



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT MILLHOUSE

AM2023/21

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

**Modern Awards Review
(AM2023/21)**

Melbourne

10.00 AM, THURSDAY, 23 NOVEMBER 2023

Continued from 03/10/2023

PN1

THE DEPUTY PRESIDENT: Thank you and good morning everyone. Thank you for your attendance. I will start by taking the appearances this morning in the order provided to me. Mr Scott, you appear for the Australian Business Industrial and New South Wales Business Chamber this morning?

PN2

MR K SCOTT: I do, Deputy President and to the extent that I require permission to appear on behalf of my clients, I seek that permission.

PN3

THE DEPUTY PRESIDENT: Thank you, Mr Scott. Ms Byrne and Ms Willox, you appear for Creative Australia?

PN4

MS S BYRNE: Yes. Thank you.

PN5

THE DEPUTY PRESIDENT: Mr Kemppi, you appear for the Australian Council of Trade Unions? Mr Kemppi, are you able to hear me? I might revert to Mr Kemppi in a moment. Ms Minster you appear for the Australian Entertainment Industry Association, trading as Live Performance Australia?

PN6

MS S MINSTER: Yes, Deputy President. That's correct.

PN7

THE DEPUTY PRESIDENT: Thank you. Mr Townsend, you appear for the community and public sector union?

PN8

MR W TOWNSEND: Yes, your Honour. Predominantly in relation to the SBC Group.

PN9

THE DEPUTY PRESIDENT: Thank you, Mr Townsend. Mr Farrow, you appear for the Australian Chamber of Commerce and Industry.

PN10

MR S FARROW: Yes. That's correct, Deputy President.

PN11

THE DEPUTY PRESIDENT: Mr Lowe, you appear for Theatre Network Australia?

PN12

MR J LOWE: Yes, Deputy President. Thank you.

PN13

THE DEPUTY PRESIDENT: Ms Benton, you appear for the National Association for the Visual Arts.

PN14

MS P BENTON: Yes, that's correct. Thank you.

PN15

THE DEPUTY PRESIDENT: Mr Kemppi, may I revert to you? You appear for the Australian Council of Trade Unions?

PN16

MR S KEMPPI: Yes, I do now. Sorry, I had a sound glitch just then.

PN17

THE DEPUTY PRESIDENT: Thank you very much, Mr Kemppi. Returning to Mr Scott's query with respect to the question of permission, to the extent it is required it's granted, Mr Scott. Thank you very much and thank you everyone for your attendance at the mention this morning.

PN18

As you are all aware, in the statement that was issued by my chambers on 6 November 2023, parties were invited to comment on the conduct of the consultation process insofar as it concerns the arts and culture sector, being the first aspect of the Modern Awards Review for 2023/2024.

PN19

The timetable that was issued by the Full Bench provides for consultation with interested parties in the period between 11 to 22 December and 22 January to 2 February 2024. Your input is sought today as to the specific times, dates, locations and method for consultation within that specified window and specific input was specifically sought, having regard to the desirability of any conference between the period 20 to 22 December 2023, of course, having regard to the time of the year.

PN20

Now, at the outset and before inviting your views, which are welcomed, it is acknowledged that the timetable issued by the Full Bench does not include the filing of reply submissions. It is anticipated by the Full Bench that the consultation process will provide interested parties with that facility. At this stage a formal variation to the timetable for the express filing of reply submissions is not contemplated, but should parties consider it desirable to file written submissions in reply they are of course welcome to do so and to that end, that may be a matter that parties consider to be relevant when considering the specific dates for consultation, which I would like to discuss with you now.

PN21

So if I proceed by taking your submissions in the order of the appearances, Mr Scott, can I commence with you? I acknowledge the correspondence that you have filed with the Commission on 20 November. What is it that you would like to say in relation to the conduct of the conciliation conferences

PN22

MR SCOTT: Thank you, Deputy President. So I think in addition and without repeating what we put in that email correspondence of earlier this week, we're

comfortable with what you've just indicated, Deputy President, in the sense that to the extent the parties wish to file reply submissions, they will be able to do that. I think it's a little bit difficult at this stage to sort of make any helpful submissions around timeframes in circumstances where at this stage we're in the dark as to how many submissions might be filed, how lengthy they are, how complex they might be, et cetera.

