



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

AM2014/300

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/300)
Award Flexibility**

Sydney

9.33 AM, MONDAY, 5 DECEMBER 2016

PN1

JUSTICE ROSS: Can I have the appearances, please?

PN2

MR H J DIXON: May it please the Commission, to the extent necessary, I seek permission to appear for Nationwide News Pty Limited - Media Pty Limited and Pacific Magazines Pty Limited, in respect of the Journalist Published Media Award 2010. I'm instructed by Minter Ellison.

PN3

MR D O'SULLIVAN: If it pleases the Commission, my name is Sullivan, initial D. To the extent necessary, I seek leave to appear for the MEAA with respect to the same award.

PN4

JUSTICE ROSS: Yes. Any other appearances in relation to the Journalist Published Media Award? No? In relation to the Horticulture and Pastoral Award?

PN5

MS S MCKINNON: Yes, may it please the Commission, McKinnon, initial S. I appear for the National Farmers' Federation, and with me, Ms Pearsall.

PN6

MS R WALSH: If it pleases, Walsh, initial R. I appear for the Australian Workers' Union.

PN7

JUSTICE ROSS: Well, who's everybody else?

PN8

MR J COONEY: Your Honour, Justin Cooney for the Australian Services Union, in the Social, Community, Home Care and Disability Services Award. I know it hasn't been listed for hearing today but it was subject to directions and there was just one matter we wanted to raise. Through my friends, I could do that quickly.

PN9

JUSTICE ROSS: Sure.

PN10

MR COONEY: There was the draft determination and so it was a typographical error and we provided - - -

PN11

JUSTICE ROSS: No, that's right. Yes. I think we know there's a typographical error and we'll fix it in the final determination. There are no other objections to the SACS Award, I think, yes.

PN12

MR COONEY: In that case, your Honour, I ask if I be excused and - - -

PN13

JUSTICE ROSS: No, no, certainly.

PN14

MR COONEY: Thank you.

PN15

JUSTICE ROSS: Thanks, Mr Cooney. I'm sorry, we should have responded and made that clear, but – and anybody else?

PN16

So all the people in the second row of the Bar table are with the people at the front, is that right?

PN17

MR DIXON: Correct.

PN18

JUSTICE ROSS: Okay, good. Just for the efficient use of time and to avoid keeping everyone here while you listen to the, no doubt, fascinating history of the Journalists' Award, in relation to the Horticultural and Pastoral matter, we note the AWU submissions came in relatively late and they've proposed a position, and there is, at least, a degree of commonality between the parties. We've discussed the matter this morning and we want to put this suggestion to you, that we won't hear your matter before 11.00. We've got the written material in the other matter. I don't apprehend it will take more than one and a half hours. And my Associate will find a room for the NFF and the RBU to see how you go with trying to conclude a consent position in relation to the matter. We're going to ask you to come back at 11.00 and we can make available a member of the Bench to assist in further facilitation and finalising the matter before you. And that, I think, might be a more productive use of the time rather than have you – unless you've got an interest in the Journalists' Award, which is difficult to understand but nevertheless – what do you think about that?

PN19

MS McKINNON: That sounds good, your Honour.

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MS WALSH: That shall be fine.

PN21

JUSTICE ROSS: All right. Well, you can leave whenever you like, and see how you go in – it does seem to me that the central issue, if you like, is the point that the AWU seems to be prepared to accommodate, the standing one. So I'd encourage you to try and reach a resolution that deals with the rest of the matters, okay? All right. Thanks, very much.

PN22

As to the journalist matter, we've had the opportunity to read the written submissions and I had some questions I wanted to put to you, Mr Dixon, and then hear from the union. The conclusion of it though, we want to make the same

proposition to the parties in this matter. And that is to have a facilitated discussion to see whether – facilitated by a member of the Bench, to see whether there is a basis on which the matter can progress, noting that in your submission and I don't really characterise this in a pejorative way but there's a series of concessions towards the end that appropriately crafted, may go a significant way to addressing the union's concerns. It may do. You know, we won't know until there's that conversation. It seems to me that one of the main issues the union raises is, well, under the current provision they may have to wait 12 months to be paid for overtime that's not taken as time in lieu. Your client's fundamental problem is that you want to retain the current default position for toil. And it may be that a clause can be crafted that retains the current default position but also provides the employees covered with more ready access to the overtime payment in the event that toil is not taken. So it may be that there's scope for some discussion, not that this is a sort of zero sum game, it's not necessarily the case that you're either in with the model toil term or you'll end with the current award provision. But our preference is that the parties engage in that discussion and seek to tailor something that best meets your respective needs. But if you can't do it then we'll need to impose a solution on you and that might be not necessarily one that best suits everybody's respective interests, that's all.

PN23

MR DIXON: We understand completely, your Honour.

PN24

JUSTICE ROSS: But look, having said that is it convenient if I first ask you some questions that arise from your submission and then you go to it or do you want to say whatever you wish to say in supplementation and then I'll ask?

PN25

MR DIXON: Can I just ask your Honour to clarify one issue?

PN26

JUSTICE ROSS: Sure.

PN27

MR DIXON: Does your Honour envisage that we have these discussion prior to opening submissions or - - -

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JUSTICE ROSS: No.

