



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2016/8)**

**Melbourne**

**1.00 PM, MONDAY, 17 OCTOBER 2016**

PN1

JUSTICE ROSS: Can I have the appearances, please? What's going on?

PN2

MR IZZO: They can't hear in Sydney.

PN3

JUSTICE ROSS: Not much point me talking to you if you can't hear me. Is there - can you hear me now? In Sydney, can you hear me now?

PN4

MR IZZO: Very, very faint, your Honour.

PN5

JUSTICE ROSS: All right, just bear with me for a moment. Now, is that any better?

PN6

MR IZZO: It's still quite faint.

PN7

JUSTICE ROSS: Is that any better?

PN8

MR IZZO: Not really, your Honour.

PN9

JUSTICE ROSS: All right, I'll stand the matter down for five minutes and we'll try and sort it out.

**SHORT ADJOURNMENT**

**[1.01 PM]**

**RESUMED**

**[1.08 PM]**

PN10

JUSTICE ROSS: Can I have the appearances, please, firstly in Melbourne?

PN11

MR M GALBRAITH: If it please the Commission, Galbraith, M, for the SDA.

PN12

JUSTICE ROSS: Thank you, Mr Galbraith.

PN13

MS K BIDDLESTONE: Biddlestone, K, appearing for the SDA as well.

PN14

JUSTICE ROSS: Thank you, Ms Biddlestone. In Sydney?

PN15

MR P BONCARDO: May it please the Commission, Boncardo, initial P, for the construction and general division of the CFMEU.

PN16

JUSTICE ROSS: Thank you.

PN17

MR A THOMAS: Yes, if the Commission please. Thomas, initial A, for the mining and energy division of the CFMEU.

PN18

JUSTICE ROSS: Thank you.

PN19

MS R BHATT: If it please the Commission, Bhatt, initial R, appearing on behalf of the Australian Industry Group.

PN20

MR L IZZO: Izzo, initial L, seeking permission to appear on behalf of ABI and New South Wales Business Chamber.

PN21

MS M ADLER: If it pleases, Adler, initial M, from the Housing Industry Association.

PN22

MR S BULL: If the Commission pleases, Bull, initial S, for United Voice.

PN23

MS W CARR: If the Commission pleases, Carr, initial W, for the Transport Workers' Union.

PN24

MS R WALSH: Walsh, initial R, appearing for the Australian Workers' Union.

PN25

JUSTICE ROSS: Anybody else in Sydney? No? Can I go to Canberra?

PN26

MR W TEGG: If it please the Commission, Tegg, initial W, from the Australian Manufacturing Workers' Union.

PN27

JUSTICE ROSS: Yes.

PN28

MS R SOSTARKO: If it pleases, Sostarko, initial R, for Master Builders' Australia.

PN29

JUSTICE ROSS: Thank you.

PN30

MS K PEARSALL: If it pleases the Commission, Pearsall, initial K, for the National Farmers' Federation.

PN31

JUSTICE ROSS: Thank you. Are there any other submissions? Anyone from Adelaide?

PN32

MR T EVANS: If it pleases the Commission, Evans, initial T, from the Australian Hotels' Association.

PN33

JUSTICE ROSS: Thanks, Mr Evans. I've received advice from the South Australian Wine Industry Association indicating that they are unable to participate in the mention today. Are there any other appearances? No? Can I indicate that we've received submissions in response to the directions that were issued. The employer's submissions are from ABI, AHA, Ai Group, the Coal Mining Industry Employer Group, HIA, MBA and the NFF. From unions there are submissions from the AMWU, the CFMEU, from the three divisions, mining, construction and general and forestry. From the SDA a submission of 16 September indicating a consent position has been reached in relation to general, retail, fast food and hair and beauty and on 13 October indicating that they do not oppose the Ai Group ABI variation to the storage services wholesale award, regarding the timing of termination payments.

