

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26230-1

**VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER BISSETT**

AM2010/3

s.158 - Application to make a modern award

**Application by Media, Entertainment and Arts Alliance
(AM2010/3)**

Melbourne

THURSDAY, 29 APRIL 2010

Continued from 27/1/10

PN66

THE VICE PRESIDENT: Can we have the appearances please, commencing in Sydney?

PN67

MR J. NOLAN: I appear for the applicant union in this matter and with me at the bar table is Ms D. Hannan of the union.

PN68

MS N. STREET: I appear for Australian Industry Group.

PN69

THE VICE PRESIDENT: In Melbourne?

PN70

MR D. SLEEMAN: I appear for the Public Relations Institute of Australia. To my left at the bar table is Mr J. Bisset who is the CEO of the Public Relations Institute.

PN71

MR D. MAMMONE: I appear for the Australian Chamber of Commerce and Industry.

PN72

THE VICE PRESIDENT: Permission is granted Mr Nolan.

PN73

MR NOLAN: Thank you, might I inquire first of all whether you require me to stand up or sit down, it's always a bit awkward in these video hearings to know what to do.

PN74

THE VICE PRESIDENT: You may remain seated, Mr Nolan, we can see you very well there where you are but I'm not too sure what happens if you stand up.

PN75

MR NOLAN: That's a great relief, thank you, Your Honour. The Bench will be aware of the background of this matter and recent developments which we will submit really add a dimension to the process. The Media Alliance not unreasonably feels that it's been perhaps in this respect feels it has been part of the collateral damage of the massive award modernisation process because this particular award, as our submissions indicate, seem to be lost in the process. We thought it was going to be dealt with in a particular way and it wasn't dealt with in the way that we've anticipated and we learned to our surprise that it hadn't been part of the process of a award modernisation and we were caught short by that realisation.

PN76

We would submit, however, that it was really no fault of the unions and it was really I think fair to say part of the process which was such a massive process it's not surprising that something like this occurred, to be frank, and it would be perhaps surprising so few examples such as this finally emerged when the process had exhausted itself or seemingly exhausted itself. So we are in that dilemma, we have really thrown ourselves on the mercy of the Commission in this regard and

say that it's been a matter of omission, not commission that a public relations industry modern award wasn't made, and to the extent that there were some observations made by the Full Bench in relation to public relation consultants, that comment would seem to us to be made without the benefit of any knowledge at all of this award and the history of the award and the requests that were made in the proceedings before Senior Deputy President Hamberger that are referred to in our submissions.

PN77

So that is the dilemma we face. The union having decided to press on to draw these matters to the attention of the Tribunal in the light of its decision that given this industry was a significant industry that merited an award, there ought to be an award made, it pressed on with its application. I suppose happily for the union the employers have now become aware of the dilemma and become involved and we would suggest that that has put a whole new complexion on the whole process because if it was thought before this was something that wasn't necessarily of great moment and could have been left as a victim of the award modernisation process and left by the wayside, that picture has well and truly be thwarted, in our submission, by the participation now of the organisation, albeit it's not a registered industrial organisation, but the organisation appears to us to represent the overwhelming number of employers in this industry and the fact that those employers have joined in principle at least the union's contention and claim that there ought to be an award made.

PN78

We understand that two peak employer groups have put in objections to an award being made. Those objections would seem to us to smack more of an appeal to abstract grand issues, rather than any acknowledgement of the practical dilemma that the union has faced and the existence of the application in the award modernisation process and indeed an acknowledgement of the fact that there is a living and breathing industry out there that has itself made a decision in favour of an award being made. We in our written submissions addressed some of the issues raised by these peak employer groups against us, but we would have thought a) they would be hard pressed between them producing one member who was actually an employer in the public relations industry and b) even if they were able to do so would not be able to mount anything like a convincing case that they had a significant foothold on the industry and certainly nothing that comes within a bulls roar of representing the kind of wide membership that is now represented by these public relations employer body and represented now in these proceedings and been responsible for making detailed submissions to the Commission on the shape of any award that should be made.

PN79

THE SENIOR DEPUTY PRESIDENT ACTON: Mr Nolan, how many employers are there in the industry?

PN80

MR NOLAN: Mr Sleeman, I think, would probably be in a better position than be to indicate. But there are over 3,000 as far as can ascertain and we understand there is probably in the region of 15 to 17,000 employees in the relevant areas, so it's not insignificant. It's not the biggest industry in Australia but it's certainly not the smallest, far from it, and it's been an industry that's been covered by the old

award as an industry that has expressed a view about having an appropriate award adapted to its particular needs and requirements and that is something that we quite happily agreed to on principle. We also I think provided the Bench a document that indicates the areas of agreement, comparing the proposed award that we put up with the employer document. As a practical matter can we indicate that we have taken on board the employer's suggestion that this award, if it's made, commence on 1 July 2010. We don't dispute that and that would give the parties an opportunity if the award was agreed to be made to have some discussions on these remaining areas of disagreement between now and 1 July, and one would hope that those discussions would produce agreement but - I don't want to get ahead of myself but one of the suggestions I was going to make was perhaps the Bench was inclined to make the award, perhaps a member of the Bench could be made available to assist the parties if there are some outstanding areas of disagreement following the discussion that we have in contemplation between the parties on the respective documents that have been put forward. So we would suggest - - -

PN81

THE VICE PRESIDENT: Mr Nolan, is there anywhere in the material a clear statement of the practical significance of making an award, and I take it from what you have said the situation is perhaps a little bit fluid, there will be potentially further discussions and further changes. But the practical significance of making the award in terms that your client seeks, compared to the status quo of the situation currently applying with no specific award in place, is there anywhere in the material where that is clearly explained?

PN82

MR NOLAN: I don't know that it was clearly explained, but I guess the position is that the situation is you have people who are, as these materials now indicate, in identifiable positions within the public relations industry who are not the high flyers that the Full Bench spoke about when they made those remarks that have been referred to in the AIG submissions and we have referred to them as well, but are nevertheless people who will be in award limbo. Having regard to the fact that there are, as I have indicated, several thousand employers, perhaps 15,000 employees covered by the award, that would have I thought indicated a very, very significant practical - - -

PN83

THE VICE PRESIDENT: What does award limbo mean in that sense? Are you saying - what sort of employees would be covered by existing modern awards and which sort of employees might not be covered.

PN84

MR NOLAN: We doubt that any of them would be covered by the existing modern award, I mean the best you could do perhaps is say that the clerks award might, on one view, apply to some of the people but really that would be a very awkward fit because what they are performing public relations type work which is not clerical work which is separate and distinct from clerical work and it is concerned - I hate to use the expression (indistinct) because (indistinct), but it really is a kind of occupation that really isn't replicated anywhere else other than the public relations industry and this award is intended, on our application, to be industry specific which deals with people involved in this publicity type work in

the public relations industry. Now, there is an equivalent classification in the book publishing award, so there is a contemporary panel (indistinct) but really this is separate and distinct and it addresses a significant number of employees who however you slice and dice it you couldn't say are covered by any other modern awards and be award free. They would be award free.

PN85

THE VICE PRESIDENT: Out of the 15,000 - I'm sorry, Mr Nolan, it is difficult over the video link. Of the 15,000 estimated employees do you have any idea how many or what proportion would be clerical employees? The clerical award applies to clerical employees, so if they're clerical employees they're covered, if they're not clerical employees they're not covered. That is the first question which you might want to take on notice and get some instructions about. The second question is is the remainder of the industry to the extent that it applies, covered by the miscellaneous award?

PN86

MR NOLAN: I understand it's not the remainder of the industry and in terms of the clerical or the understanding of what a clerical occupation entails, we would have thought having regard to those cases, I know some of them are now somewhat ancient but there's a whole line of cases Your Honour will be familiar with that dealt with clerical work and one would have thought frankly that this work is separate and distinct from the kind of administrative processes that were described in those clerks cases. This involves dealing with clients and dealing with formulating public relations strategies and doing all the work that's associated with that, it's really quite a separate and distinct occupation from administrative or clerical occupation (indistinct) common factors.

PN87

THE VICE PRESIDENT: Work of professional or semi-professional nature that involves the exercise of specialist skills of that sort of nature might be qualitatively different or different in some other way than simply clerical or administrative work. Everyone might perform those sort of tasks, but it's not the focus of their employment. They might not be clerks, they might not be covered by the clerical award but is that to say that there are no employees amongst the 15,000 in that category?

PN88

MR NOLAN: There may be some clerks, I'm not sure of the numbers but certainly what we're concentrating on is not clerks, we're concentrating on people who perform this public relations function and Your Honour will be aware of the education courses that are available, degree courses at the end of the public relations industry and they perform a separate and distinct function and I mean harking back to the old tests for clerical work, certainly there were distinctions made, and I'm relying on member now. I think one of the cases involved a union official and whether the union official was performing clerical work and the court decided there were quite significant differences between the clerical task that might be performed by a union official from time to time in record keeping and other such tasks and a substantive role which was quite separate and distinct from the traditional administrative and clerical type role. So I don't think we would have too much difficulty making a convincing case that these people stand in a separate and identifiable category. How many of the 15-plus thousand might do

purely clerical work of course would be the central question and it may be expected that within the public relations industry there will be clerical workers and people who are receptionists and so on, but that's not what we're looking at here. I think there has been some material filed by the ASU, so there's no real scope, it seems to us, for any real practical level of confusion about the two roles.

