



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT BOOTH  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER CRIBB  
COMMISSIONER HUNT**

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

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

**Sydney**

**9.06 AM, THURSDAY, 23 MARCH 2017**

PN1

JUSTICE ROSS: May I have the appearances please, firstly in Sydney?

PN2

MR K THOMAS: If the Commission pleases, I appear on behalf of the CFMEU Mining & Energy Division. My name is Thomas, initial K.

PN3

JUSTICE ROSS: Thank you, Mr Thomas.

PN4

MR P BONCARDO: May it please the Commission, Boncardo, initial P, for the Construction and General Division of the CFMEU.

PN5

JUSTICE ROSS: Thank you.

PN6

MR S SMITH: If it pleases the Commission, Smith, initial S, for the Australian Industry Group.

PN7

JUSTICE ROSS: Thank you.

PN8

MR L IZZO: If it pleases, Izzo, initial L, on behalf of ABI New South Wales Business Chamber and seeking continuing permission.

PN9

MR R CALVER: If it please the Commission, Calver, initial R, for the National Road Transport Association known as NatRoad.

PN10

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

PN11

JUSTICE ROSS: Thank you, Ms Adler.

PN12

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

PN13

MR Z DUNCALF: If it pleases the Commission, Duncalf, initial Z, for the Australian Workers Union.

PN14

MR M NGUYEN: May it please the Commission, my name is Nguyen, initial M, I appear for the Australian Manufacturing Workers Union.

PN15

JUSTICE ROSS: Thank you, Mr Nguyen. In Canberra?

PN16

MS K PEARSALL: May it please the Commission, Pearsall, initial K, for the National Farmers Federation.

PN17

JUSTICE ROSS: Thank you. It might be best if you remain seated when you're talking, just so the microphone - so that we can pick it up, okay?

PN18

MS PEARSALL: Yes, your Honour.

PN19

JUSTICE ROSS: Any other appearances? In Melbourne?

PN20

MR T CLARKE: Trevor Clarke from the Australian Council of Trade Unions.

PN21

JUSTICE ROSS: Thank you.

PN22

MR M GALBRAITH: Galbraith, initial M, for the SDA.

PN23

MS V WILES: Wiles, initial V, for the Textile, Clothing and Footwear Union of Australia.

PN24

JUSTICE ROSS: Thank you.

PN25

MS L DOOLEY: Dooley, initial L, for the CFMEU FFPD division.

PN26

JUSTICE ROSS: Thank you. Any other appearances? Just before we get underway, the Bench has considered all of the submissions that are in. Some have arrived late and all of that, and for reasons I'm about to go into we're not fussed about those issues. Everyone will have an opportunity to comment on them. It's apparent from the submissions that there is a greater degree of complexity to these issues than perhaps originally anticipated, and we think that that reinforces the need for this to be a more iterative process.

PN27

That's perhaps a more complicated way of saying that we don't intend to launch off and make a decision arising from today's proceedings about what model terms might be and whether they go in all awards or not. We think there is a need for some further interaction with the parties about how we proceed in respect of all of these issues. The first step in that process is the one that - particularly that we want to invite comment on this morning.

PN28

That is that in looking at the submissions, although they're variously expressed, perhaps some more colourfully than others, there does appear to be a measure of agreement between the parties about some important matters of principle. Matters of detail, well there's less agreement to put it mildly, but on the matters of principle it appears that there is general agreement on these sort of propositions; that clarity is important, so that those who are covered by an award clearly understand their rights and obligations.

PN29

It's acknowledged that there are benefits of uniformity but that the circumstances of particular awards may mean that not all elements of a common approach are appropriate in that particular award. There's also broad support for the proposition that an award by award approach is warranted. That regard should be had to the existing terms of the award, their historical context and the circumstances pertaining to the relevant industry.

PN30

There is also broad support for the concepts identified in the two provisional model terms. That is that the proposition that in relation to a payment of wages term, that an award should specify the duration of pay periods, the time between the end of a pay period and when payment is due, payment methods and the public holiday weekend issue.

PN31

In relation to the termination payments model term, there's also broad agreement that there should be some clarity around the timing of termination payments and the amount that must be paid on termination. There also seems to be general agreement about the need to address how wages accrue, this is the Irving and Stewart paper. There's a potential - there's some debate, although not much, that is along the lines that the circumstances of a particular award may mean wages accrue hourly rather than day to day. But leaving that aside, it seems generally acknowledged that it's desirable that awards prescribe how wages accrue.

