



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/243)
Seagoing Industry Award 2010**

Sydney

10.03 AM, THURSDAY, 4 AUGUST 2016

PN1

JUSTICE ROSS: We will just take the appearances. Can I take the appearance in Melbourne?

PN2

MS I GUARAN: Guaran, initial I, appearing for the Maritime Industry Australia Ltd on the Marine Towage Award, Ports Harbours and Enclosed Water Vessels Award and the Seagoing Industry Award.

PN3

JUSTICE ROSS: Thanks. We will deal with the Dredging Award first, so appearances in Sydney.

PN4

MR J WYDELL: Wydell, spelt W-y-d-e-l-l, initial J, from the Australian Maritime Officers Union.

PN5

MR S LITTLEWOOD: Littlewood, initial S, for the AIMPE.

PN6

MR N NIVEN: Niven, initial N, for the AIMPE.

PN7

MS WALSH: Walsh, initial R, for the AWU.

PN8

MR N KEATS: Keats, initial N, solicitor for the Maritime Union of Australia.

PN9

MS HINES: Your Honour, I'm not appearing in relation to the Dredging Award.

PN10

JUSTICE ROSS: That's fine. Are there any employers in the Dredging Award?

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MR KEATS: We're just having that discussion.

PN12

JUSTICE ROSS: Who are the employers with an interest?

PN13

MR KEATS: (Indistinct) as most dredging's on a project basis.

PN14

JUSTICE ROSS: Yes. Is there an employer or association that would normally look after them or not?

PN15

MR KEATS: When the award was made and the company Ausgroup Consulting was involved and Mark Diamond was involved, but he hasn't been for a number of years. Beyond that I can't assist.

PN16

JUSTICE ROSS: Right. Let's go through the summary of submissions document. Item 1 is fairly straight forwards, it's just a typographical error. Item 2, this is in relation to clause 5.2. Why would that need to be by majority agreement, the proposition that a facilitative clause should be by a majority agreement. That's the MUA's position I think.

PN17

MR KEATS: We just think it would be more democratic if that's the way it operated.

PN18

JUSTICE ROSS: Well, that's not really that persuasive. You can say that about any majority provision. What about this industry and this particular provision around meal breaks? What is it that says that it should be majority rather than individual? Meal breaks in other awards are by individual agreement.

PN19

MR KEATS: On a dredge there's usually only a very small number of people involved.

PN20

JUSTICE ROSS: Sure, yes.

PN21

MR KEATS: It would be important that when those meal breaks occur operationally it's at a particular point in time.

PN22

JUSTICE ROSS: Do they normally take their break all at once?

PN23

MR KEATS: I actually don't know that.

PN24

JUSTICE ROSS: Right.

PN25

MR WYDELL: Sorry, depending on the size of dredge of course, there might be - because of the way the galley and the cook and the kitchen and everything's set up, they might run, you know, a meal time over an hour here, here and here.

PN26

JUSTICE ROSS: You'd still have an officer on the bridge at all times anyway, so they wouldn't be taking a break other than if they were doing in situ. Is that right?

PN27

MR WYDELL: Well, what they'll do is typically with the deck officers, it might be that if - on a dredge you might have a master mate and a second mate.

PN28

JUSTICE ROSS: Yes.

PN29

MR WYDELL: Depending on what hour of the day would sort of determine who's on.

PN30

JUSTICE ROSS: Yes, whoever's on - - -

PN31

MR WYDELL: The master might come up and relieve so the second mate can go down for a meal and they might swap around. So it really does involve sort of the coordination of the master, the heads of those departments, so that people can sort of get their meal in, otherwise you know cooks have got galleys open for - and they can't clean up between the next meal et cetera, et cetera. So there's a large amount of how shall we say cooperation in ensuring people can get off to a meal and the operation can continue, if that's of any assistance to you.

PN32

JUSTICE ROSS: Does that favour though - does the master then decide or whoever's on duty, master or the first mate, decide the - - -

PN33

MR WYDELL: Look, I don't envisage that there's, you know, a great deal of disagreement between parties. Usually there's, you know, the relevant heads of the department can work out who's relieving who so as people get a meal break. You know, the chief engineer, you'd have a chief IR - - -

PN34

JUSTICE ROSS: It's just if it's by majority of employees then it won't be by department. You see the issue will be you'll have engineering, you'll have the deck officers, the seamen. What, they'll all come together collectively in your view and take a vote about when they take the meal breaks?

PN35

MR KEATS: Yes.

PN36

JUSTICE ROSS: Yes. Well how's that going to work?

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MR WYDELL: I don't see how it would.

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JUSTICE ROSS: No. I'm not suggesting it's not by agreement but you see the practical problems that might arise if you adopt a majority?

PN39

MR KEATS: I think they might be flipsided and every individual though can chose a separate - - -

PN40

JUSTICE ROSS: Well, it has to be - yes, it's by agreement with an individual sure, but that's how it works now. That's how the clause operates. They have to agree. Look, absent - unless you can bring forward some evidence that says at the moment the way it works is it's by majority agreement, then my provisional view is that it'd just be by individual agreement, you'd sort it out on the vessel.

PN41

Look, it may - that certainly is consistent with the proposition you've put forward that the departments will work it out, that they'll sort it out amongst themselves and you know it saves a sort of cumbersome provision that might be seen as a bit too rigid that says it's by agreement in each department et cetera. But unless you can forward something that's - goes towards what the current practice or how it would work then that's probably where we would go.

PN42

When we get to the end of it we'll talk about directions for any more material that people want to put in to give you a sufficient time to consider all of that. You can find out, each of you, to what extent this is going to be an issue, whether individual agreement will work and it'll just continue to operate as it has in the past. I'm assuming most of these operations are covered by enterprise agreements in any event.

PN43

MR WYDELL: Yes, your Honour.

PN44

JUSTICE ROSS: Yes. Types of employment. I think that item 3 is agreed. Item 4, there is a bit of toing and froing about this. This is about 6.5(a)(ii). There's this sort of unusual - just bear with me for a moment. Yes, it's an unusual provision that if you're a full-time or part-time employee you're appointed as a full-time and part-time employee but you're terminated within four weeks, then you're regarded as a casual employee. I wasn't sure, it seems that the AWU's position evolved and it was now supporting the deletion of 6.5(a)(ii) and that seemed to get the support of the MUA.

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MR KEATS: Correct.

PN46

JUSTICE ROSS: Is that where we're up to?

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MS WALSH: Yes.

PN48

JUSTICE ROSS: Do you have any opposition to the deletion of that?

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MR WYDELL: I'll just defer to whatever Mr Keats wants to do there.

PN50

JUSTICE ROSS: Yes. So it's agreed that 6.5(a)(ii) would be deleted, right. Then if we go to number 5, I think that issue the AWU has indicated that's being dealt with by the Part-Time Casual Bench.

PN51

MS WALSH: Yes.

PN52

JUSTICE ROSS: Span of hours. Can you just - where does it allow for working more than?

PN53

MS WALSH: So I think the writing - sorry, let me get it. So span of hours is 12 hours per day, seven days per week between six and six.

PN54

JUSTICE ROSS: Yes.

PN55

MS WALSH: Or alternatively other starting and finishing times as may be mutually agreed.

PN56

JUSTICE ROSS: But that seems to be a reference to the 6 am and 6 pm, not the 12 hours. Is your - are you seeking clarification that the way you want 8.2(a)(ii) to operate is that you can vary the 6 am or 6 pm point by mutual agreement, provided you don't work more than 12 hours per day? So in other words you could have 5.30 am to 5.30 pm if you were in - if you were in summer you might want an earlier start or - - -

PN57

MR NIVEN: Well, depending on the project it could be titled - - -

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JUSTICE ROSS: Yes, absolutely could be, yes.

PN59

MR NIVEN: Could be all sorts of operational reasons.

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JUSTICE ROSS: Yes.

PN61

MR NIVEN: If they're doing a port it might to fit in with other shipping movements.

PN62

JUSTICE ROSS: Yes. But I understood - - -

PN63

MS WALSH: We're not saying that you can't alter the hours more than 12 but we were concerned that it left it rather open ended to be any number of hours could be agreed to be your ordinary hours.

PN64

JUSTICE ROSS: Well - - -

PN65

MS WALSH: We'd made a suggestion that it be limited to one hour agreed upon at either end of the spread, in our submissions, and we've referred to some of the (indistinct).

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JUSTICE ROSS: Yes.

PN67

MS WALSH: I think we have your support on that - - -

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JUSTICE ROSS: How does it work at the moment? What's the - because I must admit, I didn't read the clause as being able to vary the 12 hours.

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MS WALSH: Right.

PN70

JUSTICE ROSS: I accept your point that it's not, you know, crystal clear.

PN71

MS WALSH: Yes.

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JUSTICE ROSS: But I thought starting and finishing times rather referred to 6 am and 6 pm.

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MS WALSH: Right, I see what you're saying.

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JUSTICE ROSS: And being able to move those but stick with the 12 hours. That would be consistent with 8.2(a)(i), 12 hours per day.

PN75

MS WALSH: Well, I think it's - yes, so I can see your point. But we'd still be concerned that it is about day workers so you wouldn't want those - you wouldn't want the span to ultimately shift too far from six and six. But I can see that it's not nearly as scary from the interpretation that you've - - -

PN76

JUSTICE ROSS: Yes, but you know I might be wrong. But that's why I was just having a bit of a difficulty - - -

PN77

MS WALSH: Yes.

PN78

JUSTICE ROSS: - - - trying to sort through what - but is your proposition the - essentially that it can move by up to an hour up at either end provided no more than a maximum of 14's worked per day. That - - -

PN79

MS WALSH: I mean we had a look at a few of the enterprise agreements that we're a party to and that's the way that they operated, and then - - -

PN80

JUSTICE ROSS: All right.

PN81

MS WALSH: So that's - I mean that was our position. I suppose the alternative - would you be suggesting the alternative of having some sort of clarification to ensure that the 12 hours wasn't - - -

PN82

JUSTICE ROSS: No, I'm open to whatever you want to put forward. Can I suggest this, that you give some thought to what you want to do.

PN83

MS WALSH: Yes.

PN84

JUSTICE ROSS: We'll deal with it in the later directions. Put in a further submission, it'd be helpful to refer to the existing agreements in practice and then other interested parties can reflect on their own experience and practice and if there's a solution that is consistent with existing practice then that's probably - that'll be the one that will come in.

PN85

MS WALSH: Sure. I mean we've included those agreements here in our submissions. We referenced three agreements.