PN89

THE VICE PRESIDENT: Why do you say the miscellaneous award doesn't apply?

PN90

MR NOLAN: Miscellaneous award? Our understanding is that because of the professional and para-professional nature of the work that we're looking at here, it really doesn't fit with the miscellaneous award and in any event we would say what has now emerged on the materials is a separate and distinct and identifiable industry and the industry itself wants an award that is suitable for its needs and that would have, in our submission, should be sufficient having regard to the magnitude of this exercise to suggest that award ought to be made. One is hard pressed to see any real inconsistency with the modern award project or practical difficulties that might arise and be presented for either of the peak employer groups for example.

PN91

They have, in our submission, bystanders to the process as its now emerged and developed. You have got the major employer group in the business and the union saying, well look, we really need to have a modern award, combined with the fact that the union's dilemma, as I've described it, has been a victim of the fact that the process rolled over the top of it and somehow or other the poor old public relations award went missing. That is something that's really got to be factored into the mix, in our submission. One would have thought the requirements of natural justice alone would have obliged the Commission to see that that process was dealt with appropriately and there is absolutely no evidence that it was other than complete inadvertence that led to the position we are in today.

PN92

THE SENIOR DEPUTY PRESIDENT ACTON: Mr Nolan, you don't seek to cover people that you would regard as performing clerical work?

PN93

MR NOLAN: No, people who are clerks covered by the clerical award we don't seek to cover. We say there is a distinction to be made between the professional and paragraphs professional, if I can describe them that way public relations people on the one hand, and people who are doing clerical work and as I said one would expect to find receptionists and other clerical administrative folk in public relations offices, the same as one would expect to find those classifications in doctor's offices and other businesses. But there is no real scope, in our submission, for conflict between the two groups and indeed as much has already been recognised by the fact that the ASU and the Media Alliance have resolved that potential difficulty, and I understand that has been forwarded in the submission put in by the ASU.

PN94

THE VICE PRESIDENT: Is it potentially an issue for employers in the industry,

the 3,000 employers or so that we're not too sure who they are, as to having more than one award, possibly with different terms and conditions applying to businesses that might not be significant, they might not be large businesses, they might be quite small operations; is that an issue?

PN95

MS STREET: It is for us, Your Honour, for Australian Industry Group and its members. I was going to make submissions about this point later but a number of our members already (indistinct) PR assistant classification would be covered by the clerks private sector award which provides for a very broad group of employees, including in this level 5 range employees with a specialist skill and depth of knowledge. It is quite a broad classification structure and one that's also very similar in the telecommunications services award which is also we say a (indistinct) award (indistinct) proposed public relations industry award.

PN96

THE VICE PRESIDENT: Mr Nolan? I'm sorry, I didn't mean to interrupt your flow,
Mr Nolan.

PN97

MR NOLAN: I'm sorry, I hesitated because I thought perhaps it might be useful to hear from the representative of the Public Relations Institute because he's probably in the best position to give you the up to date picture of the numbers and the composition of the workforce.

PN98

THE VICE PRESIDENT: I think in terms of the practicalities perhaps all of these questions I am asking of you might be best addressed by all parties when they do have the chance to make their submissions. But I guess the point I am coming to is if there is a question of looking at the practical significance of making an award and it involves comparing the current situation, what other modern awards currently apply or do not apply and the practical significance of making a specific award, isn't it also necessary to consider quite precisely the terms of the proposed award to properly evaluate that matter and where we have got a threshold issue, as it were, as to whether to make an award, isn't there a difficulty when there is uncertainty as to the final terms of that award, even to look at the threshold issue.

PN99

MR NOLAN: I don't disagree with that for a minute, Your Honour, and I think it's one of those things we have been assisted by the fact that the employers have in a sense got themselves organised and put their hand up in this process and so that's something everyone has to accommodate. The discussion I think was going to lead in this very direction because as I have hinted or perhaps stated earlier, the employers, that is to say the public relations employers have suggested that the process allow some period of time for discussion and further consideration with a view to an award if it's made coming in on 1 July.

PN100

As I indicated we had no difficulty with that and it may be sensible in the circumstances, having regard to what Your Honour says, to adjourn these proceedings, allow those discussions to take place, as I have indicated perhaps

with some recourse to a member of the Bench in terms of the content in any proposed award and then hopefully, having a document, come back to the Bench and say we've now got the document, we've addressed these other issues about the possible areas of overlap and ask for a final decision then. That might be a practical way to go forward because of course we're at a disadvantage to make a decision in principle, as it were, as Your Honour quite rightly points out, if we don't have the benefit of the full leaps and bounds of whatever award ought to be made. Of course the Bench, I would have thought, would be assisted if the parties themselves are able to come together and come up with an instrument that will reflect the realities of the industry that will assist it in answering the bigger question, namely whether or not the award ought to be made.

PN101

THE VICE PRESIDENT: Yes, I guess that makes sense at one level, but might it be also said there could be a fair bit of work invested in trying to get an agreement when the threshold question might not be satisfied at the end of the day, it might be said to be an inefficiency in what you have said.

PN102

MR NOLAN: Yes, but I guess we are caught on the horns of dilemma then. I mean our preference obviously would be for the Bench to say, well look in principle we think there is sufficient to bless the process and say that a modern award ought to be made and send the parties away to have discussions. But if we weren't able to achieve that preferred position perhaps that intervening course might commend itself. It wouldn't necessarily, in our submission, be time wasted because the parties might then turn their minds to whether or not if they fail at the endeavour of getting the award made, they at least made sufficient progress negotiating an industrial instrument to think of perhaps some other steps that might be able to be addressed to take advantage of the work already done. I don't want to get ahead of myself there but I would have thought that on any view the time and energy that would be expended which would be relatively confined by the July 1 date would make the parties concentrate on the task at hand and come up with an agreed (indistinct).

PN103

THE VICE PRESIDENT: In terms of the timing that particular proposal that you are raising, the proceedings be adjourned, what sort of delay would there be, approximately a month or so?

PN104

MR NOLAN: Yes, well we were working backwards from what the employer said about 1 July 2010 as being the date commencement of any new award. We thought that would have something to commend itself because that would give the parties an opportunity to have these discussions. As our document that we handed up yesterday indicates, there is a substantial amount of agreement already, so really it requires the parties to bear down on those few areas of difference and we would think that they would be insurmountable. So we could do that or attend to that as quickly as possible and we are really in the Bench's hands. If we could come back in whatever time frame we would certainly (indistinct) commit to engage in those discussions promptly and constructively with a view to reaching agreement and coming back with a finalised document and perhaps even as well with some additional material to flesh out the picture, as it were, and additionally

answer some of the questions you have raised this morning.

PN105

THE VICE PRESIDENT: Is it appropriate that I ask the other parties at this stage their view as to that proposal?

PN106

MS STREET: Your Honour, Australian Industry Group would oppose that course of action. We believe this is a matter to be determined squarely on the application of the Fair Work Act, specifically section 157 and as Your Honour had commented the investment of resources into such a process we don't think is appropriate when clearly there is a statutory test to be applied.

PN107

THE VICE PRESIDENT: Thank you, Ms Street. Mr Sleeman.

PN108

MR SLEEMAN: Your Honour, in the time table issue I need to seek some further issues on how that would precisely work and there a few other comments that I might wish to make in response to points that have been raised already, such as numbers of employers that may be involved in these processes.

PN109

THE VICE PRESIDENT: Yes, certainly.

PN110

MR SLEEMAN: If I may just very generally place on the record that 8 April was the first meeting I had with my client about these issues about which the vast and overwhelming majority of them were not aware beforehand. It is important to our client that there is a proper consultation process and they be given that opportunity to engage in that if there is to be an award and I would be more than happy to hand up in this context, if it does go in discussion today on content and things like that, some extra information that may assist to clarify those issues, (indistinct) the number of employers, I guess the nature of the industry in the sector but overarching that and certainly (indistinct) in any way reflect on the process of Fair Work Australia, noting that the members of our client have not been largely engaged in this process. The submissions that have been made all in good faith but they've a pragmatic view that if there is to be an award then our client wants a significant say in that, and it is (indistinct) all those discussions were taking place, without casting any aspersions at all on my friend in Sydney, any productive support or endorsement of there must be an award, it's certainly not reflected in the submissions that have been made by my client. It's a very pragmatic position, if there is to be an award.

PN111

THE VICE PRESIDENT: Can you tell us something more about your client and its membership and the industry more generally.

PN112

MR SLEEMAN: It's the Public Relations Institute and the (indistinct) consultant is proving (indistinct) to the employer body of that, represents about 160 to 170 employers, the principles of the public relations consultancies. In surveys conducted since these processes were brought to the attention of these members by way of electronic surveys and emails that were sent out, 24 hour notice periods

to be quite frank, the feedback has been overwhelming that they just were not aware - the latest survey said 86 per cent were not aware that any of this was going on.

PN113

THE SENIOR DEPUTY PRESIDENT ACTON: 86 per cent of what?

PN114

MR SLEEMAN: My apologies, Your Honour. 86 per cent of respondents to the survey were not aware that MAA have made application at this time.

PN115

THE SENIOR DEPUTY PRESIDENT ACTON: How many members does - - -

PN116

MR SLEEMAN: 160.

PN117

THE SENIOR DEPUTY PRESIDENT ACTON: 160 out of 3,000.