PN29

MR DIXON: No.

PN30

JUSTICE ROSS: No. I thought we would use the time, put the submissions, we'll deal with the case for hearing, if you like - - -

PN31

MR DIXON: I see.

PN32

JUSTICE ROSS: This morning and then there would be – rather than bring you back if the discussions aren't successful or – et cetera, that's - - -

PN33

MR DIXON: Yes. If your Honour pleases.

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JUSTICE ROSS: Yes.

PN35

MR DIXON: I'm in the Commission's hands as to whether your Honour wishes to pose those questions and I come back later or open. I'm fairly comfortable about that.

PN36

JUSTICE ROSS: Look, mercifully I don't have a long list of questions, Mr Dixon so it might be easier to put them at the beginning. Can you just clarify, your clients, who they are and what they cover under this – what, in short, and I don't – I'm not suggesting this is the case - - -

PN37

MR DIXON: Yes.

PN38

JUSTICE ROSS: But am I looking at a couple of employers out of 50 that only employ five per cent of employers covered by this award or am I looking at the other end of the scale? What's the - - -

PN39

MR DIXON: Your Honour, I can give your Honour and the Commission some assistance in that by reference to a document that was referenced in the material of Mr Scully but it was not attached to it. It's at footnote 19 of his evidence and it's an IBIS World report - - -

PN40

JUSTICE ROSS: Yes. Yes.

PN41

MR DIXON: Of December 2015. It's entitled, "Paper jam, revenue declines as consumers shift to online news platforms."

PN42

JUSTICE ROSS: Yes.

PN43

MR DIXON: "IBIS World industry report J5411 Newspaper Publishing in Australia, December 2015", and I have a copy.

PN44

JUSTICE ROSS: Yes. Thank you. And so is that in the form of most of the IBIS' reports, they'll give you a breakdown of who's who and that - - -

PN45

MR DIXON: It certainly talks about the industry as a whole, and I think if one – to the extent that I don't have other evidence before the Commission about this, this would be a good starting point, to answer your Honour's question.

PN46

JUSTICE ROSS: All right, thank you.

PN47

MR DIXON: If I may hand that up.

PN48

JUSTICE ROSS: Yes.

PN49

MR DIXON: If the Commission pleases, I'd intended to take you to this report later for a few purposes and - - -

PN50

JUSTICE ROSS: Perhaps we can deal with it then if you like, if that's convenient or - - -

PN51

MR DIXON: No, no. I'm happy to deal with it now. So you will note that this document, on page 3, gives what is described as, "Industry at a Glance", and consistent with the evidence of Mr Scully you will see that it's an industry which is under pressure because of a decline in revenue across the board, and on page 3 in tabular form you will see that there is a predicted negative growth up until 2021. On page 4 in the executive summary the Commission will see that in the left-hand column, about half way down on the top paragraph, "Industry revenue is estimated to fall 8.4 per cent over the five years through 2015/16", and then further, so the whole theme of this paper is that it is an industry which, because of digital social media change, the print digital industry is under significant pressures. And you will see on page 5, half way down the page under "Current Performance", it says, "The newspaper publishing industry has undergone significant structural change over the past five years".

PN52

When one then comes to talk about the industry generally, on page 11 one seeks a heading, "Products and Markets". And I think this goes in part to, or directly to the question your Honour posed. In the bottom half of page 11, "The metropolitan newspapers published on a daily basis make up the industry's largest product segment, ten metropolitan and statewide newspapers. News Australia and Fairfax own all of those newspapers with the exception of the West Australian which is owned by the Seven West Media". And then on the right-hand part, "Although the Seven West Media has purchased the Sunday Times in Perth in more recent times, you'll find that the suburban newspapers – there are about 470 suburban or community newspapers of Australia".

PN53

Then if one goes to page 17 one finds the competitive landscape and this again, I think, goes more directly to what your Honour was inquiring about. On page 17 in the top under "Market Share" the Commission will see that "The industry's four largest players, News Australia, Fairfax, Seven West and APN News & Media are estimated to account for over 85 per cent of the industry revenue of 2015". Then further down that page the Commission will see that "According to the Australian Bureau of Statistics in 2013/14, only three firms had more than 200 employees and over 85 per cent of enterprises and industry generated less than 2 million in revenue".

PN54

And then again addressing the question that your Honour, the President, asked, on the right-hand column on the top, one sees the newspapers and the daily's, and also then Fairfax daily's. In respect of the two other entities that we appear for - -
-

PN55

JUSTICE ROSS: Can we just go to Nationwide News Proprietary Limited. What's that?

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MR DIXON: Your Honour will see it's part of – I'm sorry, would your Honour just bear with me for a minute?

PN57

JUSTICE ROSS: Is it News Australia Holdings Pty Limited?

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MR DIXON: News Australia Holdings Pty Limited that's referred to on page 3.

PN59

JUSTICE ROSS: But is that the one referred to on page 21?

PN60

MR DIXON: Yes.

PN61

JUSTICE ROSS: That has 41.72 of the market share?

PN62

MR DIXON: Yes, and that's the - - -

PN63

JUSTICE ROSS: And that's one of the clients. It's just - - -

PN64

MR DIXON: Yes.

