



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

AM2014/300

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/300)
Award Flexibility**

Sydney

9.38 AM, MONDAY, 12 SEPTEMBER 2016

PN1

JUSTICE ROSS: This conference has been convened to deal with a number of specific issues relating to the TOIL provisions in certain awards. The matters at 9.30 deal with whether certain existing TOIL provisions in fact provide for TOIL at overtime rates. The matter is being recorded. The transcript will be produced, so if I could take the appearances in respect of the 9.30 matters. In Sydney first?

PN2

MR A THOMAS: Yes. If the Commission please, the name is Thomas, initial A, from the mining and energy division of the CFMEU and our interest is in the electrical power industry award.

PN3

JUSTICE ROSS: Thank you.

PN4

MR G NOBLE: Noble, initial G, for the CEPU, and we have the same interest in the same award.

PN5

JUSTICE ROSS: Thank you.

PN6

MS R WALSH: Walsh, initial R, for the AWU. We're here for the horse and greyhound training award and as well the electrical power industry award.

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JUSTICE ROSS: All right. Are there any appearances in respect of the three awards listed for 9.30? In Melbourne or anywhere else?

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MR HAMILTON: Not in Melbourne, your Honour.

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JUSTICE ROSS: Anywhere else? No. Just bear with me for a moment. Thank you. All right. Well, in the airport employees matter, I know none of you have got an interest in that, but the issue arises in clause 30.8. I think what I'll do with the airport employees award is just a bit – 30.8 is just a bit tortuous to understand. I think the safer course in relation to that clause is to refer it to the award phase of the review for a general review on the plain language structure of it and to defer the TOIL matter until then, but I'll give that matter some further thought. I'll also discuss with my colleagues on the Full Bench and we'll see where that goes.

PN10

Can I go then to the electrical power. The issue here is clause 26.3. It provides that:

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One day off may be substituted for a portion of the payment due with the balance of the payment being made in money.

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And then there's a restriction where at least a full day of overtime is worked on a Saturday or Sunday. And there's a restriction on the number of days off that can be granted. There are a couple of aspects to this that I want to put to you. I'm not sure what the reasonable basis would be for restricting the access to TOIL in the way the clause does, that is, it only operates where at least a full day of overtime is worked on a Saturday and Sunday rather than time off in lieu generally. It also caps the maximum number of days you might be granted in any one year. Those are not features of other TOIL clauses.

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So there's that issue. There's also the question of:

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One day off may be substituted for a portion of the payment with the balance of the payment being made in money.

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And the opening to the clause is:

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Time off may be granted instead of payment.

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The reason it's been listed and the reason I'm putting the questions to you about whether it's time off is at the overtime rate or not is that, unlike other awards, it doesn't expressly say that. I'm not suggesting that that's not an implication or that's not how it works in practice or anything of that nature. It's just that it's a sufficiently unusual clause to warrant me putting the question to the parties with an interest about what they say it means. So that's the reason it's been raised. I thought I'd raise it in the conference first. At some point we'll need to get to a hearing and deal with this issue, but for the moment those are the questions I've got. So what would you like you to say about that?

PN18

MR THOMAS: Your Honour, it was put that there were three issues that you mentioned, two in the one basket I suppose.

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JUSTICE ROSS: Yes.

PN20

MR THOMAS: That is the peculiar nature of the clause in terms of the number of days and the restrictions.

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JUSTICE ROSS: The limitations, yes.

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MR THOMAS: Yes. Our understanding was that a draft TOIL clause determination had been done for this and - - -

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JUSTICE ROSS: Yes, it has.

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MR THOMAS: - - it did everything including the payment for penalty as is the term used. And we actually thought that was the one that was being released and we noticed that whenever the 73 – the determination that just came out there were only 72 and I thought hello, the power industry is not there. And initially I thought it was an oversight, but now I'm aware.

PN25

JUSTICE ROSS: No, no, look, yes, it's more that the issue that came up was, is this an award where it's payment at overtime.

PN26

MR THOMAS: Yes.

PN27

JUSTICE ROSS: If it is then what it does is give rise to – it then falls into that basket where the Full Bench has already said that the level of safeguards and protections may not be the same level as if it's time for time. Look, one option might be, and maybe the quickest way through this, is we publish a draft variation determination; we'll have a look at the previous iteration. We will probably modify the safe guard, so we won't require the same level of – it might be in writing but we won't specify all the detail of what needs to be in writing, and work on the assumption that it's time at overtime rates and provide the parties with an opportunity to say what they want to say about it.

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MR THOMAS: Yes.

