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**TRANSCRIPT OF PROCEEDINGS**

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O/N H-794085

**FEDERAL COURT OF AUSTRALIA**

**VICTORIA REGISTRY**

**KENNY J**

**No. VID 618 of 2017**

**A REFERRAL UNDER S 608 OF THE FAIR WORK ACT BY THE PRESIDENT OF  
THE FAIR WORK COMMISSION**

**MELBOURNE**

**10.16 AM, THURSDAY, 22 JUNE 2017**

**MR C. RAWSON appears for the applicant**

**MR J. ARNDT appears for the respondent**

**MR M. MOIR appears as an interested party**

**MS S. ISMAIL appears as an interested party**

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HER HONOUR: Mr Rawson.

MR C. RAWSON: Yes, your Honour. Please the court, I appear for the President of the Fair Work Commission, who is the - - -

5

HER HONOUR: Thank you.

MR RAWSON: - - - party bringing the special case.

10 HER HONOUR: Thank you. Now, I know we have a number of other representatives present and it would help me if you could announce your appearances so I know who's who.

15 MS S. ISMAIL: Thank you. Good morning, your Honour. My name is Ms Ismail, initial S and I appear on behalf of the Australian Council of Trade Unions.

HER HONOUR: Thanks, Ms Ismail.

20 MR J. ARNDT: Your Honour, my name is Arndt, initial J. I appear for the Australian Chamber of Commerce and Industry.

HER HONOUR: Thank you, Mr Arndt. And in Sydney?

25 MR M. MOIR: Yes. If the court pleases, I appear as counsel for the Australian Industry Group. My name is Moir, M-o-i-r, your Honour.

30 HER HONOUR: Thank you very much. Now, this is a case management at which I really want to work out how the matter is going to proceed and who might or might not be parties to it and I also want to discuss some difficulties that I see with the way the proceeding has been formulated and I will say at the outset that I'm grateful for the attendance of the non-parties, if I can put it in that way. The first matter I wanted to talk to you about is the case stated. Mr Rawson, I appreciate you're being polite and standing at the lectern, if it's easier to take notes, please feel free to be seated for the moment.

35

MR RAWSON: Thank you, your Honour.

40 HER HONOUR: I have some serious concerns about its current competence. I hope I'm not telling you things that you take for granted but as you're aware, federal jurisdiction doesn't empower a court to give an advisory opinion and an opinion doesn't determine a right or liability as between competing parties and an advisory opinion, therefore, doesn't involve a matter and you will be aware that there must be a matter of the kind referred to in section 75 or 76 of the Constitution to attract federal jurisdiction. A case that might help – because in the end, I'm going to invite you to go and think about what I've said and let me know where your thinking takes you – a case that might help you is in *Re McBain; Ex Parte, the Australian Catholic*

45

Bishops Conference in (2009) Commonwealth Law Reports at page 372 and in particular, at page 406 to 407 and the judgment of Gaudron and Gummow JJ.

5 You will see that their Honours helpfully set out what is required in order for there to be a matter and as I'm sure most of you are familiar with the notion, there must be a liability or duty to be established in a controversy between the parties and judicial power of the Commonwealth is involved for the quelling of that controversy. Now, the difficulty here, having given that context, is that the special case that I have before me at present involves the President of the Fair Work Commission as  
10 applicant but it involves no parties to a matter which would have been, I assume, matter AM2015/1. So it seems to me, without the benefit of your submissions, which I will invite in due course, that there is a very serious question as to whether or not the manner in which the special case is framed would attract the jurisdiction of this court because it doesn't give rise to a matter in the constitutional sense. It may  
15 well be said that what it is at present is a request by the President of the Fair Work Commission for the opinion of this court. That's something that in the ordinary course is not available. So that's my first concern. I say in the ordinary course because, for those of you who are familiar with the jurisprudence in the area, the general rule that it's not open to seek an advisory opinion is controlled by a number  
20 of cases, which suggest that the general rule is sometimes narrower than I've stated and you may need to look to those.

