TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT BULL
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROE

AM2014/196 AM2014/197

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
Part-time Employment and Casual Employment
(AM2014/196 AM2014/197)

Sydney

10.03 AM, THURSDAY, 27 OCTOBER 2016

PN1

VICE PRESIDENT HATCHER: Yes, can I take appearances. Mr Bull, you continue your appearance for United Voice?

PN2

MR S BULL: I do. Thank you, your Honour.

PN3

VICE PRESIDENT HATCHER: Mr Warren, you have an expanded list of clients, is it?

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MR R S WARREN: Yes, I have.

PN5

VICE PRESIDENT HATCHER: All right.

PN6

MR WARREN: In matter number 197 I appear for the Australian Hotels Association, the Accommodation Association of Australia, the Motor Inn and Motel Accommodation Association, The Restaurant and Catering Industrial and Clubs Australia Industrial. But in 196 I only appear for Clubs Australia Industrial.

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VICE PRESIDENT HATCHER: All right.

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MR WARREN: So the casual one, I'm in 197, all that list.

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VICE PRESIDENT HATCHER: I don't think we need to be that precise about it.

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MR WARREN: May the Commission please.

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VICE PRESIDENT HATCHER: I take it there's no other appearances in any other State? No. All right. So who would like to go first?

PN12

MR BULL: We've had some discussion, your Honour. I was proposing to address in reply to my friend's submissions in relation to our claim for overtime for casual employees under the Hospitality Awards. So I was going to direct some comments towards their submission and our claim. My friend, I understand, was going to address the part-time claim which is still notionally theirs and I might say something in response to their comments about the part-time clause.

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VICE PRESIDENT HATCHER: Does that mean you're going first?

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MR BULL: That means I'm going first. Sorry, that was rather long-winded.

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VICE PRESIDENT HATCHER: All right.

PN16

MR BULL: Look, I was going to address my comments to their last submission. The first comments I want to make relate to what I call their alleged submission of the insufficiency of evidence. They've made a number of claims that there's just not enough evidence for this Tribunal to vary the award in terms that we're seeking to insert an entitlement to overtime for part-time employees under these three awards.

PN17

I'd just make the general comment that merit does not equate with the quantity of material presented in support of an argument. The repeated statements by the respondent that we haven't provided sufficient evidence in relation to the circumstances of each award, if taken to their logical extreme, would mean that it would be pretty much impossible to ever have a sufficient evidentiary case because these are three awards that have a large number of classifications; they go from a café to a large hotel. You are going to have some difficulties if the bar is set so high, you'll never meet it. We say that it's proper for this Tribunal to make certain assumptions about the discreteness of the industry or sectors that are covered by these awards. The awards make that assumption in some respect. It's an underlying theme of most narrative and discussion of these proceedings.

PN18

The respondents, as many employers have done in this four yearly review, recited quotes from the National Retail Association v Fair Work Commission. Bits from the Security Service Industry Award and the jurisdictional decision, and those authorities are usually presented as limiting this Tribunal's capacity to conduct its function which is mandated by the Parliament, which is to review these awards. It's essentially, I say, setting the bar at an inappropriately high level when change or some proposal is opposed.

PN19

The respondent has provided ritualistic incantation of the quotes from these particular authorities but it hasn't actually provided any substance to its view that there are award specific matters that have not been taken into account; that there are gaps in the evidence. So if it's going to say that there's not enough evidence it needs to, I say, say where and in what sense there isn't enough evidence. And that is a problematic feature, I say, of the way that the whole of the evidence has panned out in this matter. And, as noted, the respondent is happy to treat hospitality as a well-defined industry when it suits it, and in its first submission it talks about, and it continues to repeat this, this is a major theme of its opposition to overtime for casual employees, that there is this historical and well-established historical precedent that casual employees in hospitality don't get overtime. And that is, in some respects, its principal reason to oppose change.

PN20

So one of the problems with the - and this is about their claim of the insufficiency of our evidence, they have not themselves provided evidence, and these are not party/party proceedings in the conventional sense. This is a hybrid process which is something in between a sort of process that a conventional Court would conduct and one that an executive inquiry would be. It's not a you don't get what you asked for therefore you lose process. A perfectly legitimate result would be within the limits of natural justice that we may not get overtime as we ask for it, but some other alternative, some other solution may be found to deal with what we say is a deficiency within these awards concerning the treatment of casual employees.

PN21

We say first there is a deficiency and we've established that by examination of the awards and also by evidence, and there's been no real doubt cast on that by the respondent. And we also say that overtime is the natural solution of the identified gap in the safety net for these particular employees. There is a clear industrial standard among modern awards. It's a common place entitlement and so forth. And that's not an extraordinary statement.

PN22

One of the matters in relation to evidence that is significant is that the respondent has presented no evidence in the conventional sense. They had one statement that was essentially a reply statement to our evidence which was withdrawn, but they haven't presented employers or employees talking about the current regulation of long hours of work and how it's appropriate and so forth. One of the matters that you would expect them to be able to provide evidence to is that the entitlement as proposed would create some crushing financial burden on employers. That evidence is completely absent, and that is, I say, significant.

PN23

This also relates to, I suppose, the issue of the sufficiency of evidence, and I say that this Tribunal can, to a large extent, come to a reasoned conclusion about these awards because overtime is not a peculiar entitlement, it's common place. You know, a peculiar entitlement is clause 10.5(d) of the Clubs Award that has an additional hour for bingo callers in the minimum engagement. But the entitlement to some premium to be paid by an employer when an employee works beyond, what would be considered, ordinary hours is a common place thing. And it's ultimately based on fairly universal considerations concerning human physiology. The perhaps unspectacular conclusion that people are subject to fatigue and that there is some level of disability associated with long hours of work and that industrial law in this country and elsewhere recognises that it's appropriate that some compensation, some premium should be paid for the disability associated with long hours of work.

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VICE PRESIDENT HATCHER: Mr Bull, can you remind me, in these three awards, what the daily span of hours for permanents is? Your claim is for after 10 hours a day but how many ordinary hours are permanents entitled to work without overtime under these awards.

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MR BULL: In the Hospitality and the Clubs Award it's 12. That's the shift length. And that's including a half hour break.

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MR WARREN: Eleven and-a-half.

PN27

MR BULL: Beg your pardon?

PN28

MR WARREN: Eleven and-a-half.

PN29

MR BULL: Eleven and-a-half. But there's a half hour break. So effectively it's a 12 hour on the job including a half hour break. But that's the Restaurant and Hospitality Award, and in the Clubs Award there's this odd situation where theoretically a permanent employee could be directed to work their 38 hours straight, but obviously that wouldn't happen, but there's no shift length. There's no span of hours provisions in these awards, and that's one of the problems. They're bare bone awards, so what you have is you have maximum shift length for permanent workers, you have a current part-time arrangement which assumes agreement and that will give effectively a shift length. So that's problematic. And it was subject – your Honour did ask questions in the last hearings about that matter. There's some matters on transcript which I think I've quoted in my last submission.

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VICE PRESIDENT HATCHER: So at least with Restaurants and Hospitalities if overtime was awarded why shouldn't the daily span be the same as for permanents?

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MR BULL: I agree with that.

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VICE PRESIDENT HATCHER: Well, that would be then 12.

PN33

MR BULL: Well, I'd say it should be – the evidence of Muurlink is that there's clear disability. Disability starts arising after about eight hours. I say that the current permissible ordinary hours that a permanent worker can work under the two awards is inappropriate and I've suggested in our final submission that you should bring alignment to 10, and that's not, I say, an outrageous number.

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VICE PRESIDENT HATCHER: That's for permanents? Is that - - -

PN35

MR BULL: Yes, the maximum number of ordinary hours that they should work in a day should be 10 also.

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VICE PRESIDENT HATCHER: Well, there's no claim to that effect, is there?

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MR BULL: There is. We've made a claim in the award stage.

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VICE PRESIDENT HATCHER: I see.

PN39

MR BULL: And I've asked for it to be transferred here but - - -

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VICE PRESIDENT HATCHER: And where is that up to?

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MR BULL: It's in the award stage review, so there's a directions hearing on 6 December.

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VICE PRESIDENT HATCHER: All right. And is there an application in the Clubs Award about that matter as well?

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MR BULL: Yes, there is effectively. And part of the justification for that is, we say, that there's issue with the hours provisions in the Act, in that the Act does require modern awards to have some statement about what ordinary hours are and they're deficient in that sense. I think that there are historical problems in these awards and they were too loose. They don't, I say, comply with some of the finer details in the Act in terms of ordinary hours and so forth.

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VICE PRESIDENT HATCHER: And are those awards in stage 3 or stage 4?

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MR BULL: Stage 4.

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VICE PRESIDENT HATCHER: Stage 4.

PN47

MR BULL: In the final submission I did outline the fact that I say would be appropriate for this Full Bench to deal with these matters all together because they are linked essentially. They're a package deal. And it's appropriate to deal with them, and we've had plenty of discussions of these issues and so forth. No one can properly say that they've been taken by surprise or that they haven't had a hearing. So I wanted to make some general statements about the sufficiency of evidence.

PN48

The other matter I wanted to address was the respondent makes some comments about my elusion to necessity and the modern awards objective. In the final submission I've sought to call in support of our variations 138 of the Act, and I

suggested that it is a necessary amendment. It's necessary to have a term in these awards dealing with overtime because there's a gap in terms of what the modern awards objective says that should be in these awards.

PN49

My friend, in his submission, has suggested that the only things that are necessary are essentially items that must be in awards, subsection (c) matters, and that's because overtime, it's something that may be included in an award, and therefore we can't argue that it's necessary. I'd say that's wrong. I think 138 should be read disjunctively and that it is a commandment by the Parliament to the Commission when determining modern awards that when it puts in terms that the terms must, whether they're ones that must be there or can be there, that the character of those terms must be characterisable as the safety net things. You can't have terms that you can have that are beyond the character of a safety net if that makes sense. So it applies to all terms that are permitted under the Act. You can't say that 138 only applies to terms that must be in the Act.