PN23

But we'd anticipate, at least from my client's perspective, that once parties file the material they wish to file by 4 December, we will have a much better idea as to what we want to say and how much time we might seek to consult with members.

PN24

Just reflecting on that now, Deputy President, our perspective on the conduct of the consultation process might be that we would want some time after 4 December to reflect on all of the information that's been put forward by all of the relevant stakeholders. We then would want to consult with members in the affected industries. And so in that context it might not be the case that we would be in a position to say anything meaningful in response until the New Year.

PN25

And so noting the allocated dates or the tentative dates that your Honour has put forward, I'd have an initial concern that between 11 and 22 December it might be a little difficult to use that time effectively or efficiently in circumstances where we are still potentially reviewing the material from other parties. And so and so it might be that to the extent there's an opportunity to be productive during that period, it might be that that period could be used by the Commission to effectively give parties an opportunity to elaborate on anything that they've said themselves perhaps.

PN26

And then I wouldn't anticipate that it would be until the late January period, so 22 January to 2 February where our clients would really be in a position to respond to the other parties' submissions. So I suspect it would be that second window where there might be more progress, if you like. I'm not suggesting necessarily that we abandon the 11 to 22 December period, but I just wanted to foreshadow that it might be that we all show up on the 11 December and say, 'We're still reading everyone else's materials. Until we've really had time to reflect and consult, there might not be a lot that we can do with that time window'.

PN27

Now, I don't know whether that view might be shared by the others on the mention this morning or whether that's just an isolated view, but I just put that. And then again thinking about the efficient conduct of the process, it is possible that my clients might in the New Year propose that we respond in writing to the submissions of the other parties, rather than a kind of consultation process where we are effectively giving verbal submissions, because it just might be more efficient to put forward what we want to say in response in writing, in advance of any kind of verbal consultation process.

PN28

So I think that's about all that I would say at the outset, unless other issues are raised by the other parties this morning, Deputy President.

PN29

THE DEPUTY PRESIDENT: Thank you, Mr Scott. Ms Byrne or Ms Willox? I invite your views, including any comments that you might like to make in response to the matters that have been raised by Mr Scott today.

PN30

MS BYRNE: Thank you, Deputy President. We are here from Creative Australia, which is a government agency, so we are just here observing this morning and won't comment to the consultation timeline, but we would be very pleased to be involved in the consultation process. Thank you.

PN31

THE DEPUTY PRESIDENT: Thank you very much. Mr Kempfi?

PN32

MR KEMPII: Thank you. First off, apologies for potentially answering a question with a question, but to us it will probably depend on what the goal of the consultation is and then if the Commission is minded towards holding it in a particular way. For example, if the first round of conciliation from 11 to 22 December is more, say, conference like, where we might flesh out our own submissions and have a free flowing discussion, we would be fairly happy to participate on that basis.

PN33

And if there is intended to be perhaps consultation in that round, and then further consultation in the second round, 22 January to 2 February, we would be pretty happy to do both. If it's a matter of at some point during one of those two windows there will be one single consultation then we would prefer the later date, if it is to be the sole one.

PN34

I guess by way of feedback, we would be minded to participate in the first round, noting that perhaps by then not everyone will know the intricacies of everyone else's submission, but I think we can still have a productive discussion where we talk about our own submissions primarily as well as respond to anything that comes up on the day or days and then perhaps have a more sort of formal style of consultation from 22 January, perhaps aided by some reply submissions.

PN35

THE DEPUTY PRESIDENT: Thank you, Mr Kempfi. So I understand from that position that there might be a real opportunity to preserve those December dates, whether it's both weeks or only the first week for the purpose of perhaps fleshing out a party's own material and then the January dates might specifically be focussed upon providing responsive views, either in writing or at the consultation verbally to the other parties' positions.