And as I've suggested, a good starting point is in *Re McBain*. Now, it seems to me at first blush at least, again, without the benefit of your submissions, that section 608  
25 of the Fair Work Act contemplates that there is a dispute between the parties and that the determination of the relevant question of law, which is to be stated by the President, will quell a dispute or part of the dispute between them. It may help to turn up section 608, which says:

30 *The President may refer a question of law arising in a matter before the Fair Work Commission for the opinion of the Federal Court.*

Now, what I've said to you provides the context, it seems to me, for understanding section 608. Now, again, I repeat I have not had any submissions from you, so my  
35 mind is not made up, but it concerns me. What I think might be said about the present special case, as it's termed, is that, because it's not stated as between the parties to the dispute and the questions won't, if answered, quell a controversy, they are rather peripheral to the controversy. Now, the second matter is this – and I'm happy to pause if you need to think further about what I'm saying. The second  
40 matter is this: if the stated case or the special case is incompetent at the beginning, there's a question about whether it can be cured. That is, the incompetence can be cured.

45 If it's a defect that's curable, it may be by the addition of appropriate parties, at least a contradictor, but perhaps parties with competing interests. But I'm by no means persuaded that you can cure the special case, as currently stated. You may recall a case called *The Attorney-General for the Commonwealth v Alinta Limited*, 233 CLR

542. Now, I will let you look at that case in due course, but it's different from this case. In Alinta private parties were in dispute. The Attorney-General for the Commonwealth intervened. The private parties ultimately withdrew. The Attorney-General arranged for a contradictor and in the result the High Court held that there was a matter and federal jurisdiction was attracted.

But the difference, it seems to me, and I would welcome submissions on it if you reach this point, is that in Alinta there was a matter at the beginning. So the questions are, to recap, is the special case competent in the sense that it can be brought within federal jurisdiction as giving rise to a matter. If it's not competent, can the incompetency be cured by the addition of relevant parties, if relevant parties wish to be joined or is it irreparably incompetent? Now, having said that, and I don't ask any of you to make submissions unless you wish to today, because I'm aware that you need to think about it, because these are complex questions.

There are two things that come to mind relevant to what I've just said. You may recall that there is at least one case in which section 608 of the Fair Work – I beg your pardon, not section 608. Section 622 of the Fair Work Act has been considered. That's the case of Financial Services Council v Industry Super Australia Proprietary Limited and it's reported in 222 FCR 455. If you look at that report you will see that there was a matter inter partes between the Financial Services Council and the Industry Super Australia and others. So this question of lack of a matter or lack of federal jurisdiction did not arise. From what I can see, and this is by no means definitive, the Financial Services Council made an application for an injunction and a declaration joining the other parties to the review of the modern awards proceeding before the Fair Work Commission.

That case may give you some idea of how the matter of the question of competence of the expert panel or the proper composition of the expert panel was brought before the court. Because you will recall in that case, not unlike this present case, the question was whether the President was able to sit as a member of the expert panel. The Federal Court in that case said that he was not. Now, we're in a different region here, but I recommend the case to you in the sense that it shows how the question can be brought to this court, but it's brought where there's a matter between the parties. There are numerous ways in which one might think of bringing the present question before the court.

An obvious way is for a decision to be made, perhaps seeking to be made by the President, a decision to be reached by the Fair Work Commission and a dissatisfied party who's affected by it might, if it so chose, bring an application for judicial review raising the very sorts of questions that are raised in the special case currently filed in the court. That's one example. There are many other ways in which the matter might be dealt with. So you may need to consider whether the doubts that I'm raising are capable of easy solution or ready solution or whether they're not and whether the continuance of the doubts means that this is a suitable vehicle, whatever the conclusion you reach.

So they are my preliminary matters. In the first instance, of course, I would ask Mr Rawson to consider the orders that I should make in order that I can receive some submissions at least from the President about the matters that I've raised. But it may be that others present also wish to make some submissions. That's a matter that I think they should consider and I will invite them to let my chambers know in due course and we will proceed from there. The next matter, this really touches on the next set of questions that I have, which you will be relieved to know are a lot simpler. The first and obvious question is who would participate at any hearing? And as I've indicated, I think that might depend upon the conclusions you reach in relation to the more complex matters that I've raised.

