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SENIOR DEPUTY PRESIDENT WATSON

AM2011/39

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Application by Construction, Forestry, Mining and Energy Union (AM2011/39)
Building and Construction General On-site Award 2010

(ODN AM2008/15)
[MA000020 Print PR986361]]

Melbourne

TUESDAY, 11 OCTOBER 2011

PN1

THE SENIOR DEPUTY PRESIDENT: I've adopted my position (indistinct) matter AM2011/39. I'll take appearances again for the purpose of this matter. I'll just read those which I already have and those persons who weren't in the last matter can announce themselves. I've got Mr Maxwell from the CFMEU in Melbourne; Ms Matheson from the HIA in Sydney; Mr Smith of the AIG, with Mr Vaccaro, in Sydney; Mr Calver and Mr Thomas from the MBA; and Mr Kentish and Mr Noble from the CEPU and AMWU respectively. Who are the additional appearances?

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MR N. WARD: My name is Ward, initial N. I appear for Australian Business Industrial.

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you, Mr Ward.

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MS BLADES: Blades, initial C., on behalf of the Australian Federation of Employers and Industries.

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THE SENIOR DEPUTY PRESIDENT: Thank you very much for that.

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MR CALVER: Your Honour, sorry, if you wouldn't mind amending the appearances to just me in this instance. Mr Thomas is a witness in this matter.

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THE SENIOR DEPUTY PRESIDENT: Yes, okay.

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MR CALVER: Thank you.

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THE SENIOR DEPUTY PRESIDENT: We'll get to that if we need to. I propose to deal with the matter in three sections. I intend first to deal with the coverage issues - insertion of the new clause 4.11, deletion of "spray painter" from B.2.1(e) and the inclusion of other occupations in B.2.3(d). I'll then deal with the refractory bricklaying issue in 19.3(a)(ii), which seems to be generally agreed, the exception being AIG, I think, on the materials filed to date. Then I'll deal with the two issues in clause 23 together, the inclement weather provisions. So let's start with coverage. Mr Maxwell, what do you wish to say in relation to that?

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MR MAXWELL: Thank you, your Honour. Your Honour, in regard to coverage, I think there is a misunderstanding from a number of the employers in what we're seeking to achieve through these variations.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: During the termination of modernisable instrument proceedings the union identified that there are a number of classifications that had

previous award coverage, and there was uncertainty in regard to where that coverage was reflected in modern awards.

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I suppose to dispel what we would term the hysteria of the employers, we are not seeking to change - - -

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THE SENIOR DEPUTY PRESIDENT: That could be shared by one of the unions as well.

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MR MAXWELL: We are not seeking to make the Construction Award an occupational award that overrides any other modern award. All we are seeking to do is to make the Construction Award an occupational award for the occupations identified where no other industry award applies. That is all we're seeking to do by this application, and that's set out in the union's submission in paragraph 3.4.

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So, your Honour, the union has looked at the various modern awards that have been made by the AIRC that operate under Fair Work Australia, and we note that a number of these awards, which we can list if people want us to, don't have classifications that deal with building trades and building labourers or construction workers. Examples are the Banking, Finance and Insurance Award; the Corrections and Detention (Private Sector) Award; the Educational Services (Post Secondary Education) Award; the Firefighting Industry Award; the Food, Beverage and Tobacco Manufacturing Award; the Higher Education Industry, General Staff, Award; and so forth.

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So all we're seeking to do is - if those awards do not contain the classifications that we've identified, such as bricklayers, builders' labourers, construction workers or roof slaters and tilers, then rather than those employees either calling on the Miscellaneous Award or having no award coverage, we would seek that they be covered by the Building and Construction General On-site Award as a fall-back position.

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We note that perhaps the Construction Award may need further variations to reflect that scenario and we are mindful that clause 4.1(a) of the Joinery and Building Trades Award deals with the issue of the occupational coverage of awards, and that provides that if an employer is outside the scope of the award - is not covered -

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unless such employer employs an employee covered by -

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a clause in the award -

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and the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee.

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So it may be necessary to add that clause if this award is made an occupational award.

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I note that in the MBA submission, paragraph 4.18, they put forward a proposal which to some extent goes to the issue that the union is seeking to address. In paragraph 4.18 of the Master Builders' submission they suggest that the variation by the insertion of clause 4.11 should not be included. They consider that all that is required is the clarification of the coverage of modern awards for employees of mixed businesses. In particular, they say that they consider that the industry would benefit from tribunal guidance on:

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(a) whether an employee can be covered by two separate industry based awards.

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And:

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(b), if not, whether an employee who is not covered by the industry award applicable to their employer is able to be covered by another modern award which contains an appropriate classification without that second award specifically stating that it is an occupational award.

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Your Honour, we agree that that is the nub of the issue the union is trying to address. On our interpretation, there are two scenarios: one where you have an employer that works across industries and therefore they can be covered by a range of industry awards. The second scenario is where the employer only works in one industry but that industry award doesn't contain all the classifications that apply to their workforce. In that scenario, does it then - if you are to apply an award with occupational coverage or an award that applies the classification, does that other award have to have occupational status where it's (indistinct) We submit that it does, but if the tribunal is of the view that an award is not required to be made an occupational award and the award could then cover them, well, then we would be quite happy not to - there'd be no need for the variation.

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So that is the issue that we're trying to address by the initial part of the coverage application. The second part is to reflect in the classification structure - - -

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THE SENIOR DEPUTY PRESIDENT: Before you go to the second part, what information is there, if any, as to the existence of employees who might require the sort of variation you're seeking?

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MR MAXWELL: Your Honour, it's our understanding that - if we take the Banking and Financial Services Award, we're aware that there are occasions where some of the major banks, for example, may employ maintenance crew that does work on their buildings. Obviously that employee is not engaged in the

construction industry, they are engaged in the banking industry, and because all their employees do is work on those buildings of the employer - - -

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THE SENIOR DEPUTY PRESIDENT: Is it common these days for people to directly employ - - -

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MR MAXWELL: It is not that common but it still goes on. Obviously in terms of some of the building trades, such as the carpenters and painters, they're quite clearly covered by the Joinery and Building Trades Award, which has occupational coverage.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: However, we've identified there is no award with occupational coverage of bricklayers, of builders' labourers and also in regard to construction workers generally and roof slaters and tilers. To be honest, the likelihood of a bank employing roof slaters and tilers would be virtually zero. That may be one where it may not be necessary for the variation, but there would be circumstances where they would employ builders' labourers to assist carpenters and so forth.

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So we say it's important that those people have award coverage and are not left to the Miscellaneous Award or award-free.

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THE SENIOR DEPUTY PRESIDENT: Is the On-site Award an appropriate one? I mean, that's a very particular award.

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MR MAXWELL: Your Honour, it then comes down to, is a bank engaged in the construction industry, given that the On-site Award covers the industry of the employer, which I think is the point in the MBA's submission.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: We say it'd be a long bow to say that - once a bank has provided services to the construction industry in terms of mortgages and so forth, it would be hard to say that they're actually engaged in the construction industry unless they're financing a construction project. But if their employees are just doing minor maintenance to, you know, a bank bench or part of a bank building, well, then clearly it would be a long bow to say that they're engaged in the construction industry.

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THE SENIOR DEPUTY PRESIDENT: Yes, but a person engaged in ongoing maintenance - ongoing employment for a bank, the circumstances would be very different to a person working under the On-site Construction Award, would they not?