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And it is, I say, if you pull apart what the respondent has said, it becomes an absurd argument. Wages are not things that must be in modern awards. Theoretically you can have a modern award which perhaps says nothing about wages, and you just need coverage and flexibility terms and so forth. And the wages would be determined by the minimum wage decision each year, but this Commission has, I think, comprehensively said that the minimum wage does not provide a fair and relevant safety net because in all modern awards it has chosen to insert minimum rates that are, in almost all cases, superior to the minimum wage so we say that an entitlement like overtime is clearly something that is determined by the modern award objective. And it's also worth noting that 138 also talks about the minimum wages objective. But I'd say you get into this sort of technical argument about penalties and so forth, the minimum wage objective doesn't deal with the setting of overtime. The modern award objective is relevant.

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The Act makes the distinction between minimum wages and everything else in this review function, so if, in a four yearly review, you decide to change minimum wages, it's a work value matter, and there's separate criteria that need to be applied in the inquiry. It's a somewhat arbitrary distinction that industrial law makes, but overtime is not part of the minimum wage. It's generally – it's a penalty and, as you'd be aware, that's in a different category. And it's caught under the modern awards objective. It's not caught under the minimum wages objective.

PN52

And as you'd be aware the minimum wage decision does not deal in overtime. It only sets the minimum wage and provides for traditionally a percentage increase in the base rate or the rates of modern awards, and this is perhaps another good example of where, for want of a better term, dealing with matters as a job lot, are not inappropriate. There's no reason why the Full Bench, when determining the minimum wage, couldn't have different percentages in relation to rates in different awards, but it quite sensibly takes an approach that you should treat these matters as a whole. So the precedent for treating the three Hospitality Awards as having similar characteristics is not an extraordinary one.

PN53

So I have, in the submission, placed a great deal of significance on consideration 134(1)(d)(a) which is a factor which was inserted into the Act after the two yearly review and before this review has commenced. I do think that it does add power to the utility of our variations. It's repetitive and perhaps drafted in the wrong way. It talks about remuneration. It probably should talk about compensation associated with a disability of working long hours and so forth. But we say it provides a powerful reason for the, what we say, is a clear gap.

PN54

And the point is the jurisdictional decision and other decisions talks about permeations and so forth. You can do things different ways and so forth. But underlying that statement is that you can do things different ways as long as you actually solve the problem. And we say that there's a clear problem in the sense that there's an under-compensation; that there's a gap in the safety net for casual hospitality employees, and that's evidence by simply a reasoned review of these instruments. They don't get overtime. It's also evident by the empirical material which we're presented that shows that these people are low paid, they work difficult and unsocial hours, the nature of the work is evenings and weekends and so forth. That is supported by evidence. There's the evidence of Damian Oliver, who provides sort of empirical evidence of that, and there's the two employees or members that were presented that demonstrate what we say is a fairly typical pattern. You know, the gentleman from Queensland who works in the bar till 3 o'clock in the morning, and the lady who works in the kitchen till all hours and so forth.

PN55

And once again it's not a case where, you know, we've cherry picked evidence. I think if you come to a reasonable conclusion that the two employees we presented are reasonably typical of casual workers and I can be quite candid that we do have difficulties getting evidence because of the nature of the work and so forth. And we did our best to present some real lay evidence for the benefit of this inquiry.

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DEPUTY PRESIDENT BULL: Can I just ask then, Mr Bull, in respect of, for example, overtime for casuals, you say there's a whole host of other awards that casuals get paid overtime?

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MR BULL: That's correct.

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DEPUTY PRESIDENT BULL: And we should have regard to that sort of national practice. When we're dealing with other awards where, in a particular industry, there is a superior condition than the national practice we're told by, not necessarily your union, but particular unions that, well, don't worry about the national practice, we should worry about the industry practice. So which one has priority in your view?

PN59

MR BULL: Well, I suppose we're all advocates for a particular proposition, and when you appear you advocate a particular proposition. I'm suggesting that we have an issue here where these particular groups are below acceptable standards and once you get them there I would still be quite happy to advocate that we should continue and get better conditions. But I can't speak for other persons who appear here. But I would say that some illusion to industrial standards is appropriate when you say that there is a gap in the safety net which is the fundamental justification, we say, for our variations being made. And it's a matter for other parties to argue whether, you know, where you should be standing relative to others.

PN60

VICE PRESIDENT HATCHER: I think there was some evidence, at least in relation to the Hospitality Award and probably the Clubs Award also, that there's a usual roster cycle say four weeks and casuals are usually placed on shifts in that roster. Again, if overtime was to be awarded to casuals, why wouldn't the 38 hours be averaged over the roster cycle rather than simply on a simple week basis?

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MR BULL: Because casuals by their nature work erratically. We say that it's a – nowhere else do you have commonly – this is the – well, it's intra-month overtime then effectively, so it doesn't deal with the physiology of fatigue. So you'd have the possibility of - - -

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VICE PRESIDENT HATCHER: fatigue is dealt with by the daily span. I'm now talking about the weekly or the 38 hour aspect of the claim, not the daily span.

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MR BULL: Well, I would say that if you average it out over a month you would have the possibility that you could have long hours worked in the final week where there would be, I say, you know, the real fatigue and disability.

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VICE PRESIDENT HATCHER: What, because of the number of long days in a row?

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MR BULL: Correct. And if you work seven days and every day you work eight hours, that has an effect on you and that - - -

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COMMISSIONER ROE: But if it's permitted for full-time and part-time employees why shouldn't it be permitted for casuals? It seems to me one of your central arguments is, you know, dealing with this issue of equity, that is, there's an encouragement for casual employment in these industries because there's an economic incentive because there's no overtime provisions.

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MR BULL: That's correct.

PN68

COMMISSIONER ROE: You also raised the issue of the two hour minimum versus the three hour minimum currently applying for full-time employees. And isn't the principle that we should be looking at the question of, you know, trying to remove some of the, I'm talking about from your point of view, to remove some of the disincentive for part-time and full-time employment. And if that's the case, shouldn't we be looking at these things in terms of equity?

PN69

MR BULL: Well, I've said in my submissions in relation to the part-time work issue that you need to look at the context, and that there's a particular problem in this area where there's excessive casualisation. It's been hovering around 60 per cent for about 10 years. I'd say that's too much. There' a quote from, I think it's, 13 July, it's the Country Publican, and basically the gentleman says that – you know, confirms the obvious, that it's not desirable for a business to have a large proportion of their workforce casual who can ring up the next day and say, "I'm going to Europe". So it doesn't help anyone. And where there is common ground with the employers is that we both believe that there is excessive casualisation in this particular area, and it's unhelpful.

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I'd say if you're going to solve that problem, it's not just a matter of looking at flexibility, and that's the catch word that employers use, and I say that's undesirable. You've got to look at the broader cost structure of the categories of employment. And in this particular area it's highly award reliant. People are paid at the award and frequently below it, so small differences in the award cost structure do have a significant effect in terms of recruitment preferences, for want of a better term. So I'd say you do need to have some disincentive to hire casuals, so you need to make that less attractive. And I think that needs to be acknowledged as one of the reasons for the changes I'm suggesting.

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COMMISSIONER ROE: That in essence - - -

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MR BULL: But they're equitable changes. They're not, I'd say, inappropriate.

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COMMISSIONER ROE: But, Mr Bull, that, in essence invites the Bench to form a view that casual employment is somehow a lesser form of employment than the other forms of employment.

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MR BULL: I didn't say that. I said a proportion, so if you have too many of the casual workers as a proportion I say it's not appropriate and, look, you know, from an economic point of view, there's no reason why you couldn't have 100 per cent of a workforce as casuals but there are equity issues which I say that, you know, the Act obligates the Commission to take into consideration. And it also becomes economically inefficient because a business needs some certainty. They need some ability to invest in their employees and so forth.

PN75

So it's like anything there's a proportion of the workforce which should be engaged casually. I simply say in this particular industry the proportion is too high. It's out of whack and one of the reasons it's out of whack is that the award arrangements made casual employment too easy. So I'm not suggesting that – this is not a statement that of casual bad/permanent good, it's about the proportions.

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COMMISSIONER ROE: You raised the argument quite strongly in your submissions about the part-time issue that it shouldn't be looked at in isolation and that you need to address – you particularly point to this issue of the two hour versus the three hour minimum as an example of that point. So if that's the case how could we introduce overtime for casuals, if we decided that that's what we should do, and create a new differential in terms of the arrangements as to when overtime applies for casuals when compared to full-time employees?

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MR BULL: Well, you're never going to have perfect equivalents because there are differences in the categories of employment.

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COMMISSIONER ROE: Differences, yes.

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MR BULL: So it's always going to be a rough thing and I've sought in our draft further amended variations to have something which I say is roughly equivalent. It makes the choice evenish and it's never going to be perfect because they're different categories of employment and I have suggested that the minimum engagement or the maximum ordinary hours that permanent workers should be allowed to work should be made 10 hours to be equivalent with the criteria, and we say is for intra-day overtime. And I suppose, I think, I've borrowed from the Metals case.

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COMMISSIONER ROE: Yes.

PN81

MR BULL: Where they talk about, which is the submission of the Commonwealth that they're, you know, cost equivalents whatever that means, should be something that is aimed for.

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VICE PRESIDENT HATCHER: But you could have a provision that presumably that said if a casual is on a four-week roster cycle, or for that matter, a two-week roster cycle, that the maximum number, but for the 38 hours, could be averaged over the roster cycle.

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MR BULL: You could.

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VICE PRESIDENT HATCHER: You could do it.

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MR BULL: You could do it.

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VICE PRESIDENT HATCHER: Yes. I think that is how it works for the - - -

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MR BULL: But I would ask you not to.

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VICE PRESIDENT HATCHER: No, you don't want them, I appreciate that. Yes, yes.

PN89

MR BULL: Because I think it defeats the - well, the mischief that we say needs to be solved by the absence of overtime for casuals because they work intermittently. But obviously if you had intra-day overtime that would still be a very useful entitlement. But there's also, I think – you also want to – perhaps something that's lost is that permanent workers under these awards are also – they're not utilised as much as they perhaps should be, but they're also – part-time, I think, has been historically unattractive but a permanent employee is also – some of the conditions I say would be vehicles for, you know, anyone on salaries, for example, seem to often be ways that permanent workers are exploited. Award entitlements are avoided. You know, they're usually the more senior manager and, you know, they're told, "Just work a little bit longer. You're on salary" and so forth.

