



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT O'NEILL

AM2023/21

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

Application by
(AM2023/21)

Sydney

9.32 AM, THURSDAY, 4 APRIL 2024

Continued from 03/04/2024

PN482

DEPUTY PRESIDENT O'NEILL: Good morning, everybody. Could you just bear with me just one moment. All right. Good morning. Welcome back to those that were here yesterday, and welcome to the new participants.

PN483

So I will just quickly go through the appearances, so that if I miss anyone, you can let me know. So for the CEPU, ETU, Ms Abousleiman is with us again; for the ANMF, Ms Palmer, the AMWU Mr Amoresano; Ms Pugsley from the AHEIA; Ms Peldova-McClelland from the ACTU; Ms Bhatt, from the Ai Group; Mr Cope and Mr Gale from the Flight Attendants' Association; Ms Wells and Mr Campbell Smith for the NTEU; Mr Orr for the United Workers Union; Ms Tinsley and Mr Morrish for the Australian Chamber of Commerce; Ms Delpiano for the MEU; Mr Arndt from Australian Business Lawyers & Advisers; Ms Goldthorpe for the Club Managers Association; Mr Robson from the ASU; Mr Deguara for CPSU-SPSF.

PN484

I think that's everyone that I had. Have I missed anybody? All right. Well, I suggest that we proceed in the way that we did yesterday. So for the new participants, we are working through the summary of issues that were published, and working through each of the issues one by one, to give everyone an opportunity to say anything in addition to their written material if they wish to. We have to take a slight pause for a couple of minutes, because that's literally the one folder that I don't have in front of me. So if you don't mind just patiently sitting there for a moment or so, we'll be right back.

PN485

MS BHATT: Deputy President, I did indicate yesterday that I sought an opportunity to make some submissions about other general issues. Perhaps this is a good time.

PN486

DEPUTY PRESIDENT O'NEILL: This sounds like a perfect opportunity.

PN487

MS BHATT: I thought it might be. The submission really relates to some arguments that have been advanced by the ACTU in their reply submission, from paragraph 4 onwards. And the principal proposition that's been advanced is that the ACTU takes issue with many of the proposals that have been advanced by employer parties in these proceedings, on the basis that they would result in a reduction in employee entitlements. The first thing I'd say about that is that none of the proposals that have been advanced by AI Group are intended or designed to result in a reduction in employee entitlement in an end unto itself. They have been advanced within the spirit of these proceedings, with the genuine intent of proposing ways in which awards could better facilitate employees' working and caring responsibilities.

PN488

In addition, they would apply fairly and appropriately to employers as well, and that's entirely appropriate when one considers these issues in the context of the

legislative framework, because of course the modern awards objective applies that the minimum safety net applies fairly not just to employees, but to employers too, and that's a well-accepted proposition. The other thing I would say is that to some extent, this question of whether it might result in a reduction in employee entitlements is a somewhat subjective one, or, at the very least, will turn upon the particular circumstances or preferences of certain employees.

PN489

Yesterday, I think, for example, there was a brief submission that was made about this idea that employees be able to work ordinary hours on a weekend. Now, that's an issue that we've raised in the context of some questions posed by the Commission about the span of hours in awards. There may well be some employees, and we think there are some employees who wish to be able to do so. Many of the proposals that we've been advanced are designed to create that opportunity or to create that option, where it might not otherwise clearly exist in the award system currently.

PN490

The ACTU also places some reliance on correspondence that was written by the Minister to his Honour. And I've dealt with this briefly in a directions hearing before the Deputy President some weeks ago, but given that it's been put in the reply submissions again, I did want to say something further about it. That correspondence is quoted as having said that it is the government's view that outcomes from this review should not result in any reduction in worker entitlements. I would say again what I've said before, which is that that is nothing more than the government's policy position. It is the position that's been articulated by the government of the day. Having reviewed and reviewed again the statement issued by the President when this review was initiated, it is clear that no such parameter has been applied by the Commission to at least this stream of the review.

PN491

I acknowledge that a different view was expressed about other parts of this award review, and we've taken issue with that in that context. That's entirely appropriate, because we say that it would be inherently unfair if a gloss of that nature was placed over the statutory task that presents itself for the Commission, particularly in relation to the application of the modern awards objective. We've made detailed submissions about that statutory framework, and wish to say that that is what should guide the Commission's discretion in these proceedings. The ACTU goes on to say, at paragraph 6 of its reply submissions, that it is a significant thing to reduce the rights and entitlements owing to an employee or to an individual.

PN492

In response, we would say what I think is trite, which is that it is also a significant thing to increase employment costs. It's a significant thing to increase the regulatory burden. It's a significant thing to undermine efficiency, reduce productivity, and limit flexibility. And so the Commission's consideration of the various claims that are before it in this review, including those that have been advanced by the unions, should be approached with those issues in mind, and with its properly construed statutory task in mind. The last thing I wanted to say is that

to some extent, the ACTU's submissions, and those of its affiliates, appear to suggest that because this stream of the review is focused on issues concerning work and care, that there are certain elements of section 134(1) that should be front of mind.

PN493

I don't think they go quite so far as to say that they should be given primary or more importance than others. But we would just express some caution about those sorts of submissions, because, one way or another, that is what they appear to suggest. And as we've said in our written submissions, ultimately the Commission's task is to balance any countervailing considerations. That's all I really wish to say about that. Thank you.

PN494

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Bhatt. I think, as I indicated yesterday, the various submissions that have been made about that point will be fed into the Full Bench's consideration in terms of the final report. But ultimately, any matters that were to go forward in any sense, either on an application by a party or on the Commission's own initiative, will of course then be subject to all such considerations, and need to be satisfied that it meets the modern awards objective in its entirety.

PN495

MS BHATT: Thank you.

PN496

DEPUTY PRESIDENT O'NEILL: All right. Well, I have the material now. So turning to the first set of initiatives, which relate to quick discussion question 4, which is the hot topic, it seems, of working from home arrangements. The first proposal, at item 1, is the ACTU's proposal. Ms Peldova-McClelland.

PN497

MS PELDOVA-McCLELLAND: Thank you Deputy President. If I may just say a couple of things in response. I'll be very quick, because we rely on our reply submissions, where a lot of this was canvassed. We would characterise a lot of the proposals that the employers have put forward as being aimed at giving employers all the flexibility without needing to pay appropriate compensation for the disamenity caused to employees, by having them be able and available to work at all hours of the day and night. So just very quickly, that is what we say in response, that, taken together, that's what their proposals and claims are driving towards.

PN498

In terms of the correspondence from the Minister, the President, I believe, in his statement of September last year, noted the view of the Minister, and noted in general, not just applying to one particular stream, so I would just make that point again. And finally, the submissions of AIG are correct, in that we don't say that those new considerations should be given primacy. However, we do say they are particularly relevant to this stream, given the nature of this stream and the issues it's looking at, and that many issues that have been looked at previously, in previous decisions or four-yearly reviews, need to be re-looked at and

reconsidered in light of those new considerations. I'll leave it at that, Deputy President.

PN499

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN500

MS PELDOVA-McCLELLAND: Thank you. So turning to working from home, I might just highlight a couple of things regarding our proposal, and then seek to reply to some of the reply submissions. So just to highlight the demonstrated benefits of working from home for parents, especially women with children, people with a disability or health condition, and carers generally, with significant new research showing that these groups of people have been able to significantly increase their workforce participation, in occupations that have made that large transition to remote work. And this is particularly noticeable in traditionally family-unfriendly fields, for example, finance and marketing.

PN501

And there's a broad recognition in the literature and the research that workers with a greater need to work from home now have a much greater access to a broader range of jobs and opportunities. There are also a range of broader benefits that are drawn out in the research, such as productivity and participation gains, diversity and inclusion, mental health and employee engagement, and reducing absenteeism and improving autonomy. So given all of this research and these findings, we note working from home provisions obviously aren't currently a feature of modern awards. Given the large numbers of employees who are working from home, or would like to, the clear benefits to all workers, but especially to women and carers, and people with a disability or health condition, and the potential gains for productivity, participation, and diversity and inclusion, we say it's clear that modern awards in industries where work can be performed from home should be varied to accommodate that.

PN502

So that's why we've put forward the proposals we have. I won't go through them. They're there in the summary. In relation to some of the issues that have been raised in reply, AIG say that they don't consider that such an award term would be capable of an inclusion in an award, because it wouldn't be about any of the matters described at section 139 of the Act. We disagree. Section 139(1)(b) provides that terms of modern awards may include type of employment and the facilitation of flexible arrangements, particularly for employees with family responsibilities. And we say that working from home provisions would very clearly fall into this category of flexible working arrangements.

PN503

AIG and ACCI also I think both make the point that many employees already have a right to request to work from home, pursuant to section 65, as that section contemplates a change in the location of work. We obviously outlined at length yesterday the limitations of that regime, in our view, that it's only available to certain cohorts, and it requires 12 months' service to access. Our argument is that work from home arrangements should be available on request to all workers,

regardless of their reason or length of service, given the benefits that have been demonstrated in the research.

PN504

We also think that there is merit in having a separate award provision dealing with working from home. It might not be immediately apparent to workers they can utilise section 65 for that reason, and also to collectivise the entitlement, rather than having it be an individual request every time. ACCI makes the point in its reply that employees can already collectively negotiate working from home arrangements through enterprise bargaining. We'd just say working from home is fairly widespread. It shouldn't be limited to provisions in enterprise agreements. There are obviously workers who haven't had the ability to access enterprise bargaining for various reasons, and they shouldn't be excluded from having access to this.

PN505

Also, collective disputes, that could be inserted into awards, meaning that access to working from home can be consistent for workers doing the same kinds of work, and makes accessing those arrangements far more accessible and more efficient for an employer. ACCI also says that placing a reasonable grounds standard on an employer's ability to run its business is not appropriate, and inconsistent with the modern awards objective. In relation to that, we'd point to the reasonable business grounds that exist in relation to flexible work, and say that it's not inconsistent with the modern awards objective, which balances considerations like the impact on business with a need to promote flexible modern work practices, the need to achieve gender equality, the need to promote social inclusion.

PN506

Working from home is demonstrated to have positive impacts on all of these things, and participation and a reasonableness standard would appropriately take into account the impact on a business, and any reasons the employer had for work needing to be performed from a work site rather than from home. ACCI also says that the creation of a right to working from home purely for award-covered workers is impractical, and may lead to absurd and arbitrary results, where you've got award-covered employees working from home while managers work from the office. We say that, in practice, this is highly unlikely to occur. I think the ASU notes in its reply submission that working from home arrangements are something that managers and executives are far more likely to have access to, due to their greater bargaining power, but also the nature of their work and their duties.

PN507

We would just make that point, that in many sectors, it's far more likely to be the managers and award-free employees who'll be able to work from home, rather than award-reliant workers, who may be needing to turn up, because they're front-line workers in disability support, for example. Finally, if the situation ACCI envisages did come to pass, we say it would be good motivation for those employees to access their rights in collective bargaining. The next point from ACCI is that the widespread working from home arrangements are still a relatively recent thing, and so it's not in any sense clear that this should become a right.

PN508

We would just say that we think there's a fair consensus that the pandemic has fundamentally reshaped working arrangements here and across the globe, and there does appear to be a broad consensus that there's no returning to the way things were prior to the COVID pandemic. We would note that remote work and hybrid arrangements are now the norm in many industries where working from home is possible, and that awards should reflect this new reality. I'll leave my comments there. Thank you, Deputy President.

PN509

DEPUTY PRESIDENT O'NEILL: In your submission you talk about, at the proposal, was that relevant awards be amended. Is there anything you can say about what are relevant awards?

PN510

MS PELDOVA-McCLELLAND: I would have to defer to our affiliates. I note that there are a number of proposals from our affiliates to insert working from home provisions. I know there are a number of affiliates who have said this is not relevant to their awards, and I can certainly get a list if that would be helpful.

PN511

DEPUTY PRESIDENT O'NEILL: Well, let's just try and get a sense of the carve out, if you like, and - - -

PN512

MS PELDOVA-McCLELLAND: Yes. I certainly understand that it's not relevant, for example, in the awards that cover our SDA members, so the awards in their submissions. I think careful consideration needs to be given to industries such as healthcare. The nurses have a proposal for some employees for whom it might be relevant. Obviously, it won't be relevant for a lot of that workforce.

PN513

DEPUTY PRESIDENT O'NEILL: But there's an acknowledgment, essentially, that there's significant areas where it's just not relevant.

PN514

MS PELDOVA-McCLELLAND: Absolutely. Yes, Deputy President.

PN515

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Does anyone else wish to say anything about this proposal? Yes.

PN516

MR ROBSON: Thank you, Deputy President. I suppose from the ASU's perspective, we come to this issue with the view that working from home is a desirable thing for many workers, but it's not a desirable thing for everybody, and it's also not appropriate in every circumstance. So looking at our coverage, we see working from home affecting workers covered by the Legal Services Award, which covers graduate lawyers and administrative staff at law firms; staff covered by the Clerks Award, which covers many office workers, call centre workers who are not outsourced to contract call centre firms.

PN517

It'll cover some workers in SCHADS award, and it may even cover some people covered by the Airline Operations Award who might work in the offices of an international airline, or work at the Virgin or the Qantas campuses, because the clerical classifications in that award extend that far. But at the same time, not everyone covered by those awards could work from home, or even should. There are, for example, reasons why it may not be desirable to do that, even if they want to. For example, in a law firm, the productivity expected from an administrative worker may be very intense, and that productivity is associated with accommodations to their workstation, designed to minimise injury.

PN518

I know many of our members at Maurice Blackburn, for example, have carefully calibrated desks, and computer screens and mouses designed to avoid repetitive strain injuries. And at the same time, for example, there may be reasons in the community sector where a person is doing traumatic and difficult work may need to be at a workplace, even when they could do their job remotely, for supervisory reasons. But that's not to say that that's a blanket reason why work should not be performed at home. And that comes to the nature of the proposal that we share with the ACTU. It's that it should be a right for employees to request. And we say that's very important, because there are many reasons why an employer would want someone to work from home that are undesirable.

PN519

It's a way of outsourcing costs. It's a way of isolating people. It can be a very negative experience. During the pandemic, many of our members in call centres worked from home, and I have to say, they hated it. If you can imagine being a 25-year-old living in a share house, with a big flashing computer screen sitting in your bedroom. You work from morning to the afternoon, and then your workstation is sitting right next to you before you go to bed, and flashing through the night. It is not necessarily a desirable arrangement for everybody. So the emphasis, in our submission, is employee control. We think that there needs to be a right to request, for that request to be taken seriously, and for negotiations between the employer and the employee.

PN520

And then ultimately, the issue of reasonable grounds is one that requires an industry-by-industry consideration. It's not something that we can get into I think at this level in these proceedings, nor do I think that's desirable. Coming to some of the points made by the employer associations, I think they rest on two flawed concepts. The first, that employee agreement fixes all the flaws in our safety net. We would say the purpose of the safety is to protect employees who, because they are award-reliant, have a limited capacity to bargain, perhaps a limited understanding of their rights under the law, and simply saying that they can refuse to do this, or refuse to make this agreement isn't enough. There's a significant economic, personal, social compulsion that can be brought on an individual employee to make any agreement.