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MR MAXWELL: We recognise that, your Honour, but it's a question of, where is the award that has the best fit in terms of the occupation of the employee.

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THE SENIOR DEPUTY PRESIDENT: Yes, very well. You were going on, I think, to the next - - -

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MR MAXWELL: In regard to the second part, which then deals with the variations to the classification structure in schedule B of the award, essentially there what we are seeking to do is to - we know that there is a spray painter at CW 1 and we are suggesting that be deleted. An alternative proposition may be to say "spray painter", then in brackets "(non trade)" to differentiate between a spray painter that is not trade qualified and a spray painter that is trade qualified.

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What our application seeks to do in regard to sandblasters, spray painters and shot blaster is to give recognition to those employees in those occupations that are trade qualified, and that was the basis of the previous modernisable instrument that we've referred to in our submission, particularly the Industrial Spraypainting and Sandblasting Award.

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In regard to the artworker, the artworker classification was contained in a number of awards. That again is aligned to the painting trade, and we just seek to include that so that - - -

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THE SENIOR DEPUTY PRESIDENT: Sorry, it's aligned to what?

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MR MAXWELL: The artworker is aligned to the CW 3, which would be the painter, because they're trade qualified.

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THE SENIOR DEPUTY PRESIDENT: In the Artworkers Award?

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MR MAXWELL: In the Artworkers Award, they only have one - sorry, in the Artworkers Award from Western Australia there is only the one classification of artwork - - -

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: - - - but if you look at the definition within that award, the artworker is defined as:

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A person engaged in painting, applying paint or its substitutes or any preparation by any means, including, without limiting the generality of the foregoing, plastic relief work, paper hanging, decorating, graining, marbling, varnishing, enamelling, gilding, lacquering or spray painting.

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And (b):

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Whose work is primarily artistic in nature or purpose.

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That is taken from the Artworkers Award, which is found in AN160014, and that was identified in the union's correspondence to Harrison SDP dated 22 July 2011 in regard to the termination of the Artworkers Award proceedings.

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The other award I'll take you to in regard to the artworkers is the Building Employees Mixed Industries (State) Award, that's in AN120091. Within that award and the definitions the artworker comes under clause 4.2, which deals with painting trades, and 4.2.3 states:

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"Artworkers" shall mean a person other than an apprentice employed on the work of an artworker grade 1, artworker grade 2 and base painter as defined and shall include such a worker on construction work.

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It then has a definition of base painter art, an artworker grade 2 and an artworker grade 1:

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"Artworker grade 1" shall mean an employee engaged whether by painting or the application of other materials to complete finishing applications to exhibitions or to original artistic works or artistic works of imitation and design on buildings and other structures. Such persons shall have no less than four years' experience with applications and preparations of paints and assorted products and materials.

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THE SENIOR DEPUTY PRESIDENT: Sorry, that's from?

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MR MAXWELL: This is from the Building Employees Mixed Industries (State) Award, which is AN120091.

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THE SENIOR DEPUTY PRESIDENT: Which state?

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MR MAXWELL: Your Honour, I believe it's either New South Wales or Queensland. I'm not sure. I can check on that. Sorry, your Honour, I'd say it's New South Wales, because clause 4.1.5 of the definitions refers to the laws and regulations of New South Wales.

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THE SENIOR DEPUTY PRESIDENT: Yes. What's happened to that award in the termination process?

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MR MAXWELL: Your Honour, for some reason not all of the awards were listed for termination, and that was one that was not listed for termination.

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THE SENIOR DEPUTY PRESIDENT: I see.

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MR MAXWELL: We've noted that there are a number of awards from New South Wales and Queensland that have not been listed for termination proceedings, so we're not sure what's happening with those.

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THE SENIOR DEPUTY PRESIDENT: Yes, very well. The artworker in - at least from the Artworkers Award appears to be a primarily artistic person - - -

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MR MAXWELL: That's correct, your Honour.

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THE SENIOR DEPUTY PRESIDENT: - - - who might be self-taught.

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MR MAXWELL: Given the definitions in the award, there is an expectation that that person would be a trade-qualified painter, who'd then go along to do artistic work.

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THE SENIOR DEPUTY PRESIDENT: Wouldn't they be covered by a painter in that case; a classification as a painter?

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MR MAXWELL: Your Honour, we say we would, and perhaps another alternative is to - where the painter is identified in the broadbanded classifications under CW 3, is to then put in brackets "(including trade-qualified spray painters, sandblasters, artworkers)" and identify it that way.

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THE SENIOR DEPUTY PRESIDENT: Are we talking about a Pro Hart or are we talking about - - -

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MR MAXWELL: I don't think we're talking about a Pro Hart, your Honour, although some of these people may turn out to be Pro Harts further down the track. We're talking about someone who maybe does a mural on the side of a building and that type of scenario. Your Honour, I suppose alternatively - - -

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THE SENIOR DEPUTY PRESIDENT: They're usually commissioned works, though, are they not? Rather than persons being employed as such, they're commissioned to provide a mural.

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MR MAXWELL: Some of them are but there may others that are engaged through the painter that's employed to do the whole painting of the building. It would depend on the intricacy of the artwork being performed.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: Your Honour, the other alternative that we see in regard to reflecting this coverage is by, I suppose, a decision of the tribunal to say that the tribunal believes that this work falls within the definition of "painter" under the Construction Award and then no variation is necessary. That may be (indistinct) way of dealing with it, but all we're seeking to do is to ensure that there is ongoing award coverage of these classifications.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR MAXWELL: I should point out that, if it is an issue between the parties about whether spray painting and sandblasting is undertaken on construction sites, I can perhaps address that at a later date.

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THE SENIOR DEPUTY PRESIDENT: Yes, very well.

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MR MAXWELL: Your Honour, I think that deals with the proposal in regard to the issue of coverage and the - sorry, the only one I've not mentioned of the change in the occupations to schedule B is roof slater. We believe that that's really an omission from the award, in that you already have a roof tiler and a roof fixer in CW 3, and that's appropriately where the roof slater should be as well.

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THE SENIOR DEPUTY PRESIDENT: Yes, very well. Thank you for that. I might proceed on the coverage issue in order of date of receipt of submissions. I'll go to Mr Calver next.

PN85

MR CALVER: Thank you, your Honour. Basically we say that there are a number of defects in the CFMEU's application. The first of these is, there's somewhat of an attenuation between the termination of modernisable instruments proceedings and the arguments that they make in support here. How those proceedings give rise to the points that they now seek to make is not palpable from either their applications or the remarks of Mr Maxwell this morning, and that leads, we say, to the disparity between their intention as articulated by Mr Maxwell this morning and the intent, effect that their application would have.

PN86

Our written submissions are comprehensive, and we rely on them in that regard, but I'll just refer the commission to the disparity between intention and effect that would be brought about by the changes brought to clause 4.11(d) of the On-site Award. This would insert into the On-site Award B and C (indistinct) for builders' labourers and construction workers. That would mean that this had a very broad sweep. It would mean that those who operated as builders' labourers or construction workers in other sectors would be caught in the modern On-site Award, and this is certainly going well beyond any - and we say, misrelated -

connection between the termination of modernisable instruments and maintaining award coverage.

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This, in effect, would expand the scope of the On-site Award into realms that aren't properly charted by the CFMEU and which have caused alarm bells not only in other employers and the Master Builders but other unions as to the effect of that particular variation.