PN29

JUSTICE ROSS: So it will go in that general category which will be published in the next one to two weeks. We'll have a consultation period for those, that cluster of TOIL at overtime, and then we'll have a hearing in relation to those. Do you think that'd be the way to - - -

PN30

MR THOMAS: I think that's very appropriate, your Honour, because, to my knowledge, there's no debate that it is time for overtime that I'm aware of. With no employees here I can't predict, your Honour, if it's - - -

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JUSTICE ROSS: No, okay. No. And, look, I will say that the draft variation will probably remove the restrictions. So you'll need to give some thought to that because on the face of it – well, that's what we've done in some other areas, and, you know, whilst this may have been a feature of this award at some time past, as we're moving to try and produce greater uniformity we're also testing these awards against the modern award objective. It's not clear, on the face of it, at least, the provisional view would be, well, it seems like an unnecessary restriction. There

might be a good reason for it and it's one that you could argue for should you wish to pursue that matter in due course. Okay.

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MR NOBLE: Your Honour, it's basically – it's almost word for word from the old Victorian Court.

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JUSTICE ROSS: I'm sure that's right and that's the issue with a lot of it is.

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MR NOBLE: Yes.

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JUSTICE ROSS: And with some of them they've gone in, even prior to the personal carer's leave, iterations of TOIL and all the subsequent developments and it, no doubt at that point, reflected a consent position between the unions and the dominant employer, the SECV, presumably. Well, you know, that's no longer the, sort of, the same really.

PN36

MR NOBLE: No.

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JUSTICE ROSS: If I can put it that way. Yes.

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MR THOMAS: Yes, I think that award was done as part of award simplification process in the late nineties.

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JUSTICE ROSS: I'm sure.

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MR THOMAS: And I think the SECV was slowly being emasculated at that point.

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JUSTICE ROSS: Yes. Yes.

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MR THOMAS: If my memory serves me correct.

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JUSTICE ROSS: I'm sure that's the history. It would have come out of an SECV based award and then moved up.

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MR THOMAS: Yes, sure.

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JUSTICE ROSS: And then it's moved nationally, et cetera. But - - -

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MR THOMAS: So I think most of the awards in New South Wales are State awards.

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JUSTICE ROSS: That's right, they were.

PN48

MR THOMAS: The power industry.

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JUSTICE ROSS: Yes, they certainly were. In fact, I think one of my first cases as (indistinct) was a New South Wales Power order. There you go. But are you content to - - -

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MR THOMAS: Well, there's a bit of nostalgia.

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JUSTICE ROSS: Yes, not a lot. So, look, are you content that we'll deal with that one in that way?

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MR THOMAS: Yes.

PN53

MS WALSH: Yes, that sounds good.

PN54

JUSTICE ROSS: All right. Then let's get to the horses. This is the horse and greyhound training award, and the issue here relates to clause 22.3, and it provides that:

PN55

An employee may elect to take time off in place of payment for overtime. The overtime payment otherwise payable will be reduced by the amount calculated at the ordinary time rate for time off.

PN56

This also is slightly tortuous.

PN57

MS WALSH: Yes.

PN58

JUSTICE ROSS: But I think at least one interpretation is that you're paid for overtime at the overtime rate which, depending on when it's worked, it's time and-a-half for the first three hours, double time thereafter or double time.

PN59

MS WALSH: Yes.

PN60

JUSTICE ROSS: And this provision would allow you to take part of that payment as time off in lieu, which sort of suggests that there would be a part remaining. Now, the part remaining could either be that you've taken time off – let's say you work four hours' overtime and you've worked it on a Sunday, so you'd be entitled to eight hours' pay. At 22.3 it may mean that you take four hours off and you reduce – and then you're paid four hours pay. Or it may just mean you take four hours off. I'm not sure quite what it means.

PN61

I'm content to proceed on the basis which would be the more beneficial construction and we'll produce a variation determination that works on the assumption that it is payment for overtime. But that matter can be contested in any subsequent hearing. So once we produce the variation determination then you'll have an opportunity to comment. The employers with an interest will have an opportunity to comment and if there's no opposition then that's the variation determination we would make. If there's opposition well, there'll be a hearing in any event. We have to have a hearing because there are no defined respondents to these awards. And you never know who might sort of come along on the day.

PN62

But do you know anything about how that award provision operates in practice?

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MS WALSH: To be honest, no, I haven't looked further than having a quick look at the clause itself. But our position is definitely that because it was paid at – or accumulated at the overtime rate and then of course the difference was paid. I don't know - - -

PN64

JUSTICE ROSS: It's not exactly a masterpiece of construction though.

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MS WALSH: It's not a beautiful clause.

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JUSTICE ROSS: No.

PN67

MS WALSH: But, yes, definitely, you know, the overtime is otherwise payable, and it's reduced by an amount not to an amount, so it would the - - -

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JUSTICE ROSS: Yes. Yes, there were certainly those textual indications and - - -

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MS WALSH: Yes.

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JUSTICE ROSS: Yes.

PN71

MS WALSH: Yes, I can't offer more assistance but certainly by the next time - - -

PN72

JUSTICE ROSS: Yes. And it will be a little while off because the various clauses that provide for TOIL to be taken at overtime rates are all structured slightly differently. Some of them have existing safeguards in them and it's not intended to disturb those, so it's a tailoring exercise in the 10 or so awards that are subject to these provisions.