PN86

JUSTICE ROSS: Yes.

PN87

MS WALSH: Yes, I'm happy to do that.

PN88

JUSTICE ROSS: The other parties can just see from their perspective and their agreements. Are they party to the ones that you've referenced or are they geographically specific and so you're the only one?

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MS WALSH: I'm not sure. I think we're the only one.

PN90

JUSTICE ROSS: Yes.

PN91

MS WALSH: Yes.

PN92

JUSTICE ROSS: Well, the other parties can have a look at their own and see what might reflect current practice.

PN93

MS WALSH: Yes.

PN94

JUSTICE ROSS: Right, item 7 is about 9.2(a). That's the - I think we've covered that, the issue about which parties and we'll deal with that later. 9.2, if we go to number 8, 9.2(c) and (e). What (indistinct) do we use?

PN95

MS WALSH: Sorry, what item are we on?

PN96

JUSTICE ROSS: We're on clause 9, item 8. We may as well deal with 8, 9 and 10, they all relate to that. Is that how this clause - how the various constituent parts of it interact.

PN97

MS WALSH: Right. So 9.2(c) and 9.2(e), right, they offer two exceptions to 9.2(a). So the starting point as we have submitted is that an employee is entitled to a meal break.

PN98

JUSTICE ROSS: 30 minutes paid time within the first five hours, yes.

PN99

MS WALSH: We then see that (c) and (e) operate as exceptions to that. So (c) being if the representative or the master or engineer decides it's an emergency.

PN100

JUSTICE ROSS: Yes. Then there's no overtime and you are paid for 30 minutes at overtime rates.

PN101

MS WALSH: That's right. (e) is the other exception where it's just impracticable because the dredge must continue to operate and we just noticed that the compensation was almost identical and we were making the comment I suppose that these be merged in some way or some sort of - or just that the whole operation of this entire clause - - -

PN102

JUSTICE ROSS: Be re-written.

PN103

MS WALSH: Yes.

PN104

JUSTICE ROSS: So is the broad proposition that - look, the general position is that if you're on dredging operations you're entitled to a meal break of 30 minutes within the first five hours from the start of a shift or at a time otherwise agreed. If you're not provided with a break for any reason, then you are to be paid an additional hour's pay at ordinary rates. Is that the - that's the combined - that's the practical effect of (c) and (e), either it's in continuous operation or it's an emergency.

PN105

MS WALSH: Yes.

PN106

JUSTICE ROSS: So if you're not provided with a break, you're given an hour's pay.

PN107

MS WALSH: I mean we would be happy with that.

PN108

JUSTICE ROSS: Is that - that's pretty much how the clause works. It's the circumstances in which you get an hour's pay, are expressed differently but the effect is the same.

PN109

MS WALSH: Right.

PN110

JUSTICE ROSS: It's either in continuous operation or the master or the engineer or company representative decides that it's an emergency. I expect that - look, even if it was said, if you're not provided with a break for whatever reason then you're entitled to an additional hour's pay, it's not as if in a practical way that would be any different from the current one. The employer's obviously going to want to provide you with a break otherwise they're going to have to pay the financial penalty, and at the moment what an emergency is, is really in the eye of the master, engineer or the representative in any event.

PN111

MS WALSH: Yes.

PN112

JUSTICE ROSS: But your main point is that (c) and (e), well why do you need two clauses dealing with the same issue, and providing - it adds complexity when the compensation for the non-provision of a meal break is expressed differently.

PN113

MS WALSH: Almost identical I think you would be paid.

PN114

JUSTICE ROSS: No, you'd be paid the same amount but it's just why do you express it as payment for 30 minutes will be at overtime rates or you'll be paid one hour at ordinary time rates.

PN115

MR NIVEN: One's a foreseen and one's unforeseen, that's the only difference I can see.

PN116

JUSTICE ROSS: Yes, in the trigger but in the compensation - is overtime - well, I suppose that depends.

PN117

MS WALSH: Overtime is at (indistinct).

PN118

JUSTICE ROSS: Is double time for all overtime.

PN119

MS WALSH: Yes, so it was 30 minutes at overtime or - - -

PN120

JUSTICE ROSS: Yes, so it's the same, yes.

PN121

MR NIVEN: Is at (indistinct).

PN122

MS WALSH: Yes.

PN123

JUSTICE ROSS: Right. Well we'll have a look at the clause and take into account what you've said and come up with a revised version in a revised exposure draft.

PN124

MS WALSH: Yes.

PN125

JUSTICE ROSS: We'll look at the other points you've made in relation to clause 9.2.

PN126

MS WALSH: Sure. The MUA have also made - - -

PN127

JUSTICE ROSS: In relation to this issue? Clause 9.2?

PN128

MS WALSH: Well, in relation to the whole 9.2, yes.

PN129

MR KEATS: It gets to 9.3, which is - interacts with 9.2, in the sense that there's this overriding requirement in 9.3 about not being compelled to work more than five hours. But there's need to be put an exemption that for the clause to be consistent - - -

PN130

JUSTICE ROSS: Yes.

PN131

MR KEATS: We've just proposed except as the exemptions provide and they're currently 9.2(e) and (c).

PN132

JUSTICE ROSS: Yes.

PN133

MR KEATS: Then they won't be compelled. So we were just thinking that some preparatory words needed to be put there.

PN134

JUSTICE ROSS: It's probably really 9.2 and 9.3 need to be consolidated into one clause that probably starts with the default position, which is your 9.3 and 9.2(a), subject to the provisions of this clause and then you follow on. Yes, you're quite right because standing out by itself how would you interpret that consistent with 9.2(e), for example. It just doesn't make any sense. Right.

PN135

I think item 12 the flow point, this is really a definitional matter I think. Does anyone want to say anything further about that?

PN136

MS WALSH: Item 12?

PN137

JUSTICE ROSS: Yes. There should be some definition provided. The AWU propose a definition, so does the MUA.

PN138

MR KEATS: Yes. I don't think I've got anything more to say. Our version is there for the Commission to see.

PN139

JUSTICE ROSS: Is the minimum wage for a trailer master and chief engineer, what's that - what's the AWU's point there? Is there no minimum wage for - - -

PN140

MS WALSH: Well, they simply weren't there.

PN141

JUSTICE ROSS: I thought a chief engineer's minimum wage was in clause 10.

PN142

MS WALSH: For a non-propelled dredge.

PN143

JUSTICE ROSS: Yes. 871.10.

PN144

MS WALSH: There was (indistinct) somewhere. Let me just - - -

PN145

JUSTICE ROSS: It's there for - - -

PN146

MR NIVEN: Are you looking at the shift worker son page 13 of the exposure draft?

PN147

MR KEATS: I'm no sure, is that what you're thinking of?

PN148

MS WALSH: Yes, it must have been - page 13. Yes.

PN149

JUSTICE ROSS: The only thing that's missing is the trailer master. There's no classification for trailer master.

PN150

MS WALSH: Yes, as a shift worker.

PN151

JUSTICE ROSS: Or in a non-propelled dredge but that might be because there are no trailer masters on non-propelled dredges.

PN152

MS WALSH: Right.

PN153

JUSTICE ROSS: I think it just flows through to the shift anyway wouldn't it? You've got the minimum rate, you just add the loadings and come up with the - - -

PN154

MR KEATS: Yes, that's right.

PN155

JUSTICE ROSS: It's just that hasn't been done. Is that the - - -

PN156

MS WALSH: I think that's all our point was, yes.

PN157

JUSTICE ROSS: Right. So we'll follow that through and make sure each classification is - has a rate of pay. Clause 10.4, higher duties.

PN158

MS WALSH: Yes, so we were just making the point that when an employee was required to do new work with another employee that performed higher duties they wouldn't necessarily perform every duty, that that other employee works, that they would be doing the work of that employee. So you might be engaged for just one day to do those higher duties and we were just suggesting that the word be work rather than duties.

PN159

JUSTICE ROSS: It's duties in the current award.

PN160

MS WALSH: Yes, but it had been work previously in the pre- - -

PN161

JUSTICE ROSS: Yes, but - so what, I mean it's a modern award that's currently, unless you want to mount an argument that it was incorrect. I mean we can go through the award history and find I suspect like most of these it would have largely been by consent. So there would have been an exposure draft but we'll trek through the history of the higher duties provision and then we'll publish that with the revised exposure draft, and then you'll have an opportunity if you want to agitate for a change then agitate for it at that stage.

PN162

MS WALSH: Right.

PN163

JUSTICE ROSS: 14. It's about 11.2(a). 11.2(b) I'm sorry.

PN164

MS WALSH: Yes, I think this is just a suggestion to have it expressed as an hourly rate to reflect that it's an all-purpose allowance and it will be used with other rates and just for each of use, I suppose. So we weren't suggesting to take away the per week expression, but to put in brackets the per hour rate next to it.

PN165

JUSTICE ROSS: What is 27.84 divided by 38?

PN166

MS WALSH: 73 cents per hour.

PN167

JUSTICE ROSS: Is that rounded? Does it give you the same - - -

PN168

MS WALSH: I'm not sure how I did that.

PN169

JUSTICE ROSS: That's all right.

PN170

MS WALSH: Yes.

PN171

JUSTICE ROSS: All right. Look, yes, we'll have a look at that. Does anyone else have a view about that? Anyone care one way or the other? No? All right.

PN172

MR NIVEN: The only point I would make is that it's not something that happens hour by hour.

PN173

JUSTICE ROSS: No.

PN174

MR NIVEN: It's for the period of the engagement so I don't know if an hourly rate is going to - - -

PN175

MS WALSH: But it's cumulative with other entitlements, (indistinct) which would only attach to a portion - - -

PN176

JUSTICE ROSS: If you go to your minimum, weekly rate, it would go into that because it's paid for all purposes. Is that the - - -

PN177

MS WALSH: Yes.

PN178

JUSTICE ROSS: Your ordinary, hourly rate of pay.

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MS WALSH: Yes.

PN180

JUSTICE ROSS: So if you're paid overtime, then it's added to your minimum rate for overtime purpose but I'll just follow through, making sure it's picked up in the later schedules.

PN181

MS WALSH: Yes.

PN182

JUSTICE ROSS: If it's picked up in the schedules I don't think you need to have it there.

PN183

MS WALSH: Yes, then that's fine. Yes, sure.

PN184

JUSTICE ROSS: Because you've got the hourly rates specified in the schedules at the back for overtime purposes. If it's in there, I don't know that you need to change it here.

PN185

MS WALSH: Sure.

