

TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1034278-1

**SENIOR DEPUTY PRESIDENT WATSON**

**AM2012/48 AM2012/129 AM2012/154 AM2012/207 AM2012/227 AM2012/228**

**Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years**

**Application by Housing Industry Association Ltd  
(AM2012/228)  
Building and Construction General On-site Award 2010**

**(ODN AM2008/15)  
[MA000020 Print PR986361]]**

**Melbourne**

**11.11 AM, WEDNESDAY, 1 AUGUST 2012**

**THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO  
CONFERENCE AND RECORDED IN MELBOURNE**

PN1

THE SENIOR DEPUTY PRESIDENT: - - - the hearing and - rather than go through the difficulty of taking appearances by the video again I'll record appearances for MR MAXWELL from the CFMEU, initial S; MR A KENTISH, CEPU; MR G NOBEL, AMWU; MR M MEAD, AIG; and MS HAYNE, ABI, all in Sydney. MR R CALVER in Canberra for the MBA; MR LILBURNE in Perth, initial R of CCIWA; and in Melbourne MS M ADLER from HIA.

PN2

Now, the matter has been listed this morning for programming. Before going to that I'll just indicate - to make sure I'm dealing with the right matters - that there is a CEPU application in AM2012/160, which deals exclusively with the issue of apprenticeships and there is - not before me but is before the apprenticeship Full Bench. The MBA application 248 involves issue of apprentices. The element of the application is before the apprentice Full Bench. All other matters are with me.

PN3

CFMEU application in 129, the same position, apprentice matters before a Full Bench, all other matters before myself. ABI in 154, there is an annual leave issue and before the annual leave the Full Bench, otherwise the matters in the application are before me. AMWU 2007, involves exclusively matters before me. Chamber of Commerce Western Australia 227, goes to one discrete issue, remote work, and that's before me. And there was some correspondent sent, I think to the parties by solicitors of CCIWA in relation to that matter. And the Housing Industry Association involves matters which are before the flexibility provision Full Bench, the apprentice Full Bench, and the annual leave Full Bench. And there are, in addition, a range of other matters which are before me.

PN4

Have I got any of that wrong? No. Very well. Well, I think we can proceed then to programming an issue raised by CCIWA, effectively, seeking some indication whether the matter is raised is contentious and falls within this area, and that is I wanted to explore with the parties whether there was any benefit in instructions between them in relation to the matters before me. And, secondly, setting down a date for conciliation if that were thought desirable on the basis that that would not raise any issue about my sitting to determine any outstanding matters.

PN5

Can I ask the parties if they have a view in relation to that specific issue and that might well take up the issue raised by CCIWA. Perhaps, I'll start, for convenience, with you in Melbourne, Ms Adler.

PN6

MS ADLER: Yes, your Honour. So just to be clear - views on conciliation as a starting point?

PN7

THE SENIOR DEPUTY PRESIDENT: Yes.

PN8

MS ADLER: We don't have any objection. I guess our only - - -

PN9

MR CALVER: Sorry, your Honour, I can't hear Ms Adler.

PN10

MS ADLER: Is that better?

PN11

MR CALVER: Yes, thank you.

PN12

MS ADLER: We just had a couple of comments generally speaking. Would it be appropriate to put them now or did you want to come back to those?

PN13

THE SENIOR DEPUTY PRESIDENT: Yes. No - do them now.

PN14

MS ADLER: As a first instance, we did put correspondence in relation to the timetable generally requesting that these matters be pushed to stages 3 or 4, so I just, for the record, wanted to make that noted as well that we may, again, put correspondence forward to push these matters back given the ongoing apprentice matters.

PN15

THE SENIOR DEPUTY PRESIDENT: Correspondence directed to the president?

PN16

MS ADLER: Yes, in relation to the draft timetable and the final timetable, dated 5 July.

PN17

THE SENIOR DEPUTY PRESIDENT: Yes.

