



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

AM2016/15

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2016/15)**

Plain language re-drafting – *Security Services Industry Award 2010 and Cleaning Services Award 2010*

Melbourne

9.30 AM, WEDNESDAY, 8 NOVEMBER 2017

PN1

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

PN2

MS N DABARERA: If the Commission pleases, Dabarera, initial N, appearing for United Voice.

PN3

JUSTICE ROSS: Thank you, Ms Dabarera.

PN4

MS R BHATT: If the Commission pleases, Bhatt, initial R, appearing for the Australian Industry Group.

PN5

MR C DELANEY: Delaney, initial C, on behalf of the Australian Security Industry Association, ASIL.

PN6

JUSTICE ROSS: Thank you, and in Newcastle?

PN7

MS K THOMSON: If the Commission pleases, Thomson, initial K, for ABI New South Wales Business Chamber.

PN8

JUSTICE ROSS: And in Adelaide?

PN9

MR C KLEPPER: If it pleases the Commission, Klepper, initial C, for Business SA.

PN10

JUSTICE ROSS: All right, thank you. Well, let's turn first to the cleaning industry award and if we go to the draft summary of submissions - do each of you have that?

PN11

MS BHATT: Yes, your Honour.

PN12

JUSTICE ROSS: We might go through the issues fairly quickly because some of them may be capable of being agreed and there seems to be a significant debate between the parties around part-time employment and hours of work but let's see how we go with the other matters. The first matter, item 1, is the cross-reference to individual flexibility arrangements. Is there any dispute about that? It seems that the cross-reference is incorrect. United Voice content with that?

PN13

MS DABARERA: Yes, your Honour.

PN14

JUSTICE ROSS: Let's then move to item 2.

PN15

MS DABARERA: Your Honour, this is one of our items.

PN16

JUSTICE ROSS: It is.

PN17

MS DABARERA: Your Honour, we do press this item. We are concerned that the plain English exposure draft has altered the clause and removed some of the obligations on the employer - essentially to inform the employee of the usual location of work and the classification and to record this in their time and wages record.

PN18

JUSTICE ROSS: Yes.

PN19

MS DABARERA: This is beyond - your Honour, we argue that this is above the obligations contained in the national employment standards or the legislation in relation to recording an employee's time and wages record so we do believe that it should be retained in the award.

PN20

JUSTICE ROSS: Yes. Well, is it generally agreed that it is a change to what's in the award at present? Is there any contest about that? No? What do the other parties say about United Voice's position?

PN21

MS BHATT: Your Honour, Ai Group can't put its position any higher than it is, that we think that the words that United Voice seeks to have re-inserted in the exposure draft are not necessary because there is already an obligation on an employer to inform the employee of the terms on which they are engaged, which we say would include the usual location of work and the classification. We don't put the submission any higher than that and we wouldn't impose the words being re-instated on the basis that they're already there.

PN22

JUSTICE ROSS: Yes, so if it was to simply say that - to inform the employee of the terms of their engagement including their usual work location and classification then you wouldn't object to that course?

PN23

MS BHATT: That's correct, your Honour.

PN24

JUSTICE ROSS: All right, anyone else in relation to that? What about the recording in the time and wages record? I'll need to check, but doesn't the time and wages record required you to identify the classification in any event?

PN25

MS BHATT: My recollection is that it does, your Honour, but I don't have a copy of the regulations here.

PN26

JUSTICE ROSS: No, neither do I. Yes, Ms Daberera.

PN27

MS DABARERA: Your Honour, my recollection of just checking the regulations recently, is that it does required recording whether they're casual, permanent and so on, but it doesn't actually require recording the classification, from my recollection, for the usual location of work.

PN28

JUSTICE ROSS: Why would that be recorded in the time and wages record? Why do you see that as necessary?

PN29

MS DABARERA: Your Honour, I guess in terms of our position, it's to provide some measure of protections for the employee, so that if there's a concern about under-payment, especially in regards to classification, that they can go back and follow that up and check that with the employer's records.

PN30

JUSTICE ROSS: All right, so it's particularly classification that would provide that degree of protection, is that right?

PN31

MS DABARERA: Yes, that's correct, your Honour.

PN32

JUSTICE ROSS: I don't think much would flow from their usual location of work. If we focus on classification, given it's in the award at present, is there any opposition to recording that matter in the time and wages record? Either Ms Bhatt or Business SA?

PN33

MS BHATT: On the basis that the obligation currently exists, no, your Honour.

PN34

JUSTICE ROSS: Thank you, Ms Bhatt.

PN35

MS THOMSON: Your Honour, it's Ms Thomson here.

PN36

JUSTICE ROSS: Sorry, Ms Thomson, I'd forgotten about you.

PN37

MS THOMSON: That's okay. Just having a look at the regulations, your Honour and the pay record does require the rate of remuneration, but not the classification. So, I suppose if we're recording a rate of remuneration for an

award covered employee, it's likely that that's linked to a classification in any event, but it's not something that is of particular concern to us.

PN38

JUSTICE ROSS: Right, thank you. Mr Klepper?

PN39

MR KLEPPER: Just to be echoing my colleagues, that it is not a particular concern for Business SA, so on that basis, we wouldn't oppose the proposal.

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JUSTICE ROSS: Then can we resolve that matter on the basis that we add the words where it says:

PN41

the obligation on the employer to inform the employee of the terms of their engagement

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We would add the words - I'll give you the sense of it. It might not be precisely this, but:

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Including their usual work location and classification and further, that their classification would be recorded in the time and wages record.

PN44

Does that resolve that item?

PN45

MS DABARERA: Yes, your Honour.

PN46

JUSTICE ROSS: Let's move to item 3. I think this is an ABI and Ai Group.

PN47

MS THOMSON: Yes, your Honour, I think - and we picked up some of the discussions that have been happening with respect to other awards in relation to some of the submissions that we've made with respect to full time employment and part time employment, in particular. I suppose it just more of a wording suggestion in this particular area. We propose an alternative form of words.

PN48

JUSTICE ROSS: You're content to leave it on the basis of what you've advanced and then the Bench can then consider your proposal and the current draft and come to a view about it without the need for any further submissions?

PN49

MS THOMSON: Yes, your Honour, I think the main issue which has been picked up by a number of the other parties as well, is the requirement to have that agreed hours of work arrangement in the new draft, which is the primary concern.

PN50

JUSTICE ROSS: That's the view taken by Ai Group and Business SA, I think. Is that right?

PN51

MS BHATT: Broadly speaking, yes, although our opposition to it has probably been put in stronger terms than ABI's has. I think there's some concern that whilst the current award defines a full time employee by reference to a concept of the employee being ongoing, or their employment being ongoing, that concept has been removed in the exposure draft and I think that gave rise to some excitement amongst some of parties as to whether that would have the effect of capturing employees who might otherwise be sought to be engaged as casual employees.

PN52

JUSTICE ROSS: Yes, I see.

PN53

MS BHATT: There is also the secondary issue that Ms Thomson has alluded to, and that is an issue relating to whether there is a requirement under the current award that the arrangement of a full time employees' hours be agreed. I think we'll return to this when we come to the ordinary hours of work provision. I think the parties are apart on that issue.

PN54

JUSTICE ROSS: All right, so I think there are two issues in relation to clause 9, and as you say, one of them we'll deal with in the standard hours clause. One is the omission of the notion that full time employees are ongoing and the second is what you say is the introduction of a requirement that the hours of work arrangements for full time employees be agreed. Is that right, and the parties are apart on that?

PN55

MS BHATT: Yes, your Honour.

PN56

JUSTICE ROSS: We'll park that issue for the moment. Let's move then to part time employment. Again, are there a series of issues here between the parties? I think Business SA, if we take item 4, what's the nature of Business SA's concern? Can you explain that in a little more detail?