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So it's clear that there is a disparity between the intention and the effect, and on that basis, because the broad sweep of this application is to create the On-site Award as an occupation based award, we believe that the evidential burden that the CFMEU would be required to make to satisfy a change of that magnitude fails and fails miserably.

PN89

4.18 of the Master Builders' submission which was referred to by the CFMEU was our attempt to indicate the sorts of issues that are at large and may well stand to be considered by any reviewer of modern awards in the future but that we were urging an interpretation on the tribunal when it is quite possible for an employer to be covered by two separate industry based awards. We're urging that interpretation based upon the tribunal adopting - if not today, then in the context of the modern awards review, where these matters are far more appropriate to be discussed at length - the primary purpose test.

PN90

Footnote 19 on page 5 to page 6 of our written submission traces in some details the use of that test by the prior tribunal and by this tribunal, including by Gooley C in a decision, National Union of Workers v Bidvest (Victoria) Pty Ltd, as a means of dealing with some of the ways in which the clash of coverage between modern awards could be dealt with and has been described as dealt with.

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So that employers will find themselves administering multiple awards if they have a mixed business and where the employee performs multiple tasks (indistinct) classifications, regard should be had to the primary purpose of the employee's role.

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Maintenance has always been an issue but, as your Honour pointed out, it would be unlikely that, if someone is employed in full-time maintenance by a bank or other employer, they would be dealing with the On-site Award. The Joinery Award would be the most likely to deal with that matter. However, the evidence of the sort of occupation that would require the extent of coverage to include all workers as builders' labourers or construction workers to be covered by the coverage clause of this award has certainly not been made out.

PN93

What we are in effect asking the CFMEU to do is to give further evidence that there is a gap to be filled of the kind that we mention in point (b) of clause 4.18. There is insufficient evidence before the tribunal that there are employees not covered by an industry award applicable to their employer, not covered by another

award, without an appropriate classification. There's just no evidence before the tribunal in relation to that.

PN94

Moving onto the second part of the argument about coverage, again our written submissions are comprehensive in this regard, your Honour, and therefore my oral submissions today will be short. There is certainly no evidence that those persons who would otherwise be covered by the occupation (indistinct) inserted, particularly an artworker, are first of all required to be articulated as such or, secondly, that they belong as trades categories. I draw the tribunal's attention in particular to paragraphs 4.27 to 4.29 of our written submission, where we say that the occupations as they've been articulated do not translate into CW 3s.

PN95

In paragraph 4.9 of its written submission the CFMEU says that adding these occupations to CW 3 would "remove uncertainty as to appropriate award coverage". We say there's no uncertainty as to the appropriate award coverage at the moment and that the CFMEU hasn't demonstrated the element of uncertainty. That applies particularly to tuck pointers, who are merely - that which is merely one form of worker, a bricklayer, and would be covered by the bricklayer's description. Spray painters are covered by "painting" and artworkers would be a type of paintworker, unless it was a commission.

PN96

We think that adding merely the occupation "artworker" in (indistinct) would in fact do the reverse of what the CFMEU seeks. It would add an element of uncertainty that currently does not exist. What is paintwork primarily artistic in nature and purpose under the On-site Award? Those sorts of artistic works, as you say, your Honour, are mostly commissioned these days and would clearly be painting but certainly would not be paid at award rates.

PN97

There is no element of satisfaction of the notion that the people who are primarily artistic in nature or purpose would be trade qualified and quite frequently these people might have a bachelor of fine arts or might, as you indicated, your Honour, be self-taught. There is no indication whatsoever that they should be proposed at trade rate.

PN98

We think that the CFMEU may well have had noble intentions when it sought to protect those who were the subject of termination of modernisable instruments. However, I go back to my initial point that there is a huge disparity between that intention and the effect of this application, which would be extreme.

PN99

We say that, in regard to the relevance of the termination of modernisable instruments proceedings, the CFMEU haven't indicated sufficiently the extent to which they are relevant; haven't sufficiently identified gaps which are to be filled here; and the intent of their application would be to expand coverage of the On-site Award to an unacceptable degree.

PN100

Master Builders, as I indicated in my submission, has written a comprehensive submission on all of these matters and we rely in the main on that written submission, if it pleases the tribunal.

PN101

THE SENIOR DEPUTY PRESIDENT: Mr Calver, how is a spray painter dealt with - identified in CW 1 as one of the broadbanded award classifications, whereas, as is indicated, the painter is identified in level 3. Presumably this reflects some historic broadbanding and the spray painter and the painter were separate creatures in some sense. Do you have any knowledge about that?

PN102

MR CALVER: I don't think that spray painting is sui generis. It's not unique as a category. There are different types of spray painting, and spray painting can be done at level CW 1 or CW 3 if they were trade qualified and that work was required. But certainly there is no indication from the CFMEU other than an assertion that by moving spray painters from CW 1 to CW 3 "trade level spray painters will be paid at the correct rate". That's from paragraph 4.8 of their submission. Their submission in that regard remains unsubstantiated and therefore cannot be relied upon, your Honour.

PN103

THE SENIOR DEPUTY PRESIDENT: So your view is, a trade-qualified spray painter would fall within the "painter" classification within level 3?

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MR CALVER: That's right, your Honour, and there are also different types of spray painting work that are undertaken.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR CALVER: So that, as I said (indistinct) category is sui generis. It's not unique in the sense of being separated from other applications of paint.

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THE SENIOR DEPUTY PRESIDENT: Yes, very well. Thank you for that. I think next on the list was you, Mr Kentish.

PN108

MR KENTISH: Thank you, your Honour. Your Honour, the CEPU also relies on written submissions. Orally, very briefly, our - from a very practical concern or issue, we say that the occupations which are proposed to become occupational under the proposal by Mr Maxwell are too broad. In particular, we have concerns in relation to the construction worker and potentially the builder's labourer. Our main concern, which probably won't surprise the tribunal, is with the electrical and electrotechnology workers (indistinct) trades and trades assistants.

PN109

We say that the CFMEU hasn't identified a sufficient gap in award coverage. We say that generally these types of workers are covered by other awards and we agree that no evidence or insufficient evidence has been brought that the type of workers that we're concerned about are actually out there and are actually

award-free. We're also concerned that the modernisable instruments which are referred to by the CFMEU don't appear to have included electrical workers or workers who assist the electrical workers.

PN110

We have put a proposal to the CFMEU in an exploratory way to see whether our concerns can be carved out, and we'd like to talk about that further. But as it stands, our (indistinct) is that we would be opposed to the application as it's currently worded, if it pleases.

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THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Kentish. Ms Matheson.

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MS MATHESON: Thank you, your Honour. We also wish to rely on written submissions today and speak to those submissions briefly. Initially the award coverage, paragraphs 22 to 29 of our submission, are of particular relevance. We also support the submissions made by Mr Calver today. We note that this is an application made under section 160 of the Act (indistinct) Fair Work Australia may make a determination to remove ambiguity, uncertainty or to correct an error.

PN113

We oppose the proposed variations relating to coverage on the basis that the amendments sought do not in fact amount to an attempt to correct an error or to remove ambiguity or uncertainty. Rather, the variations proposed seek to fundamentally change the nature of the award from an industry based award to an occupational award in respect to the identified occupations.