PN18

MS ADLER: Given the resource and tense nature of the apprentice matter which is concurrently ongoing, we would request that these matters be pushed to stages three or four.

PN19

THE SENIOR DEPUTY PRESIDENT: Yes. Well, that's a matter for the president - that I can raise that with him. What I'll do is proceed to schedule the matter on the basis of the timetable established in the president's statement of 5 July. I'll bring that request to the attention of the - - -

PN20

MS ADLER: Thank you.

PN21

THE SENIOR DEPUTY PRESIDENT: - - - if that changes I'll obviously change the directions. If it doesn't we'll proceed on the basis of - - -

PN22

MS ADLER: Thank you. In addition, I guess, as a consequence of the decision of 29 June on the preliminary matters, introduced the notion of needing to establish significant change in circumstances if the variation application related to

a modern award objective and then also take into consideration what matters were canvassed during the award modernisation process as well. The HIAs position is that parties should be given an opportunity to review their original submissions given that this issue has come up subsequent to those initial submissions, and parties should be given an opportunity to reassess the variation application.

PN23

We feel that this might also help narrow the extent of some of the applications and focus them more narrowing on a certain range of issues given that this has come up subsequent to the original request for submissions and the general to yearly review.

PN24

THE SENIOR DEPUTY PRESIDENT: Yes. Very well.

PN25

MR LILBURNE: Sorry, your Honour - sorry, your Honour, Lilburne in Perth. We find it very difficult to hear - we can hear you but we can't hear the advocate.

PN26

THE SENIOR DEPUTY PRESIDENT: Yes. Well, Ms Adler was - has raised a - well, firstly, she requested the president to push back these matters from stage 1 to stage 3 or 4. It's a matter for the president and I'll refer that to him. And, secondly, indicated it would be desirable given the decision on the preliminary issues by the penalty rate Full Bench that the parties in these matters be given the opportunity to review their submissions in the modernisation process proper which might lead to some modification, possibly, withdrawal, or narrowing of some of the issues - - -

PN27

MS ADLER: That's correct.

PN28

THE SENIOR DEPUTY PRESIDENT: - - - within the - - -

PN29

MR LILBURNE: Thank you, sir.

PN30

MS ADLER: Can everybody hear me now?

PN31

MR LILBURNE: That's better.

PN32

UNIDENTIFIED SPEAKER: Yes.

PN33

MR ADLER: I just need about four microphones, but as long as everyone can hear. And just on a final note in relation to conciliation and the use of that throughout the proceedings, we have a position that there's potential to split the applications into those that relate to technical variations and those that relate to variations in relation to the modern award objectives. Those that relate to technical matters maybe more suited for conciliation or conference and we feel that they may be able to be dealt with quite expeditiously.

PN34

THE SENIOR DEPUTY PRESIDENT: Yes.

PN35

MS ADLER: Whereas those relating to modern award objectives, again, given the decision on 29 June, would need further timing and further consultation in order to prepare arguments and submissions on those matters.

PN36

THE SENIOR DEPUTY PRESIDENT: Yes. Very well.

PN37

MS ADLER: Thank you.

PN38

THE SENIOR DEPUTY PRESIDENT: Thank you for that, Ms Adler. I'll start with the smaller attendances, I'll to you next, Mr Calver. I'm sorry, Mr Calver?

PN39

MR CALVER: I didn't hear what your Honour said.

PN40

THE SENIOR DEPUTY PRESIDENT: I'm going to you next on the issue of conciliation and any of the issues raised by Ms Adler.

PN41

MR CALVER: Thank you, your Honour. Your Honour, the first point I want to make is that in proceedings that were set out for mention on Monday, Senior Deputy President Acton indicated that a Full Bench had been allocated to the joinery award matter.

PN42

THE SENIOR DEPUTY PRESIDENT: Correct.