PN186

JUSTICE ROSS: All right, number 15? So, item 15 is about the additional allowances for cooks.

PN187

MR KEATS: I think we all agree it should be paid weekly.

PN188

JUSTICE ROSS: All right. 11.2(j)(i). Yes, it's just updating of legislative references. What is the Act reference? Is it still the Navigation Act?

PN189

MR KEATS: But it's 2012 now.

PN190

JUSTICE ROSS: There's (indistinct), yes. Yes.

PN191

MR WYDELL: Then in (j)(iii), there's a reference to the Seaman's Compensation Act.

PN192

JUSTICE ROSS: Yes.

PN193

MR WYDELL: That is now the Seafarer's Rehabilitation and Compensation Act 1992. Just while we're on the Navigation Act, I apologise, we refer to sections 127 and 132.

PN194

JUSTICE ROSS: Yes.

PN195

MR WYDELL: They should be sections 68, 69, 70 and 71.

PN196

JUSTICE ROSS: All right, thank you. Protective industrial clothing. For some reason these clauses provided issues in almost every award I've looked at and they're usually a circumstance where what happens where the employer doesn't provide the clothing or those sorts of issues.

PN197

MS WALSH: yes.

PN198

JUSTICE ROSS: But can you just take me through what the MUA's issue is here?

PN199

MR KEATS: Can I just have a moment?

PN200

JUSTICE ROSS: Yes, sure.

PN201

MR KEATS: That is essentially what you have just, your Honour, is what we're after, that we be paid the cost if it's not supplied.

PN202

JUSTICE ROSS: That seems to be - - -

PN203

MR KEATS: That's about changing the internal referencing so that in clause 11.3(b)(iv), that reference should be, I think, to (iii), not to (ii).

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JUSTICE ROSS: To (iii), yes.

PN205

MR KEATS: That would then work.

PN206

JUSTICE ROSS: I think that's certainly right.

PN207

MR KEATS: I think that's what our submission was.

PN208

JUSTICE ROSS: Well, then that's fine. So the reference in 11.3(b)(iv) to clause 11.3(b)(ii) will be changed to clause 11.3(b)(iii). All right. 19 is about 13.3, shift work penalties. There's been a bit of toing and froing about this issue as well.

PN209

MR KEATS: Yes.

PN210

JUSTICE ROSS: That the AWU and MUA (indistinct).

PN211

MR KEATS: We ended up agree with the AWU.

PN212

MS WALSH: 13.3. Right. We probably wanted to amend our position on that.

PN213

JUSTICE ROSS: Well - - -

PN214

MS WALSH: About the ordinary rate, no, that's right. But we'd also made a submission in relation to subclause (a), 13.3(a) but to stay on item 19.

PN215

JUSTICE ROSS: But that's fine. We can deal with item 20 as well. It's the same issue and you've proposed some alternate wording there.

PN216

MS WALSH: Yes. So we wanted to withdraw part of - so we'd suggested that the words "Working shift work" and "which" be deleted.

PN217

JUSTICE ROSS: Yes.

PN218

MS WALSH: But we would say that we keep that but we still agree with Monday to Friday. And our point there was that at 8.2, which sets out the ordinary hours, there's no reference to Monday to Friday.

PN219

JUSTICE ROSS: To Monday to Friday.

PN220

MS WALSH: Whereas, then it's introduced at 13.3 for the shift work penalties to apply.

PN221

JUSTICE ROSS: And what would happen if it wasn't a Monday to Friday, I suppose? There doesn't seem any - what, they wouldn't get a loading is the risk? Is that the - so they can be required to work shift work on a Saturday, for example, but the way the shift work penalty operates, it doesn't prescribe a penalty for - - -

PN222

MS WALSH: The weekends.

PN223

JUSTICE ROSS: The weekends, yes.

PN224

MS WALSH: Yes, that's right.

PN225

JUSTICE ROSS: All right. So you would put a full stop after "6 pm"?

PN226

MS WALSH: Yes, or otherwise include words to the effect of, "On any day of the week". But, yes, full stop after 6 pm would be fine.

PN227

JUSTICE ROSS: All right. So that's that one. So that would be to amend 13.3(a) to put a full stop after 6 pm.

PN228

MS WALSH: Yes.

PN229

JUSTICE ROSS: And what's the other issue?

PN230

MS WALSH: So I think the Commission has asked us a question for the other issue.

PN231

JUSTICE ROSS: Yes.

PN232

MS WALSH: And the MUA and us have agreed that the loading should be based on the ordinary rate in order to capture the all purpose allowance.

PN233

JUSTICE ROSS: Yes.

PN234

MS WALSH: I don't think, well, the all purpose allowance applies to - I don't think anyone is under the impression that it doesn't apply.

PN235

JUSTICE ROSS: No.

PN236

MS WALSH: Yes.

PN237

JUSTICE ROSS: Well, otherwise it wouldn't have any purpose.

PN238

MS WALSH: Yes.

PN239

JUSTICE ROSS: If it didn't apply to shift penalties and overtime, what would be the meaning of "all purpose".

PN240

MS WALSH: Yes.

PN241

JUSTICE ROSS: And, in fact, you've got some other provisions which make it clear. For example, if we go back to the allowances we were just dealing with, the hard-line allowance, for example, in 12.2(d), it says "This allowance is not subject to any penalties or premium prescribed by this award". Well, that's clearly a reference to any overtime or shift penalties and the implication is that, for example, the dual certificate allowance would be paid on shift premiums and overtime because it's paid for all purposes.

PN242

MS WALSH: Yes.

PN243

JUSTICE ROSS: That's your point, is it?

PN244

MS WALSH: Yes.

PN245

JUSTICE ROSS: All right. 14, you're seeking the annual leave loading. Is there anything else you're going to want to say about that?

PN246

MS WALSH: Not today. I mean - - -

PN247

JUSTICE ROSS: No, but what's the process? How do you want the Commission to decide your claim on that point?

PN248

MS WALSH: I think it had been raised earlier and we were directed to raise it during the awards date.

PN249

JUSTICE ROSS: Yes, that's right and you're pursuing your claim in this award and one other award, I think.

PN250

MS WALSH: Yes, I think the Alpine.

PN251

JUSTICE ROSS: Might have dropped the Alpine. You're pursuing another one.

PN252

MS WALSH: Is that right?

PN253

JUSTICE ROSS: But one way or the other you had three and now you're got two, I think, is the upshot of it.

PN254

MR KEATS: (Indistinct) Industry Awards.

PN255

JUSTICE ROSS: Yes.

PN256

MS WALSH: Yes, sorry, (indistinct) and the Book Industry Award are the only outstanding.

PN257

JUSTICE ROSS: Yes, all right.

PN258

MS WALSH: All remaining awards (indistinct).

PN259

JUSTICE ROSS: Well, are you content to rely on what you've put? Do you want a further opportunity to put more material? Are you happy for it to be dealt with on the basis of written submissions?

PN260

MS WALSH: I'm happy. Yes, we are, happy for it to be dealt with on papers.

PN261

JUSTICE ROSS: Is there any further material you want to put in support of it?

PN262

MS WALSH: I don't think so, no.

PN263

JUSTICE ROSS: All right. Well, it will be dealt with on the papers by the Full Bench in due course. 22 is the MUA's point about clause 14. Do you want to define shift worker for the purpose of the additional week's annual leave. Is that right?

PN264

MR KEATS: That's the purpose.

PN265

JUSTICE ROSS: All right. Again are you content for us to deal with that on the basis of material you've filed?

PN266

MR KEATS: Yes.

PN267

JUSTICE ROSS: Number 23. Are you happy? As indicated it's been dealt with.

PN268

MS WALSH: Yes.

PN269

JUSTICE ROSS: 24, no additional training programs. 25, this is a definition issue in schedule E that the AWU has raised.

PN270

MS WALSH: Yes.

PN271

JUSTICE ROSS: What do you want to say?

PN272

MS WALSH: I mean, I'd be interest to see what other people thought. This award uses the term "not fully operational" interchangeably with the term "laid up", which presumably is fine for people who are using the award because they

know what that means but in terms of just navigation of the award and cross-referencing across the award, we'd suggested that "not fully operational" be the preferred term.

PN273

JUSTICE ROSS: SO it would read, "Not fully operational includes periods when a vessel is laid up, out of commission", et cetera, et cetera?

PN274

MS WALSH: Yes, that's right.

PN275

JUSTICE ROSS: Is the expression "laid up" used in the award? Certainly the expression "not fully operational" is.

PN276

MS WALSH: Yes, it is, I think, but not as much. So "laid up" is used four times in the exposure draft at 11.2(d)(v), 11. 2(e) and in one of the schedules.

PN277

JUSTICE ROSS: Yes.

PN278

MS WALSH: So we have set it all out that the - - -

PN279

JUSTICE ROSS: Yes, you have in your submission. Yes.

PN280

MS WALSH: Yes.

PN281

JUSTICE ROSS: Does anyone have a? So the effect of what you're putting would be you'd change those references to "Not fully operational"?

PN282

MS WALSH: Correct and then you'd define "Not fully operational" rather than "laid up".

PN283

JUSTICE ROSS: Yes.

PN284

MS WALSH: And you still use the phrase "laid up" in the definition but it's not a defined term.

PN285

JUSTICE ROSS: Well, "not fully operational" is probably the more important expression because it affects the wage rates.

PN286

MS WALSH: Yes.

PN287

JUSTICE ROSS: Because there are different minimum wages prescribed for vessels that are operational and not fully operational.

PN288

MR WYDELL: Your Honour, there's a definition in there. I'm not quite sure where it is. It just popped up on computer here. "Laid up means at all times when a vessel is not fully operational".

PN289

JUSTICE ROSS: Yes, no, it is in there now.

PN290

MS WALSH: Yes.

PN291

JUSTICE ROSS: It's in schedule E.

PN292

MR WYDELL: Yes.

PN293

JUSTICE ROSS: But the point is that - - -

PN294

MR WYDELL: It includes (indistinct).

PN295

JUSTICE ROSS: Sure, but is there any difference between "laid up" and "not fully operational"?

PN296

MR WYDELL: Well, "laid up" is a term that encompasses not only "fully operational" but "out of Commission, under repair, maintenance". So "laid up" seems to be a broader definition, which includes whatever "not fully operational" means.

PN297

MS WALSH: But unless that affected the terms of the award, it's only unhelpful to have two terms that effectively refer to the same thing.

PN298

MR WYDELL: Well, it's - - -

PN299

MR NIVEN: Fully operational, I think, means when it's actually dredging mode rather than transiting or transiting between projects or ports.