PN65

JUSTICE ROSS: What's the difference between Nationwide Proprietary Limited and News Australia Holdings?

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MR DIXON: It's a subsidiary of - - -

PN67

JUSTICE ROSS: But do you represent the subsidiary or the totality of the entities?

PN68

SPEAKER: The totality, is what I'm instructed, yes.

PN69

JUSTICE ROSS: All right. But not Fairfax or Southwest, so where do Bauer Media and Pacific Magazines fall?

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MR DIXON: Can I just help, perhaps, your Honour - - -

PN71

JUSTICE ROSS: Sure.

PN72

MR DIXON: If your Honour goes back to page 3, and you may be looking at that page, on the left-hand column when one talks about market share you've got the three entities, 41 - - -

PN73

JUSTICE ROSS: Yes.

PN74

MR DIXON: Fairfax 73 and 76.5.

PN75

JUSTICE ROSS: Yes.

PN76

MR DIXON: Now in the magazine publishing area Bauer and Pacific Magazines are, I'm instructed, the two most significant magazine publishing companies in Australia, with most of the titles.

PN77

JUSTICE ROSS: I see. This IBIS report is only referring to newspaper publishing?

PN78

MR DIXON: Correct, your Honour.

PN79

JUSTICE ROSS: And Bauer and Pacific dominate the magazine publishing in - -
-

PN80

MR DIXON: That is correct, your Honour.

PN81

JUSTICE ROSS: In a similar way to your other client dominates the newspaper?

PN82

MR DIXON: Correct, your Honour.

PN83

JUSTICE ROSS: No, that's fine. Can I take you to paragraph 4(i) of your submission and this would be the submission of 26 October. Now do I take it - you talk about "two other Modern Awards which have such a provision, both of which are journalist awards, and from paragraph 62, those two awards are the Book Industry Awards and the Broadcasting and Recorded Entertainment Award, is that right?

PN84

MR DIXON: Yes, your Honour.

PN85

JUSTICE ROSS: Well, the Book Industry Award has been varied to insert the model toil term and it was varied on 22 August, and the Broadcasting and Recorded Entertainment Award is about to be varied, because we published a draft variation determination on 26 September. Parties had until 19 October to comment. The employees were not opposed to the variation determination. There's one issue of interpretation that doesn't go to the substance of the clause, so it seems that the others have moved.

PN86

MR DIXON: They have. Of course - - -

PN87

JUSTICE ROSS: There is still - - -

PN88

MR DIXON: There is the further distinction with the Full Bench obviously with your detailed knowledge of this industry appreciates that to the extent that one is looking at digital publishing, the Journalists' Award expressly excludes in part 5, certain of the entitlements in respect of persons who are in the digital industry that is not printing digital like the SMH and the like, something, and - does the Commission have the award to hand?

PN89

JUSTICE ROSS: Yes, I think so.

PN90

MR DIXON: And if one, when I ask the Commission first of all to got to the definitions section, definition 3 - - -

PN91

JUSTICE ROSS: Clause 3?

PN92

MR DIXON: Clause 3, one gets the definition of the metropolitan daily newspaper.

PN93

JUSTICE ROSS: Yes.

PN94

MR DIXON: Then there's the definition of "published media industry", page 5.

PN95

JUSTICE ROSS: Yes.

PN96

MR DIXON: It means, "the industry concerned with the publication of newspapers and the provision of wire services". So then you've got regional daily newspapers, and "specialist publication" means "publication published by an employer", et cetera. If you go to clause 3.2 – sorry, the last item in 3.1 is, "The wire service means news gathering organisations that distributed syndicated copy electronically, usually to subscribers". And then 3.2 is significant. "Where this award refers to an employee working on an employer's print publication such as a metropolitan daily newspaper, et cetera, it includes a reference to an employee employed in that employer on the print publications associated online publication".

PN97

JUSTICE ROSS: Yes.

PN98

MR DIXON: And then there's one exclusion in clause 4.9 in relation to the particular level of employees that is excluded from the operation of the award, which you would be familiar with.

PN99

JUSTICE ROSS: Yes.

PN100

MR DIXON: Sorry, I mean to go back to 4.2. 4.2, of course, references the Graphics Arts & Broadcasting Awards as a separate area and they are dealt with separately. Now then one comes to clause 4.10 and the Commission will note that part 5 is said to have – "will not have any application to the following employees:- an employee employed on an online publication other than those employees described in clause 3.2". So that if you are in the print media and you do online, you're covered. If you're purely online, then you've not covered. And then you will note in 4.11, "The overtime provisions applying to a part-time and casual employee at clauses 10.2(e), (f), 10.3", et cetera, "will not apply to employees referred in clause 4.10 and 4.12, provided that all the employees referred to in clause 4.10 will not be given at least two days off in each week", et cetera.

PN101

There is a separate application before the Commission, as we understand it, in respect of which the MEAA has sought a variation of this award to extend

coverage of digital employees into part 5. And may I handed up a draft determination which - - -

PN102

JUSTICE ROSS: That's before another Full Bench? I'm pretty sure it's not before this one. Or has it – is it?

