



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT GIBIAN  
DEPUTY PRESIDENT SLEVIN  
DEPUTY PRESIDENT GRAYSON**

**AM2024/21**

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

**Social, Community, Home Care and Disability Services Industry Award 2010  
(AM2024/21)**

**Sydney**

**3.34 PM, WEDNESDAY, 24 SEPTEMBER 2025**

**Continued from 21/08/2025**

PN1

VICE PRESIDENT GIBIAN: Yes, Mr Saunders, you appear for the ASU?

PN2

MR L SAUNDERS: Yes, thank you, your Honour.

PN3

VICE PRESIDENT GIBIAN: Mr Blewett for the UWU and the HSU?

PN4

MR S BLEWETT: Yes, your Honour.

PN5

VICE PRESIDENT GIBIAN: Ms Dowsett, you appear for the Commonwealth?

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MS K DOWSETT: Yes, your Honour.

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VICE PRESIDENT GIBIAN: Ms Cruden for the AI Group?

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MS L CRUDEN: Yes, your Honour.

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VICE PRESIDENT GIBIAN: Mr Scott, you appear for a number of people, I understand.

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MR K SCOTT: I do. I do, your Honour. I'm happy to list them, but I think you might have them before you.

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VICE PRESIDENT GIBIAN: Yes, thank you. All right. Mr Saunders, the matter is obviously listed because of the application that was filed by your client on 19 September. I'll just make sure that I've understood correctly what your client is asking. That is, it wants to vacate all of the directions that at present have been listed for the SCHADS part at least of the proceedings, including the listing of the week of hearing from 27 October, and in place of that make directions for a conference on 27 October and for parties to file reply material in relation to the provisional views of the Full Bench, and, in relation to the proposed work value change claim by the ASU by 5 December, reply to that in February next year and then a report back at that time.

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MR SAUNDERS: Yes, that's right, your Honour.

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VICE PRESIDENT GIBIAN: All right. Is that different in any material way from what the ASU asked for in July?

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MR SAUNDERS: I wouldn't say materially. There are some distinctions in respect of detail, and of course there's been a material change in circumstance. But it is fundamentally the same proposal, that the provisional views be dealt with to the extent that at least they deal with the schedule B and C classification structures concurrently with the ASU's work value claim, with it being required to articulate precisely what that is.

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The material difference is the fact that a proposal draft structure has now been filed by the ASU, not its final work value claim but something very similar sans the rates, and the proposal for conciliation to use those currently listed hearing days to discuss that.

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VICE PRESIDENT GIBIAN: That proposal is the alternative response to the provisional views of the Full Bench expressed in the April decision.

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MR SAUNDERS: That's right. I apologise, your Honour. I say it's the alternative proposal in the provisional view to essentially maintain the same rates. It doesn't contain the non-gender-based uplift that the ASU says is warranted.

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VICE PRESIDENT GIBIAN: All right. That is the work value claim when it's articulated, you expect will be different to the alternative claim contained in the submissions that were filed last week or recently.

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MR SAUNDERS: Primarily in respect to the rates, yes. I'm hedging slightly, because I can see as the thing develops further refinements being added to the text of the classification structure. As the submissions set out, we have reservations about it as is, and of course want to conciliate about any reservations. Others may, and almost certainly do have, but the structure, the sort of following the guiding principles set out by the expert panel, essentially yes.

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VICE PRESIDENT GIBIAN: All right. I think you know, Mr Saunders, that I'm a jurist proceeding to some degree. I haven't been involved up to this point in time, which is hopefully why the other members of the Bench with me can inform me if I've misunderstood.

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MR SAUNDERS: Of course.

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VICE PRESIDENT GIBIAN: But as I understand it, the statement that was issued by the Full Bench in July expressed the view that, well, look, there may be some advantages in all of these matters being dealt with together, but they didn't regard it as realistic that that would be done in a period of time that was

acceptable for the resolution of the gender undervaluation aspect of the proceedings.

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Is there any reason why we would conclude that that position is different now than it was in July?

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MR SAUNDERS: Yes, three reasons. The first is that position was developed in response specifically to what the ASU had put forward to them, which included hearing my next proposal that the Bench considered unrealistic at the time. Second, it is now materially impossible to deal with the gender-based aspect to hear the provisional views concerning the whole of the award to completion in five days, given the sheer volume of material that has come forward. I said three reasons; there are in fact two. The third one is a repeated second.

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VICE PRESIDENT GIBIAN: In terms of the evidence that has been put forward to date – obviously I haven't read all of the witness statements, but as I - at least from a brief review of your submissions - apprehend that the evidence is primarily intended to be directed at establishing that the social view sector is varied, and the type of work demands and the like are varied between the different types of services and agencies that are involved and covered by the award.