PN521

We also say the second flaw is that working from home is completely different from working in an office. And I think the example that's been given is of the

allowances, and particularly the overtime meal allowances. I'd certainly say most uniform clauses in awards only apply where an employee is required to wear a uniform. There's no reason why an employee required to be wearing a uniform would be working from home. They might do that, because they're appearing via Teams. You shouldn't be compensated for wearing that uniform. Similarly, I think there's a significant consideration that needs to be given to overtime meal allowances.

PN522

We would say that the experience of our members is that when they were working overtime from home, many of the same problems that created these overtime allowances in the first place exist. They don't have time to cook. They may not have time to shop, and do all those things that you do in your own home if you have the time. And they would be ordering in, and essentially those allowances cover the costs of a takeaway meal, and that's likely to occur in that circumstance. Similarly, I think we need to look at the proposals to avoid the spans of hours, to accumulate meal breaks.

PN523

Certainly from our perspective, there is a problem where an award-dependent worker is working at their home, and all of a sudden pressure can be brought to bear on them to say, 'Well, you can start at 5 o'clock in the morning. You don't need to work your hours continuously. You can finish at 9 o'clock at night. There's no additional remuneration that goes with that. And by the way, we have put all your meal breaks at particular points in the day, because that's when it suits us'. That's not fair to employees. It's not relevant to the circumstances of working from home, and it doesn't strike that necessary balance. A right to request and a right to negotiate within that is the appropriate way to do it.

PN524

And I would certainly say there's a context in this review where not everything that we're raising could necessarily be achieved within the Commission's jurisdiction. We'd acknowledge that. For example, we've made a submission that there should be a right to dispute working from home requests or circumstances. That's beyond the Commission's power. But certainly, we would say that when all that has been produced from this is a report which might make recommendations about what is desirable or not desirable, or what should be considered, it is open to the Commission to acknowledge the limits of its jurisdiction, and suggest, as the regulator for minimum employment conditions, this is something that Parliament should consider. Thank you.

PN525

DEPUTY PRESIDENT O'NEILL: Thank you, Mr Robson. Ms Tinsley.

PN526

MS TINSLEY: Thank you, Deputy President. I'll be very brief, as we wish to rely on our written submissions. So just again, in terms of, we're talking about the right to work from home. What we do note, as we've set out in our submissions, that section 65 does allow for those with caring responsibilities to make request which would cover working from home. To the extent that the unions wish to

expand that beyond just those with caring responsibilities. I would note that really would fall outside the scope of (indistinct) as a part of this stream. To the extent we're talking about the three-pronged question of that 12 months, then really, we would say that's a matter that should be taken up with government. It's a matter for Parliament.

PN527

But I think the back and forth, the two exchanges before me, I think it demonstrates that it is complex. It is an issue that really can't be – there are differences between awards. There's differences within awards or different classifications, which really does reinforce our central point, that it could be decided at an enterprise level. And it's not as though that if we're not inserting these terms into these awards, that there won't be any sort of (indistinct) ability to work from home, where all employees (audio malfunction).

PN528

DEPUTY PRESIDENT O'NEILL: Sorry, Ms Tinsley. I don't mean to interrupt, but you're coming in and out a little bit. It's a little bit hard to hear.

PN529

MS TINSLEY: Sorry.

PN530

DEPUTY PRESIDENT O'NEILL: That's much better.

PN531

MS TINSLEY: That's all right. Is that a little bit better?

PN532

DEPUTY PRESIDENT O'NEILL: Yes, much.

PN533

MS TINSLEY: Fantastic. Well, I'll probably finish up there. So I think just sort of reinforcing our written submissions, and just making the point that I think the exchange that I've just heard, the two speakers before, that really, this clearly isn't a point to be decided at an award level. But I might just leave it there. Thank you, Deputy President.

PN534

DEPUTY PRESIDENT O'NEILL: All right. Ms Bhatt.

PN535

MS BHATT: Can I deal firstly with this issue about whether the Commission would have power to include a provision of the nature that's been proposed. In preparing for today's proceedings, we've reflected further on the submission we've advanced, and it does appear to us that potentially, section 139(1)(b) contemplates provisions that deal with flexible working arrangements, and so it might be that that provides (indistinct) power. So to that extent, we resile from what we've put in writing. Notwithstanding that, as Ms Tinsley has said, and as we've said in our written reply submissions, there is already a facility to make requests of this nature through section 65 of the Act.

PN536

And in practice, these issues are commonly being dealt with at the enterprise level, even in circumstances where employees don't have a right to request working from home, and we think that that's entirely appropriate. There is a real question here about the circumstances in which working from home is or is not appropriate. And if one was to start that exercise by identifying which awards it might be relevant to, even that is a complex exercise. I would agree with what Mr Robson has said in respect of the awards that he has identified. We have an interest in all of those awards, and we would agree that there is potentially some relevance to them.

PN537

The ACTU has this morning said that it has a view, or the SDA has a view that, in the awards that cover the SDA's membership, it doesn't have any relevance. Now, we're not sure that's right. The General Retail Industry Award, for example, has a clerical stream of classifications. Those are employees who perform their work ordinarily in an office environment, and can and do perform work from home. So I think that there would need to be a detailed examination of the relevant awards and their coverage. Some of the submissions that have been made this morning, by Mr Robson in particular, deal with the proposals that we have advanced, which is sort of the counterpoint to what the ACTU has proposed.

PN538

We say that, really, the way that this issue needs to be dealt with through the award system is to remove barriers that might otherwise prevent these sorts of arrangements from being implemented, because there are award terms that cannot sensibly be applied in practice where employees are working from home, or they serve as a barrier to accommodating the types of arrangements that employees generally want. I think we've said in our written reply submissions or submissions in chief that it is not uncommon for an employee to seek to want to take a break during the day when they're working from home that is longer than a meal break, so that they can collect their children from their grandparents' place, or from school, or whatever the case might be, spend some time with them in the afternoon, and return to work later in the day.

PN539

But if an award requires that ordinary hours must be worked continuously, you would not have complied with that requirement. So it's to deal with those sorts of issues that we've advanced essentially four proposals. One relates to this idea that ordinary hours have to be worked continuously. The second relates to the span of hours, which is to facilitate situations in which an employee wants to start early in the morning or work late at night, to provide that minimum engagement and payment periods don't apply. Much has been said in previous decisions of the Commission about the rationale underpinning those provisions, which is to ensure that employees are appropriately compensated for having to attend work, travel to work, for example.

PN540

Many of those disutilities are not experienced when an employee is working from home. And you may well have an employee who just wants to perform two hours of work in the evening, because that's what suits them best. There's then an issue

about meal breaks and rest breaks. And I do want to emphasise here that the proposal by no means takes away the entitlement to the break. What we've said is that there should be greater flexibility as to when the break is taken, because there might be less force to a provision that says that the break must be taken between the fourth and the sixth hour of work when an employee is working from home, given the nature of the work that they would necessarily be performing, and indeed might not suit that employee's needs.

PN541

They might want to take a break a bit later in the day, because that gives them an opportunity to pop around the corner to the post office to drop something off when it's not peak hour. And then the last proposal relates to allowances. Now, Mr Robson may well be right. It might be that because of the terms in which many of these provisions that give an entitlement to an allowance have been crafted, they would, by their own force, just not apply, because, for example, an employee is not wearing their uniform and they work from home, they're not appointed to perform first-aid duties when they're working from home, so they wouldn't get the first aid allowance. Those sorts of issues we simply think need to be revisited. They need to be reviewed, because clearly, there wouldn't be merit in some of those allowances being payable.

PN542

The overtime meal allowance proposition, we would contest the union's submission on that. We don't think that the circumstances of an employee performing overtime from home are necessarily the same as the one who is performing work in a designated workplace. We're not sure that the justification for that allowance being payable would be there. I think some of the submissions that have been made by the unions in writing relate to this idea that working from home can result in an intensification of work, that the proposals that we have advanced are just another way of enabling an employer to allocate work to an employee as and when it suits the employer, and to require the employee to work at times when they should otherwise be entitled to overtime rates, for example.

PN543

The thing I've emphasised by all of this is that all of the proposals we have advanced would operate only by employee agreement. We don't accept the proposition that, as a general rule, provisions that operate by employee agreement are necessarily going to be susceptible to some sort of duress or unreasonable requirement or force from the employer. And there's certainly no evidence to suggest that those sorts of arrangements are currently operating in that way in practice right now. I think that's probably all I need to say for now, unless there's anything more that's put in response to any of that.

PN544

DEPUTY PRESIDENT O'NEILL: Just given that we've segued into the alternative proposals, it just seems to me that there's been a bit of a live experiment, in a sense, of some aspects of (indistinct) proposals through the schedules in COVID. And I'm just curious if there's any evidence or significant experience that sheds any light on the practical operation of those schedules.

PN545

MS BHATT: I'm not aware, on my feet, of any research or data that has been collected based on the application of those schedules. No doubt we're aware of the experiences of our members who implemented working from home arrangements, and I can seek some instructions of that, and what is most relevant to these proceedings. But I'm not aware of any specific research that's been conducted or commissioned, but others might be.

PN546

DEPUTY PRESIDENT O'NEILL: Is there anything that you can contribute to that kind of discussion, Ms Peldova or Mr Robson?

PN547

MS PELDOVA-McCLELLAND: Not from me, Deputy President, but perhaps Mr Robson might have some insights.

PN548

MR ROBSON: My recollection, because there was a special provision that applied to the Clerks Award until the middle of 2021, my understanding is, the Commission has collected some data on that, collected some data through the exercise of that – the use of that schedule. I don't have it with me at present, but I'll look through - - -

PN549

DEPUTY PRESIDENT O'NEILL: Nor do I. I probably should.

PN550

MR ROBSON: I'll undertake to - - -

PN551

DEPUTY PRESIDENT O'NEILL: No, you don't need to. I'm just curious. It just seems that it's a very rare situation where there's been some lived experience under very particular conditions that goes to some of the proposals that have been advanced.

PN552

MR ROBSON: The only thing I can say is that our submissions are based on our members' experience of COVID-19 in the community sector, in the private sector, in call centres, in airlines. It's why we've come to the position of the right to request, and are very firmly opposed to AIG's proposal. It's not a knee-jerk union position. We were actually in negotiations with AIG and some of the employer bodies about a more longer lasting proposal during COVID-19, and without saying anything that I shouldn't, I think there was a flexibility on both sides on those proceedings. But we're very firmly opposed to it in this case, because I think we have had four years of experience with it. And what has been related about employee desires about working at particular times isn't what members talk to us about when they talk about their need to work from home. Thank you.

PN553

DEPUTY PRESIDENT O'NEILL: All right. Mr Arndt.

PN554

MR ARNDT: From my understanding, the demise of Schedule Y seemed to have been, to me at least, to be a relatively passive one, a relatively meek demise, where I don't think any of the parties pushed for its retention. There was a moment - - -

PN555

DEPUTY PRESIDENT O'NEILL: There was an opportunity - - -

PN556

MR ARNDT: There was an opportunity, and I think there was a moment where an interested party expressed some interest in keeping it going, but didn't follow through with any evidence or application. Obviously, the strong point made in all of those proceedings, that it wasn't going to serve as a precedent, because they were extraordinary times. We say – and I think everyone in this proceeding, because they've mentioned the prospect of working from home – we say that the types of discussions – even though it's on a precedent – the types of discussions, the issues that were dealt with in those proceedings are obviously still relevant, and are yet to be determined.

PN557

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Have I missed anyone that wants to say anything about the ACTU's proposal, or indeed the AI Group's proposal in items 3 and 4? I think we've covered each of those now. All right. The next is the award-specific proposal by the ANMF to include a right to request.

PN558

MS PALMER: Thank you, Deputy President. I've never appeared before the Commission before, so excuse me if I'm a little bit nervous. I rely on our submissions made, in addition to the comments by my colleague yesterday, that nursing and midwifery are highly feminised occupations, and it follows that those employees are more likely to have caring responsibilities. For the small proportion of ANMF members who would be eligible to work from home, just speaking to the issue of relevance raised before, it is a smaller number. Most nurses and midwives have to go to work to provide care. But it is important for those that have an opportunity to work from home to be able to request that.

PN559

And the balance of power can work against them, given that the profession – it's not common to request it, so it's known a sort of known or standard practice. It's really important, then, that right to request is put into the award and can't be unreasonably refused, and that it comes with other safeguards, so any work health and safety, or other rights and entitlements are there for them when they're working from home. And just on the question of supporting any removal of a threshold to request, being the length of service, putting a threshold like that in place for employees wanting to work from home can deter them from making applications for new roles and positions, or making applications to progress their career.

PN560

Because if they can't immediately access opportunities to balance work and care, they may self-select out of an application process. And that really works against other objectives of the modern awards regarding gender equality, women's workforce participation, social inclusion. And just noting that something like work from home in the award would be important for those nurses who may be looking to change the work that they're doing. And it's particularly important in the context of nurses and midwives who are just facing chronic traction and retention issues in the sector, and we don't want to deter them further from taking on roles in that profession.

PN561

DEPUTY PRESIDENT O'NEILL: Ms Palmer, I'm just having a little trouble imagining the kinds of nursing roles that would be amenable to working from home. Is things like nurse educators?

PN562

MS PALMER: Yes, nurse educators definitely, but also quality assessors for the Aged Care Quality and Safety Commission, or even aged care assessment team members, who may do a portion of their work obviously in a person's home, but have a paperwork element that could be carried out at home, rather than (indistinct).

PN563

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Does anyone else wish to say anything about the ANMF proposal? All right. There's a broad proposal by the City of Newcastle, but they are not present today, and I assume nobody wants to say anything in relation to that. So the next is the NTEU proposal at item 11. We have Ms Wells again. Hello.

PN564

MS WELLS: Good morning again. Thank you. Jeane Wells, NTEU. I just wanted to make a few points about our working from home proposal. We do note that the AHEIA has submitted in reply that they don't see a need for this provision in awards, and that they identify that there is a level of flexibility currently with university workers. We would agree that there is a level of flexibility with university workers in terms of academic staff, who have long held a great degree of autonomy about the performance of work and the location on that work; on campus or at home, or at a conference, et cetera. So we do recognise that, and this recognition has been in mind when we have pursued rights to work from home in enterprise bargaining.

PN565

We have pursued that for general professional staff, who have certainly not had the same level of autonomy and ability to be able to work from home, or indeed the same kind of access to flexible work provisions. So our proposal has recommended that the General Staff Award be amended to accommodate a right to flexible work or a right to work from home. So I'll make the distinction – with NTEU submissions, we have certainly pressed for a right to flexible work to be inserted in both the academic staff and the general staff awards, because, certainly, we have, in enterprise bargaining and in practice, experienced the resistance of some employers to give academic staff and professional staff the

ability to work part-time or access part-time work, or move between part-time and full-time work, or other forms of flexibility.

PN566

So we have pursued in our submissions that a right to have an individual or a group of employees seek changes to accommodate work and care be available for both academic staff and professional staff in those two higher education awards. However, for working from home, we have focused on the general staff, and the General Staff Award. And in respect of employer assertions, firstly, that these can easily be accommodated via the minimum National Employment Standards' right to request, which has recently become more accessible and more contestable for workers; we recognise that. Firstly, again, as we noted yesterday, you have to have a level of job security in order to be able to access flexibility as an employee. Otherwise, the flexibility of course is all in the domain of the employer. So job security is a critical element.

