



TRANSCRIPT OF PROCEEDINGS

*Fair Work Act 2009*

1053271

**JUSTICE ROSS, PRESIDENT**

**AM2014/305**

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

**Four yearly review of modern awards  
(AM2014/305)**

**Melbourne**

**1.10 PM, THURSDAY, 7 APRIL 2016**

**Continued from 21/12/2015**

PN25934

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

PN25935

MR BORGEEEST: Borgeest for the STA.

PN25936

MR DOWLING: Good afternoon, Your Honour, Mr Dowling appearing with Ms Bourke for United Voice.

PN25937

MR L IZZO: Izzo, initial L, appearing for ABI New South Wales Business Chamber, your Honour.

PN25938

MR WHEELAHAN: Wheelahan, for the Retail Associations.

PN25939

MR C BREHAS: Brehas, initial C, for the National Retail Association.

PN25940

JUSTICE ROSS: Thank you. And in Sydney?

PN25941

MR S BULL: Bull, initial S, appearing with our counsel for United Voice.

PN25942

MR B ROUF: Rouf, initial B, appearing for Restaurant and Catering Industrial.

PN25943

MR M SECK: Seck, initial M, with Ms Wellard, initial S for the Pharmacy Guild.

PN25944

MS S WELLARD: Wellard, initial S, for the Australian Hotels Association and the Accommodation Association of Australia.

PN25945

MS H CARAYANNIS: Carayannis, initial H, for Clubs Australia Industrial.

PN25946

MR A GOTTING: Gotting, initial A, for the Australian Industry Group.

PN25947

JUSTICE ROSS: Anyone else?

PN25948

MR GOTTING: That is all in Sydney, Your Honour.

PN25949

JUSTICE ROSS: I have read the flurry of correspondence. Can I put it this way - and I understand there are nuances in this, so don't get too agitated if you think I'm

fitting you up (to use the vernacular). But there seems to be broad agreement that unions go first, the first two days they be confined to the two days; they work out for themselves who goes first. The employers would then go Wednesday, Thursday; similarly, they would be confined to the two days, they would work out amongst themselves the order. Then the Friday would be reserved, if needed.

PN25950

The two issues in contention are (1) do we sit all in Sydney - I'll come back to that in a moment - and (2) the scope of the oral submissions.

PN25951

In terms of sitting all in Sydney, I can indicate that for logistical reasons that is probably a course the Bench is going to favour. Simply moving 20 volumes of material to and fro raises some logistic issues and we are conscious also that it may not be a perfect fit in that while you are confined to the Monday/Tuesday, for whatever reason, there might be something that befalls us and then all of a sudden we are halfway through. It would mean inevitably we would need to start late on the Wednesday just to wait for all the material to arrive from Sydney.

PN25952

I have discussed that with my colleagues and absent a good reason to the contrary, particularly as we would provide video facilities, so if there was an issue of cost or counsel wanted to go back, there are no witnesses, it is - I hesitate to say it - I know counsel always think it is a jury address, but ultimately the complexity of this case, it is unlikely we are going to be necessarily seduced by the power of your presence in oral argument and nor is it something we are going to be giving an ex temp decision about a conclusion. If I can make those observations about the Sydney matter.

PN25953

Can I deal with this issue about the scope question and in relation to that, obviously we have got the material, we have been through it, it is - to put it mildly - comprehensive. What we don't want is any party repeating and reading out their submission. We would not want to foreclose the ability of a party to highlight particular points. We think, providing the two-day period is going to be a sufficient discipline on parties so that they are not going to indulge in that issue and that has been particularly raised by the union parties as a concern. Well, the employer parties, we will be relying on them to discipline themselves because they will only have that time and if one of their colleagues starts reading out large parts of their submission I'm sure it won't take long for them to be dragged down and clubbed about the head, so there is that issue.

PN25954

The second issue is the point Mr Izzo raises and that is that there is some material which the employers haven't had an opportunity, because of the timing, to say anything about. They may wish to, for example, say something about - as the unions may wish to - about the Commission background paper or about the submissions filed by the other - what is described in Mr Izzo's piece as "the non-parties" or about the Productivity Commission final report.

PN25955

One way through this is to, in a statement, make the observation that we have read the material and we don't expect it to be read to us but there will be that limited opportunity that I've described. But, of course, anything that the employer parties raise in oral argument that they have not put in their written submissions the unions would have an opportunity to reply to orally and they would probably do that on the Friday.

PN25956

It seemed that at the heart of the unions' concern was both the efficiency of the process, given the volume of material that has already been filed, but also the procedural fairness aspect that if well, if you adopt the unions first then employers and the employers are allowed free reign to raise whatever they wish then the union parties won't have an opportunity to reply to that. I don't imagine it would be an extensive reply because I don't imagine the employer oral argument is going to be raising a whole range of new issues which they haven't already canvassed. So, any reply by the unions after the employer oral argument would be confined to those matters which have not been previously put in writing.

