



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER

s.156 - 4 yearly review of modern awards

**Application by
(AM2016/30)
Alpine Resorts Award 2010**

Sydney

9.06 AM, WEDNESDAY, 23 NOVEMBER 2016

PN1

THE VICE PRESIDENT: Yes, can I take the appearances, please? Ms Walsh?

PN2

MS R WALSH: If it pleases, Walsh, initial R, for the Australian Workers' Union.

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THE VICE PRESIDENT: Yes, Mr Arndt?

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MR ARNDT: That's right, seeking permission to appear on behalf of ABI and New South Wales Business Chamber and the Thredbo Chamber of Commerce.

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THE VICE PRESIDENT: Right, thank you. Mr Ryan?

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MR RYAN: For the Australian Hotels Association, your Honour.

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THE VICE PRESIDENT: Mr Harmer?

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MR HARMER: If it please the Commission, permission to appear for the Australian Ski Areas Association. I have with me Mr Russell and Mr Noland from my office.

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THE VICE PRESIDENT: And Ms Bhatt?

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MS BHATT: If it pleases, your Honour, for the Ai Group.

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THE VICE PRESIDENT: And who's appearing in Melbourne?

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MR M GALBRAITH: Your Honour, Galbraith, initial M for the SDA.

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THE VICE PRESIDENT: Yes?

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MS K MUDDAGOUNI: If it pleases the Commission, Muddagouni, for Norton Rose Fulbright, appearing for Mount Hotham - - -

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THE VICE PRESIDENT: Sorry, I'm having trouble hearing you. I'm just going to turn up the volume. I'll get you to repeat that appearance.

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MS MUDDAGOUNI: Sure. My name's Carmel Muddagouni, I'm appearing for the Mount Hotham Resort Management Board.

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THE VICE PRESIDENT: Right, thank you. Does anyone oppose permission for presentation by lawyers being granted, at least for today? Right, such permission is granted.

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So, there's been allocated to this Full Bench four issues. Firstly, there was a package of, I think, three issues that were the subject of agreement between the Ski Areas Association and the AWU. That was the removal of the seasonal loading, inclusion of an annual leave loading and the application of overtime penalty rate provisions to casual employees.

PN19

So, that was consented to by those two parties, and as I understand it, not opposed by the Ai Group. But in an early Full Bench decision, it was felt that that - there needed to be a substantive case presented to support those variations.

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And the second issue, or the second category is the coverage issue, which as I understand is being agitated by Mount Hotham. Does that affect your clients, Mr Arndt?

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MR ARNDT: Yes.

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THE VICE PRESIDENT: Yes.

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MR ARNDT: The full scope of my client's involvement in this proceeding relates to coverage.

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THE VICE PRESIDENT: All right. Now, I consider that all the matters should be dealt with together, because obviously in the event that coverage is expanded, people who will come into the award as a result, would be then affected by the other issues. So, what I'm going to ask to do is, ask each party to give me an estimate of how long the hearing of all those issues might take and what is necessary, in terms of evidence and submissions to prepare for the hearing. So I'll start off with you, Ms Walsh.

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MS WALSH: Your Honour, I think - well, I was just speaking to Michael Harmer from ASAA just before this mention. We had a number of suggestions. ASAA and the AWU are both opposed to the coverage claims.

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THE VICE PRESIDENT: Yes.

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MS WALSH: So I think - well, I'd prefer to hear what the parties that are making those coverage claims will be leading.

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THE VICE PRESIDENT: Well, in relation to the three consent issues, do you wish to call any evidence to support those matters, or is that simply a matter for submissions?

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MS WALSH: I think we will. I think the issue is whether or not we make those submissions prior to the hearing in relation to the coverage claims, or if it's done afterwards. We were of the view that it might be helpful to put on those submissions, and obviously hold off on the hearing, but in order to have those claims on foot, it might help matters proceed quickly following the coverage claims, if they don't go through.

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THE VICE PRESIDENT: You heard that, Mr Harmer?

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MR HARMER: Yes, may it please the Commission. Just to give some scope to the coverage claims, there's two layers. There's the public sector employers, and an example of that is the Mount Hotham Resort Management Board. But there's a number of other resort management boards established under the legislation in Victoria, that regulate the Alpine region. So that's one layer.

PN32

The larger layer, arising from a matter that your Honour might recall came before you a couple of years ago, relates to, as we understand it, a large number of employers represented by the Chambers of Commerce and Industry, and Mount Hotham, Falls Creek, Perisher, Thredbo. And so we're talking about a very large number of shops, restaurants, hotels, lodges, all businesses covered by those chambers attempting to get access to the award given the relatively flexible arrangements that it represents.