PN118

MR SLEEMAN: In terms of the Registered Consultancy Group that's correct. Figures range in terms of the number of employers. The Yellow Pages suggests there are just over 1,000 employers and consultancies. In terms of the number of employees I think those figures also range depending on where you say those consultants and professionals are from. Some of them work in house for large companies, some of them work (indistinct) for example. What we are talking about here is an award that would apply to private sector consultancies and the majority of those, the vast majority based on data that came from our client, small businesses. There were very few numbers of - - -

PN119

THE SENIOR DEPUTY PRESIDENT ACTON: So you've got 160 members.

PN120

MR SLEEMAN: That's right.

PN121

THE SENIOR DEPUTY PRESIDENT ACTON: How many employees would they have?

PN122

MR SLEEMAN: On average, according to the latest Benchmark and survey, that was from October 2009, it's an average of about 12 delivery staff. So I think it's safe to say between 10 and 20 and 20 would be the upper end, and there's some larger companies but as a general rule they're consultancies and they're not big businesses. They're made up of a few consultants and some support staff. Probably on average between one and five clerical staff who would prepare the day to day things with invoicing, help with faxing and things of that nature.

PN123

THE SENIOR DEPUTY PRESIDENT ACTON: Are they spread throughout Australia or are they predominantly based in - - -

PN124

MR SLEEMAN: Throughout Australia. Some of the larger consultancies, as I understand, would have a national presence and perhaps with the growth of social media and the Internet and Facebook - - -

PN125

THE SENIOR DEPUTY PRESIDENT ACTON: I'm talking about your membership, does your membership predominant in any particular states?

PN126

MR SLEEMAN: I might on that question ask Mr Bissett to - - -

PN127

MR BISSETT: Our membership is throughout Australia but there are significantly larger number of our registered consultancies in Sydney or in the New South Wales area, that probably amounts to 50 per cent of our members, the rest spread throughout the country. We also though do have - Daniel didn't mention we have 3,000 individual members as well and many of the consultancies of the 1,000-ish that are in the Yellow Pages would be sole practitioners, probably wouldn't be eligible or wouldn't be members of our register for consultancies because of that.

PN128

THE SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN129

MR SLEEMAN: If I can continue please, thank you. On the issue of the federal award and I do want to put these numbers on the record. I am actually happy to hand this up to the Bench if it please, Your Honours. I apologise it's in a dishelmed and certainly a hole punched conditioned. Of the number of consultancies referred to in the list provided at the back of the federal award, a large proportion do not exist or have irrelevant contact details and that list itself is somewhat outdated. I draw that to the Bench's attention as a way of putting some context into background to these proceedings. What the Public Relations Institute at the end of the day, inasmuch as the other employer bodies have made submissions on the threshold issue, I think that's something which is ultimately a matter for the Bench to decide frankly, but certainly if there is to be an award then it is something that needs greater consultation and the ability to generate a draft order or some suggested conditions and terms which would be contained in a public relations modern award have (indistinct) absolutely fundamental points which is as professional consultants (indistinct) consultants firms, generally small businesses, the requirement for flexibility is a must, and we can talk in more detail later if it pleases the Bench today on certain parts of the submissions made initially by the Alliance on the terms we vehemently object to, such as 19 day rotation rosters and things of that nature which I don't think you would find in many consultancy firms, be they law firms or architect firms or things of that nature. Going back to the original question on the time tabling, there is no fundamental objection to the idea of having more time, in fact we would welcome that, that has been our client's submissions to date, but I am more than happy to address the substantive issues on content and perhaps my friend here might want to comment more on the threshold issue. I don't know if there's much more I can add to that right now.

PN130

THE VICE PRESIDENT: Yes. The threshold issue we described it as, whether an award is made or not, obviously that needs to be dealt with before any final decision would be made on the terms of the award but what do you say as to whether it is easier or more difficult to do so later after you have an opportunity for further discussions with your members and the MEAA compared to considering the matter now as it were as a threshold issue.

PN131

MR SLEEMAN: I would need to take more detailed instructions to be fair but I think I can safely assume that if there was to be a straw poll of my members, the existence of an award, the answer would be against an award and at no point of the submissions put by our client said that there must be an award, with respect it would have been (indistinct). In other submissions today it is simply that if there is to be one it has to be one that recognises the flexibility needs in this business or in the businesses that are in this sector. I'm not sure I can add much more upon that particular point Your Honour. There has never been a general industry award in this sector before. There is a federal award which covers as a common rule Victoria and ACT and a number of named respondents which the Bench is now seeing is largely erroneous and outdated, it's percentages based on the number of Yellow Pages consultant ices might be lower than five per cent for consultancies covered by this federal award that exists and was created in 1990.

PN132

THE VICE PRESIDENT: So if your position is there is a preference not to make an award but if it is it should be appropriately flexible or whatever.

PN133

MR SLEEMAN: Absolutely, Your Honour.

PN134

THE VICE PRESIDENT: Is the terms of any award generally in line or in line with the attachment to your most recent submission?

PN135

MR SLEEMAN: No, sorry, Your Honour, I think to be fair to that submission I think there are some areas where further consultation would be preferred but also in the way of presenting that as an argument on the terms of the award. On the classification structure there might be some areas where members might want to have more input into that, based on our clients website there are a list of job titles, for example, in the public relations sector. Now, that I think from memory is somewhere like 800 job titles. Now, that is not necessarily saying there are 800 different types of employees, but it's indicative of an industry that has evolved and has developed since 1990 and certainly (indistinct) as well and especially the evolution of social media. That would be one area where further consultation would be a must.

PN136

I think also on the area of flexibility and hours that would need to be worked which affect things like overtime. Surveys conducted by the Public Relations Institute indicate this is a very, very flexible sector that not only requires and needs flexible hours but offers many tangible not necessarily salary related benefits, additional days off, something which I've learned recently (indistinct)

days for people who are allowed to presumably work at home, people can get sent home just (indistinct) one day and they might come back a bit earlier the next day. This is it seems particular to this sector and certainly in any law firm I have worked for previously it wasn't that flexible, but that needs to be recognised in an award. The notion of having a professional consultancy business wrapping itself around rostered times on and off in a small business I think not consistent with maintaining and keeping employment in that sector, and also the professional (indistinct) activities of those involved in order for young professionals to try and make their way and learn and develop they might want to stay back an extra couple of hours, put the hard yards in.

PN137

If an award is restricting any employer's ability to do that without excessive cost that professional development (indistinct). So I think on those sort of pragmatic issues, yes, there would be a great need for further consultation and going back to the initial point, the third week that we've been assisting in these processes and (indistinct) they were never informed, there were not letters sent to them previously to say this is what's on foot or anything like - for whatever reason (indistinct) any of those reasons, but there has been little consultation with employers (indistinct) I think they've been useful but I think there's a lot more that can be drawn out from members if they're given a little bit more time. If it please the Bench.

PN138

THE VICE PRESIDENT: Yes, thank you Mr Slevin. Mr Mammone.

PN139

MR MAMMONE: Thank you, Your Honour. ACCI just on this point, threshold issues and the way forward. Our submission would be - our preference would be that the threshold issue as to whether the Tribunal should exercise its discretion to make an award or vary an existing modern award should be dealt with first. I think that's the most efficient use of everyone's time. Should the Tribunal be inclined to exercise their discretion accordingly then we would reconsider our participation in the proceedings. Obviously we have lodged submissions, we are appearing today quite strongly in support of our submissions arguing against the Tribunal exercising their discretion and we are happy to proceed today on that basis and speak to those submissions. But we are largely in the hands of the Tribunal in this matter. If it please the Tribunal.

PN140

THE VICE PRESIDENT: Mr Nolan.

PN141

MR NOLAN: Yes, I guess we are - it depends on whether the threshold issue is whether adjournment or whether or not the award ought be made at all. We have endeavored in our written submissions to address the threshold issue and I wouldn't propose to just read out all those submissions but I would simply confirm that Your Honour and the Bench have got a copy of those submissions dated 19 April 2010 and call those submissions in A, but do so very much emphasizing the fact, as I have already pointed out, it is really arguable that we would be here arguing if an award ought be made at all if the process had of been followed in the way that was envisaged back at stage 2 or stage 3 of the award

modernisation process. However, it would be a most unfortunate turn of events if we would, as I indicated, become first of all the victim of just being overlooked in the modernisation process and then in effect insult be added to injury by saying well now we're going to deal with you by suggesting that there is no discretionary basis upon which we want to make an award. It seems to us that there is plenty of room under the sections that have been referred to and in particular section 157 for the award to be justified, the making of an award to be justified. We have indicated to you that there is a substantial industry out there that is a separate and distinct identifiable industry and there is one that would lend itself to appropriate award coverage.

PN142

THE SENIOR DEPUTY PRESIDENT ACTON: How many members do you have in that industry?

PN143

MR NOLAN: Well, we don't have very many members in the industry, it's not an industry in which there is a high membership. We can't suggest that we've got extensive numbers of members in the industry.

PN144

THE SENIOR DEPUTY PRESIDENT ACTON: Well, two, three?

PN145

MR NOLAN: But we do have members.

PN146

THE SENIOR DEPUTY PRESIDENT ACTON: You can't give me a figure?

PN147

MR NOLAN: No. We can certainly supply a figure but I can't give you a figure today.