PN90

So I think you do need to have, I say, some fairly significant change to get away from the dependence on casual employment which dominates this sector. And it needs significant change because if you had the monthly 38 hours averaging that would perhaps, once again, leave permanent employees in a position where it's desirable to make them work long hours and so forth if that's clear.

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COMMISSIONER ROE: I don't quite follow that.

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MR BULL: I might withdraw that actually. No, we're not in favour of an averaging. Any other matters? Okay. Thank you.

PN93

VICE PRESIDENT HATCHER: Yes. Mr Warren?

PN94

MR WARREN: Your Honours, Commissioner, dealing firstly with the casual claim by the union with respect to overtime, your Honour, the Vice President, raised questions of spread of hours in various awards. In the Club Award it's a variety, and your Honours and Commissioner will see it in clause 26.3 of the

award. There is various ways that a person can work, or could be rostered to work the 38 hour week. In a 19 day month of eight hours per day, spread of 11 hours; a four days of eight hours and one of six, et cetera, another spread of 11 hours; four days at nine and a half hours, a spread of 12 hours.

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VICE PRESIDENT HATCHER: That means you do whatever you like, doesn't it?

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MR WARREN: Yes indeed, your Honour. I don't think it quite says it that way. It says any combination of the above. And one of the above is no spread of hours. There's no doubt about that, but bearing in mind also when the union is pursuing a reduction it appears in the full time spread of hours that's in the award stage. The award stage hasn't been even arrived at this stage in this Commission.

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As I understand it there's the first directions hearing going to occur in December, and then there will be draft awards circulated, there will be conferences into next year. It is not, we would strongly submit, for this Commission in these proceedings to start moving or considering the spread of hours for full-time or part-time persons any change from the current position. The employers haven't even, or no one, has even put any evidence on that yet or had any opportunity to do so. So we're really dealing with the current awards, the current three awards, and the claim is for the implementation of overtime payments for casuals. I'll address - - -

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VICE PRESIDENT HATCHER: Well, no reasonable employer is going to roster anyone for more than 12 hours, are they?

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MR WARREN: I don't think there's any evidence that that occurs, and I think the evidence certainly in the part-time case, your Honour, when questions were put from the Bench to the various employer witnesses, even the employer witnesses who were employees, I don't think any of them said they were rostered for more than that. But the evidence is there on that, and I note your Honour's observation.

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VICE PRESIDENT HATCHER: And therefore theoretically the imposition of an overtime requirement, say, after 12 hours, would not be any practical imposition upon your clients and their members?

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MR WARREN: For full-time employees or part-time?

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VICE PRESIDENT HATCHER: No, for casuals.

PN103

MR WARREN: Your Honour, the evidence simply isn't there, we say, to grant such a claim.

PN104

VICE PRESIDENT HATCHER: No, answer my question. My question was if no reasonable employer rostered anyone for more than 12 hours, the award of overtime for casual after 12 hours would therefore not constitute an imposition upon your clients?

PN105

MR WARREN: On the evidence as it currently sits there's no evidence to say that it would impose a difficulty. We accept that, but that doesn't say that we accept that the Commission, in this case, should in any way introduce casual overtime. And we've spelt it out very clearly in our written submissions as to why that's the case. We've spelt it out very clearly in the long history of when casuals, for example, a casual engagement in the Hospitality Award, the old Hotels Award, there's a long history of claim and rejection by this Commission of such a claim. There's a long history of consent to the current position going back to the 1970s. There's also the history with respect to the award modernisation process of the two documents with respect to the Hotels and in respect to the Restaurants and indeed Clubs. The document put up as the draft award was the document adopted from the union and the union knowingly, we say – it's well for my friend to stand here and say it's some accident that occurred, that casuals were left out on the slip rule almost, but it is clear that the award that was put up, the draft award and the award that's been adopted, was an award supported by the union and put forward by the union, and it did not include the payment of overtime for casuals. And the modern award was made on that basis.

PN106

Indeed in the Restaurant Award, and your Honours and Commissioner will be aware there was a letter written by the Restaurant and Catering Industrial on 26 August to your Honour, Vice President's Associates, at least, it's included in the papers, and indeed in that the restaurant industry extracted a provision from part of the paragraph 193 of the Full Bench decision in 2009 making the Restaurant Award, and noted particularly:

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Including the labour intensive nature of the industry and the industry's core trading times particularly and considering the penalty rate and overtime regime it was considered –

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It was considered –

PN109

at the modern award time.

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It was considered when the award was made.

PN111

VICE PRESIDENT HATCHER: Because what's changed since then is section 134(1)(da)?

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MR WARREN: Your Honour, and section 134(1)(da) does not give any precedence, with respect, to the payment or the consideration of overtime payments to any other provision in 134. Yes, certainly, well indeed when one looks at the, and I'll address you shortly on the ministerial directive with respect to the restaurants and the particular consideration needed to be given to restaurants in 27(a) of the directive, but, yes, your Honour, certainly that provision has been inserted into the Act. But there's nothing, and no reading with respect to that can lead you to the conclusion that greater emphasis or greater reliance is to be placed on 134(1)(da) than any other provision with respect to the modern awards objective. The modern award objectives remain with respect to:

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The likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden. The need to ensure a simple, easy to understand, stable and sustainable modern award system.

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Flexible modern award work practices in 1(d). So it would be – and I understand your Honour's – it would have, with respect, a great force for the union's argument if those had been taken out or 134(1)(da) had been said, "This is to take precedence over other modern award objectives". But, as we've outlined in our written submissions, that is not the case, and that's the circumstance, your Honour.

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VICE PRESIDENT HATCHER: So, what, it's an amendment that changed nothing?

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MR WARREN: It did not effectively give the Commission any more directive to do anything more than it currently is doing. It highlighted that the Commission take that into account. Take it into account but it doesn't, at the same time, say to the precedent or over any other modern award objective. It simply says you are to take these matters into account. Now, it may well be spelling out the obvious when the Commission, in its normal process, would take into account the case put by the various parties before it. It doesn't overrule the Commission, when making the modern award, saying it particularly directed its attention to overtime provisions.

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VICE PRESIDENT HATCHER: Well, the law on statutory requirements that take matters into account means they have to be considered and given significant weight in the decision making process.

PN118

MR WARREN: And there's no greater precedence one over the other, with respect, your Honour. It certainly is listed and it says take it into account, but it

doesn't say you should take this account, and it takes precedence over any other modern award objectives. And that being the case that should be the process followed.

PN119

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay. But you've got to show that in somehow introducing an overtime provision for casuals in these awards would be inconsistent with those other requirements in the modern awards objective. Merely reciting the history, we know that they're not there. We know that in the past the Commission hasn't sought to introduce them and that's understood.

PN120

MR WARREN: And the union puts it that this is some sort of an accident.

PN121

SENIOR DEPUTY PRESIDENT HAMBERGER: And the union may have supported that indeed in the past but now we're confronted with this legislation. We now have to – I appreciate – I agree with what you're saying that you don't necessarily have to give that precedence, that particular subclause precedence, over other subsections but we now have to consider it. Where's the evidence that somehow an overtime clause, depending on how it's drafted, would be inconsistent with the other requirements that are placed on us?

PN122

MR WARREN: It's not a question of inconsistency with respect, your Honour. It's a question of whether the case has been put to this Commission to warrant the claim. You've had two witnesses, two witness who work in the industries, contrast quite significantly with the case put by Clubs in the part-time case which I'll come to shortly. Significant evidence was put from all the eastern States from both employers and employees. Employees saying I want to keep a part-time provision, the current part-time provision, or indeed in Queensland saying that would be of great benefit. In New South Wales saying I want to keep that provision because it makes me a part-time rather than a casual. Now, that was the sort of evidence that was put in support of that spread of the provision that was read circled as it were with respect to the New South Wales provision on 1 January 2015.

PN123

DEPUTY PRESIDENT KOVACIC: Well, equally, some of that evidence, Mr Warren, from some of the employers that was led was to the effect that they were active in managing the rostering of employees to avoid incurring overtime. And my recollection is that the witness, particularly from, I think, St George Leagues Club, was one that sort of made a - - -

PN124

MR WARREN: And she said that's her business to ensure but - - -

PN125

DEPUTY PRESIDENT KOVACIC: That's right. And I'm not certainly disputing that but that's, in essence, I suppose the extension of that, is why would it differ if

the Commission were of a mind to introduce a similar provision in respect of casual employees in terms of overtime?

PN126

MR WARREN: Your Honour, my friend says that there's a significant growth of casuals in this overall industry.

PN127

COMMISSIONER ROE: He didn't use the word "growth". He said it was the proportion was too high.

PN128

MR BULL: Yes.

PN129

MR WARREN: And indeed there has been a growth, Commissioner, since the part-time provision in the clubs was read circled, my words, on 1 January 2015. The evidence of Mr Tait, I think it's exhibit 206 in the proceedings, showed the significant growth in casual engagement in the club industry since that provision was read circled on 1 January. It was an increase of 10 per cent in total in club casuals. And our point there of course being if you wish to increase the provision, or you want to disincentivise casual engagement and incentivise part-time employment then the answer is to grant the claim, particularly in the club industry, and as supported by the AHA, in the hospitality industry, for the more flexible provision of part-time employees.

PN130

COMMISSIONER ROE: There's a unity ticket on that in the sense that there's a unity ticket that we need to address the issue of the part-time provision. So that's one part of the equation in dealing with higher proportions of casuals, but it's also – you've also got to look at the other side as well, which is whether the provisions applying to casuals are appropriate and equitable.

PN131

MR WARREN: I understand, Commissioner, your point but my point not raised by my friend is that it's as well to say that the current provisions for casuals does not encourage the growth of anything other than casuals because of a lack of overtime. By the same principle if you want to discourage casual and encourage part-time you make it more flexible to employ part-time.

PN132

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but you could do both. They're not inconsistent. You could, if you like, tackle the issue from both ends.

PN133

MR WARREN: We don't urge the Commission to do both.

PN134

SENIOR DEPUTY PRESIDENT HAMBERGER: I know the union supports the other but what I'm saying is they're not inherently inconsistent. You could have, if you like, more – you could introduce an overtime clause for casuals and at the

same time free up the part-time work provisions to make them more flexible and more useable. What I'm saying is they're not inconsistent. They're actually arguably consistent.