PN300

MR WYDELL: So if a vessel is laid up out of Commission, there mightn't be anybody on it or a smaller crew or something else.

PN301

MR NIVEN: If you're just sailing it to Singapore for dry dock, you'd only have the required crew for that. You wouldn't necessarily have the - you wouldn't have an dredge operators additionally manning - - -

PN302

MR WYDELL: So one seems broad and the other seems narrowed.

PN303

JUSTICE ROSS: Yes, "not fully operational" is the broader term. You might - - -

PN304

MR WYDELL: "Laid up" is the broader term. "Not fully operational" being the narrower term.

PN305

MS WALSH: But for example if you're looking at the dual certificate allowance - - -

PN306

JUSTICE ROSS: I'm not sure that's right because you could be - well, yes, in one way that's right.

PN307

MR WYDELL: Yes.

PN308

JUSTICE ROSS: Because laid up, you're either out of commission for whatever reason. You're not dredging. You're transiting or something else. Not fully operational includes all those things.

PN309

MR WYDELL: Well, not fully operation you could be alongside. Laid up you could be cold stacked.

PN310

JUSTICE ROSS: Yes.

PN311

MS WALSH: But there's no separate rates for laid up versus not fully operational under this award.

PN312

JUSTICE ROSS: No. The difference in this award is between fully operational and not fully operational. That's where the difference in rates comes in.

PN313

MS WALSH: Yes.

PN314

MR KEATS: I think all your proposition really is, is to change the word "laid up", give that broad definition to "not fully operational" so it picks up all those other things, which I think would work.

PN315

JUSTICE ROSS: It would just say, "Not fully operational includes periods when a Commission".

PN316

MS WALSH: Yes.

PN317

MR KEATS: That's right.

PN318

JUSTICE ROSS: Yes.

PN319

MR KEATS: So it's not kept that breadth. We'd be happy.

PN320

JUSTICE ROSS: What we might do is we'll make the change in the revised exposure draft, flow the change through to those other clauses that you've suggested.

PN321

MS WALSH: Yes.

PN322

JUSTICE ROSS: Then parties can have a look at it and see whether it gives rise to any practical issues, all right? Anything else on this?

PN323

MR KEATS: No, your Honour.

PN324

MS WALSH: No, your Honour.

PN325

JUSTICE ROSS: All right. Look, what we'll do is when we issue the revised exposure draft, it will probably be about four weeks or so, we'll issue directions for the filing of any further material. But to be clear, that will ask you don't rely on what you've already put. We want you to put something else in that says that you are pressing items whatever or you're not. If you're not, we'll assume you're not pressing anything. We'll assume you're entirely happy with the revised exposure draft, unless you send us something saying, in your case, "We want to argue for the annual leave loading."

PN326

MS WALSH: Yes.

PN327

JUSTICE ROSS: "And in doing that we rely on the submissions we made of."

PN328

MS WALSH: Sure.

PN329

JUSTICE ROSS: "And we are content for the matters to be dealt with on the papers", for example. All right? So that's the way it will work. Don't assume that by saying nothing that we'll assume that you're still pushing one of the issues that has not been dealt with in the revised exposure draft. All right? All right, we'll adjourn that one and call the next one, which is the marine towage.

PN330

Are you interested?

PN331

MS WALSH: No.

PN332

JUSTICE ROSS: In Melbourne, are you interested in Marine Towage?

PN333

MS GUARAN: Yes, your Honour.

PN334

JUSTICE ROSS: All right. I might get you to speak into the mic for me.

PN335

MS WALSH: I'll just excuse myself, your Honour.

PN336

JUSTICE ROSS: Yes, sure.

PN337

MS WALSH: We don't have an interest in this award, so (indistinct).

PN338

JUSTICE ROSS: All right. Got an interest in any of the others?

PN339

MS WALSH: Yes, the Ports and Harbours.

PN340

JUSTICE ROSS: Right. All right. There are a couple of matters raised in relation to the exposure draft. First item, items 1, 2 and 3, I think they're being dealt with by a separate Full Bench. Is that right?

PN341

MR KEATS: Yes, your Honour.

PN342

JUSTICE ROSS: Yes. Item 4. This is about 9.3(b)(i).

PN343

MR KEATS: The MUA's position has been, your Honour, that there is no sort of linkage between these two concepts. They are completely separate concepts and you can't try and mathematically relate the two together. We simply have support from the employer group.

PN344

JUSTICE ROSS: So what is the daily rate? Can you explain that concept for me, as opposed to a weekly rate?

PN345

MR KEATS: As in where it came from?

PN346

JUSTICE ROSS: Yes. So it's the payment for special voyages, that there's a daily minimum rate.

PN347

MR KEATS: It's just these voyages are generally ad hoc. So historically I can't pin down how long it was. I've just been given a daily rate. I can only give you the historical reference.

PN348

JUSTICE ROSS: All right. So when we're adjusting the rates for annual wage reviews, I suppose if it's a percentage, well, how do we adjust it? Do we multiply the daily rate by - do we just increase the daily rate by the percentage? For example the 2.4 adjustment, we would just increase the daily rate by 2.4 per cent?

PN349

MR KEATS: Yes.

PN350

JUSTICE ROSS: And does the MIAL agree with that?

PN351

MS GUARAN: Yes, we do, your Honour.

PN352

JUSTICE ROSS: I'm sorry, you do?

PN353

MS GUARAN: Yes.

PN354

JUSTICE ROSS: All right. So we don't need to, other than noting that, we don't need to do anything further about that. I think 10.4(d), you're both in agreement.

PN355

MR KEATS: Yes.

PN356

JUSTICE ROSS: No need to update it for mobile phones. And I think that's it.

PN357

MR KEATS: Yes, your Honour.

PN358

JUSTICE ROSS: All right. Where is the Full Bench up to on recoverage issue, do you know?

PN359

MR KEATS: The Full Bench is sitting on 16 and 17 August.

PN360

JUSTICE ROSS: All right. I don't think there are any other changes sought other than recoverage matter. Is that - - -

PN361

MR KEATS: That's sought by Sea Swift, who hasn't yet participated in this part of the review.

PN362

JUSTICE ROSS: No, but their only interest is in recoverage issue. We'll probably publish a revised exposure draft once the coverage matter is determined and provide a final opportunity but we'll take out the questions that have been asked, the issues that have been resolved and as I understand it neither the union or the MIAL have any other concerns about the exposure draft.

PN363

MR KEATS: Correct.

PN364

JUSTICE ROSS: Yes, all right. Anything else you want to say in Melbourne?

PN365

MS GUARAN: No, your Honour.

PN366

JUSTICE ROSS: All right. Let's go to Port Authorities. All right. I think the short version of this is that there was agreement in respect of items 1, 2, 3, and 4. Item 5 went to penalty rates payable on a Saturday and the MUA was proposing some changes which the employers were opposed to.

PN367

MR KEATS: Correct.

PN368

JUSTICE ROSS: And that matter was going to be determined on the papers.

PN369

MR KEATS: That was our position.

PN370

JUSTICE ROSS: That's your position as well?

PN371

MS HINES: Yes, your Honour. Yes.

PN372

JUSTICE ROSS: So in relation to your position, I should have taken the appearances in this matter. Forgive me. But Port Authorities Award. We'll call on. Take the appearances for that matter.

PN373

MS HINES: Yes, it's Hines, initial F, and I seek permission to appear on behalf of Ports Australia.

PN374

JUSTICE ROSS: Thank you.

PN375

MR KEATS: Keats, initial N, solicitor. I also seek permission to appear for the MUA.

PN376

JUSTICE ROSS: All right. Anybody else?

PN377

MR WYDELL: Wydell, initial J, Australian Maritime Officers Union.

PN378

JUSTICE ROSS: All right. All right. In relation to this seems to be the only outstanding issue. Is there anything else? Do you want an opportunity to put some further material in writing or have you put what you want to put?

PN379

MR KEATS: Our point is a simple point that historically some of the pre-reform awards had these rates. There's nothing more to the point, sir. We're happy to rely on what we've put.

PN380

JUSTICE ROSS: All right. Is there anything - do you want an opportunity to put something in?

PN381

MS HINES: Your Honour, we wouldn't wish to put anything further. Our position is set out in our submissions.

PN382

JUSTICE ROSS: Yes.

PN383

MS HINES: I would just reiterate what is set out in our submissions in that by reference to previous Full Bench decisions the Commission is to proceed on the basis that the modern award achieved the modern award's objective at the time that it was made.

PN384

JUSTICE ROSS: Yes.

PN385

MS HINES: That is our key point. And also just to note that the MUA has not put on any submissions or evidence about why they seek the change. We're only aware of the document dated 14 April 2016 and there is, at the top of page 2, there is simply one paragraph stating that there are two pre-reform awards, which provide for work on a Saturday to be paid at 150 per cent of the ordinary rate for the first three hours and 200 per cent thereafter. So our position is that the MUA needs to do more than that in order to make the variation. They need to put on submissions about the change, as well as evidence and that hasn't been done to date.

PN386

JUSTICE ROSS: All right. That is the submission you were referring to though, wasn't it?

PN387

MR KEATS: It is.

PN388

JUSTICE ROSS: Yes, all right.

PN389

MR KEATS: It really, as it says, points to two former awards saying its historical basis for where these clauses came from. The Commission either accepts them or it doesn't.

PN390

JUSTICE ROSS: Yes. All right. Well, Full Bench will deal with that matter in due course on the basis of what's been put.

PN391

MS HINES: Okay, thank you.

PN392

JUSTICE ROSS: All right. So is there anyone else likely to be coming for Ports, Harbours and Enclosed Vessels that not already here?

PN393

MS HINES: I'm not interested in the matter, your Honour.

PN394

JUSTICE ROSS: No.

PN395

MS WALSH: I think Business SA made some submissions.

PN396

MR KEATS: I think IOG too.

PN397

JUSTICE ROSS: Yes. Well, what we might do is I'll stand down for five minutes and I'll come back shortly after 11 and deal with the Ports Harbours and Enclosed Vessels. All right.

SHORT ADJOURNMENT

[10.59 AM]

RESUMED

[11.05 AM]

PN398

JUSTICE ROSS: I will call on the Ports Harbours and Enclosed Water Vessels matters. May I take the appearances in those Melbourne, please?

PN399

MS GUARAN: Guaran, initial I, for the Maritime Industry Australia.

PN400

JUSTICE ROSS: No appearance from South Australia? No. In Sydney?