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And that stemmed, in part, your Honour might recall, from an audit that the Fair Work Ombudsman undertook that revealed a large amount of non-compliance for employers trying to get access to the award, given the very flexible arrangements. Now the position of the AWU and the ASAA is that it's a unique award with a unique history. A lot of that by consent between the employers and the union, and it's not appropriate that the integrity - - -

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THE VICE PRESIDENT: Sorry, Mr Harmer, I'm a bit pressed for time and I don't want to hear the merit submissions. I just want to know how we program these matters for hearing.

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MR HARMER: Sorry for the run up to the pitch, your Honour. But the rationale is basically that, if the coverage issues goes against us, there's potentially a huge number of employers that might want to have a say on the conditions in the award. It seems to us more efficient, with respect, if the coverage issue was dealt with and thereafter, the conditions issues are dealt with, given that that might leave only the consent parties, we would hope, being the AWU and the existing employers.

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So that's the basis on which we sought to progress. We're happy to put on evidence and submissions going to the conditions issues early on and to get that underway, so there won't be too much delay. But we felt, dealing with the coverage issue first would make that later stage far more efficient and it would avoid many employers, who are potentially seeking coverage, having to address issues that ultimately they may not be affected by at all.

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THE VICE PRESIDENT: Well, in an ideal world, that would be attractive, but the 4 Year Review is running out of time.

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MR HARMER: I understand.

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THE VICE PRESIDENT: And there's a lot of Full Benches that need to be put together. So, I'm afraid that course will not be adopted. We will simply deal with all the issues simultaneously and if employers who aren't currently covered by the award are going to be covered by it, they may not have to make submissions on the hypothetical that they will ultimately be covered by, in order to be heard on the other conditions.

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MR HARMER: Yes. Look, may it please the Commission. It was just a suggestion.

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THE VICE PRESIDENT: All right, so in respect of programming, what's the sort of estimate you can give for the length of the hearing and what evidence needs to be filed beforehand?

PN42

MR HARMER: In our respectful submission, two to three days would see the hearing out. We do anticipate putting on extensive evidence about the history of the industry and the award regulation in support of our contentions on both coverage and conditions. We anticipate that the union may be merely joining in that, rather than necessarily replicating it.

PN43

We also consider it appropriate that notwithstanding there are many employers trying to get into the award, that it might be appropriate for the ASAA and the AWU to go first and to put on that material, and perhaps then the employers who

seek access to the award can say put on submissions in evidence as to why, in light of that material, they seek that access. And we'd have a brief reply and then the hearing.

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We could put on our material within four weeks, so before Christmas, and happy then for the relevant employers to have time, subject again to what your Honour's indicated about the Full Benches being pressed, but I would have thought to the end of January, given the Christmas break, to put on any evidence and submissions in response. We could then reply within perhaps two weeks and be happy to have the hearing anytime thereafter, subject to the Bench's availability. That's our position, if it pleases.

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THE VICE PRESIDENT: Right, thank you.

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MR HARMER: Thank you.

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THE VICE PRESIDENT: I might turn to you now, Mr Arndt, as one of the moving parties on coverage.

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MR ARNDT: Your Honour, just to address the - I guess the threshold issue as to whether coverage would be determined, followed by - and I hear your Honour in terms of practicality. If it assists, I think it's very unlikely that my clients will seek to be heard in relation to too many of the package issues. So, from my understanding, involvement will purely be based on coverage.

PN49

We have a practical difficulty in relation to not only the seasonal nature of the industry, but as Mr Harmer has said, the Christmas time shutdown. The preparation for the case from our perspective, will involve us going to the ski fields and gathering evidence. My instructions are that any date which would require us to provide - any date before late February which would require us to file evidence, would be very difficult to accommodate.

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So, it's my instructions that we'd be seeking a date for filing after that time. The scope of evidence provided - - -

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THE VICE PRESIDENT: I think this issue was first agitated almost two years ago.

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MR ARNDT: I wouldn't want to disagree with you on that, your Honour.

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THE VICE PRESIDENT: Anyway, go on.

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MR ARNDT: In terms of the scope of evidence, I can't intelligently tell you how many witness statements we might provide. I think that the indication of Mr Harmer of two to three days is probably consistent with how similar matters have run in the award review for four issue of this nature. I don't know how many witness statements we might be able to get in that time. Obviously the more time we have, the better.