PN567

For employer assertions that this is easily accommodated, well, in our experience, pursuing rights to work from home in enterprise agreements, in which we have achieved regulation, agreed outcomes in some enterprise agreements has not at all been easily embraced by the employer in all instances. So this seems to suggest that while minimum standards are proposed as an easy means of accessing flexible work, the notion that an employee or a group of employees would be able to access working from home, by assessing a reasonable application and allowing a dispute resolution procedure to give access to a resolution of a dispute if a dispute was necessary, the resistance to that seems to suggest that, in practice, that is not as easy as employer submissions might suggest.

PN568

This morning again we've heard a lot about how, in the instances of being able to access working from home, employee voice could be heard to choose working outside of the span of hours, or working without penalty rates, or working to organise different break times. And I would simply suggest that as NTEU's submissions identify, we consider the span of hours for general staff in the General Staff Higher Education Award to be a critical protection. I know that this is going to be discussed later today, but certainly we oppose any notion that they would need to be expanded for the benefit of workers with caring responsibilities. And we would simply suggest to employers that if you are wanting to hear worker voice, then create mechanisms, and agree to mechanisms in the award to supplement minimum standards that allow genuine worker voice to be heard, by way of individual application or collective application for flexible work in employee proposals, rather than employer proposals.

PN569

Allow that to be enjoying the protection of dispute resolution via award minimum standards to support workplace change and to support the accommodation of employees with worker's responsibilities. And the last point I would note in respect of employer assertions is that the notion that it would be a universal right, or a proposal to have working from home be a universal right being outside of the scope of the review, it's happily already dealt by not just the literature review commissioned for this award review, but also decades of literature by Professor

Marion Beard, by Professor Sara Charlesworth, by Professor Beth Gaze, by Professor Meg Smith, and the numerous research pieces that are collated within the literature review which identify that ensuring, just like access to superannuation or access to annual leave, or access to army reserve leave, that those provisions were made universal, to ensure that employees – that accessing those provisions is a normal practice for employees with caring responsibilities, or for employees who wish to play sport or be involved in their community, or numerous other reasons.

PN570

And individually, over decades, I have seen time and time again how difficult it is for that to be equitably accessed. It's never a problem, in my experience, to be negotiating with human resources or senior professionals, in terms of their location of work and access to working from home, et cetera, or access, as HR practitioners or management in enterprise bargaining negotiations may often say to me or my colleagues, accessing part-time work, et cetera. Nevertheless, I've had direct experience with assisting workers who for some reason aren't allowed to take that break to pick up their child at 3 o'clock. And yet, nevertheless, in the same workplace, flexibility is accessed by senior managers, or flexibility is accessed for the purposes of attending a sporting event, et cetera.

PN571

So I think that the literature is right, that there is still very gendered access to flexibility, and a very hierarchical access to flexibility in higher education workplaces and in workplaces in general. So specifically, we would love for the report arising from this review to take the opportunity to provide general staff, via the General Staff Award, with an individual and collective right to request working from home. We note that the AHEIA has identified some areas where they have questions about our proposal, or otherwise are uncertain about elements of our proposal. We think there's every opportunity in the process of talking further and clarifying issues to ensure that we have a working from home right for general staff workers that is suitable to both parties, and gives a minimum standard of flexibility for employees. Thank you so much.

PN572

DEPUTY PRESIDENT O'NEILL: Just while you're on your feet, Ms Wells, you might recall yesterday morning I outlined what I understood to be some areas of potential agreement between the parties, and there are a number of items in the higher education sector.

PN573

MS WELLS: Yes.

PN574

DEPUTY PRESIDENT O'NEILL: And I flagged that certainly one option is to use some of the time on 11 April to progress those discussions. Is that something that you would seek to occur?

PN575

MS WELLS: Yes. I'd be very grateful for that opportunity.

PN576

DEPUTY PRESIDENT O'NEILL: All right.

PN577

MS WELLS: Thank you.

PN578

DEPUTY PRESIDENT O'NEILL: Ms Pugsley, did you want to say anything in relation to the NTEU's proposal, or in fact what I've just outlined?

PN579

MS PUGSLEY: Thank you very much for the opportunity, your Honour. And apologies that my name doesn't seem to appear on the screen, but I think everyone will see that (indistinct). With regard to 11 April, we received the notice yesterday with regard to that. I can't bind my organisation or our members in relation to any specific areas where there might be potential agreement. As Ms Wells has alluded to, we are always ready to talk in this sector, and we talk about a number of other matters at the moment. In terms of actual issues where there might be any potential for consent, I think, while we're always happy to have discussions, those are quite limited, based on what we've seen from the submissions both on the 12th and the 26th from the parties. I think that with regard to working from home, this is an area where we have significantly apart.

PN580

And I think that's evident from looking at pages 5 and 6 of the NTEU's 12 March submission, and I think it's the equivalent pages in our 26 March reply, as to how much has been expended on this particular issue in comparison with other issues that both parties have addressed. So while we are always happy to talk, I don't see any prospect of agreement on an award variation in regard to this particular matter. Would you like me to expand on that at all, or is that sufficient?

PN581

DEPUTY PRESIDENT O'NEILL: Well, I've realised, Ms Pugsley – you weren't with us yesterday morning – the particular matters that appeared as though there may be some capacity to reach consent, my note of those was a daily minimum engagement period for part-time employees, provision of two weeks' notice of roster, and there's an issue relating to eligibility for unpaid parental leave. So they were the limited matters that had occurred to me there'd been an indication of consent.

PN582

MS PUGSLEY: Thank you, your Honour. Without specific instructions from the membership, the ones that had occurred to me as being closest to potential consent were ceremonial leave, where we've indicated that – and this has been agreed to in enterprise bargaining, obviously, on an institutional basis, but we are disposed to the concept of ceremonial leave, and our members are, and, yes, with regard to the two weeks' notice of roster changes. Those appear to me to be the matters that we will be most likely to reach consent on. But of course, we can reach consent on that at any time, but we'll certainly appear on 11 April, and I'll do my best to have sector-wide instructions.

PN583

We have over 30 members, and of course I need to have instructions in regard to any specific award change, given, in particular, as we've mentioned in previous proceedings, that there has to be, we think, a holistic look at the awards if there is to be any change. And sometimes there might be the need for swings and roundabouts in terms of other parts of the award if we were to agree to a variation in regard to part of the award. So without going into any specifics on that, that's a conceptual issue, if you like.

PN584

DEPUTY PRESIDENT O'NEILL: All right. Well, I'm optimistic enough that we'll allocate some time on 11 April for the award-specific matters in the higher education sector. It would be very helpful for those discussions to be most fruitful if, Ms Wells, the interviewer is in a position to put some concrete proposals in terms of language in respect of the areas where you understand that there is scope for agreement, in light of what Ms Pugsley said.

PN585

MS WELLS: Thank you. And I was simply going to confirm that in terms of observations of the submissions, I also understood cultural and ceremonial leave to be an area of agreement, perhaps not on the details, but conceptually, Ms Pugsley. Conceptually, I think that parties would do great work, great honourable work in order to introduce cultural and ceremonial leave, minimum engagement for part-time workers, and other areas of agreement, without detriment to other worker conditions within the minimum standards of an award. I look forward to a constructive discussion. Thank you.

PN586

DEPUTY PRESIDENT O'NEILL: All right.

PN587

MS PUGSLEY: Thank you, your Honour. Just a couple of other comments in relation to what's been said this morning by the NTEU. We don't intend to repeat our submissions in the reply submission. We rely on those and reinforce those. I just wanted to say something about the discussion this morning about relevant awards in terms of working from home, and that has been a very interesting discussion to listen to.

PN588

We certainly agree that as a first step before we would consider anything in relation to the Higher Education General Staff Award, or indeed the Educational Services Post Secondary Award which does cover a number of employees and different types of employees within the higher education industry, post-secondary institutions separate from universities.

PN589

We agree that the first step would be to identify relevant awards for consideration. And in this regard the Higher Education and General Staff Award covers very similar work to a number of other awards. So, it covers clerical work, librarian type work, financial work, technical work – there's nothing unique or specific to higher education general staff workers as opposed to the quite different

provisions that apply in the Academic Staff Award where there is no span of hours, for example. I think that award is unique in that regard.

PN590

So, any variation to the General Staff Award would have to be considered in the award context of identifying what are relevant awards and what should be the considerations in regard to all of those awards. And for the sake of completeness, noting, if I understand, your Honour, correctly this morning, where any proposed variation to any award as part of this process must meet the modern award's objective in its entirety. I think that's what I understood your Honour to have said this morning.

PN591

And we say that the submissions that the NTEU have made within the 12 March submission in regard to this don't actually address the modern award's objective. It simply sets out the proposal for the variation to the General Staff Award. So, have I misunderstood you, your Honour, in what you said?

PN592

DEPUTY PRESIDENT O'NEILL: The Commission obviously do act within the powers of function which are provided for under the legislation.

PN593

MS PUGSLEY: Yes.

PN594

DEPUTY PRESIDENT O'NEILL: The outcome of this review is a report by a Full Bench. It won't be directly variations to any award, partly because consideration to all of the modern awards' objectives would need to be given. So, if that helps.

PN595

MS PUGSLEY: Thank you. And it helps greatly. Thank you, your Honour. And finally I note that Ms Wells' references to enterprise bargaining and as you are probably aware, this sector is characterised by – (indistinct) are characterised by wall to wall enterprise bargaining. And any sector specific issues in relation to working from home or indeed institutional specific provisions in relation to working from home, as opposed to an award variation that would cover all relevant awards should be dealt with as part of bargaining in our submission.

PN596

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN597

MS PUGSLEY: Thank you. Those are my submissions.

PN598

DEPUTY PRESIDENT O'NEILL: Thank you. Ms Well, did you want to add anything?

PN599

MS WELLS: Just briefly, thank you. Yes, our experience of bargaining tells us that there are assertions made as to some things being impossible. Somehow paid parental leave and a variety of other minimum conditions now in enterprise agreements in the higher education sector become possible with positive work and a will. So, I'm trying to continue to be positive that on Thursday the 11th I'm sure we could make great progress.

PN600

I think we wanted to note that, yes, it is true that the provision of introducing a minimum standard of individual and collective rights to work from home would be applicable to other workers, and we accept that consideration of the nature of other awards would be best left to the parties that deal with those awards. We accept that we understand that that is an element of discussion within the review. And so, we think firstly that we could construct in the General Staff Award a provision that was relevant to higher education general staff workers and allow other parties to be able to negotiate what was relevant for them, or the minimum standards that should be available for all workers. That's more than possible.

PN601

In respect of the point of this review or the process of this review as throughout the current reviews, the parties have been reminded that it's not an award variation process, that it's not the time for evidence, et cetera. But I would emphasise again to everybody that if you were excitedly reading the literature review as many of us were, published on International Women's Day on 8 March, and had the benefit of considering that fantastic review and the work of so many academics and researchers over decades that is included in that review then I think the parties would be much assured that even in the absence of evidence in this review process that the evidence of the literature drawing upon qualitative and quantitative research and direct experience of workers with care responsibilities over decades is supportive for the parties to be positive that there is much to be done and that we should be able to find a way to reach consensus for the benefit of workers through the review process, the recommendation arising from the review. Thank you.

PN602

DEPUTY PRESIDENT O'NEILL: All right. Now, the next three proposals are ABL. Mr Arndt, did you want to say anything in relation to those matters?

PN603

MR ARNDT: I do, Deputy President. My contribution will probably blend a fair bit with a fair bit with Ms Bhatt's.

PN604

DEPUTY PRESIDENT O'NEILL: There is a fair amount of common areas.

PN605

MR ARNDT: There is. Ms Bhatt has already made some comments which are generally applicable to what I'm about to say, and Ms Tinsley for ACCI has a common position. Our proposal is the simple proposition that when employers

and employees, an employee agrees to work from home that they can agree that certain work conditions don't apply, the span of hours, minimum engagement.

PN606

Just to provide a bit of context about the proposal, in preparing for this proceeding we really focussed our attention on work and care, i.e., the needs of carers. And I say that because it's important to accept, as we do, and I think it's common ground that carers by and large have the ability to request to work from home through section 65. So, our proposal is really aimed at carers, given the context of working – well, again, it's not aimed at 25 year old share house residents and so forth.

PN607

The problem that we see that this Commission would be grappling with in these proceedings is a problem of balance between work and care. When you're working it's difficult or impossible to care. When you're caring it's difficult or impossible to work, and that's just a question of balancing and timing. We heard yesterday some proposals of how to deal with that time issue.

PN608

There were proposals to guarantee the ability to increase the amount of guaranteed hours, which I guess is a way of dealing with the time issue. There were proposals yesterday referred to which dealt with the ability to go part-time, reduce – reduction of hours. Our proposal is aimed at where hours are worked and how hours are worked. I have to say our proposal is very modest.

PN609

It is by agreement and it is totally confined to working from home. It's not cynical or disingenuous as that phrase that's used in the union's submissions. And we say it's a practical and relevant position that the Commission could take. And when I say that, I say it deliberately. This is something that the Commission could do. It's not a radical change to the NES. It won't turn the business world upside down. It frankly is probably something that would accord with current working conditions for some workers who are working from home.

PN610

The reality is, and I think it's common ground, that working from home is different from working in an office. When you work from home you have an ability to structure your day differently as an employee. And employees and employers should be able to come to agreements about how that structure is done.

PN611

Currently under awards, certain award provisions assume work from site and work from an office and assume work in a particular way. We say that an award should be flexible enough to accommodate a more flexible form of working from home. And that's to the benefit of all. We heard

PN612

Mr Robson's submission yesterday about living a life beyond just work, care and sleep. It was a good submission and it has some personal resonance with me. The ability under our proposal, for example, to finish work at 2.30 pm,

collect children from school, take them to sport or judo, or tutoring or a music lesson, have dinner and then return to work at 7 pm and work from 7.00 till 9 pm may not be for everyone. But it clearly is for some people. It's clearly attractive for some people and will result in a meaningful life for some people. And we say that the award should be able to accommodate it.

PN613

Some people don't want to go part-time simply because they need to do a school pick up. And the other argument that carers shouldn't miss out on penalty rates or penalty loadings simply because they're carers, I don't think that's really a realistic argument in circumstances where what we're talking about is an employee preference to work what would otherwise be an unsocial or unusual pattern of hours.

PN614

The reality is that employers wouldn't be expected to pay penalty rates to an employee in the instance of an employee who had a preference to work later at night or earlier in the morning, or had preference not to take a break or had a preference to take a longer break. That's not really an argument that would have merit. And no employee is given that now.

PN615

I don't want to give evidence from the Bar table, but the Deputy President mentioned the live experience of working from home post COVID. I think all of us would accept that there are arrangements, working arrangements of award covered workers which are not consistent (indistinct). And we say that the award should be changed to reflect that.

PN616

I can't see that the employers would derive any particular benefit from our proposal. It's really about the accommodation of an individual employee preference. And as I said, I think there is general agreement that working from home is different. We say that it can and should be relevant and should be varied to reflect that. And unless there are any questions that's all I wish to put.

PN617

DEPUTY PRESIDENT O'NEILL: Just to clarify, your proposal is that the various provisions around span and sector minimum engagement to be varied by agreement. So, by agreement it doesn't require it to be at the employee's request.

PN618

MR ARNDT: That's an option that the Commission could take, obviously. That's now how it's been put in our submission but it's certainly an option that the Commission could take. And we would say, and we think the experience with our members would be it's very, very unlikely of the types of arrangements that we're talking about, that an employer will request or suggest to an employee, it would be really great if you could work from 8 pm to 10 pm every night.

