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IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES
FULL BENCH

CHIEF COMMISSIONER CONSTANT
COMMISSIONER SLOAN
COMMISSIONER MUIR

WEDNESDAY 16 AUGUST 2023

2022/00112772 - CROWN EMPLOYEES (OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, FLEXIBLE WORKING HOURS) AWARD 2022

Awards, new award application, s 10

Ms Lowson with Ms McRobert for the applicant
Mr Mahendra with Mr M Absell for the respondent

CONSTANT CC: Yes.

LOWSON: Yes, members of the Commission, continuing my appearance for the applicant.

MAHENDRA: May it please the Commission, I continue appearing for the respondent.

CONSTANT CC: Thank you, Mr Pararogersing.

SLOAN C: Mahendra.

CONSTANT CC: You set me up for that. Next year's conference, I can see a line.

LOWSON: Take control of the transcript, that's what I say. I should also mention that I'm instructed today by Ms McRobert. I have previously been instructed by Mr Bartel and also, before that, Ms McCowan. So, we are here for submissions and, maybe, in concert with the members of the Commission and, indeed, my instructor and my clients, it came as some surprise that - in fact, it was November last year that we last actually addressed the substance of this matter, although there have been more significant - there were significant delays around the salary issue, which was being taken care of in May by the determination.

When I say "taken care of", of course, the applicant has reserved its rights in relation to properly addressing the question of those two salary points. And, then, of course, in June, there was the application to reopen which was not agreed to by the Commission, so here we are actually back to dealing with the award and the application for the award to address what we say is a significant

issue of forfeited flex. I want to start by taking the Commission to the two awards that apply and although the conditions award, if I can summarise it in that way, is attached to Mr Richardson's affidavit. It is a previous iteration of that award.

CONSTANT CC: Thank you.

LOWSON: This is the most recent published version of that award, although it still doesn't incorporate the salary rates of the two and a half per cent from last year or the 4% from this year. So, this is the most recent published version of the award that is available. And, notwithstanding that it's dated 17 October 2022, it doesn't actually incorporate the two and a half per cent in the salary rates.

Of course, in our submission, the award - because the award doesn't actually, in any way, require a payment to employees, that question is not directly relevant, in case the Commissioners were looking at the award and thinking that these were the current rates. You would have to add two and a half per cent and then 4% to the salary rates.

Now the salary rates are found in the - well, I have termed the legal officers award, which is the shorter award, and that award is dated 16 September 2021 and that's why it doesn't incorporate the updated salary rates. The Conditions Award is relevant for reasons I'm just about to take the Commission to.

So, if I can take you, first of all, to clause 10 of what I call the legal officers award but the full title is Crown Employees (Legal Officers, Crown Solicitors Office, Legal Aid Commission Staff Agency, Office of the Director of Public Prosecutions and Parliamentary Counsels Office) Reviewed Award, which is why I call it the legal officers award, clause 10 states that - at sub clause 1:

> "that the legal officers to whom this award applies are entitled to the conditions of employment as set out in this award and, except where specifically varied by this award, existing conditions are provided under the Government Sector Employment Act 2013. The regulations and rules made under that act, the Crown Employees (Public Service) Conditions of Employment Reviewed Award and the Crown Employees (Public Sector) Salaries 2019 Award or any award replacing those awards."

So, for purposes of my submissions, I want to draw attention to the fact that the conditions award applies. It's the conditions award that's attached to Mr Richardson's affidavit, but, as I say, a previous iteration of it. The conditions award is relevant - I can take the Commission to, firstly clause 11 of the conditions award. Clause 11 deals with working hours and, not altogether, hopefully, says that:

> "the working hours of employees and the manner of their recording will be as determined, from time to time, by the department head in accordance with any direction of the secretary, such direction will

> include the definition of full-time contract hours as contained in clause 3, definitions of this award."

Now, the evidence before this Commission is that the full-time contract hours, which is a defined term in the definitions clause at 3.28, that provision says that the standard weekly hours, that is 35 or 38 hours per week depending on the classification required to be worked as of the date of this award, but the evidence before this Commission, and I don't think there's any dispute about this, witnesses from both parties have said that it is a 35 hour week. So, under the award, the employees are to work - a full-time employee, I should say, is required to work 35 hours.

Coming back to the conditions of the award, at 10, clause 10, which is in the section which states the attendance hours of work, provides that local arrangements may be negotiated between the department head and the association, so the applicant in this case, in respect of the whole of the department or part of a department in relation to any matter contained in the award. So, the local arrangements provision obviously is broadly applicable to any of the matters in the conditions award, but, specifically, at 10.3 - 10.2 provides for the formalities that are required for a local arrangement, 10.3 says that:

> "subject to the provisions of sub-clause 10.2 of this clause, nothing in this clause will prevent the negotiation of local arrangements in respect of the provisions contained in clause 24, flexible work practices of this award."

So, if we go to clause 24, clause 24 deals with flexible work hour practices and 24 is a broad statement about what is involved in flexible work practices. Coming back to 10.3, the second sentence says:

> "where such local arrangements do not include provisions in relation to core time, settlements periods, contract hours, flex credit, flex debit or flex leave, the relevant provisions of clause 21 will apply."

Clause 21 sets out the numerous sub-clauses, the various ways in which flexible working hours are to apply under the award. However, clause 21 can be replaced by a local arrangement.

Clause 21 includes details as to the usual - when I say usual, under the award, the schemes that apply, including settlement periods and matters of that sort. But, in this case, clause 21 is effectively replaced by the local arrangement that was entered into by the Director of Public Prosecutions and Public Service Association in 2015 and that is the document that can be found in a couple of places in the courtbook but I will take the Commission to courtbook p 19, courtbook 1, and that is the flexible working hours agreed on that was signed off on 27 May 2015, the signature page is at p 31

And, although it is specified as being in place for three years it continues to apply. So, there's no dispute between the parties that this local agreement

continues to govern the taking of flexible - or, the performance of flexible work at the ODPP.

Now, the bandwidth hours, that is the hours in which ordinary time hours are worked under the flexible work hours agreement, are from 7am to 7pm, and that can be found at p 24, at cl 4. So, flex time can only be accrued Monday to Friday between 7am and 7pm. That is different to the conditions award which provides that the bandwidth is 7.30am to 6pm, and that's in cl 21.6 of the conditions award. The evidence before this commission is that the 12 hour bandwidth has been in existence since before the mid-1990s.

So, the ODPP has operated using a 12 hour bandwidth for many decades, and neither party seeks any change to that and, in our submission, it's not a matter that would properly be dealt with by the commission in circumstances where the agreement is in place and nobody is asking for any change in respect of those 12 hour bandwidth periods.

The second, but not the only, difference, but the second that I want to draw the commission to, the difference between the flexible work hours agreement and the conditions award is the settlement period. And, the settlement period under the flexible work hours agreement is six weeks, whereas under the conditions award, at cl 21.9, the settlement period is four weeks. Now, the settlement period is important because it sets the parameters within which the flexible work hours agreement operates in terms of forfeiture of flex, which is what, essentially, this matter is about.

So, the six week settlement period has the effect that we are looking at the way in which flex leave accrues within these parameters. First of all, you're required to work 35 hours a week, and the flexible working hours agreement permits you to work less and to have a negative flex debit up to 10 hours. So, it contemplates flexibility in both directions. Of course, what this matter is about is the circumstances in which so many hours are worked within the bandwidth hours that employees are losing their entitlement to flex leave.

Now, as I cross-examined Mr Richardson about, the way flex leave operates is this, you work 35 hours, that's your requirement. If you work 10 hours on top of that in a given week then you're entitled to have 10 hours off. You're not entitled to be paid for it, you're entitled to 10 hours off. So, for every hour over your contracted hours that you work - and, this is all within bandwidth - you're entitled to have that time off within the terms of the flexible working hours agreement. The relevant parameter is the six week period. That means that in any six week period you can accrue up to 50 hours and carry that 50 hours forward to your next six week period.

What that means in reality is that if you work an extra eight hours every week, which is more than a full day - but, if you work eight hours every week, at the end of a six week period you will have accrued 48 hours. What that means is that you have an entitlement to take almost seven days off, because 48 hours divided by seven, which is your daily rate if you do 35 hours divided by five. At the end of that six week period you have accrued the right to take more than a

week off work. That is, obviously, a significant right, and it reflects the fact that this is a public sector award, paying public sector rates, with public sector increments, and you have a 35 hour week. So, this is not the private sector, this is a public sector award where part of the conditions are that you work 35 hours. That is the starting point for the accrual of flex.

The respondent says, "Well, what is it about these awards that doesn't set just and reasonable conditions of employment?" Plainly, the local arrangement, that is the flexible working hours agreement, is not just and reasonable having regard to the evidence in these proceedings. It's made under the award, it's not just and reasonable, and that is sufficient for this commission to exercise its jurisdiction to make an award that addresses the ways in which the local agreement is not just and reasonable. But, in any event, the flexible working hours agreement itself contemplates this commission having jurisdiction in respect of disputes under that agreement, and that's at cl 17.

And, the reply evidence of Ms Chan set out in some detail the engagement between the parties about flexible work hours, forfeiture of flexible work hours, and the work management tool, and work overload generally. So, this is not a matter that takes the respondent by surprise, the evidence shows that at least since 2020 - and Mr Dean Allan's affidavit evidence also goes to this matter - that there has been agitation between the parties in relation to the forfeiture of flex.

The commission might recall that there was correspondence between the industrial officer at the time, Ms Wonderlin, and Mr Richardson, which led to the provision of the first iteration of the table that ultimately became - I think it's PSA 14, which is the spreadsheet table, which demonstrates, to a degree at least, the extent to which there has been a forfeiture of flex - sorry, PSA 13 is the spreadsheet.

Now, the special case principle requires - that is, if we go down the special case road rather than simply cl 17 of the flexible working hours agreement, either are available, in our submission - the special case says that a claim for increase in wages and salaries or changes in conditions in awards, other than those allowed elsewhere in the principles - so, plainly we're not dealing with an increase in wages and salaries, we're looking at changes in conditions in awards other than those allowed elsewhere in the principles, and which is not based on work value and/or productivity and efficiency - will be processed as a special case in accordance with the principles laid down in re Operational Ambulance Officers.

That case, at para 168, in essence said:

> "In order to make out a special case the applicant is required to make out that the variation is necessary to establish fair and reasonable conditions of employment, and that the matter has special attributes, or elsewhere in the decision is out of the ordinary."

Now, in what way is this case out of the ordinary? Well, firstly, the applicant's

evidence demonstrates that the local arrangement, as expressed in the flexible working hours agreement, is not operating in a way that is consistent with the conditions award. So, cl 21.1 of the conditions award, if I can take the commission back to that document, says this - so, this is the first statement of principle, as it were, in relation to flexible working hours.

> "The parties to this award are committed to fostering flexible work practices with the intention of providing greater flexibility in dealing with workloads and work deadlines, and the balance between work and family life. All parties are committed to managing time worked to prevent any forfeiture of credit hours accumulated under flexible working hours agreement."

There are two parts to that paragraph to which we draw attention. The first is the balance between work and family life, and the unchallenged evidence before this commission that the work hours, the workload, expressed by way of flex time accrued and flex time forfeited, is not consistent with a balance between work and family life. And secondly, that there plainly has not been commitment on behalf of the respondent to prevent forfeiture of flex hours.

And, if I can take you then back to the flexible working hours agreement itself, and you remember the evidence of Ms Chan that before this agreement she was able to use - she didn't forfeit flex, in effect. That whatever the parameters were that were in place, it was not 50 hours every settlement period, and other limitations did not apply. So that, in effect, Ms Chan's evidence was that she was able to use her flex leave around other periods of leave. The protection in this document appears in cl 7. So, at p 25 of the court book, accrual of work time within the settlement period.

Now, I'll come back to this matter in more detail, but I just note that Mr Mahendra, I think with every witness, undertook this process of averaging out the data in relation to their forfeited leave over the entire period of their employment. That cross-examination and that mathematical result, in my submission, is entirely irrelevant in circumstances where the settlement period is six weeks. So, the loss of flex leave, that is the forfeiture of flex leave, occurs within six week periods, and it's those six week periods that count. And, if somebody loses 70 hours in a six week period, that is a matter of significance that this commission should be concerned about, not how that 70 hours is averaged over the entire period of someone's career.

And, the purpose of the settlement period is to put a parameter around that accrual, and it permits the respondent to then forfeit flex above a certain amount. That means that the process of protection against forfeiture is particularly important. And, clause 7, at 7.6, that sets the limit of the amount that an employee is entitled to carry forward. And, I just want to emphasise for the commission that when you are looking at data that shows that someone forfeited 70 hours in a six week period, they are carrying forward 50 hours. There is the possibility that that worker has worked only 70 hours on top of their ordinary working hours - and I say, "Only," advisedly. There's also the possibility that they've worked 120 hours, depending on how many had

accrued at the start of that six week period.

So, we are talking about enormous amounts of hours at work being performed within those six week periods, and we are only talking about the bandwidth periods. The bandwidth period 12 hours a day, five days a week, that gives you a maximum number of hours that an employee can notionally work within bandwidth, and accrue flex time for, is 60 hours, less a half hour minimum meal break, so 57 and a half hours a week, less the 35 hours that under the award they're required to work, so that the maximum number of hours that can be accrued in a week is 22 and a half hours, multiplied by six is 135 hours. That's the maximum number of hours that a person can accrue over a six week period as flex leave.

But, out of that 135 they can only ever take 50 forward, and for them to have accrued 135 hours in total they would have to have worked 11 and a half hour days every day. And, some of the evidence suggests that some employees have worked at that level, or close to that level.

Coming back to the flexible work hours agreement. A staff member is entitled to carry forward up to a maximum of 50 flexible work hours credit. Any accrued hours above 50 are forfeited at the completion of the settlement period. That is, the respondent gets the benefit of that labour and the employee gets no benefit. That's the effect of that clause. Plainly, that is only fair and reasonable if there is a protection against that actually happening, because this commission wouldn't countenance employees working for free.

Hours worked - so, this is 7.7, this is the protection. "Hours worked are to be monitored by the staff member and supervisor throughout the six week period through the use of Cases flexitime records" - and I think there was evidence that that's now SAP, not Cases, that the record keeping process or computer system changed from Cases to SAPs - "And supervisors and staff members will work together to ensure that staff members do not exceed more than 50 working hours credit in a settlement period."

So, under this agreement it's not meant to happen that people actually accrue more than 50 hours, so it's not meant to happen that they lose it. 7.8 is the provision that specifically is intended to prevent it.

> "Once the staff member has accrued 50 hours of flexible working hours credit the supervisor and staff member shall devise a strategy in writing to ensure that the staff member is able to take the approved hours to ensure that hours are not continually forfeited."

Let me remind the commission there is no evidence before this commission of any written strategy ever having been entered into at all by any employee with their manager. Who could have best brought forward that evidence? The respondent. Which category of employees would have been best placed to bring forward evidence of written strategies? Managing solicitors. How many managing solicitors did the respondent call in these proceedings? None. Could the evidence of managing solicitors elucidated matters for this

commission? Well, yes, it could.

They could have come forward and said written strategies they'd engaged in, what they'd done, written strategies they'd tried to engage in. Nothing. And, we invite the commission to draw a Jones v Dunkel inference from the respondent's failure to call evidence from any managing solicitor in respect of compliance with this aspect of the flexible working hours agreement.