PN34

There are also submissions from the TCFUA and United Voice and I've received correspondence from the AWU today attaching a brief submission in the proceedings to be heard on Friday and we'll make sure that's posted on the website. I've also received correspondence from Ai Group; a short -in relation to the proposed program for the hearing. I'm not sure whether that's been provided to other parties, so given it was dated today and I've only just seen it I might indicate what's proposed and then I'll go to each of the parties or I'll ask generally whether there is any objection to that course, rather than asking each party individually.

PN35

What's proposed is that it's unnecessary to have opening statements from the parties as written submissions have been filed. In relation to the order of the hearing, it's proposed that the Commission firstly hear from submissions from the parties proposing variations and hear submissions in support; that would be firstly from Ai Group. It would make submissions regarding the payment of wages on termination and the annual leave loading issue. Then ABI is to make submissions regarding the payment of wages on termination and the removal of penalties for late payment. Then we would hear from any party who supports the Ai Group, ABI submissions and any party wishing to make - I think it means any party wishing to make submissions regarding the Commission's statements of 8 September and 14 October 2016.

PN36

Then it's proposed that any party wishing to make a submission in opposition to the variations proposed by Ai Group and ABI would the make submissions. There would be submissions in reply. So in other words, in essence, ABI, Ai Group make their submissions in support. Those opposed make their short oral submissions, then ABI and Ai Group in reply. I think as each party makes its submissions they can also address the matters raised in the statement of 14 October. Is there anyone who opposes that program or has an alternate proposition? Anyone in Sydney?

PN37

MR THOMAS: Your Honour, can I just make the point it's not necessarily in opposition to see where we fit into the schedule. In our submission of 20 September we propose an alternative draft determination that was prepared by the Commission for the black coal award.

PN38

JUSTICE ROSS: Yes.

PN39

MR THOMAS: I might say, your Honour, that other than addressing the issues raised by the full bench in the statement issued this morning our written submission on our alternative contains pretty much what we want to say in the matter.

PN40

JUSTICE ROSS: Yes.

PN41

MR THOMAS: Both the AiG and the coal-mining group have put in written responses and as per the directions we will put in a reply to those responses by close of business tomorrow, I think.

PN42

JUSTICE ROSS: Yes.

PN43

MR THOMAS: Save for what the Ai Group may say, or the CMIEG and save for the issues in today's statement we would probably rest on our written submissions.

PN44

JUSTICE ROSS: Yes, okay. Anyone else in Sydney?

PN45

MR BONCARDO: Your Honour, sir - so far as the construction and general division of the CFMEU is concerned this is not a matter that arises from questions that your Honour has posed in the statement but I think it perhaps may arise from your Honour expressing the matters that the ABI were going to address with the full bench on.

PN46

JUSTICE ROSS: Yes, I'm having trouble hearing you. Can you speak into the microphone?

PN47

MR BONCARDO: I apologise, your Honour; is that better?

PN48

JUSTICE ROSS: Yes.

PN49

MR BONCARDO: Thank you.

PN50

JUSTICE ROSS: You've just deafened me but okay - yes?

PN51

MR BONCARDO: Your Honour, we raised in our written submissions that we are of the understanding that the issue of penalty for late payment of wages was not to be dealt with at least so far as the building and construction and the joinery awards were concerned by this particular full bench. I know that your Honour has referenced the ABI making submissions on that particular issue. So I suppose the construction and general division of the CFMEU is clear, would your Honour be able to indicate whether that will be an issue which will be ventilated on Friday?

PN52

JUSTICE ROSS: Not off the top of my head, although - so you're indicating that there has been - the bench has previously indicated that the penalty for late payment issue in respect of the two construction awards will be dealt with by the full bench that's dealing with the other substantive changes to those awards, is that right?

PN53

MR BONCARDO: That is my understanding and I say that with this caveat, your Honour: I wasn't there.

PN54

JUSTICE ROSS: Yes, no, no - look, can I - I can't recall off the top of my head. Perhaps if I put the question to Ms Adler and also to the MBA: Ms Adler, do you have a recollection about that issue?