PN401

MR WYDELL: Wydell, Initial J. Australian Maritime Officer Union.

PN402

MR NIVEN: Niven, initial N, AIMPE.

PN403

MS WALSH: Walsh, initial R, for the AWU.

PN404

MR KEATS: And Keats, initial N, seeking permission to appear for the Maritime Union Australia.

PN405

JUSTICE ROSS: Thank you. Well, if I can go through matters 1 through to 6 are either withdrawn or being dealt with a Full Bench or are not opposed. So, I don't think much more needs to be said about those. Regular part-time is a common - that's the expression, so we'll revisit that after the part-time casuals full Bench.

PN406

MS WALSH: Sure, okay.

PN407

JUSTICE ROSS: In the event that they decide to change the terminology of regular to just part-time, then it will be a change in all awards, I expect, so that issue will be picked up, I think, when we come back.

PN408

MS WALSH: Yes.

PN409

JUSTICE ROSS: There are then - can I go through the other matters that are agreed, just to clarify.

PN410

MS WALSH: Yes.

PN411

JUSTICE ROSS: Item 10 seems to be agreed, that the breaks are unpaid. Yes?

PN412

MS WALSH: Yes.

PN413

JUSTICE ROSS: In relation to the crane driver, that seemed to be agreed between the MUA and the MIAL. Is that right or not?

PN414

MR KEATS: No, it's not.

PN415

JUSTICE ROSS: Because they say, "As identified, the clause should be amended to read that".

PN416

MR KEATS: See, it's a question of where you put the 20 tonne crane driver. Both employers put it at the lower rate, including with those lesser than - - -

PN417

JUSTICE ROSS: I see.

PN418

MR KEATS: And the two unions put it in the higher. And since we've picked that one up, I've traced the award back so far to 1995 and the award unhelpfully still at that point in time didn't say what the rate was for someone under 20 tonnes.

PN419

MS WALSH: What award was that?

PN420

MR KEATS: Well, the award is sourced, when you go back to the Fireman and Deckhands Small Tugboats Remuneration State Award, which later on got fed into the Motorboat and Small Tugs award but then became one of the pre-reform awards that was fed into this award. That's where the crane driver came from.

PN421

JUSTICE ROSS: All right, well, we'll come back to that. Clause 14, that's the duties versus the work issue. Item 15, there didn't seem to be any issue about that. Item 16 seemed to be agreed. Item 17 seemed to be agreed. Similarly with item 18, that proposition wasn't opposed. Item 21 seemed, there seemed to be agreement about that.

PN422

MR NIVEN: Yes.

PN423

JUSTICE ROSS: Item 22 there seemed to be agreement about that. 25 casual and part-time, Bench has that matter. SO if we go through the remaining items, the first is item 7 and this is about clause 6.4H of the exposure draft.

PN424

It says "expression excluding any additional hours".

PN425

MS WALSH: So I should probably just say our submissions haven't been very clear on this point but our position is definitely that of the MUA's and we support their position to just remove the reference to excluding any additional hours.

PN426

JUSTICE ROSS: So you'd remove the words "excluding any additional hours" from 6.4 paragraph H?

PN427

MS WALSH: Yes.

PN428

MR KEATS: That's the MUA's position and we say that any difficulty about spans of hours being agreed is solved by the fact that the clause already has reference to mutually arranged hours so you'd already, at the beginning of your engagement have worked out you're going to work Monday three hours, 10 until 5, so you would already have all that arrangement in place when you're first appointed.

PN429

JUSTICE ROSS: And where is that from?

PN430

MR KEATS: Because it says "Mutually arranged".

PN431

JUSTICE ROSS: Is this paragraph E?

PN432

MR KEATS: It's in H itself.

PN433

JUSTICE ROSS: Yes, I see. So but that reference to mutually arranged is a reference back to E that at the time of engagement they agree in writing on a regular pattern of work specifying the hours worked.

PN434

MR KEATS: Of course, yes.

PN435

JUSTICE ROSS: Yes, and then they can agree to a variation to that. Yes.

PN436

MS WALSH: But the addition of those words is only confusion because additional hours isn't considered elsewhere in the award.

PN437

JUSTICE ROSS: No.

PN438

MS WALSH: Yes.

PN439

JUSTICE ROSS: The MIAL, do you oppose the removal of the words "excluding any additional hours" in paragraph H?

PN440

MS GUARAN: We do. Our understanding from our members is that - sorry, there's a shocking echo from this. Our understanding from our members is that you can work additional hours between the hours of 6 am and 6 pm and that wouldn't attract an overtime payment. You only get the overtime payment when you start working beyond that and outside of your rostered hours.

PN441

JUSTICE ROSS: I'm sorry, could you just repeat that?

PN442

MS GUARAN: I'm not sure. That's the advice that I've received. Sorry, I'm picking this up.

PN443

JUSTICE ROSS: So, you mentioned that you're not paid overtime if you perform additional hours within a certain span. Is that right?

PN444

MS GUARAN: I believe most of our employees would have enterprise agreements in place, enterprise agreements which means that they would but the understanding of the modern award here is that you wouldn't get the overtime payments when you're working additional hours between 6 am and 6 pm. So, in effect, it wouldn't have much impact to change it but it would make a substantive change to the award.

PN445

JUSTICE ROSS: Well, where do they get the idea that it's only additional hours outside of 6 am to 6 pm that are paid overtime? Where does that construction come from?

PN446

MS GUARAN: I suppose a plain reading of the clause might suggest that.

PN447

JUSTICE ROSS: Well - - -

PN448

MS GUARAN: Because it does say excluding any additional hours so those words have - - -

PN449

JUSTICE ROSS: Well, can I put it to you that that's not my plain reading of the clause. I only say that because the clause doesn't make any reference to outside the span or within the span 6 am to 6 pm.

PN450

MS GUARAN: Clause 7.2.

PN451

JUSTICE ROSS: So, I'm just wondering where that part of it comes from.

PN452

MS GUARAN: From clause 7.2 and I agree it doesn't reference it directly, so it's not clear but it is distinguished. Additional hours are distinguished from mutually arranged hours and so that was the most, I don't know, direct inference that we made from that.

PN453

JUSTICE ROSS: Taking Mr Keat's point, I'm not sure if the words were removed, "excluding any additional hours", there would be nothing to stop an employer and an employee just changing to mutually agreed hours on a particular day and that would then be paid at ordinary rates.

PN454

MS WALSH: Yes, your Honour. If we're proposing to remove those though I would like to have the opportunity to make further submissions after speaking to members if that's - - -

PN455

JUSTICE ROSS: No, no. Certainly. I'd ask that if your position is to continue to oppose then all I'd be interested to know is why couldn't an employer and an employee simply agree to work what might be at the moment described as additional hours but to work additional hours on a particular day and that would constitute an agreed variation to their regular pattern of hours and would not, subject to the other provisions of the award attract overtime. So I'm just not sure. I suppose the nub of my point is the same as Mr Keats' point is that if you remove it what would be the difficulty for employers anyway because you could get an agreement through the other provisions of the clause whereas I guess my provisional view is that I'm a bit concerned that the reference to any additional hours - well, additional hours don't seem to be defined or how that would arise. And I take your point about the 6.00 am to 6.00 pm but you get there by re-reading this provision in conjunction with others and that might give rise to some confusion as well.

PN456

But look we'll come to the time framing which you can put the additional material and you can certainly do that and those who wish to respond to that will have an opportunity to do so. Is there anything else anyone wants to say about that item?

PN457

MR NIVEN: No, your Honour.

PN458

MS WALSH: No, your Honour.

PN459

JUSTICE ROSS: All right. I think then we're at item 9, which is about clause 7.2 in the exposure draft and the issue here is in what circumstances could ordinary hours be worked on the Saturday or Sunday given the reference in clause 20.1 which suggests that they can be.

PN460

MR KEATS: It makes sense to link with item 23 in the table.

PN461

JUSTICE ROSS: In the summary?

PN462

MR KEATS: In the summary table, your Honour.

PN463

JUSTICE ROSS: Yes. Yes, it does.

PN464

MS WALSH: Links with which item, sorry?

PN465

MR KEATS: Item 23 of the summary table.

PN466

JUSTICE ROSS: And - all right - so where have you all landed in relation to this issue, MUA?

PN467

MR KEATS: Well, the MUA has proposed amendments to clause 12.2 to address that circumstance.

PN468

JUSTICE ROSS: Yes.

PN469

MR KEATS: The Motor Industry Australia Group considers what our position is as a substantive plan that needs to go off to a full hearing. And the AWU I believe has a slightly different calculation for the rates for weekends.

PN470

JUSTICE ROSS: What's the difference in the rate calculation?

PN471

MR KEATS: Whether there's a penalty for Saturdays in addition to overtime is what the difference is.

PN472

JUSTICE ROSS: Or whether it's just paid at overtime.

PN473

MR KEATS: Correct. That's the strategy in it. We just count it once. So Saturday is 150 percent. Sunday 200 percent. Public holidays 250. Whereas I read the AWU's as first putting in some overtime component before you do those loadings.

PN474

MS WALSH: No. We've - - -

PN475

JUSTICE ROSS: Loading on the top of the overtime?

PN476

MS WALSH: No, no, no. Look, we probably will withdraw that submission. We made a submission about the fact that Monday to Friday employees receive overtime after three hours at 200 percent whereas on a Saturday the best they will get is a penalty rate of 150 percent regardless of the hours that they work.

PN477

JUSTICE ROSS: But aren't we talking here about ordinary hours?

PN478

MR KEATS: We are.

PN479

JUSTICE ROSS: So it's ordinary hours worked on a weekend, not overtime hours worked on a weekend. Overtime hours on a weekend would still be paid whatever they're paid under the Award at the moment. It's if you're rostered to work ordinary hours on a weekend.

PN480

MS WALSH: Right. So we would agree with the opposition on what you're paid ordinary hours on the weekend.

PN481

JUSTICE ROSS: All right. So the MUA and the AWU agree. The MIAL?

PN482

MS GUARAN: No further comment, your Honour.

PN483

JUSTICE ROSS: So do you continue to oppose the position put by the MUA and AWU?

PN484

MS GUARAN: Are we talking about open mine, sorry?

PN485

JUSTICE ROSS: Well, really - yes but that links to item 23. So it's really item 23 that we're dealing with but it's the same issue and the proposition is that for ordinary hours worked on a weekend the penalties - the MUA and the AWU are proposing that that be subject to a penalty rate of 150 percent for Saturday work and 200 percent for Sunday work for ordinary hours worked on those days and 250 for a public holiday.