The next clause says that, "Methods to ensure the reduction of excess credit hours may include reducing the hours worked during the remainder of the settlement period" - so, this is again emphasising the importance of the settlement period - "Or the taking of flex leave to prevent the hours being forfeited." So, what is being contemplated in the written agreement is that flex leave half days or days - I think there's a minimum of half a day that flex can be taken - be built into the balance of the settlement period after the 50 hours is reach. And, there's no evidence that anybody is actually monitoring the accrual of flex leave up to 50 hours during settlement periods, again because no managing solicitor was called.

The witnesses from the applicant uniformly said, "Well, my manager's aware of how much work we're doing," and if there was any doubt about that it was confirmed in the cross-examination of both Mr Richardson and Ms McNamara, and the documentary evidence that was produced - the commission might recall that ultimately the respondent produced a further iteration of the monthly reports that go to managing solicitors at PSA 15. So it was tendered at PSA15, there was a number of issues in respect to the integrity of those reports, but there was no doubt from the oral evidence of Ms McNamara and Mr Richardson that managing solicitors are constantly able to check the accrual of flex leave of their employees. The Commission will recall that there is evidence about how the groups, the legal groups, are set up within ODPP, each with a managing solicitor with responsibility for ten to 15 employees.

Finally, at 7.8.3, the identified strategy - so this is a written document which identifies how a person is going to reduce their flex leave during a settlement period such that at the end of that settlement period they don't have more than 50 hours accrued - it must be reported to and authorised by the supervisor's manager. Again, Mr Richardson confirmed that it is the deputy prosecutors - I'm sorry, I'll have to check, but he confirmed the level above managing solicitors who ultimately had responsibility for flex leave. No evidence at all that that person has ever been engaged by a managing solicitor to authorise a written strategy of this sort. Deputy solicitor, thank you, is the proper characterisation of that person.

So the provision in the Conditions Award at 21.1 that all parties are committed to managing time worked to prevent any forfeiture of credit hours accumulated under a flexible work hours arrangement, is simply not being complied with by this respondent. There is not a skerrick of evidence to suggest that it is complied with broadly within 21.1 or specifically within the local arrangement agreed between the parties, and that local arrangement had a protective mechanism that was intended to limit or prevent the forfeiture of flex--

MUIR C: What do you say is the effect of clause 21 on forfeiture? If you were bound by clause 21, what would be the position on forfeiture?

LOWSON: You mean if a flexible working hours agreement didn't apply?

MUIR C: Yes.

LOWSON: Well, the whole process by which forfeiture occurs would be different, because it's a four week settlement period. There's fewer hours that are capable of being accrued within that for the week.

MUIR C: I understand that you took us to those two points, but the position and the main point that you're making is not really about the six weeks or the banded hours, it's about the forfeiture, and I just was - what do we say that clause 21 says would happen if there was 70 hours of flex worked in a period or some - you know--

LOWSON: So 21 point--

MUIR C: --two thirds of that, because it's four weeks, not six.

LOWSON: Yes, so 21.1 allows only a maximum of ten hours' credit to be taken into the next settlement period and that also specifically contemplates--

MUIR C: So 21 point--

LOWSON: Point 11.

MUIR C: --11, thank you.

LOWSON: That also specifically contemplates that local arrangements may be negotiated in respect of the carryover of additional flexible hours more than is permitted by the clause and the length of the settlement period and the banking of any accumulated credit. So absent the flexible work hours agreement nobody would be working as hard, and that's why it's to the respondent's benefit to have a much greater number of hours than might otherwise appear under the award. The 21.12 goes somewhat further in relation to the strategy and it seems to - if I could just have a moment. So it's the reference to 150 hours is the reference to four weeks times 35, so that's in a four week settlement period the contracted hours are - or the award hours are 150 hours, whereas in a six week settlement period they're 210.

MUIR C: 35, 71, 40. So the 150 must be the 35 hours plus ten.

LOWSON: Well, this award contemplates either 35 or 38. That might why it's somewhere between the two. 152 would be four times 38 and 140 would be four times 35. And with a 38 hour week there's actually a built in entitlement at 21.4 to take a day off in a regular cycle. So - I withdraw that. That's an exclusion where--

MUIR C: Someone who works a nine day fortnight.

LOWSON: A nine day fortnight, they're not entitled to flexible work hours, but for someone who works with flexible hours and accrues seven hours every nine days, for example - and this is something I just wanted to draw attention to in terms of the hours that are worked by - the evidence of the hours worked by ODPP solicitors, or at least a significant portion of them - in 21.4 what's contemplated there is working more hours nine days a fortnight so that you can have a day off a fortnight, but you are still working your - the award hours - you're still working 76 hours, but you're working them within nine days, and then you get a day off.

The ODPP scheme on the evidence in relation to those employees in particular who are regularly forfeiting flex, they are not getting that day off a fortnight. The scheme is so far away from how the scheme might operate in ordinary circumstances in that that sort of flexibility, where someone goes, well, I'd rather work a bit longer and have a day off a fortnight, that's - there's no suggestion here that employees are regularly able to access a day off a fortnight, for example. So they are working their total hours over the ten days in a fortnight, 20 days in a four week period, 30 days in a six week settlement period, without getting any regular relief from those days that might otherwise operate when ordinary flex time works in that sort of way where there's a quid pro quo, I put in my hours, I get a day off, and if I put in more than my hours then every so often I get another day off. That is not what is happening for a significant portion of employees at the ODPP. Does that assist Commissioner Muir?

MUIR C: It goes to your main point. I guess what I'm trying to work out is whether there's an arrangement in here - I'll have to go read it, I guess, but - and to cut to the chase, I was going to ask you later, I'll ask you now, why isn't it a solution that clause 20.3 be exercised and the employees go back to what the default position is?

LOWSON: So first of all neither party is asking for that. Second of all, that default position hasn't applied at this workplace for 25, 30 plus years. There has been an alternate structure. I'd be interested to hear what Mr Mahendra's client thinks about that, but their entire SAP system is set up around a six week settlement period, not a four week settlement period, and I suspect that the criminal justice system in this State would simply fall down, because the--

MUIR C: I guess I'm saying if the Commission has set a default position and the parties have adopted a different one that doesn't work, why don't we go back to the default position?

LOWSON: Because you can actually fix the local arrangement, which is made under the award, so although there's - what you call a default position, Commissioner, contemplates a local arrangement, and both parties have exercised their rights under the award to enter into that local arrangement. So to that extent the default position has been walked away from by both parties.

What you can do is fix the area where that local arrangement is not working, and there would be no basis and no proper basis for the Commission to exercise its jurisdiction in the way that you have contemplated. And when I say that the entire criminal justice system would grind to a halt, the fact that employees can accrue 50 hours allows them to do that trial work that occurs, a week's trial where you're working ten hours a day, two-week trials where you're working ten hours a day. Under the default position as you've described it, the award position, they can only accrue ten hours. Why would they work at all in that trial context? In other words, the local arrangement is set up to accommodate the particular work of all staff, it applies to all staff, but it particularly accommodates solicitors, there's no doubt about that. It allows the accruing of more hours, and the employees aren't complaining about the fact of work on a day-to-day basis, that they might have to work very long hours to accommodate the hours of Court, to accommodate a trial.

What they are complaining about is the failure by the respondent to comply with the protective mechanism that would allow those trials to continue, but without the loss of accrued flex time. The other reason not to go back to that, with respect Commissioner, is that there's absolutely no evidence before this commission that it would lead to any improvement in circumstances. It would just lead frankly to more loss, more forfeiture of hours.

MUIR C: That was the point of my question about what this says about forfeiture.

LOWSON: Well it's in 21.11. It says that an employee can carry a maximum of ten hours. So anything above ten hours is lost. That's the maximum that's carried forward. So whereas at the moment employees are losing hours of work above 50 in a six-week settlement period, under this clause they would lose everything about ten in a four-week settlement period. There's no suggestion that the respondent would suddenly start if the provisions of the award applied. They're getting the benefit of thousands of hours of work where those employees should be having leave and they're not having leave. And if they had leave, presumably they'd have to employ more people to cover them. So they are saving money by thousands of hours every settlement period. Mr Richardson's evidence makes that clear, as does PSA 13. We're talking about thousands of hours every six-week settlement period. It would be tens of thousands of hours potentially if a four-week settlement period and a ten-hour maximum carry forward was what was put in place. That would be the only change.

This award, if it is made, will force the employer to do what it should be doing under the Flexible Work Hours Agreement but is not. They're not doing it. The very protective mechanism that one can only imagine at the time this agreement was entered into, that the change from accruing limitless numbers of hours to accruing only 50 hours - and the agreement specifically contemplates that by February 2016 hours above 50 are lost so there was an opportunity for people to use accrued hours about 50. So it's implicit by the agreement that indeed people were accruing more than 50 hours because they had to reduce it or lose it by February 2016. They simply have not stuck

to their side of the bargain, the very thing that would prevent forfeiture of flex. And they've benefited accordingly. This award has the effect of requiring that to be done. If it's not done it's a breach of award and the consequences would flow.

It also has built into it that if a written strategy is not entered into then that person is entitled to have forfeited flex recredited. So that an employee at least has the benefit of that flex on a permanent basis to be used up at an appropriate time. And just for the commission's assistance if I can take you to that graph of Mr Richardson's that showed the numbers of hours which is at p 826 in the second court book. And that shows over a two-year plus period the number of hours said to be forfeited. I say, said to be forfeited, because ultimately Mr Richardson agreed that this data was taken from a spreadsheet or something similar to the data that PSA 13 was created from and that data had limitations if an employee had not submitted timesheets, or if timesheets had not been approved by a manager. So we're not saying that this is the extent of it, it could be more than this.

But in any event it's certainly sufficient to demonstrate that every six weeks the respondent is receiving the benefit of thousands of unpaid hours where those employees are not having leave which they ought to be having. And as I say, the inference to be drawn from that is that if the employees were accessing this leave the respondent would need to employ more people to cover those absences, because somehow the work has to be done. So there is a benefit to the respondent, even though it's not in salary terms. And there's certainly a detriment to the employees who, if one takes mathematically 50 hours being accrued, as I said, that's approximately eight hours a week, so more than a day each week is accrued, and that can be carried forward. Employees have to be working more than a day each week to start losing flex time, and yet the evidence shows that that's exactly what has been happening.

CONSTANT CC: Can I just understand what you said about the benefit for the employer that otherwise they'd have to employ more people. If I followed the logic, the proposed award would require the employer and the employee, which they already should be doing, that strategy to reduce the hours, and if they don't then anything that's been forfeited - and I think that just means any forfeited hours at any point in time are recredited and then presumably can be used at any point. Is that where we're heading?

LOWSON: The primary purpose of the award, which is only for a 12-month period, is to get the respondent to do what the Flexible Work Hours Agreement contemplated, which is the written strategy.

CONSTANT CC: Which they should be doing now.

LOWSON: They should be doing now.

CONSTANT CC: Well the parties should be doing that, the employee and employer.

LOWSON: Well we say the obligation rests ultimately with the employer, particularly having regard to the evidence about the culture, the workplace culture, and the way in which there are expectations. But not just the culture, also the type of work. And there's some very eloquent evidence about the requirements that the Court puts on, requirements that are built into, for example, the early guilty plea provisions that were introduced a number of years ago. But it's not simply employer requirements directly, but it is a requirement of the nature of the work that there are deadlines that need to be met. And absent the employer directly addressing that with Courts, then those are matters that exist, trials have to be run, Court deadlines have to be met as much as possible.

I thinks Ms Rogers gave eloquent evidence that, "I got to a point where I had to stop working weekends, that meant that I started missing court deadlines. I didn't like that, but it was either my health or having to face up to judges and go, 'I haven't done it, I haven't met that deadline. I'm sorry, we need more time.'" Those are the kinds of choices, and they are a Hobsons choice. These are not choices that employees really have, given the way in which the work is performed culturally and the requirements of the work realistically because of the court requirements.

So, to come back to--

SLOAN C: Sorry, just to pick up on the chief commissioner's point, though, to recognising - if we take all that evidence at face value you've got pressures on the employees, you've got employees who - a number of employees have said that their managers are great and that if they approach them and sought a reduction in workload they think they'd be heard, but they just don't do it. You've got employees who have said that they hold onto their files, they don't want to give up their files, in one case actively seek out additional work. What I'm hearing is that it's the nature of the beast that these hours will, from time to time, be required.

You seem to be suggesting that - and, to pick up what the chief commissioner was saying, that you're saying that there's a benefit to the employer in implementing these procedures, but wouldn't the consequence be that they'd need more bodies?

LOWSON: Yes. And, that's what I'm saying, those hours represent time that employees are working on matters which if they were having time off presumably the employer would have to employ more people. That's why I say that there's a cost saving to the employer in respect of these matters. But, in--

SLOAN C: No, sorry, how? Because, if the structure is set up the way that you're suggesting - and, I'm simply trying to understand - they would need more bodies on the ground to do the work that is currently being - to perform the hours that are currently being forfeited. Isn't that the requirement - isn't that going to be required?

LOWSON: Ultimately, how the employer manages this is up to them.

SLOAN C: I understand that you're saying having the flexible work hours agreement means that they don't have to employ more people because the solicitors can work up to 50 hours without forfeiture. But, as I apprehend the draft award then - and the evidence about the nature of the work is that it's inevitable that the DPP is going to have to employ more solicitors so that the work can be devolved more broadly across the workforce.

CONSTANT CC: Can I just go back to my question?

LOWSON: Yes.

CONSTANT CC: My question is predicated on the basis that the strategies aren't entered into, therefore forfeiture no longer applies. That would need to - there would need to be new employees - or, somehow or other that work would need to be done when that time off is finally taken. But, in line with what Commissioner Sloan has said, even if you had the strategy, presumably that strategy would involve people not being at work and engaging in the flexibility. So, all my question was directed at - and, it doesn't - the answer may be not even relevant - but I'm just trying to get my hands around what you're saying is the benefit to the employer.

LOWSON: Yes. So, to come back to your question, Chief Commissioner, first - and I'll turn to yours in a moment, Commissioner Sloan, if I could - yes, in terms of the way the award is framed the expectation is that it will make the written strategy happen. If the written strategy happens - just say you get to week 3 of a six week settlement period, you've already accrued 50 hours, that's - I think the award suggests 40 hours to allow some leeway - so, 40 hours. That's the equivalent of five days leave, plus, if we allow a seven hour day.

So, you sit down at the end of week 3 and you say, "I've accrued 40 hours, that's the equivalent of five days, I need to have a week off between now and the end of this settlement period." That would take care of 40 days - or, well, it would take care of 35 hours. Or, "I need to ensure that over the next three weeks I am not working more than 35 hours a week." So, that's a potential way forward, "How can I manage that?" And, as long as that written strategy is put in place, and is realistic - now, it's not going to be realistic if someone's in the middle of a six week trial. So, it means that they will have to actually properly consider how they are allocating work and how they are dealing with those longer trials.

Now, it must be said, I think, Mr Richardson at one stage was suggesting that the figures that I was talking about were attributable to long trials. I think he ultimately conceded that the numbers that I was putting forward to him, the numbers of people who are forfeiting flex, was well outside the parameters of all the long trials. So, that long trials don't explain the degree of flex forfeiture that's going on. And, indeed, the employees' evidence, which included evidence from Ms Chan who isn't even working in a trial area, she's working in

an advice area, these time pressures arise in a range of different circumstances, depending on the work performed.

Come back to what you raised, Commissioner Sloan. Can I firstly say that the award requirement is 35 hours a week, and the responsibility of the employer is to ensure that employees work 35 hours a week, irrespective of their commitment or any other aspect of the work. Secondly, to the extent, Commissioner, you said, "Well, employees held onto matters," I think, to be fair, there is some detailed evidence about why it is ineffective and inefficient to hand over a matter that you have had control of for - you know, from inception, you've provided advice about charges, and I think there was - the term was used that the work is siloed.