PN55

MS ADLER: I guess I could say two things: the first thing is I don't think there is a claim in relation to the penalty for late payment of wages in relation to the building and construction general onsite award. The MBA can talk more to what their specific variation is but I don't think it's squarely on that issue. The second thing I would say is my understanding also was that the claim related to penalty for late payment of wages in relation to the joinery award was to be dealt with by the full bench dealing with the award-related matters. But - - -

PN56

JUSTICE ROSS: I'm sorry, Ms Adler - someone is rustling paper. I'm just having trouble hearing you. Did I understand you to say that the joinery award - that the claim in relation to late payment in respect of that award was to be dealt with by the full bench that's been constituted to hear the various substantive claims on the construction award?

PN57

MS ADLER: That was my understanding, although the specific issue of how that may interact with ABI's claim I don't think has been fully dealt with.

PN58

JUSTICE ROSS: All right.

PN59

MS SOSTARKO: Your Honour, if I could add to that - - -

PN60

JUSTICE ROSS: Yes.

PN61

MS SOSTARKO: - - I would certainly - I agree with Ms Adler's recollection of that exchange. Certainly, there was correspondence to the effect that the parties to the construction award review were of the consensus that those claims that were on foot within the onsite and joinery awards should be confined to that part of the review. However, as Ms Adler said, ABI weren't a party to that correspondence.

PN62

JUSTICE ROSS: Yes, yes, yes - all right.

PN63

MS ADLER: So therefore the issue is unresolved.

PN64

JUSTICE ROSS: Okay. All right, well, Mr Izzo, what do you say about this issue?

PN65

MR IZZO: Your Honour, we don't have an objection per se to the joinery - the issue in the joinery award being determined by a different full bench that's specifically dealing with that award. What I would say is this; is that there is a number of other awards that are going to be subject to submissions on Friday - - -

PN66

JUSTICE ROSS: Yes.

PN67

MR IZZO: - - regarding whether the clause is one which is permissible in a modern award. It may well be the case that the outcome of the hearing on Friday may have a very strong influence on what happens in the joinery award in due course. So I don't have an objection to it being dealt with later but the parties obviously will need to be aware that the outcome of Friday's hearing will likely set the tone, as it were, for what happens in the joinery award - - -

PN68

JUSTICE ROSS: All right.

PN69

MR IZZO: - - unless there is some industry-specific issue in joinery.

PN70

MR BULL: Your Honour, Bull from United Voice: I'd just like to make a comment in relation to the penalty provisions for the late payment of wages. There are, I understand, applications to remove longstanding provisions in hospitality - - -

PN71

JUSTICE ROSS: No, no - Mr Bull, I don't want to hear about - - -

PN72

MR BULL: (Indistinct) submission, that's all.

PN73

JUSTICE ROSS: I want to deal with the construction matter first, okay?

PN74

MR BULL: All right, I'll leave it.

PN75

JUSTICE ROSS: Yes, all right - so is the claim in relation to both the joinery and the construction onsite award - the two awards, or - - -

PN76

MR IZZO: It's just the joinery, your Honour, I believe.

PN77

MS ADLER: That's correct - that's my understanding also, your Honour.

PN78

JUSTICE ROSS: Okay. Subject to what the parties who have an interest in that award wish to say, I think it should be dealt with and I think this is what either the bench have indicated before or in an exchange with the parties at a previous mention I'd indicated, I think that issue should be dealt with with the other substantive matters in relation to that award before the other full bench. Having said that, the point that Mr Izzo raises is correct; that is that whilst the payment of wages full bench will no longer be dealing with that matter, the parties with an interest in that award should bear in mind that the outcome of the payment of wages full bench deliberations may well have an impact or a bearing on what happens in the joinery award when it's dealt with by the other full bench, okay?

PN79

MR IZZO: Thank you, your Honour.

PN80

MS ADLER: Thank you, your Honour.

PN81

JUSTICE ROSS: All right, is there anything else in relation to joinery or the construction area generally before we go more broadly to see if anyone has an objection to the proposed order of proceedings on Friday? No? All right.