PN32

There are a range of areas of disagreement about the matters of detail, for example on payment methods, the issue about cheques et cetera, but leaving that aside for the moment it does seem that there's utility in exploring first what the conceptual areas of agreement are before we just then start to move further into the processes of resolving any disagreements about the content. What is proposed is that we invite you to comment on this approach without necessarily - silence doesn't mean that you agree that those matters I've identified are necessarily agreed.

PN33

What we would propose - because I appreciate that you made a note of them as best you can but you don't want to be caught with being signed up to something that on reflection you think is not such a good idea. So we want to capture that in writing, put out a document to you having reflected on the submissions and there are some recent replies have come in in the last few days, or indeed yesterday. Then I'd have a conference with all the interested parties, seek to settle that scope

of agreement and where the areas of disagreement are, and then have a discussion about well what's the most efficient way of progressing it.

PN34

In part that reflects a concern that there isn't necessarily a meeting of the - many of the submissions on many of the points and there are other parties who would have an interest in the issues we're discussing. To give an example, the proposition that casuals might be dealt with differently in this, well I would certainly want to hear what the hospitality unions and employers say about that and retail for that matter, the retail employers and what they say. The SDA is here but they're not.

PN35

It does seem given, I might say, many of the submissions are similar but coming at it from a different direction. That is, perhaps not surprisingly, unions want to pick the best of the current provisions that suit them and then add in anything that's missing. Employers want to do exactly the same thing. Ai Group submissions are a pretty accurate reflection of that approach. That you want to retain the - where you have more flexibility you want to keep it but then you want to - where there's less flexibility you want to provide the greater flexibility that's provided in the model terms.

PN36

Well, whilst I can understand that approach, there's not much consistency in the way that might operate and the propositions that awards do need to be looked at in the context of their current terms, and their particular circumstances and their historical context. If you want to depart from those, well just applying general principles you have to run an argument about why there should be a departure, and that would cut both ways.

PN37

I think there are significant risks in launching off precipitously in relation to this issue. It's obviously thrown up that there are significant issues here and there are gaps in the framework, and there are things that could be done to make clear what the rights and obligations of parties are. Even at a simple level there would be broad agreement around - well, if an award provides that the payday has to be a certain day, that's what it currently says, each week, but it's silent about what happens if it's that day, if it's so many days after the end of it falls on a public holiday, well there's an acknowledgement that well, there should be some variation around that issue. An acknowledgement that the public holiday makes a difference.

PN38

Also the accrual of wages. I haven't seen anyone argue that the proposition that if you're paid monthly and you work for three weeks and then your employment comes to an end by resignation or termination, and on the face of it you're not entitled to the three weeks' pay for the three weeks that you've worked, I haven't seen anyone argue that that's a fair proposition. But that may be a consequence of the current award prescriptions, and true it is the Apportionment Acts may deal with that but there's precious little authority on that point. I'm pretty sure that, like

the rest of you, like me, the rest of you may have had very limited knowledge of the Apportionment Acts before they were brought to our attention.

PN39

There are some issues about which we can constructively engage and deal with, and I think we should explore how far we can go down that path and try and do that collaboratively. It may involve a little give and take from each group and we can see well, just how far down the agreed approach we can get as to the framing of what's necessary. Then of course there are matters of detail about which there is a clear disagreement. For example, the specification of a payday, the in writing issue et cetera.

PN40

With the in writing, I suppose it needs to be borne in mind that there's a statutory obligation to provide the information statement in certain circumstances, and so there's already written material that has to be provided to an employee on engagement. We need to discuss how that all fits with this as well. The general proposition then is that it seems that there is a measure of agreement about some of these matters at a conceptual level, along the lines that I've outlined, that we would propose to capture them in a document over the coming weeks, send that to you as a draft only and look, it may not reflect the agreement of all the parties because there's no unanimity of you in these matters amongst the employers and amongst the unions, amongst their own constituencies. We'll endeavour to - it might be reflected as broad agreement around certain issues and really then have a conference to see if we can tease out if there is any opposition, what it is and whether it can be dealt with in a particular way.

PN41

Then following the conference, we'd confirm that those are the matters that are agreed, we will identify the matters that are not agreed and then we would have a conference or a discussion about how we're going to deal with those matters. It might be useful to indicate at this stage but I think the CFMEU and certainly the HIA have raised well the matter's before the Building & Construction Bench. No, it's not. It's here and it might be dealt with by that Bench but only after we've finished with it. I think you'll get correspondence from PPH about that, if you haven't already got it, you'll get it shortly.