PN25957

I make those observations. I can't think of any other way through the conundrum rather than throwing our hands up in the air and letting you go first and we see how it all goes. But it seemed to me that was - I think adopting too rigid an approach that was originally proposed in the union proposition may operate unfairly on the employer parties for the reasons that Mr Izzo has identified but, similarly, to the extent to which new matters are raised, well the union parties ought to have an opportunity to make a brief oral submission about those.

PN25958

Can I start with the unions and their reaction to what I have put.

PN25959

MR DOWLING: We are grateful for that indication. Can I say one important thing and that is that the position put by the unions advanced by the SDA and adopted by United Voice that the confined table, as Your Honour described it, it was premised on the basis that the unions would go first because they were replying to what had already been set out in writing and nothing else.

PN25960

JUSTICE ROSS: Indeed, yes.

PN25961

MR DOWLING: The proposal that Your Honour is describing is something different to that and I appreciate that that is why Your Honour described Friday was the reply.

PN25962

JUSTICE ROSS: Let me put it to you this way, Mr Dowling: after the employer submissions were filed we published the background paper, so I don't think you can reasonably say that the employers aren't allowed to comment on the background paper. As soon as we opened that - and they are allowed to comment on the background paper - then it seems as a matter of logic you would be able to

comment on the background paper on the Monday and Tuesday, say whatever you wish to say about those matters, but you would be able to respond to whatever the employers say orally about that, should they wish to say anything at all on the Wednesday/Thursday.

PN25963

MR DOWLING: I appreciate that, Your Honour. What I was getting to was: another way of dealing with it is if the submissions are to be - perhaps not at large but at least broader than what was proposed by the unions then we should revert to what Ms Wellard on behalf of her clients described as the normal practice and that is that the moving parties would go first, that they would take the Monday and Tuesday and the unions would then take the - sorry - left the Wednesday and Thursday. Now that might be relevant to also the question of location.

PN25964

I have heard what Your Honour has already said. One thing that that would do would mean that all of those parties that are located in Sydney will have concluded their submissions on the Monday and Tuesday; the union parties being located in Melbourne would be having theirs on Wednesday and Thursday save for what Your Honour has already said about the inconvenience to the Commission.

PN25965

JUSTICE ROSS: Yes, we would be starting later on the - yes. Just to give you an idea of the logistical difficulty, I think the bags close - that is the time to move material - at about 3.30 on the day and they arrive about 9.30 the following day, that is assuming everything runs smoothly, which might be a bit optimistic. I think it will take about 45 minutes just to pack all the material into the bags, that's the difficulty.

PN25966

MR DOWLING: That means finishing much earlier on the Tuesday.

PN25967

JUSTICE ROSS: That is probably right, yes. Given that the employer interests have raised what material will we have; we will certainly have two sets, that is I will have a set and Catanzariti VP (because he is based in Sydney) will have a set of all of the materials and the other members will obviously have all the written submissions but we didn't think having five sets of everything made much sense.

PN25968

I hear what you say about the Melbourne/Sydney issue but the main point is if we are going to be a bit broader then it would be more efficient if it was - as would be the normal case - employer interests go Monday/Tuesday; unions go Wednesday/Thursday with the broader latitude that I have indicated than was originally proposed, is that where you are?

PN25969

MR DOWLING: Yes, that is the most important part for my client.

PN25970

JUSTICE ROSS: I follow, yes, all right.

PN25971

MR BORGEEEST: Yes, the SDA is in the same position: the proposition in the correspondence was advanced with the union going first because it had that very confined response to the immediate proceeding step and then having the employers - - -

PN25972

JUSTICE ROSS: Yes, and I think that starts to - and I appreciate you putting it forward, but it starts to unravel a bit as soon as you - as you must - accept that well, the employers are going to be able to address things that have come in after their reply submissions and then you should have an opportunity to say something about that.

PN25973

MR BORGEEEST: So, therefore, we do come to the same position that Mr Dowling has articulated in respect of the employers going first on Monday and Tuesday.

PN25974

JUSTICE ROSS: Yes, all right.

PN25975

MR BORGEEEST: On the venue question, we certainly have an interest in the existing arrangements being preserved and would be keen to explore adjusting sitting times around Monday and Tuesday if that would be of any assistance but we can't presume to speak for everyone in that respect.

PN25976

JUSTICE ROSS: I think you are adjusting by reducing the time available for the employers.

PN25977

MR BORGEEEST: That was sitting later.

PN25978

JUSTICE ROSS: Sitting later is not really going to help because we have to sit earlier on the Tuesday. What is the big deal about whether it is in Sydney or Melbourne?

PN25979

MR BORGEEEST: I don't put it higher than convenience for the union parties that are located in Melbourne.