PN114

The applicant hasn't made out an arguable case for more than one contention in relation to the provisions relevant to this application, and the existing provisions (indistinct) their application. The new provisions sought by the applicant raise additional matters unrelated to any error, ambiguity or uncertainty. Indeed, the variations sought have the capacity to create confusion and uncertainty.

PN115

I'll refer to paragraphs 22 to 29, as I mentioned. Although the applicant has identified (indistinct) paragraphs (indistinct) that the effect of the variation (indistinct) of the award from an industry award to an occupational award would be limited, it would raise a question of necessity in relation to that aspect of the application. For those who may be affected, extending coverage of the award to non-building businesses may impose possibly complex, unnecessary regulations on those employers.

PN116

As we noted, your Honour, building awards are unique in nature, with specific arrangements surrounding things like rostering, redundancy, penalties and loadings that are not typical of other industries.

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THE SENIOR DEPUTY PRESIDENT: Indeed, the daily hire arrangements - it's fairly unique.

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MS MATHESON: Yes, that's correct.

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THE SENIOR DEPUTY PRESIDENT: Well, they're not quite unique but they're fairly unusual.

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MS MATHESON: Yes, and certainly not for the sort of industry such as banking, which has been identified by the applicant today (indistinct) the capacity to be affected by this application.

PN121

So in this regard I do refer your Honour to paragraph 28 of our submission (indistinct) to the award modernisation (indistinct) primary intention for the award to be industry based and some consideration of whether or not occupational coverage was appropriate. We submit today that occupational coverage is not appropriate in the context of those industries that have been identified by the applicant today. As I say, banking was used as an example and has marked differences from the construction industry.

PN122

We also note that the commission was to have regard to the desirability of minimising the number of awards that may apply to a particular employer, and the variation - changing the award from an industry award to an occupational award would certainly be contrary to (indistinct) the request, if it pleases the tribunal.

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Mr Smith.

PN124

MR SMITH: Yes, thank you, your Honour. We very strongly oppose the application. As your Honour would be well aware, there was a very vigorously contested issue during the development of this award to determine whether or not it would remain an on-site award or whether it would intrude into off-site areas. What came out of that was what we see as the central principle around the coverage of this award, and that is that it's an on-site award and off-site aspects of what the CFMEU was arguing was the construction industry, which we dispute.

PN125

The two awards that cover the off-site work were the Manufacturing Award and the Joinery and Building Trades Award, both of which have occupational characteristics. So we see this as disturbing that central principle.

PN126

In terms of the definition or lack thereof, as has been identified by others, the term "construction worker" is extremely broad, as is potentially the term "builder's labourer". As we're aware, this flows out of the termination of modernisable instruments proceedings, but the CFMEU has not identified one employee that has supposedly been left out of award coverage by the potential cancellation of those other awards.

PN127

Even if there was such a person - and we're not convinced that there is any tangible person - there are plenty of examples of the tribunal not creating national

award coverage for categories of workers that were only covered under a pre-modern award in one or a few states. There are many examples of that. Just because there was a category 1 in a state or territory award doesn't mean that there's merit to cover that category across the board.

PN128

Moving on to that issue of the specific classifications, as has been discussed, the issue of the spray painter is a very broad term. There's a lot of spray painting carried out by semi-skilled people and, if the definition was to only refer to spray painting in the trade level, an argument would undoubtedly be run by the CFMEU and others that that is then deemed to be a trade type of work. It's the same with sandblasting and shot blasting. Obviously those functions are carried out on metal products. In our experience, they're mainly carried out by semi-skilled people, not tradespeople. So to only refer to sandblasting and shot blasting in CW 3 would be potentially argued as deeming those types of mainly semi-skilled functions as trades work.

PN129

Mr Maxwell said it was intended to give recognition to the fact that there are tradespeople doing this type of work, and we don't dispute the fact that of course there are trades painters, but they're already covered by CW 3, whether they be doing spray painting or brush painting, and of course painters will do both types of painting if they are trade painters doing a wide variety of tasks, which they would typically do.

PN130

The issue of artwork - that same classification (indistinct) Graphic Arts Award, and of course we're talking about painting, but there's nothing that talks about paint, and it's the same with sign-writing, which is of course a classification under the Joinery Award. These days most artwork and most sign-writing is not done with paint, it's done with graphics, and therefore putting this undefined classification of "artwork" in this award would create all sorts of issues with not only potentially the Graphic Arts Award but numerous other awards where certain types of artwork are carried out.

PN131

For all of those reasons we do strongly oppose these aspects of the application, if it pleases the tribunal.

PN132

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Smith. Australian Business, Mr Ward.

PN133

MR WARD: Thank you, your Honour. We rely on our written submissions in this matter. If I can just deal with one matter that came from Mr Maxwell, he said in his opening submissions that he doesn't seek to - I think the word he used was "override" any other award.

PN134

While it might not - it's subject to debate - the application - the variations sought override any other award, it certainly brings the On-site Award into potential conflict with other awards, which would necessitate a debate about award

coverage. The area of industry we advance to the tribunal in regard to that are industries that operate around or supply materials into the construction industry, in particular the premix concrete and the asphalt industry that operate under separate and distinct industry awards.

PN135

The use of the term "construction worker" in the application is sufficiently broad, on any reasonable reading, to bring it into conflict with persons involved in concrete (indistinct) plants and laying of bitumen and asphalt, spray seal and as far as those persons actually driving concrete agitator vehicles for the delivery of pre-mix concrete.

PN136

In our submission, it is, firstly, highly undesirable to vary this award to give rise to that potential conflict but more than that, as indicated in our written submissions, your Honour, in our view it actually offends the modern award objective itself.

PN137

We would urge the tribunal to tread on a very cautious path, with respect, in relation to this application. It is not as simple as Mr Maxwell expresses it to be. There is considerably more at stake in relation to this application and the relationship between a vast variety of awards which the tribunal considered with some care when establishing the modern awards to operate from 1 January 2010.

PN138

We say no more than that today and we rely on our written submissions in this matter, your Honour.

PN139

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Ward. Ms Blades.

PN140

MS BLADES: Thank you, your Honour. We rely upon our written submission. We do apologise for the lateness of it, being filed yesterday. We support the submissions made today by the other employer groups in relation to variations (indistinct) currently discussing.

PN141

I'll only state further that we do not believe that the case has been made out by the CFMEU to make a variation under section 160 of the Act. We also wish to (indistinct) variation 1 that we are very concerned about the suggestion that the On-site Award - and it's always (indistinct) On-site Award - being (indistinct) into an occupational award. We have grave concerns as to that, because we're concerned that employees who would have been under - such as the Mixed Enterprise Award, would then be caught under an on-site award, which is quite different in nature. Certainly the impact on employers could be significant.

PN142

In terms of variations 5 and 6, we agree with the other employee groups, referring to the lack of evidence as to why these should be added in at this particular point, and certainly as to which particular level they should be inserted at. There's just no evidence to support the variation put forward by the CFMEU. For these reasons, we oppose the application.

PN143

THE SENIOR DEPUTY PRESIDENT: Very well. Thank you. I think that leaves you, Mr Noble. Do you have anything on this issue - the coverage issue?

PN144

MR NOBLE: Your Honour, all the concerns that we have have been articulated by one party or another. I think they've been covered off quite adequately.

PN145

THE SENIOR DEPUTY PRESIDENT: Yes, but - - -

PN146

MR NOBLE: We don't have anything further to add, your Honour.