PN73

MS WALSH: Yes.

PN74

JUSTICE ROSS: So it's not likely to come out till later this week or next week and then we want you to have some opportunity to give some thought to it and then we'll wrap the matter up later in the year.

PN75

MS WALSH: Yes.

PN76

JUSTICE ROSS: All right. Everyone content with that?

PN77

MR NOBLE: Yes.

PN78

JUSTICE ROSS: Yes. Okay. Nothing further in relation to those three awards? All right. Well, I'll adjourn until 10 o'clock. Thanks.

PN79

MR THOMAS: Thank you, your Honour.

SHORT ADJOURNMENT

[9.54 AM]

RESUMED

[10.04 AM]

PN80

JUSTICE ROSS: Good morning. These twelve matters have been listed to really find out where you're up to in relation to them given, but a significant amount of things have happened since the initial objections were put in and I just want to check the status of the remaining objections.

PN81

Before we kick off, could I seek the appearances in Sydney and then I'll seek the appearances in Melbourne and Canberra. If you'd like to go first.

PN82

MR J ARNDT: Arndt, J, appearing for ABI New South Wales Business Chamber.

PN83

JUSTICE ROSS: Thank you.

PN84

MR FOSTER: Thank you, your Honour, Foster, appearing for Seven Network Operations and Nine Network Proprietary Limited and Network Ten Proprietary Limited, in relation to the Broadcasting and Recorded Entertainment Award and also appearing for News Corp about the Media Group and Pacific Magazines Pty Ltd, in relation the Journalists and Published Media Award.

PN85

JUSTICE ROSS: Thanks, Mr Foster. What's your interest?

PN86

MR FOSTER: In today's proceedings?

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JUSTICE ROSS: Yes.

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MR FOSTER: I'm not - - -

PN89

JUSTICE ROSS: I don't raise it as a criticism, I'm just interested to know which awards.

PN90

MR FOSTER: We're here in light of the reference to our submissions in the statement which were in (indistinct), in social community and there was a footnote reference, I guess you'd call it, in the Pastoral and Horticultural Award.

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JUSTICE ROSS: All right. Yes?

PN92

MS DE VECCHIS: Your Honour, De Vecchis, Australian Salaried Medical Officers' Federation in relation the Medical Practitioners Award.

PN93

JUSTICE ROSS: Thank you.

PN94

MS R WALSH: Your Honour, Walsh, initial R, for the AWU for the Pastoral and Horticultural Award.

PN95

JUSTICE ROSS: Thank you. And then in Canberra, Ms McKinnon?

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MS MCKINNON: Yes, good morning, your Honour.

PN97

JUSTICE ROSS: Morning.

PN98

MS WALSH: McKinnon and Ms Pearsall for the NFF and here today on the Pastoral and Horticultural Awards.

PN99

JUSTICE ROSS: Right, thank you. And in Melbourne?

PN100

MR D HAMILTON: Your Honour, David Hamilton, Live Performance Australia. We have an interest in the Broadcasting and Recorded Entertainment Award and the Live Performance Award.

PN101

JUSTICE ROSS: Thank you. All right, well can I deal with, as we mentioned in the statement, submissions have already been put in, in relation to, let's deal with the first three on the list. Broadcasting and Recorded Entertainment, Live Performance and Journalists and Published Media. Is the objection put in by your client still maintained?

PN102

MR FOSTER: Within the two groups we have different positions.

PN103

JUSTICE ROSS: All right. What are they?

PN104

MR FOSTER: If I can call it the, "Television networks".

PN105

JUSTICE ROSS: So that's broadcasting and recorded entertainment, yes.

PN106

MR FOSTER: Won't be pursuing their objection, save to - they may have an interest in the final version and they may comment just to ensure that whatever goes in, goes in appropriately, your Honour.

PN107

JUSTICE ROSS: So, a draft variation determination can be released.

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MR FOSTER: Yes.

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JUSTICE ROSS: And an opportunity provided for comment, provisional view expressed.

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MR FOSTER: Yes.

PN111

JUSTICE ROSS: And that would meet their, or give them an opportunity to comment on the detail, but they're not opposing the principles.

PN112

MR FOSTER: That's right.

PN113

JUSTICE ROSS: Just before we leave that, so that's Broadcasting and Recorded Entertainment. Is Live Performance, do you have a similar position in relation to that award that's just been expressed? That is, not pursuing the objection but just want an opportunity to look at the draft variation determination?

PN114

MR HAMILTON: Well, your Honour, with regard to the Cinema section of that award, we've got no objection to the model clause going in. And obviously there was one part of award, 58.4(b), which only applied to the cinema industry. How the Commission deals with it, whether it goes into the general provisions or into the specific provisions for cinema, we'll leave that to the Commission's determination.