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MR SAUNDERS: Partly that. Partly it goes to the complexity of the work. It's not just saying it's different to direct care, but that is a critical part of it. It is different to direct care; not better, not worse, different. The other part of it is dealing with some of the critical issues with the provisional view, the concept of equivalence, the concept of qualifications being required, and that penetration within the industry which is again varied.

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VICE PRESIDENT GIBIAN: And that's to address the provisional view in relation to a single classification structure.

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MR SAUNDERS: Yes, not necessarily the concept of a single classification structure, but the proposed one, and the difficulties that a qualification-based approach in this sector fundamentally driven by soft skills has.

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VICE PRESIDENT GIBIAN: Now, you may not know the answer to this obviously, but if that is the purpose of the evidence, whether there is really likely to be contested factual issues. That is, if it's not being relied upon in support – at least at this time – of a work value claim as such, whether there are likely to be heavily contested factual issues about the matters referred to in those witness statements, at least for the purposes for which they are now being proposed to be used.

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MR SAUNDERS: I think there's an overlapping difficulty with that. Your Honour's quite right that it is not being relied on in support of a contention that the rate should be increased because of changes in work value or a failure to fully recognise the work. It is being relied on to explain the current value of the work for the schedule B and C workers, particularly those who will go backwards.

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That level of overlap – I'm terribly sorry. That level of overlap leads to the potential for contest. It's unclear to us now, and this isn't critical. We're early in the piece, we don't know if anyone's required for cross-examination, but I doubt it would be zero.

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I have not myself yet read all of the 80 employer – 81 I think employer submissions, but some of them throw up factual issues that we contest, particularly Australian Industry Group and ABI. Some of those are just factual assertions in submissions. ABI have put on witness statements which we would be seeking to cross-examine.

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VICE PRESIDENT GIBIAN: All right. In terms of the employer material, as I understand it at least, there are only six witness statements that have been filed by employer groups. There are, as you say, a reasonably large number of submissions. Many of those appear to me to be relatively brief and from various community organisations, and obviously they'll be considered by the Full Bench. But it's not of the nature that's likely to require an exhaustive response by your client.

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MR SAUNDERS: I'm reluctant to commit, having not read them all, but my surface sort of sample review suggests that is to a degree right. A number of them are short employer statements, but we're not talking about templates here. It's not like someone's gone around with a quasi-petition and said, 'Sign up to this.' They're quite diverse and there's some complexity of issue.

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But some of them, they're straying into that evidentiary arena. I doubt that that would lead to cross-examination, but it makes dealing with them quite a complex proposition, particularly in the time that's put forward for reply material. Even processing them all is a significant logistical challenge.

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VICE PRESIDENT GIBIAN: All right. I understand.

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MR SAUNDERS: In that respect – I'm terribly sorry, I didn't mean to interrupt.

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VICE PRESIDENT GIBIAN: Look, I've interrupted you. Seriously, you wanted to say – you wanted to say in support of the application.

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MR SAUNDERS: It is primarily driven by procedural fairness to the ASU, not in that classic sense but we just don't think this can be heard properly or fairly in the five days. I have 78 witness statements. Even if they're not required for cross-examination, part of the benefit of cross-examination in a work value context, is at least introducing the Bench to the evidence.

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There's a sort of quasi-inquisitorial aspect to the approach. I would need to spend time in submissions taking the Bench to this material, preparing various written outlines that would be not necessarily a problem for you, Vice President, but for everyone else a difficulty of just saying, 'Here is 5,000 pages of evidence. Have fun. It

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all says the work value is fine.'

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We think earlier the statement of Kelly Thomas – has that made its way? We sent it to the chambers, someone who's not appearing. Yes, that sets out the resource intensity that's been required of the ASU, and what this process has involved. Again I want to emphasise the statements that are in there are bespoke in the sense that they're not 'Your caseworker signed at the bottom.' They've been interviewed and settled properly, and there's a diversity there.

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It's also not a complete picture. We've done our best, but there are aspects missing. We wouldn't be able to facilitate a view which is not necessarily mandatory for a work value case, but is often of great assistance.

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We haven't been able to – apart from the Cortis report which is more about current classification in the system – obtain expert evidence about the nature of the work, qualification requirements, that sort of longitudinal research that's often more helpful in work value cases, particularly here when we're talking about a situation that does change rates for B and C that are not presently through the ERO, said to be affected by gender-based undervaluation. So the urgency in respect of those schedules is not the same.

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Thank you. That's all I wish to say.

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VICE PRESIDENT GIBIAN: Thank you. Sorry, Deputy President Slevin.

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DEPUTY PRESIDENT SLEVIN: Mr Saunders, if I just draw your attention to the conference that you suggest might take place on 27 October, is it anticipated

that one outcome of that conference may be that there would be an agreed position on the classification structure?