PN147

THE SENIOR DEPUTY PRESIDENT: Okay. Thank you. I think I'll go now to the next issue, which was the refractory bricklayer in 19(3)(a)(ii). Mr Maxwell?

PN148

MR MAXWELL: Thank you, your Honour. Your Honour, perhaps, after having dealt with the hysteria, I now should deal with the historical, and that I think is in regard to the submission of the AIG that the inclusion of the - that the refractory bricklayers' boots allowance was not an error. I think, if you took a literal interpretation of what they're saying applies, then the hourly rate for a refractory bricklayer would increase by some $70 an hour.

PN149

My understanding is that all the parties, apart from the AIG, agree that it was an error to refer to the bricklaying allowance and not to the refractory bricklaying - sorry, the refractory allowance which deals with the disabilities faced by employees engaged in refractory work. We submit that this is an error and, given the overwhelming support, apart from the AIG, it is appropriate to vary the award.

PN150

THE SENIOR DEPUTY PRESIDENT: Thank you. I'll leave AIG till last. Is there anyone else who wishes to say anything beyond what's in the written submission? Feel free to do so, if you wish.

PN151

MR CALVER: Your Honour - - -

PN152

THE SENIOR DEPUTY PRESIDENT: Mr Calver.

PN153

MR CALVER: - - - Master Builders just would like to emphasise that we believe that this correction is in the true spirit of section 160 and (indistinct) contrast it with its use in other contexts in this application. We think in this context, subject to what my friends from AIG might say, that this is the appropriate use of section 160 and that by contrasting the appropriate use in this context with its intended use in the other context, we believe the true intent of section 160 can be simplified, if it please the tribunal.

PN154

THE SENIOR DEPUTY PRESIDENT: Yes, very well. Anyone else, before I go to Mr Smith, who wants to embellish their written submission? No? Mr Smith.

PN155

MR SMITH: Yes, thank you, your Honour. The nub of the issue from our point of view is the point that Mr Calver has made. We are very keen to avoid section 160 being used other than in entirely appropriate circumstances and we accept that we have not had a lot of involvement in the various proceedings relating to this particular allowance, but looking through the various decisions, we were not convinced that there necessarily was an error.

PN156

In our written submissions what we were seeking to do was to say to the tribunal really we believe this is an issue appropriately determined by the tribunal. If your Honour is convinced that there was an error, appropriately applying the test in 160, then the award should be made. But if you're not convinced, then it shouldn't be, and that's where we would like to leave the issue, if the tribunal pleases.

PN157

THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Thank you for that. Nothing further? All right. Let's move on to the inclement weather issue. I (indistinct) as to whether evidence should be admitted from Mr Thomas. The witness statement of Mr Thomas really, in a factual sense, only goes to his dealing with inquiries and, on his evidence, the absence of any disputes in relation to this provision. Otherwise, it sets out some understanding of Health and Safety Act arrangements and the expression of a view as to the undesirability of imposing time limits at odds with the requirements of the Health and Safety Act. Is that all you intended to get out of the evidence, Mr Calver?

PN158

MR CALVER: Your Honour, can I say that the reason that we sought and seek to adduce evidence from Mr Thomas - that perhaps, because I'm going to tender this evidence, I should seek to have him excluded so that it does not in any way (indistinct) sake of an excess of caution. So I might just ask the witness to leave the room while I explain the purpose of his evidence. I think that might be appropriate, your Honour - - -

PN159

THE SENIOR DEPUTY PRESIDENT: Yes.

PN160

MR CALVER: - - - if you don't mind.

PN161

THE SENIOR DEPUTY PRESIDENT: Mr Thomas can leave. Perhaps shut the door on your way out, Mr Thomas.

PN162

MR CALVER: Thank you. I'd hate to be seen to impugn any statement that he might make, your Honour. Thank you. That's from an excess of caution.

PN163

As Master Builders articulates in paragraphs 5.1 to 3 of our written submission, the test that this tribunal has brought to bear in the context of introducing substantial changes to the award following its settlement was articulated in the award modernisation statement of 2009 AIRC FB at 645, particularly at paragraphs 1 to 3.

PN164

To be satisfied that the terms of a modern award should be considered upon their merits, the test is:

PN165

The commission would be unlikely to alter substantive award terms so recently made after a comprehensive review unless -

PN166

and I quote again:

PN167

A significant change in circumstances would be required.

PN168

In other words, the applicant is under an onus to demonstrate a significant change in circumstances since the making of the modern award. We say that Mr Thomas's evidence goes to the reverse of that. In other words, his evidence shows that there hasn't been a significant change in circumstances since the introduction of this provision.

PN169

In fact, the number of inquiries that he has and the normal practice under the award provision, from someone who deals with a multitude of inquiries about matters of the award and other industrial relations matters, hasn't been affected by any change. That would underline, we say, the onus on the applicant and it would be material which substantiates the Master Builders' submission that there has not been a significant change.

PN170

If the tribunal does not believe that that evidence is necessary, given the onus on the applicant, we would be happy not for Mr Thomas's evidence to be affirmed in the manner we propose. However, what we would suggest is that we ask him to affirm his witness statement, given the disparity (indistinct) if Mr Maxwell has any cross-examination, that could be postponed to another day or the tribunal might (indistinct)

PN171

THE SENIOR DEPUTY PRESIDENT: I don't think we need to do that. Really what I was getting at - I think you've confirmed my view that Mr Thomas's statement really has limited effect, going to his experience in fielding queries from your members, and his proposition is that only about 5 per cent of inquiries relate to clause 23 and he's unaware of any disputes in its operation. I'm not sure whether Mr Maxwell - and I'll ask any other parties, obviously - wants to or is capable of contesting those propositions, unless you're aware of persons who've raised disputes with Mr Thomas about the clause.

PN172

MR MAXWELL: Your Honour, we didn't intend cross-examining Mr Thomas in regard to those issues. The issue that we want to address is the provisions that we seek to change, the provisions in pre-existing awards - - -

PN173

THE SENIOR DEPUTY PRESIDENT: Yes.

PN174

MR MAXWELL: - - - and that there is an error in the making of a modern award that didn't reflect those existing provisions. That is the only issue we wish to deal with in regard to this part of the application.

PN175

THE SENIOR DEPUTY PRESIDENT: Do you have any difficulty in accepting Mr Thomas's statement as his evidence? You don't need to cross-examine?

PN176

MR MAXWELL: Your Honour, perhaps the paragraph that I have greatest difficulty with in Mr Thomas's statement is paragraph 11.

PN177

THE SENIOR DEPUTY PRESIDENT: Paragraph 11? That's his interpretation of the clause.

PN178

MR MAXWELL: That's correct.

PN179

THE SENIOR DEPUTY PRESIDENT: It's not a factual statement necessarily.

PN180

MR MAXWELL: No, it's not, your Honour, but it's - I mean, the issue, if we did seek to cross-examine him, was the extent to which the existing clause covers the scenario that I will elaborate on once we finish this issue.

PN181

THE SENIOR DEPUTY PRESIDENT: That's a matter for submission, by reference to the provisions. Isn't that right, Mr Calver? Whether or not Mr Thomas has a particular view about it doesn't assist me.

PN182

MR CALVER: Your Honour, as I say, the evidence goes to the reverse of what we believe - - -

PN183

THE SENIOR DEPUTY PRESIDENT: Yes.