PN103

SPEAKER: Yes.

PN104

JUSTICE ROSS: Where's it up to for the - - -

PN105

SPEAKER: No, it's part of the award review application.

PN106

JUSTICE ROSS: It would be part of the substantive changes to this award - - -

PN107

MR DIXON: Yes. Yes.

PN108

JUSTICE ROSS: In the award stage, is that right?

PN109

SPEAKER: Yes.

PN110

MR DIXON: Yes. Yes, your Honour.

PN111

JUSTICE ROSS: Well, that raises a separate issue because the arguments in respect of the toil provision would be, I would imagine, if the application were granted, are likely to be different than the ones you're wanting to put in relation to the award as they are at the moment. Because at the moment we take the award as it presently is.

PN112

MR DIXON: Yes.

PN113

JUSTICE ROSS: And that would be that, well, people in that online digital environment that are not linked to a printed publication, well, whatever we do won't impact on them because they're not presently in the overtime and hours of work part of the award.

PN114

MR DIXON: Correct.

PN115

JUSTICE ROSS: And the variation would only apply to those parts of the award.

PN116

MR DIXON: But they're presently covered.

PN117

JUSTICE ROSS: Yes. Well, does anyone know where the other matter is up to?

PN118

MR CHESHER: Your Honour, exposure drafts were released by the Commission just last week.

PN119

JUSTICE ROSS: Yes, but has the – is Journalist in group 4?

PN120

MR CHESHER: Yes, group 4(d).

PN121

JUSTICE ROSS: I see. All right, so – group 4(d). All right, so the hearing in relation to the technical drafting matters will be next year.

PN122

MR CHESHER: Yes.

PN123

JUSTICE ROSS: And I've not yet constituted the Bench to deal with the substantive change issues. And I would imagine really on any view of it, that application to vary would be a matter that would go to a separately constituted Full Bench as a significant change, rather than a technical drafting matter.

PN124

MR CHESHER: Yes.

PN125

JUSTICE ROSS: Okay. All right.

PN126

MR DIXON: We make two points about this, if we can.

PN127

JUSTICE ROSS: Sure.

PN128

MR DIXON: The evidence that the union today appears to want to rely upon if one looks at it carefully, is more relevant and directed at these variations and I will deal with that as to why you should not attach any weight to that part of the evidence, but separately, the award in our submission has a longer history and has – as the Commission may have picked up, the notion of daily overtime and weekly overtime goes back to 1900s, the early 1900s and it will have, if the Commission does change the – our argument, as you may have appreciated, is that the toil provision which is developed principally – well, in part, in respect of awards that did not have any toil provision, proceeded on the basis that the underlying entitlement was payment of overtime. Throughout the history of this

award the underlying entitlement has been the time off and then the alternative,
and - - -

PN129

JUSTICE ROSS: Right. I appreciate the history but it's -there'd be two points to make in relation to that. The first is that it was certainly largely by consent in those earlier decision and it became a feature of the industry for a significant period of time. And secondly, they were outcomes in settlement of a dispute and Modern Awards are regulatory instruments, they're not in settlement of a dispute. And the consent position the parties might reach doesn't have the same weight in a regulatory environment that it has in the context of a dispute environment. In a dispute environment if the parties reach agreement on a matter, well that may extinguish the dispute on that matter and deprive the Commission of jurisdiction in relation to that matter.

PN130

So I think the history is a relevant factor but I think you have to also take into account that in many of these – there are one or two where it's not entirely clear whether it was consent or not, which is a not uncommon feature of some of those proceedings that are recorded in the CAR's. I sometimes long for a time where you could deal with a case that runs for days in a two-line decision, saying, well, it seems to me that – so it's not entirely apparent but it does seem that there are those two features about the history that also have to be taken into account.

PN131

MR DIXON: Can I respond to those observations, if your Honour pleases.

PN132

JUSTICE ROSS: Sure.

PN133

MR DIXON: Your Honour is correct that it's an industry where agreement on industrial regulation was a feature from the earliest time.

PN134

JUSTICE ROSS: Yes.

PN135

MR DIXON: And that is actually commented on in some of the earlier cases.

PN136

JUSTICE ROSS: Yes.

PN137

MR DIXON: And many of the earlier awards are effectively under the 1904 Act, in agreement that would have come in, I think, under section 28 of the old 1904 Act, and so – but they had the effect of an award.

PN138

JUSTICE ROSS: Yes.

PN139

MR DIXON: And they had the endorsement of the Commission. If one then comes to the awards amplification process and first, it was the modernisation and then awards amplification process.

PN140

JUSTICE ROSS: I think it was the other way around.

PN141

MR DIXON: Yes, but in each of those, with attached awards in it, but the similar provisions go in and there was an obviously – it had statutory overview by the Commission in the implementation of those terms.

PN142

JUSTICE ROSS: Yes.

PN143

MR DIXON: Thirdly, it would be my respectful submission that notwithstanding the consensual nature of items, and the absence of an arbitrated outcome, the Commission has, over time and even now, paid fairly significant regard to terms that have been introduced into awards even by consent.

PN144

JUSTICE ROSS: I'm not suggesting they're to be given no weight. I'm not making that suggestion.