So, there is an inefficiently in saying to your managing solicitor, "Here, take this matter that I've had for nine months which is about to start trial and give it to some other solicitor." You've raised, Commissioner Sloan, the employment of new solicitors, there is also the issue of utilisation of existing solicitors, which is something that the respondent has not put forward evidence about. But, the evidence from the employees is that - and this was reasonably uniform - "If I ask my manager, my manager" - I withdraw that.

Some evidence was that managers did not help. So, requests were made and it was, basically, "We can't do anything about it, you're just going to have to get on with it." Others said, "Yes, I've asked my manager for assistance and I could ask, and she would probably take the work off me" - he or she - "And do it themselves." So, there is no suggestion from any of the employees that there was some capacity for people to do the work in a way that didn't involve putting more work on other employees. So, I think it was Mr Clayton, who is one of two people on a--

SLOAN C: ..(not transcribable)..

LOWSON: Yes. They carry all the court work. That's it, there's two of them. So, he's uniquely placed to know exactly what his fellow employee is doing, they're sharing the list between them, and that's it, there's no more capacity. Does that mean that somebody else needs to be employed there? That's a matter for the respondent, at the end of the day. This commission is being invited by the applicant to do something to make this employer adhere to an agreement that they entered into, and from which they are benefitting, and which is costing employees.

It's costing them in time, it's costing them in health, and it is involving a breach of that agreement in circumstances where on the one hand the employer got the benefit of the 50 hours - nothing accrued over 50 hours, and on the other hand had done nothing to protect the employees as contemplated by that agreement. Does that address those questions?

SLOAN C: Thank you.

CONSTANT CC: I'm not sure I understand the benefit to the employer very

well, but I think you've answered the question. Can I ask a question that arose from that? You referenced the fact that the award is a one year award. Is there something that I should understand about that? Is it the union's position that after a year something else should happen, or--

LOWSON: We want to see if that written strategy will be put in place and can work, and we want to have the accountability to the PSA so that we have some oversight as to what's happening. Because the numbers are large, the hours are big. And so a 12-month period will allow for those accountabilities to take place, for those written strategies to be entered into. And for there to be some evidence one way or another of a reduction in the forfeiture of flex. That's what this is aimed at. And that's why it's contemplated to be a 12-month period. It's an award application. The commission can deliver its reasons and say, these are our reasons, these are some aspects of the award that we think need some tweaking and direct the parties to come back to the commission about them. But the award as framed is intended to address the problems for a period of time with a view to seeing whether this flexible work hours agreement can work in a way that doesn't impact adversely on the staff.

MUIR C: And just related to that, it would replace this agreement.

LOWSON: No.

MUIR C: No.

LOWSON: The agreement applies to all staff at the ODPP other than senior executive staff. So that's the first point. The award applies only to solicitors.

MUIR C: Right.

LOWSON: Secondly, the award does not attempt to canvass all of the other matters in the agreement. But as an award it would trump the agreement in relation to the matters that are in both the agreement and the award.

MUIR C: I understand in relation to some categories of employees not being covered, that makes some sense to me. Just explain to me, is there some document somewhere that explains which parts of the agreement would still be active for the relevant employees.

LOWSON: I think it's more that the award is quite short, the agreement is quite long. The agreement, for example, still sets out the six-week settlement period. It sets out what is to happen in relation to debits, that is that you can't accrue more than a minus ten-hour flex. The award doesn't attempt to address all of those matters.

MUIR C: Why?

LOWSON: Well, we took a de minimis approach to focus on the matters that needed to be fixed in the agreement, which is in particular the written strategy, and secondly - the award contemplates two options. One is that the written

strategy preferably is entered into, and if it's entered into then there is an expectation it be adhered to and there won't be forfeiture. Of course there may technically be forfeiture even if a written strategy is entered into. But since we had no evidence of how this might work we haven't attempted to seek recrediting of forfeited flex where a written strategy is entered into. Because our primary position is, if the written strategy process works then there shouldn't be forfeiture of flex. So we want to focus on that being potentially workable.

But we say if there's a failure to enter into a written strategy at all and you forfeit flex, then there's a recrediting. Well that has a dual effect. It enhances the obligation on the employer to come back to something that you raised, Commissioner Sloan, it focuses the employer's attention as to getting onto those written strategies, because if they don't and someone forfeits flex then that remains as a credit. There is no effective forfeiture, it gets recredited. So it is a stick on the employer that says, do the written strategy. And if you do the written strategy and flex is still forfeited, there is no remedy in this award for that. Because what we want to focus on is that the written strategies can work. We want to be positive about that in this award. If they're given a chance they'll work, and people won't forfeit flex. At the end of 12 months we might find that hasn't worked. But, that's the thing that we most want to see happen here, and hence the focus on that.

But to answer your question further, Commissioner Muir, it's what I said before. If the commission looks at all of this and goes, well, it's not good enough to just target two or three clauses of the agreement, we think the award should entirely replace the agreement, well then they can come back and direct the parties to come up with an award that meets the commission's decision in that regard. We don't think it's necessary. We think we've targeted those parts of the agreement that are not working now, we're elevating them to an award to increase the pressure on the employer, and we are trying to be positive about the written strategy actually being capable of working. After all it was entered into good faith by both parties, the PSA and the ODPP back in 2015.

CONSTANT CC: Just so I understand it, does the PSA say that - I've heard what you said to Commissioner Muir that both documents can operate together, but can the proposed award operate without the flexible working hours agreement?

LOWSON: No.

CONSTANT CC: No. It's not referenced at all, is it?

SLOAN C: It needs to be referenced.

LOWSON: We can take that on board.

CONSTANT CC: Okay. So it can't operate on its own without flexible work hours agreement?

LOWSON: No. And neither party is asking the commission to interfere with that local arrangement, as it were, beyond what's in the award. So that's a matter that could be addressed by referring to the fact that there is an existing local arrangement pursuant to the clause of the conditions award, and that this award is in additional to supplements.

SLOAN C: Well really it's having regard to clauses 7.6 and 7.7 of the agreement. Clause 5 would replace 7.8.

LOWSON: I think that's right, Commissioner.

SLOAN C: That's rough drafting on the run, but that's the effect of it.

LOWSON: Yes. There are obviously other aspects to the award which are intended to again focus the respondent's mind on its occupational health and safety or work health and safety obligations, which is something that came out again in the cross-examination of Mr Richardson and the tender of the PSA 14, which is the Strategic Risk Summary of the ODPP, where the relationship between overwork and health issues is acknowledged, and yet little being done about it. Sorry, PSA 17.

SLOAN C: The health and safety issues, it was something I was going to come to. The way that the award is currently drafted is that it carries the implication or the inference that if hours are forfeited then the hours are not safe. And yet the model that is put forward is that hours may be forfeited if there is a strategy in place.

LOWSON: Yes, I think that's a matter you raised during the hearing as well, Commissioner Sloan.

SLOAN C: It may well be, it seems a long time ago.

LOWSON: With you on that one, yes.

CONSTANT CC: That's Ms Lowson's opening line, isn't it?

LOWSON: Indeed.

SLOAN C: Is that problematic from the commission's perspective? The way that it is drafted, it seems almost to say if you are forfeiting hours you are working unsafe hours. So anything that would allow for the forfeiture, even if only in default of a written strategy, doesn't that create--

LOWSON: There's some tension there, Commissioner Sloan. I can't avoid that there is a degree of tension there. But at the same time the applicant sees a need for there to be some focus on unreasonableness as well. That is that, how do you mark unreasonableness in terms of work overload, and that will bring me in a moment to the whole question of overtime. And that's what the intention of that sentence there is. But if the commission was of the view that that was inconsistent with 7.1, the sentence would go rather than 7.1, if I can

put it that way. And the commission may be of the view that the focus on the reasonableness in balance of 3.8 is sufficient to address those work health and safety matters. I'll turn to overtime a bit later. I did want to just take the commission to some of the evidence, which is essentially unchallenged, about the impact of forfeited flex and work on how it doesn't permit a balance between work and family life.

So, the first statement I was going to take the commission to is in Mr Leach's statement at court book 1, p 109. Mr Clayton says that, "During the periods when I" - I'm sorry, Mr Leach.

> "During the periods when I have accrued and forfeited large amounts of flex leave I have felt physically and mentally drained and have had increased levels of stress and anxiety. Having a written strategy in place to ensure that I was not regularly forfeiting large amounts of stress leave would result in improved physical and mental wellbeing and reduce stress and anxiety."

Ms Chan is in PSA 3, at p 182. At para 17 she said:

> "The impact of extra time spent working unpaid is that there is a cost to my health as well as professional and financial impacts because I spend all the extra time working, I spend less time with my friends and family, and doing things that would help my mental health, such as exercise and recreation. I'm not able to spend that time on extracurricular professional activities that are important to me. I work on law reform and on professional committees and I am unable to dedicate time to those professional duties when my time is already expended on excessive hours at the ODPP."

Ms Chan then describes the nature of the work that's done, which would be - this articulates what the commission would accept generally in relation to some criminal matters in particular. And, she goes on to say at para 21:

> "The content of prosecuting work is inherently challenging, so maintaining a reasonable workload is important for me to both maintain a high standard of work and protect my health. Taking flex leave to give myself a break from this kind of work is good strategy to mitigate stress, however it is sometimes not operationally possible for me to do so. For instance, in the past I have had flex leave approved and have been asked by a manager to delay leave for operational reasons."

Now, the next sentence I think was one that was objected to, but which is to be dealt with on the question of weight. In relation to the weight of any of the applicant's evidence, in my submission the employees withstood cross-examination, and to the extent that they express views of the sort at para 22, in my submission the commission would ultimately find that there is due weight to be given to the evidence that was challenged by the respondent in the objections. And, at para 22 Ms Chan deposes to her chronic migraines and the levels of stress generally having a negative impact on her health.

Mr Staples, at PSA 4, at court book 202, para 19, he is talking there about the process of identifying how many hours he had forfeited and he says at para 19:

> "It has also caused me to reflect on the effect of overwork. There is an elevated baseline of stress in the background of everything that I do and is present in my daily life. The constant stress of numerous deadlines and the presence of work that you know is coming up affects me in various ways. The hyperawareness of all the work I have to complete is ever present, and this impacts me in making decisions about whether I have time to see friends or family. My work/life balance has been poor, and as a result of that I regularly feel tired and fatigued."

Ms Rogers, in PSA 5, at court book 207, under a heading, "Effect on my health," she says that when she has:

> "A high workload and I'm forfeiting a lot of flex leave I experience a lot of stress and anxiety based on the impossible task of meeting too many deadlines. In periods where I have worked extra hours consistently that has been because I cannot get through my work, not only does the extra time at work take me away from my personal life, it coincides with feelings of stress and shame about not meeting deadlines."

And then, at the para 25:

> "This increased scrutiny in relation to reporting back as to compliance with court deadlines during a period when I felt that my workload was entirely unmanageable compounded my stress and anxiety. It was demoralising to work so hard but still feel like I was going to get, 'in trouble.' It felt unfair to me that despite my hard work I had to bear the brunt of asking for adjournments."

She then describes at para 26 not being able to attend her partner after he had been in a motor vehicle accident and hit by a van. And, finally, I take you to Mr Clayton's evidence, PSA 6, court book 2015, at para 30. Mr Clayton says:

> "I feel honoured to work at the ODPP. The work is rewarding and challenging, my colleagues are good people, most share my commitment and dedication. However, it is for those reasons the work requires far more time than senior management expects, particularly if we are to complete that work to the standard of prosecutors."

And in the previous paragraph he describes how tired - he regularly feels burnt out, he feels tired and overworked all the time.

> "My tiredness compounds and makes the already challenging work harder. Identifying that I have forfeited at least ten working weeks of flex leave in the past three and a half years is rather disheartening."

In my submission, plainly that part of the conditions award that states that

flexible work hours is intended to improve work/life balance is not at all the evidence of the witnesses in these proceedings. The context in which the work is performed, I've alluded to briefly that they are solicitors with carriage of criminal prosecutions, and I think, again, Ms Chan articulates that very well. They are allocated files by their managers. So, this is not something where there is autonomy by the employees in terms of the work that they choose to do, they're allocated that work. They work within the timeframes set by legislation and by courts, and there's a limited ability to change those timeframes.

And, again, a number of the witnesses, in their primary statements and in cross-examination, deposed to their obligations not simply to the courts but to their own counsel, to opposing counsel, to the defendant in a criminal prosecution. That there are a number of rights and a number of statutory and other guidelines and procedures that are all putting pressure on solicitors to meet deadlines, not simply the direction by their employer. And, in my submission, the employees all demonstrated their professionalism in relation to their understanding of those obligations and the way in which those obligations pushed them towards the work hours that they were engaging in.

Changing the timeframes comes at a personal cost, again as demonstrated by Ms Rogers' oral evidence. The employees are also officers of the court, and that is no small thing. They have obligations to the court, and those obligations, again, are an overlay in relation to timeframes and their role that they perform in this important area of the administration of the criminal justice system in New South Wales. And, the question of choice in all of those circumstances is misplaced. There was general awareness that colleagues are working at or over capacity. There is also the evidence in relation to the work being siloed, as I've indicated, and that that employee responsibility for each file, and indeed under the EAGP a statutory responsibility for continuity, all put pressure on employees.

One of the witnesses, I think it might have been Mr Leach, explained that it's not sufficient to say, "I can't take on a new matter," because a new matter might seem, at first blush, to be capable of being accommodated within a workload, but upon review, that is after you've already invested hours in reading it, you identify problems with the admissibility of matters, difficulties with witnesses. You've already invested time in that matter, there was just an impossibility in going back to your manager and go, "Well, now I've looked at this it's far too hard, find someone else to do it." And, indeed, there was evidence that, as I say, for some people managers just put the pressure back on, "That's part of your workload."

There was evidence from at least two witnesses who had joined the ODPP in the last five or so years that they didn't speak up in the first few months because they were new, they expected to have to work hard to get on top of matters, but they also expected that the workload would reduce, and that just didn't happen, and there was also evidence that it - there was a reluctance to raise issues in part because it might be seen as a performance issue and witnesses identified the fact that the key capabilities or documents of those

sorts that govern the work expected resilience, expected you to be able to handle a high workload.

So there is a pressure that, well, this is just the work that you do, that's how you work, so if you put up your hand and go, "I'm not managing this," then you're not meeting that key capability, you're not managing a high workload, and those perceptions, even though, in my submission, they're inaccurate if you're working this degree of forfeited flex hours, they all pressure against employees being able to say no or to raise these issues. There was important evidence about flex time being intended to address a circumstance where there are peaks and troughs in the workload, and I think it was Ms Rogers who said, well, there's peaks, but there's no troughs. There's peaks and then there's ordinary workload, but there's no troughs, and I cross-examined Mr Richardson and I put to him this question and answer, and this was on 19 November at page 199 of the transcript, I said:

> "Q. Do you accept that it is presumed in relation to flex leave that there will be peaks and troughs in the work that is performed?
> A. Yes.
>
> Q. And you need the troughs in order to be able to use the flex time?
> A. Yes, that's true."