PN25980

JUSTICE ROSS: But how is it convenient?

PN25981

MR BORGEEEST: The union is located here and it is - - -

PN25982

JUSTICE ROSS: But, so what? You are taking all your material to Sydney anyway.

PN25983

MR BORGEEEST: Yes. I don't put it higher than that. Cost, I think, is the only other issue.

PN25984

JUSTICE ROSS: The only additional cost in the accommodation cost for counsel.

PN25985

MR BORGEEEST: Yes.

PN25986

JUSTICE ROSS: Mr Izzo, the proposition then broadly is that the employer interests - it is essentially the same as was discussed but the employer interests would put their submissions on the Monday and the Tuesday which, as has been pointed out, would be the usual course; that in those oral submissions - this is by either employers or the unions - they wouldn't be confined in the manner originally suggested but a party could highlight particular aspects of the matters they have set out in their written submissions but shouldn't simply repeat something that has already been put in writing. They may also raise issues relating to the background paper and comment on the submissions of non-parties and the effect of the Productivity Commission final report.

PN25987

So there is that broader latitude in your oral argument. What you are disciplined by though is you will only have the two days to put it and you will have to work out amongst yourselves how that works. Then once you have finished the unions would put their material and they would similarly be confined; we would probably indicate that the hearings will commence each day at 10 and conclude at 4.30, so that you know in advance - and I see the sigh of relief that we are not having my usual 9.30 start - and that we would reserve the Friday in the event that there is a need for it, for whatever reason.

PN25988

What do you think about that, Mr Izzo?

PN25989

MR IZZO: Your Honour, I must say that I kind of mentally started to move down the path of assuming the unions would go first and so - - -

PN25990

JUSTICE ROSS: Yes, but you have only moved mentally there for a day or so, so it shouldn't be that difficult.

PN25991

MR IZZO: That's right. I mean that is the ordinary course that the applicant goes first. I don't think I could have any objection to that approach, so if it is the employers first followed by the unions, certainly from the perspective of ABI

New South Wales Business Chamber we wouldn't have any objection to that and if there is additional matters raised by the unions and there is the scope for reply submissions that would be comfortable.

PN25992

JUSTICE ROSS: We would hear whatever the parties want to say about what we hear on Friday but we wouldn't want to anticipate what that might be.

PN25993

MR IZZO: Certainly. The only thing I thought I would raise just whilst I'm speaking now, Your Honour, just so that the union parties are aware and the Bench is aware, as part of the written submissions in reply that were filed some of - or certainly ABI New South Wales Business Chamber submissions referred to a joint employer analysis of the public submissions.

PN25994

What was conducted and what took considerable time was analysis of what they related to the public submissions and that a spreadsheet has been prepared, the goal was to file that a couple of days ago. Unfortunately, because of the way that it took a long time to upload a lot of these submissions we simply weren't able to get it ready until what I understand will be today; that the essence of what we sought to have found based on the analysis is already contained in our written submissions in reply. We simply weren't able to have it ready because of when the submissions were closed.

PN25995

JUSTICE ROSS: File the material and the unions will have a look at it and if they want a further opportunity to put something in writing in response to it then they can ask for that once they have seen it.

PN25996

MR IZZO: And it a very discrete issue, Your Honour, so I think it can be dealt with that way.

PN25997

JUSTICE ROSS: Sure. But I would encourage you to have a discussion about it as well. Obviously, there is not much point in trying to do anything about it at this stage until you have filed it, the unions have had a chance to look at it and then we will hear what they want to say. As you say though, it is a discrete issue; it could be dealt with by some further short written submission if that is the course they are committed to.

PN25998

MR IZZO: On that basis, Your Honour, that is all I think I would have to say about the proposal.

PN25999

JUSTICE ROSS: All right. Just to be clear, the proposal is that the hearings be held in Sydney with video links available; that the employer parties would make their oral submissions on the Monday and Tuesday and that they would determine the order for themselves and that they be confined to those days.

PN26000

The unions, similarly, would be then making their oral submissions on the Wednesday and the Thursday and determining for themselves the order et cetera but confined to those days; Friday would be reserved; hearings would commence at 10 and conclude at 4.30 each day; and the parties' submissions will be confined to the allocated days, so we would expect the parties to exercise internal discipline about how the time is allocated.

PN26001

I have covered the scope of the oral argument but from my perspective I think confining it to the days is likely to exercise more discipline than anything the Bench might say in relation to it and having the union then going second might also obviate any issues that might arise: whether an employer is spending too long repeating what they have already said et cetera.

PN26002

We have heard from Mr Izzo. Let me deal with it this way: anyone opposed to the proposition and, if so, what is the basis for the opposition?