PN145

MR DIXON: I think I'm arguing for a bit more than what your Honour is suggesting.

PN146

JUSTICE ROSS: Yes. No, no, sure. Yes.

PN147

MR DIXON: And a good illustration is the family(?) test case - - -

PN148

JUSTICE ROSS: Yes.

PN149

MR DIXON: That your Honour was ultimately involved in where the Commission in that case, and subsequently recognised, that awards that provided time for overtime rates as opposed to hour for hour, they needed to be recognised and were dealt with in that fashion.

PN150

JUSTICE ROSS: Yes.

PN151

MR DIXON: So that there was a recognition then, and even in these proceedings in the more recent history, the Commission has re-emphasised a recognition of what happened there.

PN152

JUSTICE ROSS: Yes.

PN153

MR DIXON: And in relation to that case there was no alteration to the Journalists Award because - - -

PN154

JUSTICE ROSS: I note the point you make about that in the submission but it's also the case there was no alteration to many awards, and many awards which had no toil provision, largely because it was an application based process.

PN155

MR DIXON: I understand that, your Honour.

PN156

JUSTICE ROSS: But I follow the argument. There was certainly no Commission initiative, or an initiative by party to the award to seek to vary this award on the basis that there was an already existing provision - - -

PN157

MR DIXON: Correct.

PN158

JUSTICE ROSS: Which had a long history.

PN159

MR DIXON: Yes.

PN160

JUSTICE ROSS: And where the parties had predominantly operated on a consensual basis.

PN161

MR DIXON: And then post that, went on to make consent awards.

PN162

JUSTICE ROSS: Yes.

PN163

MR DIXON: And then became employer specific awards.

PN164

JUSTICE ROSS: Yes.

PN165

MR DIXON: So you had this over a long period and then you had employer specific awards, and in those employer specific awards there was some minor changes. There was one that worked the first two hours of overtime, or three hours of overtime would be paid, and the like. And then the fourth point I want to make in response to what your Honour raised with me is that there is also some significance, given all of that history that when it comes to make Modern Award

the parties were, in effect, in agreement that the clause that has the essential terms now, was appropriate.

PN166

JUSTICE ROSS: I suppose there's a dispute between you about that and we'll have to go through the transcript and the history of it because I think it's at – is it 38 and 39 of the MEAA submission where they take issue with what you say about the award modernisation process?

PN167

MR DIXON: I don't - - -

PN168

JUSTICE ROSS: Is it just a characterisation problem?

PN169

MR DIXON: We don't accept the characterisation that our friends have put and -
- -

PN170

JUSTICE ROSS: All right.

PN171

MR DIXON: And it's readily apparent and I – may I take you through that now, I think, Commissioner - - -

PN172

JUSTICE ROSS: Well, look - - -

PN173

MR DIXON: No? I'll answer your other questions.

PN174

JUSTICE ROSS: As fascinating as the – but I don't want to divert into that issue. If we need more information about what occurred during the award modernisation process we'll obtain it and we'll put it to the parties and we'll see what you say about it.

PN175

MR DIXON: But your Honour, I can with some confidence, make the submission that if one looks at our analysis that there was some differences between the parties on the peripheral but the call to clause that you're concerned with now - - -

PN176

JUSTICE ROSS: Yes.

PN177

MR DIXON: In relation to how overtime is to be dealt with, was an agreed position that was ultimately put. And the clear significance of that if one looks at the overall history is that one must ask the question, given the history, given the position that was arrived at between the parties on these essential issues in the Modern Award, the Commission having accepted that position, the Modern

Award's objective having been prima face, at the very least, satisfied, what has happened since then, apart from the Commission looking at the other awards, which has made the Modern Awards objectives now not satisfied.

PN178

JUSTICE ROSS: Yes. But I'm not entirely sure that's the right test. And you'll appreciate that contrary to that is put by employers in other proceedings. Where does the legislation require that there be shown to be a change in circumstance since the award was made?

PN179

MR DIXON: No, your Honour. I have argued that very point on a number of points but that's not – I'm not suggesting that that is a necessary step, if there – and more recently the Full Bench said, well, if it is patently obvious that it doesn't meet the Modern Award objective, you don't need other evidence.

PN180

JUSTICE ROSS: Yes.

PN181

MR DIXON: I accept that proposition. But the point we make here, and where the Commission has spoken about probative evidence is needed, it has said in the preliminary decisions, probative evidence is required if any significant change is required. Now we have argued that the change from the present regime to the model toil term will be a fundamental change because the underlying entitlement is turned on its head. And we fully appreciate the Commission being able to say, you don't always need probative evidence, there are other basis upon which you can arrive at a conclusion that this clause doesn't meet the Modern Awards objective. But given the history, given where the parties were by – on a consensual basis, on our submission, before the Commission in 2009 and '10 - - -

PN182

JUSTICE ROSS: Do you say the current award clause was the consent position put by the parties in the award (indistinct) process?

PN183

MR DIXON: On these terms, yes, your Honour.

PN184

JUSTICE ROSS: No. What do you mean, "on these terms", though?

PN185

MR DIXON: Well, there were - - -

PN186

JUSTICE ROSS: I just want to know the current clause that deals with time off in lieu.