PN486

MS GUARAN: No. We maintain the position that we've already put in submissions.

PN487

JUSTICE ROSS: So your submission is that there should be no additional payment for working ordinary hours on a Saturday or a Sunday?

PN488

MS GUARAN: Not beyond what currently exists. No, your Honour.

PN489

JUSTICE ROSS: Well, I don't think anything currently exists is the issue. It doesn't seem that there is a rate or an additional rate at least.

PN490

MR WYDELL: Your Honour, the AMOU will support the submissions to keep if that's of any assistance.

PN491

JUSTICE ROSS: Okay. How do you propose resolving the issue between you? Do you want an opportunity to put more material or - - -

PN492

MR KEATS: I'll have to say yes.

PN493

JUSTICE ROSS: All right. Well, we'll deal with that when we come back to deal how we'll wrap up the other matters that are not agreed and all parties will be given a further opportunity to say what they wish to say about the issue.

PN494

Now, if we can go back I'm sorry. So we've dealt with nine and 23. If we go to the crane driver issue. Item 12. So the issue is the award only provides a rate for under 20 tons and over 20 tons but nothing for 20 tons.

PN495

MR KEATS: Correct.

PN496

JUSTICE ROSS: Just as a matter of practicality how many 20 ton cranes are we talking about here before I get too excited about the issue? Is there any - are any 20 ton cranes in existence? If there aren't any I'm not sure how much energy I want to spend resolving the problem. But what's the practical - - -

PN497

MR KEATS: I haven't any instructions of one at all, your Honour.

PN498

MR WYDELL: I haven't looked for them all, your Honour.

PN499

JUSTICE ROSS: Yes.

PN500

MR NIVEN: Yes. I wouldn't have thought that there'd be too many on ships operating under this award.

PN501

JUSTICE ROSS: So it's a crane on a ship.

PN502

MR NIVEN: Yes.

PN503

MR WYDELL: Well, yes. A crane or a hull. Let's put it that way. Ship has a different connotation.

PN504

JUSTICE ROSS: Sure. A vessel.

PN505

MR WYDELL: Oh, no let's not.

PN506

MR NIVEN: Yes, yes. Be careful.

PN507

JUSTICE ROSS: Exactly right. Yes.

PN508

MR NIVEN: Look before you step.

PN509

JUSTICE ROSS: Well, does the MIAL have anything they want to say about what sort of cranes are we talking about? Are there any cranes that are at the 20-ton?

PN510

MS GUARAN: Not that I'm aware of. One of our members I believe does operate cranes off-land which would be under 20,000 tons which is why we have suggested an amendment.

PN511

JUSTICE ROSS: Yes. Is the crane driver - it's the question for the moment - but they're on board something isn't it? Is that what we're talking about here?

PN512

MR KEATS: Yes.

PN513

JUSTICE ROSS: We're not talking about someone - - -

PN514

MR KEATS: On land.

PN515

JUSTICE ROSS: No.

PN516

MR KEATS: They've been stevedoring.

PN517

MR WYDELL: Don't go there Nathan.

PN518

JUSTICE ROSS: Yes. They'd be may be under another award, yes.

PN519

MR KEATS: My client - stevedoring.

PN520

JUSTICE ROSS: Mm.

PN521

MR WYDELL: The engineers might say they drive the winch.

PN522

MR NIVEN: That's right but a winch goes up.

PN523

JUSTICE ROSS: Well, the MIAL do you have any members who are covered by this award where there's a crane on a vessel covered by this award and they can tell us anything about the crane size?

PN524

MS GUARAN: Sorry, what was the last part of that your Honour?

PN525

JUSTICE ROSS: About the size of the crane. What size cranes are used on these vessels?

PN526

MS GUARAN: I would have to - - -

PN527

JUSTICE ROSS: They're either at the small end or at the high end. I'm just not sure whether you're going to get anything at the 20-ton end.

PN528

MS WALSH: What was Business SA proposing to provide?

PN529

JUSTICE ROSS: Yes, but they're not here.

PN530

MR KEATS: They wanted to seek feedback from members that's what they said.

PN531

JUSTICE ROSS: Yes. Still looking. I think that might be a sensible thing for each of you to do. How many ports, harbours and enclosed water vessels are you going to have something over 20 tons?

PN532

MR KEATS: That will depend greatly on what this next Full Bench does, your Honour.

PN533

JUSTICE ROSS: Yes. It is inter-related to the coverage issue.

PN534

MR KEATS: Correct.

PN535

JUSTICE ROSS: Yes. It might depend on the harbour I suppose. It might be conceivable you'd have something in a large harbour but it's really just going to be swinging stores on and off, isn't it? What else is it going to be doing?

PN536

MR NIVEN: No, there'll be some construction vessels.

PN537

JUSTICE ROSS: Okay.

PN538

MR WYDELL: Might be - that will have like a HIAB crane on them.

PN539

JUSTICE ROSS: Mm.

PN540

MR WYDELL: Lifting bags of material and wood - construction materials and stuff. So - - -

PN541

JUSTICE ROSS: Or pre-fabbed bits.

PN542

MR WYDELL: You know it's conceivable there could be a number of hydraulic 20-ton cranes around. You see them on trucks all the time. So there's no reason why they wouldn't appear on a floating basis - - -

PN543

JUSTICE ROSS: Sure.

PN544

MR WYDELL: I won't say ship but - - -

PN545

JUSTICE ROSS: Well, do you think it might be best waiting till the Full Bench has decided the coverage - because that might impact on the number that are affected. I don't think there's much point in you seeking some feedback from your members about frequency and all that sort of stuff if the coverage is changed that may well impact on the answer to those questions anyway.

PN546

MR KEATS: I'd agree with that, your Honour.

PN547

JUSTICE ROSS: Yes. All right. Well, we might subject to if anyone wants to get excited about it and run it now we might park that issue until the coverage question is determined and then we'll return to it. Item 13. Classification definitions. I don't think anyone other than Business SA supported the insertion of classification definitions but nobody else seemed to. Is that basically the position?

PN548

MS HINES: Yes.

PN549

JUSTICE ROSS: Did they advance any?

PN550

MS HINES: No.

PN551

JUSTICE ROSS: Anyway I wasn't sure of a ship-keeper. What's a ship-keeper?

PN552

MR WYDELL: If the vessel is laid up alongside and in tidal waters they have a person there overnight to loosen the lines and tighten the lines. So and they might - - -

PN553

JUSTICE ROSS: Yes. Right. So the boat - it's stationary. It's tied up but it's someone making sure it doesn't drift away.

PN554

MR WYDELL: On those Manly Ferries they have some ship-keepers there that are stuck on the lines and tie them up. Yes.

PN555

JUSTICE ROSS: Yes. All right. Well, I don't think we need to spend much more time on that. That can be dealt with once revised exposure draft is issued if

anyone wants to pursue them they can. I think the next item in dispute was item 19 which relates to clause 10.10 of the exposure draft. I'm starting to regret asking these questions about mobile phones. So where did you all land in relation to this? There was some shifting of position on the way through.

PN556

MR KEATS: I don't think we've sort of landed with the consensus anywhere.

PN557

JUSTICE ROSS: Oh, no. I don't think you have but - - -

PN558

MR KEATS: The MUA's position that it was to retain that current clause. I think I expressed in the transcript last time the 6 June we don't have a strong view about this. I see the AWU also doesn't have a strong view about it either but thought it should be updated and the employees seem to want to update it. It's not something I want to make further submissions for this. It's not something I have a strong view of though.

PN559

JUSTICE ROSS: MIAL?

PN560

MS GUARAN: We're content with the current drafting of the clause if everyone else supports that.

PN561

JUSTICE ROSS: Well, what do you want to do?

PN562

MS WALSH: I mean I think it's not - - -

PN563

JUSTICE ROSS: I mean you sort of started wanting to update but now you don't really care. But is that really - - -

PN564

MS WALSH: I mean we never - sometimes we're making submissions that we haven't been asked to answer a question.

PN565

JUSTICE ROSS: No, no. I'm not - I wasn't being critical about it. It's really - it's sort of back with you. Do you want to press an update or not? Or are you content to leave it? We'll put out the revised exposure draft with the current wording in there and people will have an opportunity if they want to make any comment at that stage.

PN566

MS WALSH: You'll put out a revised exposure draft.

PN567

JUSTICE ROSS: We will.

PN568

MS WALSH: Leaving it as is is what you're saying.

PN569

JUSTICE ROSS: Yes. And then if there's any change that anyone wants to agitate for then then can agitate for it at that point. So if Business SA wants to press their position at that time they can and if you want to press yours you can.

PN570

MS WALSH: Okay.

PN571

MR KEATS: That's with us too, your Honour.

PN572

JUSTICE ROSS: All right. MIAL? Are you content with that?

PN573

MS GUARAN: Pardon, your Honour?

PN574

JUSTICE ROSS: Are you content with that course? We'll just - the revised exposure draft will have the current provision in there and if anyone wants to agitate for a change then they'll be able to make - well about that or any other provision they'll be able to make a submission about that.

PN575

MS GUARAN: Yes.

PN576

JUSTICE ROSS: Are you content with that?

PN577

MR WYDELL: Yes, sir.

PN578

JUSTICE ROSS: All right. Let's go to item 20. This is about the towing allowance - MUA?

PN579

MR KEATS: Yes. We still think that the change should be made. When we look at historically where it came from - it came from clause 4.3 of Part 3 of the Port Services Award and that provision made it clear that the allowance was for all purposes of the award and so the effect of the change and language that we have proposed would be to maintain that it's for all purposes under the award. And that's where we're coming from.

PN580

JUSTICE ROSS: And the AWU supports that position?

PN581

MS WALSH: Yes, we do.

PN582

JUSTICE ROSS: And is that position opposed by the MIAL?

PN583

MS GUARAN: In relation to the allowances?

PN584

JUSTICE ROSS: Yes.

PN585

MS GUARAN: Our submission is what we'd made previously which is that of substantive change.

PN586

JUSTICE ROSS: Right.

PN587

MS GUARAN: In that.

PN588

JUSTICE ROSS: How do you want to resolve the issue?

PN589

MS WALSH: Well, I'm in - - -

PN590

MR KEATS: Well, I'm happy to put on more material if that's the preferred course of the Commission.