But the evidence is there are not troughs. That opportunity to use the flex time just is not there, and it's in that context that the work - that the hours of work are being forfeited. There were questions of - about - put to witnesses that they preferred a higher workload, so Mr Staples on 17 October at page 39 of the transcript, Mr Mahendra engaged in this exchange:

> "Q. You would prefer to have a higher workload, correct?
> A. I don't think I'd accept that. I don't think that I would accept I'd prefer to have a high workload. If I could have a smaller workload and give those matters more care and attention and do a better job in a smaller number of matters that would absolutely be my preference as opposed to a generally speaking higher workload, but in terms of raising it as an issue, I would prefer to just do the work rather than raise it as a complaint, if I can use the word complaint.
>
> Q. That's because you wanted to do the work, correct?
> A. I don't necessarily agree that I wanted to spend weekend days photocopying exhibits, no. I wanted to do a good job when I was instructing in trials for the people I was doing that work for, whether that be the Crown Prosecutor, or that be the complainant in a matter, whether that be out of fairness to the accused, whether it be for the organisation itself, but I could have thought of better ways to spend my weekends, absolutely."

And a little later at page 42, the practical impediments to the work being reallocated, Mr Mahendra was putting to him that in the lead up to 7pm he could do something about the work:

"A. Well, potentially, but the same considerations that I just mentioned in terms of - well, taking it back a step, often the work that we're doing builds on weeks if not months of prior work that I myself have done, so to simply ask that something be reallocated is perhaps a large false economy. It's just going to go to someone else who is going to spend hours trying to catch up on knowledge that I already acquired over that extended period of time, so it would seem like unless there was some extenuating circumstances where I physically could not do the work for whatever reason I would probably not go down that path."

And that was reiterated by a number of employees, this idea that if they could physically not do the work, if they were ill, perhaps, or had an accident, then that might cause them to ask for the work to be reallocated, but that otherwise the siloed nature of the work and their investment in time meant that there was no practical way of asking for the work to be reallocated.

Now, when I was preparing for today I was somewhat astounded to discover how many pages of cross-examination were devoted to overtime. We put in evidence about overtime in the employees' statement. I think it was objected to by Mr Mahendra and it was permitted. I made it clear that the purpose of that evidence was so that we would have a context in which this Commission would understand the seriousness of the forfeiture of the flex. So to put it one way, you could have a circumstance where a person only works between 7am and 7pm and only accrues that maximum number of hours, I think it was - that I stated earlier, 135 that you can accrue over a six week period, over and above your 35 hours, required hours.

If that was all that was happening that would be serious enough, but when the evidence is that simultaneously with working and forfeiting hours employees are also working outside of the bandwidth and in hours that would potentially give rise to an overtime claim but, more importantly, don't fall within the bandwidth, so they can't be claimed as flex hours, so anything that an employee has given evidence about that involves performing work before 7am, I think there may have been very little evidence about that but there was certainly evidence about performing work after 7pm and performing work on weekends. None of those hours are relevant to this award, because this award only applies to the bandwidth hours.

But for context, for the context of work overload generally, the Commission is entitled to view the seriousness of the forfeiture of the flex within a context where there is also work being performed outside the bandwidth, and the work overload issue would arise whether those hours were paid or unpaid, so that issue is relevant for contextualising the work overload and the need for this award to put a full stop to this forfeiture, to stop people working those hours and to - for the flex time to work in a way that it's meant to, that is, that there be some yin and yang here, that the flexible work benefits the employer but also benefits the employee.

The question of the payment for overtime is entirely irrelevant to this award,

that is, the - whether or not employees are actually paid for it is irrelevant to the question to the number of hours that in total they're working across - within bandwidth and outside of bandwidth, but the culture of, again, the employment, there is some relevance because it demonstrates that the access to overtime is entirely limited, and there was repeated evidence that - from these employees that either they had not applied for overtime, they had applied for overtime, it had been rejected, they had applied for overtime in very limited circumstances, and there was certainly significant evidence of working outside of the bandwidth and not seeking overtime because it did not fall within the parameters of the overtime - the clause of dealing with overtime in the award, the policy and procedure in relation to overtime, or, for example, the email that emphasised that overtime was only to be claimed in extraordinary circumstances, and of course the flexible working hours agreement itself specifies that overtime is to be applied in accordance with the award, but then goes on to say, with underlining, overtime is only payable when it's directed.

Now, the commission is not being invited to address questions of overtime, it's simply being asked to consider the need for this award in circumstances of unchallenged evidence of people working, as well as working within the bandwidth to the point that they are regularly forfeiting flex, that they are also working outside of the bandwidth, and that's the relevance of that evidence.

CONSTANT CC: Ms Lowson, it's usual to compensate an employee for working unsociable or excess hours. That seems like a--

LOWSON: It's usual to?

CONSTANT CC: Compensate an employee for working unsociable or excess hours, you would accept that.

LOWSON: Yes.

CONSTANT CC: Yes. Are you suggesting that in our minds, as the full bench, we should not be concerned about that issue?

LOWSON: No, we're just saying that the award doesn't attempt to address it.

CONSTANT CC: Right.

LOWSON: In so far as overtime is concerned.

CONSTANT CC: Yes.

LOWSON: It attempts to address it in so far as those excess hours are being performed within bandwidth.

CONSTANT CC: But, you're not saying that if this full bench - and, procedural fairness obviously would apply, and we would inform the parties, if this is where our heads were at - but, that if, given the evidence that was before us that there was an issue about overtime that we would - you know, you've used

these terms before, “It’d be a proper use of your powers,” or something, you’re not suggesting that, you’re just saying you’re not asking for it?

LOWSON: I’m just saying the award is not seeking to address the non-payment of overtime. The commission is - we’re certainly concerned about it, the commission’s entitled to be concerned about it, but this application is directed at the forfeiture of flexible work hours and those hours are, ipso facto, not overtime hours because they can only accrue within bandwidth and overtime hours are outside of bandwidth.

We’re certainly concerned about it, certainly the commission would be concerned about it because - I think Ms Chan is the only employee, from recollection, who actually had discovered a way to record her overtime hours in the SAP, and gives some evidence about the non - well, the amount of overtime hours that she worked, and the fact that she was not paid for those - I’m using the term overtime hours as being hours after 7pm or before 7am or on weekends. But, this is not - we haven’t attempted to run a case about non-payment of overtime.

There is the question if directed, but I’m sure the commission’s well aware of the decision last week in the ASMOF case with the junior doctor in Melbourne and the Federal Court case that was delivered, I think by Justice Bromberg last week, looking at the question of implicit authorisation. I think authorisation is the term that was considered in that judgment, here it’s a question of direction, but I think it was Commissioner Muir who during the hearing contemplated that in the trial context at least there would seem to be an inferred obligation to be prepared for trial and to do the work.

I’m not saying that you put it in those terms, but you raised the question that weekend work prior to a trial, there was some logic in that work being an inevitable consequence of preparing for a trial, as it were. Whether that would amount to a similar finding to Justice Bromberg’s if a case was run in that regard but, regrettably, it’s not a case that this commission has jurisdiction, other than in terms of a dispute or matter of that sort. But, it’s certainly a matter that the applicant and its clients are very alive to.

Chief Commissioner, we started a little early, would it be convenient to take an earlier morning tea adjournment?

CONSTANT CC: I think that’s appropriate. If we bring both breaks forward a half an hour that would be appropriate. So, we’ll take the morning tea adjournment and back at 11.30.

SHORT ADJOURNMENT

LOWSON: Did the morning tea adjournment give rise to any questions before I start again? Just the coffee, just the coffee, I know it stimulates questions.

SLOAN C: Not yet.

LOWSON: Not yet, okay. So, I've already addressed, in part, the fact that no managing solicitors were called, but I just wanted to contextualise that in that I think over objection Mr Mahendra asked questions of the employees about what they thought their supervisor would do in the hypothetical circumstance that they asked their supervisor to do something, which highlights the fact that there was no evidence from any manager about any of these matters, that is that any managing director ever directed employees to reallocate work - that they had given directions to employees to reallocate work and employees had refused to do it and, indeed, in re-examination at least two, I think, employees confirmed that if they were directed to reallocate a file, notwithstanding their misgivings about it, if they were directed to do it they would do it, and there's no basis for the commission to come to any different conclusion.

There's no evidence from any managing solicitor that they at any time complied with the flexible working hours agreement by identifying when an employee was approaching the 50 hour accrual, nor that they had identified ways to ensure that the hours were not forfeited and, again, no evidence that they had ever prepared a written strategy with an employee with a view to avoid forfeiture of flex, and whether or not any such strategy worked. Keeping in mind that while the applicant understands that the work needs to be done, the question of who does the work, and who bears the hours of that work, is a separate question.

And, ultimately, the employer has contracted with these employees that they work 35 hours a week. That's, fundamentally, the starting point, and at one level the end point, and the employer has to make it work. The flexible working hours agreement - I think at one stage, Commissioner Muir, we had an exchange, it might have been in January, about the 35 hours, that that's a requirement, it's an award requirement. But, of course, the availability of flexible work makes that a malleable concept, if I can put it that way. The 35 hours is what you are to perform, but there is an ability within the flex time to work, as I've said, up to 57 and a half hours in a week, without it being in breach of the award, as long as the next week - to use a week on/week off basis - the next week you work 13 hours. That's how it's meant to work.

So, the 35 hours is a baseline, it's what you are to work, and you're not to work more than that. Everybody would accept that there's a degree to which people do work more, or that five minutes either side isn't going to count, but we don't accept that there's some minimal level where you go, "That's only an hour, that's fine." Because, the evidence doesn't show that, what the evidence shows is frequent engaging in excess hours, and I'll come to that in a moment.

But, coming back to the managers, basically there is no evidence that deputy solicitors are engaging in any kind of performance management of managing solicitors, and no evidence from managing solicitors, that there is any degree of compliance with 7.8 of the flexible working hours agreement. So, Mr Mahendra made submissions that the respondent, in due course, today I guess, will say, "This isn't really - it's just a few employees." In fact, that was put, we only called 1% of the employees in this case. Their own evidence demonstrates how widespread the forfeiture of flex hours is, and I'm referring

specifically, but not only, to tab 5 of Mr Richardson's affidavit. It shows enormous numbers of hours of flex leave being forfeited.

But, PSA 13 - and I definitely don't want to revisit the circumstances of PSA 13 coming into being - PSA 13 is the respondent's own document. It is directed at four settlement periods in the first half of now last year. And, it shows that this is not a case that's been brought because eight employees and eight members came to the PSA and said, "We're having to work too much," this is about endemic and systematic performance of work where flex is forfeited in settlement period, after settlement period, after settlement period, sometimes in large numbers of hours.

So, we say that at one level it doesn't matter how much is forfeited, the employees have the benefit of the flexible working hours agreement, and the ODP is a party to that, and it guarantees a process that is intended to avoid forfeiting flex. But, the scope of the issue is best seen by considering the frequency and the extent of flex forfeiture that PSA 14 reveals, and I could take the commission to that exhibit, and I'm going to take you to some specific pages.

Let me start by putting this proposition: if you forfeit 21 hours in a settlement period that is the equivalent of working half a day every week without pay and without any time off, any flex time off, referable to that time, so I'm taking 21 hours not because I'm saying that anything less than that isn't important but because it's a quantifiable amount of time which is of significance, we say, over - on a week to week basis, that every week you're working a half day extra and you're not getting time off in lieu for that half day. Commissioner Muir?

MUIR C: Close but not quite.

LOWSON: So PSA14 notes that there are a number of inputs in--

MUIR C: Sorry, could you give me the page number?

LOWSON: So PSA14 was the exhibit that dissected PSA13 into different legal groups. It's got tables in it, so it's not in the court book, in other words. So PSA13 is the spreadsheet that is the document that was produced by the respondent and I cross-examined Mr Richardson at length about this, I don't intend to take the Commission to that, but it's in the November transcript where I got him to identify in PSA13 how data in PSA14 had been drawn out, so in my submission there is no doubt about the integrity of the data in PSA14 having been derived from the data in PSA13, but the data in PSA13 - and there was some questions from the bench about this as well - that it did not necessarily have data referable to every employee for reasons that Mr Richardson accepted could have been because the employee had stopped working, was on leave, there was a range of different reasons, but they are identified on the front page of PSA14, which is for Wollongong Group 2, so this document summarises with reference to particular solicitors what the circumstances were in terms of forfeiture of flex at Wollongong Group 2.

So the first thing to note is that there are notionally 15 solicitors that are covered here but that for the last three there was no data recorded at all and for solicitor number 12 the data was incomplete in respect of one or more of the settlement periods. What the data does show is that the first three employees each forfeited flex on each out of - during each of the settlement periods that are identified, and the number of hours that are forfeited are set out - so just to explain this table again, the position number in effect identifies the employee but by reference to a number rather than to a name. The entry date is the date that that employee commenced working at the ODPP. The number of settlement periods where flex is forfeited is identified in two ways in that column, so - and it goes in, if you like, chronologically, so that on every page the first set of solicitors are the solicitors that have forfeited flex in the most number of settlement periods.

In this case three solicitors forfeited flex in all four settlement periods, and then the numbers underneath the number four are the number of hours that are forfeited in each settlement period. The settlement periods are identified on the top of each page, 13 March, 24 April, 5 June, and 17 July 2022, and then the final column identifies where in PSA 13 that data can be found, with a reference to the page and the point 5 being about halfway down the page, so that by and large - and there are some misses, but by and large all of this is referable back to PSA13, so the Commission can be satisfied that the data reproduced here reflects the data - the primary data, the only source of data that - you know, from a Blatch v Archer perspective, the respondent was best able to produce this data, they produced it, and we then produced this document from it.

So what we have here is out of 12 solicitors where there was some data, noting that the twelfth solicitor - there was some data missing, but we include that - three of them worked for more than - forfeited flex in four periods and of those - of that forfeiture a number of them involved forfeiture of more than 21 hours, in some cases significantly more, so if one looks at the second solicitor, in the first settlement period that solicitor forfeited 43 hours' flex, so in effect they worked a day extra in every week of that settlement period without getting a day off in lieu, so they missed out on getting - not in lieu, because we're not talking about time in lieu, but they did not get their day off referable to their accrued flex hours.

So that person, in addition to having 50 hours that they took into their next settlement period, so a period of seven - equivalent to about seven days that they took into the next settlement period, they lost six days along the way. In the next settlement period, which they went into with 50 hours, because if you forfeit flex then you have necessarily taken 50 into your next settlement period, they forfeited a further 15 hours, and then in the next period a further 26 and a half hours, and then one and a half hours. It cannot be said that that person is an incidental or occasional forfeiture of flex, nor can it be said that it is of small moment. These are significant hours being forfeited, and the same is true of each of those three solicitors, so three out of 12 solicitors, 25% of the Wollongong team during the first alf of last year, regularly forfeited significant

quantifiable amounts of flex.

Three - two further solicitors forfeited flex in three settlement periods. Again, in at least four of those settlement period of an amount of 21, 20.42 isn't quite 21, but 21 hours or more, and in one case 54 hours' flex. Talking there in rough terms somewhere between eight and nine days that they should have had in time off, in flex time off, lost. As I say, I don't downplay the balance, but for the purposes of submissions I just want to take the Commission to a few of these pages to highlight the numbers that we're talking about and to disavow in anticipation of Mr Mahendra's promised submissions that this is about 1% of the workforce and involves small numbers, coming back to his cross-examination of averaging the numbers, which I'll come back further, the appropriate timeframe for examining forfeiture of flex is the six week settlement period, not the two or three years that somebody has been at work.