PN619

Those aren't the type of arrangements. Employees deriving an ability to roster people at all hours to avoid penalty rates is not the purpose of our proposal. As

Ms Bhatt mentioned, we say that employee agreement with the employer deals with that issue. But absolutely, the Commission if it were so minded, could take the view that it's a provision that's triggered through employee request and I think we share the same outcome. And I think predominantly that would be the case in most of the time it would be utilised.

PN620

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN621

Ms Tinsley?

PN622

MS TINSLEY: Thank you, Deputy President. Mr Arndt's stolen most of my thunder but the ABLA is actually family so (indistinct). In terms of (indistinct) we have got a common proposal here, so we'll reflect everything that Mr Arndt had said.

PN623

In terms of, as he has said, this is a really modest proposal which we see as being necessary to make sure that those with caring responsibilities aren't penalised and are able to fully participate in the workplace, and in doing so that the employers won't be penalised by allowing employees with caring responsibilities to take up this flexibility.

PN624

I just want to touch on one very – in terms of the contrast between it being by agreement or versus a request specifically being made by an employee, again, our preference would be for it to be by agreement. And I think in the current – when the new changes around the right to disconnect come out, that that would be completely appropriate and would provide employees with an additional safeguard.

PN625

So, what I mean by that is that it's a common complaint, I'm not saying that we necessarily support this view but it's a common complaint from unions that when you have an agreement that there's always an ability for an employer to pressure an employee to seek the agreement. We don't necessarily or, in fact, at all agree with that proposition. But in circumstances where you've also got a positive right to disconnect which will be coming into effect soon, and then as we all know, we'll even have a term in all modern awards, as well, that this will actively help to provide additional protections for employees.

PN626

So, here it will not be the case that an employer – it will a matter of saying, well, you have to undertake work. If you were picking up your kids from school and you were going back to the office you would have to respond to this email. So, I think that those two concepts will – yes, will together provide additional protection for employees, notwithstanding we don't necessarily believe that employees would need the additional protection but I just thought I would mention that, as well. Thank you, Deputy President.

PN627

DEPUTY PRESIDENT O'NEILL: Mr Arndt.

PN628

MR ARNDT: Ms Tinsley very ably reminds me to clarify. In answer to the Deputy President's question I understood your question to mean whether the right or whether the provision would be triggered or opened up by the employee request. It still would need to be subject to employer agreement.

PN629

DEPUTY PRESIDENT O'NEILL: I really just had in mind that in terms of my recollection of the COVID schedules, one of the measures was to ensure that it was by employee request, and then as the employer agrees, or something like that.

PN630

MR ARNDT: Yes. So, I think we'd be comfortable with that. And the Commission can certainly do that. Thank you.

PN631

MR ROBSON: Thank you, Deputy President. I might respond to some of that that ACCI and ABI have said.

PN632

DEPUTY PRESIDENT O'NEILL: Yes.

PN633

MR ROBSON: I'll deal with the simple one first, which is that the right to disconnect that has been legislated applies for work or contact outside the person's working hours. So, it's just not relevant to this proposal. It's a good change and very positive one but it wouldn't assuage anyone's concerns about the use of the proposal by ABI.

PN634

I then go to my friend's comments about the intent of the ABI proposal and I think it's very positive. I don't think it's a negative reason to propose this change. But it doesn't reflect the change that has been proposed to modern awards. And I think there's obvious scope for abuse of a clause of this term. I could imagine, for example, in the contract call centre industry where there is a relentless focus on labour utilisation and productivity.

PN635

These are employers that keep track of when calls are coming in, and make sure that they tailor their labour needs directly to that. You could see the advantage just from a cost competitive perspective of having a workforce that you don't need to rent a facility for; you do not need to, you know, do the instant coffee in the break rooms, all that sort of thing.

PN636

And then you can organise work during the day so that work is only performed at particular periods of time. And you don't need to bring in an extra worker in the evening because you can organise work between 5 o'clock in the morning and 9

o'clock at night depending on your view about the most efficient way to structure that work.

PN637

We say that, and I think Ms Wells from the NTEU said this perfectly, that if there was such a concern for employee voice the union proposals are the way to achieve that. We need a right for employees to request. And if there's a view from the Commission that there are flexibilities that follow on from that request that should be contemplated, that needs to be the starting point, that it's the employee's request.

PN638

Because there are too many negative consequences when employers can control when an employee works and then the working time protections that apply just suddenly disappear by employee agreement. And just finally, I really need to reiterate the point that this is a modern award covering the workers who not have the bargaining power necessarily to negotiate individualised working arrangements or negotiate enterprise agreements, for whatever reason.

PN639

I think it's right that there's things that could be in an enterprise agreement that may give much more flexibility in a modern award. And that's because there's a BOOT test, there's a negotiation and then there's a Commission review. But the problem with these facilitative arrangements and awards is that they go out into the ether and there is no monitoring of them and there's no review. They will just simply apply.

PN640

And it's a matter of, I suppose, luck if it comes to the attention of the responsible employer association or a union to try and resolve those issues, you know, through a future variation.

PN641

DEPUTY PRESIDENT O'NEILL: Thank you. All right. That discussion, in a sense, has covered the ACCI proposals, as well. And in that sense, Mr Arndt really did steal your thunder, Ms Tinsley. Are you satisfied with what has been put? Or is there anything you wanted to add in relation to the ACCI proposals.

PN642

MS TINSLEY: No, Deputy President. That's fine by us. Thank you.

PN643

DEPUTY PRESIDENT O'NEILL: All right. Then the next is the Ai Group's proposal which relates to minimum engagement periods and onwards, which you think we've covered - - -

PN644

MS BHATT: I think we have, Deputy President.

PN645

DEPUTY PRESIDENT O'NEILL: All right. Well, that is the end of the working from home issues, unless anybody wishes to add anything to that discussion. Otherwise we'll move directly into minimum payment periods with discussion on question 6 with the ACTU for the first proposal at item 20.

PN646

MS PELDOVA-McCLELLAND: Thank you, Deputy President. So, the discussion paper has a really useful outline of the purpose of the minimum engagement period and explores the history and the variation across awards. It observes they have been developed in a rather ad hoc fashion, rather than having any clear founding in a sense of general principles. I note that they range from one to four hours and vary depending on employment type or type of work performed.

PN647

It identified nine modern awards that don't include minimum payment periods for part-time employees. And it's worth calling out that the senate select committee into working care also looked at this issue in some detail and recommended that a minimum shift call in time across the care sector be introduced in order to address both gender pay equity but also the significant flow of workers out of that sector and the recruitment and retention issues.

PN648

So, this is why we've put forward what we have that awards be varied to provide for four hour minimum engagement period except where otherwise provided by affiliates. I'll touch briefly on some of the reply submissions. So,

PN649

Ai Group refer to a decision where this was looked at, the casual and part-time common issues decision, and all of the various reasons why it was rejected.

PN650

I think ACCI make a similar point, or raise some other cases where they refer to similar proposals being considered and not being adopted. Those submissions go on for quite a long time, Deputy President, and raise a lot of different issues, so without getting into the detail we would just say at the very least, the new considerations in the Modern Awards' objective of gender equality and job security really warrant looking at these matters again and reconsidering them through this lens. Obviously these considerations weren't a part of those previous cases.

PN651

And we think also that the findings of the senate select committee regarding issues in the care economy, coupled with the observations made in the literature review which include that low minimum engagement periods contribute inferior working time standards and absence of hours and income continually, all provide a really strong foundation on which to re-look at this.

PN652

The literature review also observes that there are some gender distinctions between awards and that minimum engagement periods are too low in some

feminised sectors. And the indicative proposals for change contained in the appendix basically aligns with the proposal we've put forward for those to be increased in line with male dominated awards.

PN653

We think at the very least – this is why we say that this issue should be considered at a higher level and in a broader way, rather than just taking a purely industry specific approach, as has been done in the past in those cases that I mentioned.

PN654

And at the very least I think those new considerations demand that we really interrogate whether there are legitimate industry specific considerations and reasons for shorter or low minimum engagement periods, and how these are balanced against those new considerations in the objective.

PN655

In relation to our proposal that the minimum payment period should apply where the rostered shift of a casual is cancelled. We note that Ai Group opposes this claim for various reasons, including that they haven't attended the workplace, so the expense and inconvenience associated don't arise, and that a casual employee's shift may be cancelled for a variety of reasons.

PN656

Some of our affiliates may wish to speak to this in more detail. Ai Group also say that an inherent practice for casual employment is that they don't have advanced rosters because there's no firm advance commitment to continue in indefinite work. Our affiliates note that that's just not the case. Casuals are very often offered and accept rostered shifts well in advance of those shifts, or at least with some notice.

PN657

Currently the way award provisions work is that employees can casual a casual shift while they're on the way to work. And so, we would say the same principles of minimum engagements can apply here because the idea is to compensate the person for the time, cost and inconvenience associated with the arrangements they've made to attend work, which will apply if a person is literally on their way to the workplace and has made arrangements for childcare, have paid the cost of travel, have taken the time out to travel and so on, gotten in their work uniform.

PN658

We say that this proposal would disincentivise the cancelling of shifts where casuals have made arrangements to attend work. I think that's all I wanted to say in response to the reply submissions. Thank you.

PN659

DEPUTY PRESIDENT O'NEILL: Thank you.

PN660

MS BHATT: We have dealt with this issue in some detail in our written submissions, so I'll rely on those. What I would say in addition to that is that we would oppose any suggestion that the setting of an appropriate minimum of

engagement or payment period can be done at a higher level. It is an issue that necessarily requires consideration in the context of the relevant industry or occupation to which particular award applies.

PN661

And so much is clear from that decision that was issued by the Commission in the four-yearly review. There was detailed consideration given to evidence that these core particular sectors that established a need for minimum engagement periods that are shorter than what is now being proposed by the ACTU. So, you know, I would not describe the existence of differing minimum engagement periods as being (indistinct) ad hoc.

PN662

I think rather it reflects the nature of the work that is performed in various sectors. The submissions that have been raised today about casuals, and I think we've dealt with those in our written submissions, too – I mean, the reality is that casual employees can also refuse to attend work often at very short notice. It is to some extent inherent in the nature of casual employment.

PN663

DEPUTY PRESIDENT O'NEILL: All right. Thank you. The next is a proposal for the Higher Education Industry Association. Ms Pugsley, did you want to say anything in relation to that matter? There is no – sorry. Sorry, I've just noticed, I mean, there actually isn't a particular proposal. It was more of just some commentary. But is there anything you wanted to say about this matter?

PN664

MS PUGSLEY: Thank you for the opportunity, your Honour. We rely on our written submissions in this regard. Thank you.

PN665

DEPUTY PRESIDENT O'NEILL: All right. Now, the next matter, I think we've covered which is minimum engagement and payment clauses, the Ai Group proposal. But is there anything you wanted to say in addition, Ms Bhatt?

PN666

MS BHATT: Can I just deal with items 22 and 23 jointly, because they operate in parallel. Effectively – well, to some degree they operate in parallel – so, the first proposal is this. There should be facilitative provisions that are introduced that allow for an employer and employee to agree that a minimum engagement or payment period can be reduced. This is an issue that was raised in another context at the review, as well, particularly making awards easier to use.

PN667

We see it as another way of creating opportunities for employees who have caring responsibilities, but indeed others too, such as those that have study commitments, for example, to participate in employment where they're available but just for the minimum. For example, they might only have two or three hours available in the afternoon or first thing in the morning to participate in work.

PN668

The second proposition is that in some awards that the minimum period is described as a minimum engagement period or as an obligation to roster an employee for a particular period of time. If an employer does not have that much work, so they don't have four hours of work for an employee but they make a four hour payment, it's not clear that that obligation would in fact be satisfied. It's a technical issue but one that is a genuine concern that has been raised with us by some members in the context of certain awards.

PN669

So, the suggestion here is that consideration should be given to whether those provisions can indeed be satisfied through a minimum payment. The issue that can then arise is how would that apply in circumstances where the minimum period is not satisfied because the employee is not available to work. So, you might have a casual employee do up to two hours of work and leaves.

PN670

And so, that's why we suggested that any minimum payment provision should apply subject to the employee being ready, willing and able to perform work for the entire duration of that period. But I just wanted to explain that because some issue has been taken with that element of our proposal by the unions.

PN671

DEPUTY PRESIDENT O'NEILL: All right. Does anyone else want to be heard in relation to these proposals?

PN672

MS PELDOVA-McCLELLAND: Sorry, Deputy President. Just in relation to the second part of that proposal. I mean, I rely on what we've put in our reply submissions which cover these proposals. But in relation to the second part and the minimum payment and so the minimum engagement period, as we've said, we agree that is the sensible thing to do.

PN673

The only issue is, and Ms Bhatt may have helped to clarify this today but there would be situations where that requirement for an employee to be ready, willing and able to work might be ambiguous.

PN674

So, for example, if they are there and the employer has said, 'Well, there's no work for you, you can go home,' how would that be interpreted. So, we just sound a note of caution about that, not necessarily to get in the way of a practical solution here but just to ensure that those protections that would be afforded to employees would be appropriate.

PN675

DEPUTY PRESIDENT O'NEILL: Understood. All right, then. The next is - - -

PN676

MS BIDDLESTONE: Sorry, Deputy President.

PN677

DEPUTY PRESIDENT O'NEILL: Ms Biddlestone.

PN678

MS BIDDLESTONE: I just have a couple of points.

PN679

DEPUTY PRESIDENT O'NEILL: Yes. Sorry.

PN680

MS BIDDLESTONE: Just in relation to the proposal I just note that there's been no evidence to support the variations sought by the Ai Group. However, there is an assertion that a facilitative provision allowing for agreement between an employer and employee to reduce the minimum engagement would better enable employees with caring responsibilities to participate in paid work by enabling them to perform work for short periods of time.

PN681

Further, they suggest that without that they might not otherwise be able to be engaged to work at those times. We've provided a lot of evidence in our submission in relation to the way our members manage their work and care, and that research has shown that about 37 per cent, so more than a third of our members, strongly agree that they would prefer shifts that were longer in length, not shorter in length, and that in fact short shifts are problematic for carers.

PN682

For example, short shifts are not well suited to current formal childcare arrangements. And we know from the research that we've conducted that our members have much less access to formal childcare than other working people. So, things like reducing minimum shifts would not assist worker carers but would in fact make things much more difficult for them.

PN683

The other issue is around the cost of attending a shift. So, there have been cases that have looked at that the fact that minimum shift provisions have been determined so that employees can be adequately compensated for the work that they perform, but also for the cost of attending a shift. So - - -

PN684

DEPUTY PRESIDENT O'NEILL: But isn't the proposal that it's confined for the purpose of attending training where the person was not required to attend the workplace?

PN685

MS BHATT: I think that's a separate issue that we've raised. But that's not the entirety of the proposal I just described earlier.

PN686

DEPUTY PRESIDENT O'NEILL: Okay.

PN687

MS BIDDLESTONE: No. I think it's an expansive proposal for any scenario that the person might be performing their work.

PN688

DEPUTY PRESIDENT O'NEILL: Okay.

PN689

MS BIDDLESTONE: So, we think that in terms of it being a facilitative provision, again that there are limitations with that. Obviously it would mean that someone would be agreeing to something where they would be being paid or having terms and conditions that are less than the minimum standards provided in the award, and definitely not something that we would support.