PN43

MR CALVER: And that there seemed to us to be purely systemic issues raised in that matter than in this, and with no lack of respect to your Honour most of us had sought for a Full Bench to be allocated here and I might point specifically to the fact that we raised the capacity of the Tribunal, section 9 of our submission accompanying our application - the capacity of the Tribunal to regulate occupational health and safety issues. That is a very fundamental and important matter that we would still like to see, with respect, to - before a Full Bench.

PN44

The other issue as to conciliation: we think it's vital that there be conciliation so that matters which can be agreed - it might be minor and technical - can be disposed of and so that matters which are before Full Benches can clearly be indicated a matrix of provisions which remain for you or - and, again, respectfully before a request of a Full Bench could be put into contention.

PN45

In that regard, your Honour, we think that conciliation - and obviously, with the number of people in Sydney with the ease with which we can get to Sydney, we would appreciate conciliation fairly soon in Sydney. And I note that at the time that the president issued the draft timetable upon which the subsequent final timetable for modern award variation matters for 2012 review was issued, Masters

Builders sought exactly the same matter to be dealt with as Ms Adler has raised as moving this award to stage 3.

PN46

One, because of the issue I've raised in relation to occupational health and safety; and, two, because of the volume of variations, if nothing else, before the Tribunal. That's our position, your Honour, if it please the Tribunal.

PN47

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Calver. I'll bring those matters - which are properly matters for the president, again, to his attention. Mr Lilburne?

PN48

MR LILBURNE: Thank you, your Honour. As you indicated the CCI application is fairly discrete and as set out in our correspondence sent yesterday we believe that there - particularly, in relation to the CCI WA application, the issues could well be narrowed by either discussion or conciliation. CCIWA is not opposed to conciliation taking place and thinks that will be a good idea, and I think you're involved in that process would preclude you from hearing the matter, particularly, that application.

PN49

In relation to (indistinct) points in relation to stage 3 or 4 CCIWA would not be opposed to that application, but I think you've mentioned, your Honour, that's a matter for the president in any event.

PN50

THE SENIOR DEPUTY PRESIDENT: Yes.

PN51

MR LILBURNE: Just in relation to the timetabling, it might be taking a step too far if it does go to conciliation. The sort of timetabling we're looking or anticipating (indistinct) statement of 5 July in the first - in the first stage, would be to have conciliation and discuss (indistinct) periods, say, up until (indistinct) then the applicants to file once the issues have been narrowed, to file submissions and materials to be relied upon, say, within four weeks. And then response in two weeks and a hearing in late October would be the sort of anticipated timeline. But that might be addressed after the conciliation process if that's going to be done.

PN52

THE SENIOR DEPUTY PRESIDENT: No, I think I'd rather address that now subject, obviously, with the capacity to change - to change it. Look, rather than - sorry, is that all you had, Mr Lilburne?

PN53

MR LILBURNE: That's all I was going to say, sir.

PN54

THE SENIOR DEPUTY PRESIDENT: Thank you. Rather than deal with conciliation and then hearing process, I might go back to Ms Adler - if she's got any comments on directions for hearing and also Mr Calver - before going to Sydney and hearing the five representatives there on both matters.

PN55

MS ADLER: Yes, your Honour. Taking my pointer that (indistinct) to spilt up the variation applications into those technical and those relating to those modern award objectives, we'd request a period of at least five to six weeks on those matters relating to technical issues for initial submissions and then submissions in reply notwithstanding a conciliation process. And on the modern award objectives a longer period of time up to eight weeks between submissions, given the complexities introduced by that preliminary issues decision.

PN56

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Mr Calver, did you have anything on the timetable for hearing?

PN57

MR CALVER: The Master Builders would agree with the HIA in relation to the time periods articulated. We believe that those time periods should run from any conciliation that occurs. That conciliation should be - should be supervised by a member of the Tribunal. Whether that be yourself, your Honour, or another member of the Tribunal is a matter that we are not concerned about, however, if our - in the renewal of our request for Full Bench formally, if - by the members of that Full Bench was able to conciliate, we would not oppose them appearing - sorry, being appointed in respect of the hearing of any matter.