Now, we have identified the senior legal adviser positions on page 6, so this is in Director's chambers, in what is a much smaller workplace, one out of six of the solicitors worked and forfeited flex in significant - in each of the four settlement periods and at 21, thereabouts, or more, hours, in at least two of those, and one employee forfeited again significant amounts of flex in three of the four settlement periods. If we go to page 11, which is the Lismore Group 2, you have an employee working for - so this is for nearly half a year, has forfeited flex in amounts 53 hours, 51 hours, 25 hours, and 49 hours over a - four settlement periods, and if you look at all of the settlement periods that are covered the percentage is something like 17% of settlement periods, on this page, involve working - forfeiting flex, and five of those settlement periods involve forfeiting flex of more than 42 hours. Again, looking at the second and third inputs there, three solicitors forfeiting in three out of the four settlement periods and the fourth input being incomplete for the solicitor identified by position number 536, so that zero is not - doesn't necessarily reflect what actually happened in the fourth settlement period because it was incomplete.

Page 16, you will note here I'm simply going every fifth page. I'm not finding the best ones, I'm just going every fifth page. On page 16, again, three solicitors and - have forfeited flex across four different settlement periods. Two of the - three of the amounts forfeited out of those 12 in total well exceed - sorry, four out of the - well exceed 21, some by a lot more, 54.75 and 58.5, and then a further two solicitors forfeiting in three out of four settlement periods. Page 21, Specialised Prosecutions Group, the data speaks for itself. One of the solicitors, the third one listed, forfeited 78 hours in - which is beyond the maximum, it's at the maximum number of hours you could possibly forfeit over a six week period.

Another forfeited 62, two - three settlement periods in a row, forfeited 15, then 42, and then 62. Page 26, and it's apparent that this is across different types of work areas as well, this is Sydney Group 5. If one disregards the bottom two solicitors there are a total - there's 14 solicitors over four settlement periods, so altogether there are 56 settlement periods, a quarter of those involve forfeiture and five altogether involve forfeiture above 42 hours. Fourteen of them involve forfeiture - no, I need to check that. More again, I

think more than double that amount, involves forfeiture above 21 hours, and finally page 31, Wollongong Group 1, none of the solicitors forfeit in every settlement period, but five solicitors forfeit in three out of the four periods, and again of those two of them, the final settlement period has incomplete data, so that zero does not necessarily represent an accurate reflection of what was forfeited in the fourth settlement period.

In other words, the data that the applicant has extracted from the respondent's material is conservative, and being conservative it demonstrates the scale of the problem, and I want to reiterate I am not minimising or excusing the respondent's failure to adhere to the flexible working hours agreement where forfeiture is less than 21 hours, I'm not suggesting there is some amount, magic amount, that is fine, but I've used 21 hours as a reference point just to assist the Commission to understand the scale of the problem that we're dealing with and to hopefully put to bed, ahead of the respondent's submissions, the concept that this is limited to a group of hardworking employees who just won't do what they're told, which they're not, and stop working, which they can't.

Can I take the Commission back to Mr Richardson's affidavit and note something that he said at paragraph 35? He says this:

> "Where there is regular forfeiture of flex hours by employees the ODPP's expectation is that managers will have discussions regarding why flex hours are being forfeited and what strategies can be put in place to reduce accruals and forfeiture."

That evidence is emblematic and entirely misses the point. It misses the point that the obligations under the flexible working hours agreement are proactive. They're not reactive. They're not for the employer to go, "Look, four settlement periods later you've forfeited 200 hours, what should we do about it?" It is to sit down in the settlement period and say, "You are about to forfeit flex, what can we do about it?" To make sure it doesn't happen. That paragraph, as I say, is emblematic of the ODPP's attitude to this issue.

The cross-examination by Mr Mahendra of each of the employees seeking to minimise the flex time by averaging it over the years in which the flex time was described was entirely misplaced and frankly demeaning. If I can just take the Commission to - by way of example - PSA4, which is Mr Leach's evidence, and attached - exhibited to his statement was exhibit NL1 which appears behind tab 5 of court book 1 and 172 has the document that he had attached showing forfeiture at the end of each settlement period during the period of his employment, so commencing employment on 27 August 2018 and going up to 24 April 2022, so just for the Commission's attention, the last two settlement periods on that page would be recorded in PSA13 because PSA13 captured those first two settlement periods of 2022 and the next two settlement periods of 2022, and Mr Mahendra cross-examined Mr Leach, as he did everyone else, to the effect that if you divided those 772 hours by the total number of weeks that were worked it only resulted in some minimal amount, number of hours.

The primary position - and I'll say it again because it's important - is a settlement period defines forfeiture of flex, and so to put any period of time other than the settlement period is simply irrelevant. What counts is what is forfeited settlement period to settlement period, and that's because in the award a settlement period is set, it's four weeks, in the flexible working hours agreement it's six weeks, everybody accepts that a settlement period is appropriate for managing flex. Otherwise, why not make it a year? Why not make it your entire period? Why not just accrue it and get paid out when you leave? That's not how it works, because flex leave isn't intended to operate in a way that makes people work long hours and then get paid out for it down the track. That would be to completely obviate the working hours requirement, 35 hours a week.

It would - the purpose of flex leave is to allow you to accrue it and take it, and that is where this system is falling down, because it is not permitting employees to take it.

CONSTANT CC: With respect, I do accept what you're saying, that the purpose of flex leave is that you take it. The terms of the proposed award ultimately could result in people taking it in one lump sum, subject to the Flexible Work Agreement requirements and the five days, et cetera, which I'm very confused about. I'm very confused. Because at the end of this don't we want an entitlement that the employees can enforce?

LOWSON: What we want is that they don't do excess work in the first place.

CONSTANT CC: Yes, okay, I accept that's what we really want.

LOWSON: And it's important that the Flexible Working Hours Agreement be seen in that context. It's not open slather.

CONSTANT CC: I'm not cavilling with you on that. My concern is different. We will have potentially, if we make the award that you ask us, we have the Conditions Award, we have the Legal Officers Salaries Award, we have the determination that applies to two classifications, we have a Flexible Work Agreement, and then we'll have a new award. The Flexible Work Agreement itself is a three-year term, it has a clause in it that says if the parties don't agree then we go back to the terms of the award. The agreements made in accordance with an award term that allows local arrangements, can they enforce the terms of the Flexible Work Agreement as a term of the award? I'm terribly worried about what we could create in terms of ambiguity. And I want to be very confident that any award that we make, or any determination we make in the form of some other recommendation or direction or whatever it might be, that employees have the right and enforcement. And I'm just a bit lost what we would be doing.

LOWSON: The award would allow enforcement of the written strategy. The important point is, and the reason I emphasise the hours, Chief Commissioner, and I appreciate the question, but the reason I emphasise is that the purpose of the written agreement, the written strategy, is to avoid the person working

the excess hours in the first place. And that is the point at which the Flexible Working Hours Agreement is failing at the moment.

CONSTANT CC: I'm sorry, but as a former solicitor I assume the worst. And so, don't we assume then that we have to be able to, if needed, enforce the proposed award clause 7?

LOWSON: Yes, and this does two things. It strengthens aspects of the Flexible Working Hours Agreement, and it puts beyond any doubt that it can be enforced either through breach proceedings in the Supreme Court or through dispute proceedings in this commission. Now, let's be very clear here. The respondent has not put on a skerrick of evidence to suggest that it cannot do the written strategy. It hasn't come to this commission and said, look we signed up to this agreement, and actually we can't do it. There's no evidence that they can't do it, it's simply that they don't do it. They don't do it.

CONSTANT CC: With respect your evidence, I thought you were saying, I thought - and please correct me if I misunderstand, but I thought your case was, well they're going to have to hire more people because there's all this work that's not being done. Sorry, that's being done, and they're not being paid for.

LOWSON: There's all this work that's being done when they're not getting time off for.

CONSTANT CC: Accepted.

LOWSON: So, as I said before, if you lose 50 hours then you are losing the opportunity to take seven days off, seven times seven. I don't know what the respondent's capacity is to deal with that. It may be that they need to employ more people to fill that time. But ultimately, they haven't come to you and said, you can't make this award because we can't do the written strategy. How could they come along and say, we can only operate if all of these people are giving away their hours? We can only operate if we get 5,000 hours every six weeks for nothing. They can't come along and say that, they have obligations here. We have put forward a case within the parameters of what we know, and that is that they signed up to a deal that they said that they would do a written strategy with a view to preventing forfeiture of flex. That necessarily means it prevents you working excess hours that would otherwise be forfeited.

They have not come along and said - Mr Richardson didn't say you can't make this award; we can't do it. They have to find a way to do it. They have to find a way to comply with their obligation that employees are paid for 35 hours, and when they work beyond that 35 hours they're entitled to have the time off. So in terms of enforceability, I hear what you say, Commissioner, about the range of industrial instruments. I put to one side the determination in a way, that's to employees and salaries at the end of the day don't come into it, two classifications of employees. And in terms of this being a separate instrument, again the commission might come back and say, well we agree that this award should be made, or this award should be made in this way, is there any reason

why we can't include it in the Legal Officers Award as applying to ODPP solicitors? Probably not. I'm speaking on my feet, but that would at least accommodate a concern about the number of instruments to which an employer must have regard to make them work.

SLOAN: Is there another way to come at it to say well there is the agreement, and as you say there's no evidence that the strategies could not be devised, but there's no evidence that they have been, rather than make an award, we make a direction that those strategies be implemented, and that there be a program in place under the oversight of the commission. To come back to your point about the focus being on the implementation of the strategies, the parties have to report to the full bench perhaps to a member on delegation as to whether it is having any effect to reduce the amount of forfeiture.

LOWSON: Commissioner Sloan, I am not going to stand in the way of any solution that works because we want a solution that works here. You're asking me somewhat on the run, I'd probably have to take instructions on that.

SLOAN: And I appreciate that.

LOWSON: But this commission has numerous powers it can exercise to make things happen. And a local agreement at the end of the day is made under the auspices of an award but it is not an award. And that's why the approach we took was to elevate it to an award to put beyond doubt the rights of enforcement that you've raised with me, Chief Commissioner. But, there may well be other ways.

SLOAN: Just let me flesh that out a bit, if I may, Ms Lowson, because I'd like you to think about it. This is entirely a creature of my devising, so I'm only speaking for myself here, and Mr Mahendra will no doubt have views. In the context of the Flexible Working Hours Agreement it seems, to wait until a staff member has accrued 50 hours of flexible working hours credit, is to sort of wait until the horse has bolted. So that the suggestion that perhaps the strategy be devised when that looks like it might be coming, rather than when it has happened, makes sense.

What the commission could do to reflect that, other than to perhaps make a recommendation to say that that's the point at which the strategy should be devised rather than 50 hours, we could do that. But I don't know whether there would be an impediment to the commission saying, for example, we're going to direct that these strategies be put in place. Recognising that it does require both a supervisor and a staff member to engage in that process. You must do that, and we are going to set up a program where every three months you come back here before the commission, and you let us know how you're getting on. And if it's all gone pear-shaped we'll look at plan B.

LOWSON: Well, I'll take instructions. Can I just point out that the local arrangements themselves at clause 10.2.3 do require that they be in a formal agreement, and it be in writing, and it can be an award.

SLOAN: I appreciate that, but it might also be an industrial instrument by definition.

LOWSON: It says, "or other industrial instrument". I suppose a direction requires the employer to have some recognition of the authority of this commission, as does an award. The employer has to recognise its compliance obligations one way or another. Can I have an opportunity to take further instructions?

SLOAN: Yes, of course.

CONSTANT CC: Sorry to be what might look like I'm being pedantic, but I'm just trying to understand. Can I ask, it's the PSA's case that there is still an agreement in - and, I ask this because I'm looking at cl 20.5, so I'll be clear why I'm asking this. It's the PSA's case that there is still an agreement between the parties for the local arrangement, despite there being a dispute about certain aspects? So, I'll let you look at cl 20.5 and you'll understand why I'm asking.

LOWSON: Yes. I've got it. There is an agreement in place, it's not being complied with. So, there is no argument on either side of the table, as I understand it, that the flexible working hours agreement not only continues to apply, but is being applied in 90% of it. That is, as I've said, the SAP system is set up for six week settlement periods. The SAP system is set up to forfeit hours after 50 hours are accrued. So, the practice, the process, is all in accordance with the flexible working hours agreement, except that they're not complying with their obligations to prevent forfeiture, or to minimise forfeiture. And, in saying minimise, I'm not making any concessions there. But, they haven't even got to first base in terms of minimising or preventing forfeiture.

So, that is the party's position, Chief Commissioner, and the fact--

CONSTANT CC: Well, that's the PSA's position, I'll let Mr Mahendra confirm it.

LOWSON: Yes. Well, in saying that, I don't see anything in their submissions, or any part of their case, to suggest anything differently to that. And, as I say, I think it would be - there is no evidence that they're complying with the award provisions rather than the flexible working hours agreement provisions.

CONSTANT CC: Thank you.

LOWSON: Coming back to the difficulties with that cross-examination, that document of Mr Leach's shows his employment period. What it doesn't show - so, first of all we say the six weeks. Second of all, the timeframe was entirely misleading because, as became apparent as more and more witnesses were asked, there is no evidence adduced from the respondent - if they seriously wanted to put forward this case they could have included in their evidence all of the leave taken by each of the employees who have been called to give evidence in these proceedings and actually done a proper mathematical

approach. It still would have been entirely invalid, but at least it might have had some semblance of accuracy.

What it didn't reflect was people on annual leave, that is the amount of annual leave that people have taken year to year. If you're on annual leave you're not performing work, you're not accruing flex, and you're not using flex. It didn't take account of personal leave, other than what people could remember as they were sitting there in the witness box as to what personal leave they might have taken over, in this case with Mr Leach, a four year - or three and a half year period, parental leave. It turned out that I think it was Mr Clayton had taken extensive military leave.

I think, Commissioner, you said, "Well, we can take account of public holidays." Sure, how many public holidays? Another two weeks? So, you've got four weeks annual leave, two weeks' worth of public holidays, incidental other leave personal to people. The one thing that they didn't ask any of the witnesses was, "How much time did you take out using up your flex leave?" So, Ms Chan, for example, gave evidence that she historically would take five days of flex leave if she could on either side of annual leave. Well, that's another week that you're not working, where you're not accruing flex leave, and which shouldn't be used for the averaging purposes.

And, the questions took no account of the limitations that apply, that is that you can't take flex leave while you have 30 days or more annual leave accrued. So, the whole premise of the questions, in my submission, was entirely baseless and you would not accept any argument from the respondent that this is not a significant matter because when you average out the eight employees it was maybe two hours, or three hours, or four hours, or five hours a week. The maths was not there, the premise was not there, it should simply be rejected.

Those are my submissions, members of the commission, unless there was anything else that I could assist with?

CONSTANT CC: Thank you. Mr Mahendra, we were going to break at 12.30. Is it your preference to start?

MAHENDRA: I'm in your hands, Chief Commissioner. I think I'll be less than an hour.

CONSTANT CC: Happy to start?

MAHENDRA: Happy to start. The starting point of this case has to be, obviously, the industrial framework in which we're operating. And, our primary contention is that the applicant has not satisfied the requirement to demonstrate that, firstly, the industrial framework that we're in does not already provide fair and reasonable conditions of employment, and they haven't demonstrated - or, they haven't rebutted the presumption that the current conditions of employment are no longer fair and reasonable having regard to some kind of change in circumstances.

One of the important features of this case, of course, is the fact that underpinning the flexible working arrangement is the award itself. And, when one goes to the award there are a number of provisions that are particularly important. The starting point, of course, is cl 10 which contemplates local arrangements being in place in so far as flexible work practices are concerned. But, that has to be read together with what is then contemplated by cl 11, and in particular 11.3, which provides a prohibition, effectively, on employees performing hours that are not reasonable.