PN187

MR DIXON: Can I take - - -

PN188

JUSTICE ROSS: That was then agreed by the parties in the award – because that's not what MEAA says.

PN189

MR DIXON: Can I take your Honour to our written submission?

PN190

JUSTICE ROSS: Sure.

PN191

MR DIXON: Starting at - - -

PN192

MR O'SULLIVAN: Your Honour, perhaps I can assist on that point.

PN193

JUSTICE ROSS: Sure.

PN194

MR O'SULLIVAN: I've sought some instructions with respect to that. One's put forward in the outlines of the submissions of the paragraph that (indistinct) was – I'm instructed that that was the starting position from the MEAA and ultimately when the award was made, the MEAA consented to clause 22 in its current form.

PN195

JUSTICE ROSS: It might have been helpful if you'd put that in your submissions because it's misleading in the way it's expressed there because you expressly take issue with what's put against you in the summary of the award modernisation process and you say what your position was. But really, what I'm interested in is where you ended up, not where you started.

PN196

MR O'SULLIVAN: Yes, your Honour. I'll clarify those instructions but those are the instructions that I have.

PN197

JUSTICE ROSS: All right. Well, that probably concludes the discussion on that point.

PN198

MR O'SULLIVAN: Thank you, your Honour.

PN199

JUSTICE ROSS: Those were the only questions I had for you, Mr Dixon.

PN200

MR DIXON: Would the Commission wish to mark the IBIS report separately?

PN201

JUSTICE ROSS: Sure. Objections?

PN202

MR O'SULLIVAN: It'd be difficult to object.

PN203

JUSTICE ROSS: Probably, yes. Exhibit Employer 1.

EXHIBIT #EMPLOYER 1 IBIS REPORT

PN204

MR DIXON: And may I tender the draft determination sought by the MEAA on 21 October 2016 in respect of the group 4 Awards matter? It has relevant to what weight, if any, you attach to the evidence that is being relied upon by the applicant.

PN205

JUSTICE ROSS: Well, just bear with me for a moment. Mr Dixon, I think, and both parties may wish to comment on this but it seems to us that the change that's proposed has the potential to impact on the scope of the toil provision and consistent with what we've done in other matters we would not determine the toil – and unless there's a consensual position reached between the parties as the result of a conference that meets both your needs, we wouldn't determine the toil question until the coverage point is determined. So what we would do is hear you today on what you wish to say at the moment and then if, in the event that the application to extend coverage is unsuccessful, then it might be a short further proceeding. In the event that it's successful it might be a longer further proceeding in relation to this matter. But in either event you'd be given an opportunity to be heard about what you say flows from the change in the coverage,

PN206

rather than us trying to guess here, well, if it's changed it'll be this but if it's not changed, it'll be that. We just don't know where a Full Bench would take it and they may have an intermediate position so it becomes a bit hypothetical in that sense, but I don't want to waste the time this morning to say what you wish to say about what you've put in. But I want you to do that on the basis that you will have a further opportunity once that substantive claim has been dealt with.

PN207

MR DIXON: As the Commission pleases.

PN208

JUSTICE ROSS: Yes.

PN209

MR DIXON: The only purpose for which I wished to draw that distinction and I might make the submission now - - -

PN210

JUSTICE ROSS: Sure.

PN211

MR DIXON: Is that it has a relevance when you look at the evidence that the union seeks to tender today.

PN212

JUSTICE ROSS: Yes.

PN213

MR DIXON: And it will be more apparent, my submission will make more sense, I hope, in light of that. But otherwise we accept what the Commission says. I think Mr O'Sullivan wants to tender some evidence.

PN214

MR O'SULLIVAN: Well, your Honour - - -

PN215

JUSTICE ROSS: Can we just go to – look, I put forward what we think the sequencing is that would work in the way that would be fairest to all parties, but does anyone have a different view about that? It just seems to be difficult to make a decision about a toil provision in circumstances where the scope of the people that it might apply to is an issue of active contest between the parties and will be determined in other proceedings.

PN216

MR O'SULLIVAN: We tend to agree, your Honour.

PN217

JUSTICE ROSS: Okay.

PN218

MR O'SULLIVAN: But with a slight difference in terms of the way forward.

PN219

JUSTICE ROSS: Yes, sure.

PN220

MR O'SULLIVAN: The scope - if the application was ultimately successful then the evidence that may need to be brought before the Bench with respect to this issue may change from what it is now, and it's all well and good to make submissions on what we've got now.

PN221

JUSTICE ROSS: Sure.

PN222

MR O'SULLIVAN: And whether the evidence that the Alliance seeks to tender, whether it's relevant or not today, may have a different outcome.

PN223

JUSTICE ROSS: That's true, yes.

PN224

MR O'SULLIVAN: So as much as we're all here today, it's the Alliance's position that we may be better off served, dealing with the coverage issue first.

PN225

JUSTICE ROSS: And then work out what your evidentiary case might be.

PN226

MR O'SULLIVAN: Indeed. And if that's unsuccessful, then we just simply come back here with what we've got now.

PN227

JUSTICE ROSS: Yes.

PN228

MR O'SULLIVAN: And make those submissions at that point in time.