PN135

MR WARREN: Your Honour could well take that view.

PN136

VICE PRESIDENT HATCHER: Well, can I just add to the pylon here that your clients seem to support, well not seem, they do support an expansion of part-time employment, but that's an area of employment which is subject to overtime restrictions, that is, what's the logic of saying we can't have at any price any overtime for casuals but we want to transfer casuals to part-time to a much greater extent in a scenario where the part-timers will be subject to overtime?

PN137

MR WARREN: Subject to overtime - - -

PN138

VICE PRESIDENT HATCHER: What's the logic of that?

PN139

MR WARREN: Subject to overtime beyond 38 hours?

PN140

VICE PRESIDENT HATCHER: Yes.

PN141

MR WARREN: Not subject to overtime if agreement is reached to work those additional hours below 38 hours.

PN142

VICE PRESIDENT HATCHER: Yes.

PN143

MR WARREN: Well, those are two provisions not contained within the union's claim for overtime for casuals.

PN144

VICE PRESIDENT HATCHER: Yes, but overtime over 38 hours. So what's the logic of saying we want to encourage part-time employment where we have to pay overtime up to 38 hours, but we can't pay casuals overtime after 38 hours at any price?

PN145

MR WARREN: The logic is, your Honour, simply that the casuals have had that situation for years and that's where it stands and those are the clear positions of the three industry employers I represent.

PN146

VICE PRESIDENT HATCHER: All right.

PN147

MR WARREN: Clear position. We simply say, with respect to that, that there has been an inadequate case put. If this Commission is to change what's been occurring for decades on the basis of two lay witnesses, when one considers the expert witnesses, Dr Oliver drew all his material from overseas, and Dr Muurlink didn't differentiate between casuals and other persons within the industries.

PN148

VICE PRESIDENT HATCHER: Well, speaking for myself, I don't need an expert to tell me that workers get tired after working 12 hours or more. And, on one view, the only relevant factor we need to know about this claim is that casual workers don't get overtime. I mean, I'm not sure what evidence you need to deal with this matter beyond those two propositions.

PN149

MR WARREN: And the third factor being, that's been considered in the past and it's been rejected, and the current award is by consent, it's the fundamental principles, your Honour, of this Commission is if you want to change something you should bring a case to say it should be changed, and indeed the more significant the change the more significant the case that should be put.

PN150

VICE PRESIDENT HATCHER: Well, what I'm trying to explore here is what are the relevant factual matters that weren't proven?

PN151

MR WARREN: Well, with respect, your Honour, the payment of casuals' overtime. Unless one looks at it and the Commission, with respect, shouldn't look at it on a generalised basis and say, "Well, everyone gets overtime, why shouldn't casuals in this industry get overtime. But that is expressly excluded, with respect, we say when one considers the modern award and the modern award process that the Commission is supposed to look at each individual award on its own merits. And to be persuaded to move and say well, everyone who is a casual employee gets overtime, and we note, of course, in our submissions, we say that the, and we don't take necessarily the time of the Commission, but you shouldn't accept, and we say in our submissions you shouldn't accept, that everyone else gets overtime who is a casual employee. That's been a table put up, but without the awards attaching to it, and when one peels the onion another layer you find all sorts of issues in there but we're not going to take the time of this Commission for the next three days going through every individual award.

PN152

But what we say is this: it is not the proper process of this Commission when applying the Fair Work Act, and the jurisprudence that's been attached to that, to say that we should look generally outside of these particular industries which have not have had casual overtime for decades and it's been considered for decades, and the award that's been made was made by consent on the union's instigation but that all that's changed is you put up two people to say it would be nice to get overtime.

PN153

Now, that's the case that's been put, your Honour, and we say quite clearly that the provision in the Act says each individual award must be considered on its own merits. And the reason for that should be considered on that awards merits and the reason should not enter into it that industry generally, manufacturing industry or whatever generally, if you're a casual you get paid overtime. That should not be a consideration of the Commission, because, we say quite specifically, that the Commission is directed to look at each individual award on its own merits and that's our response, your Honour. And we say if the Commission, when it's properly considering this matter, should consider the provisions of the Act, should consider the jurisprudence that's been developed around that and that's where it stands. And the Commission should not be persuaded just because it's put that industry generally gets overtime for casuals therefore let's bring it all up to the mark. There needs to be a significant case for a significant change, and this is a significant change, and the case that's been put is not significant and we've taken the Commission, in our various written submissions, to the various decision of the Commission which emphasise that point. I've already said and responded to the union's submission indicating that, in essence, it was an oversight and it, we say quite clearly, didn't occur by accident. I can put nothing further to the Commission other than emphasise our written submissions with respect to casuals and overtime.

PN154

I now turn to part-time. We rely on our written submissions and particularly our submissions at the conclusion on 15 September 2016. I just note for the record the matter number on those submissions is shown as 283. It should read 196. It's a typographical error. It's clear from those submissions that Clubs Australia Industrial has given serious consideration to the, I call it, provisional position that was put by the Commission on 2 September attached to the directions given on that date and, in particular, to that which is headed Registered and Licensed Clubs Award.

PN155

The Commission will note in the written submissions for the Club Australia Industrial from paragraph face and following, in essence, Clubs Australia Industrial says that yes the provisional clause would satisfy the position of Clubs Australia Industrial with one very important exception, and the very important exception is dealt with from paragraphs 9 and following which goes to the provisional suggestion in clause 12(f) and that reads:

PN156

The employee may alter the days and hours of the employee's availability on 28 days' notice.

PN157

We set out and posit a particular example of the difficulties that could arise in paragraph 12 of our written submissions. In other words, when the employment commences with the part-time employee, and the employee comes to the employer and says, "Look, I'm available every Friday and Saturday", and the employer says, "Well, that suits me fine because that fits right in with a busy period of time and I can guarantee you certain hours on those days, and these are your guaranteed available hours, and you may be offered additional hours beyond

that, and if you wish to take them you take them". Then if the employee then says, six months in, "Look, I'm now busy Friday and Saturday nights, I'm now only available Tuesday and Wednesday nights", now, if the clause sits as the provisional clause is suggested that would mean that employer then has to allocate that employee time in accordance with the original contract on the Tuesday and Wednesday nights. The employer may not need someone on those days, may not need an additional person on those days, may already have locked in someone else to work on those days, whether it be a full-timer or a part-timer, and to honour the provisions of suggested clause 12(f) something has got to change to an existing employee.

PN158

VICE PRESIDENT HATCHER: Well, but presumably the thing that would change would be that the employment couldn't continue.

PN159

MR WARREN: Yes.

PN160

VICE PRESIDENT HATCHER: And if you've got an employer who wants work done on, say, Friday, Saturday, Sunday and an employee who says, "I can't work on Friday, Saturday and Sunday" you've got an employment relationship that can't continue.

PN161

MR WARREN: And then they walk straight into an adverse - - -

PN162

VICE PRESIDENT HATCHER: It's not an answer to say that the employee must continue to work Friday, Saturday and Sunday. The only answer is that the employment comes to an end, isn't it?

PN163

MR WARREN: And then one might be well and truly faced, if that's the provision in the award, with an adverse action claim with an employee insisting on an employment right, an employment right being you can give notice of 28 days and you can change your roster. And that then leads us into a significant problem.

PN164

VICE PRESIDENT HATCHER: Well, that's possible, but the other possibility is if you don't have that position the employer says, "Look, I don't care whether you're available or not, I'm going to keep on giving you work on Friday, Saturday and Sunday".

PN165

MR WARREN: Your Honour, quite clearly, that is not the evidence that's before this Commission. Quite clearly - - -

PN166

VICE PRESIDENT HATCHER: But that's unworkable too. I understand the point but I'm not sure that simply saying that the employer can simply say I don't agree and force the employee to keep on working on these hours is the answer to the question either.

PN167

MR WARREN: The parties agree at the start what the hours will be. The parties can agree to vary those throughout the term of the engagement. The evidence is clearly before this Commission, both from the employees and from the employers that no one has been taken advantage of with the way it works at the moment. No one has come forward to say, "I've been forced to do this and I didn't want to do it". No one has come forward to say that. Indeed, the evidence is it's a very cooperative situation and people bend over – the gentleman from the Victorian club that basically employed University students, near Swinburne University it was, and he gave evidence how the employees come to him at the start of each semester, "Here's my hours I've got lectures for", and he works around it, and they change things around.

PN168

That's the type of evidence this Commission has heard. Not one person in cross-examination or otherwise has said, I've been leant on to do something. So the Commission must be comfortable, we say, should be comfortable that if the parties are left to their own devices to come to an agreement they will come to an appropriate agreement. If what your Honour is suggesting, well, that the employment relationship just comes to an end, I foresee difficulties, as I've already extrapolated, and you say it may occur. I put it at a higher, your Honour, I say it will occur.

PN169

VICE PRESIDENT HATCHER: Of course it will. I mean, and it speaks for itself, I'm not denying the force of the problem you're raising. It's really what the answer is. I mean, if, I think as you say, look, the employer has to agree to the change but again if the employee is truly not available to work on the days and the employer doesn't agree with the change the employment would, by the same token, still have to come to an end.

PN170

MR WARREN: Yes. And provided there is an allowance, a provision, for that agreement to occur. The change to the original hours can be made by agreement between the parties. And if that agreement is there then that would safeguard the position.

PN171

DEPUTY PRESIDENT KOVACIC: What about in circumstances where agreement can't be reached and it's arguable that it might be a case of either party unreasonably withholding that agreement. How do you deal with that scenario?

PN172

MR WARREN: Well, there's clearly a dispute provision within the award. You could even put in a provision that agreement will not be unreasonably withheld, and then it becomes a question of what's reasonable and what's unreasonable.

PN173

DEPUTY PRESIDENT KOVACIC: Yes.

PN174

MR WARREN: One could certainly consider that situation.

PN175

SENIOR DEPUTY PRESIDENT HAMBERGER: I'm just trying to think, another possibility might be that you had a sort of let out clause that says if – because it's a bit artificial to say the employer has to agree that someone's availability has changed. Just thinking logically, let's say you work Monday, Tuesday, forget about the weekend for a minute. You said you're available Monday and Tuesday, but you're studying part-time, you're going to lectures in the evening and now the lectures are on Monday and Tuesday and you're available Wednesday and Thursday. Now, I mean, to say well, the employer has to agree that your availability has changed is somewhat artificial. I'm wondering whether there could be a provision in that it said if the employee chooses to vary their availability then the obligation to provide them the hours ceases. Something like that. I'm just trying to think through. I think I'm drawing on from what - - -

PN176

MR WARREN: Off the top of the head that would solve the problem. That would solve the problem, your Honour.