PN690

DEPUTY PRESIDENT O'NEILL: Okay. I was just reflecting on – there was a considerable amount of evidence in the Aged Care case where the increasing obligation was to do mandatory training on a range of initiatives. But increasingly that is online training that might be 20 minutes, or certainly less than an hour. And I imagine that model is becoming increasingly common in a range of industries.

PN691

MS BHATT: It is. And it's an issue that we have raised, for example, in this (indistinct) review concerning making awards easier to use. There are any number of training modules relating to a range of topics that can now be undertaken remotely. Indeed, on one's mobile phone at any time. And one of the issues we have raised is it's not appropriate for a three hour minimum engagement or payment period, for example, to apply in those circumstances in this instance.

PN692

DEPUTY PRESIDENT O'NEILL: Well, I think – I think, putting it generously, the evidence was very ambiguous about what actually happens in practice in the aged care industry about the payment, if any, in relation to those, so - - -

PN693

MS BHATT: I think a separate but related issue that keeps arising in at least some contexts, is attendance at TEAM meetings, staff meetings. Also increasingly, these are remotely.

PN694

DEPUTY PRESIDENT O'NEILL: All right. So, the next matter is the ANMF specific proposal for minimum engagement. In a sense it's been discussed more broadly but is there something you'd like to say in addition to that?

PN695

SPEAKER: (Indistinct)

PN696

DEPUTY PRESIDENT O'NEILL: Okay. (Indistinct) for work proposal. There's a specific proposal by the CPSU-SPSF at item 26. Mr Deguara, did you want to say anything in relation to that matter?

PN697

MR DEGUARA: I'll just be brief. I presume this is in relation to Team meetings?

PN698

DEPUTY PRESIDENT O'NEILL: Yes.

PN699

MR DEGUARA: Yes. Just in relation to Team meetings in the SCHADS, in particular, disabilities, for the context we have the funder, which is the NDIA which is not party to the award, which runs for two hours. And sometimes you have complications. You have incidents. You have behavioural issues. You have medical issues which require you to have more than two hours to adequately deal with the issues.

PN700

DEPUTY PRESIDENT O'NEILL: Okay.

PN701

MR DEGUARA: And part of that is also to deal with the health and safety of staff in relation to those clients. So, we've made a proposal in relation to that which also covers casuals to be included. So, sometimes casuals do get included. Some providers provide for casuals to be included. Others do not. And despite the fact that it's very regular, sometimes almost full-time regular on an ongoing basis for many, many periods of time.

PN702

The other aspect of it is with the current cost of living and fuel prices. Sometimes people will have to travel significant distances and if you've got a two hour, what is effectively a minimum wage, call out it's quite easy to make the ability for a two hour call out whittle away in your wallet without actually having any benefit to your take home pay, at all, when you've had to transport yourself.

PN703

In the regions they might have to travel a 100 kilometres or so, to go to the next town to where their actual service is. And it's also the opportunity cost in relation to other work. So, a number of providers share their workers all on a part-time basis and no-one actually gets to get to a full-time basis in that respect. It's an opportunity cost lost for those workers which are low paid workers.

PN704

And in that regard it probably doesn't meet the modern award objectives of 1(a), (c) and (d) in there, as well. So, it's particularly relevant in our sector of the disability sector where we've had a number of high needs people transferred from government to the NDIS sector and - - -

PN705

DEPUTY PRESIDENT O'NEILL: I'm just a bit curious. Is the issue the award provision or the funding decisions by the NDIA?

PN706

MR DEGUARA: In effect it becomes an issue of the award because the NDIA funds what's in the award.

PN707

DEPUTY PRESIDENT O'NEILL: Right.

PN708

MR DEGUARA: So, yes. It's a minimum two hour call out, yes. So, that's why the NDIA is a frustration mechanism in this whole discussion of modern awards.

PN709

DEPUTY PRESIDENT O'NEILL: Now, while you're on your feet, the next matter is the sleepover proposal. Did you want to say anything further about that?

PN710

MR DEGUARA: Yes. In respect to the sleepover clause, I've been asked to not mention modern slavery but it's a modern award system. But the way I've been told it works from – and I'd like to apologise for the industrial officer who wasn't able to attend due to respiratory issues – but the sleepover clause is that it requires someone to work a minimum of four hours adjacent to it. There is potential for a stolen(?) parent generation if someone – I've been speaking to disability workers and they say that the way that it works is that if you do a nightshift and you do four hours each side of it, because they often give you four hours each side, so you can actually get a decent amount of money for it, you'll actually miss contact with your children on all those sleepover nights.

PN711

So, you might start before 6.00 and then start your sleepover shift at 10.00, finish it at 6.00 in the morning and do another four hours adjacent to it, in which case your kids have come home from school, gone back to school and you haven't seen them. So, that's the sort of work and care perspective. And I think it doesn't quite meet the objectives of 1(d)A(2), unsocial, irregular and unpredictable hours.

PN712

Issues when I have been speaking to delegates include the ability to do lactation planning, deal with their own families, own requirement to see friends, family, community, sport and those sort of things. We actually have dealt with this issue previously in the State Industrial Commission where the President was acting on our behalf against the state agency which is (indistinct) and we tried to get rid of the sleepover clause because the sleepover, we think, is inherently unfair, requiring someone to be at work but not paying them.

PN713

Where we got is a range of safeguard measures which provided more certainty in relation to payment for hours in relation to those. At the moment they get a 4.9 per cent allowance of the standard rate, not any penalties or anything like that. It is an industry where there is certain rights of refusal but very minimum rights when it comes down to the keeping of the operation of the business going. And that's also in the rostering later, as well. But the clause is related to the rostering clause in the current SCHADS.

PN714

And I think that's probably where I'll leave it. It's just requiring someone to be at work and actually paying them just the minimum hourly wage wouldn't be put up with in male dominated industries. This is a 70 per cent female dominated industry and we have equivalence provisions such as travel time where, in this case, standard rate when you're not required to actively work. Yet in this industry because it's 70 per cent female dominated, we have not even a minimum hourly wage being provided.

PN715

DEPUTY PRESIDENT O'NEILL: All right. Now, I'm aware there's, I think - in relation to at least the sleepovers there's an award variation application that's at play. But does anyone else wish to say anything about either of these two matters, the Team meetings or the sleepovers? Ms Bhatt?

PN716

MS BHATT: In relation to sleepovers that was one of the matters that I was going to identify. It's an Ai Group application that has been made to vary the award and it relates to sleepovers. And in any event the proposals that have been advanced by the union would be very significant and would require detailed consideration is strongly opposed by Ai Group.

PN717

Just in relation to this issue of Team meetings, we've dealt with that in our written submissions but I wanted to clarify. The union has today said that the NDIA only finds what is in the award. To be clear, the NDIA doesn't find everything that's in the award. And that's been our experience that in some circumstances the award has been varied and the funding doesn't always catch up to it. But that's the only small point.

PN718

DEPUTY PRESIDENT O'NEILL: Okay.

PN719

MR ROBSON: If I may make one brief comment.

PN720

DEPUTY PRESIDENT O'NEILL: Yes, Mr Robson.

PN721

MR ROBSON: Thank you. So, the ASU representing it is the largest disability union of the country. It represents all workers everywhere except for Victoria and Tasmania, whilst other unions for community sector working in the NDIS. And that includes disability advocates. There is – why I think without getting into the issue of sleepovers I do want to take issue with AiG's comment about the NDIA not funding everything in the award.

PN722

We would say that it does. The disability support worker cost model underpins prices for each NDIS service and that is set by reference to the conditions in the award. I think it is more accurate to say that there are some providers who dispute

that that cost model accommodates the way that they should run their business. And certainly that's not something we disagree with but that's an argument, we say, with the NDIA.

PN723

Our experience has been that the Commission has varied the awards. The NDIA has reviewed its funding model and its cost model and has made adjustments each time. It's not a position we'd agree with AiG on.

PN724

DEPUTY PRESIDENT O'NEILL: And there's no lag in between those two events?

PN725

MR ROBSON: There's an - - -

PN726

DEPUTY PRESIDENT O'NEILL: And they've all been varied and the funding been redacted?

PN727

MR ROBSON: Yes. Sorry, Deputy President. There's an annual review of pricing arrangements. There's one currently going on at the moment. This was dealt with during the four-yearly review and with the introduction of overtime rates that don't replace the casual loading but, you know, the two go with each other. The Commission addressed that by giving a lead time that was sufficient for the NDIA to conduct its review and make its changes.

PN728

DEPUTY PRESIDENT O'NEILL: All right.

PN729

MR COPE: Can I just say on the lag, if I can, there is often an individual lag where the NDIA will assess someone that's not requiring active nightshift and then providing funding for a sleepover.

PN730

DEPUTY PRESIDENT O'NEILL: Yes. But I think that's a separate issue, again.

PN731

MR COPE: And that then takes the lag where we don't have a party to the dispute, as well, so – yes.

PN732

DEPUTY PRESIDENT O'NEILL: Thank you. All right. Item 28 is a proposal by the Flight Attendants' Association. Mr Gale? Well, your first appearance can't have been too scary to have come back for a second go.

PN733

MR GALE: Thank you, Deputy President. Yes, it didn't scare me off yesterday, so - - -

PN734

DEPUTY PRESIDENT O'NEILL: I'll try harder.

PN735

MR GALE: Yes. If it pleases the Commission, as flagged to the Commission yesterday in consultations I propose to address key aspects of the FAAA's submissions in response to questions 6 and 7, this morning and question 8, this afternoon. I'll speak to question 6 now. So, the FAAA notes that question 6 in the discussion paper refers to proposals for variations to modern awards regarding minimum payments periods. And the discussion paper also encompasses discussion on minimum engagement periods where there are pertinent issues.

PN736

To that end the first issue we raise is the inadequacy of the Aircraft Cabin Crew Award in assigning minimum engagement periods for casual flight attendants and how certainties around minimum engagements, and hence payments for work performed enhances choices in flight attendants meeting their caring responsibilities. A minimum engagement or payment period centres around certainty on income and how workers can support their family and other caring responsibilities.

PN737

Casual flight attendants often need to work multiple jobs including for employers outside of the airline industry. I'll note that cabin crew can only work for one airline at a time because they are only allowed to have one airport security identification card which is assigned by the airline. So, they may work for other employees outside of the airline industry.

PN738

The award currently has no minimum payment or engagement periods guaranteed to casual employees when rostered shifts are cancelled. Companies also argued that the minimum four hour engagement period under the award does not apply when a casual employee is rostered on home reserve, the equivalent of an on-call arrangement under other awards.

PN739

As would be raised in consultations by the FAAA with the Commission then looking at question 11, the FAAA proposes that the value of home reserve be increased from one hour for every four hours, to one hour for every three hours on home reserve. We also propose that a minimum engagement apply for casual employees including where a rostered duty is cancelled within 24 hours of sign-on and the casual is not reassigned.

PN740

For casuals who may work for more than one employer their attendance to report for duty at one employer also means that they lost the possibility to work for another employer. If the industry requires casual employees for a twelve hour duty they must be prepared to pay for that time. Employees under the Airline Operations Ground Staff Award are paid under clause 24.4, their hourly rate for each hour they are required on standby.

PN741

As outlined in our submissions the FAAA proposes a variation to clauses 11.2 and 11.3 of the award to ensure that casuals are paid a minimum payment including when they are on home reserve. Just to sort of colour those oral submissions, Deputy President, a lot of the time when it comes to casuals under the award, where they're not subsequently called in from on-call they don't get any payment whatsoever. And that is underpinned by a recent decision of the Commission.

PN742

It's only when they are subsequently called in that they receive the payment for being on-call and it's one quarter of their hourly rate, which we also believe to be insufficient given that many cabin crew will have to put on their uniform, put on their make-up. There are restrictions on what they can do. For instance, cabin crew can't drink alcohol or anything like that within eight hours of undertaking a duty.

PN743

So, there's the significant degree of control that the employer holds over through when they are on home reserve. And we don't believe that the current ratio is sufficient. Nor do we believe that it fair that they are not paid at all when they are not subsequently called in. We disagree with that prior decision but nevertheless that's the law of the land as it is. So, if there are questions on that I'm happy to answer them. Otherwise we conclude our submissions at this point.

PN744

DEPUTY PRESIDENT O'NEILL: Thank you. I don't have any questions for you.

PN745

MR GALE: Thank you.

PN746

DEPUTY PRESIDENT O'NEILL: The next proposal is an NTU proposal but in light of the planned discussions on 11 April are you content for that matter to be dealt with then, or would you like to say something about that now? Ms Wells, I'll invite you first.

PN747

MS WELLS: No, thank you.

PN748

DEPUTY PRESIDENT O'NEILL: All right. Ms Pugsley, are you content with that or would you like to say something whilst we're all together?

PN749

MS PUGSLEY: Thank you for the opportunity. We are content, likewise, to defer that till 11 April, thank you.

PN750

DEPUTY PRESIDENT O'NEILL: Thank you. The next two are two proposals by the – one with the SDA in relation to (indistinct) and rest breaks. Ms Biddlestone, did you want to speak to that?

PN751

MS BIDDLESTONE: Thank you, Deputy President, just very briefly. I won't go over the points raised in relation to the minimum rate issue, but just to make a note of the second proposal which is in relation to rest breaks. And that goes to the experience of our members. When the award was changed so that rest breaks were paid when working four hours or more, rather than more than four hours, we saw a change across the industry in a way that members were rostered so they were rostered for less than four hours to avoid the payment of the rest break.

PN752

So, if the minimum shifts are increased to four hours we would like to see a change to the rest break provisions so that a paid rest break is payable on any shiftwork that is worked. Thank you, Deputy President.

PN753

DEPUTY PRESIDENT O'NEILL: Do you want to say anything,

PN754

Ms Bhatt?

PN755

MS BHATT: We've dealt with the first proposition in writing.

PN756

DEPUTY PRESIDENT O'NEILL: Yes.

PN757

MS BHATT: In relation to this submission about the rest break, I'll just firstly note that it's not clear that there's a connection between that proposal and the idea of work and care. But putting that to one side, in reality there are likely to be a number of factors that colour rostering decisions that are made by employers, including the length of a shift.

PN758

So, I think that the idea that it's necessarily in order to avoid having to give an entitlement to a rest break is one that should be approached with some caution. Obviously if this proposal was to be entertained there would need to be detailed consideration given to whether it's necessary or appropriate for rest breaks to be given on shifts that might be quite short, as short as three hours.

PN759

DEPUTY PRESIDENT O'NEILL: Yes. All right. The next is the proposal by the United Workers Union. Mr Orr, did you want to speak to this matter?

PN760

MR ORR: Deputy President, we're comfortable relying on our written submissions.

PN761

DEPUTY PRESIDENT O'NEILL: All right. Thank you. So, turning now to question 7 regarding span of hours, the first proposal is one by the ACTU. Sorry, I might just – before we might start that, we've been going a couple of hours so we might take a short, 15 minute break and resume at 11.45.

SHORT ADJOURNMENT

[11.29 AM]

RESUMED

[11.45 AM]

PN762

DEPUTY PRESIDENT O'NEILL: All right. So, Ms Peldova-McClelland, over to you.

PN763

MS PELDOVA-McCLELLAND: Thank you, Deputy President. So, span of hours. So, firstly we note, obviously that the span of hours clause is fairly fundamental because they provide the boundaries for a range of different entitlements and thereby have a material impact on the employees' pay and their entitlements, and their ability to manage work and care because they impact when they can be rostered.