PN82

MR BULL: Bull from United Voice: this does relate to the proposed order and it also relates to the late payment of wages. In our written submission we've very briefly said that we simply oppose the proposed deletion of certain provisions.

PN83

JUSTICE ROSS: Yes, just speak into the microphone, if you wouldn't mind, Mr Bull.

PN84

MR BULL: We've said we simply oppose the deletion of the certain provisions in four awards. They're longstanding provisions that basically applied a penalty for waiting in the payment of wages. I've given the matter further thought. I can elaborate on why we say they're proper provisions in terms of the current Act. It would be useful for me to either make an opening statement or perhaps provide a brief, written statement before Friday so the employers have the advantage of knowing why we say that provisions are - - -

PN85

JUSTICE ROSS: Yes, that's fine, Mr Bull - you can adopt either course, really. It would probably be of more assistance to the bench, just so we have the advantage of reading it prior to the hearing so if we have any questions for you we can put them - so if you're able to a short submission addressing that issue would be of assistance and I suppose it's in two parts: there's the jurisdictional question but there is also the merit argument around EFT and how that should be dealt with, okay? I don't think - there is nothing - Ms Bhatt, I don't mean this pejoratively - but there is nothing magical about Ai Group's proposed order. If I can give each of you the assurance that at the end of the hearing I'll certainly be asking whether anyone has anything further they wish to say.

PN86

Bearing in mind it's a review proceeding, not an inter parties matter as such - so you won't be restricted by the order that's being proposed. If, for example, ABI or Ai Group say something that a union wishes to respond to then you'll have the opportunity to do that. It will be an intrusive process. It's not intended to adopt a technical approach to the making of submissions in relation to any of these matters. Further, I might say, having regard to the fact that we issued the statement that we did on Friday, I can well appreciate that perhaps having considered for the first time the impact of section 117 that parties may want an opportunity to further consider some of the issues raised in that statement.

PN87

If that is right then I would certainly encourage you to have a discussion amongst yourselves about how we might deal with that and it may be that a short program of further written submissions to deal with those discrete issues is something that the parties would find of advantage. Of course if you are able to deal with it on

the Friday and you don't require further time then I'm happy to accommodate that as well. But I wanted to at least raise the possibility with you. All right, that might deal with the order. There is also the question of the witness. Attached to ABI's submission is a witness statement by a Mr Scott Farquharson. Is Mr Farquharson going to be required at the hearing on Friday? Does any party wish to cross-examine him?

PN88

MR IZZO: Your Honour, if I might answer that: we've had an indication from two of the union parties that they wish to cross-examine Mr Farquharson. But there have been some developments in relation to your statement: the first is that unfortunately due to pre-arranged leave he is not available on Friday. The second is that the CFMEU - one of the sets of CFMEU submissions has sought to have Mr Farquharson and a CSR referred to the Fair Work ombudsman for prosecution in relation to some of the evidence that he has given. Given that he is not available to answer what appear to be allegations of breaches of the Act, in relation to this matter and given that the hearing is scheduled to proceed on Friday, we propose to withdraw that statement because we don't think it would be appropriate for it to proceed in circumstances where he's not there to defend himself.

PN89

JUSTICE ROSS: All right, yes, well - in any event, I'm not sure that we would be allowing his cross-examination for the purpose of determining whether or not he had breached the Act. I would have thought - well, in any event, the statement is now withdrawn. I suppose we should redact your written submission to the extent that it relies on it?

PN90

MR IZZO: We would be content with that course, your Honour, and we may ask  
- - -

PN91

JUSTICE ROSS: Sorry, Mr Izzo - it might be more convenient if we simply refile your submission without any reference to it.

PN92

MR IZZO: We'd be content with that course.

PN93

JUSTICE ROSS: Okay.

PN94

MR BULL: Your Honour, there is one matter we raised in correspondence with my friend concerning Mr Farquharson which was a request for the statement. We'd suggest that he should be referred anywhere. In paragraph 13 of his statement he talks about requesting and receiving advice from the treasury department of his company about costs associated with processing a payment outside of a pay cycle.