PN42

Whilst we recognise the importance of the award by award approach, that would be an approach managed by this Bench. Only because, look, as a matter of common sense you can understand why I don't want 15 Benches dealing with the same issue in different contexts. We need to have a degree of consistency, if only to make sure that the one Bench is aware of what's being determined and what's going on in other Benches. Annualised salaries will be the same. There are only 15 or so awards that are subject to those proceedings but in any event there's nothing to stop us dealing with the conceptual framework, and then when we get to those we deal with those awards on an award by award basis later in the process. Probably after the annualised term's been decided. Those matters still have a little bit of a way to go.

PN43

That's the proposition. There are some questions for you in relation to your submissions on the way through that we can pick up, but at this stage it's not necessary for you to go into the detail as to why you think a payday should or shouldn't be prescribed. You can take it we're not going to be deciding that arising from today. We are going to be moving more cautiously in relation to the issue, and you'll certainly have an opportunity to argue the various issues that are between you.

PN44

For the moment I just want you to focus on the proposition; that is there seem to be - there's a measure of agreement around the conceptual issues, we'll capture them in a document, we'll have a conference and you'll have an opportunity to have a discussion about them, we'll clarify what the agreed matters might be, the range of conceptual issues, and then we'll have an exchange around well how do we deal with the issues in dispute. Then we'll start to work our way through these matters. That's the broad proposition.

PN45

I should say I think it's the MBA submission, there's a difference between your initial submission and your submission in reply of principle. That is - I might have picked you incorrectly but I think in your main submission you say matters of regularity gap should be left to the government and the government should get on with it. In your subsequent submission you seemed to have abandoned that and gone for model terms in a particular way. Perhaps reflecting the fact the government's not been involved in the four yearly review process to date, and you may have had some contact. But I think waiting for regulatory legislative change might be a long process, so it's really - I wasn't sure where you were up to now.

PN46

It's certainly open to you or any party to write to the commonwealth and ask them whether they've got any intention of legislating in this area, but they've not indicated publicly any intention to legislate in this area. I'm just reflecting on the time it took in relation to the notice of employee rep rights to - so it may be a long period because of the various difficulties with the parliamentary process.

PN47

At some point when we come to each organisation, if you can just clarify - I just wasn't sure what you were asking us to do, that's all. There's no need to do it now, we can - we'll go through and deal with all parties. So if we can do that and then as we come to your submission if we've got any particular questions that arise from it that need clarification, we can ask you. But for the moment we're just - we're looking for what's the way forward with this, we've outlined what we think is an appropriate way and we want to hear from you about whether you think that's right or not. We might start in Melbourne with the ACTU, the other unions, the unions in Sydney and the employers and then anyone who wants to say anything in response to what anyone else has said. Mr Clarke?

PN48

MR CLARKE: Well, look, we're comfortable with the process that you've outlined there, your Honour. It seems logical and we agree that as the matter's progressed it has taken on a greater complexity and some issues that maybe

weren't anticipated at the forefront have reared their heads. At some point in the process when reviewing the statements and so forth that have gone to date, it doesn't appear that a statement about how those issues might be dealt with in awards in terms of content restrictions has been made or a finding's been made about that.

PN49

I take it because it's uncontroversial but, you know, where certainly the issues that you've outlined as being matters of broad support conceptually are matters that squarely fall within 55(4)(a) and 139 and/or 142 as matters that can go in an award. But whether it's in this statement or elsewhere I think we just need to make sure that we tick that off.

PN50

JUSTICE ROSS: Can I just ask about your submission.

PN51

MR CLARKE: Yes.

PN52

JUSTICE ROSS: On page 4, it's this issue - there were two matters I briefly wanted to touch on.

PN53

MR CLARKE: Yes.

PN54

JUSTICE ROSS: If we start on the bottom of page 3 and then over to 4. This is the temporal question about the Acts Interpretation Act applying as in force at - -

PN55

MR CLARKE: Yes.

PN56

JUSTICE ROSS: Yes. It probably doesn't matter if as seems to be the position from other submissions that we don't go with the idea of a note and a cross reference. We actually explicitly set out the essence of what the Acts Interpretation Act says. So if you deal with it directly it doesn't really become a problem about construing the Interpretation Act as it was at that time, and I think it also overcomes the problem about if we just had a note referring to a section of the Acts Interpretation Act, people would then look at the Acts Interpretation Act as it appears at that time, and that's not the relevant provision, so it's got a potential to be misleading.

PN57

MR CLARKE: Yes.

PN58

JUSTICE ROSS: But I thought the way through that is really - well, you know, we'll obviously test the proposition as we go through but rather than to refer to a section of that Act we just set out the decision rule really.