PN148

THE VICE PRESIDENT: Mr Nolan, just on the procedural issue, the notion of an adjournment you raised initially, is that something you wish to press and have us consider because we haven't really considered the impact of all the submissions on that question that's been made.

PN149

MR NOLAN: Yes, well certainly our preference would be for the Bench, given the way things have developed, to adjourn the matter to allow for discussions to take place between the public relations employer and the alliance. As I indicated it may well be fruitful in the sense that the parties can come together, reach agreement on a document and one would have thought also flesh out some of the background material that has been the subject of some discussion today and that would put everybody in a better position to make a final decision about whether or not it ought to be made into a modern award and we would have thought in the circumstances a brief adjournment would not do much damage to anyone and it certainly wouldn't be a waste of resources for people who didn't want to participate because the peak employer bodies as I understand it have a particular position and wouldn't necessarily be involved in or want to be involved in discussing terms of an award because their position appears to be one more in principle opposition.

PN150

THE VICE PRESIDENT: Thank you, could you just excuse us for a moment.

PN151

THE SENIOR DEPUTY PRESIDENT ACTON: Mr Nolan, the award that you proposed has a classification structure which as I understand it from the document that was provided yesterday or this morning is not agreed. The classification structure in your proposed award is that from the federal award?

PN152

MR NOLAN: Yes, yes it is, and the federal award went through the award simplification process and then all the various processes that have been applied to awards since 1990. So that's why we reproduced that in our proposed award.

PN153

THE VICE PRESIDENT: We propose to adjourn briefly to consider what has been put in relation to the procedure in this matter. We will adjourn for a short time.

PN154

<SHORT ADJOURNMENT **[10.59AM]**

<RESUMED **[11.06AM]**

PN155

THE VICE PRESIDENT: We have considered what has been put to us this morning. In our view the threshold issue of whether an award is made covering the public relations industry is an important issue which should be considered at the outset. We would propose to hear from the parties on that issue alone at this stage and to do so today. If there is any particular difficulties in addressing that threshold issue from any of the parties we will hear further from those parties, but we would propose to proceed by hearing from the parties on the threshold issues. The parties do not need at this stage to address issues of the content of any award except insofar as it bears upon that threshold issue. Mr Nolan.

PN156

MR NOLAN: Yes, thank you Your Honours, Commissioner. As I indicated before we addressed the threshold issue as it is in our written submissions that have already been filed. They are dated 19 April 2010. We endeavored to address them on the first part of the submissions that follow the summary which is set out in the first couple of pages in bold print. What we have said there, and I think I have said this a couple of times, so I don't want to wear my welcome out, but what we have said is the issue really needs to be considered in the context of what happened last year in the award modernisation process and having regard to the fact there was really no conscious decision made by Fair Work Australia about the dealing of this award in the award modernisation process but rather that it fell through the cracks as it were.

PN157

So the organisation was really denied, at least at that stage, an opportunity to address the issue. What it does is it brings forward an award that's been in existence for some time and was based upon an award made back in 1999. We say that it's relevantly on similar territory to the book industry and the Full Bench

was happy to accede to a request by the Alliance to make a book industry award and indeed some of the publicists classifications were included in that book industry award. So it would seem to us, having regard to that particular situation and the analogy with that process there would seem to be no real daylight between that, if it was accepted as a matter of principle and the making of an award in this industry which as you have heard has a significant number of employers and a significant number of employees, albeit there is no precise number of employees that's been able to be ascertained in the private sector.

PN158

But as well as that, of course, there are the awards that have been made, you have heard there is a common rule award in the Victoria and the ACT that continues to apply to everyone in the industry, regardless of whether they are signed respondents to the award or not. So we would submit that what is proposed is an award that covers a relevant class of employees who are not the high flyers of the industry, who would be suitably assisted by award coverage under an appropriate and suitable modern award, and as we have indicated we believe that is well and truly in conformity with the objects of the Fair Work Act and that it gives effect to the objects of the Act because it provides for a fair safety net of conditions inter alia for the relevant class of employee, and these are employees who as I have indicated are people who occupy an identifiable and discrete class of occupation or profession.

PN159

It ranges from professional style (indistinct) professional area and would not comfortably be accommodated by the miscellaneous award and certainly not to be regarded in falling within that group of high flyers which the Full Bench referred to in those observations that the peak industry bodies seem to have placed so much store by. We would submit, for all of the reasons we put in our written submissions, that it's appropriate to make a modern award, there is no relevant distinction between in particle, as we would say, the making of an award in this area and making the modern awards that have been made in numerous other areas where there has not necessarily been hundreds of thousands of employees but where as a particular industry has been selected as appropriate for making a modern award simply because it's identifiably different from the run of industries. It's not a big manufacturing industry, it's not a big retail, hospitality industry admittedly but it still occupies an important place in the Australian economy and has significant employees. To the extent that 157 has relevance we say that it meets the appropriate test set out in the Act as much as that test can be met in respect of those other industries to which we have referred. So we would rest content with those submissions and what we have put in the written submissions to the Bench. May it please the Commission.

PN160

THE VICE PRESIDENT: Mr Nolan. Ms Street.

PN161

MS STREET: Yes, thank you, Your Honour. Your Honour, Australian Industry Group has filed written submissions on 24 February in relation to this matter and I don't intend to repeat every word of that submission but just to take the Bench to some salient points, particularly in relation to threshold issue which is the basis of our principle objection to this application. I should also mention for the Bench

that Australian Industry Group is a registered organisation of employers, as you would be aware, and we do have (indistinct) part of our membership would be affected by the award. It may not necessarily (indistinct) but (indistinct) information technology, (indistinct) marketing services and professional services. So there is a (indistinct) concern that this award (indistinct) coverage would extend to those other (indistinct) or other industry sectors which we say (indistinct) on this award.

PN162

Your Honour, if I could turn to really the crux of this case which is (indistinct) of section 157 in relation to (indistinct) award. We do note that we understand this is one of the first applications of its kind since 1 January this year and as such Australian Industry Group would seek that the provisions of the Act be applied robustly; also to preserve the integrity of the award modernisation process during which various parties here in the room were involved in participating in those proceedings pursuant to a very lengthy consultation and time table process. So we would say that in the interests of preserving the integrity of the decisions of the Commission about that process and the efforts of the parties who side with those time tables that the gate, if you like, captured by section 157 is only opened in very exceptional circumstances. It is our view that Media's application, whilst we have some sympathy in the fact that this award was not addressed by them, but it is not a basis for which the Commission should automatically make a new modern award.

PN163

The section 157, specifically 157(2) needs to be applied in this matter. We say that specifically Your Honours and Commissioner that as part of that threshold MEAA would need to determine or need to demonstrate rather to the Tribunal's satisfaction that the making of a modern award is necessary to achieve the modern award objectives which are set out in section 134 of the Act. I know Your Honour that - particularly yourself Vice President Watson - that you have been involved in a number of decisions to date concerning applications to vary modern awards and to have applied that threshold in a way where the award variation can only be made if it is necessary for the achieving of those modern award objectives. That is something that we would certainly seek to rely on in these proceedings, that it is has been incumbent on MEAA to demonstrate why it is necessary for this award to be made and why it is necessary to achieve those objectives.

PN164

How it would be applied in this particular case, Your Honours and Commissioner, would be the Commission would expect for me to demonstrate that the existing safety net for public relations professionals and assistants and indeed employers in the industry is somewhat (indistinct) not meeting the modern award objectives. Specifically by demonstrating that why for example the national employment standards supplemented with common law market conditions of employment do not achieve the objectives under section 134.

PN165

Our submissions go into a bit of detail as to what Australian Industry Group submits is met by necessary, for example words such as - the making of the award must be indispensable or is required to achieve these objectives, and we say that

the Act therefore imposes a very high hurdle for any applicant for the making of a modern award outside the scheduled four yearly review for modern awards to occur. Our submissions also go to a bit of detail about relevant extracts from the government's explanatory memorandum. We submit that the Commission have regard to that and parliament's intention with respect to how the Commission should exercise its powers in making modern awards outside the four yearly review process and following the conclusion of award modernisation.

PN166

We simply say Your Honours and Commissioner that MEAA with respect has not dealt in any way to the Commission or our satisfaction why a modern award is necessary to meet those objectives. We note that there is some material filed as to some employment conditions within the public relations industry and these predominantly relate to in paragraphs 8 and 16 of MEAA's submissions, noting the fact that hours of work within the industry recorded to be on approximately 39 hours per week as per the Department of Workplace Relations statistics, that the majority of public relations professionals are women and that the award is consistent with the objective of maintaining an appropriate safety net and to meet the living standards of those employees. We understand that to be the crux of what MEAA assert in these proceedings as to why (indistinct) for this award to meet those objectives. It is our view, Your Honours and Commissioner that this information was put forward by MEAA respectively does not go far enough to meet the (indistinct) test.

PN167

There are some elements that show that the award in fact may be consistent with modern award objectives, but we say the test is (indistinct) if you say that MEAA (indistinct) specifically in relation to hours of work and family responsibilities, we clearly submit the National Employment Standards provides an employee with a statutory right to refuse to work unreasonable, additional hours and also the right to request flexible working arrangements for childcare responsibilities. We would also submit that (indistinct) salary (indistinct) negotiated in a common law contract. There is no evidence (indistinct) are not being (indistinct). The second point we would make, Your Honours and Commissioner, is the fact that as we mentioned earlier this morning, and that is that a number of public relations assistants (indistinct) appreciate that a number of those assistants would be involved in providing specialist PR services.