PN764

They also impact whether someone may be considered to be a shift worker, and therefore determine how much annual leave they have. They obviously set the structure of hours to ordinarily be worked, with work performed outside of those hours being compensated by way of a penalty such as overtime or shift allowances. And that is appropriate compensation for employees working at unsocial times which might clash with their care-giving responsibilities.

PN765

Our submissions made some key points which I might just briefly highlight. In awards with no span, or a very broad span of hours employees have very little control over being scheduled to work outside of standard weekdays daytime hours. And they also receive much lower compensation when they do work those hours instead of ordinary hours.

PN766

We say that it's a gender equality issue because male dominated awards are more likely to have a narrower spread than female dominated awards, which then place the restriction and protection against being rostered at particular times such as evening or weekends as ordinary hours. Awards that contain a broad span and include all seven days as ordinary days need to be addressed to provide stability in terms of when an employee can be rostered, to restrict when they are expected to work and to provide the appropriate compensation.

PN767

We note also the analysis undertaken by the SDA in its initial submission of the 25 awards identified in the discussion paper and the stark differences that were demonstrated there between male dominated and female dominated awards and say that the gender equality indications of this cannot be overlooked, including

potential based gender based undervaluation of work and the implication as to how work is managed, work and care.

PN768

I turn now to a few of the reply submissions, and respond briefly. So, Ai Group refer to industries with no span of hours operating in the way that they do because of load industry requirements and how they operate, and the work that is performed, and to the point to industries with long operating hours, health care retirement(?) sort of thing. Again, we just point out that there are industries that operate seven days a week at various times of the day and night that have narrower spans.

PN769

So, for example, the Aged Care & Nurses Award have narrower spans. There are also male dominated industries that operate, as I alluded to yesterday, seven days a week, all times of the day and night, to fill things like civil construction and infrastructure projects, and repair and maintenance of essential infrastructure.

PN770

So, it's not sufficient in our submission to say that awards without a span don't have one simply because of the nature of the services and operations. It is clear that many 24/7 industries, or industries that need to operate across a broad range of hours and days have spans and have narrower spans.

PN771

Ai Group also say that we haven't taken the opportunity to identify which awards contain a span that goes beyond what we say are standard hours of work. Just briefly in response to this, I would have liked to have undertaken some detailed analysis but unfortunately it wasn't possible in the time available and in the context of all the issues that have been raised here, and just note the discussion paper was intended to provoke discussion for potential issues.

PN772

We think this issue in addition to some others that we've identified, there's significant merit in considering it further, particularly in light of the new objectives and the modern award's new considerations. And it's something that we have only been able to consider at high end, broad level at this stage but we think it warrants detailed further consideration in a report and potentially then in separate proceedings if the Commission or parties were minded to bring those.

PN773

We also say, just to clarify a point that Ai Group make about us not identifying a standard span, we do refer again to the SDA submissions in identifying the awards which contain a span that goes beyond what we are referring to as 'standard week day hours,' by which we mean Monday to Friday, day time hours. Obviously there's a little bit of variation in the exact times but for example, there are many that goes from 6am to 6pm and there are some that are narrower than that, obviously.

PN774

Ai Group and ACCI both refer to, again, this point that some industries are going to have a broader span than others, most likely to do with client/customer demand and relevant service period, again refer to plenty of industries that operate 24/7 with narrow spans. And I'd also point to the variations between female dominated awards.

PN775

So, if you look at aged care compared to the SCHADS Award they both cover 24/7 operations but the difference in the span of hours between those two awards means there is inconsistency in the way employees are compensated for working non sociable and non family friendly hours.

PN776

And the HSU in its submissions makes this point in some detail and compares the span of hours in various female dominated awards that it has an interest in. So, we'd say again there's clearly something else going on here other than the nature of the operations and services provided in a particular industry.

PN777

I'll move onto a couple of points raised by ACCI in its reply submission. They take issue with our submissions and the submissions of our affiliates that point to differences between male and female dominated awards. They stated that it's curious that we don't engage with the proposition that female dominated industries may be so because work in those industries is more amenable to balance between work and care.

PN778

And we reject this proposition and we haven't engaged with it because we say it's absurd. The reasons for the significant and ongoing occupational and industry segregation in Australia is very well established, and everything to do with social norms that shape the kind of work women have done historically and continue to do, and the ongoing rates of pay in those occupations and industries that reflect systemic gender based undervaluation and has disincentivised men going into those sectors.

PN779

There is obviously significant research and literature on this including the stage 1 report published by the Commission and some of the materials before the expert panel on the annual wage review last year. I don't propose to go through that in detail but I would just note these are well established reasons for this situation that have nothing to do with those industries being easier for workers to balance work and care.

PN780

ACCI also slightly misrepresents our argument. They say that we're saying that we should just replicate male dominated conditions in female dominated awards and pay, and the world would be perfect and everything would be fixed. We're not saying that. Indeed there are other barriers in male dominated industries that obviously need to be looked at.

PN781

But we say and what we seek to point out as part of this review is the way in which fundamental entitlements are structured in male dominated awards that provide far more security and appropriate compensation. That needs looking at about why those fundamental entitlements are so different in female dominated awards.

PN782

We have explained at length in our submissions the negative impacts of a broad span of hours – the lack of access to overtime; the insufficient compensation for on-call and travel time at length for women and working carers. And again I just make the point that the employers generally want the Commission to believe that the only way to provide flexibility to employees through making work less secure and giving more control to working hours to employers.

PN783

Their proposals would facilitate a model where employers have a lot of flexibility, where flexibility is an employer driven matter and can require employees to turn up at any time they wish with no obligation to appropriately compensate them. And we again take the opportunity to reject those proposals and that model and conception of flexibility. And I think that takes me to the end of my replies to the replies.

PN784

DEPUTY PRESIDENT O'NEILL: Thank you. Does anyone else wish to say anything about this issue?

PN785

SPEAKER: I'm content to do with what we've said in writing.

PN786

DEPUTY PRESIDENT O'NEILL: All right.

PN787

MS BIDDLESTONE: Deputy President, sorry, I do note that further down in the list is the SDA's proposals around span of hours, which are pretty much identical to the ACTU, so I am wondering whether it might be better for me to do that now rather than waiting for - - -

PN788

DEPUTY PRESIDENT O'NEILL: Do that now. Certainly.

PN789

MS BIDDLESTONE: Yes, if that's okay.

PN790

DEPUTY PRESIDENT O'NEILL: Yes.

PN791

MS BIDDLESTONE: And I will try not to repeat the submissions that have just been made but I do just want to make some separate submissions from the other

context of the SDA and the members that we represent. And obviously I rely on the submissions that we have already made.

PN792

So, firstly just in relation to the submissions of the Australian Industry Group at paragraph 196, I just wanted to clarify that the assertions that we made in our submissions in relation to the use of model rosters that include a certain number of hours that must be worked on evenings and weekends, frequent roster re-sets within computerised systems, and policies that require rosters of workers on lower classifications to work weekends and evenings, and the waiving of rights to roster protections are not premised on individual and unverified employee counts.

PN793

They are based on the interactions of the SDA and which we have on a regular basis directly with employers in relation to their policies and practices around rostering. While we included examples provided to the researchers as part of the work and care research, we do not rely solely on that but also on what we have learnt directly from employers.

PN794

I also do just want to make the point that as industrial organisations, unions and also employer organisations like the Australian Industry Group throughout their submissions do make assertions because of what we learn through our representation of our members and the interaction then we have with either employees or employers. And the weight to be given to that will be determined by yourself, Deputy President and we acknowledge that.

PN795

Secondly, the Australian Industry Group suggests that employees are compensated for working at unsociable time and employers may not be able to operate outside of the prescribed span. If it is changed and becomes overtime we submit that even with the payment of penalty rates with such an expansive spread of hours workers are not appropriately compensated.

PN796

The other issue is that the span of hours is not only relevant for establishing the rate of pay but also the times that an employee can be rostered as part of their ordinary hours of work. It is common in retail, fast food, hair and beauty, other industries for workers' rosters to be substantially changed from one end of the spread to another and to completely different days of the week, and awards don't sufficiently protect workers from those changes. The broad spread encroaches on times that caring is mostly likely to be needed and this has been evidenced in research highlighted in our submissions on work/family conflict and also in the literature review.

PN797

Thirdly, the Australian Industry Group suggests that the differences between awards in relation to standard hours is less to do with gender undervaluation than with the nature of operations. The SDA submits that this is not the case. Many male dominated awards that are identified in our submission as having a narrow spread cover industries where work is conducted outside of the spread.

PN798

For example, building and construction, major infrastructure projects, those sorts of things, storage services which is one of the awards that we have coverage of, and manufacturing and those sorts of industries often operate on a 24/7 operation. There would also be operations required outside of the normal spread in electrical, plumbing, those sorts of industries.

PN799

Rather, the commonality is not the way that work is done but the gender segregation of the work historically, and the gendered nature of the work. If I could take the Deputy President to paragraph 222 of our submission which I'm sure you've already seen and which Ms Peldova-McClelland has referred to, we have provided a table that compares the spread of female dominated awards to that of male dominated awards and the comparison is stark.

PN800

As the objectives of the Act and the modern award's objectives have now been amended to include consideration of gender equality and job security, this now needs to be reassessed. Currently it results in gendered outcomes for rostering job security incomes which are having a negative impact on female workers who are predominantly also worker carers.

PN801

I would also question whether the spread in awards such as hair and beauty, pharmacy and fast food and retail truly do reflect the standard operating hours in industries they cover. And the Australian Industry Group has not provided any evidence to this point. Thank you.

PN802

DEPUTY PRESIDENT O'NEILL: Thank you, Ms Biddlestone. All right. The next item back to 37 was the proposal in relation to the span and general staff award and the RBH(?) EIA. Again, Ms Pugsley and Ms Wells, are you content for that to be dealt with on 11 April?

PN803

MS PUGSLEY: Yes, thank you, your Honour.

PN804

DEPUTY PRESIDENT O'NEILL: Ms Wells?

PN805

MS WELLS: Yes. Thank you, your Honour, save to say that the NTU is opposed to the expansion of the span now.

PN806

DEPUTY PRESIDENT O'NEILL: Yes.

PN807

MS WELLS: Thank you.

PN808

DEPUTY PRESIDENT O'NEILL: Yes. Okay. So, the Ai Group's proposal relates to discussion question 3. But what would you like to say, Ms Bhatt?

PN809

MS BHATT: I think part of it relates to question 3 and part of it relates directly to question 7. And the latter part is this. It is our understanding that some employees wish to be able to work on weekends because indeed, that better suits their circumstances.

PN810

For example, it might be that in relation to an employee with caring responsibilities they are more able to arrange care for their children because the other parent is available or the grandparents are available to look after the children. There might be a whole host of circumstances in which this arises. But under a number of awards ordinary hours can't be worked on a weekend.

PN811

The Clerks Award is an example, save for Saturday mornings, for example, when ordinary hours can be worked. So, our proposal is that that coupled with the obvious point that many businesses also have a need to operate on weekends, that the span of hours should be expanded to (indistinct) for that. This would have the benefit of giving employers and employees more certainty, rather than relying on the performance of overtime during weekends.

PN812

And obviously if those hours are treated as ordinary hours, superannuation and leave benefits would accrue. There is an acceptance in our written submissions that it would be necessary to give consideration to appropriate penalty rates that would then apply for that work. So, for most (indistinct) not that you were paid the base wage for working ordinary hours on a weekend.

PN813

In response to the (indistinct) concerns I would simply say that they ignore changing attitudes to work being performed on weekends. Now, I think the idea of working 9.00 to 5.00, Monday to Friday is reflective of a bygone era. There is now greater acceptance of the fact that that working model is often an issue of relevance. And so, it's on that basis that we have advanced it.

PN814

Needless to say, this is not a model that would necessarily be utilised by all employers. I mean, in some contexts it might not make sense operationally, but probably, in some cases it would. It is a proposal that would advance specifically in relation to the Clerks Award in making it a more (indistinct) stream as well.

PN815

DEPUTY PRESIDENT O'NEILL: All right. Thank you.

PN816

MR ROBSON: Deputy President, I think given that the Clerks Award has been mentioned we get guernsey here. So, I think there's a contest in the Clerks Award that I think comes from the (indistinct) unusual position in the award in that it's an

occupational award and ordinary hours in that award can be set using the rules of another award where the clerk is working in that industry.

PN817

And I think traditionally that seemed to be manufacturing, and you know, don't ask me to say exactly how that would work at this point. But you can imagine that there is some use to having your office staff working at the same time that the factory is working. There is a fundamental problem with AiG's position in that it ignores part 6 of that award which provides for shiftwork.

PN818

That allows work to be rostered any day of the week and it provides appropriate penalty rates for nightshift work, Saturday work and Sunday work. There is a day work provision and that provides that ordinary hours can be worked between 7am and 7pm between Monday to Friday, and then between 7am on Saturday mornings till 12.30 in the afternoon. Now, we say if there's any consideration about changes to the span of hours in that award it's the Saturday morning ordinary hours that causes a logical problem.

PN819

If this is day work that is meant to cover work during the standard business week, why is there that Saturday morning provision when there is also a shiftwork provision that allows work to be rostered basically at any time, with the appropriate penalty rates. And then another provision where that clerk is working in another industry, to set ordinary hours by reference to that award. And that is actually narrowing in on that Saturday morning shift that actually, I think, brings the issue to its crux.

PN820

And we say, well, yes, there is actually something illogical about this, the way this is structured and surely if we - if employers want this flexibility of how we engage people as shift workers there is no need to expand the scope of day work.

PN821

DEPUTY PRESIDENT O'NEILL: All right.

PN822

MS PELDOVA-McCLELLAND: Deputy President, if I could just make a brief comment, thank you. I'd also just like to again reiterate that they are claims made by AiG about employees wanting to work on the weekend and that how that may be easier in facilitating carer responsibilities, do stand in contrast to the observations made in the literature review, and also the experience of members that are detailed at length in the SDA submission.

PN823

I'm not sure, Mr Robson, if you'd like to speak to that more but for example, the literature review talks about the impact of working weekends and the worker carer conflict that arises, particularly for mothers and, yes, looks at the disadvantages associated with weekend work and parents missing out on social and emotional benefits of spending time with their children on the weekend.

PN824

And we say that these observations, as well as the experience of members that are detailed in the SDA submissions should really strongly caution against this proposal being adopted, at all, but especially on a broad basis across awards. Deputy President, I think I'd just make one observation just in relation to the comment about the fact that unions don't have grasp of the fact that the world has moved on beyond a five day week.

PN825

SPEAKER: I do have some concerns with that because actually we haven't moved on from that. School children go to school Monday to Friday. Day care, childcare centres operate Monday to Friday. So, if you are a career, in terms of your ability to provide care and when that it is required, it is required on the weekends because that is when your children are not at school or not in childcare.

PN826

So, in fact as the world does not provide a place for workers to have the luxury of working out which date of the week that they can actually attend work. So, I just wanted to make that observation and also support the submissions just made by Ms Peldova-McClelland in relation to what our research does show.

PN827

DEPUTY PRESIDENT O'NEILL: Thank you.

PN828

MS BHATT: Can I just respond to the shiftwork proposition. (Indistinct) the shiftwork provisions have some limitations because, for example, it appears that the shiftwork provisions apply only where an employee is engaged to perform work on an afternoon shift, a nightshift or a permanent nightshift, those are defined shifts. An afternoon shift, for example, a shift which finishes after 7 pm or before midnight.