PN184

MR CALVER: - - - would be adduced by the CFMEU, and that is a significant change. Mr Thomas's (indistinct) of industrial inquiries (indistinct) - - -

PN185

THE SENIOR DEPUTY PRESIDENT: Yes, okay.

PN186

MR CALVER: - - - significant change.

PN187

THE SENIOR DEPUTY PRESIDENT: I think Mr Maxwell is saying he doesn't have any difficulty with that evidence - relying on it (indistinct) basis. I can't imagine - unless Mr Maxwell is aware of a member of MBA in New South Wales raising a dispute with him, then he wouldn't be able to challenge those propositions anyway.

PN188

So what I'd propose, unless there's some objection from someone else or Mr Calver or Mr Maxwell, is to admit the statement of Mr Thomas and mark it MBA1 and accept that as evidence without cross-examination, to the extent it deals with relevant matters.

EXHIBIT #MBA1 STATEMENT OF MR THOMAS

PN189

THE SENIOR DEPUTY PRESIDENT: As for the issue of clause 11, that reflects a summary of the clause by Mr Thomas. Obviously I'll hear submissions from you, Mr Calver, and anyone else - and Mr Maxwell - as to what the clause does and doesn't cover and what it should and shouldn't cover and why it should be varied, having regard to the terms of the Act. So we can have Mr Thomas back. We don't need to formally swear him. I'll accept his evidence uncontested.

PN190

MR CALVER: Thank you, your Honour. I ask that Mr Thomas be excused in that regard then, with the permission of the tribunal.

PN191

THE SENIOR DEPUTY PRESIDENT: Well, he is, but he obviously is going to remain with you because of his interest and fascination in these proceedings.

PN192

MR CALVER: I'm afraid he has another appointment.

PN193

THE SENIOR DEPUTY PRESIDENT: Well, he can attend to that. He can attend to that. Okay. Mr Maxwell, we'll go to your submissions.

PN194

MR MAXWELL: Thank you, your Honour. Your Honour, this part of the application seeks to address what we say was an error in the making of the award. In our submission we've dealt with the issue of the award modernisation proceedings and identified that, when the exposure draft of the award was released, the exposure draft contained two clauses - - -

PN195

THE SENIOR DEPUTY PRESIDENT: Yes.

PN196

MR MAXWELL: - - - one for building and construction and one for civil construction, which reflected the existing clauses in the predecessor awards. I note that in the MBA submission, in attachment A, they set out the provisions of both the MBCIA and the Australian Workers Union Construction and Maintenance Award 2002 and the Building and Construction General On-site Award 2010.

PN197

The first issue we raise is the provision in regard to consultation, which is in 23.3 of the existing award. The award refers to a time period which does not exceed 60 minutes. It is clear from the MBCIA provision in 21.51 that the time period was 30 minutes. No party made any submissions in regard to the actual time period to apply in the modern award. The only submission that we had was from the MBA that there was a requirement to remove what they saw as unnecessary proscription. Clearly the tribunal has recognised it was appropriate to include a time limit, and we say that the inclusion of 60 minutes rather 30 minutes was an error, and that is the basis of our submission in regard to that time period.

PN198

The second matter, which deals with safety, is slightly more complicated, and this emerged because of the way in which the clause, I suppose, was rewritten by the tribunal. The tribunal had sought to, I suppose, pick up Mr Calver's suggestion of removing unnecessary proscription, but unfortunately in doing so it removed what we see as an important provision that existed in the previous awards.

PN199

Your Honour, we understand and we accept that the tribunal determined that where time is lost due to the incidence of inclement weather, then the 32-hour time period applies. In other words, if it is raining and work stops, then the 32-hour time period in a four-week period applies. However, what the previous MBCIA stated - if I can take you to clause 21.10, this dealt with the issue of the cessation and resumption of work. So 21.10.1 of the old MBCIA said:

PN200

At the time employees cease work due to inclement weather the employer or the employer's representative on site and the employees' representative shall agree and note the time of cessation of work.

PN201

That provision is reflected in clause 23.4 of the modern award, which states:

PN202

The time of the cessation of work due to inclement weather and the resumption of work after a period of inclement weather has ended will be recorded by the employer.

PN203

If I take you back to clause 21.10 of the MBCIA, 21.10.1 dealt with the time when employees ceased work. Clause 21.10.2 dealt with the - - -

PN204

MR CALVER: Your Honour, we can't hear a thing.

PN205

MR MAXWELL: Is that better?

PN206

THE SENIOR DEPUTY PRESIDENT: No?

PN207

MR CALVER: We were completely - everything that Mr Maxwell said was completely obfuscated by a very high element of static, which is why we were pursing our lips, not because of what he was saying.

PN208

THE SENIOR DEPUTY PRESIDENT: It was all very compelling, Mr Calver, I can tell you that. Okay. Are you hearing me?

PN209

MR CALVER: The static has now been removed, your Honour.

PN210

THE SENIOR DEPUTY PRESIDENT: Okay. Perhaps we should start again.

PN211

MR MAXWELL: In regard to the issue of the time period, we say that it is clear that the tribunal recognised that it was appropriate to include a time period in which the consultation should occur and that it was not appropriate to remove such a provision. However, when the award was made, it included a time period of 60 minutes whereas the old award included a time limit of 30 minutes. We say that was an error in the making of the award.

PN212

I took his Honour through the history of the discussion of inclement weather during the award modernisation proceedings; that when the tribunal released the exposure draft of the award, there were two inclement weather clauses, one for the building and construction sector and one for the civil construction sector.

PN213

The MBA suggested that - whilst the MBA opposed the inclusion of an inclement weather clause, they suggested that, if the tribunal was to keep one, it should remove unnecessary proscription. The tribunal then determined that there'd be one clause for the whole of the industry.

PN214

We say that, if the tribunal was including a time period, then it should have been the 30 minutes that was contained in the old MBCIA and not the 60 minutes in the modern award.

PN215

In regard to the second matter, which deals with the safety, I was explaining to his Honour that this matter needs to be looked at in the context of the old award and arises because of the attempt to rewrite the award, which has had the effect of removing a provision that applied.

PN216

If I can take the parties to clause 21.10 of the MBCIA, which is contained in attachment A to the MBA's submission, the MBA's submission sets out the inclement weather clauses from the old MBCIA, the clause from the Australian Workers Union Construction and Maintenance Award 2002 and the Building and Construction General On-site Award 2010, the modern award.

PN217

In regard to 21.10 of the old MBCIA, 21.10.1 dealt with the time the employees ceased work due to inclement weather and that the parties "shall agree and note the time of cessation of work". That provision is reflected in clause 23.4 of the modern award, which states:

PN218

The time of the cessation of work due to inclement weather and the resumption of work after a period of inclement weather has ended will be recorded by the employer.

PN219

Clause 21.10.2 of the old MBCIA provided that:

PN220

After the period of inclement weather has clearly ended the employees shall resume work and the time shall be similarly agreed and noted.

PN221

Again that is reflected in part by clause 23.4. The provision from the MBCIA that has not been included in the modern award is 21.10.3 of the MBCIA, which is headed Safety. That provides:

PN222

Where an employee is prevented from working at the employee's particular function as a result of unsafe conditions caused by inclement weather, the employee may be transferred to other work in the employee's classification on site until the unsafe conditions are rectified. Where such alternative work is not available and until the unsafe conditions are rectified, the employee shall remain on site. The employee shall be paid for such time without reduction of the employee's inclement weather entitlement.