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MR SAUNDERS: Dreams are free. I think that it is unlikely that we will receive 100 per cent consensus across the industry, particularly if disability and home care are still in the mix, that schedule E and F aren't separately resolved. It's not impossible. The sector has a high degree of collaboration, and has similar concerns about the provisional view. What I doubt we would get full agreement on is rates absent funding commitments. That's just a reality for the employers.

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DEPUTY PRESIDENT SLEVIN: If we were to keep the hearing dates as they are, would your client be seeking a conference prior to those dates in any event?

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MR SAUNDERS: No, a couple of reasons, but the primary one is practicality. We have an enormous amount to do before that time period, and we're open to and interested in feedback from – and expect to receive it in reply in respect of the alternative proposal. I don't mean that is a demand on people, just that that's what's going to happen. But I just don't see that a conference fits in with the litigation otherwise rolling in the way it's currently programmed.

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Also, we want to use the conference for two purposes, not only to work out this interim result, but the broader conversation about what the future-proofing of the sector needs to look like.

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VICE PRESIDENT GIBIAN: Thank you, Mr Saunders.

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Mr Blewett, what's the position of your client, the UWU and the HSU?

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MR BLEWETT: Thank you, your Honour. There are about six points I want to make hopefully relatively briefly. One is a background comment, which is just to put the UWU and HSU position in context, which is we've filed submissions which are supportive of the ASU's alternative early structure, alternative to the provisional structure, and indicated are sharing of the concerns, reanimate that which is that this is a very large exercise crunching five or six classification structures into the one.

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And it appears to us that it's likely to result in, at the least, disputation, and underclassification, but also a lowering of pay rates for the same classifications across the sector, which is a concern of ours. And so we've supported their position but promoted a narrower variation, I guess, of the provisional structure, which is really targeted at the particular coverage that the two years they represent have. So that's the background.

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The second point I wanted to make is it seems that one of the things underpinning the ASU's application is really a procedural fairness matter. It has not yet had the capacity to make the case it wants. That's really a matter for the Commission, not us. Because we've got a much narrower approach, a narrower alternative approach, I don't say we have faced the same difficulty, so I'm not making that submission.

PN57

The third point I wanted to make is that the ASU relatedly asserts a sort of, almost a forward-looking procedural fairness issue, which is given the volume of material that has been filed, it's difficult to see the parties properly engaging with each other's cases in the time it's allocated. Again, partly because the great volume of material is from the ASU, and because we are essentially supportive of that as your position, that volume itself is unlikely to be a great concern for us.

PN58

We do think there's a lot of material that we will need to grapple with from AIG and ABI in particular, but I'm not certain that there's a procedural fairness problem for us in the time allocated.

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The fourth point I wanted to make relates to the question of adequacy of time between 27 October. I must say I share the ASU's concern as to whether we will be able to complete the matter within the time allocated. Obviously if the witness statements are admitted into evidence and no one is required for cross-examination, four or five days is perfectly adequate.

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The difficulty I think we all probably currently face is I don't think anyone has probably had the opportunity to determine to what extent cross-examination might be required, or the extent to which submissions might need to be recalibrated, retailored, in order to deal with the evidentiary material. Even if only a fraction is required for cross-examination, it's going to be very difficult to see how that can be done within the timeframe.

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Then I think there's really a separate question which is if there were to be a vacation of the dates, or delay in the dates or setting of other dates, whether a conference at that time in conjunction with the ASU's work value case then becomes a sort of live issue. But I think that probably awaits determination of the first issue, which is what we do with the current timetable.

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And then I do need to raise my last point. My clients are particularly concerned with the effect of delay on the schedule E employees, those in home care, disability care, if you like. There's a clear finding that they've been the subject of gender undervaluation. It's pretty significant, the extent of that undervaluation, and we are concerned - - -

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DEPUTY PRESIDENT SLEVIN: And they're not covered by the ERO rates - - -

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MR BLEWETT: They're not covered by the ERO.

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DEPUTY PRESIDENT SLEVIN: I understand.

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MR BLEWETT: And so they're at a significant disadvantage, and that is something that needs to be addressed. And one thing we wanted to raise, if the ASU's application otherwise met with some sympathy from the Commission, whether maybe the 27th could be used to deal with some interim measure for that cohort of employees, because they're not the only subject of the expert panel's decision, but they were a substantial part of the rationale underlying the expert panel's decision.

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Your Honour, those were the points I wanted to make. If there's anything else I could assist you with, I'm happy to.

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VICE PRESIDENT GIBIAN: Thank you, Mr Blewett.

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Ms Dowsett, does the Commonwealth have any view about these procedural issues?