PN57

MR KLEPPER: Yes, I would offer an apology at this point. I actually took over this matter yesterday, so I'm not - I wasn't able to get in contact with the person who drafted the original submissions to find out exactly what the concerns were. But looking through the comparison document, I think it may have been a reference to the inclusion of the note at clause 10.2 and also possible the removal of a current clause at 12.4 paragraph (e). My apologies that I can't provide much more details than that. That was just based on what I could see on a first pass through the comparison document.

PN58

JUSTICE ROSS: That's all right Mr Klepper. Look, what we might do in relation to clause 10, part time employment and 11, that is casual employment, is to seek the views of the draft as well in relation to the points that have been raised and then come back to the parties.

PN59

As is common with the other awards that are going through the plain language process, most of the heat has been generated around the full time / part time / casual distinctions and those clauses and the hours of work clauses. Let's see if we can work through some of the other issues and then we'll come back to the more problematic matters once we've sought the drafter's comments and provided those to the parties and have a further conference in relation to that.

PN60

Are you each content with that course?

PN61

MS BHATT: Your Honour, broadly speaking yes. I have to acknowledge that our submissions on this point are not detailed. In preparing for today, I've identified various concerns that we would seek to raise and articulate. I can do that now if it's more convenient, or I'm also content to do it at a later point in the process, anticipating that there will be, as your Honour has just alluded to, perhaps further conference.

PN62

JUSTICE ROSS: No, that's fine, Ms Bhatt. Look, it's probably easier if you wouldn't mind, articulating your concerns in a little more detail in writing. Perhaps if you could do that by the end of next week, would that be convenient?

PN63

MS BHATT: Yes, your Honour.

PN64

JUSTICE ROSS: We'll circulate that to the other parties or post it on the website and also seek the drafter's comments in relation to those.

PN65

MS BHATT: Thank you, your Honour.

PN66

JUSTICE ROSS: Ms Thomson, can I just ask - just be careful when you're - I think it's you. When you're moving your papers around because you're knocking the microphone and it's playing havoc with the recording.

PN67

MS THOMSON: Sorry, your Honour.

PN68

JUSTICE ROSS: Let's go to item 10. Can I say if anyone else - Mr Klepper this might provide some assistance to you too? If you've got any more detail in relation to your concerns around clauses - or the part time employment clause,

clauses 10 or the casual employment clause 11, or the hours-of-work clause, I think which is 13, then if you could provide some further elaboration in writing by the end of the next week as well, that would be helpful.

PN69

MR KLEPPER: Thank you, your Honour.

PN70

JUSTICE ROSS: Let's go to item 10 then. United Voice?

PN71

MS DABARERA: Yes, your Honour. This item actually - so it relates to clause 12, but it also relates to clause 15 later on in the award, which is the work organisation clause.

PN72

JUSTICE ROSS: Yes.

PN73

MS DABARERA: So essentially, 15.2 of the current award is not in clause 12 of the plain language version.

PN74

JUSTICE ROSS: Is this the one about the employee being required to perform incidental tasks?

PN75

MS DABARERA: Yes, your Honour - yes. We argue that removing - it essentially relates, I guess, perhaps better to clause 15, but we argue that the removal of the word "incidental" does change the nature of the obligation on the employee.

PN76

JUSTICE ROSS: Yes. I think it's generally agreed - it appears to be anyway, at least between United Voice and ABI - that that "existing obligation to perform all duties incidental to the tasks," et cetera, should be reinserted, which I think is 15.2 of the current award. Is that generally agreed? Ms Bhatt?

PN77

MS BHATT: Yes, your Honour.

PN78

JUSTICE ROSS: Mr Klepper?

PN79

MR KLEPPER: Yes, it is. Thank you, your Honour.

PN80

JUSTICE ROSS: Let's go to item 11. This is a Business SA - Mr Klepper, you might give some thought with this one of also providing a specific suggestion as to how you see your concern being addressed, and rather than put you on the spot,

given you've only just moved into this one at short notice, perhaps you could provide that by the end of next week as well.

PN81

MR KLEPPER: Yes, I will. Thank you, your Honour.

PN82

JUSTICE ROSS: Let's go to item 12. Ms Bhatt?

PN83

MS BHATT: Yes, your Honour. I think the concern is simply this. Clause 12 of the exposure draft creates an obligation that is ongoing in nature - so it doesn't arise only at the point of engagement - to classify an employee in accordance with the classification structure. I think a point was raised in our written submissions that there are of course in many instances employers who use various in-house job titles that don't align with the descriptors that are used in the classification structure. The terminology used in the current award is a little different. It says that an employee must be employed in a classification in schedule D, which of course we understand it must be the case for an employee to be covered by the award, but an obligation to classify in accordance with the classification structure seems a little different.

PN84

JUSTICE ROSS: Well how else would the employer work out what the employee is to be paid?

PN85

MS BHATT: I mean, I understand that there must be a process that is undertaken in order to ensure that the relevant minimum rate is being paid, or at least the minimum rate is being paid, but the obligation to classify an employee, I think the concern was that it could be read to mean something different. I'm not sure that I can take it too much further than that, your Honour.

PN86

JUSTICE ROSS: Are you content to leave this item on the basis of what you have submitted and what United Voice has replied, and the Bench can determine it on that basis?

PN87

MS BHATT: Yes, your Honour.

PN88

JUSTICE ROSS: Everyone content with that course? Anyone else have a view about this issue? No? Yes?

PN89

MS DABARERA: Your Honour, I might just briefly speak to that. Your Honour, we don't actually have a problem with the plain English language or the current award. I guess we just essentially see the obligation in both of those clauses as saying that there is an obligation to classify an employee, regardless of the wording used in either.

PN90

JUSTICE ROSS: Yes. Thank you. Let's go to item 13. I think, ABI?

PN91

MR KLEPPER: Yes, thank you, your Honour. This is the issue that we've touched on briefly with respect to permanent employment about the agreement.

PN92

JUSTICE ROSS: Yes - no, you're quite right. Let's then park that on that basis. Then 14, I think that seems to be agreed that there has been an omission of clause 24.2 of the current award and there's no objection to reinserting that. Is that the position?

PN93

MS DABARERA: Your Honour, United Voice doesn't have an objection to retaining what's in the current award at the moment.

PN94

JUSTICE ROSS: No one else? No other problem? All right. Item 15, this is a cross-referencing issue?

PN95

MS BHATT: Yes, your Honour, but the cross-referencing issue only arises in the comparative document. I think on that basis the submission can be withdrawn. It doesn't appear in the exposure draft proper.

PN96

JUSTICE ROSS: Yes. So it's not actually in the pleat itself; it's in the comparative document. Thank you.

PN97

MS BHATT: That's right.

PN98

JUSTICE ROSS: Item 16. ABI?

PN99

MS THOMSON: Yes. Thank you, your Honour. I think the parties are generally in agreement that there has been potentially an expansion of the entitlement here.

PN100

JUSTICE ROSS: Yes, I think that's right, and it seems to have been the qualification should be reinserted. Is that generally agreed? I note from the submissions that seems to be the position. Item 17 - this seems to be in contest?

PN101

MS BHATT: I'm sorry, your Honour, Ai Group withdraws its submission at item 17.

PN102

JUSTICE ROSS: All right. Thank you. Item 18?

PN103

MS THOMSON: I think this one, your Honour, was just a general comment about how the provisions have been translated and whether or not there was some value in having the drafter reconsider the manner of expression, but it's one of those ones that if the principles dictate that it must be so, then it's not something that we're going to press.

PN104

JUSTICE ROSS: I'll put it to the drafter and see what the drafter says. Mr Klepper, I'm sorry, were you saying something?

PN105

MR KLEPPER: No, I wasn't, your Honour.

PN106

JUSTICE ROSS: Thank you. Item 19?

PN107

MS BHATT: Yes, your Honour. Clause 14.4(a) of the exposure draft states that where an employer requires an employee to continue or resume work without the employee being able to take or complete a rostered meal break, they are to be paid
- - -

PN108

JUSTICE ROSS: I'm sorry, Ms Bhatt, can you just speak into the microphone? You just dropped out there for a moment.