That is, it allows the employee to refuse to work additional hours in circumstances where the working of such hours would result in the employee working unreasonable hours, and there are various factors set out in 11.3 which must be taken into account when determining whether hours are unreasonable. That, of course, is part of the framework in which we're operating. The other important factor to take into account in cl 21 - and, Commissioner Muir, I think you touched on this, or sought an answer to this - is the fact that cl 21, and 21.11 in particular, contemplates forfeiture. That is because you can only carry through a maximum of 10 hours credit when it comes to flex leave into the next settlement period.

Importantly, of course--

MUIR C: Why does 21.11, without using the word forfeiture, mean that anything above 10 is forfeited?

MAHENDRA: Because you can't carry it through to the next period so it must be forfeited.

MUIR C: Or, maybe you can't accrue more than that, you can't do more than ten. Once you've reached ten, that's it, you're not allowed to do any flexible working arrangement.

MAHENDRA: We would say that's - our position would be this, Commissioner, that is certainly an available reading, but in practice it's not a realistic--

MUIR C: And, the parties are in agreement on this, it seems.

MAHENDRA: It's an unrealistic practical application of the award because we know, from practical experience, that there are going to be situations where flex leave is forfeited. And, that's anticipated by the flexible working arrangement as well - sorry, the flexible working agreement. So, when one goes to the flexible working agreement - and I'm looking at p 25 of volume 1 of the court book, cl 7.6 at the bottom of p 25 makes it abundantly clear that any accrued hours above 50 are forfeited at the completion of the settlement period. And this of course is the agreement reached between the parties.

CONSTANT CC: But we can't interpret 21.11 by reference to something--

MAHENDRA: I'm not asking you to do that, Chief Commissioner, I'm simply

saying on our reading of the award, both for the award as well as the Flexible Working Agreement, contemplate the idea that flex hours will be forfeited. And that's important in so far as the industrial framework that we're working in for this application. What 7.8, over on the next page, makes abundantly clear is that, and again it's this contemplation of forfeiture, is that it is anticipated that there are going to be periods of time, even repeated periods of time, where flexible working hours are in fact forfeited. Because when you look at 7.8.1 the strategy that's to be devised to ensure that a staff member is able to take the approved hours is aimed at ensuring that hours are not continually forfeited. And what this obviously bears in mind is the environment that we're in and the types of employees that we're dealing with, in that there are going to be as a matter of pragmatism periods of time where there are repeated forfeitures of flex leave. And what the Flexible Working Agreement at is devising strategies where that does not continually occur.

My learned friend has taken the full bench through the various differences between the award and the Flexible Working Agreement, and it's abundantly clear, we say, that the Flexible Working Agreement is far more generous than the award. However, as part of the submission that my learned friend has made, she asserted that it's the Flexible Working Agreement that effectively allows for this overwork to occur, whereas the award wouldn't. I think in answer to your questions, Commissioner Muir, about well why wouldn't you just go back to the award, the difficulty with that submission, that it's the flexible working arrangement that encourages this overwork, is that there's a real tension between that and saying, well on the one hand we want the Flexible Working Agreement to say, well yes we can accrue 50 hours and that's great, we don't want to go back to the award because then we could only accrue ten hours, but at the same time then criticising the Flexible Working Agreement to say, well it in fact encourages people to work too much. It doesn't quite make any sense in that respect.

But I think the parties are in agreement in so far as saying, the Flexible Working Agreement works in so far as the respondent's business is concerned. The forfeiture of flex leave, as contemplated by the Flexible Working Agreement, is a natural consequence of the nature of the work that solicitors perform. Much has been said about the cross-examination that I put, or the cross-examinations questions, and I asked a number of these witnesses in so far as averaging out, and the criticism that was made is, well you can't do that over a period of a year, you need to focus on that six-week settlement period. The six-week settlement period and the evidence before the commission seems to indicate and seems to support the contention that the respondents put forward, that this issue is not as widespread as the PSA puts forward.

So if we look at the time, the flex sheets that are in evidence, and they're at tab 3 of tab 16 of the court book, you don't need to go there, or even PSA 14 in so far as the summary of those entries are concerned, what we know is that there are about 2,056 flex sheets in that six-week period. Of those 391 have blank flex sheet details, and so what we're left with is a total of 1,665 entries in the period between 31 January 2022 to 17 July 2022. Importantly 61% of those

flex sheets record no hours being forfeited. It slowly increases. 63% are at two hours or less. 64% are at three hours or less. 55% are at five hours or less, and it continues to the point where we get to 15 hours or less. And I focused on 15 hours or less because what 15 hours or less equates to is about two and a half hours additional each week. So you're talking about a 35-hour working week plus two and a half additional hours, 37 and a half hours on that week.

77% of the timesheets record 15 hours or less. Which means you've got 23% of the timesheets indicating forfeiture of hours above 15 hours. Now within that 23%, what has to be borne in mind of course, is that there are going to be periods of time where people have not continually, we say, forfeited flex leave. That is you've got periods of time, as my learned friend took the commission through, where a solicitor might, for example, have three periods of forfeiture of flex leave, but within that you'll see a zero. Which we say indicates quite clearly a period of time where either flex leave has been taken so as to avoid any further forfeiture, or there's been no additional work performed beyond the normal hours for that week.

What the data seems to suggest is that there are, and we would say a small group of people who are working beyond what we say a Flexible Working Agreement really does contemplate. And no one wants that, even on our side. We wholeheartedly agree that it's regrettable that there are employees who have repeatedly forfeited flex leave. And as evidenced in these proceedings, the ODPP is working towards implementing measures to ensure that doesn't occur, which I'll come to a little bit later. But when we come back to employees who are in fact repeatedly forfeiting flex leave, and this came out in terms of the cross-examination of some of the witnesses put forward by the PSA, it seems to be accepted that if they asked, their managers would in fact reallocate work. But they did not genuinely seek to have these matters reallocated. And when they did ask for matters to be reallocated they in fact were.

Now the criticism that's made against the ODPP in that respect is to say, well this should all be on the managers, that is it's their responsibility to monitor, to work out, and to do everything that's required in so far as making sure no one is forfeiting even one hour of flex leave. Now we say, well firstly, that's not actually what the Flexible Work Agreement contemplates. But secondly, whilst we appreciate that there is a requirement on managers to monitor that situation, there is a requirement on managers to work together, it's on staff as well, and so when you look at clause 7.7 of the flexible work agreement what it requires is that hours are to be monitored by the staff member and supervisor throughout the six week period and supervisors and staff members will work together to ensure that staff members do not exceed more than 50 hours - 50 working hours in a settlement period. It's a mutual obligation.

But in line with that, of course, what the ODPP has attempted to do is provide guidance to managers as to how they can implement strategies in order to ensure that the number of employees forfeiting flex leave is reduced, and so if I can go to page - sorry, page 828 at volume 2 of the court book, this is

annexure NR7 to Mr Richardson's affidavit, what you will see, Commission Members, is a document titled, "Managers' Guide." The reason I draw your attention to this is because what it demonstrates is that steps are in fact being taken by the ODPP to adhere to the flexible working hours agreement by implementing a strategy designed to assist managers in having discussions with employees in order to devise written strategies--

MUIR C: The date on the bottom indicates, doesn't it, that it was issued three months after the application in this proceeding?

MAHENDRA: Yes, it does, Commissioner Muir.

MUIR C: And will you take us to evidence that shows that it was implemented?

MAHENDRA: We wouldn't be able to, primarily because of when the evidence actually came to fruition it was only a recent document, that is, we accept that it's a recent document, Commissioner Muir, but what we show is - what we say is it shows steps being taken on the part of the ODPP to put strategies in place in order to adhere to the flexible working hours agreement, and the reason that becomes important is because there is no part - there is no argument in this case insofar as a lack of desire on the ODPP's part to comply with its obligations under the flexible working agreement, and that again becomes important insofar as the industrial landscape that we're operating in in circumstances where what's being asked for we say go well beyond the agreement that the parties had reached insofar as the flexible working arrangement - flexible working agreement is concerned.

MUIR C: I'm just - I'm going to ask you this because it's there and it's actually created, apparently, eight days before Mr Richardson swears his affidavit.

MAHENDRA: Yes, Commissioner Muir, I - we accept that.

MUIR C: All right.

MAHENDRA: And we accept wholeheartedly that this document has arisen because of the concerns that have been raised by the PSA. It's an indication on the part of the ODPP that it's seeking to adhere to the flexible working agreement as best as it possibly can and in fact encouraging its managers to have these discussions with staff who have forfeited flex time in order to devise ways in which that staff member can reduce the amount of flex leave that's been lost. Now, much of the evidence in this case that was led by the PSA gave hearsay accounts of what other people were doing, and part of the resistance insofar as allocating or reallocating work was, well, everyone else is busy too. Now, we say no weight should be given to that evidence because, of course, it is hearsay and there is no way in which we could challenge that fairly, and in any event the data would seem to suggest that there are at least 60% of the timesheets demonstrating no forfeiture at all.

So the data itself doesn't really match up to what the PSA witnesses are

saying in that everyone else is so busy that work cannot be reallocated. This is what we say - sorry, this is, it would appear to be, potentially resolved by way of a discussion, fair discussion between supervisors and staff insofar as being willing to reallocate work and spread the load, but the difficulty, as evidenced by the PSA witnesses, is that there are a number of staff who don't want to engage on that level, and so strategies have been implemented, which is what I've just taken the Commission to, to address that, to say, well, managers, have a look at this, deal with it, have these discussions.

SLOAN C: And as part of all that, invite the employee, if they want to, to tick a box saying they're fine, they'll keep working hours that are in breach of the award obligations.

MAHENDRA: Well, if employees wish to work the hours that they're working--

SLOAN C: Does the ODPP want to say that if an employee wants to work hours that are unreasonable then it will permit them to do that?

MAHENDRA: No, Commissioner, and that ties us back to 11.3 of the award, where it's--

SLOAN C: But in which case you're saying it's on the employee. What I'm hearing a lot of is on the employee to come forward, it's on the employee to refuse to work the reasonable hours, it's on the employee to approach the supervisor about the written strategy, it's all - what we haven't seen, other than a document created three months after the dispute was notified, or the application was filed, I should say, what we haven't seen is any evidence of proactive steps taken by the ODPP to manage these things, to save employees from themselves, if you like. Where is the evidence of that? And in the absence of that evidence, in the presence of evidence which is the employees don't feel that they can, because that is not the culture of the ODPP, what comfort can we take from a document that says one of the strategies that you can take is for the employee to tick a box saying nothing to see here?

MAHENDRA: Can I just go back to the first point that you made, Commissioner? I'm not saying that it's all on the employee, that it's up to the employee to come forward, it's up to the employee to do X, Y, Z. What I'm saying is that it's a two way street, and that's what the obligation is not only in the flexible working agreement but also in the award itself when it comes to flexible work.

SLOAN C: So on that point, where is the evidence that you've walked the other side of the street? That your client has walked the other side of that street?

MAHENDRA: Well, we say that - and we accept it's limited, but it is this manager's guide.

SLOAN C: Okay.

MAHENDRA: I accept it's limited.

SLOAN C: It's flawed, in my view. It's flawed because what it allows for is an employee to say, "I want to maintain the status quo," in which case the manager and the ODPP can wipe their hands of any responsibility.

MAHENDRA: No, we don't say, and we would never say, that simply ticking a box in this document then removes any argument about breach of the award, if there's been a breach of the award. We don't say that at all. The real point of the manager's guide is to open up that discussion in order to devise strategies to reduce down that flex leave. That's the point of it and, we say, demonstrates the willingness on the part of the ODPP to address the issue in so far as it concerns the group of employees who are, in fact, forfeiting flex leave continually.

CONSTANT CC: Well, I guess it can be characterised either way, and we don't have evidence to show how it's being used, is that where we would put it?

MAHENDRA: Yes. It could be characterised either way, but it's - and, I fully appreciate the date on which this document was created, and I fully accept that it's been created in order to address the concerns that have been raised by the PSA. But, that's the whole point, that is the ODPP is, in fact, taking steps to address this issue.

CONSTANT CC: I'm conscious our obligation here is to consider what's fair and reasonable. Was there any application to file additional evidence that went to that point?

MAHENDRA: No. No, Chief Commissioner.

CONSTANT CC: Would that be convenient for your submissions to break now?

MAHENDRA: It is, Chief Commissioner. Before we leave, and in order to answer the issue about the checking the box that you raised, Commissioner Sloan, before we break, can I just ask you to go to the bottom of p 829, which we say sets out the ODPP's position on employees who do, in fact, wish - who voluntarily choose to work the hours they work, and that is to say, well, the ODPP does not want to diminish staff choice, but this must be balanced with them mutual obligation to monitor and ensure staff wellbeing. And so, there is this real desire to ensure and adhere to those obligations in so far as staff health and wellbeing are concerned.

SLOAN C: But, I wanted to play devil's advocate to that position, Mr Mahendra, the heading is, "Employees willing to forego their flex hours." Then there's a statement saying, "Employees may voluntarily choose to work the hours they want, and we don't want to take that away from them. However, there is this mutual obligation" - and I note the use of the word

mutual again - “To monitor and ensure staff wellbeing.” It goes into saying, “The staff member may respond.” So, the commitment to staff wellbeing and the commitment to balance is sandwiched between, “Let the employee choose.”

MAHENDRA: And, putting it bluntly, Chief--

SLOAN C: Don’t elevate me yet.

MAHENDRA: --Commissioner Sloan, we’re dealing with lawyers in this context, and we’re all lawyers here, we understand this. You’re talking about high performance individuals who have a desire to fulfil professional obligations and do a good job. And, there are always going to be people who wish to work. Because, when you’re dealing with lawyers, that’s what they’re like.

SLOAN C: But, you’re dealing with lawyers who are covered by an industrial instrument in the context of these present proceedings, and the employer has obligations which it cannot evade simply by saying, “But, we’re talking about high performance people who want to work really hard.”

MAHENDRA: And, we’re not seeking to evade those obligations at all, which is why everything this comes back to is to say, “Well, look, this is designed to ensure that you’re not working excessive hours.” But, what is implicit in that is an agreement - or, a mutual discussion between supervisors and employees to say, “Well, hey, you forfeited a lot of flex leave last settlement period, what can we do to sort that out?” And, if the employee comes back and says, “I’m not really bothered by that and my workload for this settlement period’s looking okay,” then that’s a discussion that’s up to the employee, and that’s a matter for the employee.

Because, as I said before, the award, as well as the flexible working agreement, contemplates the forfeiture of flex leave.

SLOAN C: Yes, but it contemplates the forfeiture of leave with safeguards where - the award contemplates that there will be a monitoring to ensure that it’s not forfeited. The flexible working hours agreement uses the same word, “Monitoring,” and there is a system put in place. So, it’s not enough to say it contemplates the forfeiture of flex hours, it’s in the context where that is not expected to - I understand what you say, it may happen, but that is not to be regarded as BAU, if I can use that term. It is within the context of a framework where the forfeiture should be avoided, where possible.

MAHENDRA: Absolutely.

SLOAN C: And, what you’re suggesting is that that doesn’t necessarily apply if the employee’s happy to take it. Now, that’s all well and good if both parties are in an equal bargaining position. I’m more troubled by it in an employment context where the employer can say, “Well” - the pressure that may be implicitly applied to employees, be it these employees or any others, to say,

"Well, it's up to the employee to choose and we don't want to take that choice away from them," because that's a slippery slope.