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MS DOWSETT: Thank you, your Honour. No, the Commonwealth does not have a substantive position in relation to the application.

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VICE PRESIDENT GIBIAN: Thank you.

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Ms Cruden, what's Ai Group's view, if any?

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MS CRUDEN: Thank you, your Honour. We do have some views. We have some concerns regarding the implications of the alternative timetable that's proposed by the ASU, and I'll address those briefly shortly. There's essentially three key points there. But in raising those concerns I guess overarchingly, we don't oppose this application, but merely seek to ensure that the concerns that we raise are had regard to in terms of the outcome of this application.

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We do acknowledge that the existing timetable is very tight, but we are essentially in the Commission's hands regarding how it proceeds with this application. For its own part, similar to the comments made by Mr Blewett, Ai Group has approached the matter on the basis of needing to work within the current

constraints in terms of the time permitted, including confining the case that we filed on 12 September.

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We have already commenced, and should the Commission not vacate the existing directions, we will continue to work towards the date for filing the materials in reply on the same basis.

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In relation to the issue around cross-examination, perhaps unsurprisingly, we have no firm views yet regarding cross-examination. I do anticipate very tentatively that I would think it unlikely to be extensive, but again I'm not in a position at this point in time to, you know, make any comments other than that very tentative indication. I guess one - - -

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DEPUTY PRESIDENT SLEVIN: Just in that regard, and maybe you don't even know the answer to this question, but when do you think you may be able to form a view about that issue?

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MS CRUDEN: Yes, I think it may still be, bearing in mind we're working towards the filing date of the 15th, I mean I would expect it might not be another week or two until we are, you know, of a firmer view in relation to that.

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DEPUTY PRESIDENT SLEVIN: I understand. That is closer to 15 October more likely.

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MS CRUDEN: It is closer to the 15th, yes. The one caveat we would have in terms of, you know, the current way we've proceeded in terms of working within the timetable, is of course the amount of material that is filed in reply on 15 October. It's in very close proximity to the commencement of the hearing date on 27 October.

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I mean if there is a voluminous amount filed, noting the statement of Ms Thomas which indicates the volume of additional witnesses that haven't been spoken to, and additional work that may be done by the ASU in that period of time, we are mindful that if there is a very large volume of material that is filed in reply on 15 October, it may make the timetable even more tight than it already is, in terms of the hearing commencing on 27 October. I guess that is though a matter out of Ai Group's hands, in terms of what eventuates, and indeed has not eventuated yet.

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Just in terms of the three key concerns we do have regarding not just the current directions being vacated per se, but the alternative proposal that the ASU would have supplant the existing directions. Firstly, Ai Group is concerned to ensure that any extended period of time for the matter to proceed to hearing, wouldn't then detract from the period of time that employers would have following the

expert panel making its final determination of the matter for employees to then be able to implement the changes.

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So the very strong message that we're receiving from the employers who we've been liaising with is that there's a defined sequence here. They need the final determination in terms of the classification structure and the rates. They then need certainty regarding the funding position in relation to any changes to the rates.

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And it's really from that point in time onwards that employers can commence both analysing in detail the full financial and other impacts for their organisation, and commence the detailed work that might be required in terms of adjustments to payroll systems, you know, consulting and notifying employees of changed classifications and those sorts of things.

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As it presently stands, Ai Group has proposed that we would anticipate employers would need at least until 1 July 2027 to be able to do those things, you know, with an adequate and sensible time to be able to implement those changes in their organisations. And that was on the basis we were assuming there may be a December decision.

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Obviously with the ASU's proposal, it would seem the earliest the matter could proceed to hearing would be April 2026, and in those circumstances, you know, that's significantly eating into the time that we had proposed be available to employers, moving to that 1 July 2027 date. So it may be that Ai Group, you know, were it to revise its position regarding that implementation date to some time, you know, well after 1 July 2027, if not 1 July 2028, depending on how that was to play out and when exact hearing dates were to take place.

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The second point I wanted to make is that we do have a strong view that the time that the ASU has provision for interested parties to consider and respond to the work value case is likely to fall well short of what would be required. So the ASU is currently proposing to serve its additional materials for the matter on 5 December, with reply materials due on 27 February 2026. And while that is a period of 12 weeks, it obviously includes the Christmas period and New Year's period.

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On that basis we would think that at least probably two weeks of that is relatively unavailable due to very common periods of leave taken at that time, if not up to sort of four weeks, you know, over that time period. And that would include not only difficulties from an Ai Group personnel perspective, but also ensuring that our members and the relevant personnel that we would usually consult with in the forums to discuss and take views regarding these matters, would be available. We'd have concerns about the ability to do that over the Christmas-New Year period.