PN109

MS BHATT: I'm sorry, I'll start again. Clause 14.4(a) of the exposure draft requires payment at a higher rate if an employer requires an employee to continue or resume work without the employee being allowed to take or complete a rostered meal break.

PN110

JUSTICE ROSS: Yes.

PN111

MS BHATT: And we say that that's substantively different to clause 26.3(a) of the award, and that's because the current award contemplates the payment of a higher rate only where an employee's meal break is interrupted. There is no notion in the award of an employee being required to work such that they can't take their meal break. I don't think the award contemplates an ability for an employer to require an employee to keep working. The meal break must be given and taken within certain parameters, and once the employee is on a meal break, if they're interrupted during their meal break a higher rate must be paid. To that extent, the exposure draft seems to deviate from the current award.

PN112

JUSTICE ROSS: Yes.

PN113

MS DABARERA: Your Honour, our position in relation to that section is that we do support the wording of the current plain language draft clause, what's in point 4, because we argue that it clarifies the current award clause 26.3(a). So our position would be that regardless of whether the employee is interrupted or alternatively required to continue work without a meal break, the effect of that is the same. Ideally, employees - you know, it's an award obligation that they have to be provided a meal break, but we do see that there should be a penalty if they aren't provided that, and this clarifies what we would read as the intent of the current award.

PN114

JUSTICE ROSS: We might seek the drafter's views in relation to that issue.

PN115

MR KLEPPER: Your Honour, if I may add a comment on this matter?

PN116

JUSTICE ROSS: Yes.

PN117

MR KLEPPER: When I was looking through the award yesterday, looking at the current clause 26(3)A, it appears a secondary requirement in not only being interrupted during your meal break but the employee is actually directed to work.

PN118

JUSTICE ROSS: Yes, that's right.

PN119

MR KLEPPER: Business SA would maintain that that is an important qualifier - that it can't just be that maybe the employee takes it upon themselves to return to work during their meal break for whatever perceived reason they need to.

PN120

JUSTICE ROSS: Yes.

PN121

MR KLEPPER: There needs to be an actual direction from the employer to resume work.

PN122

JUSTICE ROSS: I don't think there's much doubt that there is a difference between the current 25(3)A and the proposed 14(4)A. we'll put it to the drafter and bearing in mind, Mr Dabarera, that the intent of the plain language redrafting is not to unintentionally change the legal effect. It's likely that it will be redrafted to reflect the current provision. If you then wish to argue that the current provision should be altered, then you'd be entitled to do that but that would be a separate merits argument than what we engaged in at the moment.

PN123

So let's see what the drafter comes back with and the parties can have a look at that and see how - see where they wish to take that matter.

PN124

MS BHATT: Your Honour, before we go on, in the event that the drafter looks at Ai Group submissions and the wording that we've proposed I'd like to make one correction to that. I can make it simply for the record.

PN125

JUSTICE ROSS: Certainly.

PN126

MS BHATT: At paragraph 13 of our submissions dated 12 October 2017, the proposed clause should end in the fourth line after the words, "meal break," and the words, "or the shift ends," should be deleted.

PN127

JUSTICE ROSS: Thank you, Ms Bhatt. Can I go to item 20, United Voice?

PN128

MS DABARERA: Yes, your Honour.

PN129

JUSTICE ROSS: Is this the - yes, we've dealt with that?

PN130

MS DABARERA: Yes, that's correct, your Honour.

PN131

JUSTICE ROSS: That's fine. Let's go to item 21. I think this - - -

PN132

MS DABARERA: Your Honour, yes, that's our item again. Our concern in relation to item 21 is that the - we argue that the wording in the plain language draft is a little less clear than the current award. Currently it does identify quite clearly that the minimum weekly rates are exclusive of penalties and allowances. We do understand that there is a note in the plain language draft.

PN133

JUSTICE ROSS: That's right.

PN134

MS DABARERA: However, we - sorry, your Honour?

PN135

JUSTICE ROSS: Yes, no, that's right, yes.

PN136

MS DABARERA: So we do understand that there is a note but we think that that's not as clear as the current wording and we would prefer that it be stated as we've put in our submission that essentially - yes.

PN137

JUSTICE ROSS: All right, are you content to rely on your submission and the full bench can resolve that issue?

PN138

MS DABARERA: Yes, your Honour.

PN139

JUSTICE ROSS: All right, let's move to item 22, payment of wages. Ms Bhatt, yes?

PN140

MS BHATT: Yes, your Honour - at clause 18.3 of the exposure draft there is an obligation on the employer to pay wages by cash or EFT without cost to the employee. Now, that final obligation or caveat doesn't exist in the current award. there is a concern on our organisation's part that that might give rise to disputes regarding, for instance, any fees that are incurred that are required by the bank - that are payable to the bank, rather. It seems to be a substantive change.

PN141

MS DABARERA: Your Honour, I might note that we don't press that objection there.

PN142

JUSTICE ROSS: All right, so those words can be deleted?

PN143

MS DABARERA: Yes, your Honour.

PN144

JUSTICE ROSS: All right, so we'll delete from clause 18.3 of the exposure draft the words, "without cost to the employee," from the first sentence. Let's go to item 23.

PN145

MS DABARERA: Your Honour, this is in relation to receiving payment for waiting to be paid by check so in the current award, there is an entitlement that anyone being paid by cash or check does get paid for waiting time at the workplace.

PN146

JUSTICE ROSS: Yes.

PN147

MS DABARERA: This has been removed from the plain language draft.

PN148

JUSTICE ROSS: Yes.

PN149

MS BHATT: Ai Group's submission, which is recorded as item 24, I think our position is that the submission is withdrawn on the basis that United Voice's proposal is consistent with the terms of the current award.

PN150

JUSTICE ROSS: All right, thank you. That deals with items 23 and 24. Item 25?

PN151

MS DABARERA: Your Honour, this is again one of our items. Essentially this goes to again what is more clear and what's more direct.

PN152

JUSTICE ROSS: Yes.

PN153

MS DABARERA: So this is around the language for allowances, so the current award says in clause 17:

PN154

An employer must pay to an employee such allowances as the employee is entitled to.

PN155

MS DABARERA: It goes on, whereas clause 21.1 of the plain language draft says:

PN156

Clause 21 gives employees an entitlement to monetary allowances of specified kinds in specified circumstances.

PN157

JUSTICE ROSS: Yes.

PN158

MS DABARERA: Essentially our argument is that the current award is more plain language and that it's simpler for people without a background in industrial relations necessarily to understand.

PN159

JUSTICE ROSS: All right, well, in relation to that point are you content for us to resolve that or the full bench to resolve that matter on the submissions that have already been put?

PN160

MS DABARERA: Yes, your Honour.

PN161

JUSTICE ROSS: All right, then there is a submission by Ai Group about the insertion of the word, "continuously." What do you want to say about that, Ms Bhatt?

PN162

MS BHATT: Yes, your Honour - under the current award at clause 17.2A and B there are two allowances that are payable. We say that by virtue of the second paragraph of each of those clauses the allowances payable - I'm sorry. There's an entitlement to a rest period. I've misspoken. That entitlement arises only if the

particular work is undertaken continuously for two or more hours. That is, it can't be that you perform one hour of work here and then several hours later perform another hour of work there. There is no reference to the need for that work to be continuous in clause 21.3B or 21.4C of the exposure draft.

PN163

JUSTICE ROSS: Yes.

PN164

MS BHATT: We say that's a substantive change.

PN165

JUSTICE ROSS: Yes. United Voice?

PN166

MS DABARERA: Your Honour, our position is that we don't object per se to inserting the word, "continuous," but we do think that, "continuously," has a different meaning to the word, "continuous," in the sense that continue would imply a continuous period but there might be minor breaks, for example we're thinking a toilet break or so on, whereas continuously doesn't provide space for that. So we wouldn't have a problem with the word, "continues," your Honour, but we do have some concerns.

PN167

JUSTICE ROSS: All right, are you content with that, Ms Bhatt, if the word, "continues," goes in?