PN168

It is our view that if a role of a PR assistant was to provide administrative support, then there are already modern awards that cover that kind of work, notably the clerks private sector award and indeed also the clerical stream within the telecommunications services award which a number of our members are covered by. We note that the ASU in paragraph 6 of their written submissions have identified other awards where they believe that the roles of a public relations assistant or even a consultant in some industries are already recognised by those awards. There is again no evidence from MEAA as to why those existing awards are inappropriate or are not meeting the modern award objectives for those classes of employees.

PN169

THE VICE PRESIDENT: Would those awards apply to employees of public

relations consultancies?

PN170

MS STREET: I guess this is an interesting issue, Your Honour. A number of our members would describe themselves as on line communication companies who may otherwise be covered by the telecommunications services award. I think that it raised the issue of overlap between any proposed public relations award and (indistinct) companies who provide such on line services. I think that the very definition of public relations and the industry is one that's evolving significantly at a very fast pace and that there seems to be a trend for employers certainly to engage more heavily in on line services. The issue is also whether or not this would be an industry more correctly covered by the miscellaneous award.

PN171

THE VICE PRESIDENT: The awards mentioned in the ASU submission that you have just referred to, the airline, banking, electrical power, high education, local government, rail industry, water industry, could it be said that any of those awards apply to an employer that is engaged in the industry of the employer is the public relations industry?

PN172

MS STREET: Your Honour, I certainly think it's possible. I imagine there would be a considerable level of overlap between some of these industry definition and the proposed MEAA definition of this award is considerably broad. For example you would actually extend upon the traditional notion of public relations including things such as (indistinct) functions, event management, marketing. So those awards, whilst they are confined in (indistinct) to separate and different industries, many companies these days offer hybrid functions to clients or the companies and to what extent would they be covered by the public relations industry award I think is a real issue, particularly also when the proposed award does not confine the proposed definition of industry to what is the principal function of an employer in relation to how they should fit in with a particular industry.

PN173

So we would say that there is certainly a possibility for a public relations industry employer to be caught by other industry awards given the broad definition of what MEAA has suggested is the definition of public relations industry. Your Honour, if I could continue. The other issue which I know may not have been mentioned this morning, and that is as the Bench would have been aware, the requirement under section 163(2) of the Fair Work Act and that is where the Tribunal is asked to make a modern award it must consider whether or not an existing modern award should in fact be varied. The emphasis on "much" that is a mandatory step for the Commission. It is our view that modern award coverage should not apply to public relations professional employees and that is a view that we have argued consistently throughout the award modernisation proceedings.

PN174

I note that MEAA and the ACTU have also looked at this issue and suggest that there is really no other existing award that could accommodate the MEAA proposed public relations award in a way that is meaningful. Australian Industry Group does not necessarily oppose that submission but our current view is, of

course, that public relations professionals should in fact be award free as they have been award free historically. The other issue, Your Honour and Commissioner we would like to make is that in arguing that MEAAs proposed award does not demonstrate that it is necessary to meet the modern award objectives, conversely we would say that the making of such an award is in fact contrary to the modern award objectives.

PN175

We go into some length in our written submissions from paragraph 32 to 48 where we have highlighted those objectives set out in 134 that would be offended if this modern award were in fact to be made. Principally, Your Honours and Commissioner that the vast majority of public relations professionals and public relations employers have in fact been award free. Notwithstanding the transitional award, the Public Relations Award 2003 which we do acknowledge has a common rule application in the ACT, in Victoria. The award only applies to very few employers in other states. In fact when we last checked only 38 employers in New South Wales, 11 employers in Queensland, three in South Australia, two in Western Australia and three in Tasmania.

PN176

We say that is very limited coverage and certainly not enough for the Tribunal to characterise public relations professionals as an award covered occupation or employees performing work that has historically been award regulated. We also note that there are no other NAPSAs or state awards that regulate this type of work. We say therefore that the (indistinct) to section 143(7) of the Act which seeks to limit award coverage so that modern awards cannot be expressed to cover a class of employees which because of the nature of seniority or their role have traditionally been award free or who perform work that is not of a similar nature to the work that has traditionally been (indistinct) and we say that this very much applies to public relations specialists in these proceedings. The Bench will recall the making of the miscellaneous award this was a view that we say endorsed that approach. Yes, it was in the context of making a miscellaneous award but making (indistinct) the Bench (indistinct) - - -

PN177

THE VICE PRESIDENT: I'm sorry, Ms Street, can I just interrupt you there. We are having difficulty hearing you. There's a lot of paper shuffling at the other end of the bar table which we are picking up over your voice. I think there must be a microphone very close to the other end of the bar table.

PN178

MS STREET: Thank you, Your Honour. The Commission's decision in relation to the miscellaneous award implicitly states that professional employees such as marketing and public relations specialists have not traditionally been covered by awards and indeed that is a view we would seek to press in these proceedings. I should also add Your Honours and Commissioner that we would characterise this application. Once again we sympathetic with the turn of events that occurred last year, but really this is an application to re-agitate a matter which has already been determined through a very rigorous and extensive process conducted under award modernisation. We note that the transitional 2003 award was clearly displayed in the page 2 of the modern award proceedings on the Commission's website.

PN179

It was listed in the information communications and technology group under market and business consultancy services. It is an award that has been in place since '03, it's now seven years and obviously the award applying previously had history from 1990. So we say that there was certainly awareness that this award was in existence and its existence was indeed acknowledged by the Commission in its award modernisation web page and how the various awards were to be structured in the various industry stages. We should note for the bench, as we have done in our written submissions, that MEAA was an active participant in the award modernisation process as was Australian Industry Group and indeed at the consultation hearings and the bench hearings, particularly the consultation hearings was stage 2 the ICT industries, MEAA was indeed present at that hearing where the public relations transitional instrument was an award to be dealt with.

PN180

Accordingly we say that although MEAA may feel like they have been a victim of a very ambitious time frame that was award modernisation, like all parties we would have expected them to have been involved in monitoring the developments of the awards of which they were interested in. Accordingly we say that this is not a case where we believe MEAA have suffered some level of injustice. We appreciate the frustration but really this is a matter that has been determined by the Commission both at the stage 2 ICT modern award decisions and secondly, in relation to the miscellaneous award 2010 on 4 December. Your Honours and Commissioner, if I could firstly also turn to some of the submissions that have been put forward by the other parties in writing to date.

PN181

We note that ACCI have filed submissions which oppose the application. For the record we would endorse ACCI's submissions and we don't believe there is anything inconsistent in what we are saying with views put by that employer organisation. The ACTU have also made comment in their written submissions, particularly on some of the alternative approaches that may be available to the Commission in dealing with this award. Look, whilst we understand that the Commission is open to a number of processes in dealing with transitional instruments, we don't believe that is necessarily relevant to deal with those issues here and given that this application is squarely one for the making of a modern award we would ask the Commission assess the application under the relevant provision of 157.

PN182

In relation to also submissions of the ACTU in paragraph 8, there is an acknowledgement I suppose that ordinarily with these sorts of proceedings parties would have varied views on what is required of the applicant in terms of an evidentiary onus in demonstrating why modern awards should be made outside the four yearly review. Indeed it would be Australian Industry Group's view that given that the making of such an award would be a special case, in very limited circumstances we would expect that relevant evidence be filed by the applicant organisation in which this case we say respectfully has not been met here. Further, Your Honours and Commissioner, I note that the organisation of pre or Public Relations Industry Australia is involved and certainly we would welcome their involvement in these proceedings, we acknowledge that they are an industry body.

PN183

We would however ask the Commission to consider the type of organisation that they are. They are not a registered organisation under the Fair Work Act, they are therefore not a registered organisation entitled to represent the industrial interests of employers or employees. However, we note that they might have views as to how this proposed award is to operate. Secondly, we would say that ordinarily PRIA would not have standing under 158 of the Act to be involved in the making of an application and whilst this is very much MEAAs application we ask that the Commission consider that they are a unique organisation in the sense that they represent parts of an industry whilst not being a registered association as such. We would also - this may be more a comment for PRIA itself, but Australian Industry Group understands that the organisation actually comprises of public relations professionals, being individuals, persons who are members of the organisation with a consultancy group attached to that, or those practitioners who are principals of their organisations.

PN184

As such we would say that they are not an employer association as Australian Industry Group or (indistinct), they represent a part of the industry but certainly we would not accept them as representative of all the employers in the industry, notwithstanding the issues that would affect employers. As we indicated before, Your Honours and Commissioner, Australian Industry Group would oppose any continued discussion or negotiation about the proposed award and its terms. We confidently believe that this is an application to be dealt squarely under the provisions of the Act and whilst parties are free to express their views about proposed terms of the award it would certainly be our submission that the Commission is required to accept whether or not in fact the proposed award is necessary for meeting the modern award objectives. Accordingly Your Honours and Commissioner we rely on our written submissions and if there's anything further I am happy to take questions about what we have put this morning. If the Commission please.

PN185

THE VICE PRESIDENT: Yes, thank you Ms Street. Mr Sleeman.