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Given as well that the ASU has foreshadowed in Ms Thomas' statement that it may have a significantly larger volume of material than what it has now - I think it's around 161 potential lay witnesses - it's foreshadowed bundles of documents from employers in the sector regarding classification structures and briefing experts. We would anticipate that it may be something more like a period of at least four months that might be required to be able to respond to a case of that magnitude.

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DEPUTY PRESIDENT SLEVIN: So more like the end of March rather than the end of February. Is that the long and the short of it?

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MS CRUDEN: Yes. Yes, I would think at least then.

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And thirdly, we do query the utility of the parties filing on 5 December reply materials in response to the provisional views in circumstances where the ASU will file its work value materials on the same day. I mean given the majority of the materials that are currently on concern, the classification structure, and as we understand it, notwithstanding Mr Saunders has indicated the classification structure that they've proposed is probably likely to be largely it, but subject to a consultation process and rates being attached to it.

PN93

And we would have a concern about, you know, how much utility there was in investing significant time and resources responding to the large volume of material about, you know, the current classification structure in circumstances where, you know, if there is to be a materially different version of the classification structure, or effectively doing that same exercise again, it may be the case that having the ASU's work value case on first, and then all of the responses then to the provisional – the materials concerning provisional use and the work value aspects are responded to at the one time.

PN94

In relation to the comment made by Mr Blewett regarding any interim measures, this was an issue that was ventilated in the conferences that took place after the April decision. Ai Group did oppose those interim measures, largely on the basis that they are still significant changes for employers who are covered under the schedules that would be impacted, notwithstanding those changes, interim measures wouldn't impact the entire of employers covered by the award.

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For the employers it does impact, that would be a significant change in circumstances where it's still proposed that they would then be rolled into any new classification structure. So they would, you know, undergo an interim change, you know, whilst also potentially being rolled into the final classification structure after that, which would be extremely burdensome, intensive and, you know, I expect create a fair bit of cost and confusion for the cohort that would be impacted.

PN96

Other than those points, the last thing I would say that if the Commission is minded to accede to the ASU's proposal, we do not have any objection to participating in further conferences to the extent in particular that there might be any further forthcoming proposals that could be potentially the subject to fertile discussion, noting that the parties did, you know, have some productive discussion in the conferences that took place after the April decision, which resulted in the Fair Work Commission version of the draft determination being able to be prepared.

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Those are my submissions, your Honour, unless there's anything further I can assist with.

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DEPUTY PRESIDENT SLEVIN: Thank you, Ms Cruden.

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MS CRUDEN: Thank you.

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DEPUTY PRESIDENT SLEVIN: Mr Scott.

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MR SCOTT: Thank you, your Honour. Our position in short really is that we don't think there needs to be any variation to the current directions. My clients were a little surprised by the application having been made, given that the expert panel, in our view, was quite clear back in July about its views as to how the matter should best be programmed. The variations that are now today being sought by the ASU, are very similar to the directions that the union sought at that time in July, and the Commission considered those.

PN102

They were effectively rejected at that time. The statement on 18 July set out the reasons for that. At that time in July, my clients indicated - when the expert panel outlined some proposed directions, which were then subsequently made, which are the current directions. We indicated in July that we could work within the confines of those directions. We've done that today. We're continuing to do that. Our position hasn't changed in respect of that.

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Clearly the ASU's filed a significant volume of material, but that didn't come as a surprise to my clients. That shouldn't have come as a surprise to anyone really, because the ASU had foreshadowed filing a significant amount of material. So my clients are effectively mobilised to meet the current directions, and we intend to do that.

PN104

We don't agree with the submission that's been put by the ASU that there's been a material change in circumstances. The only real development is that the ASU has filed 78 witness statements, which, I think, tallies about 1,300 pages. I would

have thought that that fact is not a primary concern of the ASU, but rather, if anything, would be a concern for the parties responding to that material, including my clients, but as I've indicated, we had some warning that a volume of material was coming and we're working through that quite diligently at the moment. So that's, in short, my client's view.

PN105

If I can just deal with a few other things, and I agree with some of the comments or submissions that have been made by Ms Cruden, but we don't accept that the volume of material means that it's impossible to hear the matter in five days. Obviously, the extent or the amount of cross-examination is going to be a really critical issue in how long is needed to deal with the matter.

PN106

Last December, there was quite a number of witness statements that were filed, and from memory, there was very little cross-examination. I think, possibly, an expert was cross-examined, but none of the lay witnesses were cross-examined last December, and again, from memory, the matter was dealt with, at least in respect to the SCHADS Award, in about two days. In short, we don't think there will be extensive cross-examination, and as Mr Blewett said, if there's limited cross-examination, then five days will be perfectly adequate.