PN115

JUSTICE ROSS: And look, whatever, that will be reflected in the variation determination and you'll all have an opportunity to comment on that, okay?

PN116

MR FOSTER: It's a good point that's raised. It's a slightly more complex award in that there's various - - -

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JUSTICE ROSS: There are.

PN118

MR FOSTER: - - - aspects of the industry. But my client's interests are in the Television and Broadcasting, stream energy costs. A stream of that award, there are some other streams that don't apply to them.

PN119

JUSTICE ROSS: I should have indicated earlier that the conference is being recorded and the transcript will go on the website, so you'll see where we go in relation to each one.

PN120

Is there anything anyone else wants to say about Broadcasting and Recorded Entertainment? Can I go then to Live Performance? The only parties present that's expressed an interest in that is Live Performance Australia. What do you want to say about the status of your objection in relation to that award?

PN121

MR HAMILTON: Your Honour, we suggested, in our submission, that it be sorted out in the individual award review process. MEAA contacted us shortly thereafter on about 8 December, and they agreed that it should be looked at in the

award stage, rather than in the Full Bench review of TOIL. And that would be still our position, your Honour.

PN122

JUSTICE ROSS: And that's because of the particular circumstances of the industry that you identified?

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MR HAMILTON: Yes, that's correct, your Honour. TOIL doesn't mean it - - -

PN124

JUSTICE ROSS: That' in your written submission of 9 November, is that right, last year?

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MR HAMILTON: Sorry, your Honour?

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JUSTICE ROSS: So those are the specific circumstances you identified in your written submission of 9 November, is that right?

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MR HAMILTON: That's correct, your Honour.

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JUSTICE ROSS: Okay, and you say that the MEAA agrees with that proposition, that it be dealt with in the award phase?

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MR HAMILTON: That's correct, your Honour.

PN130

JUSTICE ROSS: Is there anything else you want to say about that award?

PN131

MR HAMILTON: No, your Honour.

PN132

JUSTICE ROSS: All right. Well let's, just for completeness, we'll deal with the Journalists and Published Media. Whereabouts are you up to?

PN133

MR FOSTER: My clients will press the objection. We had indicated in our earlier submissions that it would be appropriate for, like my friend, in relation to live performances, for the matter to be dealt with at the award-specific stage. We don't have any sort of pre-conceived ideas as to how that will work. As I understand it, it can still be dealt with on sort of an award-specific basis, even though it's dealt with via TOIL.

PN134

JUSTICE ROSS: That's right. It doesn't really matter, because you're entitled and invited to advance the case about well, why should it be different, in this

particular award. Each award has to be reviewed in its own right, so if there's something - as has been the argument, and probably more fully articulated at this stage in the Live Performance Award, there are particular features of the work under that award which mean that the TOIL provision needs to be tailored in a particular way.

PN135

MR FOSTER: Yes.

PN136

JUSTICE ROSS: And you can certainly have the opportunity to put that in the, before the TOIL Bench or an award-specific Bench.

PN137

MR FOSTER: Yes. So, I guess the primary issue for our clients is the maintenance of TOIL as the default, which is the thing, we say, that sets the Journalist and Published Media Award apart from any of the other awards that don't consider it. Although we don't have instructions there, there's some, maybe work that can be done around the edges to align some of the other aspects of the clause to the model provisions, under the safeguards and the administrative issues won't necessarily be an issue.

PN138

JUSTICE ROSS: Look, the - and I'm content to give you time to develop that. One issue you may need to address is section 134(1)(d)(a), which deals with one of the considerations in the Modern Award objective is the provision of additional remuneration for overtime.

PN139

MR FOSTER: Yes.

PN140

JUSTICE ROSS: And we've addressed the, sort of converse to your argument in some ways, it was put by one of the unions, I've forgotten which, earlier in these proceedings, that you can't have TOIL at ordinary time rates because that would offend 134(1)(d)(a). And the response was, well no, it doesn't, because you've got your primary entitlement is to payment. In your case, there's no primary entitlement to payment. So I think that's something you need to address.

PN141

I'll see how some of the other matters go as we go through it, but whilst I'm content to give you time, we at some point want to wrap up where we're up to in relation to TOIL.

PN142

MR FOSTER: Yes, understood.

PN143

JUSTICE ROSS: So what I'd be envisaging is something like four weeks for you to - we'll issue a reissuance statement after this and clarify where we're up to on all of these, but perhaps four weeks to bring the tailoring issues and to advance a

submission in support of the variation to termination you've proposed. Okay? If you need more time, like any directions, there'll be liberty to apply.

PN144

MR FOSTER: Okay.

PN145

JUSTICE ROSS: I understand that you might be consulting with a disparate group and that's not always straightforward.

PN146

MR FOSTER: In relation to that, we're hoping to, if possible, bring in some other employers from the industry. When is it likely to be heard? Do we - - -

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JUSTICE ROSS: It will be heard before the end of the year.