PN829

It's not clear that an employee can be engaged to work more than a shift worker on a Sunday on a shift that starts at 9am and finishes at 5 pm because it wouldn't need to meet the shiftwork definitions. But there's no concept of dayshift, as it were, in the shiftwork regime for that award. I'm not sure if that makes sense but – I think some awards have that concept but many don't. And certainly I don't think the Clerks Award does. So, the shiftwork provisions are not necessarily going to be a complete answer to what we've advanced.

PN830

DEPUTY PRESIDENT O'NEILL: All right, that's fine. We're not going to resolve that particular issue here.

PN831

MS BHATT: No.

PN832

DEPUTY PRESIDENT O'NEILL: The next is the Flight Attendants' Association, the proposal to facilitate a return to (indistinct).

PN833

MR COPE: My apologies, I'm just trying to find my page. I don't appear to have my page in this set of notes, I'm afraid. We'll return to that another time.

PN834

DEPUTY PRESIDENT O'NEILL: Thank you. You mean you don't have them with you, at all, here?

PN835

MR COPE: No, no. I've got it - - -

PN836

DEPUTY PRESIDENT O'NEILL: Just go and grab it.

PN837

MR COPE: Okay. Thank you. Thank you, Deputy President. My apologies for the delay. In relation to this question the FAAA questions are at paragraph 78 to 83 of the written submissions. Cabin crew and airlines operate in a unique environment. Reflecting the nature of the industry the award does not prescribe a span of hours for cabin crew. In lieu of this, cabin crew work a maximum total number of hours averaged out over a year.

PN838

So, daily hour maximums are linked to specific duties and for short haul planned hours. I might just check my notes and we might provide a - - -

PN839

DEPUTY PRESIDENT O'NEILL: If you'd rather return to that later that would - - -

PN840

MR COPE: Yes. Thank you, so much.

PN841

DEPUTY PRESIDENT O'NEILL: That's - - -

PN842

MR COPE: Yes. Okay.

PN843

DEPUTY PRESIDENT O'NEILL: Okay.

PN844

MR COPE: My apologies. I'm so sorry.

PN845

DEPUTY PRESIDENT O'NEILL: That's fine.

PN846

MR COPE: So, daily hour maximums are linked to specific duties for short haul planned hours and they range from eight hours on airport reserve duty, to 14, a combination of non-flying, (indistinct) or dead head. For all intents and purposes

a cabin crew's daily hours' maximum is akin to their span of hours, the majority of which is 12 hours, a significant number of daily working hours by any measure.

PN847

For international flying, planned duties range from 10 to 23 hours. Because of the nature of flying, cabin crew do not have typical or normal hours of work, which is more likely to impact on care and responsibilities due to irregular home life patterns. The ability to go to work and return home as per your rostered hours is critical to support stable caring responsibilities.

PN848

Cabin Crew engaged under schedule B of the award which prescribes conditions for regional flying are regularly faced with the choice of flying home on their own time or being left to overnight away from home where their hours extend beyond the maximum of twelve. There is no provision for overtime or extended hours, as we mentioned to the Commission yesterday.

PN849

So, consequently if a flight is delayed, causing a flight attendant to exceed their maximum daily duties hours on shift, under the award they have two choices. The first is to fly back to home port on their own accord and at their own expense, or to stay overnight. This situation is not uncommon and it is particularly practised with respect to casual crew where they often do not have that same degree of power.

PN850

In our submissions the FAAA proposes to amend schedule B to provide cabin crew with the option to either work beyond their daily hour limitations at 150 per cent of their base rate on a flight returning to their home base, or to dead head back to home base at their normal rate of pay where a flight is available. For context, dead heading being travel performed under direction and regard it as duty time where cabin crew sit in the cabin as a passenger but may be called to operate on that flight in an emergency.

PN851

The ability to return home from work to family and caring responsibilities as soon as possible after the conclusion of a flight is obviously quite important. And to have this at the employee's choice supports the work and care related objectives. The FAAA's proposed variation assists in the Commission achieving this part of the modern award's objective and that is subject to any questions from yourself and the conclusion of our submissions on this question.

PN852

DEPUTY PRESIDENT O'NEILL: Thank you, very much. I don't have any questions. All right. So, that essentially takes us to the end of question 7 and onto question 8. So, starting with the Australian Chamber of Commerce,

PN853

Ms Tinsley, did you want to speak to this proposal at item 48.

PN854

MS TINSLEY: Thank you, Deputy President. It's not really a proposal here.

PN855

DEPUTY PRESIDENT O'NEILL: (Indistinct) or just making some comments.

PN856

MS TINSLEY: We were just making the comment generally.

PN857

DEPUTY PRESIDENT O'NEILL: Yes, all right.

PN858

MS TINSLEY: So, we're content to rely on our written submissions in reply on this point.

PN859

DEPUTY PRESIDENT O'NEILL: Yes, you're right. There are proposals by the ACTU, Ms Peldova-McClelland at item 49. Would you like to speak to that?

PN860

MS PELDOVA-McCLELLAND: Yes, of course, Deputy President. Was there – I thought there may have been a proposal from someone before us but I am probably mistaken.

PN861

DEPUTY PRESIDENT O'NEILL: Not that I can see.

PN862

MS PELDOVA-McCLELLAND: No. I think I'm mistaken.

PN863

DEPUTY PRESIDENT O'NEILL: Anyway, the floor is yours.

PN864

MS PELDOVA-McCLELLAND: I'm awfully sorry. Thank you. Okay. So, a rostering proposal – our proposal is based on what our affiliates have reported to us about how current rostering provisions in awards have multiple negative impacts on workers, and the balancing they are able to do of work and care.

PN865

So, similar to submissions we have made about other issues in this stream, rostering provisions are they currently stand mean workers have a lack of control of their hours of work, changes to their hours and their ability, for example, to take their leave entitlements and have a work/life balance that includes their caring responsibilities.

PN866

These issues have been acknowledged and detailed at length in the final report of the senate select committee into work and care which particularly focussed on workers in the care sector who experienced unfair rostering practices. And this is why those reports, the interim and the final report, made several recommendations in regard to rostering.

PN867

I would also just note comments in the literature review that are consistent with the findings of the senate select committee in that it observes that rostering instability and unpredictable work hours impact negatively on all employees but is obviously particularly adverse for worker carers. And they call out in particular, the retail industry where poor rostering practices are enabled by weak award protections and employer practice that have the effect of marginalising many workers' income security and denying them the ability to provide care. And that is been described by some as care theft.

PN868

To return to the reply submissions from the employers I'd just make a few points. Ai Group talk about our submissions not distinguishing between full-time, part-time and casual employees. They note that most awards require an agreement being reached with part-time employees about hours of work. So, there's no real case here for anything to be improved in terms of rostering. We have obviously discussed at length the issues of part-time employment in yesterday's consultation, how many part-time employees don't have the protections that are referred to by AiG due to, for example, being on low base hour contracts.

PN869

So, we say that this combined with the literature review which talks about evidence of unstable scheduling, on-demand flexibility and that changes being able to be advised unilaterally and without agreement or consultation, is evidence that Ai Group's proposal for this doesn't apply to part-time employment should be rejected. In any event, if what they say is correct and many, or most part-time employees have an agreement about their hours of work then a 28 day roster shouldn't present many problems.

PN870

As for casuals, I think I alluded to this earlier. The reality in our affiliate's experience is that many casuals are offered and do accept rostered shifts. And we don't say that it's unreasonable to suggest an employer would know a month in advance whether they need a casual to perform work. This doesn't necessarily suggest there is any advanced commitment to ongoing indefinite work. It might be that they have a need for casual employment coming up that they can reasonably predict.

PN871

In relation to our proposal on a positive obligation to provide employees with rosters that provide caring responsibilities, Ai Group propose that – we'd just like to say here that this recommendation is consistent again with the senate inquiry recommendations that went to a positive obligation on employers to accommodate care and responsibilities.

PN872

And we say it's necessary to avoid indirect discrimination against those with caring responsibilities who are currently subject to the same rosters and same considerations as everybody else, and just don't take those things into

account. There are numerous issues with flexible work arrangements that we've outlined yesterday, so that's not a complete answer as it's put forward by AiG.

PN873

Also, we'd note that some frontline industries claim that a condition of employment for all employees is to work rotating rosters, so across the day and the afternoon and nightshifts, and they don't resile from this, even for single parents in rural places where there's no childcare available at those times. And in the experience of our affiliates when the issue is take up by the union it can usually be resolved.

PN874

There are usually solutions that will provide a roster for those parents and is appropriate and can allow them to attend to their caring responsibilities. However, it always takes a fight. It is always hotly contested. It always takes time and disputation. And so, having something like this in our proposal would cut through that need to have that fight, and also make sure that all workers have the benefit of this, not just those who have the benefit of a union representative.

PN875

What else. Yes, the dispute resolution point. So, just on the status quo, I think Ai Group make the point that current dispute resolution processes require employees must not unreasonably fail to comply with the direction about performing work while a dispute is on foot, and that is appropriate to maintain that.

PN876

Where a dispute is about whether an employee can perform work, as has been requested by an employer, a requirement that they must not unreasonably fail to comply with a direction to perform work while a dispute is on is inappropriate because that would render the dispute process meaningless and of no utility if the employee simply had to turn up to the very shift they were disputing whether they could turn up to in the first place. So, we say it would necessitate a different approach. And I think that concludes my comments on the replies.

PN877

DEPUTY PRESIDENT O'NEILL: Thank you, very much. Does anyone wish to be heard in relation to that matter?

PN878

MS BIDDLESTONE: Deputy President, I'm sorry. Similarly, with the span of hours we've made very similar submissions so I'm wondering if it's better if we just address it now, as well.

PN879

DEPUTY PRESIDENT O'NEILL: No problem.

PN880

MS BIDDLESTONE: Apologies for that. So, just, yes, we've made - - -

PN881

DEPUTY PRESIDENT O'NEILL: So, this is at item 62?

PN882

MS BIDDLESTONE: Yes. Well, I don't know that all of the proposals we've made have been captured in the summary.

PN883

DEPUTY PRESIDENT O'NEILL: Okay.

PN884

MS BIDDLESTONE: So, I'll just address the ones that are captured here in terms of the ACTU proposals.

PN885

DEPUTY PRESIDENT O'NEILL: Yes. Yes.

PN886

MS BIDDLESTONE: And then I might address others if I need to later on, if that's okay. Just in terms about the proposal, the AiG suggests that irregular or unpredictable hours are inherent and a largely unavoidable characteristic of employer's operations in certain parts of the economy. However, this is not supported by any evidence and fails to acknowledge the extent to which this is prevalent across industries.

PN887

While there may be some fluctuations in things like customer traffic in industries such as retail and fast food, there are fairly low established patterns of customer traffic which later can be planned around and supplemented with casual labour where fluctuations occur such as peak trading.

PN888

In relation to roster changes by mutual agreement, this is also supported in the submissions of the SDA. Hours for part-time employees, for example, are agreed between employer and employee engagement. The employer managers workload output based on these hours and the worker makes arrangements for their responsibilities and commitments around their work hours. When this is disrupted unilaterally by an employer it can have significant impacts on employees and their families, particularly in relation to care arrangements.

PN889

For some they simply cannot accommodate the change and I believe their employmentology(sic) sours. The power under awards is too far in favour of employers and needs to be rebalanced so that awards can continue to meet the modern award's objectives and objectives of the Fair Work Act.

PN890

And you'll see through the evidence that we've provided in our submission the severe impact that these sorts of changes do have on workers and their families.

PN891

Also in our submissions at paragraphs 132 and 138 we have set out tables which set out the notice periods for roster changes. And again they highlight the gendered nature of the construction of awards where in this case male dominated awards are more likely to restrict changes to hours by mutual agreement or consent only, and female dominated awards allow for unilateral change by employers with the provision of notice. And I note that this is often very short, being seven or 14 days.

PN892

If you are a parent with a child in childcare it is very difficult to change the days that you have childcare arrangements with that amount of notice. And if you do raise an objection or a dispute in relation to the change, currently under awards you are still obligated to make the change in hours even while the dispute is on foot. In relation to the maintenance of status quo when a dispute is raised in relation to proposed roster changes, the SDA does strongly support this and Ms Peldova-McClelland has made reference to this.

PN893

We currently have this provision in some enterprise agreements and rather than extending the time for resolution or providing any barriers, it in fact provides an incentive for quick and appropriate resolution of any issues that an employee may raise. And it hasn't led to hindering an employer's ability to change rosters, it has just done this with more appropriate consultation and investment in resolving the issue in relation to the change not being able to be made. Thank you.

PN894

DEPUTY PRESIDENT O'NEILL: I think the next item is the AMWU. Mr Orr, it covers a lot of the ground that's been covered but did you want to speak or say anything in particular in relation to this matter?

PN895

MR ORR: Yes. Thank you, Deputy President – UWU.

PN896

DEPUTY PRESIDENT O'NEILL: No. I've got the wrong representative. I'm actually meaning Mr Amoresano. Yes, my mistake. My apologies.

PN897

MR AMORESANO: Thank you, Deputy President. Nothing arises from the AMWU's (indistinct)

PN898

DEPUTY PRESIDENT O'NEILL: Okay.

PN899

MR AMORESANO: Thank you.

PN900

DEPUTY PRESIDENT O'NEILL: I think that must be another sign that it's lunch time.

PN901

MR ORR: If it pleases the Deputy President, I might speak in relation to the same
- - -

PN902

DEPUTY PRESIDENT O'NEILL: Sure.

PN903

MR ORR: So, our proposal is - - -

PN904

DEPUTY PRESIDENT O'NEILL: So, just so I can keep a track of kind of where we are, do you - - -

PN905

MR ORR: Sixty-four.

PN906

DEPUTY PRESIDENT O'NEILL: Great. Yes.

PN907

MR ORR: Yes. So, as you can see, our proposal at 64 is very similar to the ACTU's and other unions, so I'll be very brief. Obviously having a predictable roster is going to make it much easier for a worker to take care of their carer responsibilities. But I just wanted to draw attention to the Cleaning Services Award where we have a lot of members that are covered by that award.

PN908

A lot of our members in that sector have carer responsibilities for either children with disabilities or elderly parents. And currently in the Cleaning Services Award there isn't actually a notice provision for a roster in advance. There is a seven day notice period to have it changed but there's not actually a notice period for an advanced roster. So, having that 28 days' notice is going to make a world of difference for those workers with caring responsibilities, whether it be childcare, aged care or disability care. So, they're just the comments I wanted to make. Thank you.

PN909

DEPUTY PRESIDENT O'NEILL: All right. Then just the leave is that – the requirement at the moment is at least seven days' notice because - - -

PN910

MR ORR: Of a change of roster.

PN911

DEPUTY PRESIDENT O'NEILL: Yes. But you must therefore have at least seven days' notice of the roster in order to be able to give seven days' notice of the change.

PN912

MR ORR: Yes. That's correct.

PN913

DEPUTY PRESIDENT O'NEILL: Yes.

PN914

MR ORR: Thank you, Deputy President.

PN915

DEPUTY PRESIDENT O'NEILL: Thank you, very much. All right. We will break for lunch now. Yesterday we took the approach of a slightly shorter lunch break which, particularly given the weather and a whole range of considerations and how well advanced we are today, I suggest that we do the same. Is that – I see lots of nods. All right. We will adjourn until 1.30 pm.