PN107

We share Ms Cruden's concerns about the suggestion of interim measures, and we have previously put on the record our concerns about that. Our view is that it's in the interest of the industry that any changes to the SCHADS Award all come into effect at the one time. Obviously, there will need to be a significant deferral in terms of the operative date so industry can get organised, but that's been our position for some time.

PN108

The proposal for a conference, I think, in late October, what we'd say about that is, after the decision was issued in April, there was a process whereby conferencing was scheduled and Deputy President O'Neill held two conferences in June. Those conferences, with respect, were wholly unproductive. My clients attended those conferences and on record indicated that we were very keen to work through in detail all of the issues that had been raised.

PN109

We indicated that might be a torturous process, but we said that we're here ready to do that and, indeed, we might need more than two days. And for reasons that are unclear to me, the ASU, and potentially other parties, didn't seem to have an appetite to do that, such that the second day of conferencing effectively became a quasi case management directions hearing. So the suggestion of conferencing in late October, I don't hold out optimism that there will be huge utility about that.

PN110

At that time, from memory, the ASU – and again, at that time, we indicated a keenness and a desire to work through the issues, and at that time, the ASU was seeking a six-month deferral to have a stakeholder-led, Commonwealth-funded project, which never went anywhere. And it was curious to us that we were in the

Commission being, you know, facilitated conferences before Deputy President O'Neill, and there was some desire not to utilise that forum but instead to take the matter elsewhere.

PN111

Ultimately, no progress was made. The expert panel has dealt with directions, have issued directions in July. We're now dealing with those. As I said, the only material change is the volume of material, but that shouldn't be an issue for the ASU. If anything, it's an issue for the employer parties, and my clients are saying:

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*Well, we can deal with the matter. We can deal with it within the confines of the current directions.*

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VICE PRESIDENT GIBIAN: As presently advised, at least, you don't think there's likely to be extensive cross-examination from your – or the organisations you're appearing for in relation to the 78 witness statements?

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MR SCOTT: That's right. I would reserve my position slightly - - -

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VICE PRESIDENT GIBIAN: I'm not asking (indistinct) guarantee, but - - -

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MR SCOTT: Yes. So that that's right, your Honour, save that, you know, obviously, we're still working through the material, but I don't think the expert panel should rush to vacate the directions solely because of the number of statements, because experience has shown last December there were 20-odd statements and there was very little cross-examination at all.

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VICE PRESIDENT GIBIAN: Understand.

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MR SCOTT: And then just finally, can I reiterate and can I echo the submissions of Ms Cruden about the proposed directions. If the expert panel is minded to consider the ASU's proposal, we have concerns around the December through to February timeframe for the employers to respond. My view and my submission is that the date would have to be pushed out by six weeks rather than two or four to accommodate the Christmas and then the January period, because it becomes very difficult to get instructions and various things over that period.

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What that means is our view is the matter won't be heard until May next year, and the expert panel has quite clearly already indicated a desire to finalise this matter very quickly. So unless there's any questions, those are my submissions.

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DEPUTY PRESIDENT GRAYSON: Mr Scott, how soon do you think you could indicate to the ASU and the UWU about whether you do require witnesses for cross-examination and provide an estimate as to that?

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MR SCOTT: It's difficult, because I suspect the priority right now, Deputy President, is preparing the reply submissions by, I think, 15 October. In doing that, obviously, we're focusing on the submissions of the other parties, the legal arguments, the legal issues. We haven't necessarily been focusing our attention on the evidence as such. If I said around 15 October, possibly earlier. I'm conscious that we've got a hearing listed for the 27th, but I'm quite comfortable and confident as of today that there will be very confined, if any, cross-examination at least from my clients. Obviously, other parties might have a different view.

PN122

There's an expert report from Ms Cortis. That might be the subject of cross-examination, but my clients don't intend to cross-examine statements that have been put on by CEOs of organisations, for example. I suspect that there would only be cross-examination of employees if we had instructions from their employer that some of their evidence was factually incorrect, which, at this stage, I assume is unlikely.

PN123

DEPUTY PRESIDENT GRAYSON: All right. Thanks, Mr Scott.

PN124

VICE PRESIDENT GIBIAN: Mr Saunders, is there anything else?

PN125

MR SAUNDERS: If I can respond to a couple of those things, your Honour. It's not safe to assume that the lay witness evidence, or even the employer – well, I suppose they're lay witnesses – but the employer lay witness evidence will be treated in the same way as in the December hearings. The evidence in December concerns disability support workers, which is a single identifiable job. With one job, the level of disputation and disagreement drops. It's also work that's very, very similar to what had been considered very, very recently in the aged care case, which itself operates to reduce the level of functional disputation.