PN591

JUSTICE ROSS: All right. Well, then we'll deal with it on the same basis as any other matter that is going to be - that's still outstanding. We'll identify what they are when we release the revised exposure draft. We'll set out a short summary of the parties' position thus far and provide a further opportunity for those advocating a change to put in submissions and those opposing to reply. Everyone content with that?

PN592

MR KEATS: Yes, your Honour.

PN593

MS WALSH: Yes, your Honour.

PN594

JUSTICE ROSS: All right. Okay, now we've dealt with item 23 when we dealt with the earlier issue of ordinary hours on a weekend. Item 24 is cross-referred to item 8. That looks that's been referred to the part-time casuals Bench as well. Are there any items that are identified in the summary which I have not gone to that anyone wishes to say anything about?

PN595

MR KEATS: No, your Honour.

PN596

MS WALSH: I thought - sorry if I might?

PN597

HIS HONOUR: Yes. Sure.

PN598

MS WALSH: It is actually just part of item 23. I just wanted to make clear that the summary with the AWU position they're on page 13. The summary of our submission - not our reply or our original submission - not our reply submission. Our position there should be withdrawn.

PN599

JUSTICE ROSS: So really we should just say AWU supports MUA's position?

PN600

MS WALSH: Yes.

PN601

MR KEATS: Yes.

PN602

JUSTICE ROSS: All right. Well, the summary can be amended to reflect that. All right. Well, we'll publish the revised exposure draft and with it - it will identify those issues which we've discussed today which are not agreed and where a change is proposed and we'll set down directions for the filing of material in relation to that. It will be assumed that those matters will be dealt with on the papers unless a party wishes to have an oral hearing in relation to it in which case you'll get one. But the nature of the matters it seems that no parties intending at this stage to call evidence in relation to it. It's really a merit based written argument but if that changes and you want an oral hearing then that will be provided.

PN603

All right. Are there any further issues or questions in relation to the Ports Harbours and Enclosed Vessels Award in Sydney? In Melbourne?

PN604

MS GUARAN: No, your Honour.

PN605

JUSTICE ROSS: Okay. We will try and sort out the link issues during the adjournment before we come to deal with the Seagoing Award at 12 o'clock. We will adjourn until 12 o'clock. Thanks.

SHORT ADJOURNMENT

[11.38 AM]

RESUMED

[12.02 PM]

PN606

JUSTICE ROSS: All right, we're now dealing with the Seagoing Industry Award. Can I have the appearances in Sydney, please?

PN607

MR J WYDELL: Wydell, initial J, for the Australian Maritime Officers' Union.

PN608

MR M NIVEN: Niven, initial M, for the Australian Institute of Marine and Power Engineers.

PN609

MR N KEATS: Keats, initial N. I seek permission as a solicitor to appear for the Maritime Union of Australia.

PN610

JUSTICE ROSS: Thank you, and in Melbourne?

PN611

MS I GUARAN: Guaran, initial I, for the Maritime Industry Australia Limited.

PN612

JUSTICE ROSS: Thank you. All right, let's go through the decision summary document. The first item is withdrawn. So is the second item. The third item relates to clause 6.2. I'm not sure – the MIAL has raised an issue in relation to this. What's that issue, can you explain it?

PN613

Ms GUARAN: My understanding of it is that part B that covers temporary licences is well known and well understood by operators who operate under that part, and changing it to Schedule A could cause some confusion. It's become the vernacular in the industry, your Honour.

PN614

JUSTICE ROSS: And how many of the industry who are covered by the award are actually paid under the award, as opposed to an enterprise agreement?

PN615

MS GUARAN: Because part B applies to temporary licences it's covering a lot of international companies who would just come in and work more than two trips, thus triggering the coverage provisions there. So it is a number of operators and they're foreign operators so they're not necessarily keeping across this level of changes to the award. And schedule B is understood by them presently, and we do get inquiries from time to time from members who are covered by those provisions and they do use part B commonly to describe their operations.

PN616

JUSTICE ROSS: The MUA?

PN617

MR KEATS: Our position is that we're not aware of any such confusion that would arise from this change. I might just clarify in answer your question, your Honour, there are no enterprise agreements for the people that operate under part B, that I'm aware of. They mainly have what are called ITF agreements and there's a variety of different types of those that apply to those vessels, whether

they be the collective agreement, whether they be the standard agreement, and there's a couple of others, as well.

PN618

JUSTICE ROSS: All right. Well, we'll come back to deal with all of the issues that are not agreed under process, and the provision of a further opportunity for the parties to say what they wish to say about those matters. There's another matter in 6.2 which is item 4, which is the definition of a temporary licence contained at 6.1. What's the confusion that the MAL says is caused by the definition?

PN619

MS GUARAN: So temporary licences are again terminology that's used in relation to part B. And bringing the definition in at 6.1 made it confusing because that's another type of temporary licence. Actually, can I clarify that?

PN620

JUSTICE ROSS: Sure.

AUDIO MALFUNCTION

[12.07 AM]

PN621

MS GUARAN: But in our submission you're only covered by (indistinct) if you – you may have a temporary licence and not be covered partly (indistinct), sorry. So talking about temporary licences without clarifying that in 6.2 may be confusing. So employers may see the clause and think that they are covered.

PN622

JUSTICE ROSS: Sorry, can you just speak into the microphone? I'm just – we're having trouble picking you up at this end. So are you suggesting that what is in the exposure draft schedule A, vessels granted a temporary licence, that is somehow a broader category than those who are granted a temporary licence within the meaning in the Coastal Trading (Revitalising Australian Shipping) Act? Is that what you're putting?

PN623

MS GUARAN: Yes, your Honour, because (indistinct) some operators may find that clause confusing, or the inclusion of that definition in that part of the award, confusing.

PN624

JUSTICE ROSS: Okay, but what does, whether it's described as part B or schedule A, that applies to temporary licence holders, is that right?

PN625

MS GUARAN: Yes, your Honour.

PN626

JUSTICE ROSS: Okay, a temporary licence under what Act? What is a temporary licence?

PN627

MS GUARAN: Sir, it is as defined. The definition is correct.

PN628

JUSTICE ROSS: Well, then, what's the problem? If schedule A and part B can only apply to the holder of a temporary licence granted under the Coastal Trading Act, I don't follow what the problem is.

PN629

MS GUARAN: Yes, your Honour, I'd have to take further directions on that.

PN630

JUSTICE ROSS: Okay. I mean, it would be a different issue if part B, now schedule A, the meaning of "temporary licence" was somehow different to what's set out in 6.1, if it had a broader meaning. But if it doesn't have a broader meaning and, in fact, if that is the meaning, I'm not sure what the problem is. But if you can get some instructions in relation to that issue then when we come to deal with any further issues then we can deal with it at that point.

PN631

MS GUARAN: We'll do that, your Honour. Thank you.

PN632

JUSTICE ROSS: Okay. That probably – that deals with item 4.

PN633

MR KEATS: Can I just (indistinct) that the MUA - - -

PN634

JUSTICE ROSS: Sure.

PN635

MR KEATS: Doesn't wish those clauses to be changed, and actually considers it's been the subject of an earlier Full Bench decision.

PN636

JUSTICE ROSS: Okay, what's the earlier Full Bench decision?

PN637

MR KEATS: It's the Australian Maritime Offices Union v CSL Australia Pty Ltd. It's recorded at [2013] FWCFB 8338. It's a decision of 23 October 2013.

PN638

SPEAKER: Can you give us the reference again, mate, sorry?

PN639

MR KEATS: Sorry, it's [2013] - - -

PN640

SPEAKER: Yes.

PN641

MR KEATS: FWCFB 8338.

PN642

JUSTICE ROSS: Do I take it that that decision says that a temporary licence holder is a temporary licence holder – well, the holder of a temporary licence granted under the Coastal Trading Act, or – does it deal with that issue or?

PN643

MR KEATS: It deals with ensuring the award has the broadest interpretation of the legislation by picking up the language of the legislation rather than giving an interpretation that's available. And the language that's used in the submission of the Maritime Unions of Australia Limited, chooses to pick an available interpretation by focusing on whether you're operating under the licence or whether – whereas the regulations of the Fair Work Act talk about having such a licence. So that's the debate that went on and it was decided to leave it by reference to the breadth of the legislation, as opposed to choosing an interpretation which is now, we say, being re-agitated by the industry group.

PN644

JUSTICE ROSS: All right, well if the MIAL can also, in seeking further instructions can consider the effect of that Full Bench decision. Okay, then we go to item 9. The other matters seem to be either agreed or not opposed. Item 9 deals with clause 9.3.

PN645

MR KEATS: I think it's the MUA that first agitates this.

PN646

JUSTICE ROSS: Yes.

PN647

MR KEATS: I don't think there's a huge difference between the parties about this. We both agree there needs to be consistency. We've proposed a particular way of doing that by making reference to the particular marine order, being Marine Order 28.

PN648

JUSTICE ROSS: Yes.

PN649

MR KEATS: I don't understand there to be opposition but I can stand corrected.

PN650

JUSTICE ROSS: Does the MIAL oppose the change proposed by the MUA?

PN651

MS GUARAN: We don't.

PN652

JUSTICE ROSS: All right. You are?

PN653

MR WYDELL: For the AMAU. We would support that the award reflect the drafting of the marine order in terms of the minimum hours of rest there, and the

order in which those clauses appear. There is some difference in the current exposure draft between the order of those clauses and how it's set out in the marine order. So if the award could be set out in terms of section 14 of the minimum hours rest provision, we would support that.

PN654

JUSTICE ROSS: What would that look like then? How would you deal with clause 9?

PN655

MR WYDELL: Well, there's clause 14 there, so the minimum hours of rest, and you'll see in the – so we're up here. They've reworded 14.3 and put in a "b" here.

PN656

JUSTICE ROSS: This is in 8.5?

PN657

MR WYDELL: Yes.

PN658

JUSTICE ROSS: Yes.

PN659

MR WYDELL: So what we would say is it should read as per this, and then this clause would come down further. So (b) would come down and be reworded.

PN660

JUSTICE ROSS: So (b) would appear after - - -

PN661

MR WYDELL: As – after (d).

PN662

JUSTICE ROSS: After (d) in the current - - -

PN663

MR WYDELL: Yes. And, "The interval between consecutive periods of rest must not exceed 14 hours" - - -

PN664

JUSTICE ROSS: Yes.

PN665

MR WYDELL: Whereas it says, "a seafarer must not work in excess of 14 hours without a rest period", that's not how the international convention which marine order reflects, that's STW. So some slight rewording of that to reflect the convention would be appropriate.