MAHENDRA: I wholeheartedly agree with you, Commissioner, and that's not the intention. That's certainly not the intention in my submissions today, all I'm saying is that in so far as the flexible working agreement is concerned, in so far as the award is concerned, fair and reasonable conditions are already there. And so, what's the basis upon which a new award could then be made? That's the argument.

SLOAN C: Because, the safeguards aren't being implemented.

MAHENDRA: But, that--

SLOAN C: The terms are fair and reasonable in so far as there are safeguards in place. If those safeguards are not being implemented, then why wouldn't the commission want to intervene, in one way or another, to ensure that they are?

MAHENDRA: So, what we're talking about there is then a compliance issue as opposed to an award issue. That is, the protections are already in existence and there are, we say, a smaller group of employees who are saying that the flexible working agreement isn't working for them, and that they are working in breach of award or the flexible work agreement's requirements. That's an individual case not, we say, a basis for a new award.

SLOAN C: But, where does the - there is no evidence before the commission that there has ever been a written strategy once an employee reaches 50 hours of accrued flex hours. Now, that's not about an individual saying, "I'm forfeiting flex hours," that's just a question of you're not doing what it requires. It doesn't say, "If an employee is continually forfeiting leave you'd better talk about a strategy," it says, "Once you hit 50 you will have a meeting, you will devise a strategy." Now--

MAHENDRA: Well, that's why the manager's guide has been implemented and brought into effect to say to managers, "This is what you need to be doing."

SLOAN C: Okay. We're going around in circles.

MAHENDRA: That's as high as I can take it, Commissioner.

SLOAN C: Thank you.

CONSTANT CC: So, I'm very grateful that we started at 9.30 to accommodate me, but in the event that we do not finish at 3.30 I am content to rearrange my afternoon so that we can finish. So, if everyone else can get instructions about the availability of those instructing them, and also taking into consideration the monitor - so, if I'm given advance notice I'll just change things, if it suits everyone else.

LOWSON: Is there any possibility of a shorter luncheon adjournment, subject to the monitors and the commissioners, so that we resume at half past 1.00, for example?

CONSTANT CC: Yes. Well, yes? Yes, thank you. But, if you can take instructions on the other as well.

LOWSON: Yes, we will.

CONSTANT CC: Thank you.

MAHENDRA: Thank you.

LUNCHEON ADJOURNMENT

MAHENDRA: Before the break, commission members, I'd taken you to the bottom of p 829. Can I just remain with this document for the moment. I fully appreciate the comments that, Commissioner Sloan, you've directed at me in so far as there being no evidence of a written strategy actually being deployed. And that's an issue in so far as the evidence is concerned that on one view, and as I said before, I fully appreciate the comments that have been made, that is lacking in so far as an evidentiary gap on the part of the respondent. However, what we do say is what needs to be borne in mind here of course is that when one looks at the manager's guide there is still this desire on the part of the respondent to implement strategies designed to address that specific issue. For example, when you look at the bottom of p 828 there's an acknowledgement by the ODPP directed at its managers, that whilst a mutual obligation exists in relation to managing accruals, as managers we are expected to initiate action to address the situation.

So that goes back to the submission that I was making before. And that is, although there is this mutual obligation, as far as the ODPP is concerned there's still that expectation on it to take steps in order to ensure compliance with the Flexible Working Agreement. And you will see at the top of p 829 the action that the ODPP requires of all managers on a regular and ongoing basis. Now, it's in that context where this award application has been made. And we say, when one looks at the content of the award that's been put forward by the applicant in this case what is abundantly clear is that this award is not appropriate. There's already been discussion, and we've set out in written submissions, why we say the terms of the new award are inconsistent and confusing and likely to lead to further disputation between the parties as to the meaning and effect of the new award, rather than providing any proper basis for resolving the industrial issue between the parties.

For example the terms of the new award, on the one hand contemplate the possibility that employees will accrue more than 50 flexible working hours and in some circumstances those hours will be recredited to the employee, however, cl 3.8 and cl 4 of the new award impose a mandatory requirement that any additional hours that involve an employee forfeiting flexible working

hours will be unreasonable, and as such would constitute a breach of the new award. So there's a real inconsistency and those provisions are quite difficult to reconcile. The other real issue in so far as the new award is concerned is that it seems to be directed towards this, ultimately what started off this dispute between the parties, and that is the workload management tool, and commission members, you would have seen some of the evidence going to that issue. What the real complaint appears to be here is that optimal practice size number that's been used as part of a workload management tool, as opposed to a real complaint about the Flexible Working Hours Agreement.

It seems, at least on our understanding of the case, that's advanced by the union that the parties, both parties, wish for the Flexible Working Agreement to continue and for it to be adhered to, and that's certainly the desire of the ODPP. Now, it's in that industrial landscape that the PSA or the applicant has to persuade the commission that some kind of special circumstances exist whereby the new award is necessary, the new award that they seek is necessary. And all I can say in response to that is, well we need to go back to the relevant legal principles that apply in the context of these types of matters. And we've set out in our written submissions re Operational Ambulance Officers (State) Award 2001 113 Industrial Report 384 at para 168, the evidentiary requirements of a special case and the special case principles that apply. And we say they simply have not been met in the context of this case so as to warrant the making of the award that the PSA seeks.

In terms of wrapping up some of the issues that have arisen today, the only final matter that I wish to address is a question you posed to my learned friend, Commissioner Sloan, and that is, why couldn't you just make a direction about compliance with certain provisions of the flexible working agreement? From our perspective we wouldn't say anything in opposition to that because, of course, we wish to adhere to the flexible working agreement in any event. All I wish to do is draw your attention to - and I know you're familiar with it because you've written decisions on this issue, is the scope of the power under section 136A and whether what is contemplated would be within that power, and if the Commission is minded to do that what we would ask is for a draft of that direction to be provided so that the parties can then provide submissions as to whether that would be within jurisdiction or not.

Can I just remind the Commission of the decision of Local Government Engineers Association of New South Wales v MidCoast Council (No 2) [2022] NSW IRC 1069 where this issue was ventilated, although the Full Bench in that case didn't really seem to come to a landing on the scope of section 136A.

SLOAN C: In fact, Mr Mahendra, on that point, I had - and before I had raised the issue with Ms Lowson while I was sitting here it picked up that decision was going through it and - there is - I have to say that I have some reservations as to the - and whether it would be what might be regarded as a facilitative direction in the context of the Full Bench's consideration in that case and picking up the previous Full Bench authority referred to in that decision. I'm mindful that - of the limitation, I think, of our powers, but it just seemed to be an alternative, and particularly given your submissions that your client is

keen to ensure that the flexible working hours agreement is given its full effect, then it would seem to be consistent with that to say, well, show us. Show us that you're doing that and perhaps have - as I said to Ms Lowson, have report backs or - every quarter or something with the Commission just to see how things are tracking against the historical forfeiture of flex leave.

MAHENDRA: We would be content with that approach.

SLOAN C: Thank you.

MAHENDRA: Thank you, Commission Members.

LOWSON: Just a few matters in reply.

CONSTANT CC: Sorry, Ms Lowson, I didn't ask Mr Mahendra a question I wanted to ask him. You talked about your written submissions and interpreting the award and there being some ambiguity. How do you say clause 7 would work?

MAHENDRA: Clause 7 of the proposed award?

CONSTANT CC: Proposed award.

MAHENDRA: I don't think the issue is with clause 7 alone. In practice the - how that would work, I'm assuming, is that if there is going to be forfeiture or there is forfeiture then there needs to be a written strategy entered into to avoid forfeiture, but if that written strategy is not entered into the way I read it is those forfeited hours would then be recredited. The tension arises from clause 3.8 and clause 4.1 where there's a definition of safe practice workload which says at the bottom, "Additional hours will be unreasonable if they involve the employed solicitor forfeiting flexible working hours credit." And so the moment the forfeiture occurs there is then a breach of clause 4.1, and yet clause 7.1 says, well, it can occur, it just gets recredited. It - there's a real tension, and so we say it's inconsistent and inoperable.

CONSTANT CC: Can I ask, then, if we blue pencil the sentence, "Additional hours to credit"--

MAHENDRA: Sorry, in which clause?

CONSTANT CC: So if we took out that sentence, "Additional" - in - sorry, in 3.8, when we talk about circularity--

MAHENDRA: Then clause 4.1 would also - well, 4.1 again is difficult, it remains difficult in circumstances where health and safety obligations already exist and this seems to add to that and there is a real difficulty in terms of how it would operate. I think the real issue fundamentally comes down to clause 5, essentially, that is, what's captured by the flexible working agreement, and if there's desire on the parties to adhere to that, well, then the question remains, putting aside the inner workings of this document, why is it necessary?

CONSTANT CC: Why is 7 necessary?

MAHENDRA: Why is the award necessary?

CONSTANT CC: I'm sure Ms Lowson will tell me better than I can state, but because we're in this position where people are forfeiting hours and they want, reasonably, to be able to enforce what are the current - what you say are the current entitlements. Would that be fair?

LOWSON: It is certainly directed at that exactly, I think that's what I said in my submissions, the award is primarily framed with a view to enforcing what appears in the local arrangement in the broader context that these are employees employed to work 35 hours a week for a specific salary for those number of hours.

MAHENDRA: Well, that comes back to my primary point, Commissioner, and that is if we're talking about a situation where the award - the framework already provides fair and reasonable conditions of employment and the issue is non-compliance, that's a different case. It's not this case.

MUIR C: Can I ask you about that? Say the totality is already fair and reasonable, the flexible working hours agreement allows up to 50 hours to be banked, if that's the right word, in a period, but only allows effectively 35 to be used in any period.

MAHENDRA: Yes.

MUIR C: Doesn't that - it has an inherent contradiction that it's part of this that - I think it was your case that hours are going to be forfeited.

MAHENDRA: Yes.

MUIR C: And so couldn't you just say why that is a fair and reasonable set of working conditions for what is a 35 hour a week award?

MAHENDRA: Well, we say that the award itself also contemplates forfeiture because it caps it at ten. You can't carry over more than ten. The fact that it contemplates carrying over and limits that to ten we say contemplates forfeiture.

MUIR C: Right, but than if I open the question of whether the award itself is fair on that basis--

MAHENDRA: Well, the Commission has already satisfied itself that it is because it said that.

MUIR C: Anyway, you--

CONSTANT CC: What's the solution to the dispute, then, Mr Mahendra? You

say it's that document and meetings. That's the answer?

MAHENDRA: Well, we say that the answer is - the answer is not a simple one, but certainly not this award, and that's the case that I am faced with, that is, whether this new award should be made or not, as to what other solutions exist. I'm in the Commission's hands as to that. We are certainly willing to continue participating and conciliation, we're willing to continue consulting with the union as to measures that can be put in place to ensure the obligations under the flexible working agreement are met. What should not occur is the granting of the application that's been made by the PSA, which is the award that's set out at p 6 of the court book.

CONSTANT CC: Because, the current conditions of employment are fair and reasonable, and they have special--

MAHENDRA: Presumed to be.

CONSTANT CC: Well, they are presumed to be, the applicant has not made out its onus to establish that the presumption should be rebutted, and there is no special case. That's your case in summary?

MAHENDRA: Yes.

CONSTANT CC: Thank you.

MAHENDRA: Thank you, commission members.

LOWSON: The flexible working hours agreement terms are not being met at the moment, that's the fact of the matter. It's not limited to the failure to engage in written strategies, it extends to the sharing of information under cl 16. There's no evidence of compliance with that clause, which is, in a way, brought into the award by the PSA monitoring. The idea that a employer can come before this commission and say, "Well, in effect, we're not going to admit in the face of clear evidence - we're not going to admit there's a problem, and we say that there is no problem, so there's no need for a solution, but when you press us and ask for what other solutions there are, it's not really for us to deal with."

It is an egregious abrogation of the employer's responsibilities, frankly, for Mr Mahendra to have been put in the position of having to make that submission. And, it is not a proper engagement with this commission in terms of the issues that have demonstrably been placed before it in this case. Commissioner Muir, you asked about the award and the contemplation of forfeiture. Mr Mahendra said, "Well, the award contemplates forfeiture because you can only carry forward ten hours." In my submission, what the award contemplates is that you do not work more than ten hours in any four week settlement period unless you can take the excess as flex time during the settlement period. That's what the intention of the award is.

So, the intention of the award is not to permit forfeiture, the intention is to

manage the performance of hours of work in a way that makes sure that the flex provisions work both ways. I've been around long enough to remember when flex time was first being introduced. It was radical, it was hotly debated the extent to which it would benefit employers, or the extent to which it would benefit employees, and the way in which it could be managed that didn't disadvantage or advantage one over the other. And, those checks and balances, by and large, are in the award.

The concept of forfeiture is not contemplated because it is not contemplated that you do more work than what you can carry forward, or use within the settlement period. If you work 20 hours in a four week settlement period you use ten of them and you carry forward the other ten. That's the position. There isn't some overarching unfairness built into the flex time provisions of the award like Mr Mahendra would have you believe, and there isn't some justification for the unfairness in the way in which this employer chooses to deal with a flexible working hours agreement.

This is what Mr Mahendra said. He said, "Forfeiture of flex is the natural consequence of the nature of the work that is performed." That is outrageous. This employer comes forward and says, "Well, we say that we'll pay you this much for this many hours of work, but we don't mean it." That's what that submission means. It means:

> "We're lying to you when we say we're going to pay you this award rate for 35 hours, because the natural consequence of being a solicitor is that you don't do that. And, the natural consequence of being a solicitor is you don't really get that salary for that number of hours, you're actually buying into working for nothing, diminishing the value of your salary, and not getting your side of the bargain."

That's what this employer is saying to this commission. It's extraordinary.

CONSTANT CC: Ms Lowson, I don't disagree with you in respect of the award, but the flexible working hours agreement is an agreement between the PSA and the employer, which does accept forfeiture.

LOWSON: Well, Mr Mahendra of course has emphasised the word, "Continually," and you might recall there was some toing and froing in my questions of Mr Richardson about continually, and what he meant." The agreement, like an award, should be read as a whole, in my submission. If we look at where that word appears it's in this context. Once the staff member has accrued 50 hours of flexible working hours credit - and I think we've all accepted the limitations of that as a matter of practicality - it says:

> "The supervisor and staff member shall devise a strategy in writing to ensure that the staff member is able to take the approved hours to ensure that hours are not continually forfeited."

It is not entirely clear how that comes - how that's to be interpreted in the context where no hours have yet been forfeited in that you're meant to address

it at the point of 50 hours. So, at that point there is not actual forfeited. It also appears in the context of the following subsections, which is about reducing - it's called, "Methods to ensure the reduction of excess credit hours." There you seem to be talking about more than 50, or are you just talking about 50, which is excess to your ordinary hours? It's not entirely clear.

But, don't forget that this is in the context of the principles. So, the principles at cl 2.1.2 is that, "The introduction of the agreement is intended to improve the officer's organisational performance" - it certainly seems to do that - "Increase flexibility for all staff members to ensure that there is an appropriate balance between work and personal commitments." It doesn't seem to be doing that in so far as there is persistent and large amounts of flex forfeited.

> "The officer acknowledges that the agreement will provide the capacity for a staff member to increase their hours of work at times to meet high volumes of work and/or deadlines whilst enabling staff to take additional time off or work shorter hours during times which are less demanding."