PN126

The ASU's evidence, we're relying on the previous disability support worker stuff and there are one or two people in that classification, but it is predominantly the material that was not before the Full Bench and that nobody's thought about or looked at, schedule B and schedule C workers, the diversity within the sector and the different jobs that are there, the different levels of responsibility and tasks, necessarily, so it may be that it is the same, but it may be that it's not. It's just not safe to carry that assumption along; particularly, that seems to be the only basis on which Mr Scott says he doesn't think there will be cross-examination. It is possible that that creates the fact that that will happen, and I think it's more likely than not; just impossible to say with certainty now.

PN127

The difficulty is, though, that that still requires the process of taking the Bench through the evidence, which is itself time-consuming if it's done properly. Anything can be done in a tearing hurry. Impossibility is not the threshold. This is about it being heard properly in a way that the Bench gets the assistance that it requires, that we are able to properly put our case forward, the parallel issues.

PN128

I don't think I walked away or even blinked at the suggestion that this is very similar to the proposal put forward in July. The differences are really just because of the passage of time, not a fundamental change in concept. It remains the way we consider the best way to deal with that. We're not ignoring the statement. What we were dealing with at the time is perceived or potential difficulties, which are now, in part, crystallised.

PN129

It's no surprise to us that we filed a large case, but expanded in the sense that the volume of employer response material, which, while short, does need to be engaged with on these critical issues. That is also different, but we did see that it was necessary to, in light of the ASU's members and their interests and the significance of the change, to bring it back, but it shouldn't be taken as we've ignored or disregarding the finding of Jean. It's just we see there's a material change.

PN130

Similarly, when AIG is saying they have worked within the current constraints and so we've all got to put on a confined case, we have a large task. We have a much larger task than the two employer associations who have sectoral interests which are not necessarily the whole of schedules B and C and which are concentrated in those more discrete disability and aged cares. I don't say 'limited to', I say 'concentrated in', is our understanding. We ran a case in respect of how the classification structure should be amended to reflect, on an interim basis, to identify particular jobs, and that was rejected on the basis of there being no evidence about those jobs.

PN131

We have taken from that that if we want to run a case saying this provisional view undervalues these jobs has resulted in an anomaly where people are going backwards without a finding – and I say 'anomaly'; we don't take it that this was the intention, which is part of the problem – from that, the only conclusion that has been drawn is that if we want to advance that position, we have to put on a significant evidentiary case about these jobs. We've done that. It's not a matter of working within the constraints to narrow the case down below where it needs to be.

PN132

As I say, this is why I was emphasising that they're not template statements, because that's how you generate a massive case that looks like it can't be done. You have statements that are very similar signed by a range of different people. It's quick. It's not necessarily inappropriate because if it's true, it's true, but it's less helpful to the Commission because it's a bulking exercise.

PN133

This has identified targeted jobs across the sectors, across the key – not even all of them – across the key occupations that fall within it done in a detailed way. That'll need to be put forward to the Bench in some way, whether it's via the process of cross-examination or whether it's via a process of taking the Bench through the evidence, but it is much more complicated on a factual basis than what was being dealt with in December.

PN134

The timing stuff, the dates are obviously arbitrary where we've put something in that sort of we think works within the current framework and moves as fast as it can. I am finding it difficult to reconcile the idea that ASU's current case about what the work is can be responded to in four weeks, but if it puts on a bit more about that, everyone suddenly needs five months. There's a real tension in the employer positions there, and it emphasises that the first part of that is probably optimistic. It can be done, but not necessarily properly.

PN135

In terms of schedule E, look, my union, of course, shares Mr Blewett's concerns about the – sorry, Mr Blewett's client's concerns, I should say – about the effect on, in particular, disability home care workers who are just visibly having lower rates than aged care. Our primary concern is the – well, our only concern – is the impact that the provisional views, if implemented, would have on schedules B and C.

PN136

And the reason this direction differs from the ASU's proposal in its submissions, which is to fix up schedule E, is because we're trying not to traverse the provisional view that there should be one classification structure across the award. It puts us in a positional difficulty there. We're not opposed to – have no difficulty at all with the provisional view herein continuing other than for schedules B and C. That has its detrimental side effects. There is no perfect solution here, but that's the alternative option. There's no one correct way to do this.

PN137

In terms of the conferences, I don't accept Mr Scott's characterisation of, really, his position or my client's.

PN138

VICE PRESIDENT GIBIAN: Mr Saunders, (indistinct) go into the rights and wrongs of what happened - - -

PN139

MR SAUNDERS: No, no, I was about to say I'm not going to.

PN140

VICE PRESIDENT GIBIAN: All right.