PN59

MR CLARKE: Well, your Honour, our position about that is that - the view we've reached on it is that the awards are capable of; a) including content about it, and b) including a contrary intention for the purposes of that Act, so that you could actually say, you know, if it's an organisation that's a rotating organisation, maybe they can pay it on a public holiday, maybe some who continue to pay before the public holiday can keep paying before the public holiday and others will pay after. But it's a matter that's within the scope of the Commission's powers to say either of those things.

PN60

JUSTICE ROSS: Yes. But I suppose consistent with the proposition that on any of these matters there may be a reason that warrants a different approach in a particular award, but as a general proposition the Acts Interpretation Act applies to those awards now in one form or another. So you've got a degree of ambiguity or uncertainty about how that might operate. It should be clarified one way or another. Again depending on the award context.

PN61

MR CLARKE: Yes.

PN62

JUSTICE ROSS: In relation to the point that's excited a range of submissions in reply at the bottom of page 4, this is the payment by cheque issue.

PN63

MR CLARKE: Yes.

PN64

JUSTICE ROSS: Is the proposition here that while section 323(2)(b) plainly permits payment by cheque, it's subject to 323(3), which would allow a modern award to deal with the issue by prescribing the particular method of payment. Is that the - so you're relying on the 323(3) power in conjunction with 139. Is that how it works?

PN65

MR CLARKE: Well, yes. Yes, you have the capacity to exercise a choice there. I mean the Act has a broader - also has to provide a default rule for everybody, including those who are not covered by awards or whose awards are silent or whose agreements are silent.

PN66

JUSTICE ROSS: Yes.

PN67

MR CLARKE: But yes, you have a choice. That's the proposition.

PN68

JUSTICE ROSS: Right. Was there anything else, Mr Clarke?

PN69

MR CLARKE: No, your Honour.

PN70

JUSTICE ROSS: Any others in Melbourne who take a different view?

PN71

MR GALBRAITH: Your Honour, it's Matt Galbraith from the SDA. No, we don't take a different view to the ACTU and we support the process that you've just described.

PN72

JUSTICE ROSS: Thank you. Anyone else?

PN73

MS WILES: Your Honour, it's Ms Wiles from the TCFUA. We support the submissions of Mr Clarke of the ACTU. We think that's a preferable way to proceed in this matter and we agree with the Full Bench that there are issues of complexity, both generally and on an award by award basis that should be given due consideration, so we support your proposed process. Thank you.

PN74

MS DOOLEY: It's Ms Dooley from the CFMEU FFPD. We support the submissions of Mr Clarke also. Thanks.

PN75

JUSTICE ROSS: Thank you. Sydney?

PN76

MR THOMAS: Yes, your Honour, we are also comfortable with the process that you've outlined and we'll participate when the material arrives. Your Honour, could I also ask to be excused as I have another - - -

PN77

JUSTICE ROSS: Certainly.

PN78

MR THOMAS: Thank you.

PN79

MR BONCARDO: Your Honour, we concur with the propositions that your Honour has put to us this morning and we also thank your Honour for clarifying the issue concerning whether this Full Bench or the Construction Full Bench was dealing with the payment of wages issues.

PN80

JUSTICE ROSS: The Construction Full Bench may eventually get it because having had something to do with the industry in the past though I wouldn't describe myself as having a huge appetite for getting into the detail of it. It's really that I think we have to get to a certain point in these proceedings and then make a decision. At that point I'll invite submissions from the interested parties to those awards as to well, how do we deal then with the remaining issues in dispute. Is it better that it's dealt with in the context of the construction awards

generally or here. So you'll have an opportunity to make submissions about the where, but it's just it will be - we'll be a little further down the track, that's all.

PN81

MR BONCARDO: Certainly, thank you, your Honour.

PN82

JUSTICE ROSS: Right.

PN83

MR NGUYEN: Your Honour, we support the position that's been put by the ACTU.

PN84

JUSTICE ROSS: Right.

PN85

MR DUNCALF: Your Honour, we also support the submission that's been put forward by the ACTU and also support the process that you proposed today.

PN86

JUSTICE ROSS: Right, thank you. Mr Smith?

PN87

MR SMITH: Yes, your Honour. We support the process that's been outlined and as best I could note those various dot points down. We also support those particular issues, those ones where there is potentially a broad measure of agreement. Just by way of example, that one that was identified about the time when payment is due after the end of the pay period. As the members of the Bench would know from our submissions, our concern that we've raised about that issue is not so much that as a concept but about how that would interact with issues like annualised salaries as one example.

PN88

Even in the regular RDO type system, where you might have a 19 day four week cycle and effectively two hours of pay is carried over from week one, week two, week three and paid in week four. Those issues of detail need to be considered in the wording of such a provision and subject to the wording of that sort of provision being dealt with, then we'd support the principle. If the wording can't be accommodated then we wouldn't support it but it's an issue of detail.