I will need to know an answer to that in due course and it is, I think, essential that it not be simply the President. There needs to be at least a contradictor and from what I've said to you, it may be necessary that there be parties in competing interest. The next question is interlocutory issues. Are applications to be made? And I think it's probably fair to say that at present I've raised at least one major interlocutory issue. There is the question of joinder of parties as another interlocutory issue, and there may be other issues that the parties consider should be brought before the court when they've thought – parties – I'm sorry, I should really say the president and those interested in the special case who are in attendance today.

I would like some indication in due course of what those applications might be and when you propose to make them. The other issues you might like to give some consideration to, although I think they're subsidiary at this stage, is whether there's any reason why the matter should be expedited. In the normal course, assuming that the matters I've raised can be dealt with or you propose that the matter go in its present state, subject to all its doubts and difficulties, to the Full Court, and I'm prepared to make an order accordingly – which at present I would not be prepared to do, at least not until I'm satisfied there was an arguable case for competency – in the ordinary course the matter would come on in November.

And the final matter that you might like to consider, but I think is a long way down the track just at present, is how long is it likely to take. The question then arises, well, what orders should be made today, at least in relation to the matter as presently constituted. It seems to me probably there are only two matters, although you may want to suggest more. The first is that there be a further case management hearing on a date at which you had a chance to consider your positions, and the second order would be that there be liberty to apply, because it seems to me that the president may wish to apply and those who have attended today may wish to make an application.

What I would indicate, though, is that so far as the president is concerned some timetable for the receipt of submissions should be contemplated. It may be, Mr Rawson, you can suggest a timetable today. It may be that you're in need of time to reflect upon a suitable timetable, in which case I would ask you to let my chambers know before Friday what that timetable might be, and I would invite the other parties, if they wished, to indicate whether they wanted to make submissions on the competency matters before Friday.

The reason I say before Friday is that I'm going on a period of two weeks leave on Friday. Now, the matter of when to have a further case management: what I propose is either 4 or 18 August. I've said – proposing that, but it's open to change. The reason I proposed those dates is that it would allow you the month of July,  
5 effectively, to reflect upon your positions and what applications, if any, you wanted to make, and your responses to the questions that I've raised and, bearing in mind the habit of lawyers to take a break in July, it might assist if you have more time rather than less.

10 So it was for that reason that I proposed 4 August as probably the better date. If that was too short for anyone interested, 18 August is a possibility. It might be done earlier, because I'm only, myself, taking a fortnight's leave, but it seemed to me that that might be too short given the nature of the matters involved. Do you need to have time to reflect upon any of this or are you happy, if I can put it that way?

15 MR RAWSON: Your Honour, I wonder if I might have a very short time, one or two minutes, just to take instructions - - -

HER HONOUR: Yes.

20 MR RAWSON: - - - in respect of a couple of the matters ..... in respect of a couple of the matters your Honour has raised, but I don't envisage that I will need any longer than that.

25 HER HONOUR: All right. Well, the orders I'm proposing, Mr Rawson, at this point, are simply two: (1) that there be a further case management on, let us say, 4 August 2017, and (2) there be liberty to apply. But it's on the basis that a timetable be set for the receipt of submissions on the matters I've raised and on the basis that  
30 any other body present today who wishes to take steps indicates they will take steps relatively early. If they can be Friday, that would be useful, even if it's only tentative, even if it's, "Well, we envisage making submissions on the question," or, "We envisage ..... apply to be joined." It may be that's as high as any of you can put it or, if you can't, you at least let my chambers know that you're thinking about the matter and you believe you will be in a position by X date. That would be helpful.

35 MS ISMAIL: Your Honour, I can indicate now that the ACTU would be interested in making submissions, at least, so I can let you know that now.

HER HONOUR: That's very helpful. Thanks, Ms Ismail.

40 MR MOIR: Your Honour, Moir for the Australian Industry Group. Just from our point of view, your Honour, 18 August would be a preferable date for the case management hearing.

45 HER HONOUR: All right. Thanks, Mr Moir.

MR MOIR: Thank you, your Honour.

HER HONOUR: I have no difficulty with 18 August. If it suits, if there's no difficulty so far as anyone else is concerned, it can be 18 August. Ms Ismail.

5 MS ISMAIL: We will seek to be represented by counsel and he has advised me that he's not available on the 18<sup>th</sup>. He's only available on the 4<sup>th</sup>. But we could make arrangements for someone else to appear.