PN141

MR SAUNDERS: It's a different point that I want to make and say to why it doesn't matter and why I don't need to. They're conceptually different. So the conferences being conducted in respect of the provisional views was a process of not the parties working out disagreements between them over something that was foundationally acceptable to everyone; it was the ASU and pretty much everyone except ABI and AIG, and even them having concerns trying to negotiate that with the Commissioner. You can't do that. That's not how the provisional view is moderated. That's through a hearing process.

PN142

So they were inutile in that sense because of the lack of underlying consensus. We weren't conferring about matters of detail between the parties. It was more fundamental than that. It's different with the ASU's proposal, because that's something we're putting forward that people can argue with us about. So it's a distinct process. I think that was everything, unless there was something your Honours particularly wanted me to address.

PN143

VICE PRESIDENT GIBIAN: There was only – well, for my part, at least – look, speaking personally, I wanted to list this matter, your client's application quickly, because it was an application to vacate directions and a substantial hearing that's due to take place in four or five weeks' time, and I didn't want people to be doing work or incurring costs that might prove to be unnecessary if that application was successful.

PN144

It seems to me perhaps the main thing that – well, the only thing, arguably, that maybe have changed since July is really an argument as to whether the hearing in relation to provisional views can be dealt with adequately in November, or at the end of November. Whilst I'm sure those who instruct you would like to down tools, Mr Saunders, what's wrong with the directions staying as they are and the reply material file being filed on 15 October, and your application being revisited at that time or in the day or so after that where we will be in a position to know with greater precision the extent to which there will be cross-examination in relation to that evidence, the extent of the reply material, obviously, without prejudice to anything you might want to say about whether your clients had an adequate time to prepare that material and the like?

PN145

MR SCOTT: Your Honour has reminded me of a point I did want to make in terms of inadequate preparation time. AIG raised an issue of us filing the residual 80 people we haven't spoken to. We don't consider that the directions allow us to file further evidence-in-chief in reply, and we are accordingly not proposing to do that. Difficult to say with certainty, I don't anticipate an evidentiary response of the kind of magnitude, but that's the reality of that.

PN146

The main reason not to do that and the reason that we haven't proposed doing that and have brought this on quicker – as a caveat, we are grateful for the Commission listing it as quickly as it has as well – is cost. It is sunk cost for everyone where no one's going to recover, but that's not an insurmountable

consideration. There are competing matters. It would also possibly release your Honour from having to deal with the matter, but that's probably not a reason to do it alone.

PN147

VICE PRESIDENT GIBIAN: Indeed.

PN148

MR SCOTT: I think what we press for to be considered now, there is enough that the cross-examination estimates are shaky and the basis of them is a hearing that is fundamentally different to this, but the limited scope of interest that we think the employer groups have cuts both eyes in that respect as well. I have to accept that. Yes.

PN149

VICE PRESIDENT GIBIAN: In terms of the sunk costs, I mean, I'm not underestimating the effort and the work that is no doubt going into this and I fully understand that, but it's not likely that the work would be wasted in the sense that it would not – at least in the substantial part, in the sense that it would be evidence and submissions that are prepared, will presumably have utility for the proceedings whenever they get to be determined.

PN150

MR SCOTT: That's right. It just makes it a little less efficiently done, and it means you've got, like, four statements rather than one or two, but that's not the end of the world. It's sunk, not total lost, cost.

PN151

VICE PRESIDENT GIBIAN: Yes. Thank you, Mr Saunders. Sorry, was there anything anyone else wished to add?

PN152

MR SCOTT: There's a - - -

PN153

VICE PRESIDENT GIBIAN: (Indistinct.)

PN154

MR SCOTT: I'm sorry, there was a – I apologise for cutting in – there was a peripheral, unrelated matter I wanted to raise procedurally. On the last occasion, I indicated that I was, in fact, unavailable on the five hearing dates, which at the time I said was not a reason not to list them there with – there's other barristers. Happily or otherwise, I've fixed that for Monday through Thursday. I can't do it for Friday, but I apologise in advance for the discourtesy of seeking to be excused on that day.

PN155

VICE PRESIDENT GIBIAN: Yes. Thank you, Mr Saunders. Sorry, Mr Blewett, was there anything you wanted to say in reply to the other submissions that have been made?

PN156

MR BLEWETT: No, your Honour.

PN157

VICE PRESIDENT GIBIAN: Right. Sorry, was there anything anyone else wanted to add? No. All right. Well, look, I'll just have to consult with the other members of the Full Bench in relation to the course to be adopted. Just because of the other commitments, I anticipate that we will indicate to the parties at least the position for the time being on Friday. The parties will have to at least continue their efforts until Friday, and we'll then indicate at least the position for the time being. Can I thank everyone for their attendance this afternoon. The Commission is now adjourned.

**ADJOURNED INDEFINITELY**

**[4.23 PM]**