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MR FOSTER: It will? Okay.

PN149

JUSTICE ROSS: No doubt about that. Look, it will be slotted in at around - there are other award model proceedings. Probably, and I will check - you see, there are these groups of awards, the eight or so that we've got now, there's another group of about 10 awards that provide for TOIL at overtime rates. They're being dealt with separately as well because the nature of the model term that goes into those awards will be less prescriptive - that's what is proposed, anyway - than for those that provide for TOIL at ordinary time rates.

PN150

The reflects a decision we took last year in relation to those matters. The rationale being that there's less incentive for abuse if you've got TOIL at overtime rates. Now, that also will be a draft variation determination, opportunity to comment at a hearing. We'll probably hear these matters - those overtime TOIL matters and any residual matters from this group at the same time. Now, I don't know when they've been listed or when they're programmed yet, but in the draft directions that go out, the type of this set of conferences, we'll indicate those sorts of things, a hearing date, so you'll know when that is.

PN151

MR FOSTER: The only thing I might have, if I can, is that I've been asked to foreshadow that my clients may put on evidence.

PN152

JUSTICE ROSS: That's fine.

PN153

MR FOSTER: I appreciate it's a slightly different scenario to a party putting on an application and therefore it's sort of difficult to identify who the other side to the matter in these proceedings is, but if AMA, the other way, wanted to put on evidence in reply, they would need an opportunity to and - - -

PN154

JUSTICE ROSS: Certainly, yes. Yes, certainly. The directions will have the flexibility to adapt to that. I don't think I'll specify a particular reply point or anything like that. I'll simply say there's liberty to apply, and then if anyone wants to put on any evidence in response, they can. You should, if you do have witnesses, again, make sure they're available on the day of the hearing - - -

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MR FOSTER: Yes.

PN156

JUSTICE ROSS: - - - because even if no one else wants to cross-examine them, you shouldn't assume that the Bench won't want to ask them some questions.

PN157

MR FOSTER: Understood. Yes. Just finally, nothing ventured, nothing gained, your Honour, six weeks?

PN158

JUSTICE ROSS: I'll have a look at when the hearing is listed and I'll see what sort of flexibility can be provided.

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MR FOSTER: Thanks so much.

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JUSTICE ROSS: But to the extent we can, then I will.

PN161

MR FOSTER: Thank you.

PN162

JUSTICE ROSS: All right. That deals with those three. Those who only have an interest in those first three awards, if you want to go, feel free to go.

PN163

MR FOSTER: Thank you, your Honour.

PN164

JUSTICE ROSS: Let's go to the Social, Community, Home Care and Disability Services Award. ABI had an interest, I think, in that. To the extent an objection was taken, what do you want to say about that?

PN165

MR ARNDT: Sir, I think the position was that the ASU sought to preserve an existing part of the existing clause.

PN166

JUSTICE ROSS: They did.

PN167

MR ARNDT: Namely, that the payment be made, if the payment is eventually made, it be made at the rate applying at the time that the payment is made as opposed to the time of accrual.

PN168

JUSTICE ROSS: Yes. That was the issue that you objected to, is that right?

PN169

MR ARNDT: That's right. I think your Honour asked both ABI to go away and think about which would it prefer, the model term or the current clause and requested the ASU to do the same. Well, I know, because I've read the correspondence this morning, that the ABI and ASU were in agreement that the existing clause would be preferable to the model term. Now, the ASU's position is, I think, that they would like their variation included, but if they couldn't get their variation included, that they would prefer to retain the existing clause rather than receive the model term, and ABI is content with that course.

PN170

JUSTICE ROSS: All right. I need to talk to the other members of the Bench, but it may be that there's a middle course which might have some elements of the model term and the existing clause retained. I'm thinking here of the - and this is only obviously a provisional, only my own provisional view of that, that there may be some utility in the agreement for TOIL being in writing and be retained as an employee record without necessarily specifying what the detail of it might be.

PN171

That's really to avoid any subsequent problems that might arise as to whether someone has taken it or they haven't, consistent with what we've said in previous decisions. But I wonder whether the best way of dealing with this award would be for the Bench to consider its position on the basis of what's being brought, express a provisional view only, attach a draft variation determination and give any interested party an opportunity to look. I just don't think it's necessarily going to be a zero sum game. Either we agree with you or we don't; we shove in the model term or we don't; we just leave it as it is or we go down the ASU's path. But I don't want to turn this into a, you know, an - - -

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MR ARNDT: No.

PN173

JUSTICE ROSS: - - - endless proceeding and the rest of it and that might - so what I suggest, I think you've each said largely what you want to say.

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MR ARNDT: Absolutely.

PN175

JUSTICE ROSS: I wouldn't propose determining it on the papers. I think I would prefer to express only a provisional view and then attach a draft variation determination and give an opportunity to comment on that.

PN176

MR ARNDT: We're content with that course.