PN223

The importance of that provision is that that deals with the time period after the inclement weather has ceased. To put it in, I suppose, more practical terms, if you have a situation where it is raining, the employees and the employer agree that it is raining and the inclement weather provisions of the award apply. The time that work ceases is recorded. The rain then stops, so the inclement weather has ceased. That time is then recorded.

PN224

But you then have a situation where, for example, if it has been raining and a part of the site is flooded, which then makes it unsafe for employees to work in that flooded area - then clause 21.10.3 picks up that situation and says in such a situation, if they are prevented from working due to the unsafe conditions caused by the inclement weather, then the employees remain on site, they are paid for that time, but it does not come out of their 32-hour inclement weather entitlement. This is that specific provision that we are seeking to be reinserted into the award, which we say was omitted by way of error.

PN225

I know that we had the statement from Mr Thomas about him being unaware of any disputes in regard to this issue. Well, I can inform the tribunal that there have been many disputes in Queensland in regard to the recent situation of the floods,

where a number of building sites were flooded. Workers were prevented from working but they remained on site. They were paid, but that time period was limited to the first two hours that applied under the inclement weather provision.

PN226

Your Honour, the union recognises that the tribunal determined that the 32 hours of payment for a four-week period applies across the board where work is stopped due to the inclement weather occurring. There is no argument against that. But where we do have the issue is where the inclement weather has stopped and the employees are on site and are prevented from working by safety provisions caused by the inclement weather that occurred, and that is demonstrated by the example I have given where the site is flooded, where the site is required to be dewatered, where there are other employees who will then be prevented from working until that dewatering has occurred. In such a situation we say that the award provided that such employees will be paid but that that payment would not be considered part of the lost time entitlement under the inclement weather clause but that that would be paid as their normal time.

PN227

That is the only situation that we are seeking to address by this provision. We are not seeking to double up on the payment; we are not seeking to say that all time lost through inclement weather should be paid. We recognise that the tribunal has made a decision in regard to that. That's the submission we wish to make.

PN228

THE SENIOR DEPUTY PRESIDENT: Yes, very well. Thank you, Mr Maxwell. Mr Calver.

PN229

MR CALVER: Thank you, your Honour. I'll start where I finished off in relation to my remarks about the intent of section 160. The intent of 160 is - in the absence of any substantive information or submissions about the tribunal's intent, it's quite clear that there is some limited ability to say that there has been an error when the tribunal has considered a particular provision.

PN230

Mr Maxwell relies arguably on the MBCIA, where clearly the inclement weather provisions in the modern On-site award are related to different categorisations. For example, because they in part (indistinct) new award, they now apply to all categories of employees; for example, daily, weekly hire, casuals and the like. That's certainly a change in the application of the provision under clause 21 of the MBCIA. Whilst clause 23 in part derives from that provision in the MBCIA, as Mr Maxwell has noted it has been streamlined and its application widened.

PN231

In that regard, we would say that the barrier to which I adverted when we were dealing with Mr Thomas's evidence has not been met; that is, despite Mr Maxwell's assertion about the Queensland floods, we do not believe that there is sufficient evidence before the tribunal to mark a significant change in circumstances from the time that this provision was introduced, after a considerable amount of reference, which is set out in our written submission, about its terms. Attachment A that was referred to by Mr Maxwell goes to that very point; that the tribunal sought to merge the intent of those awards.

PN232

As we say in our submission, at paragraph 5.7, despite the fact that the provision now sought existed in pre-modern instruments - is not of itself sufficient to require a change in the terms sought by the CFMEU.

PN233

The other point again reverberates with a point we made earlier; that is, there is a marked difference between the way in which the prior provision worked and this provision would work. We say that, by having it as a stand-alone clause, it could subvert the intention of the balance of the provisions. Whilst it was clear when it was in context previously that it was intended to be a situation where employees would otherwise return to work because of inclement weather and then the site was not available to them, as a stand-alone provision it has the capacity to undermine all of the other provisions of this clause and it's not related to where inclement weather has been established but there are unsafe conditions remaining. Because it's a stand-alone provision, it'd have a markedly different effect.

PN234

So the point that I made earlier about the CFMEU - the professed intent - that it's application in reality - would be that this provision would undermine the notion of the 32-week limit and all of the other streamlined provisions in a widely redrafted and expanded provision that now stands as clause 32 of the modern award.

PN235

Apropos the Queensland floods, we deny that there is a gap in the law or in the way in which that matter could be handed. In fact, the view of the Master Builders in light of the Queensland floods is that the Workplace Health and Safety Act 1995 Queensland and section 524 of the Fair Work Act dealt with the Queensland floods adequately.

PN236

The Workplace Health and Safety Act Queensland provides that employers must provide safe premises, safe systems of work, safe machinery and materials, suitable working environment and facilities. If those obligations are not complied with, prosecution and attendant fines may result. Therefore, in light of the flooding, employers were required to assess the relevant OHS standards and ensure employees were returning to a safe working environment. They have that pre-existing obligation under occupational health and safety law.

PN237

There was some considerable debate at the time of the making of the modern award about the extent to which awards should regulate occupational health and safety. At the time of making the modern award, we submit that one of the factors which would have seen the removal of the provision currently sought to be reinserted but in a different and more onerous form is that the making of awards about OH and S matters was not particularised in those matters which fall to be considered as appropriate for inclusion in modern awards. That point was not directly addressed by the full bench at the time, but certainly we believe that it would influence the manner in which this clause is shaped.

PN238

I mentioned 524 of the Fair Work Act. In that context of the Queensland floods, employers retained the right to stand down an employee under an employment

contract or an agreement because of other things - breakdown of machinery or equipment - that the employer cannot be reasonably held responsible for the breakdown and the stoppage of work from any cause for which the employer cannot reasonably be held responsible.

PN239

Therefore, in the context of the Queensland floods, if an employee couldn't have performed their job because of the breakdown of machinery needed to perform that function, the employer would have had the ability to stand them down without pay, and that right to stand down without pay is subject to an expressed term contained in the employment contract, and one would imagine the provision that the CFMEU seeks to insert.

PN240

Therefore, the magnitude of the change they seek is not merely reflective of the prior circumstance but would go against, in the context of the Queensland floods, the rights of employers under section 524.

PN241

We say in our submission not only the fact that 160 doesn't really permit the change currently before the tribunal; we also say that there's the evidential burden which I referred to in my remarks about Mr Thomas's evidence, and the balance that the full bench has expressed in clause 23 now, which we consider was designed by the then commission to fairly spread the risk of unproductive work, would be upset by any change based on a tenuous notion of error.

PN242

We rely on our submissions, we rely on the evidence of Mr Thomas and we believe that the CFMEU has not satisfied the requisite evidential barrier for bringing the variations sought, particularly under section 160, if it please the tribunal.

PN243

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Calver. Mr Kentish.

PN244

MR KENTISH: I have nothing to add other than we support the CFMEU's application, Senior Deputy President.

PN245

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Kentish. Ms Matheson.

PN246

MS MATHESON: Yes, your Honour. We support the submissions made by the Mr Calver (indistinct) I appreciate the comment made by Mr Maxwell regarding the intention of the provision not to extend the nature of the entitlement or the quantum of the entitlement. However, the proposed variation, as it does stand as a stand-alone provision, does in fact have that effect.