PN58

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Mr Maxwell?

PN59

MR MAXWELL: Thank you, your Honour. Your Honour, in regards to the issue raised in regard to discussion and the conciliation we have no opposition to that occurring. I do personally have a slight problem with the timetable in that I'm on leave for the next weeks as at Friday. So, your Honour, I should also mention that the AWU asked me to represent them in regards to this mention of programming.

PN60

THE SENIOR DEPUTY PRESIDENT: Yes.

PN61

MR MAXWELL: And they send their apologies for not being able to attend today.

PN62

THE SENIOR DEPUTY PRESIDENT: Well, we'll add the AWU to your appearance, Mr Maxwell. Yes.

PN63

MR MAXWELL: Yes, thank you, your Honour. Your Honour, we have no problem attempting to narrow the masses where there is a disagreement through the process of conciliation. I should say in regards to the timetable, we oppose any delay in the dealing with masses involving the construction awards and to a later stage in the process. We indicated to ACTU and the other parties when these matters were before (indistinct) that we have (indistinct) for the construction award to be dealt with in stage 1, so we're quite happy with the timetable that's been set by the president.

PN64

In regard to the issue of the timetable for submissions, given that most of these applications were lodged back in March, that then we believe that most of the applicants should be well advanced in terms of preparation for their cases. We would suggest that the parties be given four weeks after the conciliation is dealt with to lodge the outline of submissions and any evidence they wish to rely on. Given that we will be responding - the union's application is I suppose - the issues in the main are about technical matters rather than matters of any depth or substance.

PN65

In responding, we will be responding to matters of substance raised by - sorry, by the CCI application, by the HIA application, and by the MBA application, and possibly the NBI application (indistinct) matters would rely on any witness evidence. I therefore seek a longer period in which to respond because we've had to then chase up witness evidence once we have seen the other applicants' witness evidence. So we would suggest a six week timetable in which any party wishes to make a response to the outline of submissions (indistinct) the applicants.

PN66

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you for that, Mr Maxwell. Mr Kentish?

PN67

MR KENTISH: Thank you, your Honour. Your Honour, the CEPU would support a process of conciliation. And in terms of the timetabling we would adopt the oral summations that Mr Maxwell just made with respect to the time being allowed for those responding to the applications and we would seek a period of at least six weeks to put on - to put on material from whenever the applicants are directed to put on material. If it pleases.

PN68

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you. Mr Nobel?

PN69

MR NOBEL: That AMWU would likewise concur with what Mr Kentish has just said. Because there is so much evidence from the employers (indistinct) we would ask for a longer than usual period. Six weeks seems reasonable to us, your Honour.

PN70

THE SENIOR DEPUTY PRESIDENT: Yes. Mr Mead?

PN71

MR MEAD: Thank you, your Honour. The instructions (indistinct) our application is before you. We ask for conciliation to see if issues can be narrowed given we do have substantial (indistinct) in this award. I don't have any submissions in relation to contact. I'm in the Tribunals hands in relation to appropriate time table given the directions and the (indistinct) regarding completion of this matter (indistinct) the end of October.

PN72

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you. Ms Hayne?

PN73

MS HAYNE: Your Honour, similar to the other parties ABI agrees with any issue with any effort of conciliation. With respect to the timetable and keeping in mind if this matter as to pertaining to stage 1 when (indistinct) which need to be concluded - we'd ask the Tribunal to give each party as much time as is practical in that - to allocate timeframe. Thank you.

PN74

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you for that, Ms Hayne. Just one moment. Yes, very well. Let's look at some dates. Before I do, Mr Calver, can I just clarify: does your request for the president for a Full Bench concern the matters in section 9 of your application? Am I correct in limiting it in that way?

PN75

MR CALVER: I'm sorry, your Honour, I only partially heard your question.

PN76

THE SENIOR DEPUTY PRESIDENT: My question was whether your request to the president for a Full Bench related only to section 9 of your submission of 7 March, or did that request extend more broadly?