PN168

MS BHATT: Yes, so the idea is that the work is continuing, yes.

PN169

JUSTICE ROSS: All right, thank you. Let's go to item 26, which I think seems to be agreed?

PN170

MS BHATT: Yes.

PN171

MS DABARERA: Yes, your Honour, yes.

PN172

JUSTICE ROSS: Let's go to item 27. Again, that seems to be agreed.

PN173

MS DABARERA: Yes, your Honour.

PN174

JUSTICE ROSS: Item 28, meal allowance - - -

PN175

MS DABARERA: Your Honour, this is in relation to the change of the word, "additional," to, "overtime."

PN176

JUSTICE ROSS: Yes.

PN177

MS DABARERA: So our concern for this would be essentially if there was a casual employee who was working a certain shift and they were asked to work extra hours beyond that, under the current clause we would seem them getting the meal allowance if they weren't notified of that beforehand. But under the plain language draft, they may be excluded from that so that's our major concern with that clause, your Honour.

PN178

JUSTICE ROSS: All right, well, we'll put that issue to the drafter and see what the drafter comes back with and the position of each of the parties can be reserved until we see how that turns out, similarly in relation to Ai Group's point. Let's go to item 29.

PN179

MS DABARERA: Your Honour, this is our submission. We have had a look at it in relation to this clause again and we do have a preference for the current award but we do think that the plain language draft - it doesn't essentially change the entitlement there, so we would withdraw that.

PN180

JUSTICE ROSS: All right.

PN181

MS BHATT: Your Honour, Ai Group would seek an opportunity to reserve our position in relation to that provision. It's tied to the part time provisions which your Honour has given an opportunity to say something more about.

PN182

JUSTICE ROSS: Yes, that's fine Ms Bhatt.

PN183

Item 30, I think there's the cross-referencing here and Ai Group's point seems to be correct. Does anyone take a different view? No?

PN184

Item 31 is that the words 'is required by the employer' should be inserted. I think that's consistent with the current provision. Is that right, Ms Bhatt?

PN185

MS BHATT: I'm not sure that it is, because I don't think - the current award doesn't specify that the minimum two hour payment is due even if the employee works for a shorter time. It's simply assumed that the payment will be made every time they're engaged for at least two hours, and it doesn't go on.

PN186

JUSTICE ROSS: Yes. Well, we'll ask the drafter for his views about that issue and the parties can reserve their position until they see what it is. Item 32.

PN187

MS BHATT: I think the view is simply taken by Ai Group that the provision in the current award is in fact, simpler and easier to understand because it specifies the rates that might be payable. If I can just give your Honour a brief example.

PN188

JUSTICE ROSS: Sure.

PN189

MS BHATT: 23.6(c) of the exposure draft in brackets says (including overtime). I'm not sure that an entitlement to overtime would ever arise, because I think this deals only with ordinary hours of work.

PN190

JUSTICE ROSS: Yes.

PN191

MS BHATT: Similarly, I'm not sure that an issue about shift loading would arise on a Saturday or Sunday, because if you work on a Saturday or Sunday, you're paid a higher rate and you're not paid a shift loading. Shift loadings are only payable Monday to Friday. The way that's articulated in the current award at 24.6, we think makes that - all of those issues abundantly clear.

PN192

JUSTICE ROSS: We'll put your views to the drafter and see what he says about them, and then each party will have an opportunity to comment on that.

PN193

MS BHATT: Thank you.

PN194

JUSTICE ROSS: 33, this is a United Voice issue. This does appear to be a change, yes.

PN195

MS DABARERA: Yes, your Honour. It is a pretty significant change in terms of who is considered a shift worker under the award.

PN196

JUSTICE ROSS: Yes.

PN197

MS DABARERA: So, this would be something that we do continue to press.

PN198

JUSTICE ROSS: We'll get the drafter's comments and come back to you about that issue.

PN199

In relation to item 34.

PN200

MS DABARERA: 34, your Honour, this is again one of our items. There's a current entitlement in the award for employees who work part of the year as a shift worker. It's just simply not in the plain language draft.

PN201

JUSTICE ROSS: Yes, and 35, Ai Group takes a similar point about the existing award provision not being in the plain language draft. In relation to each of those, we'll seek the drafter's comments and the parties will be able to comment about those.

PN202

MS BHATT: Your Honour, I'm sorry, in relation to item 34, no doubt your Honour has fond memories of the NES inconsistency proceedings that were conducted at the start of this review, which looked at provision in a significant number of awards that had the same effect as 29.2(b) of the current Cleaning Services Award.

PN203

JUSTICE ROSS: Yes.

PN204

MS BHATT: That is, it provides a mechanism for the accrual of an additional week of annual leave where an employee meets the definition of shift worker for the purposes of the award.

PN205

JUSTICE ROSS: Yes.

PN206

MS BHATT: My recollection is that the Commission decided that such provisions are inconsistent with the NES or the way in which the NES regulates the accrual of annual leave and determined that all such provisions would be deleted.

PN207

JUSTICE ROSS: Yes.

PN208

MS BHATT: I have a citation if it assists my friends.

PN209

JUSTICE ROSS: Thank you.

PN210

MS BHATT: It's [2015] FWCFB 3023 at paragraphs 4 to 13. We would say that in light of that decision, that provision should not be reinserted in the plain language draft.

PN211

JUSTICE ROSS: Thank you. We'll put that to the drafter as well and we'll - no doubt United Voice has noted the citation and we'll see what issues the parties might have once we see the comments. Item 36.

PN212

MS DABARERA: Your Honour, this is one of our items in relation to the temporary close-down period. In the plain language draft, there's no requirement that the close-down period will be limited to four weeks. Also, there's no provision that somebody who's on leave without pay during that period receives the public holiday entitlement.

PN213

JUSTICE ROSS: Yes. Any other party wish to comment on that?

PN214

MS BHATT: Your Honour, I think Ai Group has to accept that the current clause 29.6(d) and 29.6(e) do not appear in the exposure draft. I should note - we've said this at item 37, we think there are numerous other issues that arise from the redrafting of the close-down provision, but we haven't articulated all of those. May I have until next Friday again to spell out what those concerns are.

PN215

JUSTICE ROSS: Certainly.

PN216

MS BHATT: Perhaps they too can be put to the drafter.

PN217

JUSTICE ROSS: It's also likely that all of the close-down provisions in awards will be referred to a separate Full Bench for review following the Black Coal decision in recent weeks.

PN218

MS BHATT: That's right.

PN219

JUSTICE ROSS: But certainly forward the comments in relation to it. Item 38, the consultation clause.

PN220

MS DABARERA: Your Honour, I think there might be some agreement between Ai Group and United Voice that there is a substantive change in 32.5(b) of the exposure draft.

PN221

JUSTICE ROSS: Yes.

PN222

MS DABARERA: Your Honour, I think it's about changing the words from the shift that they work to shift configuration, and your Honour, we don't have an issue with that.

PN223

JUSTICE ROSS: All right, then it will be varied on that basis. Item 39.

PN224

MS BHATT: Ai Group withdraws its submission.

PN225

JUSTICE ROSS: Thank you. Item 40.

PN226

MS DABARERA: Your Honour, this is one of ours and we're arguing that in the plain language draft, it's removed the direct acknowledgement that a union may be involved in consultation about change of contract. Essentially the words 'including a relevant union' have been removed from the plain language draft, your Honour.

PN227

JUSTICE ROSS: Yes, Ms Bhatt?

PN228

MS BHATT: Ai Group simply says that the exposure draft still refers to any representative nominated by the employee, which would necessarily include a union if they were so nominated. So, the reference to a union is not necessary.

PN229

JUSTICE ROSS: Are you both content for that matter to be resolved on the basis of what you've each said?

PN230

MS DABARERA: Yes, your Honour.

PN231

MS BHATT: Yes, your Honour.

PN232

JUSTICE ROSS: Item 41.

PN233

MS DABARERA: Your Honour, 41 is simply a typo, so there's a reference to clause 11, which appears to be an error and should be amended to clause 34.