PN177

COMMISSIONER ROE: And just speaking for myself, having heard the evidence, wouldn't you want also to have a provision then that reasonable attempts should be made to accommodate, because it works both ways.

PN178

MR WARREN: Yes.

PN179

COMMISSIONER ROE: And it does seem in the clubs industry that is what people want to do, so I get that in the clubs industry. But if somebody's availability increases and we had evidence of that, you know, somebody who's no longer got a University obligation or their University workload has reduced, and they want to increase their availability then they want the employer to consider whether they can have more shifts. Now, employers consider that. They don't necessarily have an obligation to give the people the extra shifts, but they have an obligation to consider it, or if they change from classes on Monday and Tuesday to Wednesday and Thursday, having some obligation to consider that.

PN180

MR WARREN: But, Commissioner, that's all possible, if it's an obligation to consider and give reasonable consideration in both directions. There certainly is no evidence that any unreasonable consideration has been given in this industry at all, and that people bend over to accommodate.

PN181

Can I just simply make one other point on that also, the 28 days' notice could bounce in the wrong direction as well. The employee might not be able to give 28 days' notice. I mean, I don't think you should necessarily put a timeframe of what notice is required because, once again, it's a question of reasonableness. The employee might suddenly get notification that this lecture has changed or whatever the case might be, or one of his children is sick, or whatever the case may be, and so there's - - -

PN182

VICE PRESIDENT HATCHER: Well, I mean, it's meant to address permanent ongoing change to availability not day-to-day crises.

PN183

MR WARREN: Yes, certainly and that may be an ongoing change. Preschool commitments might change. There's all sorts of issues, your Honour. What we say is the clause that is put forward by the Commission is workable in this industry but for that, and I think the Commission understands the "but for" that we're putting.

PN184

SENIOR DEPUTY PRESIDENT HAMBERGER: In terms of, you said, "this industry" as in clubs you're referring to.

PN185

MR WARREN: Correct.

PN186

SENIOR DEPUTY PRESIDENT HAMBERGER: Would it work for restaurants and accommodation as well?

PN187

MR WARREN: In my submission, certainly.

PN188

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. I mean, you're representing all three.

PN189

MR WARREN: No, well, actually in this one I'm - - -

PN190

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay.

PN191

VICE PRESIDENT HATCHER: So what's the issue with restaurants? So there's no claim for restaurants but what's the nature of the part-time clause in restaurants?

PN192

MR WARREN: I don't think there is one.

PN193

VICE PRESIDENT HATCHER: Well, is there one or?

PN194

MR BULL: It's the substantive clause, so it's the Federal standard.

PN195

SENIOR DEPUTY PRESIDENT HAMBERGER: It's standard.

PN196

VICE PRESIDENT HATCHER: Federal standard.

PN197

MR WARREN: I'm not briefed on that one, I'm sorry. I can't assist you on that.

PN198

SENIOR DEPUTY PRESIDENT HAMBERGER: But we did have a submission, I think, from the Hotels - - -

PN199

MR WARREN: My friend, Mr Ryan, will be speaking as far as the AHA is concerned, and we note that a same clause has been suggested provisionally in the hospitality industry as well in the same directions, and I've no doubt Mr Ryan will be addressing. Unless there's any further assistance I can give, those are the submissions.

PN200

COMMISSIONER ROE: Well, I would be assisted by one thing.

PN201

MR WARREN: Yes, certainly, Commissioner.

PN202

COMMISSIONER ROE: So United Voice have tackled it not just from the issue of the availability issue, which you've raised, but they've looked at the issue of the guaranteed hours and they're concerned that the guaranteed hours might be set artificially low, and they've put up some proposals to try and address that issue which I think are two-fold really. I mean, Mr Bull will correct me if I've got it wrong, but I think essentially it's saying that the guaranteed hours should reflect what the employer really needs, and that there should be some review of that after 26 weeks so that if it's been set artificially low it can be adjusted. Right. So that's my understanding of the solution to that issue being proposed by United Voice. I'm interested in what you say about that.

PN203

MR WARREN: We question the notion of a review. We say eight hours as suggested is appropriate.

PN204

COMMISSIONER ROE: Yes, I know the eight hours is a different issue.

PN205

MR WARREN: If employers have a good employee and they want to continue to employ that person they will engage them as many hours as that employee wants to be engaged in practical terms.

PN206

COMMISSIONER ROE: It's not the issue.

PN207

VICE PRESIDENT HATCHER: But let's say you've got someone is engaged for eight a week but it turns out that after two years they're working 30 hours a week, and the person wants to go and get a bank loan, and all they've got to show the bank is look, I'm guaranteed eight hours a week. I think what's being put is there should be some mechanism to say, look, I'm working 30 hours a week, I've done so for two years, can we review it to up my guaranteed for 30 hours which gives the employee greater security, reflects the actuality and might assist with bank loans and that sort of thing.

PN208

MR WARREN: In those circumstances, your Honour, there wouldn't be a difficulty. Once again, in practical terms that's not going to be a difficulty. But if you move the bar too high and you say there's that bar at 16 hours or 22 hours or whatever it is, you're not going to be encouraging part-time employment.

PN209

VICE PRESIDENT HATCHER: It's not a case about changing the minimum. It's a case about reviewing the guarantee in terms of the employee's actual hours being worked.

PN210

MR WARREN: That would certainly be available to do so.

PN211

VICE PRESIDENT HATCHER: Right.

PN212

MR WARREN: As the Commission pleases.

PN213

VICE PRESIDENT HATCHER: Thank you, Mr Warren. Mr Ryan?

PN214

MR RYAN: Your Honours, Commissioner, I appear for the Australian Hotels Association, the Accommodation Association of Australia and Motor Inn Motel and Accommodation Association in matter 196. In this review the AHA and the Accommodation Association have sought a variation to the Hospitality Industry Award to incorporate a flexible part-time provision. The detail of that provision is set out in annexure C attached to our final submissions dated 16 September 2016. And that constitutes, I suppose, for want of a better word, your Honours and Commissioner, a hybrid of what the AHA was seeking and the provisional view expressed by the Full Bench, or in other words, the provisional view expressed by the Full Bench with some modification.

PN215

In support of our claim we rely on our submissions dated 12 October 2015 and 16 September 2016 and the evidence which was led by the AHA and the Accommodation Association and we set that out in our 16 September submissions at paragraph 18.

PN216

VICE PRESIDENT HATCHER: Sorry, Mr Ryan, the hybrid clause, where is that?

PN217

MR RYAN: Annexure C.

PN218

VICE PRESIDENT HATCHER: To which submission?

PN219

MR RYAN: Of 16 September submission. That's in the form of a draft determination. And the annexure immediately before that, annexure B - - -

PN220

MR WARREN: Tab A.

PN221

MR RYAN: - - - the provisional view in a markup.

PN222

COMMISSIONER ROE: Sorry, Mr Ryan.

PN223

MR RYAN: If your Honours, Commissioner wishes to see in markup version the amendments or modifications that were made they're set out in annexure B. Now, in total there were seven witnesses, six of whom gave evidence relating to the mix of venue types falling within the coverage of the Hospitality Award that covered accommodation hotels, metropolitan suburban pubs, rural and regional hotels and pubs as well as caravan parks. And they were located across various state and territories.

PN224

The seventh witness, Mr Chris Gatfield, gave evidence in relation to a survey undertaken by the AHA. And we don't put that survey any higher than what we set out at paragraph 28 of our submissions, that is, a snapshot of the broad views and observations of the respondents to the survey and did not represent a scientific or weighted analysis.

PN225

Now, in terms of the claim run by the AHA and the Accommodation Associations there are some underpinning points which were set out in our submissions which I just want to briefly touch on. First, the modern award must be of utility for the industry or occupation that is covered by it and in particular where a modern award provides for a type of employment, the parameters of that type of

employment or category of employment must be able to accommodate the characteristics of the industry or occupation and we've set that out in a little bit more detail in our 12 October '15 submissions at paragraphs 39 to 40.

PN226

Secondly, we accept the view of the Full Bench in the award modernisation proceedings where it was observed that the essential characteristics of part-time employment include some degree of regularity and certainty of employment. It is not absolute certainty. It's some degree of regularity and certainty of employment but the requirement in our submission to lock in a part-time employees' hours of work including actual starting and finishing times goes too far.

PN227

In our final submissions we summarise the main points of the evidence led from each of the witnesses and that's set out at paragraphs 18 to 39. Now, in the submissions in reply, and the only submissions in reply, was a submission from United Voice and a submission from Restaurant and Catering Industrial. There was no real detailed challenge or detailed submissions concerning or opposing that evidence and/or the conclusions or observations that we drew from that evidence, and those conclusions or observations are set out at 67 to 68. And in our submission, your Honours, Commissioner, we submit that the threshold envisaged by the Full Bench in the Security Services Industry Award decision has been met.

PN228

In terms of the submission and evidence in reply United Voice led evidence from three witnesses. Firstly, Mr Keith Harvey, and in our submission little weight can be given to that evidence. The nature of the evidence is of little relevance to this proceedings and his conclusion regarding compliance in the industry is at odds with the conclusion reached by the Fair Work Ombudsman. And his evidence there was to refer to a number of reports from the Fair Work Ombudsman and concerning compliance within the industry. I think the submissions by United Voice referred to compliance being endemic in the industry whereas the conclusion from the Fair Work Ombudsman says, and this is at 56 of our final submission, the report continues - sorry, at 55:

PN229

These sectors had a better understanding of their rights and obligations than we expected in light of our initial complaint analysis.

PN230

And then it concludes:

PN231

The report continues overall the audit of the accommodation and pubs, taverns and bars sector has not revealed any significant industry wide issues.

PN232

The remaining two witnesses were Ms Marsiglia and Ms Healy. Ms Healy, of course, was her name and her employer was suppressed and redacted on the public record, and she, in any event, was covered by an enterprise agreement and

subject to that enterprise agreement had entered into a flexible workplace arrangement under the terms of the agreement and the NES.