PN55

The fact is that many of the people we would be getting evidence from simply aren't in the ski fields right now. They're doing other things and it's a seasonal industry. So that is our particular difficulty in complying with a date earlier than late February.

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THE VICE PRESIDENT: When you say those people, you mean people operating small businesses on the - - -

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MR ARNDT: That's right.

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THE VICE PRESIDENT: - - - in the ski fields. What, they all close down during the summer, do they?

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MR ARNDT: Well, given the nature of the industry, I'm informed by one of my friends on the Bench, that summer activities in the ski fields are growing in popularity, but for the most part it's a winter industry, obviously and access to evidence from employers will be difficult to obtain over the Christmas period. Leaving aside the fact that access to employees over the summer period will almost be impossible. So, that is our position and - - -

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THE VICE PRESIDENT: Do you have any opposition to Mr Harmer's suggestion about the order of evidence and submissions?

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MR ARNDT: Well, no, in that practically that might afford us more time.

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THE VICE PRESIDENT: Gives you more time.

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MR ARNDT: So, I'd welcome that approach. I don't see it being hugely difficult in terms of common sense. It seems a sensible approach. So that would suit us.

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THE VICE PRESIDENT: All right. Well, if we set three days, it will only be three days. There won't be much of an opportunity to extend the hearing. So, are you confident that all those issues can be dealt with in three days?

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MR ARNDT: I can't say I'm confident, given the evidentiary case hasn't been established yet. I would find it hard to believe, given how other 4 Yearly cases have gone, that this case would extend into weeks. It seems like a case that would be decided in less than a week.

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THE VICE PRESIDENT: All right, so if we give you to the end of March, is that
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MR ARNDT: That would be sufficient.

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THE VICE PRESIDENT: Right. Mr Ryan, where do you fit into all this?

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MR RYAN: Your Honour, we've come to this late in the piece, but as a result of the Full Bench decision in the group 2 exposure drafts, where the issue of coverage is being considered and it was contemplated in that decision that more employers may be covered by the award, and therefore, ought to be heard, we think that the approach put by Mr Harmer that the Ski Industry Association puts on their evidence and submissions first and then others respond to that, is a sensible approach.

PN70

We share some of the same difficulties that Mr Arndt's alluded to with the availability of people for instructions and witness statements and if a date in March was available, that would be convenient to the AHA.

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THE VICE PRESIDENT: So do I take from that, you're supporting the expansion of coverage?

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MR RYAN: Yes, your Honour.

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THE VICE PRESIDENT: Okay. Ms Bhatt?

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MS BHATT: Thank you, your Honour.

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Our group has a concern with the proposal to expand coverage. It won't surprise your Honour to hear that the concern relates specifically to the possibility that it may disturb existing award coverage in respect of maintenance employees specifically. We don't have any difficulty with the process that has been proposed by Mr Harmer. It would seem appropriate that we, Ai Group, file at the same time.

PN76

Can I raise one issue, your Honour, and that is - Mr Arndt will correct me if I'm mistaken - but I'm not sure that our organisation has seen a specific form of words that had been proposed by Mr Arndt's client. It might be that we've simply missed it. But if that's the case, we would seek a direction from the Commission that propose the claims file draft determinations, before any party opposing the claims, is required to file any material. If the Commission pleases.

PN77

THE VICE PRESIDENT: Mr Harmer, can you remind me, in terms of the agreed package, was there a draft determination for those files at some stage? I'm sure there was, but perhaps not.

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MR HARMER: In terms of the coverage issue?

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THE VICE PRESIDENT: No, no, the three agreed issues.

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MR HARMER: Yes, I'm sorry. Yes, there was, following the conference with yourself and Ball DP I believe, your Honour, did request materials that were subsequently filed by the AWU, as I understand it.

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THE VICE PRESIDENT: Right, thank you.

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MR HARMER: And we'd be happy to collate and recirculate those within seven days, if that would assist.

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THE VICE PRESIDENT: All right, thank you.

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MR HARMER: Your Honour, if I might just be heard on the issue of timing, and again, I appreciate the pressure the Commission is under, because it is such a seasonal industry, the time of June to October is quite critical, in terms of operations. And to have a decision before then would be good, because people would know what was happening for that season. To have a hearing run during that time, when people are just absolutely flat out trying to generate revenue in the very limited time they have, would be quite difficult. And then thereafter, any decision would again, be able to be accommodated for the next season.