HER HONOUR: Well, the alternative - - -

10 MR ARNDT: I should also say, your Honour, the preference of the Australian Chamber's counsel would be the 4<sup>th</sup> as well, if that assists.

15 HER HONOUR: Is the 7<sup>th</sup> or the 11<sup>th</sup> of more – of any use to any of you? It's not an ordinary case management date for me, but I could give you – could give you those dates.

MR MOIR: Unfortunately, your Honour, I'm in a trial all that week, the week commencing the 7<sup>th</sup>.

20 HER HONOUR: All right. Well, it looks as though it might have to be the 4<sup>th</sup>, in any event, at that rate. I will leave it to you to think about it and I will adjourn for 10 minutes.

25 MR RAWSON: I hope I won't need that long, your Honour, but perhaps that's best.

HER HONOUR: All right. Adjourn. Thank you.

30 **ADJOURNED** **[10.41 am]**

**RESUMED** **[10.53 am]**

35 MR RAWSON: Can I firstly thank your Honour for giving me the opportunity to take instructions on the propositions that your Honour has put before us this morning and I thank your Honour also for the considered way in which you've done that. Can I indicate – and obviously I'm not in a position to make a substantive response on any of those points today but they were matters which had taxed us before today and  
40 certainly we had given thought to whether the proceeding, as formatted, matched the requirements of a matter in section 608 of the Fair Work Act, having regard, amongst other things, to the guidance in the Full Federal Court decision of Hamsey, which is an old case dealing with referral under the old Workplace Relations Act.

45 I think it's fair to say that, inherent in the propositions your Honour has put before us this morning is a lurking, real, live constitutional issue about what is a matter and whether this proceeding, as presently brought, meets that definition and in

rehearsing, even outside court, the response which we might have provisionally made to that question, I think it becomes increasingly obvious that this is a matter where my client is going to be required to serve section 78B notices on the Attorney-General, giving notice of a constitutional issue arising because I don't think the  
5 question your Honour has asked this morning can be answered without raising a constitutional issue fairly and squarely.

HER HONOUR: There's a further difficulty too, Mr Rawson, you might like to consider and that is whether the special cases raises what can be properly  
10 characterised as questions of law. I haven't referred to that because that's a rather more fine-tuned question but for example, the first question is – and I haven't formed a view about it – the first question is are Deputy President Gooley and Commissioner Spencer presently permitted by the Fair Work Act to issue their decisions or  
15 decisions in matter AM2015/1. Well, it may be one would need to have some other facts about the existence of their commission and the like before one could even begin to answer that or it may be that one might say what's implicit in the case that has been forward. I could go through the other questions and it might be open to a party who wished to, to challenge whether or not they raised properly questions of law or were mixed questions of law and fact. Now, we all know that's a difficult  
20 area and I don't wish to go there today but you may also want to consider that.

MR RAWSON: I can indicate that we had considered that particular question and in particular, whether all the facts that we considered necessary to establish that those  
25 questions did arise, we had, to our satisfaction at least put those facts in the special case but we will revisit that question in light of what has fallen from your Honour.

HER HONOUR: It's a second consideration at least. You might also want to consider, Mr Rawson, if you're thinking of serving section 78B notices – and it may  
30 be that you're quite correct to do so, if you continue as you wish to continue – whether this is the proper vehicle to solve the essential problem of what to do to complete the decision making task that the commission had begun.

MR RAWSON: Yes.

35 HER HONOUR: In other words, I indicated before that a simpler answer would be to make a decision about how section 622 operates and to act upon that and then have a concrete question tested within the court.

MR RAWSON: Yes. I've heard what your Honour has said about this morning. I  
40 obviously haven't had the chance to take instructions on that point and so I'm confined, at the moment, to what I think has already fallen from the president about that question in some of his published statements. It may be possible to proceed in that way but it's by no means certain, at least as I stand here now, that any ruling made by the president on that question would be challenged in this court by anyone.  
45

HER HONOUR: Well, then it doesn't matter, does it?