PN186

MR SLEEMAN: Thank you, Your Honour. If it please the Tribunal I might actually suggest that the Australian Chamber might like to go next, their submission is more in line perhaps with the AI Groups, but then I would like to if it please the Tribunal to say a few words on some of the points that have been raised already, with a focus perhaps on again submitting some factual information that might be of use to the Tribunal in relation to the nature of the industry, which might also address some of the issues that have been raised and also the modern award's objective, for example needs of flexible workplaces, if those workplaces already happen to be flexible then perhaps that might be something that (indistinct) would be mindful of in determining whether the threshold has been met. We do have that data and I would like to submit that but in view of the nature what I understand my friend's submissions will be, which are going to be more along legislative lines and has that legal threshold in that, perhaps I with your indulgence they could go next and I am happy to go after.

PN187

THE VICE PRESIDENT: Are you happy to go next, Mr Mammone?

PN188

MR MAMMONE: That's no problem from my end.

PN189

MR SLEEMAN: Thank you, Your Honour.

PN190

THE VICE PRESIDENT: Yes, thank you Mr Mammone.

PN191

MR MAMMONE: Thank you, Your Honour. ACCI has filed written submissions. I will say at the outset we thank the Tribunal for allowing additional time to lodge written submissions. As the Tribunal is aware ACCI was not served in accordance with the directions and we have tried to seek instructions from our members about this issue within the time constraints. We do have particularly the chambers that ACCI members had had some level of involvement in this industry, so we wish to thank the Tribunal. ACCI's submission, whilst I won't repeat what is said in the submission, we obviously rely on the written submission. We just want to raise an issue at the outset which is about the notification of these proceedings in general, in case I do forget to mention it at the end. Paragraphs 13 to 17 of our written submission we just note the context of this application. We believe that the making of a new award is a significant matter. It was only brought to our attention as I happened to be on the website looking for variations of modern awards. It is a concern to ACCI that there are many employers that are affected or potentially affected by an application such as this one that is either not aware of these proceedings at the moment or wouldn't necessarily know about it either by membership of PRIA or another industry organisation.

PN192

THE VICE PRESIDENT: Isn't it incumbent, given the nature of modern awards and the processes that are well known to employer associations that the website material is monitored and those associations or organisations notify their members who are potentially affected by such processes?

PN193

MR MAMMONE: Your Honour, I would agree that it's incumbent on those organisations, particularly registered employer organisations that monitor and subscribe, but the curious aspect to this is that it's filed under variations to a modern award when in actual fact it's an application to make a new award for the public relations industry and the scope - not just the public relations industry as a scope for suggesting its actually wider than that. So it may affect those employers that by a cursory glance the title of the proposed award wouldn't necessarily think it's an issue. To put some context into ACCI's involvement during award modernisation proceedings and our members, which is at the heart of our submission, is that this is not something exceptional. What I have heard today and in the written submissions as well is that MEAA seems to suggest that there is collateral damage as part of award modernisation proceedings.

PN194

The ACTU in their written submissions also talk about unfinished business. MEAA suggests that there is an oversight. ACCI and our members have been

involved in award modernisation proceedings as the Tribunal would appreciate and we believe that there was no oversight. This matter was squarely before the Commission, the award modernisation Full Bench at the time. We believe that all throughout the process MEAA had sufficient opportunity to raise the matter. Our affiliates instruct ACCI that once the decision not to make a dedicated modern award for the public industry was decided they at that stage thought it was concluded and didn't partake in proceedings, apart from instructing us to be involved in the proceedings involving the miscellaneous award which may have suggested there was some sort of extension in award regulation. Now, all we suggest in our written submission is that perhaps there is some other method where there is an application to make a new modern award that there be some sort of dedicated part of the website that would alert people to that and indeed looking back to the common rule declarations when they were made there was an established process, there was notifications in the paper, et cetera. We just make that as a recommendation so that employers potentially affected are aware.

PN195

THE VICE PRESIDENT: Yes.

PN196

MR MAMMONE: To that end PRIA is an industry body, as AIG has mentioned they are a hybrid type of organisation in the sense that they represent both employers and employees. We do note that the amended scope clause of MEAAs draft award is quite wide and refers to not just public relations and media relations, government relations, corporate social responsibility and sustainability, et cetera. ACCI within the time that we have had available has considered the register of lobbyists which is part of the department of prime minister and cabinet at federal level and has printed off who is actually on that register and it would appear that there are - I can hand a copy of this to the Tribunal - it appears that there are 291 lobbyists, some of those may be individuals, others may be companies. We just note, based on the information that PRIA has provided about who they actually represent in terms of the employer side of things, they clearly do not represent everyone, and that is no criticism of PRIA, it's just that once again we are concerned that the potential reach of this new award will cover - would potentially cover those employers that are not here today.

PN197

THE VICE PRESIDENT: Are public relations consultancies the same thing as lobbyists?

PN198

MR MAMMONE: It may be a question for other parties today, but just as an example, ACCI and its members is not registered on that register, although the nature of some of its work would be considered government relations and lobbying and advocacy. We are not sure where public relations starts and ends, but the scope clause obviously captures other sectors or types of industries.

PN199

THE VICE PRESIDENT: Lobbyists might be a sub-set but consultants in the private sector assisted a corporation in their public relations, they wouldn't necessarily deal with government relations with the registered lobbyists perhaps. I don't know, I'm just asking the question.

PN200

MR MAMMONE: Unfortunately I can't assist the Tribunal, but it highlights once again the scope clause does potentially either extend award regulation into previously award free areas, which we say would be contrary to the modern award objectives. If it was confined to the scope of the federal award that previously applied, that may be another issue entirely but we are concerned about the general breach. We put this within a context. The miscellaneous award in its draft form raised potential issues of award regulation extending to traditionally award free areas.

PN201

One of the requirements was that it would not cover those employees who were traditionally award free. That is why ACCI provided a draft award of the miscellaneous award, we provided extensive written submissions and material about possible sectors, industries, types of occupations that might have been covered by the miscellaneous award and we did provide APS material that suggested that many occupations would be potentially covered by the miscellaneous award even where there was patchy award coverage or there was no award coverage. In our written submission we reiterate what the award modernisation Full Bench said in relation to the coverage of the miscellaneous award in its 4 December 2009 decision.

PN202

It's quite clear from paragraphs 151, 152 and 153 that they considered all of the submissions before it, they, as in the Full Bench, were of the mind to make clear what the miscellaneous award was intended and is intended to cover. We say it's quite unambiguous. At paragraphs 152 the scope clause clearly says, and I am reading from clause 4.2, "The award does not cover those classes of employees who because of the nature or seniority of their role have not traditionally been covered by awards, including managerial employees or professional employees such as accounting, finance, marketing, legal, human resources, public relations and information technology specialists."

PN203

Paragraph 153, the Full Bench then goes on to say, "We agree with those who have suggested that the coverage of the award is very narrow and likely limited in time where emerging industries are concerned or where the expansion of coverage of modern award is involved. Accordingly we do not think the award should contain a comprehensive safety net designed for any particular occupation or industry." Now, we say that after reviewing all of the transcripts, the major submissions of MEAA and other parties that the issue was before the Full Bench. MEAA concedes that they did raise it with Senior Deputy President Hamberger in one of the consultation proceedings.

PN204

There is no suggestion on the face of the record that the Full Bench simply overlooked the matter or that it is part of the collateral damage of award modernisation proceedings. With respect the same could be said of - to take one of the sectors, the legal services sector, there was limited award coverage and quite clearly the award modernisation Full Bench declined to create a modern award for that sector. We just can't see how that argument can be sustained in light of the actual facts, notwithstanding we don't believe that MEAA, as the

applicant in this case, has provided any cogent evidence that addresses the statutory considerations for making the modern award or varying any other modern award.

PN205

THE SENIOR DEPUTY PRESIDENT ACTON: Mr Mammone, just before you go onto that. Was there any - I can't recall, you might be able to - specific provision of the award modernisation Full Bench where they determined not to make a public relations industry award. My recollection is in the legal services industry there was a specific decision.

PN206

MR MAMMONE: No, I could not locate any decision which expressly decided that point, although one would assume that in the decisions handing down stage 2 modern awards it fell within the list of awards to be considered within the large list of awards, and there was no express reference indicating that they declined to create a modern award for that sector.

PN207

THE SENIOR DEPUTY PRESIDENT ACTON: Thank you.

PN208

THE VICE PRESIDENT: Did your research cover the submissions filed by all parties in those various stages as well. I just wonder whether one of your members might have made a specific decision about an award in the public relations area to the effect that there was no need (indistinct) or something of that nature.

PN209

MR MAMMONE: No, to answer that, Your Honour, the way I believe it panned out is that members would consider any draft award that the union would submit. MEAA didn't submit a draft award as far as I could ascertain and members indicated that there was no draft award. The Commission did not put forward a draft award for comment and on that basis there was no submissions made.

PN210

THE VICE PRESIDENT: It might have been before the exposure drafts, consultation prior to the exposure drafts may have addressed what awards were proposed to be made.

PN211

MR MAMMONE: I certainly couldn't locate any submissions, it's not to say - - -

PN212

THE VICE PRESIDENT: The submissions as well as the decisions.

PN213

MR MAMMONE: Yes, that's not to say that there was not one made, I wouldn't want to categorically say that. Quite a lot of material during the award modernisation proceedings. But it's our best endeavors that's what we've found. If I could continue with the substantive application and the merits of that. At paragraphs 34 to 35 of our written submission we do say that the applicant bears the onus of providing material, it should be cogent material and evidence, that would satisfy and warrant the Tribunal exercising its discretion. A decision that

was referred to by Ms Street of Your Honour which was an application concerning the general retail industry award by Integrated Trolley Management Ltd.