PN229

JUSTICE ROSS: Yes, okay. All right. Well, do you want us to take a five minute break while you reflect on – I don't want to – I should have been aware of the variation but I must admit, I'm not – I've turned my mind to the 4(a) and (b) groups because they're on tomorrow but I hadn't thought of what happens in – it's hard to think that far ahead, into February and March next year.

PN230

MR O'SULLIVAN: Yes.

PN231

MR DIXON: Your Honour, it appears clear that for the print media and print online publications the present clause applies.

PN232

JUSTICE ROSS: Yes.

PN233

MR DIXON: And our submission, of course, is that they are distinct areas of publication and they are distinct areas of the media. To the extent that the Commission deals with print and print online, then the parties can deal with that issue because whatever happens ultimately for pure online employees in online cases - - -

PN234

JUSTICE ROSS: Sure, but - so does that mean that we deal with a toil provision that only applies to part of it and then if the scope is extended, we'll have to look at whether a toil provision applies to the extended scope?

PN235

MR DIXON: My instructors would like me to get some more instructions on that topic if we have a - - -

PN236

JUSTICE ROSS: That's fine. Look, five or ten – let us know how much time you require.

PN237

MR DIXON: If the Commission pleases.

PN238

JUSTICE ROSS: How much time you require and then we'll come back. But bearing in mind the indication from the union is that they are going to want to withdraw their witness statements at this time and they'll await the outcome of the – that's as I understand it, they'll await the outcome of the coverage determination. We'll relist the matter, provide an opportunity for parties to file material and witness evidence, post that. Now it may be that if there's no change they file the same material or they adopt a different course but that's their current indication. And perhaps you might also have a discussion with each other about where this matter might go.

PN239

MR DIXON: If the Commission pleases.

PN240

JUSTICE ROSS: All right.

SHORT ADJOURNMENT

[10.18 AM]

RESUMED

[10.35 AM]

PN241

MR DIXON: We appreciate the indulgence of the Full Bench to allow us to obtain further instructions. The Commission pleases, I'm instructed that in light of the approach which the union has put forward, the entities for whom I appear would agree to a course which we understood the Commission at least flagged with us as one option, namely that we don't proceed further today, the matter stand over until after the determination of the question as to whether the digital employees are, by way of whatever process take place, become covered by the part 5. And if that is successful there would be one way of addressing it and if that is not successful then this case could be finalised on the basis that we've already put forward to date.

PN242

JUSTICE ROSS: All right. Perhaps if I clarify what I envisage the steps to be, that, as you said, we not proceed further today, although I do want you to think about whether there'd be a utility in a conference today, we'll come back to that in a moment, but not proceed further today, await the determination of the coverage issue and the other substantive issues in relation to this award that will come up in the Group 4 award phase. I'll then call this matter on for mention and at that point hear from the parties as to whether or not they wish to - or how they wish to proceed. It may well be that if there's no change to the coverage clause you're content to proceed on what you put in and you'll want an opportunity for a short oral hearing to deal with that, that's one alternative.

PN243

Another may be that in the event there is a change in the coverage you'll want an opportunity to recast both your submission and your evidence and then we would

go down that path. But I don't want to be too rigid about what might occur, other than to assure you that we won't determine it without hearing from you further but, more importantly, once the coverage issue is determined I'll call this matter on for mention and provide you with an opportunity, at that stage, to let us know which way you want to proceed.

PN244

Just in case I don't remember to put in the mention directions, I would encourage you to discuss, between yourselves, how you see the matter proceeding so hopefully you're able to come to the mention with a joint position about what's to take place. So that's what's envisaged, are your clients content with that?

PN245

MR DIXON: Yes, thank you, your Honour.

PN246

MR O'SULLIVAN: Yes, your Honour. If I could just quickly clarify something that fell from your Honour before the adjournment. It's not necessarily the case that the Alliance will be withdrawing its evidence, it may or may not - - -

PN247

JUSTICE ROSS: Of course. I appreciate that. We'll leave the material as it is and I'm not proposing to make any procedural directions about the evidence at all and it's more that given that this coverage issue is in a state of flux, you don't want to press it at this stage but you may be presenting exactly the same material and relying on it, you don't need to refile it, you can simply say, "We continue with that."

PN248

MR O'SULLIVAN: Indeed, your Honour.

PN249

JUSTICE ROSS: Given you might have a bit of time, can I draw two things to your attention about the witness statements? One is, if you wouldn't mind putting them in numbered paragraphs because it makes it a lot easier to refer to. The second thing is, about the survey evidence, speaking for myself I want to know a bit more detail about that survey. It only tells me how many responses there were, it doesn't tell me what the sample size was, who it was sent to, how you came up with that. So there are some issues that it might be better to give some attention to, given we've got a bit of time.

PN250

MR O'SULLIVAN: Yes, your Honour.