PN233

But the extent of their evidence, in any event, went no further than saying that they were concerned about losing a regular pattern of work which, in our submission, can be dealt with by way of a transitional provision, and it appears that there's common ground with Restaurant and Catering Industrial and United Voice on that point.

PN234

VICE PRESIDENT HATCHER: Well, would there be any difficulty if we introduce a clause of the type suggested that having a transitional provision which protects people who are currently on a fairly fixed arrangement and without apparent difficulty that they - - -

PN235

MR RYAN: Not at all, your Honour, and we deal with that – I'm getting a bit ahead of myself at the moment, but 79 to 81 of our final submissions, and we submit that that would be a convenient and sensible way to accommodate existing part-time employees. And I note in the modified provisional view submitted by United Voice that they essentially pick up almost an identical transitional provision. I think there is one word – I think they say a part-time employee. We start off with an existing part-time employee and I think that's the extent of the difference between the two. Restaurant and Catering made a submission in relation to the Hospitality Award but they didn't address the transitional provision.

PN236

United Voice, as I alluded to earlier, in the award modernisation process the Full Bench referred to the essential characteristics of part-time employee requiring some degree of regularity and certainty. United Voice picked that up in their submissions, but otherwise go on to submit that the current part-time provision is desirable and it, or important elements of it, should be maintained.

PN237

They make various submissions about the cost profiles of different types of employment but they do not provide any detailed analysis of that, nor is there any evidence of that before the Commission. And I think this came up at some part along the way this year in terms of what costs more, a casual or a part-timer, and there's different ways you could cut that cake, but what we would say is hour for hour the cost of a casual employer is in excess of a part-time employee and there's no cost advantage by employing casuals. And, in our submission, it's a dominant factor and pushing employers to engage casuals is the restrictive provision of the part-time employment clause in the award combined with the deeming effect.

PN238

Now, in terms of the current provision being desirable I'm seeking to maintain that what needs to be at the forefront of the Full Bench's mind is that the current part-time employments arrangements under the Hospitality Award, well, under those arrangements, part-time employment in this industry is virtually non-existent. And on this point, in an exchange between your Honour Senior Deputy President

Hamberger and Ms Elizabeth Cleaves the following took place. Your Honour asked the question:

PN239

Do you think that is the point, that while it's a nice idea for an employee to have set hours, I can see why it would be attractive, the reality is that people in this industry generally don't employ people on a part-time basis.

PN240

And Ms Cleaves responded:

PN241

Yes, that's exactly the point.

PN242

In terms of maintaining important elements we're minded of the Full Bench's observation in award modernisation where part-time employment is akin to full-time employment except the average of hours is less than 38.

PN243

The provisional view maintains a guarantee of hours and in terms of removing the requirement to set actual starting and finishing times the evidence of Mr Leonardi was relevant and he gave some evidence in response to a question from Mr Fleming from the ACTU about employers potentially losing under the AHA's proposal at that stage as this was prior to the release of the provisional view. The question was about employees losing the actual starting and finishing times and set days, and Mr Leonardi's response was that the major benefit for them was being able to know that they had a stable set of hours, so irrespective of the days that they worked, it was known that they were engaged for 30 hours a week, and that 30 hours gave them a sense of a stable income.

PN244

Now, United Voice has referred to, in their submissions in February, the '95 award and that is the Hotel, Resorts and Hospitality Industry Award 1995 and that a loading – there were two types of part-time employment provisions in that award and a loading was applicable to one of those type of provisions and I might just hand up for the Bench, this is a three-page extract. The print reference is M2100 and it extracts clause 16.3. The first six sub-provisions, so 16.3(1) through to 16.3(6) deal with the part-time provision where the loading applies. 16.3.7 then deals with the alternative arrangement which, in their February submissions, United Voice referred to as fixed hours and it required starting and finishing times to be set. More accurately clause 16.3.7 should be referred to as a specific hours provision in that an employee is provided with a specific number of hours falling within a range and then there are some parameters around which those hours can be rostered. Importantly they will get two days off each week or they go the other way in this provision, and the hours are not to be worked on more than five days each week.

PN245

And, in our submission, the loading does not apply to this provision, and in our submission a loading would not be appropriate for the provision that's sought by

the AHA and/or the provisional view expressed by the Full Bench. When one lines them up side-by-side you will see that the provisional view was more aligned with the non-loading provision rather than the provision which the loading applies to.

PN246

Now, in dealing with Restaurant and Catering Industrial they made essentially two points in reply to the AHA. Firstly, it was that the minimum requirement for eight hours for a part-timer be substituted for less than 38. We would oppose that. We think a minimum requirement of eight hours is appropriate and suitable. And, secondly, they made an amendment to, or proposed an amendment, dealing with defining the employee's availability and they submitted that is contracted availability, and they suggested that that be replaced with, at the time of engagement, the employer and the employee will agree on the employee's availability of hours and specify in writing at least the hours of availability for each day of the week. In our view, it achieves the same purpose and we would submit that that change be rejected.

PN247

Just dealing with the provisional view, your Honours, Commissioner, there are some modifications which we propose. These commence at page 28 on paragraph 74 of our final submissions. The first of those is the change of availability on 28 days' notice, and I don't wish to recite everything that happened about 15 minutes ago, but the proposal that was put by your Honour, Senior Deputy President Hamberger, in the time that I've had, may be able to deal with that situation adequately.

PN248

The other modifications we make is to reduce or to standardise the maximum number of hours in 12(e)(ii) so it was consistent with the existing provision in the award instead of in excess of 12, in excess of 11.5 and that's, again, just to make that consistent with the existing provisions in clause 29.

PN249

The next modification we make is to remove the word "consecutive" for two days off.

PN250

VICE PRESIDENT HATCHER: I'm sorry, what did it say before?

PN251

MR RYAN: It said 12, your Honour. So 12(e)(ii), so:

PN252

The employee must not be rostered working in excess of 12 or less than three.

PN253

And we've just changed that to, well, we said less than three or in excess of 11.5. And because there is an existing minimum/maximum hours for part-time employees in clause 29(ii) of the award and so that makes it consistent with that. The same minimum/maximum applies to full-time employees.

PN254

The next modification, in our submission, deals with the proposing, or the removal of the word "consecutive" for two days off. And our submission there, as at paragraph 78, in that it's potentially onerous and would not cater for employees whose availability based on whatever commitments they may have, be it, study, alternative work, family, where that is structured in a way that can't accommodate two consecutive days it would operate as a barrier to part-time employment for those persons and either unnecessarily require an IFA to be entered into or push the employment of that person to casual employment.

PN255

I think I've addressed the transitional provision, and that deals with, or that sums up, the extent of the AHA's modifications. If I can just take – are there any questions before I continue, your Honours, Commissioner?

PN256

If I can just take you then to United Voice's modifications. Firstly, dealing with 12(b) they seek to reduce the maximum number of hours to less than 35. In their submission they've seeking to avoid a situation where part-time employment becomes more attractive than full-time employment. The provisional view as published said it is engaged to work no less than 38 and they're suggesting it should be less than 35. Well, the question that arises, what do you do whereby an employer has 36 hours of work a week? On United Voice's submission on their proposal 36 hours a week would have to go to casual, and that would be an absurd arrangement so we would submit that the existing arrangements published in the provisional view should be maintained.

PN257

VICE PRESIDENT HATCHER: So wouldn't it be overtime?

PN258

MR RYAN: No. In my submission, no, your Honour, because the guaranteed hours have to fall, by default, in establishing the part-time employment arrangement within that range. If you establish that and then you go over each week possibly, or if they're available up to 38 it may, but if the number of hours was 36 by default, in our view, it wouldn't comply with establishing the hours at the outset and pushing the casual employment.

PN259

VICE PRESIDENT HATCHER: Well, you'd just have a regular overtime hour, wouldn't you?

PN260

MR RYAN: Possibly. That could be one way of dealing with it, but it would make more sense to leave the provisional view as it was.

PN261

VICE PRESIDENT HATCHER: I understand that, but, I mean, the same issue arises if, for example, you have a part-timer for 38 and then there's 39 hours work.

PN262

MR RYAN: I accept that, your Honour.

PN263

VICE PRESIDENT HATCHER: You're not going to say it's casual. You're going to have the person, whether part-time or full-time, you're going to have a regular hour's overtime rather than just employ a casual.

PN264

MR RYAN: I accept that, your Honour. Secondly, turning to the concerns that United Voice have that there could be artificially low number of hours set and a mechanism to increase those, in our submission, that a request or a review every 26 weeks is too short a period. If the Full Bench was minded to put in some mechanism in the award or in this part-time provision which allowed that, that mechanism should be: (1) upon request by an employee; (2) it's over a 12 month period; (3) we wouldn't oppose that being absolute on an employer if there was one qualification to that.

PN265

VICE PRESIDENT HATCHER: So what do you mean absolute?

PN266

MR RYAN: That if a request is made to increase the guaranteed hours that the employer must increase those unless there are reasonable business grounds for not doing so. And we wouldn't be opposed to, where there is a refusal, the reasonable business grounds being required to be provided in writing.

PN267

The final modification, in United Voice's submission, is the 15 per cent loading, and I've already addressed that, your Honours and Commissioner.

PN268

COMMISSIONER ROE: Can I just go back to the two consecutive days issue?

PN269

MR RYAN: Yes.

PN270

COMMISSIONER ROE: Yes. The example you give of where that may be a problem is, for example, where an employee wants to, because of their arrangements, wants the days to be separated, right?

PN271

MR RYAN: Wants or – yes, yes.

PN272

COMMISSIONER ROE: So would you consider the issue of it had to be two days and they should be consecutive unless there's agreement to them not being consecutive?