PN177

JUSTICE ROSS: All right. Well, that's what we do in relation to that award. Medical Officers?

PN178

MS DE VECCHIS: Yes, your Honour. We've previously made submissions contending for the retention of two aspects of the existing TOIL provisions. Firstly, that the clause be limited to doctors in training, and secondly, that the time period for the taking of TOIL or it being paid out be - or reflect the current provisions of four weeks rather than the model term. This award was last listed on 10 December, I believe. I didn't appear on that occasion, one of my colleagues did, but I understand your Honour at the time asked why the provision could not be extended beyond doctors in training to include senior doctors.

PN179

JUSTICE ROSS: Yes.

PN180

MS DE VECCHIS: We don't have any particular objection to that occurring.

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JUSTICE ROSS: Does that mean that your proposed variation relates to the second element, and that is, the - - -

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MS DE VECCHIS: Correct, the timeframe.

PN183

JUSTICE ROSS: What's that exactly? Can you just explain that to me?

PN184

MS DE VECCHIS: So what we've asked for is that the current provisions which say that the TOIL will either be taken within a period of four weeks or paid out, and I understand the model term is six months.

PN185

JUSTICE ROSS: Yes. That's to provide the longer period of flexibility, but bearing in mind that the employee, in this case, the doctor, can ask for it to be paid out at any time, why would you need to restrict - - -

PN186

MS DE VECCHIS: I guess our particular concern is for the doctors in training and our submissions of 10 November last year go to that particular point. Doctors in training, they're a very mobile workforce. They rotate several times a year. They rotate between hospitals, not only within the one State but even interstate and in our view, that can make the administration of their entitlements, including TOIL, very difficult and can lead to potential enforcement issues for the doctors.

PN187

They simply lose track of those entitlements and for that reason, we would argue for the retention of the current four weeks. It would just be simply easier for administration and enforcement purposes and it would make it easier for the doctors in training to keep track of their entitlements.

PN188

JUSTICE ROSS: All right.

PN189

MS DE VECCHIS: I should say, your Honour, that that's not so much a concern for the senior doctors who don't have that mobility.

PN190

JUSTICE ROSS: True, but I think if we were going to do it for one; it would just lead to quite a complex clause if you had a different arrangement for both. So I would think if your first submission finds favour for trainee doctors, then we would probably do it for - that would probably be the position generally. That reflects the existing arrangement?

PN191

MS DE VECCHIS: It does. It does, your Honour.

PN192

JUSTICE ROSS: All right. Are you content for that issue to be determined on the basis of what you've already put in and we'll just make a decision?

PN193

MS DE VECCHIS: I think we are. I think we are, and I note that the Health Services Union has previously supported our submissions and I believe continues to do so and I don't think any of the employers have made submissions in relation to these matters.

PN194

JUSTICE ROSS: No.

PN195

MS DE VECCHIS: So we'd be content for the Bench to now consider the matter.

PN196

JUSTICE ROSS: All right. We'll decide it on the basis of what you've said today
- - -

PN197

MS DE VECCHIS: Thank you, your Honour.

PN198

JUSTICE ROSS: - - - your submission of 10 November, what was said on the previous hearing in December, I think, and what the HSU has been - I think you're right, I don't think anyone else has said anything about this.

PN199

MS DE VECCHIS: No.

PN200

JUSTICE ROSS: The HSU made a submission supporting your submission on 11 November 2015 as well.

PN201

MS DE VECCHIS: Yes.

PN202

JUSTICE ROSS: All right. That deals with that matter. Can I now turn to the Pastoral Award and the Horticultural Award. My recollection, and that's all it is, really, was in the Pastoral Award, there have been discussions between the NFF and the AWU and some form of agreement was emerging from that, and then I didn't hear anything more about it, which is why I guess that's been listed today. But let's deal with the two of them together.

PN203

Ms McKinnon, what would you like to say about these two awards?

PN204

MS MCKINNON: Yes, thank you, your Honour. That's correct, we did have some discussions the last time this matter was before the Commission. They were productive discussions and we have since had an exchange of correspondence over the issue. I think the two reasons why you haven't heard anything further from us is, firstly, that this matter more broadly, we understood, would be listed for hearing so we weren't quite sure where that might take us, but in the meantime, the discussion between the NFF and the AWU has somewhat sort of split, so we are very close, I think, on the Horticulture Award, but the Pastoral Award approach taken by the AWU is different and from our point of view, the hours flexibility that's needed in both contexts is the same. So we just haven't yet aligned the approach in each of the awards.

PN205

JUSTICE ROSS: Okay. Is there anything you want to say in relation to either of these two?

PN206

MS WALSH: Yes. I mean, that's right. I think I'll probably just have to say that I'm standing in for my colleague who does have carriage of these matters, for these awards.

PN207

JUSTICE ROSS: Sure.

PN208

MS WALSH: Since April when the model term was revised and it became the case that overtime would be accrued and a written agreement could be - well, a written agreement would account for the whole week or for a pay period rather than per occasion - - -

PN209

JUSTICE ROSS: Yes, yes.