PN95

JUSTICE ROSS: Yes.

PN96

MR BULL: We thought that information may generally be useful to this inquiry. So if my friend is able to if he could perhaps provide a copy of that information to the full bench and those interested in it - that might be a useful thing to do.

PN97

JUSTICE ROSS: Mr Izzo?

PN98

MR IZZO: I don't have instructions whether his employer would be willing to have that material provided to the bench. I can certainly ask but I must say if they're not willing then I would strongly resist any attempt to have that material produced under compulsion, given that if the evidence is no longer be tendered then the material wouldn't really be relevant to evidence being given in the proceedings. The material could be sought from any employer in the country, really, so there's no reason why CSR itself should be singled out if it's not giving evidence. I can request and I'm willing to undertaken that but if they're unable to provide it we'd suggest that that should be where the matter ends.

PN99

JUSTICE ROSS: Well, if you make the request and we'll see where that goes and if anyone wants to take the matter further we can deal with it on Friday.

PN100

MR BULL: Perhaps if Mr Izzo could finalise his request by close of business tomorrow in writing to me that would be appreciated.

PN101

JUSTICE ROSS: Well, we can certainly make the request by then. I suppose he's in CSR's hands about when they respond. But if you can undertake that as soon as possible, Mr Izzo, that would be appreciated.

PN102

MR IZZO: I will, your Honour.

PN103

JUSTICE ROSS: Is there anything further? Ms Biddlestone, yes?

PN104

MS BIDDLESTONE: Yes, your Honour, thank you - the SDA indicated in our correspondence to the Commission on 13 October - - -

PN105

JUSTICE ROSS: Just a moment, we'll just find it. Right, no apparently we weren't moving vigorously enough so the room went to sleep. But, you know - - -

PN106

MS BIDDLESTONE: We indicated that given we had no opposition to the AiG and ABI claim in relation to the storage services award that we wouldn't be making any further submissions in relation to the matter.

PN107

JUSTICE ROSS: Yes.

PN108

MS BIDDLESTONE: In light of the statement that we received this morning, however, we do have some concerns about whether any decision around timing of payment of wages on termination will automatically have a flow-on effect to other awards and whether or not there will be a broader consultation process, given that other parties haven't had an opportunity to make submissions on those points because we haven't had an opportunity to review our other awards that we have an interest in. So we're unable to make a comment at this stage in relation to that but we'd like to see that process established for that.

PN109

JUSTICE ROSS: No, no - I understand that. Perhaps if - probably the easiest way, Ms Biddlestone, would be to send a short letter to that effect and we'll make sure it's posted on the website. As I indicated it's likely that this will be an intrusive process. It's really only been having regard to the submissions that have been made and the statutory provisions that we thought it was a matter that we thought we should bring it to the attention of all the parties. I readily accept that whilst we have published statements to date and whilst obviously the one on Friday has been published, it's likely that unless you were interested in one of the awards that's been subject to a draft variation determination you wouldn't be following these proceedings closely.

PN110

So if you've got a proposal about how we deal with that then I'd certainly be interested in hearing about it. If you put it in correspondence then it's a matter that other parties can address at the hearing on Friday, about how we should deal with that circumstance. But I certainly understand the issue that you've raised and speaking for myself, I'm not about to launch off and make variations through all modern awards without some further process in the matter.

PN111

MS BIDDLESTONE: Thank you, your Honour.

PN112

JUSTICE ROSS: Is there anyone in Sydney who wishes to say anything further?  
No?

PN113

MR IZZO: Your Honour, it's Mr Izzo here. There is one final matter that I think may have been addressed by Mr Bull but I do just want to insure that it has been: if I could just explain, our claim in relation to the penalty relating to late payment of wages is based upon a submission that principally asserts that the terms as they are currently in the awards do not fall within section 139 of the Fair Work Act; that is, terms that may be included in modern awards. Therefore to be included an alternate source of power must be identified, for instance, such as section 142, which talks about ancillary terms.