PN77

MR CALVER: The matter that's in section 9 is of primary concern because it relates to the capacity of the Tribunal to regulate a particular area, that is occupational health and safety, your Honour. So, yes, that is a matter that goes to the jurisdiction of the Tribunal to regulate a very large number of conditions in the modern award before you this morning - and that is certainly our request.

PN78

In respect of the other matters, if they were to be dealt with by a member sitting alone we would not object, but we do believe that the matter of the capacity of the Tribunal to regulate on occupational health and safety is such a fundamental concern in the shaping of modern awards that the Full Bench would be justified. And I didn't raise the allocation of the Full Bench in the joinery matter to be (indistinct) and I hope it did not come across in that way, but it does seem to me that the matters before the Tribunal in respect of this award exceed the matters before the Tribunal in respect of the joinery award in both their fundamental reach and in relation to the capacity of the Tribunal to certainly regulate the major subject area.

PN79

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Okay. Well, let's proceed on the assumption the president is not receptive to either Ms Adler or Mr Calver's request and if that changes we can modify. Now, I - the first question - looking at the appearance sheet and the predominance is Sydney, is it safe to suggest that Sydney might be the best place, perhaps, for conciliation or - and/or hearing?

PN80

MS ADLER: Yes, your Honour.

PN81

UNIDENTIFIED SPEAKER: Yes, your Honour.

PN82

THE SENIOR DEPUTY PRESIDENT: Yes. Well, there's no objection from Melbourne. Any objection from Perth?

PN83

MR LILBOURNE: No objection, your Honour.

PN84

THE SENIOR DEPUTY PRESIDENT: Mr Calver, I think you indicated Sydney earlier.

PN85

MR CALVER: Yes, your Honour, that's the most convenient capital city other than Canberra for me. Thank you.

PN86

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Well, that's disposed of. Mr Maxwell, you say you've got a problem in terms of the discussion prior to conciliation.

PN87

MR MAXWELL: Your Honour, I will be on holidays (indistinct) August, so any time after that would be fine.

PN88

THE SENIOR DEPUTY PRESIDENT: Any time after that would be fine.

PN89

MR CALVER: Can we do it on the Friday of that week, your Honour?

PN90

THE SENIOR DEPUTY PRESIDENT: No, we can't. Look, I'll set down conciliation at 10am in Sydney on Monday, the 27th, and that's on the basis that the parties will have some discussion between themselves prior to that time. It may be in those discussions that some consideration be given to whether there are - there is a useful division between technical and modern award objective matters. I'll leave that in the hands of the parties. And that would also provide an opportunity to discuss the matters raised with CCIWA - but can I suggest if any of the parties is in the position to provide an immediate response to CCIWA that they should do so at the earliest possible time so at least CCIWA is apprised of - in general terms the position of each of the parties. And looking at the letter it appears that everyone here today - or another representative of their organisations, has received a copy of that correspondence.

PN91

Okay. Moving on from there - - -

PN92

MS HAYNE: Excuse me, your Honour?

PN93

THE SENIOR DEPUTY PRESIDENT: Yes.

PN94

MS HAYNE: ABI here. On 27 August, the commercial sales award is listed for hearing - - -

PN95

THE SENIOR DEPUTY PRESIDENT: I see.

PN96

MS HAYNE: - - - and that would have difficulties for the Australian Business Industrial but we are in the hands of the Tribunal on that matter.

PN97

THE SENIOR DEPUTY PRESIDENT: Well, let's move it then until Tuesday, 28th.

PN98

MR CALVER: Your Honour, I'm not available on Tuesday, 28th, I'm afraid I'm in Melbourne on that day presenting to the Masters program in the (indistinct) which has been a locked in date for six months, your Honour.

PN99

THE SENIOR DEPUTY PRESIDENT: I'll talk to Professor Giudice and have you excused of that duty, Mr Calver. Look, I'll go back to the Monday, 10th and Ms Hayne, it might require you to involve someone else from ABI.