PN214

If I could quote from Your Honour at paragraph 10 of that decision where Your Honour was of the view that in relation to section 158 and whether the Tribunal would be satisfied that a variation out of the four yearly review period was necessary to achieve the modern award's objective, Your Honour considered that, "This is a significant hurdle that any applicant in a matter under section 158 is required to meet. The clear import of this provision is that award variations outside the four yearly reviews will be the exception. " In my view this means that an applicant must establish that the modern award's objective cannot be achieved unless the modern award is made.

PN215

There is obviously some higher threshold that must be met before the Tribunal could exercise its discretion. We say that based on the materials provided by the applicant we say the applicant has not met that threshold. In relation to some of that material the attachments in our submission do not more than set out various details of an industry. Attachment 2 to the MEAA submission provides some statistics and data about public relations professionals. It could be said that material could be provided about any number of sectors, it doesn't really illustrate anything that goes to the statutory considerations under section 134 of the Act.

PN216

In terms of whether there is agreement with the major - what they consider is the major industry representative, we say that it is obviously a matter for the Tribunal as to what weight they attach to submissions, whether it is from the peak parties, registered organisations or other interested parties and that is a matter for the Tribunal to decide what weight attaches to that. We obviously have highlighted what we consider is the nature of PRIA. One other matter that we wish to draw the Tribunal's - - -

PN217

THE VICE PRESIDENT: ACCI is not in any different category is it?

PN218

MR MAMMONE: Your Honour, we - - -

PN219

THE VICE PRESIDENT: Membership be exclusively employers or registered by them?

PN220

MR MAMMONE: No, ACCI is not a registered organisation, it's what we would consider a peak council body similar to the ACTU, but our members consist of both registered and unregistered employer organisations, they to my knowledge anyway and not to mislead the Tribunal, they don't represent any employees.

PN221

THE VICE PRESIDENT: Members of PRIA are employers, employers have rights in their own right.

PN222

MR MAMMONE: Correct.

PN223

THE VICE PRESIDENT: If they wish to make an application for a modern award.

PN224

MR MAMMONE: It is my understanding PRIA represents a significant number of employees, also the employers but as I say that's a matter for the Tribunal to decide what weight to attach to everyone's submissions. One matter I did want to raise is in respect to the competency of the application. Section 158 and the various items of the Act talk about who an application can be made by. It does refer to an organisation that is entitled to represent the industrial instruments of one or more employees that are covered by the modern award.

PN225

In this case the scope clause is so large that with reference to MEAAs eligibility rules, which ACCI has had some brief consideration prior to the proceedings, it appears that the eligibility rules only refer to in or in connection with public relations. It doesn't refer to government relations, doesn't refer to corporate social responsibilities, sustainability issues and crisis management, event management, (indistinct) marketing, include brand campaigns. We just raise this as a possible issue that goes to the competency of the application and what it seeks to actually cover. MEAA hasn't indicated how many members they have or where they actually work. We don't make any specific submissions that it's an incompetent application and it shouldn't actually be considered at all, only that if the Tribunal does go - if the Tribunal is mindful to exercise its discretion and decide that a modern award should be created or that another modern award should be varied it should be mindful about the coverage of the actual instrument. Those are the submissions of ACCI, if it please the Tribunal.

PN226

THE VICE PRESIDENT: Thank you, Mr Mammone. Mr Sleeman.

PN227

MR SLEEMAN: Thank you, Your Honour. I think perhaps a good way to proceed from PRIAs perspective is to work our way through the modern award's objective and see if there is anything we can add in factual information that may assist the Tribunal to determine what should happen in relation to the threshold issue. As a general comment, and I think that there has been a dearth of actual evidence of what the industry actually entails and what happens in this industry and assertions and ABS things that are thrown in there, this body possibly because of its nature as identified by the parties is able to gather that information and has done so to the best of its ability in a very short space of time.

PN228

All I propose to do and I don't want to re-read the legislation but addressing the first part of the modern award's objective, dealing with relative living standards, needs of low pay, salary surveys conducted by PRIA and this will be something, if it please the Tribunal, expanded upon but they might need a bit more time to get that information. There is certainly no evidence at all that this is an industry that pays at the federal minimum wage level, in fact quite a bit above. The salary level

indicated in October 2009 through a confidential benchmarking survey which is (indistinct) hand up at this stage as a formal submission but indicates - or at least not without formal instructions, indicates salaries ranging from about 40,000 up to let's say 150,000 for owners of businesses and directors, again depending on the size of the business but significantly above what we consider federal minimum wage.

PN229

On top of that, I think this is very important to get on the record, this is an industry that pays employees bonuses, other additional benefits, additional leave and things of that nature. On that particular issue we have on that survey itself 36 per cent of respondents on the survey in October last year provide extra unpaid leave as an additional benefit. In a survey conducted in the last few days bonuses of up to \$1,000 or \$2,000, subsidized training, all of these things have not been canvassed until now and they ought to have been but due to the time frames involved perhaps that wasn't able to be done. But in the context of modern awards objectives and should there be an award, the information I think and submit must be taken into account to determine whether or not an award should be made here, to address the modern award's objective or apparent issues in this industry (indistinct) an award.

PN230

The second part, need to encourage collective bargaining, partly due to the small number of employees in most of these small business consultancies. I suspect those that want to make enterprise agreements will do so and those that don't will not. Based on feedback from a survey of last Friday or Thursday, five or six respondent have made an enterprise agreement but I don't see in this industry, and I say manufacturing for example, a terrific need either for enterprise bargaining to be encouraged or anything in the arrangements at the moment which would discourage it. If anything I think at best it's a bit of a moot point and I would urge the Tribunal not to take much weight in that part of the modern award's objective. The third part about the need to promote social inclusion for increased workforce participation is a point I would like to address in substance.

PN231

My instructions are very clear on the nature of this sector, an industry which has a large proportion of female part time workers who are able to participate in this industry because of flexible arrangements, whether that is working from home or working in three or four hour stints or whatever that might be. Whilst we're not necessarily focusing on the pointy end of the proposed award by PRIA, I think it is important to note that many of the terms that are proposed in the submission would take all of that away. If anything it will reduce the workforce participation because there won't be that flexibility, employers simply cannot provide that sort of flexibilities if an award (indistinct), especially when seen in the context of an award that is evolving through telecommunications and the internet where work can be done from home, I think that any award imposed in this area which would take away this flexibility and that is what has been proposed by now would be a problem.

PN232

To put on the record, the attachment which was submitted as part of PRIAs last submission sought to address that by PRIAs flexible work conditions in terms of

its hours of work, that was based on the submission or reply from (indistinct) last night or this morning rejected those (indistinct). The proposals of MEAA is that a professional consultancy firm (indistinct) or 20 day work cycles and 32 hours one week and the next 45 or 46, (indistinct) averages, that's not unusual necessarily but I think that the National Employment Standard also addresses the concept of averaging and in an industry where salaries are the norm that is what actually happens at the coal face. Of the respondents to last week's survey, which was simply an on line survey conducted by PRIAA, had about 19 or 20 respondents, 100 per cent of respondents use salaries, provide salaries to their professionals.

PN233

This is not the area of an industry which needs to have hour by hour roster, log on, log off requirements and linking that again to an industry that pays well above federal minimum wages and provides additional benefits and entitlements. So that is (indistinct) I put that to the Tribunal in reference to the modern award objectives as a matter of factual information that hasn't been provided to date. I skip over briefly the (indistinct) remuneration. There is no evidence that has been submitted I have seen that would suggest there is a female versus male wage industry, assuming that that part is intending to address. It's basically a merit based industry. If you're good at your job you get paid well, you get bonuses; if you do really really well in professional consultancies I think that's the norm.

PN234

Of course there may be employers that don't do that as there would be in any industries, there might also be employers that don't (indistinct) but in any industry that relies on being able to deliver services, (indistinct) legal services or architectural services or anything of that professional nature, it is not uncommon for salaries and Commonwealth contracts to prevail, well above legal minimums set out in legislation (indistinct) the federal minimum wage made under the relevant legislation and that's what happens in this industry. I would like to quote some other figures. I think you have actually addressed some of the other issues in terms of productivity, employment costs, regulation, other things that are going to be simple to apply and those other three modern award objectives and just quote some figures based on the surveys and I think they are of relevance here.

PN235

Of the respondents to the benchmarking survey of last year, October 2009, certainly recent, 32 per cent of respondents use four day weeks or offer four day weeks for employees. 71 per cent of respondents in the industry utilise flexible working hours which (indistinct) by the application of MEAA in these terms which we (indistinct) if there was to be an award, it is proposed by MEAA that this award should have very tight (indistinct) practices, well that just can't work. If that does apply it will completely (indistinct) the modern award (indistinct). Extra unpaid leave, I have already dealt with before with 36 per cent of respondents said that survey offer extra unpaid leave. In terms of overtime which is perhaps part of the safety net, time off in lieu is common in this industry.