PN234

JUSTICE ROSS: Yes, that seems correct.

PN235

MS BHATT: Ai Group agrees.

PN236

JUSTICE ROSS: Thank you, we'll make that change. Item 42. Similarly, that seems to be an error and could be corrected. Does anyone have a different view? No, all right.

PN237

MS DABARERA: No, your Honour.

PN238

JUSTICE ROSS: We'll make the agreed changes and seek the drafter's comments on the items that I've identified and we'll await further submissions from the parties clarifying their respective positions by the end of next week.

PN239

Is there anything further in relation to the Cleaning Services Award? No? I would envisage that once the drafter's comments have been provided and a further exposure draft circulated, that we would organise a further conference in relation to that award. We'll be in touch about the dates.

PN240

Let's go to the Security Award.

PN241

MS BHATT: Your Honour, it's Ms Bhatt here.

PN242

JUSTICE ROSS: Yes.

PN243

MS BHATT: I'm appearing today only in relation to the Cleaning Services Award. May I be excused?

PN244

JUSTICE ROSS: Certainly. Thank you for your attendance.

PN245

MS BHATT: Thank you, your Honour.

PN246

MR KLEPPER: Your Honour?

PN247

JUSTICE ROSS: Yes?

PN248

MR KLEPPER: Business SA is in the same position, so could we also please be excused?

PN249

JUSTICE ROSS: Yes, no problem, Mr Klepper. Thank you for your attendance.

PN250

MR KLEPPER: Thank you.

PN251

JUSTICE ROSS: Let's go to those who are remaining. Let's go through the items. We'll adopt a similar approach and we'll try to have a reasonably quick pass where we can identify the issues that are agreed or not pressed and those that can be resolved on the basis of what has been put to date. It's likely again that the hours issues and full-time/part-time, et cetera, are the more contentious ones. Can I just start with the draft summary of submissions, item 1?

PN252

MR DELANEY: ASIAL withdraws that, your Honour.

PN253

JUSTICE ROSS: Thank you. Item 2?

PN254

MR DELANEY: We also withdraw - it's clear that even though there is a default employee definition in the award, it doesn't appear that it is mentioned anywhere else in the award other than in the definitions clause.

PN255

JUSTICE ROSS: No, I think that's right.

PN256

MR DELANEY: So I think it's not necessary.

PN257

JUSTICE ROSS: Thank you. It might be quicker, given there are really - well ABI has some - but there are only three of you involved. Can I ask you to identify which items - if there are any other items that any of you seek to withdraw at this point?

PN258

MR DELANEY: If I may, your Honour?

PN259

JUSTICE ROSS: Certainly.

PN260

MR DELANEY: I can go through and tell you what items we withdraw.

PN261

JUSTICE ROSS: That would be helpful, thank you.

PN262

MR DELANEY: If we go to item 7?

PN263

JUSTICE ROSS: Yes.

PN264

MR DELANEY: I think we withdraw that item.

PN265

JUSTICE ROSS: Are there any others?

PN266

MR DELANEY: Yes, item 9.

PN267

JUSTICE ROSS: Yes?

PN268

MR DELANEY: ASIAL withdraws item 20.

PN269

JUSTICE ROSS: Yes?

PN270

MR DELANEY: Item 47.

PN271

JUSTICE ROSS: Yes?

PN272

MR DELANEY: That's it for us, your Honour.

PN273

JUSTICE ROSS: All right. ABI?

PN274

MS THOMSON: Nothing, sorry, your Honour.

PN275

JUSTICE ROSS: That's all right. United Voice?

PN276

MS DABARERA: Your Honour, I don't think we're withdrawing anything at this stage either.

PN277

JUSTICE ROSS: Let's go then to item 3.

PN278

MR DELANEY: I think that's agreed, your Honour.

PN279

MS DABARERA: Your Honour, we don't have a problem with the definition of a shift worker being inserted, provided it's the definition in the current award.

PN280

JUSTICE ROSS: I think there's an interaction with a later clause 24.2. So having regard to the fact that it's not contested between the parties, we'll just seek the drafter's comment on that issue and come back to you. Can we go to item 4? That seems to be agreed, is that right?

PN281

MS DABARERA: Yes, your Honour.

PN282

JUSTICE ROSS: Anyone have a different view?

PN283

MR DELANEY: Yes, your Honour.

PN284

JUSTICE ROSS: And item 5, there doesn't appear to be an objection in relation to this item. The use of the expression, "and/or," though is one that the plain language drafting principles don't encourage, so we'll seek the views of the drafter as to whether there's another way of dealing with the issue that the parties have raised. Item 6? Anything ASIAL - - -

PN285

MR DELANEY: Yes, ASIAL - we believe that the word, "control room," should be back in that clause, your Honour. It is a distinctly different situation from monitoring centre. Control rooms are often co-located with the client. They may be smaller and have a different function from a monitoring centre.

PN286

JUSTICE ROSS: All right. Do you have a definition - - -

PN287

MS THOMSON: If I may, your Honour?

PN288

JUSTICE ROSS: Yes.

PN289

MS THOMSON: I think 5 and 6 might be relating to a similar provision, well the same item essentially.

PN290

JUSTICE ROSS: Yes.

PN291

MS THOMSON: They've just been separated.

PN292

JUSTICE ROSS: Yes. We'll see what the drafter comes back in relation to both. Item 7 has been withdrawn. Item 8 - that seems to be agreed, is that right?

PN293

MS DABARERA: Yes, your Honour.

PN294

MR DELANEY: Yes, your Honour.

PN295

JUSTICE ROSS: Nine is withdrawn. Item 10 - this is a cross-reference. It would appear that ASIAL is right about that. Does anyone disagree? No?

PN296

MS DABARERA: No, your Honour.

PN297

JUSTICE ROSS: All right. Go to item 11.

PN298

MS DABARERA: Your Honour, this is a United Voice submission. In relation to this, we do prefer the current award wording around this, because it does have that obligation to record that information in a time and wages record. However, we do recognise that it is in the Act, that obligation.

PN299

JUSTICE ROSS: That's right.

PN300

MS DABARERA: So we don't press that, your Honour.

PN301

JUSTICE ROSS: Thank you. Item 12, is this a part-time employment one?

PN302

MR DELANEY: Yes, your Honour.

PN303

JUSTICE ROSS: We might leave part-time employment and seek the drafter's comments on what has been raised. This relates to items 12, 13 through to 16.

PN304

MR DELANEY: Yes, indeed.

PN305

JUSTICE ROSS: We'll park that for the moment. In relation to item 17, casual loading?

PN306

MS DABARERA: Your Honour, we did park that with the other issues in the Cleaning Award.

PN307

JUSTICE ROSS: We did, yes.

PN308

MS DABARERA: Yes. Would we be doing similar things - - -

PN309

JUSTICE ROSS: No, that's fine; we'll do the same with this one.

PN310

MS DABARERA: Yes.

PN311

JUSTICE ROSS: And we will seek the drafter's comments. Item 18? Bearing in mind, I think the issue here is that clause 12 doesn't deal with the requirement to pay.

PN312

MR DELANEY: Yes. Your Honour, as distinct perhaps from other industries, security officers are very often engaged at different levels, providing different types of work within the classification structure. So for instance, they may be engaged on one day as a level 1, but on another day work as a level 2 - they've stepped into a patrol car and they become a level 2. We think it would be highly restrictive to say that they would have to be engaged in a particular classification - paid for the classification in which they work, sorry, but not necessarily engaged in a particular classification at the first instant.

PN313

JUSTICE ROSS: We'll draw that to the - - -

PN314

MS DABARERA: Your Honour?

PN315

JUSTICE ROSS: Yes. We'll draw that to the drafter's attention and see what he says about it, and the parties can reserve their position. Did you want to say something about that now?

PN316

MS DABARERA: Sorry, your Honour. We would mention that we do have quite a significant objection to that way of viewing classifications. We would see it as the employee having a classification, and not kind of moving around from that on a day-to-day basis, your Honour.