MR RAWSON: But it may still matter and it may matter because for the sake of the argument, to tease out the question, if the president made a ruling and took a decision with respect to the constitution of this tribunal one way or the other and subsequent to that, the Full Bench, as constituted, then delivered its decision and no party took  
5 any step to challenge that decision and in the fullness of time, a variation to modern awards came about on the basis of that decision and some time down the track, other proceedings arose in which, for determination, depended upon rights or obligations arising under the modern award as varied, one conceivable possibility is that a party said to be bound by that modern award as varied may seek to collaterally challenge  
10 the validity of the modern award by reference to a defect or an asserted defect in the way in which the Fair Work Commission or the Full Bench was constituted when it gave its decision and so that is a theoretical possibility at this point only but it's one that emerges from the president's published statements about the matter.

15 And it's by no means clear that that possibility will arise, but it's at least theoretically possible that it could. And it obviously would be a very undesirable outcome and without developing any submission about the matter point today, it's one that we say must in some way weigh in the balance when construing section 608 and in particular the reference to a matter in section 608 in the context of a statutory scheme  
20 which does contemplate that the Commission itself may make decisions in matters that are not inter partes matters before it. And so all of those are matters that we need to take away and consider and we will certainly take away and consider what has fallen from your Honour this morning about other possibilities or other ways in which this may - - -

25 HER HONOUR: Other possibilities which may not give rise to the same difficult legal questions.

MR RAWSON: Well, they might not give rise to that difficult legal question, but  
30 they may not solve the legal question either; the legal question that's taxing the President at the moment. But I haven't had the opportunity yet to take instructions in relation to what has fallen from your Honour about that and we will do so.

35 HER HONOUR: And there might be other options open to other parties too, I imagine.

MR RAWSON: So your Honour, with that in mind, we have given some thought to some proposed directions that pick up what your Honour has suggested and flesh it out a bit further.

40 HER HONOUR: So you might say – just following that through, Mr Rawson. I'm going to ask you in due course to make submissions on the future conduct of the proceeding. It may be that the questions you want to place before the Full Court are preliminary questions. In other words, if you take the view that this is properly  
45 constituted, it may be you want to ask the Full Court to decide whether it's properly constituted. It's a matter for you to consider.

MR RAWSON: Well, we will consider that, your Honour. So your Honour, we thought that your Honour might make directions this morning encompassing the following. Firstly, that the President file and – well, sorry, that the President serve notices under section 78B of the Judiciary Act upon all Attorneys-General by 29  
5 June 2017 giving notice of a possible constitutional issue arising in this application – sorry, in this special case.

HER HONOUR: Well, that's a matter for the party. Why should I make an order to that effect at this point? I'm not yet persuaded I have a competent matter in front of  
10 me.

MR RAWSON: Yes.

HER HONOUR: If you believe that you are going to raise a constitutional matter, I  
15 would have thought that you should go ahead and raise it.

MR RAWSON: Do it. Well, we're content with that, your Honour. That leaves an order requiring – this is, again, our suggestion, but there are – in the special case we have attached the submissions, both written and oral, that have been made by parties  
20 in proceeding AM2015/1 on the questions which can be broadly described as the questions that have come before the court today. There are a number of other parties who have appeared or made submissions in relation to the substantive matters in matter AM2015/1.

25 Can I indicate I've spoken this morning to the solicitor from the Victorian Government Solicitors office, who we have made aware of the proceeding and he has indicated that, on his client's part, the State of Victoria, they would seek an opportunity to have time to consider whether they wish to make submissions in the proceeding, which I think is broadly in conformity with what your Honour has  
30 suggested this morning. We propose that the President take steps to notify all parties who have participated in proceeding AM2015/1 of the special case filed by the President by 29 June 2017.

HER HONOUR: Yes, I think that's sensible. I mean, you can, if you wish, include  
35 something to the effect that any notice proposed to be given under section 78B of the Judiciary Act 1903 be given on or before or no later than 29 June. I'm happy to direct - - -

MR RAWSON: Yes. Well, we're content with that too, your Honour. Excuse me a  
40 minute, your Honour. Yes. So I'm reminded that it may be desirable for your Honour to direct that the parties notified by the President of this proceeding be required to indicate by a certain date whether they wish to participate in the proceeding.