PN114

The submissions that have been filed by all union parties - none of them actually identify what their response is to that particular assertion, as to whether or not these terms are permitted by 139 or not. Now, I'm conscious that we have to file submissions in reply tomorrow and we're going to be in quite a difficult position if we don't actually know the union position on this. Now, I suspect that the effect of what Mr Bull said earlier might be that United Voice will be asserting that the terms that are presently in the awards do fall within the coverage of section 139.

PN115

If that is the case, we really need to know what limb of 139 United Voice says it relies upon in order to file any reply of any substance because as it stands right now, we're not really in a position to file any reply submissions because there is nothing to respond to.

PN116

JUSTICE ROSS: Yes.

PN117

MR BULL: Well, I can indicate very briefly, if it will help Mr Izzo - and I've only looked at this material in more depth this morning in response to reading the statement - in relation to cleaning services, hospitality industry, general and the registered and licensed clubs award, they talk about waiting. They're likely archaic provisions that have been in those awards or their predecessor awards for some time. I'd indicate that I think they are permissible in the sense that there is a power to make them, under 139, likely as something akin to a penalty rate in the sense that they - they're different from what was dealt with in the timber award because we would say the words, "waiting", imply the attendance of the employee at the workplace.

PN118

So they involve attendance, if you like. The supported employment award of the only four which I'm interested in is a different one. There may be some issues with that. Alternatively I would say in relation to the cleaning and hospitality awards, that if you don't believe that there is jurisdiction to have them substantive terms, that they're appropriate ancillary provisions, we would rely on I suppose the notorious history of non-compliance in the sectors that the awards deal with.

PN119

Look, I apologise: I will attempt to get something in writing to elaborate what I've just said but that is in broad compass while we say there is jurisdiction to do them. There is no broader issue in light of the Commission's proposal as to whether they can sit with a uniform full term. The main justification for them I would say is that you're dealing with industries where there is high levels of non-compliance. They're useful statements of, you know, to get people to have their money paid promptly, which I'm unhelpful with. There's no evidence that they're abused or the employers are paying exorbitant penalties because of them. That is what I'd say.

PN120

MR IZZO: Your Honour, if I could just respond: firstly, I'm greatly appreciative because that assists in understanding the case that we may be required to answer.

I think there is just two issues that I might just still put before the bench: the first is it's probably still difficult for us to file submissions in reply until we've seen Mr Bull's submission.

PN121

JUSTICE ROSS: Yes.

PN122

MR IZZO: Additionally it would be helpful if any other union party who objects to our claim articulates the basis upon which they say the terms are permitted within the meaning of 139 before we file reply submissions because we will need to consider whatever is going to be put. I understand now from Mr Bull that the argument that is being advanced is the terms are penalty rates within the meaning of 139. But I don't know if there is any other position that is going to be put.

PN123

JUSTICE ROSS: Yes.

PN124

MR IZZO: I think we need to know that before we file reply submissions.

PN125

JUSTICE ROSS: Yes, well, bear in mind that to the extent that any party is either taken by surprise or hasn't had sufficient time to consider an argument that is put during the course of the hearing on Friday then you should feel free to seek an opportunity to make a written submission in relation to the particular matter. I suspect that after we have heard everyone there will be a further process for us to deal with the range of issues that have been raised as we try and grapple with some of these provisions. Mr Bull, as you indicated I think a number of them - I think you used the word archaic. I think a number of them give rise to an issue about whether they suit contemporary circumstances and if they are to continue then in what form and that is an issue that we're going to want to give some further consideration to as well.

PN126

MR BULL: I'd agree that that would be appropriate.

PN127

JUSTICE ROSS: Okay. Is there anything further anyone wishes to say at this stage? No? All right, well, thank you very much and I'll no doubt see you on Friday. I will adjourn.

**ADJOURNED UNTIL FRIDAY, 21 OCTOBER 2016**

**[1.39 PM]**