

Mr McIlwain—I will go first to how the parties in April dealt with protected award conditions. Again, this is from a sample of 250 AWAs. I have some information about collective agreements, as well, provided by the Department of Employment and Workplace Relations.

Senator MARSHALL—We will keep them separate and come back to them.

Mr McIlwain—In the sample, all AWAs expressly excluded at least one protected award condition.

Senator MARSHALL—At least one?

Mr McIlwain—At least one. Of the sample, 16 per cent expressly excluded all protected award conditions.

Senator MARSHALL—I know last time you were before us you were not clear on how that could happen. Has that happened by a single clause removing all award conditions or has each award condition been removed individually?

Mr McIlwain—It has happened both ways.

Senator MARSHALL—That is okay? I thought the evidence provided last time by Mr Rushton, if my memory serves me correctly, was that each individual clause would need to be excluded.

Mr McIlwain—We believe that either approach can be effective.

Senator MARSHALL—Okay. A clause simply excluding all other award provisions is okay?

Mr McIlwain—Without actually seeing the wording of a particular clause, I must be cautious, but—

Senator MARSHALL—A single sentence could do it.

Mr McIlwain—we are suggesting that parties that wish to adopt that omnibus approach use words like, 'For the avoidance of doubt, the following protected award conditions are excluded or modified in this agreement.' Then the parties may choose to list by dot point those protected award conditions that they are excluding or modifying.

Senator MARSHALL—So you are assisting the parties in making sure there is no doubt, but at the present time you are accepting a single sentence removing all award conditions.

Mr McIlwain—Again, I do not want to talk about a hypothetical. It is possible that a single sentence might effectively exclude or modify all or some protected award conditions. However, our advice would be that, if the parties wish to exclude or modify protected award conditions, they use language like, 'For the avoidance of doubt, the following protected award conditions are excluded or modified,' and then nominate them as they appear in the legislation.

Senator MARSHALL—So 16 per cent of your sample removed all of the award conditions. Do you have any other information?

Mr McIlwain—The three most commonly excluded protected award conditions were leave loading, penalty rates and shiftwork loadings.

Senator MARSHALL—What is the percentage for each of those? Start with leave loading.

Mr McIlwain—It is 64 per cent. For penalty rates it is 63 per cent and shiftwork loadings, 52 per cent.

Senator MARSHALL—What other information do you have?

Mr McIlwain—The three most commonly modified protected award conditions were overtime loadings, in 31 per cent.

Senator MARSHALL—Do you have information on how they were modified—up or down?

Mr McIlwain—No, I do not on overtime loadings. Next is rest breaks, in 29 per cent.

Senator MARSHALL—Again, does that mean additional rest breaks or the removal of rest breaks?

Mr McIlwain—I do not have that information. And public holiday payments, 27 per cent.

Senator MARSHALL—And they are legally removed?

Mr McIlwain—All of these findings are on the basis that the provision was effective in its intention.

Senator MARSHALL—So when you talk about removed public holiday payments in 27 per cent of the AWAs, is that referring to an additional amount for working a public holiday, the complete payment for a public holiday or the removal of a public holiday?

Mr McIlwain—It would be an additional amount for working public holidays. The most commonly retained protected award conditions were declared public holidays.

Senator MARSHALL—What is the percentage of that?

Mr McIlwain—It is 59 per cent.

Senator MARSHALL—So 59 per cent of agreements retained declared public holidays?

Mr McIlwain—They retained declared public holidays.

Senator MARSHALL—All right. Go on.

Mr McIlwain—And days to be substituted for public holidays were retained at the level of 54 per cent.

Senator WONG—That means 40 per cent of agreements do not contain existing gazetted public holidays—is that right?

Mr McIlwain—It means that 40 per cent of that sample of 250 AWAs—

Senator WONG—Yes, of the sample. What about the 54 per cent? Is that of all of them? That does not make sense. Or is it 54 per cent of the remaining 40 per cent? You said 54 per cent have an alternative day identified instead of the gazetted holiday—correct?

Mr McIlwain—Yes.

Senator WONG—I presume, therefore, that is not the 60 or 59 per cent which actually retained the gazetted day. So is it 54 per cent of the 40 per cent?

Mr McIlwain—I would have to check that.

Senator WONG—That is pretty important, because, if it is 54 per cent of the 40 per cent, that means that in 20 per cent of agreements you do not have the gazetted day and you do not have an alternative day.

Mr McIlwain—I will check that. The way the information is provided here suggests strongly to me that it is 54 per cent of the total.

Senator WONG—How does that make sense? If you have 60 per cent which retain the gazetted day and 54 per cent which have an alternative day, that adds up to more than 100 per cent, and I think that is a problem.

Mr McIlwain—I will take that on notice. Mr Casson suggests that, whilst at first blush those two characteristics may seem mutually exclusive, in fact it may not be the case that the parties are making clear in the agreements that public holidays are retained but, where one is required to work a public holiday, there is, nonetheless, a day substituted in its stead. It is not possible to say this evening, without further reference to those agreements, whether in fact that is the case or the view you propose is the case.

Senator WONG—Of the 41 per cent that do not protect the gazetted day, how many have, and consequently how many do not have, an alternate day identified?

Mr McIlwain—I am unable to say.

Senator WONG—You did not collect that data.

Mr McIlwain—I do not know whether we collected that data. I do not have it with me this evening.

Senator WONG—Are you able to come back tomorrow? You were originally scheduled to come tomorrow evening.

Mr McIlwain—I am unable to answer this question. I do not know whether we have the data available now. I will take the question on notice, and we will answer it as part of that process.

Senator WONG—I understand that Senator Marshall may well still be asking you questions tomorrow morning, so you might have the opportunity then to provide it.

Senator Abetz—Senator Marshall did ask for a fair degree of statistical analysis, which Mr McIlwain has agreed to take on notice. With a bit of luck, these sorts of matters can possibly find their ways into that statistical analysis.

Senator MARSHALL—Yes, it depends how it is presented.

Senator Abetz—Yes. This is the difficulty with the statistical analysis presented thus far: the statistics on their own do not necessarily mean all that much. As I understand it—and correct me if I am wrong, and I may well be—with the public holidays, for example, it may be that extra pay is put into the amount that people are paid so that they are above the standard, or they may be given more annual leave in exchange. I think I made a