PN273

MR RYAN: I think it could be dealt with that way, Commissioner. The last point in their submissions, United Voice introduce some new claims, and one of those is

reduction in the maximum hours for full-time and part-time employees. I don't wish to say any more than what's already been said about that by my friend, Mr Warren. But in terms of the alternative argument or that's put in relation to the increasing minimum engagement of hours for casual employees from three to four, they submit that there's been a significant merit and evidential case heard in relation to that, and I just wish to draw your Honours and Commission's attention to our submissions. That was in reply to the ACTU claims. And we set these out at paragraphs 48 to 54 of those submissions which are dated 5 August. And in particular at 49 we submit that the ACTU did not advance any direct evidence from employees in the hospitality industry in support of this proposed variation nor is there any level of industrial disputation in the industry relevant to that issue and our conclusion was that the good practice, particularly in the evidence that's set out in those submissions later and elsewhere of employees, particularly middle-aged women with childcare arrangements, school aged children, who are working a short two or three hours shift at lunch time, dealing with kids finishing school, and coming back in the evening, that increase would potentially jeopardise some of those arrangements, and we would submit that the minimum engagement for casuals be maintained at two hours. Unless there was anything further, your Honours, Commissioner, they're the submissions for the AHA and Accommodation Associations.

PN274

VICE PRESIDENT HATCHER: Thank you, Mr Ryan. Before we get to Mr Bull, Mr Warren, sorry, I did mean to raise this with you before, this issue of a transitional provision.

PN275

MR WARREN: Yes.

PN276

VICE PRESIDENT HATCHER: You've no doubt seen the draft that the AHA propose for the Hospitality Award.

PN277

MR WARREN: Yes. Yes.

PN278

VICE PRESIDENT HATCHER: Is there any reason why a similar provision shouldn't apply for clubs?

PN279

MR WARREN: No.

PN280

VICE PRESIDENT HATCHER: Particularly, I think there was some evidence that in the white collar area, that is, in administration there may be more fixed arrangements for part-timers and whether they should be protected from carte blanche under a new provision.

PN281

MR WARREN: That's not an issue. We could see if there is a need for transitional provisions then to the extent there would be, it's questionable of course, but I understand what your Honour is saying.

PN282

VICE PRESIDENT HATCHER: Thank you. Mr Bull?

PN283

MR BULL: Thank you. I might just raise one matter. This relates to our claim for overtime for casuals and the proposition that was put to me that intra-week overtime there should be an averaging facility. So I've just done some calculations on my telephone. Now, I understand the proposition that's been put to me is for the intra-week overtime we have an entitlement that basically says that you can work 152 hours over a month or weeks and that it can be – you average it over the four week period. So I understand one of the possible consequences of that type of provision would be that the employee would be able to be directed to work essentially the last 16 days in the period and work nine and a half hours every day as a casual employee, and that work would not attract any overtime. And we would say that that's not appropriate.

PN284

VICE PRESIDENT HATCHER: But you can do that for a permanent, can't you?

PN285

MR BULL: You could.

PN286

VICE PRESIDENT HATCHER: That is, what was floated was only something you could already do for a permanent and why would a casual get a better deal than the permanent in that respect?

PN287

MR BULL: Well, we could do it for a full-time permanent employee.

PN288

VICE PRESIDENT HATCHER: That's what I mean, full-time.

PN289

MR BULL: Yes, I suppose one of the arguments is that they have actually signed up to be a full-time permanent employee. They do have rosters.

PN290

SENIOR DEPUTY PRESIDENT HAMBERGER: I think this would only apply – well, potentially this could only apply if there was a rostering arrangement.

PN291

MR BULL: Yes.

PN292

SENIOR DEPUTY PRESIDENT HAMBERGER: It wouldn't be that you could just call people in willy-nilly and to get up to the 152 hours.

PN293

MR BULL: Well, that's what they can do.

PN294

SENIOR DEPUTY PRESIDENT HAMBERGER: Sorry?

PN295

MR BULL: That's what they can do and that was – sorry, I was just - - -

PN296

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but that's what, one possibility we would say if there was a roster cycle then you can't be rostered for more than this many hours over a four-week period. If it's a four-week roster cycle.

PN297

MR BULL: Yes.

PN298

SENIOR DEPUTY PRESIDENT HAMBERGER: Not that you can just be dragged in in the last week to get up to 152 hours.

PN299

MR BULL: Thank you for your – because I was just gathering my thoughts about the question that the Vice President asked me, and one of the things that does differentiate a permanent employee from a casual employee is that under these awards permanent employees have a right to a roster. So they know in advance what they're going to work whereas a casual employee doesn't, so the situation that you've suggested is basically correct. If the business is experiencing increasing business you can pull the casual in and they, you know, won't have had any warning that they're going to work that pattern, so you're right in the sense that there is some equivalence but there is a fundamental difference in that a permanent employee has a right to a roster. He or she is forewarned. They're not subject to surreptitiously being dragged in.

PN300

SENIOR DEPUTY PRESIDENT HAMBERGER: But one option would be to only allow this averaging arrangement where there is actually a roster. I mean, obviously a lot of casuals are rostered in fact, and normally - - -

PN301

COMMISSIONER ROE: And there was evidence that it was quite common for casuals to be rostered.

PN302

MR BULL: That's correct. But they don't technically have a right to a roster.

PN303

SENIOR DEPUTY PRESIDENT HAMBERGER: No, no, but theoretically you could have an arrangement like this where the averaging only applied where people were on a roster, a four-week roster, rather than just saying, well, at the

end of a four week period as long as you haven't worked more than 152 hours over the four weeks you don't get overtime.

PN304

MR BULL: One of the technical matters I've tried to raise in our final submission was that this overtime is – the catch phrase used about stands alone in a day, that seems to be precise, that it relies on sort of custom and practice and so forth. This is an industry where I think there is – you know I can say there is a level of non-compliance and that having the sort of complex averaging arrangement will not assist. It's better to have a clearer entitlement where it's a week and so forth. And the issue about somehow placing casuals - - -

PN305

VICE PRESIDENT HATCHER: So when you say that this is an industry with non-compliance, what industry are we talking about now?

PN306

MR BULL: Hospitality generally.

PN307

MR WARREN: That's a bit rough.

PN308

VICE PRESIDENT HATCHER: Well, I mean, if you're talking about restaurants I'd probably agree with you but hotels and clubs I'm not aware of that.

PN309

MR BULL: I think there's different levels of non-compliance in the sector.

PN310

COMMISSIONER ROE: Restaurants, yes.

PN311

MR BULL: And I'm not going to – look, perhaps - - -

PN312

MR WARREN: There is no evidence in the club industry of non-compliance or in the hotel industry. Let's be very clear.

PN313

VICE PRESIDENT HATCHER: Clubs I think I'm prepared to cop at least.

PN314

MR BULL: I think restaurants probably.

PN315

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, restaurants.

PN316

MR BULL: Look, I'd rather not speculate on these matters but, look, it's an award reliant area where - - -

PN317

COMMISSIONER ROE: Certainly is in restaurants.

PN318

MR BULL: - - -there's, you know, people sometimes are not paid their correct entitlements.

PN319

COMMISSIONER ROE: Well, especially in the restaurants.

PN320

MR BULL: And a particularly vulnerable class is casual employees when overtime is looming and there's evidence, as you indicated, from the person from St George Leagues Club. Managers become very sensitive to the accrual of overtime because it's one of their no doubt key performance indicators.

PN321

VICE PRESIDENT HATCHER: But I just contextualise something, I mean, that's not unusual whether it's in any of these sectors or any other award.

PN322

MR BULL: I agree.

PN323

VICE PRESIDENT HATCHER: I mean, you know, sort of employers per se would, I would imagine, be very conscious of overtime and managing it to the extent that it's part of managing their costs.

PN324

MR BULL: I'm just making a submission to the effect that I think an averaging facility in relation to the overtime would be undesirable. One of the reasons it would be undesirable is that it's unwieldy and so forth. It would be apt to not be complied with, whether deliberately or just simply because people don't understand it, so I just make that point. And it does appear to contemplate a pattern which I would say would tend to lead to fatigue which is working 16 days in a row without a break, nine and a half hours a day, and that pattern of work, I say, is deserving of some premium should be paid to a person working that pattern. So that's what I wanted to say about the suggestion of an averaging facility.

PN325

There was quite a bit said by the representative from clubs about historical behaviour in relation to overtime. I'd simply note we have, in our final submission, made a number of comments about that, that it's perhaps not appropriate in relation to conducting this review to put too much emphasis on what the history was and what past or predecessors, my predecessors may have done in these processes. One of the points, look, this matter has not been arbitrated in any degree. There's one decision which they present in support which is from the seventies, and if you read the full decision, it's not, I would say, as supportive of their view as they present it as being. This was a completely different award where there were significant penalty rates that applied and so

forth. It's not particularly helpful. I won't press that. But the fact that the history is what it is, I say, doesn't to a significant extent hinder the Commission determining what is the appropriate safety net for these workers.

PN326

In relation to the right to alter the pattern of work, this is now going to the part-time claim, in our submission, we have suggested that the word "reasonable" should be added to the clause as proposed by the Commission. If that word is added I would say that adequately deals with all the concerns that have been raised. It means that a reasonable request that the student whose lecture patterns, you know, there's a new semester and they can't work on Wednesday night, obviously a request to not work on Wednesday would be reasonable. We say it's important to preserve some of the autonomy that's currently in the substantive part-time clause, namely, that variations need to be mutual. So a provision as proposed in the provisional term of the clause by the Full Bench should remain and the word "reasonable" I think will deal with the concerns. And the matters that my friend noted, and this is in error, the evidence clearly indicates that employees are compliant with the directions of their employers. They work additional hours when they're requested to. There was very little evidence that the sort of bloody mindedness that would cause problems is, in fact, prevalent in this particular industry.

PN327

VICE PRESIDENT HATCHER: Where is this dealt with in your redraft?

PN328

MR BULL: Paragraph 40 of our submission. And we talk about it – I think it's – the numbering gets changed. So we say – I'm just trying to find it, sorry.

PN329

DEPUTY PRESIDENT KOVACIC: I think it's sub-clause – well, I have the - - -

PN330

COMMISSIONER ROE: Yes.

PN331

MR BULL: It becomes (i). This is the Hospitality Award. So it's 12(i):

PN332

The employee may alter the days and hours of the employee's availability on 28 days' notice to the employee provided that the alteration is not unreasonable.

PN333

And that's just a – I'd say it's a clarification. And that would, I'd say, solve the concerns.