PN317

JUSTICE ROSS: Is there a higher duties provision in the award?

PN318

MR DELANEY: Yes, there is, your Honour.

PN319

JUSTICE ROSS: Doesn't that deal with the circumstance that you've identified?

PN320

MR DELANEY: I think it does to an extent, your Honour, but I mean, there are going to be many employees who will be engaged doing exactly the same thing every day. But there will be many, many more based on the requirements of clients and so on in our industry who will work on a day-to-day basis in different classifications. If we apply the higher duties clause, usually that's applied if the employee works less than or more than four hours on a particular day. The higher duties clause says that if they work more than four hours they get paid at the higher rate for the entire shift, less than four hours for the number of hours that they work at the higher duty on that shift.

PN321

JUSTICE ROSS: That's fine.

PN322

MR DELANEY: We don't think that it would be - we think it would be overly restrictive to use the higher duties for every day of the week.

PN323

JUSTICE ROSS: All right, well, as I've indicated we'll see the drafter's comments and the parties will - I'll draw the drafter's attention to this part of the transcript and the parties can then respond to the drafter's comments. Item 19?

PN324

MR DELANEY: ASIL has no comment to make about item 19, your Honour.

PN325

JUSTICE ROSS: All right, ABI?

PN326

MS THOMSON: To the extent that it's in the current award, your Honour, it's our general view that those provisions should be maintained but noting that there's a particular question that's been asked in that regard, I think we have to acknowledge that it may restrict those flexibilities.

PN327

JUSTICE ROSS: All right, anyone else wish to say anything?

PN328

MS DABARERA: No, your Honour.

PN329

JUSTICE ROSS: Item 21?

PN330

MS THOMSON: Sorry, sorry, your Honour - I just - I was commenting on item 21. I was premature.

PN331

JUSTICE ROSS: Right - item 19, then? Did you want to say anything about 19?

PN332

MS THOMSON: No, just to the extent that it has been omitted.

PN333

JUSTICE ROSS: Yes. Item 21?

PN334

MS THOMSON: As I just indicated, your Honour, I think there's a question been asked by the Commission that we were responding to.

PN335

JUSTICE ROSS: Well, we note the comments made by each of you about that. Item 22?

PN336

MR DELANEY: Your Honour, we note that the word, "concerned," has not appeared in the plain language draft.

PN337

JUSTICE ROSS: Yes.

PN338

MR DELANEY: We believe that either the word, "confirmed," or - "concerned," or, "affected," should be there because there will be and are many locations where some employees would be engaged on 12-hours shifts while others would never be engaged on that.

PN339

JUSTICE ROSS: Yes.

PN340

MR DELANEY: So, well, the effect - - -

PN341

JUSTICE ROSS: If we put, "effective," before, "employees," that would seem to resolve the issue and I note it's not opposed by United Voice. Would everyone be content with that?

PN342

MR DELANEY: Thank you.

PN343

MS DABARERA: Yes, your Honour.

PN344

JUSTICE ROSS: Let's go to 23.

PN345

MS THOMSON: Yes, your Honour - this is one of our submissions. So contrary to the discussion that we just had with respect to the cleaning award, the current draft doesn't contain the word, "union," but it has been re-added in this provision.

PN346

JUSTICE ROSS: Yes.

PN347

MS DABARERA: Your Honour, as may be expected we think that acknowledgement of the union and the role that we play is fair so we disagree with ABI's submission.

PN348

JUSTICE ROSS: All right, but you accept that you're not specifically identified in the current award?

PN349

MS DABARERA: Yes, your Honour, so we wouldn't press that but, yes, thanks, your Honour.

PN350

JUSTICE ROSS: All right, let's go to item 24. This is proposing some amendment to the definition of rest breaks and United Voice is of the same view. We'll ask the drafter to reconsider that provision and come up with a set of words and then put that back to you, okay? Let's go to item 25. I think that's agreed? Yes, it looks like it is. Item 26?

PN351

MS DABARERA: Your Honour, this is what we see as a substantial change so currently the award - where an employee has a change to their roster without receiving the seven days' notice, they currently - they can receive overtime for that.

PN352

JUSTICE ROSS: Yes.

PN353

MS DABARERA: The plain language draft doesn't contain that. I think that's generally agreed between the parties, in item 27 as well.

PN354

JUSTICE ROSS: Yes.

PN355

MR DELANEY: Yes, we agree with that.

PN356

JUSTICE ROSS: So 26 and 27, it's agreed that that provision has been omitted. We'll ask the drafter to redraft the provision to insure that there is no substantive change. 28?

PN357

MS DABARERA: Your Honour, this was - the Commission put to the parties what would be considered a reasonable time of advance notice. Our position in relation to that after talking to our delegates was that the minimum time should be 14 days, because that allows people to make plans in relation to out-of-work commitments as well. Further, the award does contain that clause where the roster can be changed with the seven days' notice so we would see advance notices being before that so the roster would be given our 14 days' notice and then it can be changed with the seven days' notice. So we think 14 days is a reasonable amount for that, your Honour.

PN358

JUSTICE ROSS: Well, we note the difference of views amongst the parties so it may be that we don't define it, we simply reflect clause 21.11 of the current award and then if parties want further clarification then they can make submissions about that but that would be a change to the award. we are raising the issue in the hope that the range of views between you might not be quite as diverse as it turned out to be. Let's go to item 29 - United Voice, you press that?

PN359

MS DABARERA: Your Honour, we do. We do believe that the example provided in the plain language version is a little unclear in relation to George. I'll go through that.

PN360

JUSTICE ROSS: Yes.

PN361

MS DABARERA: So essentially in the example 1 in clause 14.5, in the second part where it says, "Calculating pay for a break of eight hours or more," it says:

PN362

Alternatively, George may be directed by his employer to start work at 8 am on Wednesday, one hour later than his usual 7 am start so he can receive an eight-hour break.

PN363

MS DABARERA: That is all very clear, your Honour. However, when it goes into the calculation it says:

PN364

If George works 7.6 hours on Wednesday - - -

PN365

MS DABARERA: - - - and it goes on to make that calculation. However, George should actually be working one hour less so he should only be working 6.6 hours on the Wednesday but still getting paid for the full shift - for the full 7.6 hours. That's our concern, your Honour.

PN366

JUSTICE ROSS: Yes, I follow. We'll put that to the drafter and see what he says in relation to it and whether the point you've raised can be made clearer.

PN367

MS DABARERA: Thank you, your Honour.

PN368

JUSTICE ROSS: That's all right. Item 31?

PN369

MS DABARERA: Your Honour, I think we missed item 30.

PN370

JUSTICE ROSS: I'm sorry, 30 - yes, you're right. This is ABI's.

PN371

MS THOMSON: Yes, your Honour, so it's our submission that this actually represents a departure from the current arrangements in terms of the taking of breaks. It contemplates a situation that's not contemplated in the current award.

PN372

JUSTICE ROSS: Are you content to rely on what you've said in your written submissions about this and the full bench can determine that issue?

PN373

MS THOMSON: Yes, thank you, your Honour.

PN374

JUSTICE ROSS: Similarly with United Voice?

PN375

MS DABARERA: Yes, your Honour.

PN376

JUSTICE ROSS: All right, anything further with relation to that? No?

PN377

MR DELANEY: Not from ASIL, your Honour.

PN378

JUSTICE ROSS: Let's go to 31, which is agreed. Let's go to 32. Sorry, does ABI have a different view about 31? No?

PN379

MS THOMSON: No, your Honour.

PN380

JUSTICE ROSS: Item 32?

PN381

MR DELANEY: We believe that the submission that we've made is appropriate, your Honour.

PN382

JUSTICE ROSS: All right.

PN383

MR DELANEY: We would press it. It's really about rostering. It's not about overtime so we would press that. I think United Voice are almost in agreement with us.

PN384

MS DABARERA: Your Honour, actually our position is that we don't have a particularly strong position on it, your Honour.

PN385

JUSTICE ROSS: Well, that matter can then be determined on the basis of what the parties have said about it. Let's go to item 33.