PN36

MR KEMPPI: Correct. Yes, we would be in a position, I think, to have some form of discussion. I think it could be productive in the first round, but to get to that full stage of response type submission, we would need the extra time until late January.

PN37

THE DEPUTY PRESIDENT: Thank you, Mr Kemppi. Ms Minster?

PN38

MS MINSTER: Thank you, Deputy President. LPA agreed mostly with Mr Scott's view from ABI and a little bit with Mr Kemppi. I think it is difficult for us at the moment to comment on specifics of the process, given that it's not clear how many parties will be filing submissions and what issues will be raised. We do agree the timetable is very tight, so I do welcome the view of Mr Kemppi that it's more of a discussion prior to Christmas and then following that, we have the opportunity to file or present submissions, I think is a very adequate way to proceed.

PN39

THE DEPUTY PRESIDENT: Thank you, Ms Minster. Mr Townsend?

PN40

MR TOWNSEND: Yes, thank you, your Honour. Our participation in this matter could well be quite limited. My first thoughts on it are that our submission is likely to be limited to assisting round out the application of the State Government Agencies Award in the public sector. My colleagues in the PSU Group may have a view about the application of other modern awards to federal government-run institutions.

PN41

In the state public sector mostly arts and cultural institutions are run by state governments and are not covered by modern awards due to primarily the operation of section 14(2) of the Fair Work Act, but that is not the case in Victoria. So our participation could well be limited to assisting the Commission and rounding out the scope of the sector and the awards involved and we will be happy to concur with the position put by Mr Kemppi.

PN42

THE DEPUTY PRESIDENT: Thank you, Mr Townsend. Mr Farrow?

PN43

MR FARROW: Thank you, Deputy President. We would very much echo the position put by Mr Scott. A few things that I'd just quickly add is that we certainly appreciate the opportunity to file written reply submissions if that appears necessary. Our preference would be for as much of the consultations as possible to deal with issues that sort of arise in other parties' submissions, as opposed to more elaboration on the material that was already filed if possible, just because we see the discussion paper potentially canvassing quite a broad range of issues and what may actually be necessary to discuss in those consultations may actually be somewhat narrower.

PN44

So if possible, yes, we'd really prefer as much of the consultations to be spent on dealing with issues that have arisen and sort of discussing with other parties to try and work out the best solution to issues that are in this aspect of the review. And apart from that, in terms of the desirability of additional hearings in December, we are happy to be guided by other parties, but as Mr Scott said and Mr Kemppi and Ms Minster, we are very much in the dark in terms of it really does depend on what we see in the submissions of other parties. Thank you very much, Deputy President.

PN45

THE DEPUTY PRESIDENT: Thank you, Mr Farrow. Mr Lowe?

PN46

MR LOWE: Nothing really further to add, Deputy President, other than to really echo Ms Minster's point and her summation of Mr Scott and Mr Kemppi's point. Thank you.

PN47

THE DEPUTY PRESIDENT: Thank you. Ms Benton?

PN48

MS BENTON: Same, if I can say. Yes, I support what Mr Kemppi has put forward in terms of a practical way forward.

PN49

THE DEPUTY PRESIDENT: Thank you.

PN50

Mr Scott, coming back in a loop to you, is there anything that you would like?

PN51

MR SCOTT: Thank you, Deputy President. I think the answer is not really, but I might just elaborate on that a little bit. My understanding from hearing the submissions of the other parties is that there seems to be a common view that there might be some progress that can be made during that first window between 11 and 22 December. Ultimately, it's a matter for the Commission as to precisely how those consultations are conducted. But at this stage, I wouldn't think that we would need everyone of those dates that your Honour has made available. And so the question might be is it one day, is it two, is it three perhaps?

PN52

And so my thinking at the moment would be that we might need more than one day, but I wouldn't think that we would need more than a few. But ultimately I'm in the hands of the Commission on that point. And then in relation to that second time window in late January, that might be the chunkier and more time-consuming process, because by then parties will have had the opportunity to really digest and consult in relation to all the other matters. It may well be efficient for parties to, as much as they wish to put reply materials in writing in advance of that 22 January period.