PN89

JUSTICE ROSS: I think one of the difficulties we have is some of the issues you've raised already arise in some of the current award terms. That they do have payment provisions and they don't say how they interact with RDOs or annualised salaries. So I think interactions issues are live ones and we'll have to come to terms with them. One issue in your submissions, and speaking for myself I struggled with how it could be said to be fair, is the proposition that an employer has almost an unfettered right to change the payday.

PN90

You say that in some instances it's brought forward - well that might be true but an unfettered right, I just ask you to give some thought to this, and as I say there will be a further opportunity to get into the detail of some of these. Just as a matter of common experience, most employees have regular debit payments coming out at a certain time that aligns with their pay period. An unfettered right to change that in circumstances, for example, of cash flow or whatever it might be seems to give rise to circumstances that might visit some unfairness on employees.

PN91

MR SMITH: Yes, we can certainly understand that but the prime concern that we've got about that issue is a very practical one, particularly with monthly pays. It is extremely common for there to be a general understanding that people will be paid, say, by the 14th but in a particular workplace it can be the 10th, 11th, 12th, 13th or 14th.

PN92

JUSTICE ROSS: I don't think there's a problem with paying before. I accept what you say about that in your submission. I'm not suggesting that that visits any problem, but the difficulty might be if the expectation is there be payment on or before the 14th and payment - but no obligation to do so, and payment is then made on the 18th well then they end up in default of mortgage payments and other financial obligations. That's the only issue I raise for you to think about. It's not - as I say we're not moving to decide the question but it was - I think you were the only party to agitate it and I thought it's worth raising that proposition.

PN93

As you say in your submission, it's not the payment in advance of it that creates the difficulty and as you say that often occurs on monthly payments. They've got the cycle and you'll often get it - well I'm paid monthly and that sometimes happens to me. I'm not so agitated when it's paid early but if it's paid later, I think that does raise some real issues. How we deal with that is a separate question. Whether it's appropriate for award regulation or separate questions, but it does seem to me there are two sides to that argument. That's all.

PN94

MR SMITH: We accept that point, your Honour.

PN95

JUSTICE ROSS: What do you say about the process, Mr Smith?

PN96

MR SMITH: Yes, we agree with the process.

PN97

JUSTICE ROSS: Right, thank you. Mr Izzo.

PN98

MR IZZO: Your Honour, we're broadly comfortable with the process. We think it's a constructive way to deal with the array of different submissions. If I could

just raise one point because the issue of the treatment of public holidays has been raised.

PN99

JUSTICE ROSS: Yes.

PN100

MR IZZO: In our submissions, can I just note we were initially supportive of a note being included. There's been some legitimate concerns raised by a number of parties about that. I think our position is mainly this; we should address it somehow. Whether it's through a note or whether it's through some other way.

PN101

JUSTICE ROSS: Yes.

PN102

MR IZZO: Probably not too concerned about that but it's an issue we say needs to be addressed and that's our main concern.

PN103

JUSTICE ROSS: I think that's common ground with Mr Clarke. He's saying that he's got a slightly - you've got different views about how it might be addressed and by that I mean - I think most people are moving off the note idea. But it should be addressed perhaps in a substantive term way. The question of how it's addressed is it may be that in most awards it provides that if it falls on that day then it's the next working day type of Acts Interpretation Act point. Mr Clarke's just foreshadowing that there might be some awards where you don't need to address it that way, and it maybe that despite it being a public holiday it's paid.

PN104

Now I don't think we need to get into - that's really an award by award issue and I think with all of the conceptual matters, you can't discount that there will be particular circumstances. The Maritime Awards might be a good example. They're replete with odd provisions. Mining is a not dissimilar area and so we'll try and build up a conceptual agreement and frame it in a way that can maximise the degree of agreement, and then I think work through what the individual things are. But no, I thank you for that. So it needs to be addressed in one way or another and - - -

PN105

MR IZZO: Yes, precisely.

PN106

JUSTICE ROSS: - - - just to provide clarity. So people know what the position is. I think the same proposition can be made about the accrual point. Whether it's day to day, which might be the usual proposition, or whether it's hour to hour as is the position already in some awards, that's more of a contextual award by award argument. But it would seem that it needs to be addressed in one way or another.

PN107

MR IZZO: Yes, in relation to the accrual point, we haven't actually put submissions on - - -

PN108

JUSTICE ROSS: No, I know.