PN100

MS HAYNE: I understand, your Honour, thank you.

PN101

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. So on the 27th.

PN102

MR CALVER: Your Honour, I'm going to document that Masters Builders has prepared its - it's about 40 pages long - we believe indicates each clause of the award that is affected by a particular application. I think that in the process of sorting out which matters can be considered technical - which easily would be the subject of conciliation, I would be prepared to make that document available to the other parties for checking, first of all to make sure I haven't omitted matters; and, secondly, for use of the conciliation on 27 August if it please the Tribunal.

PN103

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you, Mr Calver, that would be helpful.

PN104

MR CALVER: Sir, if I file it with your associate would it be possible for you to then distribute it to the parties through your offices, sir?

PN105

THE SENIOR DEPUTY PRESIDENT: We have no issue with it being placed on the website, Mr Calver?

PN106

MR CALVER: No, none, sir, but I will ask that - because it was quite a laborious task we may well, have omitted one or two matters. If people will check it and then give me feedback about any amendment that might be required I'd be appreciative.

PN107

THE SENIOR DEPUTY PRESIDENT: Well, I wonder, Mr Calver, if you could send the document, perhaps, with a covering letter noting that it is in draft form and subject to comment by others or whatever other form of words you think necessary to avoid any embarrassment to yourself or MBA.

PN108

MR CALVER: Thank you, your Honour. Yes, I will address the draft to your associate if I may.

PN109

THE SENIOR DEPUTY PRESIDENT: Yes. Very well. Thank you for that. Could I also say in relation to the 27 August in the process of consultation between the parties before that time, I'd appreciate it if some effort could be made so that by the time you get to the 27th, if there's any level of agreement that matters X, Y and Z are agreed, matters A, B and C are not agreed but capable of conciliation, and matters F, G, H that the parties believe are not capable of resolution by conciliation, that might direct us more productively for the conciliation on the 27th.

PN110

Okay. In terms of hearing what I propose to do - I understand the positions put by the parties but I also understand the necessity to complete the process. What I will do is require the filing of outlines of submission and evidence materials relied upon by 4pm on Friday, 21 September; filing of outlines in reply and evidence materials relied upon by 4pm on 19 October - and assuming everything proceeds before me, what would be the time required - would it be best to set down two dates even if one weren't required? Two days, rather - would that appear sufficient to conclude the matter?

PN111

MR NOBEL: Your Honour, depending on what evidence is filed by the applicants, that would discern then the extent to which we would then file evidence in response. Given that the nature of some of the applications I would expect that some of that evidence might be quite substantial. I think it may take more than two days to resolve this case. I'd suggest that, perhaps, three days be set aside to be safe.

PN112

THE SENIOR DEPUTY PRESIDENT: Very well. Is there any support or a disagreement with that?

PN113

MR LILBURNE: Lilburne of the CCIWA, I support the three days, your Honour.

PN114

THE SENIOR DEPUTY PRESIDENT: Very well. What I'll do then is set the matter down in Sydney for hearing on 7, 8 and 9 of November, and I will also direct that all parties advise the Tribunal and all other parties of any witnesses who will - any requirement that witnesses be available for cross-examination.

PN115

MR LILBURNE: Your Honour, is that 7, 8 and 9 November? Sorry to ask? There's static noise.

PN116

THE SENIOR DEPUTY PRESIDENT: 7, 8, 9 November, yes.

PN117

MR LILBURNE: Thank you, your Honour.

PN118

THE SENIOR DEPUTY PRESIDENT: And I'm already in trouble with the president. Okay. Is there anything else at this stage? Okay. Well, look, I'll adjourn. I will contact the president and advise him of those matters that have been raised which will be appropriately directed to him. I'll proceed on the basis indicated unless there is some change in those arrangements arising from any decision the president might make. Very well. I'll now adjourn.

**<ADJOURNED INDEFINITELY**

**[11.48AM]**