PN247

We'd oppose the application on the basis that we don't feel that the requirements of section 160 have been satisfied, for the reasons advanced in our submission, and the clause would result in an additional costs burden and would be impractical to administer.

PN248

I also take the point raised by Mr Calver that there is some variation from (indistinct) not necessarily amount to an error in the making of the modern award. There was an attempt to streamline the operation of the awards and their content, and we submit that it is a likely consequence of that process that that provision has been removed, if it please the tribunal.

PN249

THE SENIOR DEPUTY PRESIDENT: Thank you for that. Mr Smith.

PN250

MR SMITH: Yes, thank you, your Honour. We oppose the application. Mr Calver has run through all of the arguments, and I won't repeat all of those, but one central issue of course is this item under section 160; that by any stretch of the imagination the application meets the requirements of 160. It's not an error. There's no uncertainty.

PN251

If the application was to have been reviewed seriously, then it would have had to have been reviewed under section 157, we'd submit, and to do that the CFMEU would need to provide evidence of why the application is necessary to meet the modern award's objective. There is no evidence at all that supports the application and therefore we think that the tribunal should readily reject, if the tribunal pleases.

PN252

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Smith. Mr Ward.

PN253

MR WARD: Your Honour, we support the oral submissions of the Master Builders and simply add these points: we don't agree that the matter is amenable to be dealt with under section 160 of the Act. It's interesting that the matter has been raised now, some 22 months after the original making of the award.

PN254

In our view, if the matter does require consideration, the appropriate forum for its consideration would be the 2012 review of modern awards, which we anticipate Fair Work Australia will attend to in due course. We'll leave our submissions at that, your Honour.

PN255

THE SENIOR DEPUTY PRESIDENT: Probably got some idea of the date as well.

PN256

MR WARD: I thought your Honour might have offered some form of - - -

PN257

THE SENIOR DEPUTY PRESIDENT: Yes, I'll offer you 2012. There you are. That takes us, I think, to Ms Blades.

PN258

MS BLADES: Thank you, your Honour. We rely upon our submission. We oppose any variation put forward by the CFMEU in relation to variations 3 and 4. We support the submissions already made by the employer groups. I won't again

go over the same issues but just merely say that we don't believe that the case has been made by the CFMEU to make a variation under 160 of the Act. There is no evidence provided to show that this is an error - either variations or an error - and the award should be left as is in relation to those two matters.

PN259

THE SENIOR DEPUTY PRESIDENT: Mr Noble, did you have anything you wanted to say?

PN260

MR NOBLE: Just that the AMWU broadly supports the intent of Mr Maxwell's application and that it is simply up to Fair Work Australia to make up its own mind whether or not there is an error and, if there is an error that has been made by the commission, or whatever other reason, then we would submit that section 160 does actually allow Fair Work Australia to make the appropriate order it deems necessary to correct that error.

PN261

THE SENIOR DEPUTY PRESIDENT: Yes, thank you, Mr Noble. Do you want to say anything arising out of that, Mr Maxwell?

PN262

MR MAXWELL: Your Honour, the only additional point I'd make is that Mr Calver sought to, I suppose, imply that the provision was based on the AWU Award rather than the MBCIA. I just note that under clause 20.4 of the AWU Award - provided that there should be no deduction of wages for any working time lost due to inclement weather. So in terms of the scenario we're seeking to cover - - -

PN263

THE SENIOR DEPUTY PRESIDENT: This isn't a circumstance of inclement weather, is it? Unsafe conditions arising from inclement - - -

PN264

MR MAXWELL: That's right, your Honour, but under that award they would have still been paid after the inclement weather had ceased. All we're seeking to do is to reflect that that payment doesn't come out of the 32-hour time period. It may be that the wording could be altered so that the provision that we seek could be made a subclause of 23.4, which deals with the particular situation of the cessation and resumption of work, and the additional words put in that, where work is resumed after inclement weather but the employees are prevented from working - that that provision that we seek applies, which reflected the intent of the provision from the pre-existing awards.

PN265

THE SENIOR DEPUTY PRESIDENT: Yes. How do you say 21.10.3 would have applied in the Queensland floods where, for example, a construction site was unsafe for - well, up to weeks in some cases.

PN266

MR MAXWELL: In that scenario, the employer would have had to - if the employer wishes to stand down the employees, it would have to have said that they were standing them down in that situation and that the employees were not required to attend work.

PN267

What we're seeking to address is a situation where the employees attend work, are required to remain at work and are then paid and whether there is then a limitation on the amount of time that they can be paid; whether that falls within the 32-hour time period.

PN268

THE SENIOR DEPUTY PRESIDENT: Is that what the clause says?

PN269

MR MAXWELL: The intent of the clause is that if, for example, the water levels have stopped rising in terms of the Queensland floods - - -

PN270

THE SENIOR DEPUTY PRESIDENT: Yes.

PN271

MR MAXWELL: - - - that they have attended for work, that the employer intends to dewater the site - and that can be done within, let's say, a four-hour time period - and the employees are required to remain on site. In that situation, they will be paid for the time they remain on site but that time period will not come out of their 32-hour entitlement. That will just be considered normal time. If the employer did not want them to remain on site, then the employer would have sought to enact the stand-down provisions and would have sent the employees home.

PN272

THE SENIOR DEPUTY PRESIDENT: What practical difference would there have been in relation to the Queensland situation? Mr Calver is suggesting that what occurred was, the employees were stood down - - -

PN273

MR MAXWELL: Your Honour, it's our information that the employees were not stood down in all cases - they remained on site - but that that period for which they were paid was then deducted from their inclement weather - - -

PN274

THE SENIOR DEPUTY PRESIDENT: The wording of 21.10.3 isn't limited by two circumstances where employees have attended work, but that would suggest that the employee would attend day in, day out and be paid - - -

PN275

MR MAXWELL: It says:

PN276

Where an employee is prevented from working at the employee's particular function as a result of unsafe conditions caused by inclement weather, the employee may be transferred to other work in the employee's classification on site -

PN277

so that option of transferring into another area and doing work there -

PN278

until the unsafe conditions are rectified. Where such alternative work is not available and until the unsafe conditions are rectified, the employee shall remain on site.

PN279

That is the particular requirement that the employees remain on site. In such a situation:

PN280

The employee shall be paid for such time without reduction of the employee's inclement weather entitlement.

PN281

THE SENIOR DEPUTY PRESIDENT: It's somewhat unfair. It talks about "remain on site" but isn't qualified by an employee having commenced on site. It confuses me somewhat as to what might happen from day to day in a Queensland situation, where you've got several days of - or indeed, to be local, the desalination plant circumstances where early on they tried a reservoir before they tried desalination as the solution to water shortages.

PN282

MR MAXWELL: Yes. Your Honour, it mainly deals with a situation where the employees have attended site and are ready and willing to work.

PN283

THE SENIOR DEPUTY PRESIDENT: Yes.

PN284

MR MAXWELL: The inclement weather has ended but it's a situation about whether work can start because of the unsafe conditions.

PN285

THE SENIOR DEPUTY PRESIDENT: Yes, very well. Thank you for that. Thank you all for your contributions. I'll adjourn now until we meet again. I see that the MBA has given us a further opportunity to all meet again at some point in the future, and I'll issue a decision in relation to this matter and see some or all of you on the next occasion.

<ADJOURNED INDEFINITELY [11.43AM]

LIST OF WITNESSES, EXHIBITS AND MFIs