PN666

JUSTICE ROSS: So instead of 8.6(b), at the moment, "A seafarer must not work in excess of 14 hours without a rest period", do you say it should read, "The interval between consecutive periods of rest must not exceed 14 hours"?

PN667

MR WYDELL: That's correct, your Honour.

PN668

JUSTICE ROSS: It's not exactly a model of simplicity, the - - -

PN669

MR WYDELL: Welcome to shipping.

PN670

JUSTICE ROSS: Yes. Yes, well on the face of it, I'm not that enthusiastic about changing it to that language, given it means the same thing, but the other one put – it makes it clearer that you're not to work in excess of 14 hours without a rest period. But in any event, the order change would reflect it and once you see the revised exposure draft, if you want to press the language change then you'll have a chance to do that then.

PN671

MR WYDELL: Thank you.

PN672

JUSTICE ROSS: In relation to clause 9, so 9.3, the proposition is that – what would be the change that you'd be proposing, Mr Keats? Are we talking here about 9.3? I see, is it 8.3(d)?

PN673

MR KEATS: It's 8.5 - - -

PN674

JUSTICE ROSS: It's 8.5, really, that you're changing?

PN675

MR KEATS: 8.5(b), from memory. That's what I'm changing.

PN676

JUSTICE ROSS: Where it says, "A seafarer must not work in excess of 14 hours without a rest period"?

PN677

MR KEATS: Yes. So that we then pick up the language that Mr Wydell was giving you.

PN678

JUSTICE ROSS: And do you think that's clearer?

PN679

MR KEATS: There's - - -

PN680

JUSTICE ROSS: Is it different, in effect?

PN681

MR KEATS: It's important, I think, that the legislative provision which the employer has to follow regardless of what the award says, be in the same terms as the award, save that there might be any interpretation difference. I don't immediately see one but I think it's important the language is the same for consistency purposes.

PN682

JUSTICE ROSS: All right. Well, can I put it this way, that – can I ask that you redraft 8.5 and – just so that we don't get accused of drafting something that, you know, might be less than idea. And I think it would be better if that clause then went on to say, "The employer shall comply with the terms of marine order 28 which states", and then set out what the provisions of it are. There are two reasons for that. One, that a reader won't look at it and go, well, why didn't they just say you shouldn't work in excess of 14 hours without a rest period, because that's simpler, but that's really protecting the Commission's position.

PN683

But the other is, it'll show where it comes from and so if there's a change in marine order 28 then it will trigger the need to change the award and it will make it clear that there's a connection between the two. And that seems to be the position put by MIAL, as well, that there should be a consistency between – and the MUA's position and the union's generally, between their obligations under the marine orders and their obligations under the award. So it's probably better if it's a direct sort of lift. So can you have a look at that?

PN684

MR KEATS: I can do that, your Honour.

PN685

JUSTICE ROSS: Okay. Then I think Item 11 is – Item 10, no longer pursued; 11 has been referred to another Full Bench, I think; item 12, that's also been referred to a Full Bench. Item - - -

PN686

MR NIVEN: No, 12 – item 12?

PN687

JUSTICE ROSS: Yes.

PN688

MR NIVEN: We're not pursuing that.

PN689

JUSTICE ROSS: Has that been withdrawn?

PN690

MR NIVEN: Yes, that's been withdrawn.

PN691

JUSTICE ROSS: Okay, 13 and 14 agreed; 15? Yes, "trappings".

PN692

MR NIVEN: Trappings.

PN693

JUSTICE ROSS: So it's clothing, equipment or dress.

PN694

MR KEATS: It's equipment or dress, yes.

PN695

JUSTICE ROSS: Equipment or dress?

PN696

MR KEATS: Yes.

PN697

MR NIVEN: Yes.

PN698

JUSTICE ROSS: Not clothing?

PN699

MR KEATS: So they're things like epaulettes, silver lanyards, hats with certain insignia on them, they're those sort of things. They're typically, Mr Niven was reminding me, some employers still require them to be worn at all times that you're on a vessel.

PN700

JUSTICE ROSS: Okay. So how would I define – "trappings" are "items of equipment or dress, such as epaulettes, lanyards" - - -

PN701

MR KEATS: Yes.

PN702

JUSTICE ROSS: And - - -

PN703

MR WYDELL: Black and whites.

PN704

JUSTICE ROSS: Black and whites?

PN705

MR WYDELL: Yes. So there's some operators out there who require their officers to, when coming into - - -

PN706

JUSTICE ROSS: Black trousers, white shirt?

PN707

MR WYDELL: When they're coming into port, to – black pants, black jacket, et cetera, you know - - -

PN708

JUSTICE ROSS: That's not a uniform?

PN709

MR WYDELL: Well, yes, a bit of both, actually.

PN710

MR KEATS: They still have hats.

PN711

JUSTICE ROSS: No, sure. Yes, hat would be the other. Hats, epaulettes, lanyards, yes. All right, well, we'll craft a definition based on that and see what you all think. I don't think - the MIAL says that it doesn't have much contemporary use.

PN712

MS GUARAN: No, not that we're aware of. And I share the AIG's concerns about it not being distinguished from uniforms and safety equipment.

PN713

MR NIVEN: There is at least one vessel where it's required, where we think the term, "trappings", are actually used. And we understand that there's other vessels with various forms that are required, hence the black and whites.

PN714

JUSTICE ROSS: Which vessel?

PN715

MR NIVEN: The Investigator, which is a government research vessel.

PN716

JUSTICE ROSS: Well, the old ANL used to require it too.

PN717

MR NIVEN: Yes, that's right.

PN718

JUSTICE ROSS: The police officers and any of their – you know?

PN719

MR NIVEN: That's right, or the - - -

PN720

JUSTICE ROSS: I don't know where that's gone, but - - -

PN721

MR KEATS: Sold.

PN722

JUSTICE ROSS: Yes.

PN723

MR NIVEN: So the CSIRO required on the investigator - -

PN724

JUSTICE ROSS: Does this award cover, in any way, cruise ships, based – are there any based here that would be covered by this?

PN725

MR KEATS: The award is unhelpful in that respect, in that the coverage clause picks up "passenger vessels" but there's no rate of pay currently for a passenger vessel. The current view is that it doesn't cover passenger vessels.

PN726

JUSTICE ROSS: Is the vessel that goes to and from Melbourne to Hobart under this award?

PN727

MR WYDELL: Yes, they are, yes.

PN728

JUSTICE ROSS: Yes.

PN729

MR WYDELL: Although they're not a cruise ship, if you like.

PN730

JUSTICE ROSS: No, they're not.

PN731

MR WYDELL: They're a RO-RO PAX, so PAX, p-a-x, means "passengers".

PN732

JUSTICE ROSS: Yes, yes.

PN733

MR WYDELL: So "RO-RO" is "roll on, roll off" cargo.

PN734

JUSTICE ROSS: Roll on, roll off, yes.

PN735

MR WYDELL: So yes, they're sort of a hybrid of a passenger vessel.

PN736

JUSTICE ROSS: Yes. Well, their deck officers are (indistinct).

PN737

MR WYDELL: Yes, they are.

PN738

JUSTICE ROSS: Yes. Okay. As I say, we'll include a definition. If the MIAL or AI Group want to delete the clause, given it's an existing clause in a modern

award, then you'll have an opportunity to mount an argument in support of that, okay?

PN739

MS GUARAN: Okay.

PN740

JUSTICE ROSS: Then we go to, I think, item 17 but that's really the temporary licence issue again, I think.

PN741

MR KEATS: Yes, your Honour.

PN742

JUSTICE ROSS: And item 18, what's that?

PN743

MR KEATS: Item 18 is about ordinary hours of work for temporary licence facilities. The question that was asked about – is the consistency of working eight hours from Monday to Friday, and the national employment standards. The MUA has put forward submissions to say that there was an inconsistency and has suggested a change to the clause by making reference to the hours of work in excess of eight hours a day or 38 hours per week.

PN744

JUSTICE ROSS: All right.

PN745

MR KEATS: So the ones in excess of that would therefore be paid at overtime, so it would be a change to 8.3.1(b). It's met some resistance from all the employers.

PN746

JUSTICE ROSS: Yes. So the issue is whether or not the current clause 27, and as it finds its way into (a), 3.1, is inconsistent with the NES?

PN747

MR KEATS: Correct.

PN748

JUSTICE ROSS: Look, what I'll probably do with that item is refer it to the Full Bench that dealt with all the NES inconsistency issues in a suite of other awards, and we just missed this one as to – you know, they dealt with a range where it was agreed that it was inconsistent, where it was agreed that it was not inconsistent, and the ones in the middle. And so this is one where the parties disagree about the inconsistency point and further, might disagree about what's to be done to resolve it in the event that any inconsistency is found. So it will go that Full Bench and be probably dealt with as a discrete issue and probably dealt with by submissions on the papers.

PN749

MR KEATS: Yes.

PN750

JUSTICE ROSS: But there'll be a mention before – I was on that Full Bench anyway – before a member of that Full Bench, and directions issued for submissions so all parties that are interested can have their say about it, okay? 19 is, I think, no longer pressed, is that right?

PN751

MR KEATS: I think no one sought a change.

PN752

JUSTICE ROSS: No one sought a change, yes. Item 20?

PN753

MR KEATS: I read it that no one's seeking hourly rates to be inserted into the award. That's at least our position.

PN754

JUSTICE ROSS: And that seems to be the position of MIAL.

PN755

MS GUARAN: Yes.

PN756

JUSTICE ROSS: Does anyone have a different view? Okay. So the common position is no hourly rate schedules.

PN757

MR NIVEN: That's correct, yes.

PN758

JUSTICE ROSS: Twenty-one, no amendment necessary; 22, 23 were agreed – okay. So what we'll do is pick up the various agreed and non contentious changes that are appropriate to be made in a revised exposure draft. We will also identify the issues which remain in dispute between the parties, and when we release the revised exposure draft, set down a process for parties to say what they want to say about the revised exposure draft and also about the issues that are identified.

PN759

We will work on the assumption that the matters in dispute will be dealt with by written submission on the papers but if any party wishes to call evidence or wishes to have an oral hearing in relation to any of those matters you should just indicate that, and that will be granted.

PN760

MR KEATS: Yes.

PN761

JUSTICE ROSS: Is there anything else about this award? No? All right. Anything else in Melbourne?

PN762

MS GUARAN: No, your Honour.

PN763

JUSTICE ROSS: No? Okay. Thanks, very much.

PN764

MR KEATS: Thank you, your Honour.

ADJOURNED INDEFINITELY

[12.19 PM]