LUNCHEON ADJOURNMENT

[12.30 PM]

RESUMED

[1.32 PM]

PN916

DEPUTY PRESIDENT O'NEILL: All right. So we resumed at question 8, and the next three proposals are from the ANMF. Ms Palmer, did you want to speak to those matters?

PN917

MS PALMER: Yes. Thank you, Deputy President. Just confirming that's reference 53-55?

PN918

DEPUTY PRESIDENT O'NEILL: That's right.

PN919

MS PALMER: Yes, thank you. So the ANMF has proposed both longer roster notice and roster cycle periods. This is particularly important for working carers who also work in 24/7 care environments and are carrying out shift work. These employees face greater difficulties planning work and care due to their unsocial hours, and those challenges are compounded in lower-wage sectors, which is, you know, common for nursing and midwifery where the employer may have to pay higher care costs to accommodate last-minute or out-of-hours care, as was mentioned by Ms Biddlestone earlier.

PN920

Sufficient roster cycles and notices are critical to care planning within the work environment as well. Forward planning ensures continuity of care and compliance with regulatory staffing requirements, known as ratios or care minutes. And that's important to nurses and midwives in meeting their duty of care and other, you know, professional and legislative obligations that rest with them and the employer.

PN921

I just want to make that point sort of as an aside to work and care, but I think that's important, you know, given the emotional toll of the profession itself.

PN922

The seven days currently provided for in the award don't support balanced work and care, particularly for those shift workers in those environments, and nor does it promote quality and stable care within the workplace.

PN923

The longer roster notice and cycle periods that the ANMF has proposed for the Nurses Award would promote such a balance and that safe workforce planning.

PN924

Just acknowledging that we seek to retain clause 13(2F) which would allow for an employer to alter a roster in instances of personal or carer leave, family domestic violence leave or ceremonial leave, so that would still be available.

PN925

And I just want to acknowledge as well the intersection of low-hour part-time contracts that are frequently flexed up and down with minimal notice of roster changes or a forward roster, and it exacerbates issues of job security, which in turn make balancing work and care particularly difficult. Hence, we have proposed a penalty to be payable where the notice period is not adhered to within the seven days.

PN926

And just acknowledging as well that something like this existing in the awards would be possible. It's already present in a number of enterprise agreements covering public hospitals so that the longer cycles and notices can be done, and we believe that the award should be amended accordingly. Thank you.

PN927

DEPUTY PRESIDENT O'NEILL: All right. Thank you very much. Item 60 is a proposal by the CPSU in relation to the shared award. Mr Deguara, did you want to speak to that?

PN928

MR DEGUARA: I'll be very brief because it's been litigated before, but the comparison was of SCHADS and the (indistinct) state award and rostering principles, and there's a case reference which I'll leave to Deputy President to review. Thank you.

PN929

DEPUTY PRESIDENT O'NEILL: All right. Thank you very much. Item 61 is a proposal by the NTEU. Ms Wells, did you want to say anything about that here, or are you happy to deal with that on the 11th?

PN930

MS WELLS: Thank you. We're happy to deal with that on the 11th.

PN931

DEPUTY PRESIDENT O'NEILL: All right. And Ms Pugsley?

PN932

MS PUGSLEY: Likewise, yes. Thank you.

PN933

DEPUTY PRESIDENT O'NEILL: Okay. Well, we've dealt with 62 and 64. So that is the end of that matter, and we turn to the variation to rosters, starting with the ACTU at item 65.

PN934

MS PELDOVA-McCLELLAND: Thank you, Deputy President. So this item is obviously about varying the standard consultation term. We say that it should be varied to specify that certain information should be provided. So that includes two key things: information about whether the change that the employer is proposing is expected to be permanent or temporary, if the latter, the duration; and the second thing is information about the effect of the change on the employee's earnings.

PN935

We say this is necessary because both of these pieces of information are critical to enable an employee to participate in the consultation in an informed way and to thereby exercise some actual influence or choice over matters that affect their job security and their ability to manage work and care. For example, it will affect their assessment of whether they might need to seek alternate care arrangements and how long for, and whether they'll still be able to meet their financial commitments, including the cost of any care arrangements.

PN936

We say this proposal is supported by observations that are made in the literature review. Appendix 1 of that review identifies poor working time security in relation to changes to rosters with little notice and consultation, strength and consultation requirements as key areas for change.

PN937

We've referred in our submission to the Textile, Clothing, Footwear and Associated Industries Award which requires that information concerning changes to regular rosters or ordinary hours to be provided in a manner which facilitates the employee's understanding of the proposed changes, having regard to their English language skills.

PN938

We accept that that particular industry that that award covers has a high density of workers from a non-English speaking background. However, it would seem to us that this is a broader issue that genuine participation and consultation and the genuine facilitation of choice does require effort to ensure that what is being put to employees is comprehensible, irrespective of where they work. And of course it goes without saying that workers from diverse backgrounds are employed across a range of industries in our economy.

PN939

We also think this obligation would be consistent with section 5772 of the act, which provides that 'In performing its functions, the Commission must have regard to the need for guidelines and other materials to be available in – multiple languages, excuse me.

PN940

Turning to the Ai Group reply, there is a point made that, similar to points they've made in other issues raised in this stream, that it's not possible to provide affected employees with information about whether the change is expected to be permanent or temporary. It's not possible to have that level of predictability.

PN941

The response here is similar to that as advanced by Ms Biddlestone earlier. We don't accept it's impossible to predict these matters and working hours. There is a lot of technology available these days that makes it possible to predict peak periods and traffic flow in many industries, and it would therefore be possible to provide employees with information about whether changes are expected to be permanent or temporary, and the kind of time period over which they may go if they're temporary.

PN942

The Ai Group also takes issue with a couple of the proposals, saying that they have been looked at previously by the Commission and that it was decided they would be unduly burdensome to business.

PN943

Again, without getting into the detail of those decisions, we would say, again, we believe these matters should be revisited in light of the new considerations in the modern awards objective and the demonstrated impacts of the lack of consultation on women workers and worker-carers, and that those impacts which are demonstrated in our submissions and in the literature review and in the Senate interim and final reports, they need to be weighed now against any burden that is said to be imposed on business.

PN944

I'll leave it at that. Thank you, Deputy President.

PN945

DEPUTY PRESIDENT O'NEILL: Thank you. Does anyone else wish to say anything in relation to that proposal?

PN946

MS BHATT: I'm content to rely on what we put in writing.

PN947

DEPUTY PRESIDENT O'NEILL: All right. Well, you might as well stay on your feet, Ms Bhatt. The next two proposals by the Ai Group (indistinct words) to be varied.

PN948

MS BHATT: Yes, thank you. And I don't think I need to say too much more about this and what we've put in writing either. The first proposition is what we say are sensible and straightforward change, which is to enable rosters to be amended by agreement between an employer and an employee at any time.

PN949

My understanding is that various awards that contain rostering provisions do contain such a flexibility or something that's substantially similar to what we've proposed, but I'm not sure that that's true across the board, so it's in that context that we've raised that proposal. Obviously relevant in circumstances where, for example, employees might also seek changes to rosters at short notice because of their own availability to attend for work changes.

PN950

The following item is a different one. It's this idea that there should be a greater capacity for employers to make changes to rosters due to unexpected changes, including, quite often, unexpected changes that arise due to staffing absences, employees might absent themselves from work because, for example, their own health, someone else in the family is unwell, they're looking after them. That often necessitates a need to require another employee to work instead.

PN951

DEPUTY PRESIDENT O'NEILL: So that's the link to the working care?

PN952

MS BHATT: That's right, yes. I mean, we're not shying away from the fact that, in respect of both of these proposals, there are benefits that will flow to business, but we think that they're important and sensible flexibilities.

PN953

DEPUTY PRESIDENT O'NEILL: Does anyone else wish to speak to these two proposals?

PN954

MS PELDOVA-McCLELLAND: I'm happy to rely on what we've put in writing.

PN955

DEPUTY PRESIDENT O'NEILL: Okay. Mr Robson, item 68 is the ASU proposal. Did you want to speak to that?

PN956

MR ROBSON: I think Ms Peldova-McClelland has really spoken to the issue of consultation. I think just the one thing that should be said is that our proposal is about ensuring that there is a collaborative approach to setting hours in a workplace. We've given a case study that's been taken from a supported independent living facility in the (indistinct) in our submissions. I think this emphasises that employers don't always get it right the first time.

PN957

Often there's a knee-jerk response to a change in the business, and a discussion with the employees affected by the change often finds a better way forward. And ensuring the changes proposed by the ACTU, so the consultation term, emphasised that need for a consultative collaborative approach to hours of work, and I'll leave it at that. Thank you, Deputy President.

PN958

DEPUTY PRESIDENT O'NEILL: All right. Thank you. Item 71 is a proposal by the CPSU. Mr Deguara was here, but - - -

PN959

MS PELDOVA-McCLELLAND: Deputy President, if I may. A different part of the CPSU, and the representative from that part of the CPSU is unfortunately unable to attend today, but did offer that if there were any questions, they would be happy to take them on notice and provide an answer to chambers.

PN960

DEPUTY PRESIDENT O'NEILL: Well, I didn't have any particular questions, so thank you for that. All right. Item 72 is a proposal by the Flight Attendants' Association.

PN961

MR COPE: Thank you. May it please the Commission. So if it pleases the Commission, in relation to question 8, this is reflected in paragraphs 84-118 on pages 22-29 of the FAAA submissions.

PN962

Rostering is an area of significant difficulty for aircraft cabin crew and goes to the heart of work and care challenges in our industry. This brings me to the first set of claims in this regard.

PN963

So in terms of changes to rosters, airlines often make significant and unpredictable roster changes with little or no notice. The lack of consultation and abrupt schedule changes without a clear definition of operational reasons place undue stress on our members, especially those with caring responsibilities.

PN964

So by way of background on that point, Deputy President, airlines are enabled through the award to make any changes they wish to rosters, even after they've been put in place for operational reasons. I'll get to this later on, but for instance, in the Nurses Award, there's a much tighter approach, looking at things like emergency or specific things like sick leave being taken by colleagues.

PN965

So for instance, many of our caregiver members with school-age children have had to make last-minute and often costly alternate after-school and/or weekend care arrangements for their kids when their rosters have been changed at short notice.

PN966

The award enables practices that have put caregivers in these kinds of situations due to the disproportionate level of flexibility provided to employers in relation to rostering. Specifically, the award provides that:

PN967

An employer may reassign employees for an alternate duty for an operational reason at any time during the roster period.

PN968

The first issue with this approach, as I've mentioned, is that the term 'operational reasons' is not defined, so this has led to the practice whereby employers have, for virtually any reason that they deem operational in nature, making it almost impossible for you to be both a carer and a flight attendant at the same time. As I mentioned in our previous submissions, many flight attendants have to have a second job to make ends meet as well, and this encroaches on your ability to be both a worker and a carer, and also a human in other parts of your life.

PN969

This approach, as I've mentioned, contrasts significantly with the protections provided under other awards, including the Nurses Award, for instance, where although 'emergency' isn't specifically defined, it's been interpreted through decisions, for instance, of the Commission, to have a much tighter scope.

PN970

The FAAA is totally cognizant of the issues that airlines face and the natures of the industry, however there must be a protective scope around this kind of practice.

PN971

To support the framework around the airline's ability to cancel a cabin crew member's assigned duty for legitimate operational reasons, the FAAA proposes that the Commission varies the definitions in clause 2 to insert a definition of 'operational reasons', to define the scope of what might fall within those words, and to make that definition consistent across the three schedules as well, those schedules being regional, domestic and international.

PN972

The term 'operational reasons' is important to define the scope of when an employer may reassign cabin crew from their rostered duties. The proposed definition is consistent with the definition, for instance, in the pre-modern domestic award and with other EBAs currently in place, for instance, the Qantas Short Haul EBA.

PN973

Deputy President, I mentioned this yesterday so I won't go on too much about it, but it's important to note some of the historical significance of the prior domestic award. Pre-modernisation, the domestic award covered domestic cabin crew. However, due to airline collapses and amalgamations – for instance, Ansett – this award only had one remaining respondent, that being Qantas. So at the time the Fair Work Commission declined to make a modern – to sort of turn that award into the modern award because it was deemed to be an enterprise-level award. This resulted in decades of those arbitral conditions that were put into the old award not being included into the new modern award.

PN974

So what we are essentially suggesting here is that establishing these clear guidelines on the circumstances under which employers can alter work schedules with minimal or no work notice would be very advantageous, especially from a work and care perspective. This is particularly relevant considering the

significant effect that this has, these unpredictable shifts can have on an individual's capacity to handle their caregiving responsibilities.

PN975

On another claim, in relation to the types of duties that a cabin crew member can be reassigned to: in conjunction with that definition of 'operational reasons' the FAAA is proposing, we also are proposing a framework to ensure some level of security and stability around the types of duties that cabin crew can be reassigned to for operational reasons. Our proposal, laid out in greater detail in paragraph 110 of our written submissions, provides a buffer of two hours around the original rostered hours and protects cabin crew who currently have no award entitlement to resist being reassigned at any time.

PN976

The proposal retains significant flexibility, greater than many other awards if I might say so, for an employer to manage the airline. So this is a very conservative proposal from the FAAA.

PN977

Accordingly, we would submit that, although this proposal which prevents the unilateral reassignment of crew members from a planned one-day trip to a reassigned multi-day trip is modest in our view, it would go a long way, a significant way to supporting cabin crew in managing their work and care responsibilities and, more generally, is very consistent, in our view, with the modern awards objective.

PN978

Subject to any questions, this is the conclusion of the FAAA's appearance today.

PN979

DEPUTY PRESIDENT O'NEILL: Thank you. Okay. So in relation to the other matters relating to roster, you don't want to speak to those?

PN980

MR COPE: We'll rely on our written submissions in that respect.

PN981

DEPUTY PRESIDENT O'NEILL: Okay. Thank you very much.

PN982

MR COPE: Thank you.

PN983

DEPUTY PRESIDENT O'NEILL: All right. Item 75 and 76 are proposals from the SDA. Ms Biddlestone, is there anything you wanted to add to - - -

PN984

MS BIDDLESTONE: No, Deputy President, thank you.

PN985

DEPUTY PRESIDENT O'NEILL: All right. The right part of the CPSU is in item 77, at least from Mr Deguara's perspective. Did you want to say anything in addition to the written submissions on that one?

PN986

MR DEGUARA: No.

PN987

DEPUTY PRESIDENT O'NEILL: All right.

PN988

MR DEGUARA: I've been trying to get onto the other (indistinct) for the other submission (indistinct words) I haven't been able to.

PN989

DEPUTY PRESIDENT O'NEILL: It has been dealt with, thank you. The last two are also SDA proposals at 82 and 83. Did you want to speak to those, Ms Biddlestone?

PN990

MS BIDDLESTONE: No, Deputy President, I'm happy to rely on our written submissions in relation to that.

PN991

DEPUTY PRESIDENT O'NEILL: All right. Then that brings us to the end of day 2, we've crossed the bump.

PN992

I'm just going to pose a question out of curiosity more than anything else, and you don't need to answer it now but I'd just be literally quite curious as to your respective views, particularly from the peak representative bodies, but anyone who has a view. If you had to identify out of the issues that have emerged or the themes that have emerged from this stream, if you had to identify your top three, what would they be?

PN993

Anyway, that's something for you to think about perhaps overnight, well, over the next few days. We're back together next week. Unless there's anything further, the Commission is adjourned.

ADJOURNED TO A DATE TO BE FIXED

[1.54 PM]