45 HER HONOUR: Yes. I think that has to be done, but there's a preliminary problem, and that is it's not merely participate. For the purposes of this case management you're all – the other three, if I can put it that way, are before me as

interested persons, because I anticipate that they really have an interest. At some point or other their status has to be regularised. They're either parties joined or, in the case of Attorney-Generals, interveners perhaps or wishing to appear amicus is a possibility is a matter for the particular bodies concerned to consider.

5

MR RAWSON: Well, perhaps a direction could be made along the lines of any person wishing to be joined as a party to the proceeding or wishing to intervene in the proceeding file an application in the Federal Court and serve on the President. Perhaps 13 July might be too soon for that process. Maybe by 20 July, your Honour.

10

HER HONOUR: What I'm going to do, Mr Rawson, is rather than come up with dates on the hop and orders on the hop, ask you to go away and formulate a draft set of orders.

15

MR RAWSON: Yes.

HER HONOUR: But for the present purposes, yes, something to that effect would be appropriate and I would suggest that you speak to each of the other representatives at the bar table and ask them what an appropriate date would be so far as they're concerned for receiving instructions and considering their position.

20

MR RAWSON: Yes, your Honour. Well, with the same avoidance of date for present purposes in mind, the next order should be that any person wanting to make submissions.

25

HER HONOUR: Well, I have it in mind that you should go first. You are the moving party.

MR RAWSON: Yes. Well, save only that one possibility – and I say this without instructions from my client at this point, let alone any other party, but one possibility is that once section 78B notices have been served, the Commonwealth Attorney may make submissions on this question. And if the Commonwealth Attorney did so, there may be a question then as to whether the President seeks to make submissions on this question.

30

35

HER HONOUR: Well, that's not a matter I can contemplate really.

MR RAWSON: No. So just in terms of timetabling, if there's an order requiring the President to go first, it's possible that by the time the President's submissions are due there may be no additional submission for the President to make.

40

HER HONOUR: I will undoubtedly reserve liberty to apply.

MR RAWSON: Yes. Thank you, your Honour.

45

HER HONOUR: So if something should arise which makes these orders inappropriate or the orders I propose to make inappropriate, then it would be for the

party who perceives that they are inappropriate to apply to me and ask for them to be varied in an appropriate fashion.

MR RAWSON: Yes, your Honour.

5

HER HONOUR: So I will reserve liberty to apply on three days notice. But in the first instance, I think, Mr Rawson, I had in mind that if we retain the 4 August date that the President should be required to make submissions no later than 14 July – that gives you three weeks – on the question of competency of the special case, as it has been called and on the future conduct of the proceeding. Precisely who those submissions will be served on is an interesting question. At present they be filed in the court until someone is joined. I think the short answer is you need an order saying file and serve submissions on the competency of the special case and on the future conduct of the proceeding. For the purposes of the present matter, the persons to be served include each of the bodies represented today and any other – and if, by that point, you’ve given your section 78B notices, perhaps you might wish to serve those indicated and interested in the proceeding.

MR RAWSON: So, your Honour, the last two ingredients would be the case management conference be listed for 4 August - - -

20

HER HONOUR: Well, there’s one other. You’re going to have to, at some point, make provision for the receipt of submissions by interested parties.

MR RAWSON: Sorry, yes, your Honour. Yes.

25

HER HONOUR: And I had in mind an appropriate date would be 28 July. That’s the week before the proposed case management on the 4<sup>th</sup>. It would give each of the other parties two weeks to see what the president had said and they would have the advantage of what you had said.

30

MR RAWSON: Yes, your Honour.

HER HONOUR: All right. Well, let’s say the 28<sup>th</sup>. So it would be an order in terms of, on or before 28 July 2017, any other interested person file submissions in response, and the question is who do those interested persons file their submissions – serve their submissions on. Clearly the president and any other person attending today or represented today. So that’s three, at least.

35

MR RAWSON: Yes. And then the - - -

40

HER HONOUR: That - - -

MR RAWSON: I’m sorry, your Honour.

45

HER HONOUR: That may, in terms, not prove satisfactory. You will have to include in these orders an application for intervention by 13 July, so that should also assist, but it won't have been determined by the 28<sup>th</sup>, I would not have thought.