PN109

MR IZZO: - - - because we don't have an in principle opposition. By the same token we haven't seen this being a problem in practice, so we've kind of - - -

PN110

JUSTICE ROSS: Yes, but - - -

PN111

MR IZZO: Whilst not supporting, we haven't opposed in any way.

PN112

JUSTICE ROSS: No, that's really - and you're not alone in that regard, and that's really why we have reached the view it might be better to do this on an incremental basis so that everyone can focus on particular issues, and we can break it up that way and deal with them sequentially. Rather than flooding you with you've got to address everything and then everything everyone puts, and you may not have sufficient time to come to grips with what all the consequences might be.

PN113

MR IZZO: There's only one other thing I thought I would raise in case it is of assistance to the Bench. You raised a query with Mr Clarke in relation to the ACTU's position regarding cheque payments.

PN114

JUSTICE ROSS: Yes.

PN115

MR IZZO: The question in relation to the ability to include those terms or the operation of section 323. Our opposition in relation to the ACTU's submissions in this regard is primarily on a merit basis. We don't put up any opposition on a jurisdictional basis in relation to how to do what the ACTU says, we just say it's not a good idea.

PN116

JUSTICE ROSS: No, no, I appreciate that, and I think the same cuts the other way. None of the unions are contending that it's a jurisdictional problem with some of these issues, they're primarily addressing it on a merit basis. For example, the provision of monthly pay. I don't hear them to be saying we can't do it as a matter of jurisdiction. I'm hearing that as a matter of merit we shouldn't do it because it wouldn't be fair in the context of that award.

PN117

MR IZZO: Yes.

PN118

JUSTICE ROSS: But Mr Clarke's right to raise, at some point we will have to obviously close off on the - what there's power to do and then separate the merit argument out.

PN119

There was one part of your submission that I thought did seem a little ambitious, Mr Izzo, that I wanted to - this is your submission of 6 January and paragraph 3.3 on page 5.

PN120

MR IZZO: Is this the paragraph starting, "When considered together"?

PN121

JUSTICE ROSS: Yes. It does seem that you've sort of grabbed the best of both, in the sense that you recall the discussion around within seven days was to reflect the fact there was an argument that well, if you were terminated just after the end of your pay period you might have to wait a month to get your termination payments. There was also an argument that well, if your pay period - or the day on which you were regularly paid, your normal payday, was in fact the day of termination or the following day, then that might create a difficulty for the employer. But what you're really putting here is that well, if your next payday's three weeks away, then it will be three weeks, and it just seems to be another way of framing your original claim. In fact it's adding to your original claim. It's saying that well, the next payday but, you know, if the next payday's tomorrow then it will be a week. Is that how - am I reading that incorrectly or - - -

PN122

MR IZZO: If you'd just bear with me a moment, your Honour.

PN123

JUSTICE ROSS: Sure.

PN124

MR IZZO: Yes, in relation to this I think the submission's in a peculiar context because we've kind of argued in the previous hearing in relation to the question about how long after a termination payment should a termination payment - sorry, how long after a termination should the payment be made. We had said in the course of the ordinary pay cycle and after that hearing we now have a decision that has expressed a view that it should be within seven days. So in a sense I think we've kind of had this argument but because of the iterative way in which this process is unfolding and that comments have been asked on the proposed model term, I suppose we've restated our original position. But it may be that we've already ventilated this argument.

PN125

JUSTICE ROSS: I think you've restated it and grabbed a bit in addition, is probably the - so it's not just - you're not just reiterating it should be the next pay period. I think you're acknowledging implicitly that that might be a problem. If we granted your claim it might actually be a practical problem for you in any event, in circumstances where the next pay period is the following day.

PN126

MR IZZO: I see, yes, yes.

PN127

JUSTICE ROSS: Yes. Look, this issue is one that is going to need some further focus by all of us. We've got the long service leave argument, we've got some arguments around redundancy toing and froing and all of those issues. So it's not a straight forward question, and there will be an opportunity for all of us to give more thought to it as we go along the path. I just wasn't sure about where you were going with it but I understand what you're saying.

PN128

MR IZZO: Yes, because our understanding of the initial statement that talked about these issues talked about the termination payment should be paid either within seven days or in accordance with the ordinary pay cycle. So in our view, what that meant was if the next pay cycle was you have to pay them the next day, you could still choose the seven day option which would give the employer more time. With the revised provisional view that's expressed in the most recent decision, it now just says within seven days, and so we've - what we've tried to highlight is yet again our point that well, if someone ordinarily is used to receiving money at a particular time, then it wouldn't necessarily prejudice them to receive it whenever their pay cycle would land. But we can take your point on notice and come back to it.