PN210

MS WALSH: - - - I suppose we did see that as reducing or potentially some of those concerns that the NFF had about those written requirements might not be there anymore. So we were wondering actually if perhaps those concerns had subsided and perhaps the model term as offensive as it originally was. So while we obviously happy to continue having these conversations, our primary position would be that the model term be inserted into both of those awards. I mean the issues in relation to both of those award have already been canvassed in written submissions so I probably don't need to go into those but certainly with the Horticulture Award which you've just discussed with the Journalists Award, it does have that default arrangement as TOIL rather than overtime, or payment for overtime, as well as no expressed right to overtime. So there was I think a bit issue there if employees don't request to be paid for overtime within a specific period they don't appear to be paid - - -

PN211

JUSTICE ROSS: I think it's the same with the Pastoral Award isn't it, or am I wrong about that.

PN212

MS WALSH: Well, there's different arrangements for different streams in the Pastoral Award but yes, there is an issue for the Farming and Livestock operations stream, that there's no entitlement to payment of overtime if it's not made within two weeks that it was accrued, yes.

PN213

JUSTICE ROSS: Well, Ms McKinnon, it doesn't like that at least there's any agreed position at the moment in relation to it. My initial thought would be to deal with this award in the same way as it was proposed to deal with the journalist matter, and that is we will - I'll issue a statement arising from today's conferences. That will set out some draft directions and provide you with - I'll give you as much time as I can, I just need to check the hearing date for those overtime and TOIL provisions because it would seem to make more sense to deal with all this stuff on the one day so it's more efficient for the Full Bench. So I'll work backwards from that but you'd have a period of four to six weeks in which to make submissions each of you about your respective positions in these awards.

PN214

In your case why you say the model term should not be inserted. In those submissions, and I'm not sure the extent to which the issue arises in each of these two awards. You should address the issue that I raise with the employer representative in the Journalist Award, that is the operation at 134(1)(da) and no provision for payment of overtime in these awards. Rather there's a default preference for TOIL. If that is the case and I've not looked at those awards closely so I don't know. So I'm going to issue some draft directions, give you a short opportunity to comment on them, let you know when the hearing date is and we deal with it on that basis.

PN215

If you reach a consent position then you file that, still come along on the hearing and - so it doesn't preclude you continuing to have discussions, it doesn't preclude

you advancing a consent position and obviously the Bench would give weight to consent but it wouldn't necessarily determine the question from our perspective, but it would obviously be a relevant consideration. Are you content with that approach or is there something else you might want to suggest?

PN216

MR MCKINNON: If I could just clarify, we did put in quite comprehensive submissions in November and I'm not sure that the model TOIL term has changed since then.

PN217

JUSTICE ROSS: It has. It has changed since then.

PN218

MR MCKINNON: It has?

PN219

JUSTICE ROSS: So you'd need to look at the subsequent iteration and you can perhaps deal with it this way. Rather than put you to the trouble of putting in completely new submissions, you could rely on your earlier submissions of the November date and make some short further submissions which are directed to the changes in the TOIL model term that took place, plain language and some flexibility changes that took place earlier this year. I'm not sure of the date of that decision.

PN220

MS WALSH: It's the April 16 decision.

PN221

JUSTICE ROSS: So it's the 16 April decision, Ms McKinnon, that finalised the model TOIL term this year. So you might want to have a look at that and see whether all of your concerns remain the same name, or at least address the differences in the TOIL term as it's emerged, right?

PN222

MR MCKINNON: I'm certainly happy to do this. I can indicate that our position hasn't changed, for the benefit of the AWU, and that it's absolutely for us to have the flexibility of hours and that it's just not manageable in the sector to have a separate agreement each time, you know, in advance of when hours might be worked because it's not possible to make those arrangements in any workable sense.

PN223

If I might, your Honour, just clarify too on the section 134(1)(da) issue. I mean we've always understood that provision not to mandate the payment of overtime for work outside ordinary hours, it's just one of the factors I think to be taken into account.

PN224

JUSTICE ROSS: I'm not suggesting otherwise but it's a relevant consideration in determining whether the modern award objective has been met and for that reason you'd need to say something about it.

PN225

MR MCKINNON: Yes, certainly, and I think we've got, you know, a reasonable way of explaining how the two can interact. The additional concern we have is this issue that the AWU has raised about the removal of the provision that requires a claim for overtime to be made within two weeks or the overtime is not payable. That's not a claim that the AWU has ever raised in this proceedings, it's only arisen in the context of responding to the TOIL term. From our point of view it doesn't deal with TOIL in a substantive way. It's about how overtime is managed in the sector, which is slightly different.

PN226

JUSTICE ROSS: Sure. It is different but there's nothing to preclude - it's a review. The Bench is going to have a look at the issue anyway. There's nothing to preclude a party drawing our attention to it and we'll see what they say and we'll give you an opportunity to be heard on it.