5 MR RAWSON: I'm sorry, your Honour.

HER HONOUR: Well, if you're going to provide, as I had understood you to do, that any person wishing to be a party or to intervene in the proceeding file an interlocutory application by 13 July 2017. Under this present timetable there may or  
10 may not have been a determination of that application by the twenty – by 14 July – most unlikely by the 14<sup>th</sup>, and may have been by the 28<sup>th</sup>, but the status of some parties will be as yet unknown. So any drafting is going to have to take account of that.

15 MR RAWSON: Yes. There may be some ways we can accommodate that, your Honour. We will give some thought to it.

HER HONOUR: I mean, one way of dealing with it would be simply to require at this stage that applications for joinder or intervention become – be made by 13 July  
20 and be – and one has a hearing of those applications, insofar as a hearing is necessary, on 4 August, and then deal with the matter of competency. That might, in fact, work better, I think, on reflection.

MR RAWSON: But still having programmed submissions on - - -  
25

HER HONOUR: But programming submissions for competency at a subsequent date.

MR RAWSON: Yes.  
30

HER HONOUR: The difficulty is, Mr Rawson, that I – until one knows who's joined and who's not, and who's intervening and who's not, no one really knows they're proper status and I won't know what – how I should be treating them. If  
35 they're joined as parties they have a certain status or if they're intervening, clearly, they have a status. If they're just coming along as today, it makes it very difficult indeed and I rather doubt whether I could proceed in that way for very long, in any event.

MR RAWSON: Yes.  
40

HER HONOUR: So perhaps that's the first matter we need to deal with. We can timetable submissions. I think that would be a good idea, because it keeps the matter progressed, but it may be we need two hearings, one on the 4<sup>th</sup> as to applications for joinder and notification if there's then to be intervention as a right, and a further  
45 hearing on the substance of the submissions.

MR RAWSON: Your Honour, that may be so. Although the matter is not attended by urgency, perhaps, in a conventional sense, I think there still is a desire, I think, probably, in - - -

5 HER HONOUR: Might be very - - -

MR RAWSON: - - - all circles to keep the matter moving expeditiously, noting that the proceeding before the commission itself is a four-yearly modern award review. So to the extent that it's possible to make orders today to keep the matter moving, I  
10 think, as a matter of principle, we would support that.

HER HONOUR: I understand that. This matter has been going since at least February. The difficulty is not a new one.

15 MR RAWSON: No.

HER HONOUR: And I understand the desire to solve it, but if it's not progressed in an orderly fashion it won't be solved properly at all.

20 MR RAWSON: No.

HER HONOUR: One could have a hearing of the submissions on 18 August, that is, the other date, or is that unsatisfactory to those who are – I know it's satisfactory to Mr Moir, but is it unsatisfactory to other persons at the bar table?  
25

MR RAWSON: Well, not to us, but I might let the other parties speak.

MS ISMAIL: Yes. Our counsel is available in August only on the 4<sup>th</sup>, the 24<sup>th</sup> and the 25<sup>th</sup>.  
30

HER HONOUR: Well, the 24<sup>th</sup> and the 25<sup>th</sup> would both be possible.

MS ISMAIL: Thank you, your Honour.

35 HER HONOUR: Can everybody else do the 24<sup>th</sup> or the 25<sup>th</sup>?

MR MOIR: Your Honour, those dates are suitable to us.

HER HONOUR: Thanks, Mr Moir. Mr Arndt?  
40

MR ARNDT: Your Honour, in August, counsel for the Australian Chamber is only available on the 4<sup>th</sup>, the 8<sup>th</sup>, the 9<sup>th</sup>, the 10<sup>th</sup> and the 11<sup>th</sup>.

HER HONOUR: Well, he's not available on any other dates?  
45

MR ARNDT: No.

HER HONOUR: So it's going to have to be the 24<sup>th</sup> or 25<sup>th</sup>, so either he makes separate arrangements and becomes available or another person is briefed.

MR ARNDT: Understood.

5

HER HONOUR: Mr Rawson.

MR RAWSON: 24<sup>th</sup> and 25<sup>th</sup> are fine for us, your Honour and I think, in order to best position the matter for – that is, the matter of whether there is a matter – for hearing on one of those dates and bearing in mind what I've already said, it may still be best to require my client to file submissions on that question ahead of 4 August.