PN129

JUSTICE ROSS: Yes. Look, it's - I don't think you're the only party to perhaps take what might be described as an opportunistic approach to - well we've seen a bit that we like so we may as well have a go at it, if I can put it that way. So you're not on your own, Mr Izzo. I just wasn't quite sure from the language precisely what was intended, but I understand it now so thank you.

PN130

MR IZZO: Thank you, your Honour.

PN131

JUSTICE ROSS: Mr Calver.

PN132

MR CALVER: Thank you, your Honour. We have no objection to the process. The submission that we wrote was highly specific to the Transport Awards and the translation of matters from the general to the specific will be a matter about which we would ask in the process there be further clarity attached to.

PN133

JUSTICE ROSS: Yes.

PN134

MR CALVER: Thank you.

PN135

JUSTICE ROSS: I think the other advantage in doing the conceptual and then moving at some point to specific awards is that ensures that, for example, the TWU is engaged because their awards will be listed and then we'll get the - and it's the same with where there are some unions here but there's no counterpart employer organisation. I think once they see their award listed for conference, then they start to get a bit more focused. So it will have that advantage as well.

PN136

MR CALVER: Thank you.

PN137

JUSTICE ROSS: Thanks. Ms Adler.

PN138

MS ADLER: Thank you, your Honour. We would be supportive of the proposed course of action by the Bench. We also appreciate the clarification in relation to our claims in relation to the frequency of payment of wages and are content to have that dealt with at the appropriate time during the course of these proceedings. Thank you, your Honour.

PN139

JUSTICE ROSS: Look, I'd encourage you to have a discussion with the other employer interests and the unions about when might be the appropriate time, where do you want it dealt with and we'll obviously have regard to how you collectively want us to deal with that at whatever time.

PN140

MS ADLER: Yes, because there's obviously material that we've filed before the other Full Bench.

PN141

JUSTICE ROSS: Yes, I appreciate that. I think the other Full Bench have got plenty to chew through before they need to get to that issue.

PN142

MS ADLER: Absolutely.

PN143

JUSTICE ROSS: That was really the reason why I thought it would be better clarified now and say that, look, I don't think you need to get too excited about that in that Bench. You can delve into the fascinating business of consolidating allowances and all the rest of it, so there will be plenty of excitement for you before you get to the payment of wages issue.

PN144

MR ADLER: There will be, your Honour, thank you.

PN145

JUSTICE ROSS: Thank you.

PN146

MS SOSTARKO: Yes, thank you, your Honour. We too appreciate the clarification on that point and we also support the process that you've outlined this morning and look forward to being part of those proceedings. I guess the point I'd just like to make too is that certainly with regard to the Construction Awards, obviously there are sector specific nuances that we acknowledge.

PN147

JUSTICE ROSS: Yes.

PN148

MS SOSTARKO: But certainly we're of the view that they're not so complex that they cannot be dealt with during the course of these proceedings if the Commission sees fit. With regard to your question about the accrual and our submissions with regard to any legislative gaps that the Commission might have identified, we certainly haven't abandoned that position that we've put forward in our December submission. However, the subsequent submission in reply that we filed in February simply was dealing with those matters that were put forward by the other parties in those December submissions, so just for clarification no, we certainly continue to hold that position.

PN149

JUSTICE ROSS: Thank you.

PN150

MS SOSTARKO: Thank you, your Honour.

PN151

JUSTICE ROSS: Well, look, indeed if anyone becomes aware of any legislative development in the area, I'm not sure, for example - Mr Clarke, you might know because I think it's your claim. Do you remember that if you remove the emotional scaring for a moment and take yourself back to the annual leave case, there was that outstanding claim on - - -

PN152

MR IZZO: Annual leave loading on termination.

PN153

JUSTICE ROSS: - - - annual leave loading on termination, and there was, I think, legislation at some point and I think it lapsed and then I don't know what's happened with that. Do you know anything about that, Mr Clarke?

PN154

MR CLARKE: I don't know what the - whether it will re-appear. I suspect others are in a better position to - - -

PN155

JUSTICE ROSS: That might be right. Mr Izzo?

PN156

MR IZZO: Your Honour, my understanding is that there was legislation put in place to deal with the issue. The legislation - the bill that was put forward

ultimately passed without the measures in relation to this issue, they dropped off. Then a new piece of legislation is being introduced into parliament, which again attempts to deal with this issue but I don't know where it is in that - in the process. But there is a bill that has at least been drafted to deal with it but it hasn't been voted on yet in either house. So it is still in a sense on the horizon of the legislature but when it will be dealt with, I can't - I don't know if Mr Smith has any knowledge but I can't assist in that regard.