PN386

MS DABARERA: Your Honour, again, this is a similar issue to what was raised in regards to the cleaning award in relation to the explicit recognition that penalties and allowances are exclusive from minimum wages.

PN387

JUSTICE ROSS: Yes.

PN388

MS DABARERA: So we would be happy to proceed on the same basis that we did with the cleaning award to refer it on the basis of submissions, your Honour.

PN389

JUSTICE ROSS: All right, thank you.

PN390

MR DELANEY: We believe that it's appropriately covered in schedule B of the plain language award, your Honour.

PN391

JUSTICE ROSS: Thank you. Item 34. Table 4 though, is not limited to full time employees.

PN392

MR DELANEY: No, I think I've made an error there, your Honour.

PN393

JUSTICE ROSS: Withdraw that one?

PN394

MR DELANEY: Yes.

PN395

JUSTICE ROSS: Item 35.

PN396

MR DELANEY: I think that's been agreed, your Honour, that the award clause should be retained. I think there's an error there.

PN397

MS DABARERA: Your Honour, I think all the parties have raised - the three parties have raised concerns about the wording of that clause and whether it is clearer in the current clause.

PN398

JUSTICE ROSS: This is the current wages clause?

PN399

MS DABARERA: Yes, that's correct, your Honour.

PN400

JUSTICE ROSS: That's items 35 and 36.

PN401

MS DABARERA: Your Honour, sorry, in relation to item 36, we would withdraw our objection to that.

PN402

JUSTICE ROSS: We'll remove the words 'without cost to the employer' and we'll ask the drafter to re-examine the other aspects of the clause in light of the submissions made.

PN403

Item 37.

PN404

MS DABARERA: Your Honour, again, this is similar to the issue we raised in relation to the allowances clause in the Cleaning Award in that we think the current award is a lot clearer.

PN405

JUSTICE ROSS: Yes.

PN406

MS DABARERA: Again, we would be happy to proceed with that being decided on the submissions.

PN407

JUSTICE ROSS: Thank you.

PN408

MR DELANEY: ASA agrees that the current award would be more appropriate, your Honour.

PN409

JUSTICE ROSS: Item 38. ABI?

PN410

MS THOMSON: Yes, your Honour. That's one of ours. I think the issue here, is that it's not entirely clear that the allowance is only payable once per shift, as opposed to the two periods of duty.

PN411

JUSTICE ROSS: We'll put that to drafter and seek the drafter's comments and the parties can comment in relation to those.

PN412

Item 39.

PN413

MR DELANEY: Your Honour, we believe that the supervision allowance has been expressed previously as per shift for casuals and we would refer to, if I may, prior to the modern award being made, there were a number of schedules put out by the AIRC comparing pre-reform awards both Federal and State.

PN414

JUSTICE ROSS: Yes.

PN415

MR DELANEY: Although I don't have it in front of me at the moment, I believe that the supervision allowance was expressed, particularly in the Security Employees New South Wales Award, as an allowance per shift, as well as per week. The per shift allowance was for casuals, in particular.

PN416

JUSTICE ROSS: Perhaps if you can provide some more detail about that by the end of next week and then we'll forward that to the drafter.

PN417

MR DELANEY: Yes, your Honour.

PN418

JUSTICE ROSS: Then the parties will have an opportunity to comment on anything he says.

PN419

Item 40. This is United Voice matter.

PN420

MS DABARERA: Yes, your Honour. This is in relation to the Relieving Officer allowance. We have some concerns that the plain language draft has removed the agreement - has removed the requirement that the employee has to agree to be appointed as a relieving officer. We think that's substantial in the sense that not every employee will have the capacity to act in that role, because it does require being available at short notice.

PN421

JUSTICE ROSS: Yes.

PN422

MS DABARERA: We think the words retaining that agreement, should be retained in the award.

PN423

JUSTICE ROSS: Does anyone else have a view about this?

PN424

MR DELANEY: We don't disagree with United Voice on that matter, your Honour.

PN425

JUSTICE ROSS: ABI?

PN426

MS THOMSON: No, your Honour.

PN427

JUSTICE ROSS: We'll put it to the drafter and seek a redraft of that provision.

PN428

Item 41. This is responding to a question. Can we ask ABI, is this proposition that the weekly allowances, the current practice is for them to be divided into a daily figure for those employees who don't work a full week as a supervisor or a relieving officer. Is that generally accepted, that that's the current practice?

PN429

MS THOMSON: That was the feedback that I received, your Honour.

PN430

JUSTICE ROSS: Yes.

PN431

MR DELANEY: That's certainly the feedback we get at ASA amongst our members.

PN432

MS DABARERA: Your Honour, I might mention that that was what we talked to the delegates about, and that's opposite to the feedback that we've received. I've been told that it's paid as a weekly allowance regardless of how many shifts are worked per week, for example.

PN433

JUSTICE ROSS: I suppose it's also a question about whether, to the extent it's a practice to divide it into a daily figure for those who don't work a full week, whether that's consistent with the current award.

PN434

MS THOMSON: I think, your Honour, if we go back to the part time provision for a moment, the current wording in the award provides for entitlements to be pro rataed, depending on the number of hours and days worked by the employee. There would be some circumstances in which it would be in accordance with those provisions, able to be divided would be our submission.

PN435

JUSTICE ROSS: That's true if they were a part timer. Not so much if they're a full timer.

PN436

MS THOMSON: Yes, your Honour.

PN437

MR DELANEY: Your Honour, I guess if they were a full timer, they'd be entitled to the high duty allowance in that respect.

PN438

JUSTICE ROSS: Yes.

PN439

MS DABARERA: Your Honour, this is for the relieving officer, so it's essentially for being available to work those shifts, so yes again the feedback that we've had is - let's say somebody was working that for a whole week, and they only had to

work those shifts twice that week, they would still be paid the weekly allowance, for being available for that week.

PN440

JUSTICE ROSS: Let's go to time 42.

PN441

MS DABARERA: Your Honour, this is in relation to the meal allowance. Again, similar to the issue that we raised in the Cleaning Award. We're happy for the drafter to have a look at it and get back to us. If that's appropriate.

PN442

JUSTICE ROSS: Yes, that's fine. We'll put your comments to him and get a response. Item 43, ASIL's point.

PN443

MR DELANEY: Your Honour, what do you say is the inconsistency? This is overtime for casuals, isn't it?

PN444

MS DABARERA: Overtime for casuals is a later item. This is a broad - - -

PN445

JUSTICE ROSS: It's overtime generally.

PN446

MR DELANEY: Sorry, I do need to look at that again. It's 21.3 of the exposure draft.

PN447

JUSTICE ROSS: That's right, it's just overtime rates generally.

PN448

MR DELANEY: I'm sorry to delay this, your Honour.

PN449

JUSTICE ROSS: That's all right.

PN450

MR DELANEY: Look, I think the issue was more that it talks about the minimum hourly rate. I think ASIL's position is that as a general position is that if we're going to talk about a minimum hourly rate or an ordinary hourly rate, or a base rate, whichever term we decide to use, and it looks like it will be minimum hourly rate, that the minimum hourly rate should be defined in the award, so that we're clear. I think it falls into our other submissions later on about whether or not the casual loading falls within the minimum hourly rate. So, it's more of a general statement.

PN451

JUSTICE ROSS: No, that's fine. Same issue in 44?

PN452

MR DELANEY: Yes, your Honour.

PN453

JUSTICE ROSS: We'll take that on board and pass it on to the drafter.

PN454

Item 45, you're raising the retention of 43.4. Is it intended that the overtime starts on a Sunday and continues for one hour into the Monday - yes, bear with me for a moment. No, it's all right, we'll put your comment to the drafter.

PN455

MR DELANEY: Thank you, your Honour.

PN456

JUSTICE ROSS: 46?

PN457

MS DABARERA: Your Honour, I think items 46 and 47 - sorry, no - item 46 also relates to the same issue - - -

PN458

JUSTICE ROSS: Yes, it does.

