern award's objective. And that therefore manifestly some of the proposals cannot be seen to improve access to secure work.

PN303

Additionally, just to touch on some of RAFFWU's proposals which were made in reply obviously by writing, we oppose those submissions. We believe that in particular the abolition of junior rates could have very significant dis-employment outcomes and we would strongly oppose that proposition. Thank you, Commissioner.

PN304

COMMISSIONER TRAN: Thank you, Mr Morrish. Now, I think that's everyone in the room. Can I just confirm whether there's anyone via Teams who wishes to make some submissions today? I'll take the silence as a no. It does mean we can adjourn today rather than reconvening at 3.00 as I earlier suggested. So we will adjourn today and we will reconvene on Monday, 18 March in Sydney and of course, we'll facilitate attendance of that via Teams, as well. Thank you all.

PN305

DEPUTY PRESIDENT GOSTENCNIK: Thank you. We're adjourned.

ADJOURNED UNTIL MONDAY, 18 MARCH 2024

[12.13 PM]