PN53

THE DEPUTY PRESIDENT: Yes.

PN54

MR SCOTT: And so I'd say perhaps we might need a larger number of days during that window. I did raise this in the email earlier in the week, but that week of 22 January, in my experience at least, I know the 26 January public holiday falls within that window and is a time period where quite a few people do take annual leave around, you know, any opportunity to extend the weekend into a four or five-day weekend.

PN55

So I just raise that as a practical matter. But I think I'd envisage that if parties are in a position to put reply materials, potentially in writing prior to that second window, there might be a much more productive consultation process thereafter.

PN56

THE DEPUTY PRESIDENT: Thank you. Would anybody else like the opportunity to raise anything in reply? Mr Kemppe, you had your hand raised.

PN57

MR KEMPE: Thank you, yes. Just on that matter of written replies, we would prefer there be a scenario in which essentially everyone replies or has the option at least to reply or nobody replies. There is a way we could probably get through this, just by virtue of the consultation alone and rely on our original submissions. But, of course, we are getting to that kind of arms rest type thing where one person wants to reply and then everybody feels like they need to reply and so on and so forth.

PN58

So perhaps it might be worth putting on another mention, just on that question of whether we are all going to reply or not in writing or rely on the second window of consultation prior to that second window.

PN59

THE DEPUTY PRESIDENT: All right. Has anybody got anything else they would like to say? That has been very helpful and I thank you all for the contribution. Having regard to what's been said, it's my preliminary view that there is some valuable time that can be spent in the first week of December, at least sharing any initial views about one's own material, in order to assist the Commission as well with understanding the position that you reach advance.

PN60

If may be consistent with the position that's been identified by Mr Scott that we don't need to list the matter for consultation over each of the days that have been nominated in December. So to that end, I will in a moment invite your views as to the preferred dates in December, identifying that Monday, 11 December has now become available in my calendar, if that is a desirable date for the parties.

PN61

With respect to the filing of reply submissions, it's my preliminary view that parties should not have the opportunity to file written reply material curtailed in this matter if they choose to put something in writing. I would really just endeavour to ensure that that written reply material is received prior to the commencement of the consultation process in January and it's a matter for the individual parties as to whether they would like to file any written responsive material or reserve their position for the consultation in January in order to raise their reply there.

PN62

The third matter that I would be interested in your view about concerns the conduct of those consultation processes and whether we are coming together in person here at the Melbourne office of the Commission, or whether there is a preference for the consultation to occur by way of Microsoft Teams.

PN63

Now, can I get an indication about that matter at the outset, just working through the group. Mr Scott, do you have a view?

PN64

MR SCOTT: So in relation to location, Deputy President, my view would be that Microsoft Teams can be an efficient way to conduct the consultations. With the exception of Mr Kemppe's slight glitch, which was very quickly resolved this morning, all of the parties seem to have been able to use it very effectively and so I think just in the modern world where, you know, lots of people are located in lots of different locations Teams would seem to be an efficient way to conduct the consultation.

PN65

I'm happy to address the issue of dates while I'm speaking, Deputy President, unless you want to go around and canvas everyone else's views about the issue of how we conduct the conferences?

PN66

THE DEPUTY PRESIDENT: I would like to just canvas the issue on how we conduct the conferences at first instance, thank, Mr Scott. Perhaps in the interest of brevity, if there is anybody that holds a view that in person consultation in December would be preferred would you like to indicate that to me now?

PN67

MS MINSTER: Deputy President, I do prefer it to be in person, but I realise I am the only one and I've probably lost that argument. I do think conversations are more productive when you come to the Commission, however, I am willing to concede that I am the only person who has said that.

PN68

THE DEPUTY PRESIDENT: If I can indicate, Ms Minster, that I share your view as to the utility of coming together in person and it may be that an initial approach would see the December conferences conducted by Microsoft Teams and given the views that seem to be shared amongst the group this morning that

January might be when we really get to the heart of addressing each other's submissions.