10

HER HONOUR: I think that's right.

15 MR RAWSON: Yes.

HER HONOUR: The problem is who do you serve them on and I suppose you can serve them on those who've applied to be joined on the basis that it gets things going.

20 MR RAWSON: Yes. And I think we would be content to informally provide them to - - -

HER HONOUR: Yes. I think that might be good.

25 MR RAWSON: - - - parties who express interest in receiving them for the purpose of considering this application.

HER HONOUR: That would be sensible and then you serve them on those that are joined thereafter or are intervening.

30

MR RAWSON: Yes.

HER HONOUR: All right. Well, let's set it down for 25 August. So there will be a case management on 4 August and one on 25 August. One to deal with the question of parties and intervention and another to deal with other matters arising, if I can put it that way for the moment, including the – I don't specifically name the question of competency, although if it is going to be dealt with by me, it will be dealt with on that date.

35

40 MR RAWSON: It was the 25<sup>th</sup>, wasn't it, your Honour? Yes.

HER HONOUR: Friday the 25<sup>th</sup>.

45 MR RAWSON: And then so the date for our submissions maybe could be possibly 28 July, your Honour?

HER HONOUR: Yes. That would be suitable. And other parties – any joined parties, one could make the 11<sup>th</sup>.

MR RAWSON: 11 August?

5

HER HONOUR: 11 August. Then interested persons would know their status and they would be making submissions as such.

MR RAWSON: Perhaps that should be joint parties and any submissions of interveners, your Honour. I'm apprehending, on that date, your Honour might hear applications to intervene as well as applications to join.

10

HER HONOUR: All right. Well, let's say on the 11<sup>th</sup> – those are the - - -

MR MOIR: Your Honour - - -

15

HER HONOUR: Yes, Mr Moir.

MR MOIR: Sorry, your Honour. Just in terms of that date, the 11<sup>th</sup>, given those instructing me have other matters in the Fair Work Commission over that period, could we have possibly until, say, the 16<sup>th</sup> instead of the 11<sup>th</sup>?

20

HER HONOUR: It can be the 16<sup>th</sup> for everyone. I think that's not unreasonable, whether it's the 11<sup>th</sup> or the 16<sup>th</sup> is a negotiable date, so we will say the 16<sup>th</sup>.

25

MR MOIR: Yes. Thank you, your Honour. Appreciate it.

MR RAWSON: Your Honour, I think that just leaves liberty to apply, which - - -

HER HONOUR: It does. I will say there be liberty to apply on three days' notice. Now, my guess is that other matters will arise and other applications will be made and these orders may prove unsatisfactory in some regards. I think as soon as they do, I would be grateful if you would approach chambers and explain - - -

30

MR RAWSON: Yes. Yes, your Honour.

35

HER HONOUR: - - - what you believe is the difficulty and what you believe ought to be done. I will maintain the practice of copying into communications from chambers for the time being both you, Mr Rawson and the representatives of each of the others attending.

40

MR RAWSON: Yes. Could I also just – and it's purely an administrative matter – request that your Honour also copy in my colleague, Ms Groves, who sits at the bar table today?

45

HER HONOUR: Yes.



MR RAWSON: I, myself, will be away on leave for part of the period we've been talking about today.

5 HER HONOUR: I think that's all we can do today, save that, Mr Rawson, I would like – I will make orders in those terms, they will be copied to each of you present but I would ask you to draft – do the first draft of those orders and provide me with a minute – proposed minute of orders by 2 o'clock today, would that be satisfactory?

10 MR RAWSON: Yes, your Honour.

HER HONOUR: All right. And then they will be settled and circulated. Any further matter?

15 MR MOIR: Your Honour, can I just thank the court for arranging the video link to Sydney, it's most appreciated.

HER HONOUR: Thanks, Mr Moir.

20 MR RAWSON: Nothing from me, your Honour.

HER HONOUR: All right. Thanks, Mr Arndt. Thanks, Ms Ismail. All right. We will adjourn.

25 **MATTER ADJOURNED at 11.24 am UNTIL FRIDAY, 25 AUGUST 2017**