PN236

In fact of the 19 respondents that replied to the survey last week, all of them offer time off in lieu when people worked over 38 hours, which is a preferred arrangement between the employer and the employee, looping it back again to a base salary which is well above federal minimum wages or anything of that

nature. In terms of other modern workplace practices, and I have just been informed, I apologise, but there are now 35 respondents. It was an online survey (indistinct) I suspect the proportion of responses for each of those will be the same but I am happy to come back to the Bench on that. 54 per cent of respondents are working from home arrangements, again going back to the features of a modern workplace, things that are meant to be part of the modern award's objective where if an award does not achieve that or is not necessary to achieve that because it is already there, then a modern award surely should not be made.

PN237

The premise of these - the reason that I am giving this factual content and information is that there has been so little canvassed about the nature of the industry in all these proceedings and wide sweeping assertions that people might be stressed from work. There were submissions filed by MEAA previously which attached a report on stress management and things of that nature. No disrespect to that submission I think most professionals feel stressed at times, I don't see how that links to the need to create a modern award to meet the modern award's objectives, in an industry that provides, for example, doona days for employees. Take a day off and either work from home, because they have been given laptops to work from home with, in fact 70 per cent of respondents to the survey last year provide the monthly Internet access for their employees so they can work from home.

PN238

Now the award as proposed strips a lot of that away. It does the opposite to what the modern award's objective is actually meant to achieve. This is an industry that is effectively looking after itself, we would submit. Now, it is in the context and I want to go back to what I said earlier in relation to (indistinct) this point. There was no consultation, (indistinct) many of PRIAs members just weren't aware. I do endorse with great respect to (indistinct) the processes that in a modern award - I think under the heading of modern award variations is where you find the modern award applications (indistinct) to find out where on the website I needed to go, and I do look at that website, I get all the reports (indistinct) and I did find it very hard to come by myself and it might be a reflection on me but at the same time I think most employers would have found it very difficult, even if they did know to look on the website to actually find that this had happened given that the majority of them had never been written to about this, those that were respondents often would have had a letter sent but no one was actually there, it was an old address or they didn't exist anymore, and largely because of that there was really no consultation with industry on these issues.

PN239

I am happy to leave it unless there are any further questions from the Bench and I am happy to invite if there are questions on specifics of the PR industry which we could also address, I'll leave my submissions there. I don't intend to make comments about whether PRIA is or is not an employer organisation. The way I read the Act is that those sort of issues cannot hinder submissions of this nature (indistinct) sought leave (indistinct). So on that I simply rest and if there are any further questions.

PN240

THE VICE PRESIDENT: Yes, thank you Mr Sleeman.

PN241

MR SLEEMAN: Thank you, Your Honour.

PN242

THE VICE PRESIDENT: Mr Nolan. Do you have anything in reply on the threshold issue?

PN243

MR NOLAN: Yes, thank you Your Honours and Commissioner. Look, a couple of these issues in our submission could be dealt with rather briefly. This issue about the coverage we would suggest with all respect is something of a canard because one would have thought the best measure of a dispute about possible coverage would come from competing unions who would put their hand up and say this award appears to be trespassing on an area of our interest and indeed that issue has been well and truly put to bed with the submissions of the ASU in our submission as well as the ACTUs submission and any remaining matter of detail about the precise tweaking of the scope clause of the award is something that can be dealt with when the Bench makes a decision in principle in favour of the making of the award. So much of the debate, the discussion that has ranged about this, and references to the telecommunications industry and on line services and so on, either are addressed by the fact of the proposed scope coverage of the proposed award simply doesn't go there or alternatively if there is some issue about fine tuning the scope clause that is something that can be done as it has been done in numerous awards in this process. That is one issue we think can be put to bed rather quickly and abruptly.

PN244

So far as the public interest issues that have been addressed and the requirements of the Act, well we have already drawn your attention to the history of our involvement with this and we rest on that and we would have thought that is well and truly accommodated in the statutory provision because after all there is nothing too novel in a provision in a statute that says an award may not be varied unless there are some kind of special circumstances during the term of the award and that's really, in our submission, what has been translated into the statutory provision. Those concerns are really addressed - considerations that are quite outside what we have here which is a special and unique circumstance where the Alliance has acted in good faith, believing it was going to be dealt with in the award modernisation process and for whatever reason was left by the wayside as we have already suggested.

PN245

We say this matter ought to be judged not by reference to all these after the fact complaints but rather by saying or asking this question that if we were in the shoes of the Alliance back when this process should have operated, according to the statutory scheme and the award modernisation process, it wouldn't be realistic to say that the Commission would have turned its back on a proposal to make a public relations industry award. We can suggest we think the answer to that question would be no and that everyone had an opportunity, knowing that this thing was on the horizon to make their feelings known about it, a specific public relations industry modern award and allowing for the fact the PRIA people weren't aware of the process.

PN246

Certainly the peak councils were there and neither of them could point to submissions that were made by either of them or anybody else for that matter that said - was conscious of this application had been made and said that no public relations industry modern award should be made by the Bench. That is the fact of the matter so far as we can ascertain from inquiring of materials. Indeed, if such a suggestion or submission had of been made the requirements the rules of natural justice would have made it obligatory and bring those to the attention of the applicant union namely the Media Alliance, and that was simply not done.

PN247

So may we suggest that if we had been where we should have been most of these issues would never have arisen and the question or issue of a modern award for public relations industry would have been uncontentious and it would have been made the same way, we suggest, as the book industry award was made which I should also point out was made prior to the miscellaneous award being made - sorry, after the miscellaneous award was made, so it's not as though there was any discussion of these issues in the course of the miscellaneous award, it was rather thought these were right outside, and sensibly so, the (indistinct) of those things that were concerned with the miscellaneous award.

PN248

We would submit that that is the appropriate perspective upon which this application ought to be viewed, but we shouldn't be penalised simply because we (indistinct) we have become a victim of the system and I don't want to be too florid about it, but the fact of the matter is this award took the course that's been described through no fault of the Media Alliance and indeed not blaming Fair Work Australia and the award modernisation process, we can say I think sensibly that the process was so ambitious and involved such a massive undertaking that it's not at all surprising there would be the odd wrinkle like this. That was the position that was faced by the Media Alliance back when the application was made.

PN249

There is no doubt about the fact that whatever the debate is there is an industry. We have pointed out the official Australian Government statistics which suggest that there are 17,000 employees in the industry. Some of them may not be in the employ of private sector public relations consultancies. We have tried to embrace them in the award application but there is no doubt about the fact that from that it can be at least inferred that there is a significant number of employees and to say upon that assumption, to make a suggestion that they wouldn't be covered is not, we would suggest, a radical or an extravagant claim to make and that contention and that general position is really fortified by what our friend from the public relations industry has said, because if we are looking at salary ranges from 40,000 to 150,000, accepting that at face value, we are looking at, may I suggest, a very significant number of people who are in the salary range where modern awards have been made.

PN250

In other words, it wouldn't be at all surprising to equate that general level of income with a whole range of professions within the community for which modern awards have been made. If it was good enough to make modern awards

for those people, and not (indistinct) seems to suggest that if the NES applies to you you have got some scope to make some sort of common law contract you should be locked out of the system. Well, that same reasoning would go for that longitudinal group of professionals and para-professionals and other skilled workers that make up the bulk of the areas in respect of which these modern awards have been made. Just following up those other points that were made.

PN251

One would have thought that what was said about the capacity to engage in collective bargaining would really support the making of an award, not to contradict it, because if it is the case as it is that there are numerous small employers their position in our submission would be much better served by at least a basic safety net award rather than a multitude of enterprise agreements and it provides a proper safety net for an industry like that that is suitable, in our submission, for the industry having regard to the nature of the industry in particular where it wouldn't let itself be collective agreements that are typical of (indistinct) hospitality enterprises and so on. Indeed the same would go to the social inclusion factors that have been mentioned in our submission, because notwithstanding this isn't (indistinct) of what the Media Alliance propose for its award, there is no doubt about the fact that the idea of a modern award being appropriately tailored to meet the needs of a particular industry absolutely fits neatly with the sort of description you have been given about this particular industry.

PN252

If there is a large proportion of female and part time workers that is precisely the kind of (indistinct) territory in our submission that leads itself to making a modern award and that's precisely that kind of factor that has been, in my submission, a powerful factor that has encouraged awards being made in retail and hospitality and a range of other issues where there has been that kind of profile in the workforce. So that is another reason in our submission why you would be persuaded to make an award and not otherwise. Perhaps the other issue we should have emphasised more strongly is the existence for the time being at least and for the foreseeable future of these common rule awards in Victoria and the ACT.

PN253

One would have thought that they would have - because of their comprehensive coverage and (indistinct) locations there would be every indication or every suggestion that the making of a modern award was indicated, because it appears from what we have heard that there would be inevitably a disconnect between the provision of the awards as they exist and the patterns of work that have emerged as the industry has evolved over time and one would have thought it is a timely suggestion to make that a modern award be made to take into account these changes in circumstances that have occurred since the formal award was made, it adds another powerful reason in support of making a modern award not, in our submission, to the contrary. So we would say all of those factors, including the factors that we put to you in our written submissions and earlier submissions ought to be taken into account by the Bench and we would suggest, with respect, that the case for making a modern award for the industry is really quite compelling.

PN254

THE VICE PRESIDENT: Yes, thank you, Mr Nolan. We thank the parties for those submissions. We will reserve our decision. These proceedings are now adjourned.

PN255

<ADJOURNED INDEFINITELY

[12.24PM]