PN459

MS DABARERA: - - - in regards to that clause.

PN460

JUSTICE ROSS: Well, we'll put that to the drafter and see what he comes back with.

PN461

MR DELANEY: Yes.

PN462

JUSTICE ROSS: 48?

PN463

MR DELANEY: Yes, that is to do with the casual loading and whether it's included in the minimum hourly rate for the purposes of calculating other penalties. We say it's not. We say there is a long history of that, that the casual loading is on the ordinary rate of pay. In fact, if we look at the clause in the - it will be clause 10.5 in the Security Services Industry Award [2010]. It reads at (b), if I can read this out to you, your Honour:

PN464

In addition to the ordinary, hourly rate and penalty rates payable for shift, weekend and public holiday work payable to full-time employees, casual employees will be paid a loading of 25 per cent of the ordinary rate for the classification.

PN465

MR DELANEY: So we say that the 25 per cent is of the ordinary rate of pay and it doesn't affect the loaded rate so for instance, if a casual worked on a Saturday we would say that they would get the ordinary rate of pay plus 25 per cent and the ordinary rate of pay times time and a half but not the ordinary rate of pay times time and a half plus 25 per cent of the ordinary rate plus time and a half.

PN466

JUSTICE ROSS: Yes.

PN467

MR DELANEY: We say that also applies in the overtime situation where the casual rate of pay should be the ordinary rate of pay times time and a half for the first two hours and double thereafter or on a Sunday of course the ordinary rate of pay times double or on a public holiday the ordinary rate of pay times double time and a half or 250 per cent, but not inclusive of the 25 per cent.

PN468

JUSTICE ROSS: Yes, no, I follow - in relation to 48 and 49, we'll seek the drafter's comments and if there is still an issue between you in relation to how it operates then you'll have an opportunity to say what you wish to say about that and the full bench can - - -

PN469

MR DELANEY: I think it will, your Honour. United Voice have made a separate application already on that matter.

PN470

JUSTICE ROSS: Yes.

PN471

MS DABARERA: Your Honour, I might briefly speak to that.

PN472

JUSTICE ROSS: Sure.

PN473

MS DABARERA: We have made a separate application but aside from that, your Honour, we disagree that this is a change that should be pursued in the plain language draft because it was already pursued as a substantive change and there was a decision on 2 March 2015 and the Commission was not persuaded to include these words, include the wording related to the casual loading, in the award because it was not convinced that it was necessary to achieve the modern awards objective. So our position, your Honour, would be that if ASIAL do seek to pursue it, it should be outside of this process.

PN474

JUSTICE ROSS: Yes. All right.

PN475

MR DELANEY: Yes.

PN476

JUSTICE ROSS: Yes. Item 50 - that change seems to have been made. Item 51?

PN477

MS DABARERA: Your Honour, again this is similar to an issue we raised with the cleaning award in that the language around who is considered a shift worker in the plain language draft is far more restrictive than what is in the current award.

PN478

JUSTICE ROSS: Yes. All right, well, we'll put those views to the drafter. 52 - ASIAL is submitting that some wording in the current award has been omitted. We'll also put that to the drafter and see what comes back.

PN479

MR DELANEY: Thank you, your Honour.

PN480

JUSTICE ROSS: 53?

PN481

MS DABARERA: Your Honour, this is in relation to the payment for annual leave.

PN482

JUSTICE ROSS: Yes.

PN483

MS DABARERA: Current - I think we may need to put this one to the drafter as well because I think there may be some significant disagreement about it but essentially the award does contain an entitlement where an employee will receive the greater of two options for annual leave.

PN484

JUSTICE ROSS: Yes.

PN485

MS DABARERA: But the plain language draft only contains the 17.5 per cent loading.

PN486

JUSTICE ROSS: Is that also an issue that arises on 54?

PN487

MS DABARERA: It's similar, your Honour, in that that's on - that's in relation to annual leave on termination but yes, it is similar.

PN488

JUSTICE ROSS: Yes, all right.

PN489

MR DELANEY: We agree with United Voice on the 51, your Honour. On 54 - perhaps I should leave that until we come to it.

PN490

JUSTICE ROSS: No, that's fine, we're at 54, yes.

PN491

MR DELANEY: Okay, we are indeed. What we say is that 54 provides a greater benefit to the employee than they would have under the - if they had taken leave during the course of their employment. I think it's been probably a drafting error in the first instance but it says the way it's drafted that an employee should get their ordinary rate plus a 17.5 per cent loading plus what they would have got had they worked their roster. They shouldn't get both. To us that's a double-dip. They should get either the ordinary rate plus 17.5 per cent or if they were a shift worker what they would have got had they been at work during that period of leave. Now, obviously it's an accrued period of leave but that's all they would get if they had been at work, greater of one than the other.

PN492

JUSTICE ROSS: That's really a merit argument, isn't it? It's not so much the transposition of the current award to the plain language draft. It's that you say - - -

PN493

MR DELANEY: And we made that submission - sorry, your Honour.

PN494

JUSTICE ROSS: No, that's all right - go on.

PN495

MR DELANEY: We made that submission back in 2014, I think, the first time when we were looking at the - it might have even been in 2012. It's in our submissions, anyway.

PN496

JUSTICE ROSS: All right, well, perhaps if you can just forward a copy of when you've raised the issue previously and we'll note your position on that and we'll come back to it later in these proceedings - in the process of reviewing this award.

PN497

MR DELANEY: Sorry, your Honour - we have done that. I think it was an attachment to our earlier submissions on this but I'll do it again.

PN498

MS DABARERA: Your Honour, I would note that it's actually item 56 that relates to the issue that we're discussing now.

PN499

JUSTICE ROSS: Yes, yes.

PN500

MS DABARERA: ASIAL have provided draft wording and we would be - your Honour, our position is that it is quite a significant substantive change to the award. we don't think it's appropriate for the plain language process. It would significantly reduce the employee entitlements.

PN501

JUSTICE ROSS: Well, that seems to be the case. That doesn't mean that ASIAL can't pursue it. It's just that it wouldn't be through the plain language process, it would be through a substantive change and it would be dealt with that way, okay?

PN502

MR DELANEY: Thank you, your Honour.

PN503

JUSTICE ROSS: All right?

PN504

MS THOMSON: Your Honour, if I could just note for the record as well that we support the position of ASIAL in that regard. I think the current wording in the PLED reflects what we think is the intention or the rectification of the unintended consequences in the current award but of course appreciate your comments with respect to the change in entitlement. In the Commission's hands on that one.

PN505

JUSTICE ROSS: Well, I think to the extent this process isn't intended to unintentionally change entitlements, so it is a significant change and will have to be the subject of a merits argument. Whether it's done by the plain language bench or a separate bench, we'll see as we go through the process. Look, in 55 this is a temporary closedown. This is similar to the point that's been raised by United Voice in the cleaning award. As I indicated there, it's likely following the black coal matter that temporary closedown provisions will be referred to a Bench for review but we'll note the points that United Voice raises and put them to the drafter.

PN506

MS DABARERA: Thank you, your Honour.

PN507

JUSTICE ROSS: Item 57 - 56 we've dealt with - yes, that seems to be agreed.

PN508

MR DELANEY: I think the matter was agreed between the parties.

PN509

JUSTICE ROSS: Is that all right?

PN510

MS DABARERA: Yes, your Honour.

PN511

JUSTICE ROSS: All right, well, that seems to deal with the items. We'll come back the ones we've parked and we'll await any further comments any of you have by close of business next week and put the items to the drafter that I've indicated and publish a further exposure draft and continue to work through the issues that are presently between you. Is there anything further in relation to that award?

PN512

MR DELANEY: No.

PN513

MS DABARERA: No, thank you, your Honour.

PN514

JUSTICE ROSS: All right, thanks for your attendance and we'll let you know when the next conference will be, thanks very much. We'll adjourn.

PN515

MS THOMSON: Thank you, your Honour.

ADJOURNED INDEFINITELY

[12.32 PM]