PN157

MR SMITH: I can't shed any more light on it.

PN158

JUSTICE ROSS: In the event that anyone hears of any legislative enthusiasm to deal with the issues that are before us they can in the normal course, as happened in the annual leave loading on termination, they can bring it to our attention and we can take account of that at the relevant time. In Canberra from the NFF?

PN159

MS PEARSALL: Your Honour, we're comfortable with the proposed course of action.

PN160

JUSTICE ROSS: Thank you. Anyone else have any - yes?

PN161

MR CLARKE: Sorry, your Honour, it's Mr Clarke here again in Melbourne. We're very supportive of the idea of this being processed through conferences but it occurs to me that the conferences that have been had in award review matters are somewhat different to the traditional conferences, in the sense that they've been transcribed and the transcript have been publicly circulated and so forth. There are some potentially - I recognise that it's very important to encourage people who have particular knowledge of industry practices and how these proposals might interact with them to participate.

PN162

I mean there are issues here in terms of how the accrual rules operate and what the obligations in relation to termination pay and timing currently are, and how monthly pay interacts with - particularly monthly pay in arrears interacts with particular provisions of the Act. But when we draft a statement, the purpose of which is to encourage people to participate, it might be necessary to say something about the type of conference procedure that's envisaged to deal with those issues, just to encourage people to flesh out the issues, as it were.

PN163

DEPUTY PRESIDENT BOOTH: Mr Clarke, do you mean that you'd have a preference for a conference that was more of the traditional nature that wasn't transcribed, so that free flowing discussion could occur or the opposite?

PN164

MR CLARKE: I imagine that many parties would. Perhaps the need for that might be greater as well delve further into the detail of the award specific

considerations. But if the purpose of the statement is to, you know, ensure as was highlighted that the relevant parties with relevant interests do participate, that that might give them some comfort.

PN165

JUSTICE ROSS: Any view?

PN166

MR SMITH: We don't particularly have a view one way or the other. It would create a more free flowing discussion but the idea of transcript is useful, so perhaps that process of starting with a slightly more formal process and when it deviates into a more detailed discussion, leaving that other option open. We're comfortable with either approach.

PN167

JUSTICE ROSS: Mr Clarke, does that meet your concern? That is that we can perhaps commence the process on transcript and then go off the record at a point when - and we'll obviously canvass it with those who are at the conference, see what their view is then, and we can deal with any issues of sensitivity at that point and facilitate a free flowing discussion. It is a bit different to an award review conference in the sense that we're not seeking to reach agreement on substantive or variations to a particular exposure draft or anything of that, where it's important to keep it on transcript so that any other interested party can see how the consent position arrived.

PN168

This is really exploring initially at a conceptual level how we might deal with these matters, but it can probably be left to - when the conference is convened, you can communicate to whoever is coming that there will certainly be the option to request to have the matter go off the record and I'd hear what people think about that. But my usual experience is if a party asks for that, most people are fairly relaxed about doing that and seeing how it goes. Ultimately if it gets too problematic for a party to have it off the record, well they can ask to go on or they can ask for the conference to be concluded. I think there are those options available. Are you content with that course?

PN169

MR CLARKE: Yes, I suppose - I mean we'll certainly communicate to our affiliates that they have that option open to them, and if our counterparts would do the same I think it would assist in achieving the objective of ensuring that the relevant matters are brought forward.

PN170

JUSTICE ROSS: Yes. I certainly don't want anyone to drop into self-incrimination, so - and it may be the employer interest might be more likely to fall into that problem. So I'm sure they'll communicate with their members that this is really designed to try and find out well what are the real practical issues here and what actually happens, and I certainly don't want them to do that in a way that sort of might expose them to some sort penalty provision if it's then put on the website as transcript and then they receive a knock on the door from the ombudsman. I'm not sure they'd thank us for that process.

PN171

MR CLARKE: Yes.

PN172

JUSTICE ROSS: Right. Anything else? Well we'll release, as I say, the draft. Don't - it's the best we'll be able to do, bearing in mind not all the submissions address all the issues. It's more of a caution, when you get excited - when you see it, don't have a blood pressure spike, it's only going to be a draft based on the limited information that we've got on some of these issues and it's really intended to try and test the area of broad agreement.

PN173

It may be that not everyone - there might be individual parties that have a different view on some aspects, so I'm not seeking to railroad you into agreement but I think it's best if we start at a broader concept of where the agreement might be and then work our way in, rather than a small idea and then try and work our way out. Nothing further? Thank you very much.

**ADJOURNED INDEFINITELY**

**[10.00 AM]**