PN69

Then perhaps there might be some utility in at least initially listing those matters for in-person attendance where those persons can attend and perhaps we might adopt a hybrid approach if there are any particular individuals that would really like to attend but wouldn't be able to get here in person for the January listings. Would there be any general opposition to that course? Please indicate? I'm getting a lot of shaking 'no' heads. Thank you all for your indication

PN70

Now, with respect to dates, I might just work through each of you in relation to that matter. I've indicated to you that that Monday 11 December has become available in my diary, but the dates between Monday the 11th and Monday the 15th have been preserved for this purpose as too have the dates between 20 and 22 December.

PN71

Now, I acknowledge that there has been a general view that parties would like the opportunity to get across each others material as much as possible prior to the conference dates. But it's apparent from what we've discussed today that at least those initial discussions in December might be more focused upon presenting one's own position rather than having an obligation to address the other parties positions, which might tell against a need to push those December dates out as late as possible.

PN72

So to that end, inviting your view, Mr Scott, about the dates, I share your view that at least at this stage, I would propose listing the matter for consultation by Microsoft Teams over two days in December. In terms of dates, I welcome your view, Mr Scott.

PN73

MR SCOTT: Thank you, Deputy President. I'm available on the 20th and the 21st. Not available on Friday the 22nd. I think, Deputy President, you indicated that the 18th and the 19th haven't been made available, which is convenient for me, because there is another Full Bench matter that I am involved in on those days.

PN74

As for the first week, our availability is pretty good, but I hear what your Honour says about the fact that the more time that parties have to digest the other materials, potentially the better.

PN75

So generally available in the week of the 11th. I also have availability on the 20th and 21st, but not available on the 22nd, and I'm hoping and I suspect that maybe there are others who might also not be available on Friday the 22nd, given it's the last working day for most people before Christmas.

PN76

THE DEPUTY PRESIDENT: Thank you. Ms Byrne, would you like to express a view about the dates?

PN77

MS BYRNE: Yes. Thank you, Deputy President. We can echo Mr Scott's views there. Also available the 20th and 21st. Not on the 22nd and general availability the week of 11 December.

PN78

THE DEPUTY PRESIDENT: Thank you. Mr Kemppi?

PN79

MR KEMPPI: Equally not the 22nd for us, but otherwise we're fairly good.

PN80

THE DEPUTY PRESIDENT: Thank you. Ms Minster?

PN81

MS MINSTER: The 20th and 21 December are available. All week 11 to 15, except 14 December.

PN82

THE DEPUTY PRESIDENT: Thank you. Mr Townsend?

PN83

MR TOWNSEND: Your Honour, I don't really have a view. As expressed earlier, our participation may well be quite limited, so happy to go with whatever the Commission determines.

PN84

THE DEPUTY PRESIDENT: Thank you, Mr Townsend. Mr Farrow?

PN85

MR FARROW: Thank you very much, Deputy President. In the first week, our preference would be for the Wednesday and the Thursday, which I think is the 13th and 14th. If it is on other days in that first week, we will of course make arrangements to still participate. Those would be our preferred days. As to the second week, we are free. So any days in that second week work for us.

PN86

THE DEPUTY PRESIDENT: Thank you, Mr Farrow. Mr Lowe?

PN87

MR LOWE: Your Honour, all dates available for me, except it's a hard no on the 22nd and the 12th. Thank you.

PN88

THE DEPUTY PRESIDENT: Thank you. Ms Benton?

PN89

MS BENTON: Thank you. I already have the 11th and 12th in the calendar as per the timeline. Otherwise I can do all of those dates, except the 13th.

PN90

THE DEPUTY PRESIDENT: Thank you very much everyone. Is there anything else anyone would like to raise this morning before we adjourn?

PN91

MS BENTON: I'd like to say thank you for undertaking this work. It means a lot to a lot of people in the arts sector and we really appreciate this dedicated focus on it. Thank you.

PN92

THE DEPUTY PRESIDENT: I appreciate everybody's attendance at this morning's mention. I will take into account all the views that have been expressed today and my chambers will issue notices of listing as soon as possible. Thank you for your attendance. We will now adjourn.

ADJOURNED INDEFINITELY

[10.29 AM]