PN85

So, I appreciate we can't be too precious about these issues, your Honour, given the pressure on the Commission, but that's the reality and I'm just afraid that if we wait till March for these responses, and subject to the Bench's availability, as to whether it would be fair to expect a decision by June. So we'd prefer to either expedite and have it done and dusted before next season, or we're happy to float till after the next season. But anything during the season would be very difficult to service.

PN86

THE VICE PRESIDENT: So when do employers start ramping up for the season, as it were? That is, employing people.

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MR HARMER: Employing people actually starts now. There are contracts going out to attract people from all around the world for what's a very intense season starting next June. But there's other recruitment that occurs all the way up to June. So if there was a certainty at least before the long weekend in June, that would be helpful.

PN88

As I say, anything after that and to have a decision come down in the midst of the season, would be extremely difficult to accommodate, including a hearing. Thereafter again, it's far easier to plan, once we've got certainty for the following season.

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THE VICE PRESIDENT: Right, okay.

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MR HARMER: Thank you.

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THE VICE PRESIDENT: Thank you. Now, Victoria, what submissions do you want to make?

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MR GALBRAITH: Your Honour, it's Matt Galbraith for the SDA. Your Honour, in terms of the Alpine Award, our only interest is in the matter of coverage. There are a number of other awards that the SDA has an interest in that would otherwise cover workers on the mountain. Then the General Retail Award, the Fast Food Award and the Hair and Beauty Award.

PN93

Our submissions would be that they are the appropriate awards to cover people that would otherwise be our members, and we would oppose any change to the coverage in the Alpine Award. And we note, as Mr Harmer has said, there is a long history as to the coverage and the reasons why there is particular coverage in that award. If it please the Commission.

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THE VICE PRESIDENT: All right. And Mount Hotham, what's the position there?

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MS MUDDAGOUNI: Sure. Your Honour, my instructions from my client are that we only seek to be heard on the issue of coverage. And as articulated by Mr Harmer, we see the coverage issue to really be split into - in that my client, Mount Hotham Resort Management Board is a board which has statutory responsibility for functions and the operation of an alpine resort.

PN96

So, in terms of the submissions we've already made, we are only seeking an amendment to the coverage clause to the extent that it would cover establishments which have statutory responsibility for the management and operation of an alpine resort, whether or not they operate an alpine lift.

PN97

So, in terms of the proposed directions that Mr Harmer proposed, my instructions are that my client would have no difficulty with such a timeline and it seems appropriate that Mr Harmer's client and the Ai Group, if they wish to be heard first, in terms of witness evidence and submissions, we do propose to file witness evidence in support of our claim for coverage.

PN98

THE VICE PRESIDENT: All right. And do you agree with the estimate of three days?

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MS MUDDAGOUNI: We can't comment on the package issues, but in relation to coverage, we think that it would sort of easily be dealt with within one or two days.

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THE VICE PRESIDENT: One or two day, all right. Thank you. Will the parties just give me a minute and I'll try to pencil out a program?

PN101

All right, what I propose is this, and if any party disagrees, they can say so, that by 30 November 2016, those parties agitating for a change to the coverage award shall file and serve a draft determination setting out the variation that they seek.

PN102

By 21 December 2016, firstly the AWU and the Australian Ski Areas Association shall file any submissions and evidence they wish to advance in support of the three agreed changes in the package. And also by that day, the Australian Ski Areas Association shall file and serve their material Mr Harmer referred to. That is, historical material going to the history of this award.

PN103

Those parties agitating for a change to the coverage shall, by 31 March, file their evidence and submissions in support of a change of coverage and any party opposing such changes shall have until 14 April to file their evidence and submissions in reply and the matter shall be set down for hearing before the Full Bench on 8, 9 and 10 May.

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MR HARMER: If it please the Commission.

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THE VICE PRESIDENT: Does any party want to take issue with any of those proposed directions? Ms Walsh?

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MS WALSH: Your Honour, I probably should have piped up a little earlier. The AWU might find 21 December a little bit difficult to meet. At the moment our union has coverage of 14 awards that need to be reviewed by 21 December in relation to the new exposure drafts that have been published. If it were even after Christmas and in early January, that would be of assistance.

PN107

THE VICE PRESIDENT: Well, in respect just to the agreed package of changes I will extend that until 13 January.

PN108

MS WALSH: Yes. That would be great, thanks.

PN109

THE VICE PRESIDENT: All right. Anyone else got any problems? Right, anything else I can deal with today.

PN110

Right, the parties can take it that those are the directions that will be made, but they'll be confirmed in writing and sent to the parties and issued on the website.

PN111

We will now adjourn.

ADJOURNED INDEFINITELY

[9.30 AM]