PN26003

MR WHEELAHAN: Your Honour, I'm not so much opposed, obviously we have given up the gift that was given to us in the correspondence but I can't really oppose now going first. But in terms of the reply by the employers, if the matter was to finish, for example, Thursday lunchtime we wouldn't want to be called upon to reply immediately.

PN26004

JUSTICE ROSS: Let's not jump at shadows. In whatever statement we make we are not able to anticipate every eventuality and we would want to hear from you anyway about well, what is the scope of the reply; what are you replying to that you haven't already had an opportunity to say something about. That will depend on what the unions say. If the unions say nothing about, for example, the material that has been filed post the written submissions in reply by the employers, well then you may not get a reply at all. If they are simply wanting to highlight material they have made in their written submissions and the question of reply doesn't arise, you have already had your opportunity to reply to that. I think we have to see what they say orally before - and it will depend on the extent of it. You may be quite content to go straight on because it may be you have only got 10 minutes worth of comment on an aspect that the unions said. But we will be sensible about it. If the union does put orally material that is a significant amount or it has got a level of complexity and you have to have a think about it, well we are not about to rush you on to do that, but I don't want to pre-empt - - -

PN26005

MR WHEELAHAN: That's fine, Your Honour. We have said that we will proceed in the normal way employers/unions and a reply, yes.

PN26006

JUSTICE ROSS: Yes. And we want to ensure that everyone has an opportunity. We don't want it to be - we want to confine the time you have got because - look, if we gave you five days you would talk for five days - each party. Going on the

experience to date, I don't think any of you would have any difficulty doing that, given the volume of the material; you will just expand to fit the time available. But we have had full written submissions so it is in that context that we are looking to fairly proportion the time that is available for next week.

PN26007

MR WHEELAHAN: Yes. Could I raise one other matter whilst I'm addressing Your Honour. The question of authorities: I thought that presumably the Bench won't need parties handing up all these obvious authorities that have been referred to in the submissions.

PN26008

JUSTICE ROSS: No.

PN26009

MR WHEELAHAN: So, we don't need to hand up any?

PN26010

JUSTICE ROSS: No.

PN26011

MR WHEELAHAN: Presumably the associates would, unless it is beyond - - -

PN26012

JUSTICE ROSS: No, I don't think we will necessarily be printing out five copies of every authority that every party has referred to and we don't really need to. You might want to take us to - well, you rely on this case because you say the ratio of that case is X and you might refer us to particular pages or whatever. But I don't think we need it in front of us.

PN26013

MR WHEELAHAN: Yes, I just wanted to put that so that the instructing solicitors don't venture off on to the photocopy machine and handing up folders and folders.

PN26014

JUSTICE ROSS: No. And it is not a case where you are relying on an authority for the first time.

PN26015

MR WHEELAHAN: Yes, I agree.

PN26016

JUSTICE ROSS: So, it is not as if the other side is going to be disadvantaged either, they have all seen it and I agree to the extent to which we can save paper we should save paper.

PN26017

MR WHEELAHAN: Yes, thank you.

PN26018

JUSTICE ROSS: With some of those authorities, if I was to keep each one I would probably have six bound volumes in my Chambers of one case, so I think less is more. Nothing further in Melbourne?

PN26019

Can I go to Sydney. Is there any opposition to what has been outlined? No?

PN26020

MR ROUF: No, Your Honour.

PN26021

JUSTICE ROSS: Is there anything anyone else wishes to say? All right. I have got a telephone hook-up with my colleagues in 10 minutes. I will go through where we have got to and we will issue a short statement just confirming what has been discussed. We won't deal with this sort of more vexed issue of reply and timings, I think we will wait and see how the case develops. But you can it - both parties - that we want to ensure that you have an opportunity to say what you wish to say and if you are taken by surprise about something then you will be given a chance to deal with it.

PN26022

Now whether, for example, in the material the employers are proposing to file, well if the unions want an opportunity to analyse that and make some comment on that and they want an opportunity to do that at some future time then that - given it is such a discrete issue that can probably be dealt with in writing but I would encourage the parties to have a discussion about how they want to deal with that. It may be that the unions are content, that there is nothing new in it and they can say what they want to say about it, but if there is to be anything in writing I would encourage you to agree on what might be a program for how we deal with that. Is there anything else? Is there anything you need in Sydney? Anything we can do to assist. Do you want me to see if I can organise conference rooms for each group, for the employers and for the unions?

PN26023

MR BORGEEST: It would certainly be of assistance at this end, yes.

PN26024

JUSTICE ROSS: All right, we will take steps to do that. If you get there a bit earlier my associate will be there, in any event, and I think we will - given the volume of material - we will also make arrangements - you can leave your material there overnight if you wish and if there is anything else we can do to make it slightly less painful then let me know, other than moving it to Melbourne, I suppose.

PN26025

Thank you very much for your attendance.

**ADJOURNED INDEFINITELY**

**[1.36 PM]**