PN334

SENIOR DEPUTY PRESIDENT HAMBERGER: But does that – I mean, it might be genuinely the case that the person, now their lecture times have changed, and so their availability has genuinely changed. It's not unreasonable in that sense, but if there isn't the work for them on the days that they're now available it

still leaves the practical issue. It's not that they're being unreasonable. It's not that they're being capricious. I mean, it could be capricious but let's assume they're not being that, and presumably it has changed, but there just isn't the work available. I mean, that's the issue that's been raised. The work just simply isn't available at the times they're available.

PN335

MR BULL: Well, then you've got to deal with the fact that the employment relationship is frustrated and it's going to end.

PN336

COMMISSIONER ROE: And there's a right that's created in the proposed term which is the employer can't make you work when you're not available. That's how they have to organise the roster. And that's why, in a sense, that's why you have to deal with this issue of change of availability, and I think the exchange that we had earlier with Mr Warren about this matter, I mean, I think all parties are working towards a solution of this issue, but I suppose what Senior Deputy President Hamberger is raising is that just simply adding the word "reasonable" doesn't necessarily deal with the question of the right.

PN337

MR BULL: Well, it goes to what is part-time work in that, you know, reasonable and predictable hours.

PN338

COMMISSIONER ROE: Correct.

PN339

MR BULL: So - - -

PN340

VICE PRESIDENT HATCHER: As predictable with both sides.

PN341

COMMISSIONER ROE: Yes.

PN342

MR BULL: Right.

PN343

DEPUTY PRESIDENT KOVACIC: The stars have to align, Mr Bull.

PN344

MR BULL: I think it's a useful clause to have.

PN345

COMMISSIONER ROE: No doubt about that. It's just whether you're proposed amendment to it, is adequate.

PN346

MR BULL: We're attempting - I've assumed that we're in, as the President would say, the iterative stage in relation to the part-time clause.

PN347

COMMISSIONER ROE: Correct.

PN348

MR BULL: So, you know, I'm not fighting battles that have been lost; attempting to move along.

PN349

SENIOR DEPUTY PRESIDENT HAMBERGER: But what do you think about the idea that if someone's availability has genuinely changed, let's assume it's not capricious, it's genuine, but therefore you have to, if you like, re-negotiate the whole deal, so in other words, you don't have a right to a certain number of hours. If you had said I'm available Friday and Saturday and – well, let's not say Friday and Saturday, let's say Monday and Tuesday. You're available Monday and Tuesday and they say, "Yes, well we can employ you for 12 hours a week". Minimum, you know, you'll get 12 hours a week on Monday and Tuesday. And now you say, "Well, I'm only available Wednesday and Thursday", but they actually don't need anybody extra on Wednesday and Thursday, then in a sense the whole deal is off as it were and so the obligation to provide the hours ceases unless they can reach an arrangement that does work for both parties which they might be able to do.

PN350

MR BULL: Well, I - - -

PN351

VICE PRESIDENT HATCHER: That's kind of – I mean, I don't think we'd actually disagree on that basic concept. It's just how you give effect to it. Do you agree?

PN352

MR BULL: Well, it's the difficulty in the award to say when the employment is untenable.

PN353

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, I'm not - - -

PN354

COMMISSIONER ROE: You can't do that.

PN355

MR BULL: These substantive provisions set the broad parameters within which the relationship can exist. The particular issues about when particular relationships will be untenable, the award cannot deal with that issue. And I think it's simply a matter – there will be certain types of alterations to availability that will indicate that the employment relationship is frustrated, it can't continue, and that will be evident in the situation there will possibly be a dispute about it, but that just is a fact of life.

PN356

VICE PRESIDENT HATCHER: Well, we need to articulate that in some way.

PN357

COMMISSIONER ROE: Yes.

PN358

VICE PRESIDENT HATCHER: So just to give another example, if a person says, "Look, I can work Friday and Saturdays", and the employer says, "I can give you eight hours on Friday and I can give you eight hours on Saturday, so we'll have a 16 hours guarantee", and then circumstances change, say, because of childcare. The person says, "I can't work Fridays any more, but I can still work Saturdays". So the practical position is the employee has eight hours work, not 16 hours work, so there has to be some mechanism in that scenario for the guarantee to change to reflect the hours that are actually available in connection with the employee's available hours.

PN359

SENIOR DEPUTY PRESIDENT HAMBERGER: You know, you might not need to terminate the employment relationship in fact.

PN360

MR BULL: Yes. I'm just looking at the provision and trying to think of an answer.

PN361

COMMISSIONER ROE: And that's why - - -

PN362

MR BULL: You can have a clause saying in effect that – some subclause that – because the problem with the current right is that it's directed towards the employee, and presumably – but I would have thought if you were engaged – and the current draft has – it's got guaranteed hours and availability. You're talking about guaranteed hours that are the availability, which is very narrow.

PN363

VICE PRESIDENT HATCHER: Well, where the availability reduces to the extent that the guarantee can't be met any more in terms of what the employer has to give.

PN364

MR BULL: Yes. I'm concerned that you don't want to make it too complex; that people don't understand it. And I find it, if I can get my head around it, but I need to read it a few times and so forth. And you want a provision that is practical and useful. I don't know whether a great deal more could usefully be put into the substantive provision other than what we have suggested which is that alterations to availability be conditioned by reasonableness.

PN365

VICE PRESIDENT HATCHER: But maybe it's entirely reasonable. It might be a child care commitment. It's entirely reasonable but that doesn't solve the problem that the employer no longer has the hours to give to the employee.

PN366

COMMISSIONER ROE: It's much more around requiring, isn't it surely, the employer to give some serious consideration to can the change to availability be accommodated whilst maintaining your guaranteed hours or not. And that's what you mean by reasonableness, isn't it?

PN367

MR BULL: Yes. It should work both ways.

PN368

COMMISSIONER ROE: Yes. So the - - -

PN369

MR BULL: It's not purely – and there would be situations where something which is reasonable from the perspective of the employee would not be, in the global sense, reasonable if you've committed to working every Friday night and suddenly for a perfectly legitimate personal reason you can't do that then that would obviously go to the employment relationship.

PN370

If you're, you know, suddenly you have a religious aversion that means you can't work on Saturdays and the business, it's busiest day of the week is - - -

PN371

SENIOR DEPUTY PRESIDENT HAMBERGER: No, no, two Jews on the Bench. Does that indicate more religious?

PN372

MR BULL: My family grew up in Sydney but, you know it's perfectly - it's a reasonable thing, if you're from a liberal Jewish background and you up the ante and you suddenly become ultra-orthodox and you decide that - - -

PN373

SENIOR DEPUTY PRESIDENT HAMBERGER: That's right. It was reasonable to - - -

PN374

MR BULL: You need to get an automatic oven and so forth in your kitchens but it would affect the employment relationship and it may be reasonable for the employer to reconsider the fact that this person can't work when they're initially the busiest day of the week. Sorry, I used that allusion.

PN375

VICE PRESIDENT HATCHER: That's all right.

PN376

MR BULL: Look, it's a difficult one, and it's one of these issues where I don't know whether you want to put too much detail in it because it might not actually, in the end, be helpful. And I think it's a bit of a straw person, because certainly the evidence was that the employees in this particular industry are fairly compliant, so – and, you know, people work because they want work and they want remuneration and so forth. So somebody who is completely dealing

themselves out, I don't think it's going to – it's not a significant problem. That's what I'd say about that.

PN377

Just in relation to consecutive days, we are dealing with part-time work which is supposed to be something less than full-time work. I don't think it's unreasonable to have two consecutive days off. But it perhaps is not a critical issue but I just make that point.

PN378

We have put the 35 hours to you and this is part of this global picture of equalising the cost structure and so forth. I think the point made by the Vice President is correct. There's nothing stopping you from directing the person to work 36 hours. It just means you pay one hour of overtime.

PN379

VICE PRESIDENT HATCHER: Mr Bull, since you've raised the issue of a few very late claims in your submissions, I'm just wondering whether we should open up this inquiry to the Restaurants Award as well?

PN380

MR BULL: I've suggested that you should deal with them globally because I think it – they currently have – they're very similar awards, and you can make a number of general statements that apply to the three awards. There are also, you know, whilst there's obviously variations within the industry, they cover similar sort of – it's hospitality and it's unsocial hours.

PN381

VICE PRESIDENT HATCHER: Does the Restaurants Awards have a casual conversion clause?

PN382

MR BULL: From memory I don't think it does. The only one that does is the Hospitality Award.

PN383

MR WARREN: Yes, I think that's right. Yes, that's right.

PN384

MR BULL: And there's one in the Clubs. The Restaurants Award is probably the most pared down on some levels. Although it does have superior annualised salary provisions to the other awards. I think it's a proper way for these reviews to be conducted for a global view to be taken because dealing with matters in isolation is not properly dealing with them. But in relation to dealing with the Restaurant Industry Award I think certainly we've made our submissions on the basis that our overtime claim applies to the Restaurant Award. We are, as part of the iterative process, conceding that change in relation to part-time is inevitable. And it would seem somewhat perverse that there would be significant change in the other two awards and essentially technical – well, it's not technical reasons, but there's no substantive change to the Restaurant Industry Award because

certain things, certain parties didn't do certain things and so forth then they might have been expected to do something.

PN385

So we obviously think you should accept everything we've put to you and make the changes that we've proposed to all three awards but it's not inappropriate to consider the change to the Restaurants Award as a package because there's a wealth of common context and so forth.

PN386

I didn't think our evidence was that bad but I'll just make that statement.

PN387

MR WARREN: We did.

PN388

MR BULL: Thank you, Mr Warren. That's all I wish to say. Thank you.

PN389

VICE PRESIDENT HATCHER: Anything in reply on the part-time issue?

PN390

MR WARREN: I think we've said it all, your Honour, and I think the Commission has understanding of our position, just judging by what has been put back to the parties. I think you understand our position.

PN391

VICE PRESIDENT HATCHER: Anything in reply further, Mr Ryan?

PN392

MR RYAN: No, your Honour.

PN393

VICE PRESIDENT HATCHER: All right. Well, we'll consider what the parties have put and envisage it might be necessary to issue a further draft clause for further comment just - - -

PN394

MR WARREN: And we can put that in writing back to the Commission. Thank you.

PN395

VICE PRESIDENT HATCHER: Yes. All right, we'll now adjourn.

PN396

MR BULL: Thank you.

ADJOURNED INDEFINITELY **[12.05 PM]**