PN227

MR MCKINNON: Yes, just it might be an issue that's quite contested and in that case may require an evidentiary case which will be - just to foreshadow that.

PN228

JUSTICE ROSS: Indeed. Well look we'll see what's raised and it may be that it's more appropriate to deal with that issue in the award phase than in these proceedings. Let's see what emerges in the submissions. You'll also be given the opportunity to put forward any evidence - I'm not dealing here with your most recent comment, I mean the broader issue of your objection to the TOIL provision and those aspects of your submission to talk about the existing flexibility and use. You'd also have the opportunity to put forward evidence in relation to any of those assertions.

PN229

MR MCKINNON: Yes. Thank you, your Honour.

PN230

JUSTICE ROSS: Right. Does that deal with those two awards? Anything else anyone wants to say about that?

PN231

MS WALSH: Nothing more, your Honour.

PN232

JUSTICE ROSS: Then let's go to the Clerks Private Sector Award. Where are we in relation to that, in relation to that?

PN233

MR ARNDT: Your Honour, it's probably relevant to note the context in which our submission, our initial submission was made.

PN234

JUSTICE ROSS: Yes.

PN235

MR ARNDT: It was made in response to a request or probably a direction from the Bench to ensure that any further submissions be specific to certain awards and not general submissions about the general issues involved in these proceedings. In that sense we made a submission about clerks. Looking at the submission it's apparent that it's not of a similar nature to perhaps in the Pastoral Award where we're talking about specific elements of the industry.

PN236

JUSTICE ROSS: That's right.

PN237

MR ARNDT: In light of the position that the Full Bench has taken in regards to those in-principle type arguments, we certainly don't seek to be heard further on the point. I think the Bench has already indicated a proposed position or a preliminary position, so it's difference from the SACS situation.

PN238

JUSTICE ROSS: Well, for what it's worth, the submission struck me in the way me.

PN239

MR ARNDT: Yes.

PN240

JUSTICE ROSS: That it was raising general matters without - and I don't say this by way of criticism, Mr Arndt, but without identifying what the particular features of this award were, that it created a particular problem in relation to those matters. We've heard from the NFF, (indistinct) and others, well they are particular features of these awards which mean this has to be tailored or done in a particular way or not done at all. It struck me that wasn't really a submission on the Clerks Award and that probably reflects the time at which it was made.

PN241

MR ARNDT: That's exactly right, your Honour.

PN242

JUSTICE ROSS: Look, matters have moved on subsequently and absent any specific or any desire to advance a specific award case, then I think the view of the Bench will be to make the variation determination in the previous form. What we will probably do is express that as a provisional view, publish a draft variation determination and give any interested party a short period to respond. If there's no response then we go ahead and we'll do it that way.

PN243

MR ARNDT: I think that's the appropriate course. Perhaps just as a matter of completeness, I think to defend the author of the submission, the position - I think the position was that because the Clerks Award is so general, used by a full array

of businesses, the complexity - increasing complexity of the TOIL clause may have more an effect of on say a small business.

PN244

JUSTICE ROSS: Yes.

PN245

MR ARNDT: That's as high as I can put it.

PN246

JUSTICE ROSS: Look and I suppose we could go in the other direction as well but mostly where the Clerks Award, applies another award applies also.

PN247

MR ARNDT: That's right.

PN248

JUSTICE ROSS: Now we've reached the position where the TOIL, model TOIL term is in most modern awards and so it sort of is an argument now that because of the passage of time it can work the other way as well.

PN249

MR ARNDT: That's right, that's right.

PN250

JUSTICE ROSS: It would advance - I appreciate that it's a more complex term but it would advance simplicity if the same term dealing with TOIL applied and, for example, you'll get an overlap - the Clerk's Award often applies where manufacturing applies, where tail applies, some elements of hospitality and the like but while as they've got that provision having the same one and you're administering the same scheme might also be preferable.

PN251

MR ARNDT: It's very difficult to argue with that, your Honour.

PN252

JUSTICE ROSS: But look we'll do the provisional view, that will give everyone an opportunity to reflect and if we don't hear anything, and look I don't expect we will, then we'll proceed along those lines. Is there anything else from any party or any questions anyone has about the process? No? As I say I'll get the transcript ordered from today, get it loaded onto the website, put out a statement probably on Wednesday setting out how we propose to deal with each of these matters, some draft directions in relation to particularly the Journalist, Horticulture, Pastoral Award et cetera, and there'll be a short opportunity to comment on that. I'll express some provisional views on some of the others and that's both the medical practitioners one and the clerical one. There was no (indistinct), just put out the draft determination variation for comment. Anything further? No?

PN253

MS WALSH: Nothing further.

PN254

JUSTICE ROSS: Thanks very much for your attendance, I'll adjourn.

ADJOURNED INDEFINITELY

[10.43 AM]