PN251

JUSTICE ROSS: Well, that's the where to, in relation to the matter but bearing in mind, Mr Dixon, your client's, as I apprehend it, your primary concern in relation to all of this is that - well, you characterised it, you turn on its head, the current arrangement where TOIL is the default, et cetera, into a position where payment is the default and TOIL is the option. The union's express a number of concerns, one of which is under the current position, I'm not quite sure how this follows, but

it's said, in the submission, that people may never get paid for overtime, but certainly, under the current clause, they may have to wait for an extended period to get paid the overtime. So however one characterises it, there's that delay and you've responded to that by saying six months. There may be some capacity for discussion around those issues and give that you're all here I wonder whether it might be an opportunity to have that facilitated discussion.

PN252

MR DIXON: Your Honour, from my client's perspective everything your Honour says we can accept and try and further the process that your Honour indicates. I did understand, from our learned friends and his client, that the degree to which they're able to get proper instructions today for that might be an issue. If not, then certainly from our client's perspective we would envisage that if we go away today there will be further discussions between the parties with the option of asking for the assistance of a member of the Full Bench or from the Commission to facilitate that. It's because of that indication, if we've got it right, that I put the position that I have just put.

PN253

JUSTICE ROSS: It may, if you can give this some consideration, it may be that you don't enter the discussions or the facilitation immediately but a member of the Bench could be available at 1 o'clock and that might give you an opportunity to make some inquiries, or is it the case that everyone's gone north and there's no one at home, is that the problem?

PN254

MR O'SULLIVAN: Bearing in mind the nature of those who instruct me, your Honour, being a collective body, it's going to take a little bit of time to get those people together.

PN255

JUSTICE ROSS: Okay, yes.

PN256

MR O'SULLIVAN: Just while I'm on my feet, your Honour, if I could just help explain one particular point, you made a comment about some part of the submissions, in terms of never being able to be paid.

PN257

JUSTICE ROSS: Yes, yes.

PN258

MR O'SULLIVAN: If one goes to paragraph (b) of subclause 22.3, you'll see that:

PN259

Time off, instead of overtime, will be taken as mutually agreed.

PN260

We then get into the other position, if there's no agreement then it's by the employer rostering accrued overtime. So in those circumstances, if there's no

agreement the employer has, on the face of that particular provision, the right to simply say, "Well, in 14 days' time you're taking it."

PN261

JUSTICE ROSS: I see.

PN262

MR O'SULLIVAN: So in those circumstances you could very well end up with the position where the person, the employee, will never get paid overtime.

PN263

JUSTICE ROSS: In fact, they end up being compelled to take the time off at a time that may not suit them or allow them to do what they would wish to do in their time off in lieu. I follow. Okay. All right.

PN264

Well, what we might do is the Bench will adjourn and Kovacic DP will come back and have a discussion with the parties as to how we might progress some facilitated discussions in relation to the matter, rather than let it drift. You can give us an indication then as to how soon you can get instructions so that the conversation can be productive. But it does seem that, in view of the degree of movement around the position, that there may be a capacity to end up with a result that may retain the default position but provide additional provisions and modifications that address the unions concerns so, in the usual fashion, we'll end up with something that suits nobody but that you can perhaps both live with. So let's have that modest objective as our goal. We'll adjourn. Is there anything else anyone wishes to say? Okay. We will adjourn now. Kovacic DP will come back and have that conversation and, as I say, I will list this matter for mention, assuming that it's necessary and the matter is not concluded by the conciliation, in that event I'll list it for mention after the determination of the coverage question and we'll proceed as I indicated before. Nothing further? Thank you.

SHORT ADJOURNMENT

[10.46 AM]

RESUMED

[11.55 AM]

PN265

JUSTICE ROSS: Can I outline my understanding of where we're up to and suggest a process for concluding the matter? As I understand it, there's an in principal agreement between the NFF and the AWU in relation to the TOIL provision to go into both the Pastoral Award and the Horticultural Award. I understand, in relation to the draft, it's proposed that in the Pastoral Award it would apply to all streams, other than shearing, on the basis that nothing seems to apply to shearing but the provisions in the shearing area, that in order to provide each of you with an opportunity just to confirm the agreement, can I suggest this course, and let me know if this isn't enough time, but say by the end of this week you'll file a joint proposal and clearly identify which streams it's to go into, et cetera, into the two awards.

PN266

What we would then do is have prepared a draft variation determination, and I don't say this critically, but there are some aspects of the current agreement that might be subject of some drafting variation just to make it a little easier to follow, but we understand the essence of what's put forward. In any event, the draft variation determination would provide you with a period of time in which to look at it, make sure you're happy with it before it's published in final form. Our understanding is that this proposal is advanced on the basis of the particular and unique features of the industries covered by these two awards, which is documented in the NFF's submissions in these proceedings. Is that where we're up to and are you both content with that course and does that give you enough time? We're just wanting to try and wrap it up before Christmas if humanly possible.

PN267

MS McKINNON: No, that's suitable, your Honour. I'm happy to provide a revised draft to my friend this afternoon and they can have a bit of time and then hopefully we can both get instructions fairly quickly and submit it to the Commission.

PN268

JUSTICE ROSS: Thank you. Ms Walsh, are you happy with that?

PN269

MS WALSH: Yes, that's fine by us.

PN270

JUSTICE ROSS: All right. That is the course we'll adopt. Thank you very much for your assistance and we'll adjourn.

ADJOURNED INDEFINITELY

[11.58 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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