So, there's nothing in the principles to say that the parties agree that there would be some inchoate basis for employees losing flex hours, which is a long way of saying that the only point where there is inferentially some suggestion of forfeiting is this reference to not continually forfeited without any definition of what that's meant to mean. Is that meant to mean forfeited in two consecutive settlement periods? Is that meant to mean on a certain number of settlement periods in a year that there isn't forfeiture? I accept that the word's in there, I don't accept that when you read it together with all of the principles and the other context, including 2.1.5 that I didn't take you to, which is that:

> "In fact, staff members and supervisors shall take all reasonable steps to ensure that a staff member does not constantly accrue excess credit hours at the conclusion of settlement periods."

It's not contemplated that forfeiture be a standard employment practice, and indeed, it's beyond contemplation, really, that the applicant would have signed up to this agreement if it had thought that that was the approach that was going to be taken by the employer.

CONSTANT CC: I might have missed it, but it is in 7.6, you accept that?

LOWSON: The word, "Continually?"

CONSTANT CC: No. At 7.6, "Any accrued hours above 50 hours."

LOWSON: Yes.

CONSTANT CC: Yes. Okay.

LOWSON: Yes. But, pinned against a mechanism to prevent it happening. That's the difficulty here, that the whole agreement, read as a whole, can't possibly be read as an agreement where there was some contemplation that

some amount of forfeiture of some specified amount was agreed upon. It was acknowledged it could happen, but there were protective mechanisms to prevent it happening, not that it would occur - and certainly not that it would occur in the way we have seen the evidence in these proceedings. This is a matter where the PSA has made this application for a new award. It's not an insignificant application. It's brought here, the Commission has obviously sat over a number of days, employees, solicitors, officers of the Court, have come forward to be cross-examined by their own employer because of the seriousness of this matter. It is a significant investment and it is an investment that arises because there is evidence of persistent and large amounts of forfeiture, not because there is occasional small amounts of forfeiture, and so I think that context of these proceedings is important to keep in mind.

The employer, to use an overworn phrase, perhaps, is talking the talk but is a long way from walking the walk, and the issues that, Commissioner Sloan, you raised in relation to that manager's document, and you, Chief Commissioner, in asking about whether application was made to adduce further evidence, are apposite. This document was introduced specifically in the context of these proceedings and conciliation of these proceedings. It was produced in July. The hearing didn't begin until October. It was deferred until November. The respondent was still in its case in November. That was a period of some four months in which an application could have been made to produce evidence about this matter. The highest it got was in re-examination Mr Richardson said, "A number of employees have taken up that opportunity to sign a waiver."

The idea that the waiver is offered at all, the applicant's view is it's a breach of the award and it's potentially an occupational - a work health and safety issue, and the applicant has made plain it reserves its position in relation to all of those matters. It entirely undermines anything else in that managers guide, and it certainly does not amount to the intervention that is contemplated by the agreement. Mr Mahendra put the submission that it seemed to be accepted that - by all of the employee witnesses that if they asked managers would reallocate work. At least two witnesses did not agree with that and the rest of them, frankly, the evidence goes no higher than speculation. More importantly, there was no evidence from any of those witnesses that if their work was reallocated, any work that they might ask their supervisor to reallocate, that it would lead to non-forfeiture of hours.

There was simply no exploration of the extent to which work would have to be reallocated in particular circumstances to avoid accruing flex to the point of forfeiture. An obligation that's stated to be mutual in the agreement, or anywhere else, is still mutual in the context of a employee and their supervisor. That supervisor has control of that employee, that supervisor has the role of initiating these discussions. As I said before, no supervisor was called to give evidence in these proceedings. More importantly, the supervisor ultimately, and not the employee, represents the ODPP in terms of its responsibilities to comply with the award and the flexible working hours agreement. That is the way in which levels of authority operate.

So the supervisor's failure is sheeted home to the ODPP and any failure by the

employee, which is rejected in any event by the applicant, is de minimis compared to that failure to discharge that responsibility. Just coming back to the stated desire on the part of the respondent to address the issue, the documents - and the managers guide is an illustration of this - is typical of a paper system, if we're talking work health and safety types of analysis, a paper system that doesn't actually have a practical aspect to it, so that Mr Mahendra takes you to the managers guide and says, "Look, this is what we are committed to," but doesn't produce any evidence that shows that they have actually made a difference in relation to this matter, and evidence given by the employees from their first statements in August through to October, at least with some of them, demonstrated ongoing loss in that period of time, so even after the commencement of the proceedings.

In terms of the - what managers know, and the monitoring that Mr Mahendra was saying that the respondent might be open to, can I take you to paragraph 35 of Ms Chan's evidence in reply, which is at page 225? No, that's not the correct paragraph, sorry. Paragraph 37, so Ms Chan gives evidence there of having acted up in a position of principal legal adviser in September 2022 and sets out the array of functions that a manager is able to manipulate data on the SAP system, including the flex sheet state overview, so there is no doubt that the people with the immediate responsibility for employees who are forfeiting flex time have the capacity to monitor that regularly, so any suggestion by the respondent that they would be - that they could address this problem by further monitoring - they're not doing anything with the information they have at the moment. That's the fact of the matter.

Just finally in response to Mr Mahendra's submissions, the idea that the - the reference to I think it was 15 hours, some large percentage forfeited 15 hours, 60% or something, in a six week settlement period, the forfeiture is happening on top of having accrued 50 hours, so it's not just simply 15 hours, it has to be seen in that context, in my submission, of the amount of work that's being performed in that six week period in order to reach the point of forfeiture, and so the number of hours - and that's one of the reasons why we don't concede that any number of hours is small, is because understood in its context we could be talking about significant hours, settlement period after settlement period being worked.

Now, Commissioner Sloan, in relation to the question of a direction, our concern would be that in effect the applicant would be left out of that. We see ourselves as having an ongoing role, we have a role under the agreement, we have a role under clause 16 of the agreement of being given information, which hasn't happened, we have a role representing our members, and so a downside of the type of bilateral approach between you and the respondent is that the applicant would have a diminished role compared to their existing role under the agreement and would also mean that any enforcement - it would isolate the applicant from any potential of enforcement action. Quite apart from the question if the--

MUIR C: Wouldn't it be within the power of a..(not transcribable)..to order the parties to meet regularly to talk about what is being done to implement these

agreements?

SLOAN C: Can I just amplify that point. As Mr Mahendra said, and as I've pointed out, having put forward a great idea about directing compliance with the agreement, I've got some reservations about whether that could be done, whether it would be in the nature of enforcement, but we could issue a statement, the full bench could issue a statement reflecting the submissions that Mr Mahendra has made today by the ODPP about their commitment to compliance, et cetera, et cetera. Directions could then be made, as Commissioner Muir suggests, that the parties confer, and that at regular intervals the parties come back before the commission. So the proceedings remain live pending any positive developments along the lines that we've discussed.

Now I appreciate what that might mean from your side, is feeling like you're just kicking the ball down the road, even more than we already have. I'm simply putting it forward as an alternative. Because I'm picking up on your submission which was the focus, as I heard you just say, the focus is on the written strategy. The focus is on implementing the safeguards that are built into the Flexible Working Hours Agreement. And I was suggesting an alternative way that might perhaps avoid the debate as to whether an award was necessary, and if so how that fitted within what seems to be an already complicated industrial landscape when it comes to the arrangements for this group of employees.

LOWSON: I would say in relation to that, first of all, a multiplicity of places where you look to enforce various aspects of industrial obligations is not uncommon, so I don't accept that it's complicated in a way that makes it unmanageable in my submission. In effect you have the specific salaries award, the conditions award, that's not uncommon in the public sector. You've got a local agreement. We don't have evidence about the frequency of local agreements, but in terms of - and this commission might have a greater awareness of the extent of them. Certainly my review of decisions where local agreements have come up have often involved flexible work hours, although local arrangements, sorry not local agreements, although not - I'll just leave it at that.+

In terms of the need for the award, cl 7 is a fundamental part of the award, which is, "The recrediting of forfeited flex of a written strategy isn't entered into". So although I've said that primarily we're focused on trying to obtain compliance with the Flexible Working Hours Agreement, it's not limited to that. We've structured this award with a view to attacking the problems from a number of fronts, including the safe work front, work health and safety front, because we see it as all elements of the award. So in terms of alternate routes, I would see it as clicking it down the road in circumstances where - the respondent has had every opportunity over a number of years now to do something, show something to the applicant to demonstrate that they actually think this is an issue. Let's face it, they ran this entire case as if it was not an issue. They've run it by cross-examining the employees to minimise the issues that they've raised. So I have no confidence that anything further other than

award is going to actually motivate this employer to do the right thing.

CONSTANT CC: Can you then explain to me how cl 7 would work then.

LOWSON: Let me just make sure I'm talking about the right clause.

CONSTANT CC: Forfeited hours being recredited. That's the one that I'm stuck on trying to understand.

LOWSON: Chief Commissioner, 5.1 says that, "If an employed solicitor has 40 or more flexible working hours credit at the beginning of any settlement period the supervisor and the employed solicitor are to devise a written strategy to ensure that the employed solicitor does not exceed 50 flexible working hours credit at the end of the settlement period". So that is a more onerous requirement than what appears in the Flexible Working Hours Agreement, in that it requires something to be considered at the commencement of a settlement period, and it requires a written strategy to take place. If no written strategy has been entered into, and this is only a requirement that comes into play at the commencement of a settlement period where it's at 40 or more, it doesn't limit the employer to only entering into a written strategy on those occasions, it's a mandatory requirement if this particular situation is met.

And if a written strategy is entered into, and the person still forfeits flex leave, they don't fall within cl 7. But if no written strategy is entered into at all, then they fall within cl 7. And cl 7 has the effect that someone who at the end of a settlement period, on their SAP timesheet, it says well you've accrued 50 and you've lost 15, they would go to their manager and say, there was no written strategy, I get that 15 back.

CONSTANT CC: So then they've got 65.

LOWSON: Yes.

CONSTANT CC: And they can always carry forward an extra 15. I'm just trying to practically understand.

LOWSON: Well then at the beginning of the next settlement period they would have 40 or more flexible working hours and there would have to be a written strategy under cl 5. So it comes back to cl 5, and cl 5 requires a written strategy to avoid the forfeiture. And the accountability means that at the end of each settlement period somebody else, the applicant, is looking at that data. And if these issues that, Chief Commissioner, you are contemplating arise then there is an accountability process. And the matter can be returned to the commission by way of a dispute if there isn't any attempt by the respondent to address the issue.

CONSTANT CC: If we decide to make an award I don't want to make an award that is ambiguous and requires a dispute to resolve what the terms are. So I'm trying to understand myself. I know I've put this out there before, but I'm troubled by the idea of this hanging off, or at least in concert with an

agreement--

LOWSON: As I said before, Chief Commissioner--

CONSTANT CC: So this is the only document you can take enforcement proceedings successfully, or do you submit that because the Flexible Working Hours Agreement was made under the award you could do that with that?

LOWSON: I haven't found an authority that says that a local arrangement is enforceable. I think it can be the subject of a dispute because it's made under an award. It's open to the applicant to bring proceedings to enforce a breach of award around the idea that the 35 hours isn't being adhered to, or the salary rates are not being properly paid. It's open to individual employees to bring a claim for, in effect unjust enrichment, that is that the employer is being unjustly enriched by the hours of work that are being performed. These are not straightforward. None of these are straightforward, and they all involve a cost to jurisdiction. The benefit of an award is that it allows disputes to be brought here, not about how the award is to be interpreted, hopefully, that's not the intention, but where the award is not complied with, so if written strategies are not being adopted, if leave is not recredited when it should be.

But to answer your question again, Chief Commissioner, it is not uncommon in this commission in an award case for a commission to publish a judgment to say, the applicant has made out its case, but the remedy that it has proposed doesn't address these things, these things, these things, we want the parties to bring in an award by agreement that addresses the things that we've identified in this decision or, if no agreement can be reached, to put forward their different propositions and we'll rule on which one we make. The Commission is not - these are not pleadings. An applicant does its best, but ultimately if there are things about it - it can be addressed. It should not be simply ignored, in my submission, if the Commission is satisfied that there is an issue here affecting in reality the working lives and more of the employees here.

SLOAN C: Why is the flexible working hours agreement not an industrial instrument by definition and therefore amenable to enforcement under chapter 7, part 1?

LOWSON: Well, as I say, Commissioner Sloan, I haven't found an authority that says that. I'm not saying that it's not.

SLOAN C: I'm not saying I can show you one, but if I just - section 8 defines an industrial instrument to include a public sector industrial instrument and the dictionary of the Act refers to a public sector industrial instrument being - bear with me. An agreement under section 51 of the Government Sector Employment Act--

LOWSON: Which it is not.

SLOAN C: And then it refers to the Police Act and the Teaching Service Act and the Area Health Services - or any similar kind of agreement relating to

public sector employees.

LOWSON: Well, can I just put it this way, Commissioner Sloan, that's not the case we've run and--

SLOAN C: Well, it's part of the submissions that this award is necessary to enforce and I'm - I guess I'm not challenging you so much as questioning why, as an instrument made under the award, as between the ODPP and its employees, why this is not a public sector - why it might not be regarded as a public sector industrial instrument by definition.

LOWSON: In that regard, assume that was the case, what orders would the Commission make to enforce the terms?

SLOAN C: Well, the Commission can't make orders to enforce it, that's the point. But that doesn't say that it's not enforceable by the association. Is it?

LOWSON: Well--

SLOAN C: Or you could seek orders. Sorry, not you, the - why could the union not bring enforcement proceedings in either the Supreme Court or in the Local Court?

LOWSON: So we would be first of all - well, let me just have a moment. I'm just looking at the Act, in case you thought I was sending text messages, I'm not.

SLOAN C: I'm kind of making it up as I go along as well, so--

LOWSON: It comes back, I suppose, to this question, first of all, it is not - it would first have to established that a local agreement is - a local arrangement is an industrial instrument, so that's the first hurdle.

SLOAN C: Yes.

LOWSON: And we might fail on that point, potentially. Secondly, we would have to go to the Supreme Court or the Local Court sitting as an Industrial Court to do that, which is a costs jurisdiction, so we are already going down the track of being uncertain that it's an industrial instrument and then saying that the breach of it would include the failure to do written documents, the written strategy, that that's a failure, and then we would have to demonstrate that that failure was linked to the failure - the forfeiture of flex. I can see a range of difficulties going forward. I'm not saying it's impossible, but it's certainly not attractive when this Commission can make an award that might have the effect of dragging the employer, who is otherwise simply refusing to comply with an agreement they signed up to.

So the mechanism that we are using is the mechanism - is the most straightforward industrial mechanism to try and solve an intransigent problem with a respondent who will not come to the party, and based on their - the

position they have taken in this matter, you might expect to take every single point in a costs jurisdiction. There are obvious issues for the applicant that they have to assess in determining a matter of that sort, and for individual employees to also assess before they put their money into an action around unjust enrichment or, you know, potentially unpaid overtime to go into a different area. This Commission is here to deal with these sorts of matters as quickly, as justly, as cost efficiently, and least - with the least amount of technicality, and that's why we're here. So I don't have to answer your other question, Chief Commissioner.

CONSTANT CC: No.

LOWSON: About staying past 3.30.

CONSTANT CC: No, we all get an early mark.

LOWSON: Well, that's good because I want to get to the live screening of the Matildas somewhere, so--

CONSTANT CC: Thank you, Ms Lowson, and thank you, Mr Mahendra, for your submissions. I assume we are reserving.

SLOAN C: We are reserving.

CONSTANT CC: As is our practice we will notify you when the decision is to be handed down and one of us will deliver itn person but you aren't required to attend. You may if you wish, and then we will email the decision to you.

DECISION RESERVED